STATEMENT OF DAVID B. KOPEL

ON
S. 466 & H.R. 975 "THE BRADY AMENDMENT"
AND
S. 1523 LEGISLATION TO AMEND THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT -- FIREARMS OFFENSES PROPOSED AS RICO PREDICATES

BEFORE THE
U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION
OF THE COMMITTEE ON THE JUDICIARY

AUGUST 2, 1988
Russell Senate Office Building

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Mr. Kopel graduated 5th in his class from the University of Michigan Law School, where he served on the Michigan Law Review from 1983 to 1985. In 1982, he graduated from Brown University, with highest honors. His thesis "The Highbrow in American Politics -- Arthur M. Schlesinger Jr. and the Role of the Intellectual in Politics" won the National Historical Society Prize for best history thesis.

Mr. Kopel's other writing includes When American Aid Brings Food for Naught (Newsday, April 7, 1986), and Legal Education and the Reproduction of Hierarchy (82 Michigan Law Rev. 961), as well as a bi-weekly political column for the Brooklyn Free Press. He co-authored And Justice For Some: The Reagan Administration and the Rule of Law in America, a report released by the National Association of Law Students and Professors for Responsible Government, in October 1984.

He has been listed in "Who's Who in American Lawyers," "Who's Who in American Law Students," and "Outstanding Young Men of America."

Mr. Chairman:

Good afternoon. Thank you for the opportunity to appear before this Subcommittee.

The Subcommittee on the Constitution is the proper place for gun legislation to be heard. During the 97th Congress, this

Subcommittee investigated the historical roots of the Second Amendment. The Subcommittee unanimously concluded that the Second Amendment protects an individual right to bear arms. The Second Amendment protects what Josiah Quincy called "a well-regulated militia composed of the freeholder, citizen and husbandman, who take up their arms to preserve their property as individuals, and their rights as freemen."

Both proposals under discussion today -- the waiting period and the RICO amendment -- are offensive to the Constitution. Not only do these proposals violate the Second Amendment's right to bear arms, they will violate the Fifth Amendment's guarantee of due process of law, and the Tenth Amendment's guarantee against federal interference with state matters.

Further, the case for these proposals is based on deception, misstatement, and outright lies. A moment of common sense analysis reveals how utterly useless both these proposals are in genuine crime-fighting; their only real utility is to increase police and government control over law-abiding gun owners.

WAITING PERIODS

Citizens should not have to wait for police permission to exercise their Constitutional rights. Reporters who wish to file stories, even about national security matters, should not be required to pre-clear them with government officials. Women who choose to exercise their right to abortion should not have to submit to a waiting period. Citizens who wish to protect themselves should not have to wait to receive police permission.

Some people wonder why anyone would object to a seven day waiting period. Seven days is too long for a woman whose ex-boyfriend is threatening to come over and batter her. Seven days is too long for families when a burglar strikes three homes in a neighborhood in one week, and may strike that night. Moreover, the imposition of waiting period changes the Constitutional right to bear arms into a mere police-granted privilege.

A NATIONAL WAITING PERIOD WOULD NOT REDUCE GUN CRIME

Every single study of waiting periods has found them to be absolutely useless in stopping gun crime. Professor Matthew DeZee states "I firmly believe that more restrictive legislation is necessary to reduce the volume of gun crime." Yet his study of waiting period laws showed them to have not the slightest effect. Professors Joseph P. Magaddino and Marshall H. Medoff, both of California State University, Long Beach, came to exactly the same conclusion. Another anti-gun scholar, Duke University's Philip Cook explains: "ineligible people are less likely to submit to the screening process than are eligible people . . . because these people find ways of circumventing the screening system entirely." Cook concludes: "[T]here has been no convincing proof that a police check on handgun buyers reduces violent crime rates." When the Senate Judiciary Committee investigated the issue, the Committee found no evidence that waiting periods affect crime.

Waiting periods have existed in some states for over half a century. Yet after all this time, there is not a single criminological study ever published which shows waiting periods to have any beneficial impact.

The unanimous studies by the criminologists comport with common sense. Said Willis Ross, a former police chief, and currently lobbyist for the Florida Police Chiefs Association: "I think any working policeman will tell you that the crooks already have guns. If a criminal fills out an application and sends his application. . . he's the biggest, dumbest crook I've ever seen."

As a National Institute of Justice study concluded, felons get guns on the street, or from friends, or they steal them. They do not walk into stores, and fill out background check forms.

Mrs. Sarah Brady, the nation's most prominent anti-gun lobbyist, claims that if the waiting period had been in effect, John Hinckley would not have shot her husband and President Reagan. As part of the national media campaign in favor of the waiting period, she asserts that Hinckley "lied on his purchase application. Given time, the police could have caught the lie and put him in jail."

That Mrs. Brady and HCI use such a demonstrably false anecdote shows how weak their case really is. When asked for identification by the gun dealer, Hinckley offered his valid Texas driver's license. The address on the license was Hinckley's last valid address, a rooming house in Lubbock. (At the time of the gun purchase, he had no permanent address.) For the police to find the so-called "lie" would have required them to send an officer to check Hinckley's listed address, and determine that he no longer lived there. Since many police departments do not have the time to visit the scene of residential burglaries, it is rather absurd to expect them to have the time to visit the home of every single prospective handgun buyer.

Moreover, under the Brady amendment, the police would not be verifying Hinckley's address as reported on the federal multiple handgun purchase form. They would only be conducting a background check, and would have found that Hinckley has no criminal or publicly available record or mental illness.

Another inaccuracy in the campaign for a national waiting period is the claim that it will help disarm drug dealers. It is simply preposterous to imagine that any kind of gun legislation, including a waiting period, would have the slightest impact on drug dealers.

Drug dealers obviously cannot count on the police or the courts for protection from violence. Because of this, and because they are a valuable robbery target, it would virtually be suicide for them not to carry a gun.

In addition, drug dealers cannot use normal legal and social commercial dispute resolution mechanisms. Like the gangsters of alcohol prohibition days, drug dealers need guns to protect their

business's income and territory. Thus, many drug dealers must own a gun for their lives and their livelihood.

No matter how scarce guns become for civilians, there will always be one for a criminal who can pay enough. Street handguns now sell for less than $100. If the price went up to $2,000, dealers would still buy them, because dealers would have to. Spending a few hours' or days' profits on self-protection is the only logical decision for a dealer. Can anyone really believe that an individual who buys pure heroin by the ounce, who transacts in the highly illegal chemicals used to produce amphetamine, or who sells cocaine on the toughest street-corners in the worst neighborhoods will not know where to buy an illegal gun?

POLICE TESTIMONY

Several high-ranking police officials, purporting to represent the nation's police, have stated that a waiting period would be beneficial. That testimony is highly dubious.

First of all, it is simply untrue that these police bureaucrats represent the sentiment of the nations's police. In 1987, the Florida Legislature repealed a host of local waiting periods, and that repeal took place thanks to the lobbying of the Florida Police Chiefs Association. In a national survey of all the nation's chiefs of police and sheriffs, 59% percent said that a national 7 day waiting period would not be helpful.

More fundamentally, the opinion of police chiefs is not the arbiter of our Constitutional rights. Some police executives criticize the exclusionary rule; they claim that a strong fourth amendment causes crime. Some police executives criticize the grand jury system, and claim that a strong fifth amendment causes crime. Some criticize the Miranda decision, and claim that a strong sixth amendment causes crime. The police executives here today say that a strong second amendment causes crime. In every case the executives are wrong.

In fact, the actual effect of this legislation will be to decrease crime-fighting resources, and thereby increase crime. There are at least six million handgun transfers per year. How many hours would it take for a policeman run a national criminal records check, and to visit the home of every person who applied?

One hour, at the very least. That would be six million police hours spent checking up on honest citizens, instead of looking for criminals. In the haystack of applications by honest citizens, police will search for a few needles left by the nation's very stupidest criminals. Looking for crime, police officers will be directed into a paperwork enterprise particularly unlikely to lead to criminals. Wouldn't all those millions of police hours be better spent on patrol; on the streets instead of behind a desk?

The asseverations of some police officials that waiting periods have helped them stop large numbers of criminal handgun purchases ought to be taken with a grain of salt. The fact that

police officials may deny a handgun permit does not prove that the applicant was a criminal -- more likely, that official was capriciously denying a citizen his Constitutional rights. Nor does the fact that an applicant was rejected for unpaid parking tickets or other petty offenses prove that the applicant was a gun criminal. How many applicants were turned down solely because they were once falsely arrested, even though they were later acquitted at a trial? Of the applicants who actually were turned down because of felony convictions, how many did the police immediately arrest and imprison? Any such applicant who was not arrested had the opportunity to buy an illegal gun on the street.

Evidence and logic indicate that the national waiting period law is useless against crime. So why are some police officials in favor? Some of them simply take a dim view of all citizens' rights, including the right to bear arms. It's hardly a surprise to hear an organization like the International Association of Chiefs of Police testify against citizens' rights. The IACP welcomes into its membership police chiefs from nations where citizens have virtually no rights at all.

A few years ago, when the McClure-Volkmer bill was under consideration, some of these same police chiefs warned that the bill threatened law officers' lives. The bill passed anyway; and, it turns out, letting a Pennsylvania hunter drive to Maine without obtaining a New York gun permit has not endangered anyone.

Some of these same police officials supported Senator Metzenbaum's "plastic gun legislation" as absolutely essential to combat terrorism. (That misnamed legislation actually dealt with small conventional guns, rather than all-plastic weapons, which are a decade or more away.) Congress, though, rejected that argument, and enacted Senator McClure's alternative airport security bill, which affects not a single one of the guns that Senator Metzenbaum and his police chiefs had claimed to be so easily usable by terrorists.

In short, the fact that some police officials reflexively oppose the exercise of Constitutional rights is not entitled to much weight in the deliberative process. Congress has repeatedly rejected their unreasoned arguments, and should do so again. (By the way, actual police officers -- as opposed to officials who specialize in lobbying -- strongly support Second Amendment rights.)

Another reason that some police chiefs favor this proposal is that police chiefs, like any other administrators of large government offices, often seek to expand their official power. From the perspective of a police administrator (who may never even have served in street patrol) more power means more officers doing administrative tasks. It is the same mentality that leads to the creation of paperwork empires in the Pentagon or in the Hubert H. Humphrey building, even if the emphasis on paperwork hinders the agency's performance of its assigned mission.

SOME PARTICULAR DEFECTS OF THE BILL

Turning the right to bear arms into a police-granted privilege is one flaw of the bill, and its criminogenic effects are another. These problems are obvious enough, but there are more problems revealed when one examines the bill's particulars.

First of all, the bill claims to be just about waiting periods, but it turns out to include de facto gun registration. Applicants must submit not only identification for a background check, but also "an accurate description of the handgun," and "the serial number of the handgun."

The police are theoretically supposed to destroy the statement of an applicant who is not denied permission to buy. Yet there is nothing in the bill to punish police who keep a photo-copy or a computer entry. (Indeed, the bill only requires that the statement itself be destroyed, not the same information in another form.) Further, no one doing a background check on an applicant needs to know the gun's make or serial number. The only point of those items being required, therefore, must be for later use. Gun registration, incidentally, is itself quite useless in crime-fighting.

At a time when local police resources are already stretched thin, the bill imposes very substantial paperwork and manpower requirements on every police force in the country. The bill claims it is cost-free, because the background check will be optional. But the bill's prime lobbyist, Handgun Control Inc., has already announced that its legal defense fund will sue police departments that do not implement the background check.

In this regard, it is astonishing that witnesses who claim to speak for the nation's police want a law to make police departments everywhere vulnerable to a brand new form of tort litigation.

Police officers and gun dealers will not the be only people burdened by paperwork, for the bill applies even to private gun transfers. Suppose a father wishes to give one of his handguns to his daughter, who lives alone in a dangerous neighborhood where several rapes have occurred recently. The daughter must swear out a written statement, then the father must send the statement, along with photo identification of the daughter (and a description of the identification) in a certified or registered letter (return receipt requested) to the chief of police. After seven days, if the police have not vetoed the sale (and the daughter has not yet been raped or killed), she may receive the gun. The father must keep on file his own copy of the daughter's sworn statement for at least a year; if he fails to do so, he is subject to a $500 fine.

Paperwork like this does not uphold the law. Rather, it diminishes respect for the legal system, as citizens are niggled to death with self-evidently silly paperwork requirements.

When citizens deal with the government, the Fifth Amendment guarantees them due process of law. This is true for everything from public library cards to driver's licenses. It is all the

more true when Constitutional rights are involved.

Yet the national waiting period bill provides no appeal from police decisions. If a police department denies applicants for specious reasons, or no reason at all, the applicants have no remedy. In Maryland, where an appeals process exists, the police are over-ruled 85% percent of the time, as previous testimony on this bill has revealed.

In this context, one should remember that some American police departments have a proven record of lawless enforcement of the gun laws. The St. Louis police have denied permits to homosexuals, nonvoters, and wives who lack their husband's permission. Although New Jersey law requires that the authorities act on gun license applications within 30 days, delays of 90 days are routine; some applications are delayed for years, for no valid reason. Mayor Richard Hatcher of Gary, Indiana, ordered his police department never to give anyone license application forms. The Police Department in New York City has refused to issue legally-required licenses, even when twice commanded appeals courts to do so. The Department has also refused to even hand out blank application forms.

Finally, the national waiting period is offensive to the Tenth Amendment, and to principles of federalism. Most states, including Senator Metzenbaum's state of Ohio, have rejected waiting period proposals. In the last 15 years not a single state has instituted a waiting period. Indeed, the trend has been against waiting periods, with Florida repealing its waiting periods, and other states enacting pre-emption laws to prevent localities from imposing such laws. There is no compelling federal need to over-ride the decisions of these states. There is no federal need to impose mountains of paperwork on state and local police agencies. That is why President Reagan, who favors waiting periods at the state level, has announced his opposition to the national waiting period proposal.

The national waiting period bill will most likely be offered as an amendment to the drug bill, on the Senate floor. The claim that it would have the slightest effect on drug dealers is patently absurd. The claim that the bill would have prevented the assassination attempt on President Reagan is a falsehood. The only evidence for the proposal comes from government administrators who are reflexively hostile to individual rights. Their claims contradict all the academic evidence, and they contradict common sense. As a first step in the destruction of the right to bear arms, the national waiting period is splendid. It is not part of the war on drugs; it is part of the war on the Constitution.

MAKING GUN CONTROL ACT OFFENSES INTO RICO PREDICATE OFFENSES

The other proposal under consideration today is whether violations of the Gun Control Act of 1968 should become RICO predicate offenses.

Making Gun Control Act violations into RICO offenses

essentially makes every armed robbery in the U.S. a high-level federal crime. This strikes me as a rather strange re-allocation of criminal justice resources. Are the U.S. attorneys today underworked? Have they done such a thorough job with insider trading, procurement fraud, and civil rights violations that they can now do the work of all the state and local prosecutors who prosecute street crime today?

On its face, the proposal does not violate the Second Amendment, but the bill is in very serious conflict with the Tenth Amendment. Ordinary violent crime has long been exclusively a state matter. This is appropriate, for states and cities best understand local conditions, and can devise the most appropriate anti-crime strategies. Until the federal government has wiped out the crimes it already must prosecute, it seems ill-advised to take on the added task of prosecuting ordinary violent crime.

In the past several years, a law originally aimed at racketeering has now become a law about everything, and may therefore degenerate into a law about nothing. When banks involved in a commercial dispute file RICO charges against each other, when a mom and pop video store that rents out adult movies is charged under RICO, the statute's effectiveness is diluted. Adding ordinary violent crime to RICO's already overbroad compass may stretch the statute so thin that its utility against organized crime is diminished. RICO used to command the attention of prosecutors, judges, and juries, for RICO was shorthand for "organized crime prosecution." Soon, RICO may come to mean just "felony." Does it really make sense to label a punk who robs old ladies a "racketeering enterprise."

Frankly, I do not believe that the bill's proponents really intend that it be used against ordinary street crime. Rather, the bill amounts to a back-door repeal of the Firearm Owners' Protection Act. This bill gives the Bureau of Alcohol, Tobacco, and Firearms new authority with which to harass non-criminal gun-owners.

For many years BATF spent much of its time pulling the so-called "straw man" entrapment game. Agents posing as fake buyers would trick gun collectors and small-scale dealers into technical violations. According to this subcommittee:

> [A]pproximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations.

The Firearm Owners Protection Act took BATF out of this dirty business. The RICO gun bill lets BATF back in. Gun collectors tricked by BATF would now be "gun racketeers operating a criminal enterprise." Further, BATF could invoke civil forfeiture, even after an acquittal to confiscate the collections of these small-scale dealers.

From a civil liberties or due process point of view, the

last agency that deserves any additional discretionary power is BATF. Consider some of their recent prosecutions. U.S. law prohibits the possession of unregistered fully automatic weapons (one continuous trigger squeeze causes repeat fire). Semiautomatic weapons (which eject the spent shell and load the next cartridge, but require another trigger squeeze to fire) are legal. If the sear (the catch that holds the hammer at cock) on a semiautomatic rifle wears out, the rifle may malfunction and repeat fire. The BATF has arrested and prosecuted a small town Tennessee police chief for possession of an automatic weapon (actually a semiautomatic with a worn-out sear), even though the BATF conceded that the police chief had not deliberately altered the weapon.

This spring, BATF pressed similar charges for a worn-out sear against a Pennsylvania state police sergeant. After a 12-day trial, the federal district judge directed a verdict of not guilty and called the prosecution "a severe miscarriage of justice."

To convict on a RICO offense, a prosecutor need not prove that the defendant "willfully" violated the law. It is no surprise that opponents of gun ownership want to find a way to reduce the BATF's burden of proof in its war against legitimate gun owners.

As drug hysteria sweeps through Congress, anti-gun organizations hope to create their own wave of drug and gun hysteria. Before adopting the proposals of the hard-core opponents of the Second Amendment, Congress should have its own "cooling-off period." In that period, Congress can evaluate the real evidence about these proposals. When cool-headed reason prevails, Congress will again reject a passionate but illogical lobby's assault on the American Constitution.