

WAITING PERIODS: INEFFECTIVE AND UNCONSTITUTIONAL



Waiting periods are ineffective barriers to law-abiding citizens' ability to exercise their Constitutional right to purchase firearms. Advocates of waiting periods dismiss the Second Amendment and argue that such a barrier is merely an inconvenience, not an imposition. This is similar to arguing that laws forcing citizens to submit to literacy tests, or poll taxes, did not create obstacles for those who wished to vote in elections. These laws did not prevent one from voting, but they imposed unnecessary and unconstitutional barriers for those who sought to cast their votes.

When a law-abiding citizen in a rural area must drive hundreds of miles in some cases to purchase a firearm from a federally licensed retailer (FFL), only to be told that he or she must turn around and return in 3 days, or a week plus, an obstacle is created. Or when a single mother in an urban area secures childcare and time off work to purchase a firearm at a licensed retailer, to be turned away and told to repeat the process in several days, an obstacle is created. Or when a collector finds a firearm at a gun show that he has been looking for, seeks to purchase the firearm

from a licensed retailer at the event, and is told that he cannot purchase the firearm for another three business days, by which time the gun show will be over, an obstacle is created.

When the waiting periods also apply to ammunition, further barriers to the Second Amendment right are built. Now, a law-abiding individual who has already passed at least one federal FBI background check, must irrationally wait an additional period of time before purchasing ammunition.

TIME-TO-CRIME

Gun control advocates argue that waiting periods will prevent criminal misuse of firearms. All evidence discredits this argument.

According to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the time between when a firearm used in a crime was sold at retail, and used in the crime, is an average of 9.3 years.ⁱ Criminals are clearly not legally purchasing firearms and then turning around to commit crimes. In fact, a recent government survey of prison inmates showed that criminals rarely purchase firearms from licensed

retailers to begin with. About 90 percent of firearms possessed by inmates during their crime were obtained illegally on the street, from theft, or from family and friends.ⁱⁱ

There is no evidence that imposing waiting periods on law-abiding citizens will have any impact on the criminal misuse of firearms.

EXISTING 3-DAY DELAY

The firearm and ammunition industry strongly supports the current background check system. Under federal law, before a FFL may transfer a firearm to an individual, the retailer must conduct a background check through the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS) to determine if the individual is prohibited by law from receiving firearms.ⁱⁱⁱ

In a few cases, rather than an approval or denial, the background check results in a notification that the retailer must delay the transaction for three full business days before completing the transaction. This gives NICS more time to research the individual attempting to make the

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purchase. Data from the FBI show a very small number of firearms are transferred after three business days without a concluded check.

In 2019, the most recent year for which data are available, 89.44 percent of checks resulted in an immediate determination, while the FFL was still on the phone with NICS. Just over 10 percent of all transactions were “delayed” meaning they were not immediately determined.^{iv} And, over 99 percent of the delayed transactions are resolved with the vast majority being resolved during the first three business days.

In the rare, but legal, occurrences where firearms are transferred after the three business day period with no resolution from NICS, data on firearm traces conducted by law enforcement fail to show that these firearms are any more likely to end up in the hands of criminals than any other firearm.

While federal law prohibits an FFL from transferring a firearm for three full business days after a delay, individual FFLs establish their own policies about whether to complete the transfer after the three day period or whether to wait longer, such as for one week, 30 days, or to not complete the transfer without receiving a proceed from NICS.

If the FFL lawfully transfers a firearm after the three business days expires, and the NICS system later determines the transaction should have been denied, NICS notifies the FFL and contacts ATF to handle the case as a firearm retrieval referral.

In 2019, NICS forwarded 2,898 firearm retrieval referrals to ATF. This represents 0.01 percent of all NICS checks that year. Only a mere 0.7 percent of all delayed transactions are never resolved after a nearly three month NICS investigation, according to FBI officials. Data provided to the NSSF show that from

October 15, 2013 through November 23, 2015, about 79 percent of delayed transactions are resolved within three business days, 88 percent are completed within five days and 94 percent are completed within 10 days. Of the delays that go beyond three business days, 12 percent are eventually denied. This compares to a 54 percent denial rate for delays that are resolved within the three business day period.

FOCUS ON THE RECORDS

Rather than imposing ineffective and unconstitutional waiting periods on law-abiding citizens, lawmakers should be focused on improving the quality and accuracy of data in the NICS system and ensuring background checks are run against a complete database.

i ATF, Firearms Trace Data – 2017, <https://www.atf.gov/resource-center/firearms-trace-data-2017>

ii Mariel Alper, Ph.D., and Lauren Glaze, “Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016,” Bureau of Justice Statistics Special Report, January 2019. NCJ 251776. <https://www.bjs.gov/content/pub/pdf/suficspi16.pdf>

iii The Brady Handgun Violence Prevention Act of 1993, Public Law 103-159, requires the Attorney General to establish the National Instant Criminal Background Check System. In 36 states, FFLs contact FBI-NICS to initiate the background checks. In 13 full “Point of Contact” states, the FFL contacts the state for the background check

for both handguns and long guns, rather than the NICS Section. The state-run check searches the same federal databases as when NICS conducts the check. In 7 states, the NICS Section handles all long gun transactions, and the states conduct the required check for handguns and handgun permits. These are called “Partial Point of Contact [POC]” states. Additionally, 23 states have at least one ATF-Qualified alternative permit issued by local or state agencies that preclude the need for an otherwise required NICS check. However, NICS checks are required to obtain one of these permits.

iv U.S. DOJ FBI NICS 2019 Operations Report, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>