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## COMMENT

# FIREARM TRANSACTION DISCLOSURE IN THE DIGITAL AGE: SHOULD THE GOVERNMENT KNOW WHAT IS IN YOUR HOME?

ELAINE VULLMAHN, MBA, CPA, CIA\*

### INTRODUCTION: INCREASING GOVERNMENT OBSERVATION

In a quite average town in America where the sky is blue and the grass grows green, a family gathers around the dinner table. The wife just prepared the family's favorite recipe, venison steak, which her husband procured during the last hunting season. All of a sudden, this law-abiding family hears a pounding knock at the door. When the father gets up from the table, he wonders who it is. A gruff voice states – "This is the police, come out with your hands up!" As he steps out, an agent continues by stating, "We have knowledge by our records that you have firearms in your possession, and we have come to confiscate them." This scenario, where law enforcement officials confiscate a family's firearms has occurred as a result of government decrees in jurisdictions where firearm owners are obligated to register their firearms.<sup>1</sup>

This example, which is based on what occurred in New York City, validates the necessity for precaution because licensing and registration laws can become morphed into a means to invade the privacy of law-abiding citizens and seize their personal property. In 1967, the New York City Council passed a mandatory licensing and registration ordi-

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\* The author, Elaine Vullmahn, MBA, CPA, CIA, is currently a Senior Litigation Accountant in a Chicago, Illinois firm. Ms. Vullmahn is also a J.D. candidate at the John Marshall Law School, class of 2011. I want to thank all of the members of The Journal of Computer and Information Law for their assistance. I would also like to thank my family for their continuous support and encouragement. Finally, I would like to dedicate this comment to my own father, Christopher Vullmahn, and to our country's Forefathers.

1. James Bovard, *The Assault on Assault Weapons*, WALL ST. J., Jan. 6, 1994, at A12.

nance with just this limited objective.<sup>2</sup> Later, in 1991, New York's City Council willfully abused that foundation against New Yorkers when the Council completely banned certain firearms.<sup>3</sup> New York City police officers were instructed to utilize firearm registration lists, which were created as a result of the 1967 ordinance, to confiscate firearms the City Council decided to ban.<sup>4</sup>

American citizens should understand the ramifications of overzealous government attempts to protect us from ourselves. Narrow views that pertain to guns, gun ownership, and those rights must be set aside to objectively examine the potential consequences. While licensing and registration proposals are traditionally conveyed as being necessary government intervention measures they may, however, subject law-abiding citizens to government intrusion.

The purpose and manner in which records containing personal information regarding firearm sales and ownership can be utilized has changed with advances in technology. In this fast paced world of computers, individuals are exposed to personal security and identity breaches and have become victims of circumstances that seem beyond their control. The transition from hard copy data compilations that were maintained solely by firearm dealers to the modern age where records are stored in large searchable databases now runs the gamut of potential and unforeseen misuse. Ambiguity in the discernment for accessibility can easily outweigh the reason to institute the regulations. The scenario where law-abiding firearm owners' property can be confiscated is more likely to reoccur when politicians subordinate private electronic information regarding citizens' firearm purchases and possession to public interest.

These risks certainly should be at the forefront of the minds of residents of Chicago, Illinois, for example. After the United States Supreme Court struck down the city's 28-year old ban on handguns, Mayor Richard M. Daley, a long-time and outspoken anti-gun politician, vowed that the city would "rewrite our ordinance in a responsible way to protect our 2nd Amendment rights and protect Chicagoans from gun violence."<sup>5</sup> On July 12, 2010, however, when Chicago's new gun ordinance became effective officials hailed it as being one of "the strictest of its kind in the

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2. *Id.*

3. *Id.*

4. *Id.*

5. Amanda Carey, *Chicago's Mayor Richard Daley Fights for Gun Control Despite Supreme Court Ruling On McDonald Case*, THE DAILY CALLER, July 1, 2010, <http://dailycaller.com/2010/07/01/chicagos-mayor-richard-daley-fights-for-gun-control-despite-supreme-court-ruling-on-mcdonald-case/>.

country.”<sup>6</sup> Among the many provisions of this new ordinance is a mandate that Chicago residents “obtain a Chicago firearm permit” and “individually register each gun they own.”<sup>7</sup> This registry, which will include names and addresses of firearm owners, also will be made available to individuals outside of the Chicago Police Department.<sup>8</sup>

While some states and cities mandate firearm registration, current federal law prevents a national system of firearm registration.<sup>9</sup> There is pending federal legislation that would repeal the current federal law and permit the New York City scenario to be repeated at a national level.<sup>10</sup> The Firearm Owners’ Protection Act of 1986 prevents the federal government from establishing “a system of registration of firearms, firearm owners, or firearm transactions or dispositions.”<sup>11</sup> Senator James A. McClure (R-ID), the bill’s sponsor, declared that language to be critical as he believed gun registration to be “the first step toward ultimate and total confiscation”<sup>12</sup> and “the first step in a complete destruction of a cornerstone of our Bill of Rights.”<sup>13</sup> Instead of rescinding the existing privacy protection afforded to consumers, Congress should explore solutions that parties on both sides of the debate can agree will have an actual and realizable impact on reducing gun violence and crime.

This comment examines the primary arguments for continuing to prohibit the federal government from establishing a federal firearm registry. The Background section of this comment surveys the development of laws restricting firearm sales and requiring federal firearm licensed dealers to maintain pertinent records. This section also describes how, if enacted, the Blair Holt’s Firearm Licensing and Registration Act of 2009, known as H.R. 45, would, through the creation of federal firearm registry, expose electronic records of private citizens’ firearm purchases and ownership to possible government abuse. The Analysis section examines why H.R. 45 is not the correct means for achieving a reduction in gun

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6. *Chicago’s Tough New Gun Law Goes Into Effect*, CBSNEWS, July 12, 2010, <http://www.cbsnews.com/stories/2010/07/12/national/main6670601.shtml>.

7. *Chicago’s New Law Goes Into Effect Today*, CHICAGO BREAKING NEWS CENTER, July 12, 2010, <http://www.chicagobreakingnews.com/2010/07/chicagos-new-gun-law-goes-into-effect-today.html>.

8. Don Babwin, *Mayor Daley Lays Out Strict Gun Rules For Chicago*, THE ASSOCIATED PRESS, July 1, 2010, <http://www.google.com/hostednews/ap/article/ALeqM5hIWgd9nLX0S5df61V1VxuPif8gXgD9GMEC7O1>.

9. 18 U.S.C. §926(a) (2010).

10. Blair Holt’s Firearm Licensing and Registration Act of 2009, H.R. 45, 111th Cong. (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-45>.

11. 18 U.S.C. §926(a) (2010).

12. National Rifle Association of America, Institute of Legislative Action, Registration & Licensing, (Oct., 7, 2000), [www.nraila.org/Issues/FactSheets/Read.aspx?id=28&Issue=006](http://www.nraila.org/Issues/FactSheets/Read.aspx?id=28&Issue=006).

13. *Id.*

violence and crime. This section also examines alternative solutions, in light of the recent *McDonald v. Chicago* decision, to handle the underlying problems addressed by H.R. 45. The concluding section sets forth some final thoughts.

## BACKGROUND: INCREASING GOVERNMENT REGULATION

This section introduces the complex history of federal firearm sale regulations. Part I presents a chronological overview of significant federal legislation aimed at prohibiting certain persons from acquiring firearms and imposing verification and record keeping responsibilities on firearm dealers. Part II examines the process for acquiring a firearm under current federal law. Part III describes how, if enacted, proposed legislation would leave electronic records of legitimate firearm sales vulnerable to government misuse through repealing existing privacy protections and mandating that the Attorney General establish a federal licensing and registration system.

### I. FEDERAL FIREARM LEGISLATION HISTORY

The Founding Fathers of the United States of America judged that it was necessary to preserve “the right of the people to keep and bear arms.”<sup>14</sup> They chose to prohibit government infringement by ratifying the Bill of Rights in 1791. The Second Amendment of the Bill of Rights declared, “[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”<sup>15</sup>

From 1791 to 1938, the federal government recognized that all American citizens could legally purchase and possess firearms. However, in 1938, one hundred and forty seven years after the ratification of the Bill of Rights, President Franklin D. Roosevelt signed the Federal Firearms Act into law.<sup>16</sup> This Act was the first federal law that defined which persons could legally purchase a firearm.<sup>17</sup> These firearm purchaser guidelines remained unaltered for thirty years.

The assassination of President John F. Kennedy, and other prominent American figures,<sup>18</sup> spurred Congress to pass the Gun Control Act

14. U.S. CONST. amend II.

15. *Id.*

16. *The Federal Firearms Act*, 13 ST JOHN’S L. REV. 437, 438 (1939), available at <http://www.saf.org/LawReviews/Ascione1.html>.

17. epic.org, Gun Owner’s Privacy, <http://epic.org/privacy/firearms/> (last visited Oct. 29, 2009) (indicating that the Federal Firearm Act of 1938 prohibited federal firearm licensed dealers from selling a firearm “. . .to those individuals who were convicted of certain crimes or lacked a permit”).

18. *Id.* (“Gun Control Act of 1968: The assassinations of President John F. Kennedy, who was killed by a mail-order gun that belonged to Lee Harvey Oswald, inspired this

of 1968.<sup>19</sup> A centerpiece of this legislation was to prohibit mail order sales of rifles and shotguns.<sup>20</sup> The legislation also expanded “the list of those prohibited from acquiring a firearm to include individuals convicted of felonies, those found mentally incompetent, as well as drug users.”<sup>21</sup> Federal firearm licensed dealers (FFLs)<sup>22</sup> were required to obtain from their prospective purchaser the information necessary to complete the sale. If the retailer proceeded with the transaction, the law then required the retailer to maintain a paper and pen record of the transaction along with a completed paper copy of ATF Form 4473.<sup>23</sup>

The enactment of the Firearm Owners’ Protection Act of 1986 constituted the first comprehensive redraft of federal firearms laws since the Gun Control Act of 1968. This Act, which is still effective today, was designed “to protect firearm owners’ constitutional rights, civil liberties, and right to privacy.”<sup>24</sup> Similar to the Bill of Rights, this legislation was passed as a check and balance of the government’s power. At the heart of this Act is a section that prohibits the “federal government from keeping a national registry of gun owners.”<sup>25</sup> This privacy provision counteracts the possibility that the federal government would misuse the records that firearm dealers were required to compile and maintain and assures private citizens that they are protected from government abuse.

Congress reverted back to enhancing rather than continuing to relax federal gun laws when it passed the Brady Handgun Violence Protection Act of 1993 (Brady Bill). The Brady Bill was named after Press Secretary James Brady, who was shot when John Hinckley Jr. attempted to

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major revision to the federal gun laws. The subsequent assassinations of Martin Luther King and Robert Kennedy fueled its quick passage.”)

19. The Gun Control Act of 1968, 18 U.S.C. 44 (2006), *available at* [http://www.atf.gov/pub/fire-explo\\_pub/gca.htm](http://www.atf.gov/pub/fire-explo_pub/gca.htm). Sec. 101 states:

[t]he Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

20. Gun Owner’s Privacy, *supra* note 17.

21. *Id.*

22. 28 C.F.R. §25.2 (2010) (Federal firearms licensee, or FFL, is defined as, “a person licensed by the ATF as a manufacturer, dealer, or importer of firearms”).

23. Gun Owner’s Privacy, *supra* note 17.

24. Firearm’s Owners’ Protection Act, S. 49, 99th Cong. (1985) (enacted), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d099:SN00049:@@L&summ2=m&>.

25. 18 U.S.C. §926(a) (2010).

assassinate President Ronald Reagan.<sup>26</sup> The Brady Bill was first introduced into Congress in 1987<sup>27</sup> and President Bill Clinton eventually signed it into law at the end of 1993.<sup>28</sup> At that time, lawmakers were of the mindset that they could curb handgun violence by again constricting the ability to acquire a firearm. Consequently, the Brady Bill directed the Attorney General to establish a computerized national instant criminal background check system (NICS).<sup>29</sup> In addition to maintaining ATF Form 4473 and an acquisition and disposition book, firearm dealers were required to initiate a pre-sale<sup>30</sup> verification to confirm whether a potential buyer was prohibited from purchasing a firearm under the Gun Control Act of 1968<sup>31</sup> once NICS became operational.

After NICS confirms the identification of the dealer initiating the

26. James B. Jacobs and Kimberly A. Potter, *Guns and Violence Symposium: Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 97 (1995).

27. H.R. 975, 100th Cong. (1987); S. 466, 100th Cong. (1987).

28. Pub. L. No. 103-159, 107 Stat. 1536, 1541 (1993); Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417 (1995), available at <http://www.saf.org/LawReviews/Aborn1.html>.

29. Pub. L. No. 103-159, §103(b), 107 Stat. 1536, 1541 (1993).

30. 18 U.S.C. §922(t)(1) (2010).

31. The Gun Control Act of 1968, §922(g) & (n). §922(g) states:

It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) who is a fugitive from justice; (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)); (4) who has been adjudicated as a mental defective or who has been committed to a mental institution; (5) who, being an alien – (A) is illegally or unlawfully in the United States; or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(26))); (6) who has been discharged from the Armed Forces under dishonorable conditions; (7) who, having been a citizen of the United States has renounced his citizenship; (8) who is subject to a court order that –(A) was issued after a hearing in which such person received actual notice, and that which such person had an opportunity to participate; (B) restrains such a person from harassing, stalking, or threatening an intimate partner of such a person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C) (i) includes a find that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

§922(n) states:

It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

background check,<sup>32</sup> the system queries available records in the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Index.<sup>33</sup> The NCIC is a computerized index of criminal justice information developed by the Federal Bureau of Investigation (FBI).<sup>34</sup> Federal, state, and local law enforcement and other criminal justice agencies maintain and utilize the NCIC as a resource to apprehend fugitives, locate stolen property, and find missing persons.<sup>35</sup> The III is also an automated national index maintained by the FBI that is composed of persons arrested for felonies or serious misdemeanors under state or federal law.<sup>36</sup> The NICSIndex contains records on indi-

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32. Federal Bureau of Investigation, *NICS/FBI Interface Control Document*, 3-10 (Oct. 27, 2008). The document states:

The ATF is responsible for providing the NICS the list of valid FFL numbers issued to FFLs that may legally transfer firearms in the United States (i.e. gun dealers, pawnbrokers, importers, and manufacturers). The ATF also provides updates to the NICS on new licenses issued, renewals, and expirations. This FFL data is used by the NICS to validate FFLs requesting Brady Law background checks on potential firearm purchasers. . . . Routine updates are supplied by electronic file transfer in accordance with the detailed design characteristics in ATF Interface. For updates of a more urgent nature, such as the revocation or reinstatement of a license, the updated is provided to the FBI via telephone or facsimile. *Id.*

33. Department of Justice, Federal Bureau of Investigation, NICS Index, <http://www.fbi.gov/hq/cjisd/nics/nicsindex.htm>. (last visited July 26, 2010).

34. *Id.*

35. Department of Justice, Federal Bureau of Investigation, National Crime Information Center, [http://www.fbi.gov/hq/cjisd/ncic\\_brochure.htm](http://www.fbi.gov/hq/cjisd/ncic_brochure.htm) (last visited Oct. 29, 2009). According to the website:

The NCIC database consists of 18 files. Seven property files contain records for articles, boats, guns, license plates, securities, vehicles, and vehicle and boat parts. The 11 person files are the Convicted Sexual Offender Registry, Foreign Fugitive, Identity Theft, Immigration Violator, Missing Person, Protection Order, Supervised Release, Unidentified Person, U.S. Secret Service Protective, Violent Gang and Terrorist Organization, and Wanted Person files. In addition, the database contains images that can be associated with NCIC records to assist agencies in identifying people and property items. *Id.*

36. Department of Justice, Federal Bureau of Investigation, Integrated Automated Fingerprint Identification System: (IAFIS), <http://www.fbi.gov/hq/cjisd/iafis.htm> (last visited July 26, 2010); TASK FORCE ON INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY, INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY – REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL, (July 1999), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/iiince.pdf>; Office of Justice Programs, Bureau of Justice Statistics, Criminal Record Systems Statistics, Aug. 4, 2009, *available at* <http://www.ojp.gov/bjs/crs.htm>; Science Applications International Corporation (SAIC): Integrated Justice Information Systems, <http://www.saic.com/justice/integrated.html> (last visited July 26, 2010). According to the website:

SAIC designed and completed the development of the Interstate Identification Index segment of the FBI's Integrated Automated Fingerprint Identification System (IAFIS). This system became operational nationwide in July 1999. One of the key challenges with this program was the migration of the criminal history database to a client/server environment. SAIC's expertise created a system that provides the same level of control and reliability as the legacy system, yet with improved speed, flexibility and expandability. This system is a high performance, on-line

viduals identified in federal, state, and local records as being prohibited by federal law from receiving firearms.<sup>37</sup> In addition, the NICS conducts other criminal searches to determine whether the potential purchaser “is a sexual offender, is on supervised release, is in the Bureau of Prisons SENTRY file; or is in the Violent Gang and Terrorist Organization file.”<sup>38</sup>

Congress understood that creating a searchable electronic pre-sale verification system would present firearm dealers and law enforcement personnel with many advantages. However, Congress also acknowledged that establishing an interactive electronic database would pose accessibility and usage challenges beyond those attributable to a paper record system. Consequently, Congress chose to mitigate the threat of misuse of electronic records by instituting safeguards against the establishment of a federal firearm registry.<sup>39</sup> By law, records related to denied gun sales transactions can be retained, but the NICS Section must destroy all identifying information regarding permitted sales transactions within 24 hours after a firearm dealer is notified that the dealer may proceed with the sales transaction.<sup>40</sup>

## II. THE PROCESS FOR BUYING A FIREARM UNDER CURRENT FEDERAL LAW

A series of steps must be satisfied before a law-abiding citizen can lawfully acquire a firearm from a firearms dealer. First, either a paper or electronic version of ATF Form 4473 must be completed, signed, and dated.<sup>41</sup> The ATF Form 4473 contains the purchaser’s name, sex, address, date and place of birth, height, weight, race, driver’s license information, country of citizenship, state of residence, serial number and model of the firearm, and a short federal affidavit stating that the purchaser is eligible to purchase firearms under federal law.<sup>42</sup> A purchaser can be charged and penalized for knowingly making a false statement or

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criminal history and mug shot database (45 million people), which is accessed by federal, state, and local law enforcement agencies via the National Crime Information Center network. *Id.*

37. NICS Index, *supra* note 33.

38. NICS/FBI Interface Control Document, *supra* note 32, at 1-33-1.

39. 28 C.F.R. §25.9(b)(1-3) (2010).

40. *Id.*

41. Harris Law Office, Federal Laws on the Purchase and Sale of Firearms, [http://harrislawoffice.com/content/areas\\_of\\_practice/tennessee\\_firearms/federal\\_purchase\\_and\\_sale.htm](http://harrislawoffice.com/content/areas_of_practice/tennessee_firearms/federal_purchase_and_sale.htm) (last visited July 26, 2010).

42. 27 CFR §478.124 (2010); Department of Treasury: Bureau of Alcohol, Tobacco and Firearms, “Firearms Transaction Record,” ATF Form 4473, available at <http://www.thundertext.net/documents/4473.pdf>; Bartholomew Roberts, *Gun Registration and Gun Control*, GUNCITE, Aug. 24, 2007, available at [www.guncite.com/gun\\_control\\_registration.htm](http://www.guncite.com/gun_control_registration.htm).

misrepresentation on this form.<sup>43</sup> Once the dealer obtains a completed ATF Form 4473 and verifies the identity of the purchaser,<sup>44</sup> the dealer must initiate a pre-sale background check.<sup>45</sup>

A dealer can access the NICS either by telephone or by computer. FFLs that contact NICS by phone will communicate directly with an FBI/NICS Examiner or with a Call Center Representative who will forward information about the prospective buyer electronically to NICS.<sup>46</sup> Dealers also have the option of verifying a purchaser's eligibility over the Internet through E-Check.<sup>47</sup> On average, once NICS can establish the dealer's federal firearm license number and code word,<sup>48</sup> the system can complete a background check within 30 seconds.<sup>49</sup>

The system can return one of three responses: proceed, denied, or delay. When the system indicates "proceed," the dealer can complete the sale because the system concluded that the transfer would be lawful.<sup>50</sup> When the system indicates "denied," the dealer cannot execute the sales transaction.<sup>51</sup> A denied response occurs when at least one system match indicates that the prospective purchaser is not legally able to possess a firearm.<sup>52</sup> When the system indicates "delay," the dealer must postpone the transfer as further research will be necessary before a conclusion can be reached based on whether the prospective purchaser is prohibited from acquiring a firearm.<sup>53</sup>

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43. Don't Lie for the Other Guy, FAQ, [www.dontlie.org/FAQ.cfm](http://www.dontlie.org/FAQ.cfm) (last visited Nov. 3, 2009).

44. Harris Law Office, *supra* note 41 (The website states, "[t]he identification document presented by the purchaser must have a photograph of the purchaser, as well as the purchaser's name, address, and date of birth. The identification document must also have been issued by a governmental entity for the purpose of identification of individuals").

45. Roberts, *supra* note 42; Harris Law Office, *supra* note 39; Harris Law Office, *supra* note 41.

46. Department of Justice, Federal Bureau of Investigation, National Instant Criminal Background Check System Fact Sheet, <http://www.fbi.gov/hq/cjisd/nics/nicsfact.htm> (last visited July 26, 2010).

47. Department of Justice, Federal Bureau of Investigation: NICS E-Check, <http://www.fbi.gov/hq/cjisd/nics/echeck.htm> (last visited July 26, 2010).

48. 28 C.F.R. §25.8(f)(3) (2010).

49. National Instant Criminal Background Check System Fact Sheet, *supra* note 46.

50. 28 C.F.R. §25.6(c)(1)(iv)(A) (2010) ("Proceed response, if no disqualifying information was found in the NICS Index, NCIC, or III").

51. 28 C.F.R. §25.6(c)(1)(iv)(C) (2010). The code states:

Denied response, when at least one matching record is found in either the NICS Index, NCIC, or III that provides information demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C. 922 or state law. The "Denied" response will be provided to the requesting FFL by the NICS operator during its regular business hours. *Id.*

52. *Id.*

53. 228 C.F.R. §25.6(c)(1)(iv)(B) (2010). The code states:

Delayed response, if the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a

After the dealer receives a response from NICS, the dealer signs and adds the NICS background check transaction number to ATF Form 4473.<sup>54</sup> The firearm dealer is required to retain a copy of ATF Form 4473 for at least twenty years.<sup>55</sup> The e-Form 4473 must be maintained for at least five years, even if the firearm dealer only conducts a background check and does not actually transfer the firearm.<sup>56</sup> Both Form 4473 and e-Form 4473 are subject to inspection.<sup>57</sup> The National Tracing Center may also request to review these documents when the agency is trying to trace the chain of ownership of a firearm associated with a crime.<sup>58</sup> A dealer is also required to submit Form 3310.4 to both the ATF and local law enforcement when the dealer transfers two or more handguns within five days to the same purchaser.<sup>59</sup>

The dealer is also required to record the sale in a bound acquisition and disposition book.<sup>60</sup> In that book the dealer must record the date of the transfer, the firearm manufacturer's name, the firearm's caliber, and the purchaser's name, address, and date of birth.<sup>61</sup> The dealer must keep the book the entire time he or she is in business.<sup>62</sup> If the dealer should cease operations, the law requires the dealer to surrender the acquisition and disposition log to the ATF's Out-of-Business Center.<sup>63</sup>

The Supreme Court's recent decision in *McDonald v. Chicago*, which confirmed and held that the Second Amendment was applicable to the states, will affect state and local governments that impose conditions above and beyond these federal requirements.<sup>64</sup> The degree to which state and local laws will be invalidated is yet to be determined. Although, litigation arising out of the City of Chicago's most recent gun control ordinance is likely to provide the first example of what represents an unconstitutional roadblock to the individual right to keep and bear

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firearm by Federal or state law. A "Delayed" response to the FFL indicates that the firearm transfer should not proceed pending receipt of a follow-up "Proceed" response from the NICS or the expiration of three business days (exclusive of the day on which the query is made), whichever occurs first. *Id.*

54. ATF Form 4473, *supra* note 42; Roberts, *supra* note 42.

55. ATF Form 4473, *supra* note 42.

56. Bureau of Alcohol, Tobacco, Firearms and Explosives, E-form 4473 Frequently Asked Questions, <http://www.atf.gov/applications/e4473/faq.html> (last visited July 26, 2010).

57. Roberts, *supra* note 42.

58. *Id.*

59. Don't Lie for the Other Guy, *supra* note 43.

60. 27 C.F.R. §178.125 (2010).

61. *Id.*

62. *Id.*

63. A.T.F. Rul. 2008-2, 5 (Aug. 25 2005), available at [http://www.atf.gov/firearms/rules/atf\\_ruling2008-2.pdf](http://www.atf.gov/firearms/rules/atf_ruling2008-2.pdf); Roberts, *supra* note 42.

64. *McDonald v. Chicago*, No. 08-1521, slip op. at 2 (U.S. June 28, 2010), <http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>.

arms. As of July 12, 2010, Chicago residents who desire to purchase and possess a firearm not only have to comply with the State of Illinois' requirements, but they also became subject to Chicago's new law, which imposes both firearm licensing and firearm registration.<sup>65</sup> The city's new ordinance, which replaced its twenty-eight year-old gun law that the Supreme Court held unconstitutional, is said to go "farther than anyone else ever has."<sup>66</sup>

### III. PROPOSED REVISIONS TO FEDERAL LAWS ENTAIL ESTABLISHING A FIREARM LICENSING AND REGISTRATION SYSTEM

Over the last decade, several attempts have been made to change the process by which a dealer can sell and a buyer can acquire a firearm. The common thread among these proposals is that they negate the provisions of current federal law, which prevents the federal government from establishing a federal firearm registry system.<sup>67</sup> Congressmen from across the United States have proposed bills that recommend eliminating the safeguards over electronic records and mandating that the Attorney General establish a federal firearm licensing and registry system. For example, in 1999<sup>68</sup>, 2001<sup>69</sup>, and 2003<sup>70</sup>, Representative Rush Holt (D-NJ12) introduced the Handgun Licensing and Registration Act into Congress. Each of these bills provided for "the mandatory licensing and registration of handguns."<sup>71</sup>

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65. *Chicago's New Law Goes Into Effect Today*, *supra* note 7. Starting July 12, 2010 "anyone who wants to get a handgun must obtain a Chicago firearm permit." *Id.* "Permit-bearing owners also must individually register each gun they own." *Id.*

Other [k]ey provisions of the ordinance include:

- Firearm sales will be banned in the city.
- Gun training totaling four hours in a classroom and an hour on the firing range will be required before getting a permit. But firing ranges are banned, so training must be completed outside Chicago.
- To transport a gun, it will have to be "broken down," not immediately accessible, unloaded, and in a firearm case.
- Firearms may be possessed only inside the dwelling. It will be illegal to have a gun in the garage, on the front porch or in the yard. Guns also will not be allowed in hotels, dorms and group-living facilities. *Id.*

66. Don Babwin, *supra* note 8.

67. 18 U.S.C. 926(a) (2010).

68. Govtrack.us, Overview of H.R. 3472: Handgun Licensing and Registration Act of 2000, <http://www.govtrack.us/congress/bill.xpd?bill=h106-3472> (last visited July 26, 2010).

69. Govtrack.us, Overview of H.R. 114: Handgun Licensing and Registration Act of 2001, <http://www.govtrack.us/congress/bill.xpd?bill=h107-114> (last visited July 26, 2010).

70. Govtrack.us: Overview of H.R. 124: Handgun Licensing and Registration Act of 2003, <http://www.govtrack.us/congress/bill.xpd?bill=h108-124> (last visited July 26, 2010).

71. Handgun Licensing and Registration Act of 2000, H.R. 3472, 106th Cong. (1999), at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_bills&docid=f:h3472ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:h3472ih.txt.pdf); Handgun Licensing and Registration Act of 2001, H.R. 114, 107th Cong. (2001), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_bills&](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&)

In 2000<sup>72</sup>, and then again in 2001,<sup>73</sup> Senator Dianne Feinstein (D-CA), along with three co-sponsors, introduced the Firearm Licensing and Record of Sale Act of 2000 into Congress. These bills were more comprehensive than the bills that Representative Holt proposed. They called for registration of firearms that satisfied the definition under section 921(a) of title 18, United States Code,<sup>74</sup> as well as “(i) any handgun; or (ii) any semiautomatic firearm that can accept any detachable ammunition feeding device.”<sup>75</sup>

Six years after Senator Feinstein’s last proposed bill did not pass, Representative Bobby Rush (D-IL) made insignificant wording modifications to the bill and reintroduced it as H.R.2666: Blair Holt’s Firearm Licensing and Record of Sale Act of 2007.<sup>76</sup> The bill was renamed after Blair Holt, “a 16-year old honor student in Chicago who was murdered in May 2007 when another teenager began firing a handgun on a public bus in a gang-related attack.”<sup>77</sup> Although H.R. 2666 did not survive the Subcommittee on Crime, Terrorism, and Homeland Security’s review, the bill did attain co-sponsorship by several well-known anti-gun legislators, including President Barack Obama’s Chief of Staff, Rahm Emanuel.<sup>78</sup>

On January 6, 2009, Representative Rush essentially reintroduced H.R. 2666 again into Congress, but this time under the title H.R. 45: Blair Holt’s Firearm Licensing and Record of Sales Act of 2009.<sup>79</sup> This

docid=f:h114ih.txt.pdf; Handgun Licensing and Registration Act of 2003, H.R. 124, 108th Cong. (2003), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_bills&docid=f:h124ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h124ih.txt.pdf).

72. Govtrack.us, Overview of S. 2525: Firearm Licensing and Record Sale Act of 2000, <http://www.govtrack.us/congress/bill.xpd?bill=s106-2525> (last visited July 26, 2010).

73. Govtrack.us: Overview of S.25: Firearm Licensing and Record of Sale Act of 2001, <http://www.govtrack.us/congress/bill.xpd?bill=s107-25> (last visited July 26, 2010).

74. U.S.C. §921(a) (2010). The term “firearm” is defined in subsection (3) to mean: (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm. *Id.*

75. Firearm Licensing and Record of Sale Act of 2000, S. 2525, 106th Cong. §3(a), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_bills&docid=f:s2525is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s2525is.txt.pdf).

76. Govtrack.us, Overview of H.R. 2666: Blair Holt’s Firearm Licensing and Record of Sale Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2666> (last visited July 26, 2010).

77. Wade Bourn, *Blair Holt Gun Control Bill Rehashed*, SPECIAL TO ESPNOOTDOORS.COM, Feb. 11, 2009, <http://sports.espn.go.com/outdoors/hunting/news/story?id=3899236>.

78. Govtrack.us, Overview of H.R. 2666, *supra* note 76.

79. Govtrack.us, Overview of H.R. 45: Blair Holt’s Firearm Licensing and Record of Sale Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-45> (last visited July 26, 2010).

bill is still in the initial stages of the legislative process.<sup>80</sup> Currently, it has been referred to the House Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security where it is undergoing review and deliberation.<sup>81</sup>

H.R. 45 provides “for the implementation of a system of licensing for purchasers of certain firearms and for a record of sale system for those firearms, and for other purposes.”<sup>82</sup> In order to achieve this objective, the proposed bill calls for amending Section 926(a) of title 18 “by striking the second sentence.”<sup>83</sup> If enacted, this bill would repeal the provision that prevents the federal government from establishing a federal firearm registry system.<sup>84</sup>

Along with creating a very restrictive and burdensome licensing process,<sup>85</sup> the proposed bill would also require the Attorney General to “es-

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80. *Id.*

81. *Id.*

82. Blair Holt’s Firearm Licensing and Record of Sale Act of 2009, H.R. 45, 111th Cong. (2009), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h45ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h45ih.txt.pdf); Blair Holt’s Firearm Licensing and Record of Sale Act of 2007, H.R. 2666, 110th Cong. (2007), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:h2666ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2666ih.txt.pdf); Firearm Licensing and Record of Sale Act of 2000, S. 2525, 106th Cong. (2000), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_bills&docid=f:s2525is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s2525is.txt.pdf); Firearm Licensing and Record of Sale Act of 2001, S. 25, 107th Cong. (2001), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_bills&docid=f:s25is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s25is.txt.pdf).

83. H.R. 45 §202(c).

84. 18 U.S.C. §926(a) (2010). The section states that:

[n]o such rule or regulation prescribed after the date of the enactment of the Firearms Owners’ Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

*Id.*

85. H.R. 45 §102(a) & (b). The bill proposes that an individual desiring a firearm license should submit an application to the Attorney General with:

(1) a current, passport sized photograph of the applicant that provides a clear, accurate likeness of the applicant; (2) the name, address, and date and place of birth of the applicant; (3) any other name that the applicant has ever used of by which the applicant has ever been known; (4) a clear thumb print of the applicant, which shall be made when, and in the presence of the entity to whom, the application is submitted; (5) with respect to each category of person prohibited by Federal Law, or by the law of the state of residence of the applicant, from obtaining a firearm, a statement that the individual is not a person prohibited from obtaining a firearm; (6) a certification by the applicant that the applicant will keep any firearm owned by the applicant safely stored and out of the possession of persons who have not attained 18 years of age; (7) a certificate attesting to the completion at the time of application of a written firearms examination, which shall test the knowledge and ability of the applicant regarding – (A) the safe storage of firearms, particularly in the vicinity of persons who have not attained 18 years of age; (B) the safe handling of firearms; (c) the use of firearms in the home and the risks associated with such use; (D) the legal responsibilities of firearms owners, includ-

establish and maintain a Federal record of sale system.”<sup>86</sup> That computerized system would be populated with information from reports FFLs would be required to submit<sup>87</sup> to the Attorney General within 14 days<sup>88</sup> of transferring a firearm through a sales transaction. Firearm dealers will, in effect, be registering each firearm they sell. Dealers are directed to submit reports that include information relating to the transferred firearms’ manufacturer, model and serial number, the date of the transfer, the purchaser’s valid license number, and the name and address of the dealer executing the sales transaction.<sup>89</sup> If Congress were to adopt this proposal they would effectively be instituting the most restrictive measure ever imposed on firearm sales. This proposal would also eliminate the only assurance law-abiding gun owners have that their personal information would not become vulnerable to government abuse.

### ANALYSIS: FINDING A PROPER SOLUTION

H.R. 45 has gained an incredible amount of public attention lately. According to OpenCongress, a non-partisan web resource of official government data and commentary, this bill is “the second-most blogged about bill in Congress and the second in the list of bills most often covered in the news.”<sup>90</sup> While it is encouraging that an overwhelming number of OpenCongress users oppose this bill’s passage,<sup>91</sup> constituents must continue to contact their Senators and Representatives and urge them to vote against H.R. 45 should it come to vote during this or any subsequent congressional term. H.R. 45 should be abandoned as a viable solution because, if enacted, it would place law-abiding citizens in a worse position than they are today, while having only a nominal impact on gun violence and crime. Congress should instead pursue gun control

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ing Federal, State, and local laws relating to requirements for the possession and storage of firearms, and relating to reporting requirements with respect to firearms; and (E) any other subjects as the Attorney General determines to be appropriate; (8) an authorization by the applicant to release the Attorney General or an authorized representative of the Attorney General any mental health records pertaining to the applicant; (9) the date on which the application was submitted; and (10) the signature of the applicant. *Id.*

86. H.R. 45 §202(b).

87. *Id.*

88. H.R. 45 §202(a).

89. *Id.*

90. Donny Shaw, *Gun Registry Bill Draws Massive Resistance*, OPENCONGRESS, Feb. 18, 2009, [www.opencongress.org/articles/view/883-Gun-Registration-Bill-Draws-Massive-Resistance](http://www.opencongress.org/articles/view/883-Gun-Registration-Bill-Draws-Massive-Resistance).

91. OpenCongress, H.R. 45 – Blair Holt’s Firearm Licensing and Record of Sale Act of 2009, <http://www.opencongress.org/bill/111-h45/show> (last visited Nov. 5, 2009). As of November 5, 2009, this bill’s standing among OpenCongress users was 317 in favor – 13986 opposed. *Id.* As of this date OpenCongress also reported that the bill had been viewed 984,645 times. *Id.*

legislation that can address the underlying problem of gun violence and crime without offending either side of the debate.

I. A FEDERAL FIREARM LICENSING AND REGISTRATION SYSTEM IS NOT THE CORRECT MEANS OF ACHIEVING A REDUCTION IN CRIMINAL ACTIVITY

Representative Rush, Senator Feinstein, and the Firearm Licensing and Record of Sale Act co-sponsors have claimed that there is a need to institute a national licensing and registration system.<sup>92</sup> The theory is that having individuals obtain a license qualifying them to purchase a firearm, registering every privately-owned firearm, and then aggregating those records into a centralized computer system will be more successful at eradicating gun violence and crime than current laws.<sup>93</sup> While reducing gun violence is certainly a worthy goal, passing H.R. 45 is not the method to achieve that mark as explained further below. Paperwork and databases will not inhibit nor cease gun violence or crime. Congress should not pass H.R. 45 during this session or any future session, as amassing license and registration records on law-abiding firearm owners will not prevent, detect, or lead to the prosecution of gun violence.

A. *Issuing Firearm Licenses Will Not Prevent Criminals From Purchasing Firearms*

Senator Charles E. Schumer co-sponsored the Firearm Licensing and Record of Sale Act of 2000<sup>94</sup> and 2001.<sup>95</sup> During a press conference, he exclaimed that it was imperative that Congress pass legislation creating a national firearm license and registration system to plug the “four main holes” that enabled criminals to obtain firearms.<sup>96</sup> Those four holes were described as gun runners, straw buyers, rogue gun dealers, and gun theft.<sup>97</sup>

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92. See H.R. 45.

93. *Id.*

94. Govtrack.us, Overview of S. 2525: Firearm Licensing and Record of Sale Act of 2000, <http://www.govtrack.us/congress/bill.xpd?bill=s106-2525> (last visited July 26, 2010).

95. Govtrack.us, Overview of S.25: Firearm Licensing and Record of Sale Act of 2001, <http://www.govtrack.us/congress/bill.xpd?bill=s107-25> (last visited July 26, 2010).

96. Representative Charles E. Schumer, Chairman, House Subcommittee on Crime and Criminal Justice, Statement given at News Conference (Dec.8, 1993) (transcript available at <http://rkba.org/antis/schumer.8dec93>). At this news conference, Senator Schumer was promoting the Handgun Control and Violence Protection Act that he had introduced into Congress. *Id.* This bill, similar to the version for the Firearm Licensing and Record of Sales Act introduced by both Senator Feinstein and Representative Rush, mandated the establishment of a national licensing and registration system. *Id.* In addition, Senator Schumer's bill proposed reforms for issuing federal firearm licenses.

97. *Id.*

Senator Schumer explained that gun runners are those “people who go to states with lax gun control and buy hundreds of guns using fake identification documents.”<sup>98</sup> After purchasing firearms with fake identification, gun runners will then “go to other states or cities and sell guns on street corners to anyone who comes along with the cash.”<sup>99</sup> He described the concept of a straw buyer as “the people with clean records who stand in to buy guns for criminals and gun runners.”<sup>100</sup> Then Senator Schumer discussed his concern over the quantity of federally licensed firearm dealers and how there was a potential for rogue gun dealers to sell firearms to “gangs and violent criminals.”<sup>101</sup> As a final point, Senator Schumer stated that he firmly believed that gun theft was a serious problem and that “[g]uns are stolen all too often.”<sup>102</sup>

In order to combat these “four holes” Senator Schumer, Senator Feinstein, and Representative Rush have posited that instituting a federal firearm license and registration system is necessary.<sup>103</sup> H.R. 45 has retained its predecessors’ provision - assigning the Attorney General with the responsibility of issuing firearm license cards to applicants who have appropriately submitted completed applications, paid the application fee, and are not prohibited from acquiring a firearm.<sup>104</sup> Law-abiding citizens who had acquired firearms within the two years prior to the enactment of H.R. 45 would be obligated to obtain a license and register their firearms.<sup>105</sup> Thereafter, any individual who intends to exercise his or her Second Amendment right and acquire a firearm after the enactment of the bill would be required to obtain a license qualifying him or her to purchase a firearm legally.<sup>106</sup> Then he or she would have to register that firearm.<sup>107</sup> Failing to obtain a federal firearm license card would result in criminal penalties.<sup>108</sup> The proposed legislation stipulates that these penalties shall include a fine, imprisonment for up to two years, or both.<sup>109</sup>

Each federal firearm license card would include the applicant’s photograph, date of birth, unique license number, and signature.<sup>110</sup> In bold at the top of the license would be typed “Firearm License – Not Valid for

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Representative Charles E. Schumer, *supra* note 99.

103. *See* H.R. 45.

104. H.R. 45 §102 & 103.

105. H.R. 45 §101.

106. *Id.*

107. *Id.*

108. H.R. 45 §401.

109. *Id.*

110. H.R. 45 §103(c).

Any Other Purpose.”<sup>111</sup> Federal firearm license cards would be issued for a period of five years.<sup>112</sup> In order to renew a federal firearm license card, the card holder would be required to complete another application, supply a current photograph, proof of identification, and current address.<sup>113</sup> If a licensed individual subsequently becomes prohibited from acquiring a firearm, that license holder would be obligated to return the federal firearm license card to the Attorney General.<sup>114</sup>

It is highly unlikely that a federal firearm license and registration card system, such as the one proposed in H.R. 45, would have more than a nominal effect on preventing criminals from acquiring firearms. As Senator Schumer pointed out, criminals are already capable of obtaining firearms by creating fake identification or falsifying personal information.<sup>115</sup> It is more probable that adopting such a federal firearm license and registration card scheme would cause another underground crime market to emerge in the United States.<sup>116</sup> Criminals motivated by opportunity could develop an underground business to make and sell fake federal firearm license cards just as they create fraudulent government documents such as driver’s licenses, currency, and passports.<sup>117</sup>

When compared against the potential negative results from adopting H.R. 45, it would be better to retain the current system. The existing system, with all its imperfections, is adequate. The “four holes” Senator Schumer described, gun runners,<sup>118</sup> straw buyers,<sup>119</sup> rogue gun deal-

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111. *Id.*

112. *Id.*

113. H.R. 45 §104(a).

114. H.R. 45 §105.

115. Representative Charles E. Schumer, *supra* note 99.

116. Andrew Hanon, *Fake Firearms Licenses Seized*, CNEWS, June 24, 2010, <http://cnews.canoe.ca/CNEWS/Crime/2010/06/24/14497076.html> (Example from a Canadian news source of where police seized fake “licenses to buy guns and ammunition” from “a suspected forger factory in downtown Edmonton,” Canada).

117. *Novelty Fake ID Cards*, NEWIDCARDS.COM, <http://www.newidcards.com/> (last visited Aug. 23, 2010) (this website advertises that it sells “state ID cards of every US state.”); FakeID, <http://www.fakepassportsale.cc/> (last visited Aug. 23, 2010) (this website advertises that it offers “only original high-quality fake passports, driver’s licenses, ID cards, stamps and other products for following countries: Australia, Belgium, Brazil, Canada, Finland, France, Germany, Holland, UK, USA, and some others”); Marshall Brian, *How Counterfeiting Works*, HowStuffWorks, <http://money.howstuffworks.com/counterfeit.htm#> (last visited Aug. 23, 2010) (describing how to counterfeit United States currency); Barbara Hagenbaugh, *More Counterfeit Money Changed Hands in ‘06*, USA TODAY, Feb. 27, 2007, [http://www.usatoday.com/money/2007-02-27-counterfeit-usat\\_x.htm](http://www.usatoday.com/money/2007-02-27-counterfeit-usat_x.htm) (last visited Aug. 23, 2010); Jeannine Aversa and Martin Crutsinger, *New \$100 Bill Looks to Outsmart Counterfeiters*, USA TODAY, Apr. 23, 2010, [http://www.usatoday.com/money/economy/2010-04-21-new-100\\_N.htm](http://www.usatoday.com/money/economy/2010-04-21-new-100_N.htm) (describing how the \$100 bill has been recently redesigned in an attempt to stay ahead of counterfeiters).

118. 18 U.S.C. §922(a)(5) (2010) (It is unlawful for an unlicensed individual to willfully transfer, sell, or transport a firearm to another unlicensed out-of-state person.); 18 U.S.C.

ers,<sup>120</sup> and gun theft,<sup>121</sup> are already considered illegal activities and have been addressed by numerous federal laws. Under current laws, each firearm sales transaction creates an opportunity to initiate a back-

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§922(d) (2010) (It is unlawful to knowingly sell a firearm to a person who is prohibited from acquiring a firearm.); 18 U.S.C. §922(e) (2010) (It is unlawful to willfully deliver a firearm to a common carrier without giving a written notice.); 18 U.S.C. §922(g) (2010) (It is unlawful for certain groups of individuals such as persons who has been convicted of a felony, who is addicted to illegal drugs, and who has been adjudicated insane, to acquire, ship, or transport firearms.); 18 U.S.C. §922(i) (2010) (It is unlawful for an individual to knowingly ship or transport stolen firearms or firearms the individual has reason to believe are stolen.); 18 U.S.C. §922(j) (2010) (It is unlawful for an individual to knowingly acquire, possess, or sell stolen firearms, or firearms the individual has reason to believe are stolen.); 18 U.S.C. §922(k) (2010) (It is unlawful to knowingly possess, receive, ship, or transport a firearm with altered or obliterated serial numbers.); 18 U.S.C. §922(l) (2010) (It is unlawful for an individual to knowingly receive, import, or acquire a firearm in violation of 18 U.S.C. §921.); 18 U.S.C. §922(n) (2010) (It is unlawful for a person who is under a felony indictment to knowingly acquire, ship, or transport firearms.); 18 U.S.C. §922(o) (2010) (It is unlawful, unless permissible under an exception, “to transfer or possess a machinegun.”); 18 U.S.C. §922(p) (2010) (It is unlawful “to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm” designed to avoid detection.); 18 U.S.C. §922(r) (2010) (It is unlawful to assemble a prohibited firearm from imported parts.); 18 U.S.C. §922(x) (2010) (It is unlawful for an individual to willful sell a firearm to a juvenile).

119. 18 U.S.C. §922(a)(6) (2010) (It is unlawful for an individual to knowingly make a false oral or written statement or provide false or fictitious identification in connection with the purchase of a firearm); 18 U.S.C. §922(g) (2010) (It is unlawful for persons prohibited from to acquire, ship, or transport firearms).

120. 18 U.S.C. §922(a)(1) (2010) (It is unlawful to for an individual to willfully engage in importing, manufacturing, or selling firearms without a license); 18 U.S.C. §922(b)(1) (2010) (It is unlawful for a dealer to willful sell a firearm to a juvenile); 18 U.S.C. §922(b)(2) (2010) (It is unlawful for a dealer to willfully sell a firearm if the sale would violate state law); 18 U.S.C. §922(b)(3) (2010) (It is unlawful for a dealer to willfully sell a firearm to an out-of-state recipient); 18 U.S.C. §922(b)(4) (2010) (It is unlawful for a dealer to sell certain prohibited firearms); 18 U.S.C. §922(b)(5) (2010) (It is unlawful for a dealer to sell a firearm without keeping proper records of the transaction); 18 U.S.C. §922(c) (2010) (It is unlawful for a dealer to sell a firearm outside of the dealers business without obtaining required documentation from the customer); 18 U.S.C. §922(d) (2010) (It is unlawful to knowingly sell a firearm to a person who is prohibited from acquiring a firearm); 18 U.S.C. §922(e) (2010) (It is unlawful to willfully deliver a firearm to a common carrier without giving a written notice); 18 U.S.C. §922(j) (2010) (It is unlawful for an individual to knowingly acquire, possess, or sell stolen firearms, or firearms the individual has reason to believe are stolen); 18 U.S.C. §922(k) (2010) (It is unlawful to knowingly possess, receive, ship, or transport a firearm with altered or obliterated serial numbers); 18 U.S.C. §922(l) (2010) (It is unlawful for an individual to knowingly receive, import, or acquire a firearm in violation of 18 U.S.C. §921); 18 U.S.C. §922(m) (2010) (It is unlawful for a dealer to fail to record or make a false entry in any record which the dealer is required to maintain); 18 U.S.C. §922(o) (2010) (It is unlawful, unless permissible under an exception, “to transfer or possess a machinegun”); 18 U.S.C. §922(p) (2010) (It is unlawful “to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm” designed to avoid detection); 18 U.S.C. §922(r) (2010) (It is unlawful to assemble a prohibited firearm from imported parts); 18 U.S.C. §922(t) (2010) (It is unlawful for a dealer to knowingly transfer or sell a firearm without conducting a background check).

ground check with NICS and confirm that the customer is not prohibited from acquiring a firearm prior to completing each sales transaction.<sup>122</sup> In addition to statutory deterrents, the ATF and the National Shooting Sports Foundation (NSSF) have jointly launched a national campaign to train firearm dealers on how to detect potential straw sales and educate the public on the seriousness of this type of crime.<sup>123</sup> It is plausible that, when enforced, these existing laws would obviate the need to establish additional regulatory obstacles for law-abiding firearm owners.

*B. Amassing Firearm License And Registration Records Will Not Detect Whether A Qualified Firearm Owner Will Commit A Crime With A Firearm*

The existence of a federal licensing and registration system cannot prevent an individual from acquiring and then carrying out a crime with a firearm. Allowing law-abiding firearm owners to protect themselves and others during the commission of another's crime can, however, play a significant role in ending violence and saving lives. An example of this occurred when civilian firearm owners played a critical role in ending the shooting at the University of Texas.<sup>124</sup>

On August 1, 1966, Charles Whitman, an ex-marine, perched atop the Tower building at the University of Texas and indiscriminately fired his rifle at people on the ground.<sup>125</sup> Instead of running from the scene, armed students and civilians returned fire against Mr. Whitman.<sup>126</sup> "This had the dual effects of forcing the sniper to aim out of the water spouts, reducing his line of sight and consequentially his victims, and forced the sniper to play defense rather than ensuring that no police could make their way up the tower to stop him."<sup>127</sup>

There are a couple of important annotations that can be made from this single event. It must be noted that prior to this incident, Mr. Whitman appeared to be a good citizen.<sup>128</sup> He had been honorably discharged from the Marine Corps.<sup>129</sup> While Mr. Whitman was serving his country

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121. 18 U.S.C. §922(u) (2010) (It is unlawful for an individual to steal from a dealer or a dealer's place of business a firearm in "inventory that has been shipped or transported in interstate or foreign commerce").

122. See *supra* Background, Section II.

123. Don't Lie for the Other Guy, *supra* note 43.

124. Prinalgin, *Charles Whitman - The Texas Tower Massacre*, ASSOCIATED CONTENT, Mar. 1, 2006, [http://www.associatedcontent.com/article/20857/charles\\_whitmanthe\\_texas\\_tower\\_massacre\\_pg3.html?cat=49](http://www.associatedcontent.com/article/20857/charles_whitmanthe_texas_tower_massacre_pg3.html?cat=49); Nick Prelosky, *When Guns Are Safe*, DAILY TEXAN, July 3, 2009, at 4.

125. Prinalgin, *supra* note 124; Prelosky, *supra* note 124.

126. *Id.*

127. Prelosky, *supra* note 124.

128. Prinalgin, *supra* note 124.

129. *Id.*

he earned several distinguishing honors including a Good Conduct Medal, a Marine Corps Expeditionary Medal, and a Sharpshooters Badge.<sup>130</sup> Mr. Whitman later went to Austin, Texas in 1961 to utilize the Naval Enlisted Science Education scholarship he had won and to achieve an engineering degree.<sup>131</sup> The existing law, under Federal Firearm Owners Act of 1938, did not bar Mr. Whitman from acquiring a firearm, nor would the Gun Control Act of 1968 bar him had it been in effect.<sup>132</sup> Despite these facts, Mr. Whitman's actions led to a horrific tragedy at the university.

Second, it is necessary to recognize that despite the accumulation and retention of documents pertaining to Mr. Whitman's firearm purchase, his nearly hour and a half rampage was not prevented.<sup>133</sup> There is no logical basis for anticipating that aggregating the information from ATF Form 4473 and the acquisition and disposition book entry into a centralized federal repository would have had any bearing on this situation. Regardless of such a compilation of records, Mr. Whitman would still have taken the lives of seventeen individuals and wounded others that day.<sup>134</sup>

Third, "Austin learned that day that guns make people safer."<sup>135</sup> "[T]he police that day give credit to the people who aided them and said that without such aid, more would have died."<sup>136</sup> In other words, intervention by citizens, as opposed to a collection of searchable paper or electronic records, had an immediate impact on the situation and real ability to protect and save the lives of those in need.

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130. *Id.*

131. *Id.*

132. Prinalgin, *supra* note 124 (This article explains that Mr. Whitman on one occasion Mr. Whitman saw Dr. Maurice Heatly, a Texas University Health Center Staff Psychiatrist in 1966. During his session Mr. Whitman "told the doctor that he had violent fantasies of climbing the University tower and shooting people." However, "Heatly saw nothing in Whitman to indicate that he could possibly be serious, as many of his patients had made the same remark.").

133. Prelosky, *supra* note 124.

134. Prinalgin, *supra* note 124 (The article details how Mr. Whitman carried his marine footlocker into the Tower building loaded "with provisions; food, a radio, gasoline, a hammer and hatchet, knives, a compass and a flashlight. He also put inside it a 35mm Remington rifle, a 6mm Remington with a scope, a .357 Magnum revolver, a 9mm Luger and another pistol. In addition, he went to a gun shop and bought a 12 gauge shotgun and a carbine.").

135. Prelosky, *supra* note 124.

136. *Id.* .

C. *Establishing A Firearm's Pedigree Does Not Further Prosecution Of Gun Crimes*

A District Attorney does not need to establish a firearm's complete chain of ownership in order to bring a case against an individual for committing a crime such as murder, bank robbery, or burglary.<sup>137</sup> At trial, it is only necessary for the District Attorney to establish "that the defendant used a gun, not that the defendant used a gun with a particular pedigree."<sup>138</sup> If ascertaining a firearm's complete ownership history was essential, justice would rarely, if ever, be achieved.

A national licensing and registration system, as proposed in H.R. 45, would not necessarily further either the National Tracing Center or a State's efforts to trace firearms or prosecute criminals. Tracing involves an attempt to piece together a firearm's chain of custody.<sup>139</sup> Generally, the process begins by determining "the history of the gun from its manufacture, purchase by a wholesaler, sale to a federally-licensed gun dealer, and then retail sale."<sup>140</sup> There are numerous reasons why tracing is of limited value.

Investigations of crimes associated with a firearm usually start with examining the wound inflicted on the victim, not a firearm the perpetrator left at the scene.<sup>141</sup> It is valuable to understand that "criminals very rarely leave their guns at the scene of the crime."<sup>142</sup> "When guns are left behind, it usually is because a crook has been seriously injured or killed and the police are poised to catch him anyway."<sup>143</sup>

Furthermore, "would-be criminals also virtually never get licenses or register their weapons."<sup>144</sup> The likelihood of recovering a firearm at a crime scene and for that firearm to be actually registered to the person who perpetrated the crime would be extremely low.<sup>145</sup> More often than

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137. Roberts, *supra* note 42, citing to David B. Kopel, *Tracing Misinformation: How Anti-gun Activists Misuse BATF Data*, 1998, available at [http://www.guncite.com/gun\\_control\\_registration.html](http://www.guncite.com/gun_control_registration.html).

138. *Id.*

139. David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. MICH. ST. U. DET. C.L. 171 (1999), available at <http://www.davekopel.com/2A/LawRev/CluelessBATFtracing.htm#fnb25>.

140. *Id.*

141. Explore Forensics, Entrance and Exit Wounds, <http://www.exploreforensics.co.uk/entrance-and-exit-wounds.html> (last visited July 2010).

142. John R. Lott, Jr., *Ballistic Fingerprinting is a Dud: Another Failed Gun-Control Strategy*, THE UTAH SHERIFF, Feb. 4, 2005, at 7, available at <http://www.utahsheriffs.org/newsletters/pastissues/files/Jun2005%20USA%20Newsletter.pdf>; Editorial, 'We want them registered' Democrats are going after guns, WASH. TIMES, Apr. 13, 2009, available at <http://www.washingtontimes.com/news/2009/apr/13/39we-want-them-registered39/>.

143. 'We want them registered' Democrats are going after guns, *supra* note 142.

144. Lott, *supra* note 142.

145. *Id.*

not, if a recovered firearm is “registered at all, it is to someone else, whose piece was stolen.”<sup>146</sup> Politicians like Speaker of the House, Nancy Pelosi, continue to voice support for firearm registration.<sup>147</sup> However, it is unlikely that a bill like H.R. 45 can effectively influence perpetrators to suddenly respect the “request to file paperwork so the government can catalog the tools of their trade.”<sup>148</sup>

## II. A FEDERAL FIREARM LICENSE AND REGISTRATION SYSTEM WILL HAVE UNACCEPTABLE RAMIFICATIONS FOR LAW-ABIDING FIREARM OWNERS

The execution of additional gun control laws may intuitively hinder criminals and criminal activity. However, the adoption of H.R. 45 may weigh as a greater threat to society and our American values. An analysis of H.R. 45 reveals that the proposed legislation will not have as significant of an impact on gun crime and violence as promised. A review of the historical experience of states and cities that have enacted legislation similar to H.R. 45 demonstrate a chronic, if not inevitable, infringement of law-abiding citizens’ Second Amendment right. Concerns regarding the social, physical, and privacy implications H.R. 45 will have if enacted tip the scale in favor of voting against H.R. 45. Public objection to this bill should continue to be raised because passage of this bill will treat law-abiding citizens as criminals, lay the ground work for banning and confiscating their personal property without compensation, and jeopardize their privacy and confidentiality.

### A. *A Federal Firearm License And Registration System Will Treat Law-Abiding Citizens As Criminals*

It is best to put this in perspective so individuals who do not own or wish to own a firearm can understand the frustration of the true victims of this proposal, which are law-abiding firearm owners. It is reasonable to force an individual to provide the local police with fingerprints, a photograph, and a host of personal information when being booked for a crime. In addition to those procedures, a law-abiding firearm owner would also be obligated to show the police a certificate of successfully passing a competency test, authorize the police unfettered access to check mental health records, as well as provide a signed affidavit stating how personal property would be stored and operated.<sup>149</sup> Indeed, there are more intrusive and burdensome requirements under H.R. 45, however, these are the very requirements that citizens would have to com-

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146. ‘We want them registered’ Democrats are going after guns, *supra* note 142.

147. *Id.*

148. *Id.*

149. H.R. 45 §101 & 102.

plete to retain the firearms they already own and to have the ability to purchase firearms in the future.<sup>150</sup>

The United States has undergone extensive changes since the ratification of the Bill of Rights. Legal expert, David Kopel, explained that “[t]he Supreme Court’s decision last year in *District of Columbia v. Heller* was the epitome of ‘original meaning’ jurisprudence.”<sup>151</sup> He points out that “[t]he majority opinion and the dissents argued at length about what citizens of the Founding Era thought that the Second Amendment meant.”<sup>152</sup> However, Mr. Kopel notes that “[f]ortunately for the Second Amendment, the case for a strong *individual* right is at least as strong under the living Constitution theory as it is under originalism.”<sup>153</sup> There is a process to change or repeal the Second Amendment if it was not necessary, but those measures have not been pursued because there is still value to retain the Second Amendment as guaranteeing an individual right.

Several times in the last century, this nation significantly lacked regular military resources and had to reach out to common citizens for help and arms expertise.<sup>154</sup> During World War II, organizations like the National Rifle Association allowed the government to use its facilities and provided training to soldiers and to recruits.<sup>155</sup> President Truman acknowledged civilian and civilian agencies’ contributions towards the war effort when the country faced a crisis.<sup>156</sup> President Truman also expressed his and the nation’s gratitude for the experienced instructors

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150. *Id.*

151. David Kopel, *What is the Difference Between a “Living Constitution” and a Dead Document?*, AMERICA’S 1ST FREEDOM, Sept. 2009, at 25, available at <http://davekopel.org/2A/Mags/Living-Constitution.pdf>.

152. *Id.*

153. *Id.* (Mr. Kopel explains how two diametrically opposite schools of thought have emerged as to how the Constitution should be interpreted and applied today. He also discusses how Oliver Wendell Holmes Jr., is considered the Founding Father of living constitutionalism. According to Mr. Kopel, “Justice Holmes and the living constitution would tell us to consider how those words [of the Second Amendment] have been used *after* the Founding, and over the course of 220 years of our nation’s development.” *Id.* at 27.); Jess Bravin, *Rethinking Original Intent: The Debate Over the Constitution’s Meaning Takes a Surprising Turn; a Private Gun-Rights Case*, WALL. ST. J., Mar. 14, 2009, at W3, available at <http://online.wsj.com/article/SB123699111292226669.html> (explaining how conservative icons, such as Supreme Court Justice Antonin Scalia have popularized the originalism method and describing how Originalists, “seek to apply the law according to the text’s [Constitution’s] meaning at the time of adoption” in the 18th century”).

154. Brief for the National Rifle Association and the NRA Civil Rights Defense Fund as Amici Curiae in Support of Respondent at 11, D.C. v. Heller, No. 07-290 (D.C. Cir. Feb. 7, 2008), available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/07-290/07-290.mer.ami.resp.nra.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/07-290/07-290.mer.ami.resp.nra.pdf).

155. *Id.*

156. *Id.* citing Letter reprinted in Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency, S. Comm. on the Judiciary, 90th Cong. 484 (1967).

and individuals who voluntarily provided small arms training without expense to the government.<sup>157</sup>

In addition to an armed citizenry's ability to fight against foreign threats, the Second Amendment empowers citizens to rebuke the United States government if it exceeds its authority and oppresses the people. In 1960, President Kennedy stated that he believed the Second Amendment guaranteed an individual right to keep and bear arms and that the amendment is still relevant because it preserves the fundamental civilian-government relationship.<sup>158</sup> Likewise, Senator Hubert Humphrey noted that the Second Amendment provides one more safeguard against arbitrary government.<sup>159</sup> Judge Kozinski of the Ninth Circuit Court of Appeals summarized the importance the Second Amendment withstanding the test of time the best in a dissenting opinion. Judge Kozinski wrote that while the Second Amendment seems like a doomsday protection, "[h]owever improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once."<sup>160</sup>

B. *A Federal Firearm License And Registration System Lays The Foundation For Banning And Confiscating Registered Firearms Without Compensation*

Law-abiding firearm owners fiercely believe that "registration" is ominously related to "confiscation."<sup>161</sup> Given the historical precedents set by States and cities that have passed firearm license and registration statutes there is great reason to be alarmed that the proposed Firearm Licensing and Record of Sale Act continues to be resurrected. New York City's firearm laws, for example, are a perfect illustration of what firearm owners could expect if H.R. 45 is passed. New York City's firearm registration ordinance is a prelude to confiscation of registered firearms banned by a subsequent city ordinance.

In 1967, New York City Council passed an ordinance requiring all rifles and shotgun owners to register their firearms.<sup>162</sup> At the time, instituting registration was touted as a new means to control dangerous

157. *Id.*

158. Eugene Volokh, UCLA Law School, Sources on the Second Amendment and Rights to Keep and Bear Arms in State Constitutions, [http://www.law.ucla.edu/volokh/2amteach/SOURCES.HTM#\\*](http://www.law.ucla.edu/volokh/2amteach/SOURCES.HTM#*) (last visited Nov. 5, 2009).

159. *Id.*

160. *Silvera v. Lockyer*, 328 F. 3d 567, 570 (9th Cir. 2003).

161. National Rifle Association of America, Institute of Legislative Action, Registration & Licensing, [www.nraila.org/Issues/FactSheets/Read.aspx?id=28&Issue=006](http://www.nraila.org/Issues/FactSheets/Read.aspx?id=28&Issue=006) (last visited Aug. 22, 2010).

162. *Id.*

weapons and not as a means to prohibit firearm ownership.<sup>163</sup> To ease fears, City Council members promised the roughly one million New Yorkers affected by the ordinance, “that the registration lists would not be used for a general confiscation of law-abiding citizens’ weapons.”<sup>164</sup> One of the ordinance’s co-sponsors also “solemnly promised that the \$3 [registration] fee would never be raised, but that the city would always bear the brunt of the real costs of administering the law.”<sup>165</sup>

Despite New York City Council’s assurances, the Council passed a law in 1991 banning what they claimed were “assault weapons.”<sup>166</sup> Attorney Stephen Hallbrook remarked that the ambiguity of the ban’s language led the New York City Police to “arbitrarily apply [the ban] to almost any gun owner.”<sup>167</sup> The ban was so outrageous and far-reaching that Jerold Levine, counsel to the New York Rifle Association, remarked that “[e]ven the puny target shooting guns in Coney Island arcades have been banned . . . because their magazines hold more than five rounds.”<sup>168</sup>

In turn, the New York City Police Department began using the registration lists<sup>169</sup> to send out thousands of threatening letters.<sup>170</sup> New Yorkers who had been licensed and registered to possess firearms were notified that they had to submit a sworn statement to the police department indicating how they became compliant with the new ban.<sup>171</sup> The three options available to these individuals included: surrendering their firearms to the police, rendering their firearms inoperable, or removing their firearms from the city.<sup>172</sup> Then the New York City Police Department “used the gun owner-registration lists to go door to door to prosecute registered gun owners who had not provided the city with proof that their guns had been surrendered or moved out of the city.”<sup>173</sup>

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163. Bovard, *supra* note 1.

164. *Id.*

165. National Rifle Association of America, Institute of Legislative Action: Firearms Registration: New York City’s Lesson, <http://www.NRAILA.org/Issues/FactSheets/Read.aspx?id=41&issue=006> (last visited Aug. 22, 2010).

166. Bovard, *supra* note 1; Peter Howard Tilem, *New York City Bans Items that are Common and Lawful Most Other Places in New York State and in the Country*, N.Y. CRIMINAL ATTORNEY BLOG, May 24, 2009, [http://www.newyorkcriminalattorneyblog.com/2009/05/new\\_york\\_city\\_bans\\_items\\_that.html](http://www.newyorkcriminalattorneyblog.com/2009/05/new_york_city_bans_items_that.html) (The website provides a brief list of items banned in New York City which includes: “1. Air Pistols and Air Rifles. The sale and possession are illegal in New York City pursuant to 10-131(b). 2. Sale of certain toy pistols pursuant to 10-131(d) is illegal in New York City”).

167. Bovard, *supra* note 1.

168. *Id.*

169. *Id.*

170. Firearms Registration: New York City’s *supra* note 165.

171. *Id.*

172. *Id.*

173. David Kopel, *Bait-’n’-Switch*, NATIONAL REVIEW ONLINE, Sept. 13, 2004, [available at http://nationalreview.com/kopel/kopel200409130630.asp](http://nationalreview.com/kopel/kopel200409130630.asp).

New York City's firearm registration and ban on semi-automatic rifles and shotguns are both still in effect today.<sup>174</sup> Just as the New York City Council failed to keep its word on how the city's firearm registry would be utilized, the City also has not maintained the \$3 application fee.<sup>175</sup> While the New York City Police Department rifle/shotgun website indicates that "there is no charge for registering firearms," there is a \$140.00 application fee and a \$94.25 fingerprint fee.<sup>176</sup>

C. *Aggregating Firearm License and Registration Records in a Centralized Repository May Jeopardize Law-Abiding Citizen's Privacy and Confidentiality*

It is questionable whether the privacy and confidentiality of firearm owner's license and registration records would remain protected if H.R. 45 is passed. President Lyndon Johnson signed the Freedom of Information Act (FOIA) into law in 1966.<sup>177</sup> This federal law "provides access to all records of all federal agencies in the executive branch, unless those records fall within one of nine categories of exempt information that agencies are permitted (but generally not required) to withhold."<sup>178</sup> Federal agencies are excused from producing records that pertain to national security,<sup>179</sup> internal agency rules,<sup>180</sup> information exempt under other laws,<sup>181</sup> confidential business information,<sup>182</sup> inter or intra agency com-

174. New York Police Department, Rifle/Shotgun Permit Information, [www.nyc.gov/html/nypd/html/permits/rifle\\_licensing\\_information.shtml](http://www.nyc.gov/html/nypd/html/permits/rifle_licensing_information.shtml) (last visited July 26, 2010).

175. *Id.*

176. *Id.*

177. Katy Gill, *The Freedom of Information Act History*, ABOUT.COM: US POLITICS, <http://uspolitics.about.com/od/usgovernment/a/foia.htm>.

178. The Reporters Committee for Freedom of the Press, *The Federal Freedom of Information Act*, FEDERAL OPEN GOVERNMENT GUIDE, (2009), available at <http://www.rcfp.org/fogg/index.php?i=pt1#a> ("FOIA applies to every "agency," "department," "regulatory commission," "government controlled corporation," and "other establishment" in the executive branch of the federal government").

179. 5 U.S.C. 552(b)(1) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178 ("This exemption is designed to prevent disclosure of properly classified records, release of which would cause some "damage" to the national security").

180. 5 U.S.C. 552(b)(2) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178 ("This exemption covers two different kinds of records. "Low 2" applies to agency management or "housekeeping" records Congress decided would not be of interest to the general public. "High 2" applies to internal documents that would allow a requester to circumvent laws or regulations or to gain an unfair advantage over other members of the public").

181. 5 U.S.C. 552(b)(3) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178:

The "statutory exemption" is designed to exempt from disclosure information that is required or permitted to be kept secret by other federal laws, when the law in question: (A) requires that the matter be withheld from the public in such a man-

munications,<sup>183</sup> personal privacy,<sup>184</sup> law enforcement records,<sup>185</sup> bank reports,<sup>186</sup> and geological information.<sup>187</sup>

The federal FOIA defines the term “record” very broadly. A person may submit a written request for “all types of documentary information, such as papers, reports, letters, e-mail, films, computer tapes, photographs and sound recordings in any format, including electronic.”<sup>188</sup> Under the federal FOIA, federal agencies are also required “to make documents available on their Web sites and in physical ‘reading rooms.’”<sup>189</sup> Even though state and local government records do not fall within the scope of the federal FOIA, all states have since passed “open records” laws.<sup>190</sup>

A situation occurred in Michigan where a man believed that under the Michigan FOIA he was entitled to obtain the names, addresses, and telephone numbers of persons who had registered handguns.<sup>191</sup> That

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ner as to leave no discretion on the issue, or, (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

182. 5 U.S.C. 552(b)(4) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178 (“Exemption 4 intends to protect “trade secrets,” such as customer lists and secret formulas. It also shields sensitive internal commercial information about a company which, if disclosed, would cause the company substantial competitive harm”).

183. 5 U.S.C. 552(b)(5) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178 (“This exemption is intended to incorporate material normally privileged in civil litigation. It applies to records that are: inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”).

184. 5 U.S.C. 552(b)(6) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178:

Some federal agencies use this exemption to block disclosure of information that might identify individuals. However, the exemption should apply only when the individuals’ interest in privacy outweigh the public’s interest in disclosure. This exemption applies to: personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

185. 5 U.S.C. 552(b)(7) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178 (“This exemption is primarily designed to protect documents when untimely disclosure would jeopardize criminal or civil investigations or cause harm to persons who help law enforcement officials or are otherwise involved in law enforcement matters”).

186. 5 U.S.C. 552(b)(8) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178 (“The exemption applies to federal government records of banks, trust companies and investment banking firms and associations. Its purpose is to prevent disclosure of sensitive financial reports or audits that, if made public, might undermine public confidence in individual banks, or in the federal banking system”).

187. 5 U.S.C. 552(b)(9) (2010); The Reporters Committee for Freedom of the Press, *supra* note 178 (“This provision is rarely used. It covers geological information in files of federal agencies, such as the Bureau of Land Management in the Interior Department, the Federal Energy Regulatory Commission and the Federal Power Commission”).

188. The Reporters Committee for Freedom of the Press, *supra* note 178.

189. *Id.*

190. *Id.*

191. *Mager v. State of Mich., Dep’t of State Police*, 595 N.W.2d 142, 143 (Mich. 1999).

man sought the records in an effort to reach other gun owners that might also want to support a change in Michigan's concealed-weapon's laws.<sup>192</sup> In February 1996, the man submitted the request to the Michigan State Police Department.<sup>193</sup> The Michigan State Police refused to provide what it considered "private information that could be withheld under an exemption" in the Michigan FOIA.<sup>194</sup> In May 1996, the man submitted another request to the Michigan State Police Department.<sup>195</sup> After his second request was declined the man brought a cause of action against the Michigan State Police Department.<sup>196</sup>

The Michigan Supreme Court unanimously determined that "the Department of State Police did not violate the law when it refused to provide the gun-registration information requested" based on a Michigan FOIA exemption.<sup>197</sup> It is important to note that the Michigan FOIA personal privacy exemption is broader in scope than the federal FOIA privacy exemption. "The state exemption pertains to information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."<sup>198</sup> On the other hand, the more limited "federal exemption pertains to personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>199</sup>

The Michigan Supreme Court reached its conclusion by first analyzing whether the information requested was of a personal nature.<sup>200</sup> The court believed that "[a] citizen's decision to purchase and maintain firearms is a personal decision of considerable importance."<sup>201</sup> The Michigan Supreme Court noted that "gun ownership is an intimate or, for some persons, potentially embarrassing details of one's personal life."<sup>202</sup> The Michigan Supreme Court further recognized that "knowledge that a household contains firearms may make that house a target of thieves, and thus endanger its occupants."<sup>203</sup>

After establishing the first prong of the Michigan FOIA privacy exemption, the court contemplated whether disclosing the requested information constituted a "clearly unwarranted invasion of privacy."<sup>204</sup>

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192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Mager*, 595 N.W.2d at 148.

198. *Id.*, citing MCL 15.243(1)(a); MSA 4.1801(13)(1)(a).

199. *Mager*, 595 N.W.2d at 144, citing 5 U.S.C. 552(b)(6).

200. *Mager*, 595 N.W.2d at 144.

201. *Id.* at 147.

202. *Id.*

203. *Id.*

204. *Id.* at 146.

While the Michigan Supreme Court acknowledged that “federal decisions concerning the privacy exemption are of limited applicability in Michigan,” the court took note of the United States Supreme Court’s words in *United States Department of Defense v. Federal Labor Relations Authority*.<sup>205</sup> In that case, the United States Supreme Court said that, “. . . a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect.”<sup>206</sup> The United States Supreme Court further wrote that “the only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the [federal] FOIA, which is contributing significantly to public understanding of *the operations or activities of the government*.”<sup>207</sup>

Taking those comments into consideration, the Michigan Supreme Court held that in this case “fulfilling a request for information on private citizens – a request entirely unrelated to any inquiry regarding the inner working of government, or how well the Department of State Police is fulfilling its statutory functions – would be an unwarranted invasion of the privacy of those citizens.”<sup>208</sup> The Michigan Supreme Court’s decision, however, does not extend to all instances where personal information from the State’s handgun registry is requested.<sup>209</sup> Thus, this decision still leaves open the possibility that another request, written under the guise that such information would be used to assess the Michigan State Police Department’s operation might have to be fulfilled.

Private firearm owners must be mindful that federal agencies may provide exempt information to requestors even if they are not required to do so.<sup>210</sup> There is a greater possibility that requests for federal firearm license and registration database records would be satisfied because the federal FOIA privacy exemption is even narrower in scope than the Michigan FOIA privacy exemption. H.R. 45 provides no assurances that federal firearm license and registration records will always be protected and inaccessible by the public.

The fact that H.R. 45’s sponsors believe, and included in the text of the bill, that a federal firearm license and registration system is of a “national interest”<sup>211</sup> should greatly alarm law-abiding firearm owners. This perception could grant the Attorney General the rationale necessary to make license and registration records accessible by the public, as

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205. *Id.* at 147.

206. *Mager*, 595 N.W.2d at 147, citing *United States Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

207. *Id.*

208. *Mager*, 595 N.W.2d at 148.

209. *See Id.*

210. The Reporters Committee for Freedom of the Press, *supra* note 178.

211. H.R. 45.

the federal FOIA instructs, through a federal website. Firearm owners should also be concerned that their personal information could be posted and open to the public in a manner similar to the Department of Justice's National Sex Offender public website.<sup>212</sup> Firearm owners certainly could be subject to public ridicule, even if warnings are posted, comparable to the ones posted on the sex offender public websites,<sup>213</sup> about the conclusions that can be and should be drawn from the records.

While the public might have great curiosity, actual knowledge about what is in their neighbor's home will not provide the public any greater protection from gun crime or violence. In addition to the potential mental anguish, law-abiding firearm owners themselves, their families, and their homes may be targets for physical harm and crime if the public is granted access to license and registration records. As warned by the Michigan State Police, criminals that desire to steal firearms will know by virtue of public records which homes to target.<sup>214</sup> Consequently, the need to protect citizens from mental and physical danger should not be subordinated to the legitimate desire for appropriate procedures to protect the public.

### III. SOLUTIONS THAT ACHIEVE H.R. 45'S GOALS AND PRESERVE LAW-ABIDING CITIZENS' RIGHTS AND PRIVACY

Existing laws, if enforced, are capable of achieving similar, if not greater results than legislation like H.R. 45, without placing law-abiding citizens and their personal information in peril. If additional laws are deemed necessary, Congress should explore options that address the underlying problems of gun violence and crime head on. For instance, enhancing penalties for residential firearm theft would deter criminals from stealing firearms from law-abiding citizens' homes. Addressing misuses of electronic records stored in existing federal databases would immediately benefit firearm dealers and law enforcement officers who rely on the accuracy of data within those systems. Ensuring that state and local lawmakers respect the United States Supreme Court's decision in *McDonald v. Chicago* and modify their laws appropriately would provide law-abiding citizens assurance that their Second Amendment right and privacy would not be compromised.

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212. Department of Justice, National Sex Offender Public Registry Sites, <http://www.nsopw.gov/Core/PublicRegistrySites.aspx> (last visited July 26, 2010).

213. Illinois Sex Offender Information, Disclaimer, <http://www.isp.state.il.us/sor/> (last visited July 26, 2010) (“[t]he information contained on this site does not imply listed individuals will commit a specific type of crime in the future. . .”).

214. *Mager*, 595 N.W.2d at 143.

### A. *Penalties For Gun Theft Need To Be Enhanced*

Finding a solution that would deter residential firearm theft is relevant to parties on both sides of the debate. Gun control advocates, such as Senator Schumer, are correct that gun theft is a serious problem. According to the ATF, “[f]irearms stolen from FFLs, residences, and common carriers” are primary sources for gun trafficking.<sup>215</sup> Law-abiding firearm owners, their families, and their firearms are at serious risk when criminals target homes based on knowledge of the presence of firearms. That knowledge would potentially be more widely available if H.R. 45 was enacted.

H.R. 45 imposes penalties against residents who do not to report firearm theft within a certain period of time to authorities.<sup>216</sup> However, the bill fails to protect firearm owners from potential theft. The text of the bill does not provide safeguards over misuse of federal records by persons who would be authorized to access license and registration data. Nor does the bill provide for the protection of records from public inquiry. Without proper access, security, and penalty provisions in place the Michigan State Police’s concern that firearm registration records could be utilized like shopping lists for criminals may prove to be valid.

Currently, there are three federal laws that specifically address firearm theft. Under 18 U.S.C. §922(i) it is unlawful for an individual to knowingly ship or transport stolen firearms or firearms that the individual has reason to believe are stolen.<sup>217</sup> Under 18 U.S.C. §922(j) it is unlawful for an individual to knowingly acquire, possess, or sell stolen firearms, or firearms the individual has reason to believe are stolen.<sup>218</sup> Under 18 U.S.C. §922(u) it is unlawful for an individual to steal from a dealer or a dealer’s place of business a firearm in “inventory that has been shipped or transported in interstate or foreign commerce.”<sup>219</sup> Persons who violate subsections (i) and (j) of section 922 can be fined, imprisoned up to 10 years, or both.<sup>220</sup> While these laws serve an important function, none of them specifically address residential firearm theft.

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215. Depart. of the Treas., Bureau of Alcohol, Tobacco & Firearms, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, 10, June 2000, at xi, available at [http://www.mayorsagainstillegalsguns.org/downloads/pdf/Following\\_the\\_Gun%202000.pdf](http://www.mayorsagainstillegalsguns.org/downloads/pdf/Following_the_Gun%202000.pdf).

216. H.R. 45 (“Failure to Report Loss or Theft of Firearm – It shall be unlawful for any person who owns a qualifying firearm to fail to report the loss or theft of the firearm to the Attorney General within 72 hours after the loss or theft is discovered”).

217. 18 U.S.C. §922(i) (2010).

218. 18 U.S.C. §922(j) (2010).

219. 18 U.S.C. §922(u) (2010).

220. Under 18 U.S.C. §924 (a)(2) “whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.”

By closing the existing gap in federal laws, Congress could protect law-abiding citizens and make their homes and personal property less vulnerable to theft. Thus, Congress should enact a law that would provide enhanced penalties where the underlying crime is the intentional theft of a firearm from a residence. The law would be applied to anyone who intentionally commits a burglary or a robbery for the purpose of stealing firearms, regardless of whether the firearms have traveled through interstate commerce. Imposing a fine, prison sentence of up to 10 years, or a combination of both would enable this new enhancement to have an equivalent level of deterrence and retribution to other section 922 violation penalties.

B. *Existing Federal Databases Should Be Reassessed Before Further Endangering The Privacy And Confidentiality Of Law-Abiding Firearm Owner Records*

The interests of both those who support and oppose H.R. 45 would be served if Congress made an effort to reassess and address abuses of electronic records in existing federal systems instead of proceeding with establishing a federal firearm license and registration system. Those who oppose the bill are adamant that storing electronic records of personal information on law-abiding citizens is extremely dangerous. Advances in technology have made searchable electronic records particularly vulnerable to misuse. This conclusion is buttressed by the fact that persons authorized to access existing federal databases, such as NICS and the other databases NICS interfaces with, and queries, have abused their authority and misused stored records. In order for NICS or any additional federal database to be of value, the electronic records housed in the system must be accurate, secure, and used for their intended purpose. Until well-known failures of the existing systems are addressed, it arguably would be quite irresponsible for Congress to establish a federal firearm license and registration database.

On several occasions the United States Department of Justice has intervened when states demonstrated a pattern of misusing NICS records for what each state believes is a legitimate purpose. For example, California officials were specifically told that “all three federal databases – NICS, the National Crime Information Center [NCIC] and the Interstate Identification Index [III]” were not to be utilized to enforce a state program.<sup>221</sup> When that instruction was not heeded, Attorney General John Ashcroft “threatened to criminally prosecute California’s

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221. Robert Salladay, *U.S. Threatens to Sue State for Using Gun Database*, S.F. CHRON., Feb. 28, 2003, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2003/02/28/MN40941.DTL>.

top firearms official over the state's continued" misuse of the NICS.<sup>222</sup>

Another example occurred when Georgia officials were "threatened by federal authorities over interpretation of U.S. law concerning criminal background checks."<sup>223</sup> For six years, Georgia officials denied "gun purchases to people arrested for crimes but not charged or convicted."<sup>224</sup> Georgia officials were "warned that the 1993 Brady Handgun Violence Protection Act and Georgia law do not allow 'naked arrest' without an indictment or conviction to be used to deny a gun purchase."<sup>225</sup>

Persons authorized to access the NICS, and other databases that the NICS interfaces with and queries may not be fully aware of when it is or is not appropriate to disclose information from federal records. A federal agent's response for why he "used a restricted database to obtain information that the Beauprez campaign used in an ad criticizing Democrat Bill Ritter" during the 2006 Colorado gubernatorial primary illustrates this point.<sup>226</sup> The federal agent "ran names given to him by the Beauprez campaign through the [NCIC] database."<sup>227</sup> The information that the federal agent provided was instrumental in enabling Republican candidate, Bob Beauprez, to formulate an ad claiming that "during Ritter's tenure as Denver district attorney, an illegal immigrant charged with heroin possession was allowed to plead guilty to the manufactured charge of agricultural trespassing."<sup>228</sup> According to the federal agent's attorney, the federal agent complied with the requests because he "believed he was not doing anything wrong."<sup>229</sup> The federal officer learned that his actions were inappropriate when he was charged "in Denver federal court with three misdemeanor counts of exceeding his authorized access to a government computer by retrieving 'criminal histories of various individuals.'"<sup>230</sup> He was later suspended from work.<sup>231</sup>

Persons authorized to access the NICS and the other federally maintained electronic databases the NICS interfaces with and queries also commonly access and misuse the records available to them for personal gain. Information brokers prey on persons authorized to access restricted federal databases.<sup>232</sup> That is exactly how Nationwide Electronic

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222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Karen E. Crummy, *Closed Crime Database Accessed 3 Times*, DENV. POST, Nov. 8, 2007, at A-01, available at [http://www.denverpost.com/ci\\_7399502?source=pkg](http://www.denverpost.com/ci_7399502?source=pkg).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Michael Isikoff, *Theft of U.S. Data Seen as Growing Threat to Privacy*, WASH. POST, Dec. 28, 1991, at A1.

Tracking, or NET, became successful at “Gets the Information You Need – When you Need It.”<sup>233</sup> This company openly advertised that “it could provide customers with data on virtually anyone in the country – private credit reports, business histories, driver’s license records, even personal Social Security records and criminal history backgrounds.”<sup>234</sup>

The FBI identified NET as “one player in a nationwide network of brokers and private investigators who allegedly were pilfering confidential personal data from U.S. government and then selling them for a fee to lawyers, insurance companies, private employers and other customers.”<sup>235</sup> What is particularly concerning about these types of operations is that in order for the information brokers to be able to deliver their promised product they require “inside” help to steal federal computer data.<sup>236</sup> The FBI arrested 16 people in 10 different states who abused their authority to access federal databases and supplied NET with certain personal and confidential information.<sup>237</sup>

The FBI arrested a Chicago police officer and a Fulton County, GA, sheriff’s office terminal operator in the NET debacle and charged them with “illegally retrieving criminal history records from the FBI’s National Criminal Information Center (NCIC).”<sup>238</sup> Even though NCIC is considered a highly sensitive federal database, federal officials said that “the information-broker case is particularly troubling because it appears to indicate routine penetration of the NCIC.”<sup>239</sup> In fact, federal officials warn that this is not an isolated incident, and that “tapping into the NCIC is surprisingly simple.”<sup>240</sup>

Eliminating well-known abuses in NICS, and the federal databases NICS interfaces with and queries, would immediately enhance those systems’ ability to be effective tools to prevent persons prohibited from acquiring a firearm through a firearm dealer. Implementing appropriate controls, reiterating to authorized personal the proper use of electronic

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. Isikoff, *supra* note 232 (“[L]aw enforcement officials said, information brokers like NET were bribing the government employees to run computer checks on individuals for as little as \$50 a pop. Computer check are being run ‘on thousands of people, said Jim Cottos, regional inspector general in Atalanta for the Department of Health and Human Services”).

239. *Id.*

240. *Id.* (“The public is abysmally uninformed about problems like this,” said Peter Neumann, a computer security expert and principal scientist at the computer science laboratory at SRI International, a Menlo Park, California think tank. *Id.* “With sufficient access to a few databases these days, you can get pretty close to somebody’s life history with nothing more than a Social Security number”).

records, and severely penalizing those who abuse their authority would also mitigate the chance that recognized system failures will be duplicated if another federal database were established. Taking these measures would obviate the need for bills such as H.R. 45.

C. *State and Local Gun Control Laws Should Comply With The Boundaries Set By The Supreme Court In McDonald v. Chicago*

There was great excitement when the United States Supreme Court announced that it would review a challenge of Chicago's total handgun ban.<sup>241</sup> That is due to the fact that the Supreme Court's final ruling in *McDonald v. Chicago* would have a profound impact on firearm laws in Chicago and across the country. Many also consider this case to be monumental because the country had been awaiting a definitive answer on whether the Second Amendment was "incorporated."<sup>242</sup> Incorporation is "[a] constitutional doctrine whereby selected provisions of the Bill of Rights are made applicable to the states through the Due Process Clause of the Fourteenth Amendment."<sup>243</sup> On June 28, 2010, the United States Supreme Court confirmed and declared that the Second Amendment is applicable to the states by way of the Fourteenth Amendment.<sup>244</sup> State and local lawmakers should now look to the decision in *McDonald v. Chicago* as a guidepost and revise their laws accordingly.<sup>245</sup>

Until the enactment of the Fourteenth Amendment, the Second Amendment was rarely litigated.<sup>246</sup> The first time that the United

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241. *Supreme Court to Hear Second Amendment Case "McDonald v. Chicago" Challenging Handgun Ban*, CHICAGO PRESS RELEASE, Sept. 30, 2009, <http://chicagopressrelease.com/press-releases/supreme-court-to-hear-second-amendment-case-mcdonald-v-city-of-chicago-challenging-handgun-ban>.

242. Jon Roland, *Intent of the Fourteenth Amendment was to Protect All Rights*, CONSTITUTION.ORG, Sept. 24, 2000, [www.constitution.org/col/intent\\_14th.htm](http://www.constitution.org/col/intent_14th.htm).

243. The Free Dictionary by Farlex, *Incorporation Doctrine*, <http://legal-dictionary.thefreedictionary.com/Incorporation+%28Bill+of+Rights%29> (last visited Aug. 12, 2010).

244. U.S. CONST. amend XIV §1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . .").

245. *McDonald v. Chicago*, No. 08-1521, slip. op. (U.S. June 28, 2010), available at [http://www.oyez.org/cases/2000-2009/2009/2009\\_08\\_1521](http://www.oyez.org/cases/2000-2009/2009/2009_08_1521).

246. Steven Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEORGE MASON L. REV. 1 (1981) (explaining that most courts struck down a variety of state legislation because they accepted the Bill of Rights did not apply to States); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92 (1822) (In 1813, Kentucky passed the first concealed weapons statute. The Court of Appeals found the statute invalid because it violated the established right to keep and bear arms under both the State Constitution and the United States Constitution); *Nunn v. State*, 1 Ga. 243, 251 (1846) (In 1837, Georgia tried to completely ban the sale of pistols and other weapons. The Georgia Supreme Court held the statute unconstitutional because it inhibited the security of a free people protected under the Second Amendment.); Cong. Globe, 39th Congress, 1st Sess., pt 1, p. 474 (Jan. 29, 1866)

States Supreme Court came to assert an opinion directly on the meaning of the Second Amendment was in 1939 when the Court decided *United States v. Miller*.<sup>247</sup> The defendants in this case were charged with knowingly transporting an unregistered short-barrel shotgun from Oklahoma to Arkansas in violation of the National Firearms Act.<sup>248</sup> The National Firearms Act defines a number of weapon categories which require registration and imposes excise tax on the manufacture and transfer of those weapons.<sup>249</sup> The Court reversed a prior decision, which held the National Firearms Act invalid for violating the Second Amendment.<sup>250</sup>

In reaching its decision, the Court first conferred with historical documents such as early state judicial and legislative text, and scholarly writings on the history of the militia that demonstrated the Framers' intent.<sup>251</sup> The Court accepted evidence that at the time of the Framers, militias were comprised of all able-bodied males as opposed to being comprised of only soldiers, thus, suggesting that the Second Amendment protected an individual right to keep and bear arms.<sup>252</sup> The conclusion was buttressed with prior regulation that obliged men when called for service to report ready for duty with their own arms and ammunition.<sup>253</sup>

Then, the Court referenced several state cases that interpreted the Second Amendment to guarantee an individual right to keep and bear arms.<sup>254</sup> For example, the Arkansas case *Fife v. State* asserted that the Second Amendment protects the possession of concealed pistols.<sup>255</sup> The Michigan case *People v. Brown* held private individuals may possess firearms that have no militia purpose.<sup>256</sup> Likewise, the West Virginia case *State v. Workman* accepted that the Second Amendment protects an individual right to keep and bear weapons such as swords, guns, rifles, and muskets.<sup>257</sup>

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(After the passage of the Fourteenth Amendment and the Civil Rights Act of 1866, many otherwise uncontested basic American civil liberties began to be debated. During the debates of the Civil Rights Act, Senator Sulsbury argued against the Civil Rights Act as his own state would no longer be able to enforce their own law prohibiting gun ownership by free African Americans. Undeniably, racial tensions in the United States eroded the value of the liberties the Framers had preserved in the Bill of Rights).

247. *United States v. Miller*, 307 U.S. 174 (1939).

248. *Miller*, 307 U.S. at 175.

249. 26 U.S.C. 53 (2010).

250. *Miller*, 307 U.S. at 183.

251. *Id.* at 179.

252. *Id.* at 179.

253. *Id.* at 180.

254. *Id.* at 182.

255. *Miller*, 307 U.S. at 182, citing to *Fife v. State*, 31 Ark. 455, 461 (1876).

256. *Id.* at 182, citing to *People v. Brown*, 235 N.W. 245, 246 (Mich. 1931).

257. *Id.* at 182, citing to *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891).

Next, the Court reviewed the case circumstances and disregarded the fact that the defendants were not affiliated with a state organized militia like the National Guard.<sup>258</sup> In the absence of such discussion or of noting who is permitted to keep and bear arms, it can be inferred that the right is an individual right and not a collective right. Had the Court believed the Second Amendment preserved only the right to bear arms to a subset of men affiliated with a militia, it is not likely the Court would have granted certiorari.

Finally, the Court focused on the regular use of the firearm in question.<sup>259</sup> The Court evaluated whether at that time the short-barrel shotgun would ordinarily be used in military combat.<sup>260</sup> The Supreme Court concluded that the short-barrel shotgun at issue in that case would not contribute to the preservation of a militia.<sup>261</sup> In passing judgment, the Supreme Court set the standard that an individual could keep and bear arms appropriate for militia use.<sup>262</sup>

There was a sixty-nine year time span between *Miller* and the next time the Supreme Court reviewed a Second Amendment challenge. During this interim period, nine Circuit Courts adopted a Collective, also known as State Right stance, finding that there was a right to keep and bear arms only in connection with state militia services.<sup>263</sup> Those circuit courts reached that conclusion in part by putting the term “militia” in context today and reasoning that only members of an organization, like the National Guard, have a protected right to keep and bear arms.<sup>264</sup>

In 2008, the Supreme Court granted certiorari to hear *District of Columbia v. Heller*.<sup>265</sup> In that case, Dick Heller, a special police officer at the Federal Judicial Center and a resident of the District of Columbia was required to carry a handgun while on duty.<sup>266</sup> When he left work he

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258. *Id.* at 182.

259. *Id.* at 178.

260. *Id.* at 178.

261. *Miller*, 307 U.S. at 178.

262. *Id.* at 178.

263. Brief for the National Rifle Association and the NRA Civil Rights Defense Fund, *supra* note 154, at 3.

264. *Id.* at 9.

265. The cause of action commenced in the District of Columbia when residents disputed the District of Columbia’s Code Sections 7-2502.02(a)(4), 22-4504, and 7-2507.02. Section 7-252.02(a)(4) bars the issuance of a handgun registration certificate to a non-law enforcement officer for a handgun that was not validly registered prior to September 24, 1976. Section 22-4504 prohibits registrants from moving a gun from room to room within their own home. Section 7-2507.02 requires all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or a similar device.

266. Emma Schwartz, *A Key Case on Gun Control*, U.S. NEWS, Mar. 6, 2008, at 1, available at <http://www.usnews.com/articles/news/national/2008/03/06/a-key-case-on-gun-control.html?PageNr=2>.

had to relinquish his firearm and confine it to a vault.<sup>267</sup> Just as the agency where he was employed to protect, Dick Heller's Capitol Hill home was surrounded by crime.<sup>268</sup> He protected his employer, the Federal Government, and he also wanted to protect his home.<sup>269</sup> In Heller's words, as a Federal employee, "they give me a gun to protect them, but I am a second class citizen when I finish the work."<sup>270</sup> Ultimately, the Supreme Court concluded that the District of Columbia's gun control laws had deprived Mr. Heller of his Second Amendment right, which guarantees an individual the right to keep and bear arms.<sup>271</sup>

After confirming that the Second Amendment guaranteed an individual right to keep and bear arms, in 2010, the Supreme Court appropriately undertook to resolve the historical debate as to whether the Second Amendment was incorporated, thereby being applicable to the States through the Fourteenth Amendment. Otis McDonald, a retired maintenance engineer and army veteran, wanted to be able to protect himself in his Chicago home.<sup>272</sup> He explained how he had "been threatened for his efforts to rid his neighborhood of drug dealers and other criminals."<sup>273</sup> The City of Chicago's handgun ban, however, prevented him from legally keeping his handgun in his home for protection.<sup>274</sup> As long as the ban remained in place, Mr. McDonald would be required to keep his firearm outside of Chicago.<sup>275</sup>

Many legal experts anticipated that when the Supreme Court reviewed *McDonald v. Chicago* it would conclude that Chicago's total handgun ban deprived Mr. McDonald of his right to keep and bear arms.<sup>276</sup> Ultimately, the Court did reach that conclusion.<sup>277</sup> The Court held "that the Fourteenth Amendment makes the Second Amendment right to keep and bear arms for the purpose of self-defense applicable to the states."<sup>278</sup> In deciding *McDonald* the Court established a definitive

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. The Oyez Project, *District of Columbia v. Heller*, [http://www.oyez.org/cases/2000-2009/2007/2007\\_07\\_290](http://www.oyez.org/cases/2000-2009/2007/2007_07_290) (last visited Aug. 22 2010).

272. Mark Taff, "Meet the Plaintiffs," CHICAGO GUN CASE.COM, June 21, 2008, available at <http://www.chicagoguncase.com/2009/09/30/press-release-supreme-court-to-hear-mcdonald-case/>.

273. *Id.*

274. *Id.*

275. *Id.*

276. Nelson Lund, *Anticipating the Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185 (2008).

277. *McDonald v. Chicago*, No. 08-1521, slip op. at XX (U.S. June 28, 2010), available at <http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>.

278. *Id.*

precedent for how the Second Amendment applies to State and local governments.

As the Second Amendment is now considered “incorporated,” state and local governments are forbidden, just as the federal government, from infringing upon the individual right to keep and bear arms.<sup>279</sup> The Court’s holding should go a long way to help protect law-abiding firearm owners from the risk that, after complying with existing or future firearm license and registration schemes such as H.R. 45, their federal, State, or local governments would ban and confiscate their registered firearms.

The best assurance for law-abiding citizens that their privacy and Second Amendment rights will not be compromised, however, will come when H.R. 45 is defeated and when State and local governments repeal their laws mandating firearm registration. Considering the federal government is prohibited from maintaining a national firearm registry, it is only logical following *McDonald*, that state and local governments should likewise be prohibited from maintaining a firearm registry. State and local lawmakers should thus heed the Supreme Court’s decision in *McDonald* and proactively revise their current laws as necessary to avoid future litigation and law nullification.

Accordingly, Mayor Richard Daley and the Chicago City Council should reevaluate the city’s new gun law that went into effect July 12, 2010. On the heels of the *McDonald* decision, the Chicago City Council followed “Mayor Daley’s proposal to allow Chicagoans to own handguns with some tough restrictions”<sup>280</sup> and passed the ordinance. Mandatory firearm licensing and firearm registration are among the new requirements imposed on the residents of Chicago who desire to purchase and possess a firearm.<sup>281</sup> The new ordinance also enables persons outside of the police department, which is tasked with maintaining “a registry of every handgun owner in the city,”<sup>282</sup> to have access to the electronic files. Taken as a whole, Chicago’s ordinance is likely to do little to end crime in the city. This new ordinance in its current state is, however, poised to compromise Chicagoan’s Second Amendment right and to jeopardize their privacy.

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279. *Id.*

280. *City Council Passes New Gun Laws*, FOX CHICAGO NEWS, July 2, 2010, <http://www.myfoxchicago.com/dpp/news/metro/chicago-gun-laws-city-council-vote-supreme-court-ruling-20100702>.

281. *Chicago’s New Gun Law Goes Into Effect Today*, *supra* note 7.

282. Don Badwin, *Chicago Approves Tough New Handgun Restrictions*, LAW.COM, July 6, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202463274660>.

CONCLUSION: H.R. 45 WOULD UNJUSTIFIABLY AUTHORIZE  
GOVERNMENT INTRUSION

America continues to move away from its heritage where the firearm was a necessary tool for survival. Today, the firearm is all too often viewed as a sinister piece of weaponry.<sup>283</sup> While the United States Supreme Court has decided that the Second Amendment preserves an individual's right to keep and bear arms, some believe that right should be supervised.

State and local governments have already proven that laws promulgated initially for supervisory purposes ultimately have turned into a means to confiscate the very firearms law-abiding citizens registered. The opportunity to repeal established federal laws prohibiting the federal government from instituting a federal firearm registry would create a dangerous prospect for the same kind of abuse to occur on a national level.

Actions and conveyances made by former President Bill Clinton and his administration illustrate this threat. During 2000, when the 5th Circuit Court of Appeals reviewed *United States v. Emerson* and "whether the Second Amendment guaranteed the *individual* right, the Clinton administration told the judges that the Second Amendment allowed for unlimited gun confiscation – even from National Guardsmen on active duty."<sup>284</sup> Concerned citizens immediately began inquiring about the validity and the sincerity of the statements made by the Clinton Administration. Solicitor General Seth Waxman responded "that the Clinton administration really did believe that it could 'take guns away from the public' and 'restrict ownership of rifles, pistols, and shotguns from all people.'"<sup>285</sup>

The Clinton Administration's position and actions further highlight why tremendous support and appreciation should be given to individuals, such as Representative Walker Minnick (D-ID1) who put forth great effort to convey that "firearm registration should be held to be an undue burden on the right of the people to keep and bear arms."<sup>286</sup> There is no

283. Jeff Snyder, *Who's Under Assault in the Assault Weapon Ban?*, WASH. TIMES, Aug. 25, 1994, at A19, available at <http://www.firearmsandliberty.com/snyder.aw.ban.html>.

284. Kopel, *supra* note 151, at 26-27.

285. *Id.* at 27 (David Kopel continues to explain that "[t]he NRA put those words on billboards where voters could see them, and in the 2000 election the Second Amendment issue cost Al Gore five swing states – West Virginia, Missouri, Florida, Clinton's home state of Arkansas and Gore's own Tennessee." He further wrote that "[s]hortly before Bill Clinton left office, he publicly acknowledged that Gore had lost the election because of gun owners").

286. See Govtrack.us, Overview of H.Res. 351: Expressing the Sense of the House of Representatives that a Federal Statute Requiring Firearm Registration Would Unduly Burden the Second Amendment Right of the People to Keep and Bear Arms, <http://>

justifiable basis for the federal government to have a continued interest in knowing the identity of citizens who have passed the mandatory background check and can legitimately acquire a firearm. Alternative solutions to H.R. 45 must be sought because amassing electronic license and registration records of law-abiding citizens is not an appropriate or effective means to achieve reduction in gun violence or crime. For the reasons set forth in this comment, it is clear that H.R. 45 and any similar future proposals deserve to be publicly exposed, vigorously debated, and then defeated.

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[www.govtrack.us/congress/bill.xpd?bill=hr111-351](http://www.govtrack.us/congress/bill.xpd?bill=hr111-351) (last visited July 26, 2010). In response to H.R. 45, Representative Walker Minnick (D-ID1), along with five cosponsors, introduced H.Res. 351. The full title of H.Res. 351 is “*Expressing the sense of the House of Representatives that a Federal statute requiring firearm registration would unduly burden the Second Amendment right of the people to keep and bear arms.*” *Id.* This resolution articulates that “firearm registration should be held to be an undue burden on the right of the people to keep and bear arms, consistent with the firm convictions to that effect of many of the people and the history of robust legal protection for the right.” *Id.* To circumvent unduly burdening law-abiding citizens, the resolution sets forth “that a Federal statute requiring firearm registration, such as proposed by H.R. 45. . . would – (1) be contrary to the Constitution of the United States; (2) unduly burden the right of the people to keep and bear arms; and (3) stand in opposition to the founding principles of the United States.” *Id.*

