



Legal Action

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Two Federal Appellate Judges Adopt Faulty Second Amendment Theory Pushed by NRA and Criminal Defendant

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Legal Action

is published by the Legal Action Project of the Brady Center to Prevent Gun Violence.

The Legal Action Project Salutes Herblock

The Legal Action Project is dedicating this issue of *Legal Action* to Pulitzer Prize-winning cartoonist Herbert Block – also known as Herbblock – who died on October 7, 2001 at the age of 91. Herbblock drew his award-winning editorial cartoons for the last 55 years at *The Washington Post*, several of which have been reprinted in *Legal Action*. His satirical work encompassed topics such as civil rights, the environment, and gun control, and he is also well-known for coining the term “McCarthyism.” The Legal Action Project will miss his insightful commentary on controversial issues.

An unprecedented decision by a federal appeals court in the closely-watched case of *U.S. v. Emerson* is both a victory for common sense gun laws and an ominous development that will likely trigger a wave of legal challenges to gun laws throughout the country. The Legal Action Project stands ready to continue its fight for these laws against gun lobby and gun industry attacks.

The United States Court of Appeals for the Fifth Circuit reversed a lower court’s decision that had dismissed the indictment of Timothy Joe Emerson. The court unanimously held that the Violence Against Women Act and its provision prohibiting those under domestic violence restraining orders from possessing firearms are constitutional. *U.S. v. Emerson*, 2001 WL 1230757 (5th Cir. Oct. 16, 2001).

Two judges, however, went against all other Supreme Court and federal appellate precedent to find that the Second Amendment provides individuals the right to possess firearms regardless of militia-participation. This renegade finding flies directly in the face of the U.S. Supreme Court’s decision in *U.S. v. Miller*, which held that the Second Amendment was designed “to assure the continuation and render possible the effectiveness” of the state militia and the Amendment “must be interpreted and applied with that end in view.” 307 U.S. 174, 178 (1939).

In a strongly worded special concurrence, Judge Robert M. Parker refused to join the two other judges in their Second Amendment argument, explaining that the pair’s lengthy discussion of the Second Amendment “is dicta and is therefore not binding on us or on any other court.” Judge Parker joined the decision reversing the lower court’s dismissal of a criminal indictment under the Violence Against Women Act.

The three-judge panel of the Fifth Circuit was reviewing federal prosecutors’ appeal of a decision by the United States District Court for the Northern District of Texas, which dismissed an indictment against Timothy Joe Emerson for possessing firearms while under a domestic vio-

lence restraining order. *U.S. v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999). In his appeal of his indictment for possessing numerous firearms, while subject to a divorce court’s restraining order, Emerson claimed that the Second Amendment protected his individual right to have a firearm.

The District Court agreed with Emerson and its dismissal of his indictment set off a maelstrom of activity. Opponents of reasonable gun regulations heralded the decision as the “individual rights” decision they had long lobbied for and applauded the court’s reliance on NRA-sponsored scholarship. The Brady Center to Prevent Gun Violence, joined by eleven national law enforcement organizations, filed an *amicus curiae* – or friend of the court – brief in support of the United States’ position on the meaning of the Second Amendment.

Despite the Fifth Circuit’s misguided interpretation of the Second Amendment, the fact remains that no federal gun regulation has ever been overturned based on the Second Amendment. It is unclear whether Emerson will appeal his defeat or whether this case will make its way to the Supreme Court. It is clear, however, that the NRA – which has not used the Second Amendment to challenge a firearm regulation since its failed suit against the California assault weapons ban in *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992) – will see this decision as a new opportunity to challenge any and all common sense regulations on firearms. ●



The Brady Center to Prevent Gun Violence is a nonprofit, education, research, and legal advocacy organization established in 1983 to reduce the tragic toll of handgun violence in America.

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As our Nation responds to the horror of September 11, the work of the Brady Center's Legal Action Project has become more important than ever.

While we implement national strategies to protect against terrorism in all its forms, we should not lose sight of a salient and indisputable fact: terrorists and guns go together. Guns are used to commit terrorist acts and guns are used by terrorists to resist law enforcement apprehension and arrest. The day before the attacks on the World Trade Center and the Pentagon, a Michigan man was convicted of conspiring to supply the Lebanese terrorist organization Hezbollah with guns purchased at Michigan gun shows. The oft-seen file footage of Osama Bin Laden, aiming his assault rifle at an unknown target, is now a familiar reminder of the incontrovertible connection between terrorism and guns. The mission of the Legal Action Project – to work for legal precedents that will make it more difficult for dangerous people to obtain lethal weaponry – has acquired a new urgency.

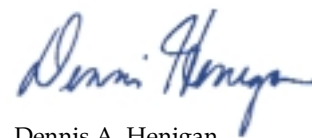
We must work to ensure that those who profit from supplying guns to the illegal market – a ready source of guns for terrorists – are held legally accountable. For example, several years ago, we represented the victims of a terrorist attack on a van full of Hasidic Jewish students, in which one was killed and another seriously wounded. The killer used a Cobray M-11 assault pistol that had been

assembled from a mail-order “parts kit.” We sued the manufacturer of the “parts kit,” charging that it was engaged in a scheme to funnel guns to criminals and terrorists without complying with federal gun laws that apply to assembled firearms. We currently represent the victims of the terrorist racial shootings committed by white supremacist Benjamin Smith, who obtained one of his murder weapons from a gun trafficker who was supplied scores of pistols by a Pekin, Illinois gun dealer. We have brought legal claims against the trafficker and the dealer, as well as against the manufacturer of Smith's gun, who did nothing to set standards of conduct for its retailers that would prevent such collusion with gun traffickers.

We also must be vigilant in protecting our gun laws from the constant legal attacks of the gun lobby. This issue of *Legal Action* discusses the recent ruling by the U.S. Court of Appeals for the Fifth Circuit in *U.S. v. Emerson*. In this closely watched case, a criminal defendant, with support from the National Rifle Association, argued that the Second Amendment protected his right to an arsenal of guns, even though he was under a domestic violence restraining order and had threatened his estranged wife with a handgun. Fortunately, the three-judge Court unanimously upheld his indictment, reversing a lower court ruling that had declared unconstitutional the federal statute barring gun possession by persons under

restraining orders. However, two of the judges adopted the long-discredited “individual rights” view of the Second Amendment, departing from decades of federal court decisions holding that the “right to keep and bear arms” refers only to gun possession related to service in an organized state militia.

The NRA has announced its intention to use the Emerson “individual rights” theory to support “test cases” challenging other gun safety laws in court. (Is this the same NRA that argues that we need stronger enforcement of existing gun laws?) Wherever the NRA seeks to use the courts to weaken laws needed to keep guns out of the hands of dangerous people, Brady Center lawyers will be there, helping to keep our laws intact. We now understand that the NRA's extremist version of the Second Amendment is not only a public safety issue, it is a national security issue as well.



Dennis A. Henigan
Director, Legal Action Project

Major Victory For Gun Safety In New Mexico Court of Appeals

The Legal Action Project won a major victory in the fight for safer gun designs when a New Mexico appellate court upheld claims against a major handgun manufacturer that sold a pistol lacking vital safety features. The Court of Appeals of New Mexico unanimously ruled that Bryco Arms and B.L. Jennings, Inc., its distributor, each have a duty to make the handguns they make and sell safe. The decision is the first appellate ruling in New Mexico holding that guns without feasible safety features are defective. In October, the New Mexico Supreme Court unanimously denied review of the decision. "This case is now the strongest gun safety appellate decision in the nation," said Brian J. Siebel, Senior Attorney of the Legal Action Project, which represents plaintiffs in the case.

The case was brought on behalf of 14-year-old Sean Smith, who was unintentionally shot and injured by one of his friends who was handed a Bryco J-22 pistol with the ammunition magazine removed and mistakenly believed the pistol was unloaded because he could not see a round hidden in its chamber. The gun lacked vital safety features, including

a magazine-disconnect safety, a chamber load indicator, or warnings printed on the gun, that would have prevented the shooting.

In reversing a lower court's dismissal of the case, the Court of Appeals of New Mexico found that the claims against the gun's manufacturer are "well within existing New Mexico products liability and negligence law." *Smith v. Bryco Arms*, No. 20389, 2001 WL 1330013 (N.M. Ct. App. Jul 27, 2001), cert. denied, (N.M. Oct. 19, 2001). According to the Court, the lower court's finding that the gun was not defective because it "functioned exactly as it was designed to do" was based on a narrow definition of "defect" that ignored the Legal Action Project's true argument, "that the gun as designed was defective because it did not incorporate available and economically reasonable design features and warnings which would have prevented the shooting." The Court acknowledged the feasibility of safety design features, finding that for about 30 cents per gun, a magazine disconnect safety and chamber load indicator could have been included in the J-22. ●

Brady Center and Others Seek to Block Military Weapon Imports

On September 19, 2001, the Brady Center to Prevent Gun Violence, joined by seven major law enforcement and public health groups, filed a friend-of-the-court brief in support of the Bureau of Alcohol, Tobacco and Firearms' 1998 decision to prohibit the importation of military assault rifles capable of accepting high-capacity ammunition magazines. The Brady Center filed the brief with the United States Court of Appeals for the District of Columbia Circuit in *Springfield, Inc. v. Buckles*, a lawsuit brought by a firearms importer challenging the ATF's decision.

The Gun Control Act of 1968 requires the ATF to prevent the importation of

firearms that are not "particularly suitable for or readily adaptable to sporting purposes." The ATF's 1998 decision followed the enactment of the federal assault weapon ban in 1994, which banned future domestic production of large-capacity magazines. Such military assault rifles repeatedly have been used in mass killings, including the terrorist attack in 1993 by Mir Aimal Kasi on motorists at the entrance to the CIA headquarters in Virginia, in which two people were killed and three injured. A federal judge upheld ATF's broadened import ban last year and the importer appealed. The brief was prepared with the *pro bono* assistance of the Washington, D.C. law firm, Arnold & Porter. ●

Brady Center Files Suit For Parents of Boy Killed By Bullet Hidden In Chamber

The Legal Action Project's latest case stems from a tragic shooting in Maryland with a Sturm, Ruger P89 pistol. On August 20, 1998, 13-year-old John Price was shot and killed by nine-year-old Phillip Alexander. John, Phillip, and two friends were playing at Phillip's father's rented home, which was shared with the

home's owner who owned a handgun, rifles and other weapons. The handgun was stored unlocked and near live ammunition. Phillip found the unlocked handgun and, with an empty magazine in the gun but with a bullet hidden in the chamber, pulled

the trigger. The gun fired, hitting John in the face, killing him. Neither Phillip nor his friends were aware that the gun was loaded because there was no visible indication on the gun that the chamber was loaded. Although it was feasible for Ruger to include a chamber loaded indicator as well as a safety feature to prevent unauthorized use, Ruger chose not to include these features on its gun.

On July 24, 2001, the Legal Action Project filed a lawsuit on behalf of John's parents. The suit names Ruger and the pawn shop that sold the gun, for selling a gun without feasible safety features; the gun's owner, for failing to store his gun locked and inaccessible to children; Phillip's father, for failing to properly supervise children playing in a home with firearms; and Phillip, for shooting John. The case is currently proceeding in the Circuit Court for Baltimore City. Pat Malone, of the Washington, DC law firm Stein, Mitchell & Mezines, is acting as co-counsel in the case. ●



John Price was killed with a gun by a boy who didn't know a bullet was hidden in the gun.

California Legislators Call For Repeal of Immunity Law That Protected Assault Weapon Maker in 101 California Case

A ground-breaking lawsuit brought by the Legal Action Project against the manufacturer of TEC-9 assault pistols ended on August 6, 2001, when California's highest court ruled that a state statute gave the company a special immunity from liability. The decision prompted calls for immediate repeal of this special interest statute.

Within a week of the court's ruling, State Assemblyman Paul Koretz and State Senator Don Perata introduced legislation to repeal the gun industry's immunity. While their bill did not make it through the legislative process by the end of the session, it will return in 2002.

The suit was brought in May 1994 against Navegar, a Florida gun maker that did business under the name Intratec, on behalf of victims of a shooting in the 101 California Street office building in San Francisco. The shooter used two TEC-9s, which combined extraordinary firepower with easy concealability. Eight people were killed and six others were seriously injured.

Navegar executives admitted they were "flattered" by news about criminal use of TEC-9s because it has "advertising tingle to it" and "generates more sales." Navegar's ads promoted the gun's infamous reputation and even invited criminal use by touting the gun as having "excellent resistance to fingerprints."

After a trial judge dismissed the case, the Legal Action Project won a historic decision from the California Court of Appeal recognizing that a gun manufacturer can be held liable for conduct that creates unnecessary risks.

In August, 2001, the California Supreme Court reversed the Court of Appeals in a 5-1 decision. None of the justices, however, disputed that Navegar could be liable under normal principles of negligence law. Instead, the majority allowed Navegar to escape liability under the immunity statute pushed through the California legislature by the gun lobby in 1983. The statute prohibits a gun manufacturer from being held liable in a products liability action on the ground that the risks of its product outweigh the benefits.

The one justice who thought the immunity law did not apply answered all of the fundamental questions in the case in favor of the shooting victims.

The narrow ruling will not affect other litigation underway in California. Those cases involve claims not covered by the immunity statute, such as claims that a gun lacked vital safety devices or was distributed and sold in a dangerous way.

Navegar could not celebrate its narrow escape from legal liability. Several months before the ruling, the company shut its doors, gave up its manufacturing license, and dissolved. ●

Million Mom March Joins the Brady Center and the Brady Campaign

On October 1, 2001, the Million Mom March merged with the Brady Center and the Brady Campaign to Prevent Gun Violence. By combining the experience, talent, and resources of these powerful organizations, we are better positioned to work to prevent gun violence in this country. The Legal Action Project is looking forward to the future, working hand-in-hand with the Million Mom March.



Municipal Lawsuits Move Ahead

Cities and counties around the country continue to move closer to having their day in court and the opportunity to prove their claims against the gun industry in front of judges and juries. The first cases scheduled for trial, later in 2002, are the lawsuits brought in Massachusetts by the City of Boston and in California by twelve cities and counties, including Los Angeles and San Francisco.

The Legal Action Project and its co-counsel representing these cities and counties are engaged in a far-reaching program of discovery, the process in which litigants collect evidence and prepare for trial. While resisting discovery as much as possible, the manufacturers have been forced to produce tens of thousands of pages of documents, to answer extensive written questions, and to send their top executives to answer questions in depositions.

While the numbers continually change as courts issue decisions, the current "scorecard" in these lawsuits is very favorable to the cities and counties. Of the 33 government entities that have filed suits, 18 have had all or some of their claims upheld against a motion to dismiss, 4 are still waiting for rulings on dismissal motions, and 1 continues because the manufacturers never filed a motion. Only 10 of the governments have had their cases dismissed, and 7 of those are still challenging those rulings before appellate courts. The only cases that have come to an unsuccessful conclusion are those brought by the cities of New Orleans, Miami-Dade, and Bridgeport, Connecticut.

Reports on all the latest decisions can be found on the Legal Action Project's website at www.gunlawsuits.org. ●

Brady Center Pushes For Safer Gun Designs In Important Maryland Case

For the first time in over fifteen years, Maryland's highest court has agreed to hear an important gun safety case. In June 1999, three-year-old Jordan Garris was killed after loading and firing a Ruger P89 pistol, a gun that lacked safety features to prevent even a small child from operating it. This case, *Halliday v. Sturm, Ruger & Company, Inc.*, seeks to hold gun manufacturer Sturm, Ruger liable for injuries caused by its failure to include feasible safety features on its guns. A lower court previously dismissed the case, finding that a "gun exception" to products liability law should protect gun manufacturers from the general requirement that consumer product manufacturers must

include feasible safety features on their products.

The Legal Action Project, joined by eight public health, religious, and social justice organizations, filed a "friend of the court" brief in *Halliday*, urging the Maryland Court of Appeals to reverse the lower court's dismissal of the case. The Legal Action Project's brief argued that Ruger has long known that children and others are needlessly killed because Ruger's guns lack safety features to prevent unauthorized users from firing them, and that it has long been feasible for Ruger to make its guns with these safety devices, but simply chose not to do so. The Court will hear the case in December. ●

ABA Opposes Special Treatment for Gun Industry

As lawsuits brought against the gun industry by cities and counties continue to move forward in courts around the country, the American Bar Association weighed in with a strong statement condemning special interest legislation immunizing the industry from liability in these suits.

As soon as cities and counties began exercising their legal rights in an effort to reform dangerous gun industry practices, the gun lobby and state legislators friendly to it began pushing for legislation designed to preempt or block the local governments' lawsuits. More than two dozen states have passed these statutes, including one signed into law in

Texas by then-Governor George W. Bush.

At its annual meeting in Chicago on August 7, 2001, an overwhelming majority of the ABA's House of Delegates voted in favor of a resolution opposing statutes that give gun makers unique immunity from the duties and responsibilities that apply to manufacturers of all other products. The ABA is the nation's largest organization of lawyers and judges.

The gun manufacturers insist that the lawsuits against them are frivolous, but the push to enact special immunity laws reveals how much they fear close scrutiny of their business practices. ●

Jury Finds Kmart Liable For Negligently Selling Gun

On September 12, 2001, a Salt Lake City jury found Kmart Corp. liable for \$3 million in compensatory and punitive damages to the family of suicide victim Ryan Eslinger. Eslinger, a 19-year-old suffering from schizophrenia, walked into a Kimball Junction Kmart and purchased a Remington 870 for \$253 in cash. Eslinger had scars on his neck and forearms from a prior suicide attempt, was on new medication that made him appear intoxicated, and lacked identification proving his current residence when he purchased the firearm. His family charged the company with negligence in failing to require proper identification, omitting information on his federal gun sales form, improperly supervising employees, selling a firearm to a mentally ill individual, and for allowing a 17-year-old male employee to complete the sale, in violation of federal law. The jury agreed with the family that Kmart engaged in “willful and wanton misconduct” by selling Eslinger the firearm. The Brady Center assisted the attorneys for Eslinger’s family with key legal issues in the case.

Pawn Shop Liable for Selling Gun To Mentally Retarded Man

A Florida appeals court overturned a lower court’s dismissal of a lawsuit against Williams Pawn & Gun, Inc. based on Williams’ sale of a gun to Jamie Lofton, a mentally retarded man who used the gun in a robbery attempt that resulted in the death of Sonny Jones. *Jones v. Williams Pawn & Gun, Inc.*, No. 4D00-3723, 2001 WL 1202661 (Fla. Dist. Ct. App. Oct. 10, 2001). Jones’ widow sued Williams for

wrongful death, claiming that Williams knowingly sold the gun to a person of “unsound mind,” in violation of a Florida statute. The trial court held that the term “unsound mind” in the statute was unconstitutionally vague and dismissed the case. The appeals court reversed, noting that the term could be subject to differing interpretations but that the plain and ordinary meaning could be derived by reference to a dictionary. After testimony from Lofton’s mother and doctors that he had only a second grade education, attended special classes, always lived with relatives, never held a job, received federal disability benefits, could not drive, and did not know how to handle money or balance a checkbook, the court found that Lofton fell squarely within the plain and ordinary meaning of the term “unsound mind” and ruled in favor of Mrs. Jones.

Court Rules That Gun Distributors May Be Held Liable For Injuries Caused By Assault Weapons

A Massachusetts Superior Court judge ruled that a lawsuit against gun distributor Southern Ohio Guns International for negligent and reckless distribution of guns may proceed, denying Southern Ohio’s attempt to dismiss the lawsuit. The suit alleges that Southern Ohio negligently and recklessly sold a 9mm Cobray assault pistol, leading to the shooting of plaintiff Lenny Isaac.

Mr. Isaac, who filed the lawsuit, argued that the Cobray assault pistol has no legitimate use because it is made only to “spray fire” at people, is too inaccurate for hunting, and is too dangerous for use by police or in self-defense. The gun is a weapon of choice for drug dealers and was marketed to

criminals with the slogan, “The gun that made the eighties roar.” Additionally, it is specially designed to hold devices used by criminals including silencers, flash suppressors, and grenade launchers. The Cobray was traced to violent incidents at a rate seven times greater than the rate for all other handguns and traced to homicides at a rate nine to ten times greater than that for all other handguns. The complaint alleges that, despite the obvious dangers of the gun as a weapon solely suited to criminal use, Southern Ohio marketed and sold this gun, causing Mr. Isaac’s injuries.

In light of these asserted facts, the court held that “Southern Ohio had a duty to guard against a likelihood that the Cobray could be secured by unfit individuals, including criminals.” Chester L. Tennyson, Jr. of Weymouth, Massachusetts represents the plaintiff, and the Legal Action Project has actively assisted in this case.

NRA-Backed Prosecutor Challenges Provisions of California’s Assault Weapons Ban

Fresno County, California District Attorney Edward Hunt filed a lawsuit on September 18, 2001 against California Attorney General William Lockyer, challenging sections of California’s Assault Weapons Control Act (“AWCA”) requiring assault weapon owners to either remove or modify a firearm’s features that make it an assault weapon or register the firearm as an assault weapon with the State. Hunt is joined in the lawsuit by the California Sporting Goods Association; the Law Enforcement Alliance of America, an NRA front-group; a local gun dealer; and several individuals.

The complaint in *Hunt v. California*, filed in the Fresno

County Superior Court, alleges that the law is vague, confusing, and unintelligible and challenges the adequacy of regulations issued by the Attorney General that interpret the law. District Attorney Hunt claims that “[w]ithout clarification, it[’]s impossible to know what is legal and what isn’t. I simply can’t do my job, and I can’t do justice, under these confusing circumstances. There has got to be some standard set for everyone to follow.” A spokesperson for Lockyer said that Hunt never made an attempt to work with the Attorney General’s Office to get his questions answered or attend any training sessions that were held for prosecutors.

Unlike other challenges to AWCA, this one focuses on procedures used to enforce the law. The California legislature passed the landmark legislation in 1989 after a gunman fired a semiautomatic weapon into a Stockton schoolyard, killing 5 children and injuring 30. The 1999 additions were designed to close a loophole that allowed manufacturers to make slight cosmetic changes to their assault weapons and legally market them.

Florida Family Files Suit Against a Shooting Range for Renting a Pistol Used in Suicide

The family of a Florida woman who killed herself two years ago with a rented pistol filed suit on September 24, 2001 against the shooting range where the suicide occurred. Loretta Tomesak-Anderson, a 45-year-old mother of three, had a blood-alcohol level of .28, three times the level of presumed impairment under Florida law, when she entered the Shooting Sports range and rented a Smith & Wesson 9mm pistol for \$7.95. Tomesak-Anderson’s family alleges that range employees are at fault for

renting the victim a pistol while she was extremely and obviously intoxicated. The family filed the lawsuit against several individuals, including former range owner Michael Spielvogel, who was already convicted in federal court earlier this year for attempted extortion, conspiracy, lying to the FBI, filing a false statement and mail fraud, and range employee Benjamin Nenko, who was present at the time of the suicide.

Federal Courts Continually Reject Emerson-like Second Amendment Theory

Notwithstanding the Fifth Circuit's anomalous 2-1 ruling in Emerson v. United States, (See story on page 1), federal appellate courts around the country have continued to follow the U.S. Supreme Court's well-settled precedent that the Second Amendment only guarantees an individual's right to bear arms in the context of participation in a state's well-regulated militia. The Fourth Circuit Court of Appeals twice followed this precedent in two recent cases. See U.S. v. Smith, 2001 WL 1082100, *1 (4th Cir. Sep 17, 2001); U.S. v. Pruess, 2001 WL 685590 (4th Cir. June 19, 2001). Likewise, the Tenth Circuit reasoned in U.S. v. Haney, 264 F.3d 1161, 1165 (10th Cir. 2001), that the Second Amendment only protects a state's "well-regulated militia," rejecting the argument that the militia referred to in the Second Amendment includes "the private anti-government groups that sometimes refer to themselves as 'militias.'" ●

Brady Center, Campaign Challenge Ashcroft's Attempts to Destroy Background Check Records

Continuing its fight to keep guns out of the hand of criminals, the Brady Center and the Brady Campaign to Prevent Gun Violence submitted comments to the U.S. Department of Justice on September 4, 2001, opposing Attorney General John Ashcroft's proposal to reduce the amount of time that National Instant Criminal System (NICS) background check data is kept. The data consists of information gathered when a federal firearms licensee performs a background check on a potential handgun purchaser. Attorney General Ashcroft is proposing to destroy these critical records merely one day after a gun is sold, despite law enforcement officials stating that they need at least 90 days to ensure the integrity of the background check system.

Since its inception in 1994, the Brady Handgun Violence Prevention Act (the Brady Act) has prevented more than 680,000 fugitives, felons, and other prohibited purchasers from buying guns. The NICS, implemented in 1998, is a critical component of the Brady Act.

The FBI periodically audits the NICS to perform quality control checks. The retained data assists the FBI in identifying instances in which the NICS is used for unauthorized pur-

poses, such as gun dealers running background checks on people other than potential handgun purchasers. The audits can also determine whether potential handgun purchasers have stolen the identity of innocent individuals or otherwise submitted false identification information.

The Brady Center argued in its comments to the Justice Department that any reduction in the retention time will undermine the core mission of the Brady Act and the NICS, which is to prevent prohibited purchasers from obtaining firearms. The change could cripple the ability of the FBI to identify fraud within the NICS system, rendering the system pointless.

Prior to Attorney General Ashcroft's proposal to limit data retention time to one day, the Justice Department had already concluded, after a lengthy and comprehensive rule-making procedure, that 90 days "was the shortest practicable period of time for retaining records of allowed transfers that would permit the performance of basic security audits of the NICS." The Justice Department's decision to temporarily retain background check data was upheld by the United State Court of Appeals for the District of Columbia in May 2001. ●

Brady Center Argues For Responsible Storage Of Guns In Indiana

On October 1, 2001, the Legal Action Project filed an *amicus curiae* brief in the Indiana Supreme Court, urging the Court to overturn a lower court ruling that Indiana gun owners have no duty to exercise reasonable care in storing their guns. In Estate of Heck v. Stoffer, the parents of a drug-addicted felon gave their son free access to their home where they kept their unlocked handgun. One day after the son failed to appear at a sentencing hearing, he took his parents' gun and used it to shoot and kill a sheriff's deputy. A lower court dismissed the case against the felon's parents, ruling that these gun owners had no duty to store their gun so that their son, on the run from police, could not gain access to it.

The Legal Action Project's brief urged the Court to find that the felon's parents had a

duty to exercise reasonable care in storing their gun to prevent persons likely to misuse it from gaining access to it. Numerous courts have held that such a duty exists, with some states holding gun owners to a higher duty of care because of the significant dangers of negligent storage of firearms. The Legal Action Project argued that this ruling, if allowed to stand, would set Indiana apart from other states, needlessly endangering Indiana residents. The National Rifle Association, by contrast, filed a brief with the Court arguing that because the Indiana constitution protects the right "to keep and bear arms," gun owners should be permitted to store their guns in any means that they see fit, even if this results in police officers being killed by felons given free access to unlocked guns. The law firm of Arnold & Porter assisted the Legal Action Project with its brief. ●

Brady Center and Common Cause File Ethics Complaint Against U.S. Attorney General

The Brady Center to Prevent Gun Violence, joined by Common Cause, has challenged an egregious breach of legal ethics by Attorney General John Ashcroft, who sided with the NRA and an accused criminal, instead of federal prosecutors, in an important gun case. The Brady Center filed an ethics complaint against Ashcroft on July 3, 2001, with the Department of Justice and the District of Columbia Court of Appeals and on August 3, 2001, with the Missouri Supreme Court. The complaint demands an investigation into the ethical propriety of a letter sent from Ashcroft to the National Rifle Association, in which the Attorney General unequivocally contradicted the United States' legal interpretation of the Second Amendment to the United States Constitution pending at the time before the United States Court of Appeals for the Fifth Circuit in United States v. Emerson (See story on page 1). The criminal defendant in Emerson subsequently filed Attorney General Ashcroft's letter with the Fifth Circuit in support of his position on the Second Amendment. The NRA had filed an *amicus* brief in the Emerson case, arguing against the United States' position.

The Brady Center's and Common Cause's ethics complaint is supported by an opinion from legal ethics expert, Professor Samuel Dash, of the Georgetown University Law Center, who termed the Attorney General's violations "egregious," "an act of disloyalty to his client, the United States," and an "impermissible conflict of interest." "We believe that Attorney General Ashcroft has blatantly violated numerous ethical guidelines that govern his conduct toward his client, the United States of America," said Michael D. Barnes, President of the Brady Center. "Mr. Ashcroft has publicly stated he supports the fundamental legal position of the defendant in a case that the United States is prosecuting. If the Attorney General had written a similar letter to the defendant's attorneys in the case, there would be no question as to the letter's impropriety. That the letter was sent to an amicus party supporting the defendant makes his statements no less objectionable."

The complaint is pending before the Justice Department and the Missouri Supreme Court. The District of Columbia Court of Appeals' dismissed the complaint because Ashcroft is not a member of the D.C. bar. ●

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