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## EDITORIAL

### A VIEW THROUGH THE GUN SHOW LOOPHOLE

*Andrew Goddard*

The term “Gun Show Loophole” came about as a result of the passage of the Firearm Owners Protection Act of 1986<sup>1</sup> and the Brady Handgun Violence Prevention Act of 1993.<sup>2</sup> These laws effectively created a dual standard for gun sales based on the federal license status of the seller. The Brady Act mandated that licensed gun dealers must conduct criminal background checks on potential buyers regardless of whether the sale takes place at the dealer’s store or at a gun show,<sup>3</sup> whereas the Firearm Owners Protection Act expressly exempted “persons making occasional sales or selling all or part of a personal collection” from the need to obtain a federal license to sell firearms.<sup>4</sup> Thus, a private individual who is not considered to be “engaged in the business” of buying and selling guns, or who sells occasionally, is not required, or even allowed, to conduct a background check on a prospective buyer.<sup>5</sup> The reason for the exception to the background check requirement for private sellers was to allow for the unregulated sale or transfer of guns between friends and relatives or the “occasional” sale of guns by individuals from their personal collection.<sup>6</sup>

The gun lobby argues that since this exception was included in the original intent of the laws it is not technically a loophole.<sup>7</sup> The counter argument is that many private sellers at gun shows exploit the vague definition of “engaged in the business” and the equally undefined concept

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· President, Richmond Chapter of the Million Mom March against gun violence.

1. Firearm Owners Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (codified at 18 U.S.C. §§ 921–929 (2006)).

2. Brady Handgun Violence Prevention Act of 1993, Pub. L. 103-159, 107 Stat. 1536 (codified at 18 U.S.C. §§ 921–924 (2006)).

3. 18 U.S.C. § 922(t)(1).

4. *Id.* § 921(a)(21)(c).

5. *Id.* § 921(a)(21).

6. *Id.* § 921(a)(21)(c).

7. Cf. Adam Rhew, *Battle Over Virginia’s Gun Show Loophole*, [http://www.nbc29.com/Global/story.asp?S=9491867&nav=menu496\\_2\\_5](http://www.nbc29.com/Global/story.asp?S=9491867&nav=menu496_2_5) (last visited July 20, 2009).

of “occasional” sales. While some private sellers at gun shows do indeed only sell one or two weapons and attend just one show as a seller, many gun show sellers who are not federally licensed buy and sell large numbers of guns and attend many shows each year.<sup>8</sup> Therefore, a private seller using the exception written into the law in a way that was not originally intended creates what is in fact a loophole.

Regardless of the actual name given to the unregulated sales, the fact remains that a large number of guns change hands at gun shows without a background check on the buyers.<sup>9</sup> When sellers do not perform background checks, it is possible for prohibited purchasers,<sup>10</sup> who the law forbids from purchasing or owning firearms, to buy weapons at gun shows on a cash and carry basis with no questions asked.<sup>11</sup> Such gun sales are not subject to any form of record keeping requirements and thus are untraceable.<sup>12</sup> It is also possible for gun buyers to circumvent the Virginia law that limits handgun purchases to one a month,<sup>13</sup> since authorities cannot monitor unrecorded sales from private sellers for compliance with this law.

While it is the responsibility of the Bureau of Alcohol, Tobacco, and Firearms (“ATF”) to monitor activities at gun shows, staffing and budget limitations, combined with the lack of a coherent national policy on gun shows, means that the ATF can only monitor activities at about two percent of shows.<sup>14</sup> Clearly such low levels of monitoring do not prevent criminal activity from taking place at gun shows.

Gun shows have been reported to be involved with the trafficking of approximately twenty-six thousand firearms over a two and a half year period, a figure that represents thirty percent of all guns identified in

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8. See U.S. DEP’T OF JUSTICE ET AL., GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES I (1999), available at <http://library.findlaw.com/1999/mar/9/126583.pdf> (stating that nonlicensees make up one quarter or more of the sellers of firearms at gun shows).

9. See *id.* at 6.

10. The term “prohibited purchasers” includes convicted felons, spousal abusers, those adjudged to be a potential harm to themselves or others due to mental illness, and underage or out of state buyers. 18 U.S.C. § 922(d).

11. See U.S. DEP’T OF JUSTICE ET AL., *supra* note 8, at 6.

12. BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, CRIME GUN TRACE REPORTS (2002), available at <http://www.atf.gov/firearms/ycgii/2000/generalfindings.pdf>.

13. VA. CODE ANN. § 18.2-308.2:2(P) (Cum. Supp. 2008).

14. *Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE): Gun Show Enforcement (Part I and II): Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 34 (2006) (statement of Michael R. Bouchard, Assistant Director of Field Operations, BATFE).

federal criminal trafficking cases over that period.<sup>15</sup> Not all guns used in crimes can be traced, due to the fact that unrecorded transactions prevent authorities from tracking the chain of custody of a particular weapon. As such, it is virtually impossible to trace any guns found at crime scenes to sales made by private sellers, either at gun shows or any other venue. The gun lobby uses this lack of trace data to “prove” that private sellers do not supply guns that are eventually used in crime.<sup>16</sup> Thus, according to gun lobby, the absence of evidence is the evidence of absence. Law enforcement traces a large number of firearms, found at crime scenes in many states, to sales by licensed dealers at Virginia gun shows.<sup>17</sup> Therefore, criminals use guns that are traceable and that originally required the buyer to undergo a background check. However, according to the gun lobby, these same criminals do not take advantage of the ability to purchase untraceable guns sold by private sellers in transactions that require no background check or personal information transfer of any kind. It seems inconceivable that criminals would risk using traceable guns in crimes, while not taking advantage of the gun show loophole to purchase and use untraceable ones.

In an attempt to prevent ineligible buyers from buying firearms from private sellers at gun shows, Virginia lawmakers introduced a number of pieces of legislation requiring a criminal background check of any individual attempting to purchase a firearm at a gun show.<sup>18</sup> Virginia was a pioneering state with regard to background checks for gun buyers and is now a model in efficiency, simplicity, and speed for the rest of the nation.

Senator Henry Marsh’s Senate Bill 1257 would have required background checks on all gun buyers at gun shows, with the exception of those buying antique weapons and purchases made by concealed handgun permit holders that have undergone a background check to obtain their

15. See MAYORS AGAINST ILLEGAL GUNS, THE MOVEMENT OF ILLEGAL GUNS IN AMERICA 9–10 (2008), available at [http://www.mayorsagainstillegalguns.org/downloads/pdf/trace\\_report\\_final.pdf](http://www.mayorsagainstillegalguns.org/downloads/pdf/trace_report_final.pdf).

16. See, e.g., NAT’L RIFLE ASS’N INST. FOR LEGISLATIVE ACTION, FIREARM TRACES: THE ANTI-GUNNERS’ BIG LIE (2000), available at <http://www.nraila.org/Issues/Articles/Read.aspx?id=12&issue=020>.

17. See generally MAYORS AGAINST ILLEGAL GUNS, *supra* note 15, at 23–24.

18. See H.B. 2318, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 54.1-4201.2 (as introduced Jan. 14, 2009 by the House Committee on Militia, Police, and Public Safety); H.B. 2631, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 54.1-4201.1 (as introduced Jan. 23, 2009 by the House Committee on Militia, Police, and Public Safety); S.B. 1257, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 18.2-308.2:4 (as engrossed Jan. 29, 2009 by the Senate); S.B. 1385, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 54.1-4201.2 (as introduced Jan. 19, 2009 by the Senate Committee for Courts of Justice).

permit.<sup>19</sup> In 2009 the bill passed through the Senate Courts Committee by a vote of eight to seven, but was narrowly defeated on the Senate floor by a vote of twenty-one to nineteen.<sup>20</sup> A similar bill has been defeated almost every year for the last ten years.<sup>21</sup> An amendment to make the background check voluntary was rejected by the patron as this would undoubtedly have limited the background checks to only law abiding buyers who are not the target of the legislation.

Delegate Morrissey introduced a bill with similar intent, House Bill 2318, in the House of Delegates. This bill sought to require private individuals who sold three or more guns at a gun show to obtain a dealer's license, which would have resulted in prospective buyers being subject to a background check.<sup>22</sup> This bill was defeated in Subcommittee Number One of the House Militia, Police, and Public Safety Committee after minimal discussion.<sup>23</sup>

Another measure, House Bill 2631, introduced by Delegate Caputo, sought to mandate background checks on all gun sales at gun shows in Fairfax County.<sup>24</sup> The House Militia, Police, and Public Safety Committee left the bill in committee without considering it.<sup>25</sup>

Finally, Senate Bill 1385, introduced by Senator Stolle, would have provided for increased police surveillance at gun shows to deter or detect potential criminal activity such as illegal bulk sales, straw purchases,

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19. S.B. 1257, ¶ 1, § 18.2-308.2:4.

20. Legislative Information System, Bill Tracking: S.B. 1257, 2009 Session, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=sb1257> (last visited July 20, 2009).

21. See generally S.B. 109, Va. Gen. Assembly (Reg. Sess. 2008) (as introduced Jan. 3, 2008 by the Senate Courts of Justice Committee); S.B. 827, Va. Gen. Assembly (Reg. Sess. 2007) (as introduced Jan. 5, 2007 by the Senate Courts of Justice Committee); S.B. 15, Va. Gen. Assembly (Reg. Sess. 2006) (as introduced Dec. 12, 2005 by the Senate Courts of Justice Committee); S.B. 807, Va. Gen. Assembly (Reg. Sess. 2005) (as engrossed Jan. 26, 2005 by the Senate Courts of Justice Committee); S.B. 48, Va. Gen. Assembly (Reg. Sess. 2004) (as engrossed Feb. 6, 2004 by the Senate Courts of Justice Committee); S.B. 898, Va. Gen. Assembly (Reg. Sess. 2003) (as introduced Jan. 8, 2003 by the Senate Courts of Justice Committee); H.B. 310, Va. Gen. Assembly (Reg. Sess. 2001) (as introduced Jan. 12, 2001 by the House Militia, Police, and Public Safety Committee); H.B. 310, Va. Gen. Assembly (Reg. Sess. 2000) (as introduced Jan. 12, 2000 by the House, Militia, Police, and Public Safety Committee); H.B. 1808, Va. Gen. Assembly (Reg. Sess. 1999) (as introduced Jan. 13, 1999 by the House Courts of Justice Committee).

22. H.B. 2318, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 54.1-4201.2 (as introduced Jan. 14, 2009 by the House Militia, Police, and Public Safety Committee).

23. See Legislative Information System, Bill Tracking: H.B. 2318, 2009 Session, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb2318> (last visited July 20, 2009).

24. H.B. 2631, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 54.1-4201.1 (as introduced Jan. 23, 2009 by the House Militia, Police, and Public Safety Committee).

25. Legislative Information System, Bill Tracking: H.B. 2631, 2009 Session, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb2631> (last visited July 20, 2009).

sales to ineligible buyers, and private sellers abusing the definitions of “engaged in the business.”<sup>26</sup> The patron withdrew the bill without discussion by any committee or subcommittee.<sup>27</sup>

A January 2008 survey by Christopher Newport University conducted across the entire state showed that sixty-eight percent of Virginians rated the closure of the gun show loophole as the most important priority for the General Assembly in the 2008 session.<sup>28</sup> National surveys show support for the closure of this loophole by more than eighty-five percent of the public.<sup>29</sup> Even amongst gun owners, the rate of support for gun purchase restrictions is still extremely high, at around eighty percent.<sup>30</sup> However, the main firearms rights groups, including the Gun Owners of America, National Rifle Association, and Virginia Citizens Defense League, are all headquartered in Virginia and oppose any attempts to impose background checks at gun shows.<sup>31</sup> They see any measure to control the sale of firearms as the first step down a slippery slope that will eventually lead to the federal government’s confiscation of all privately held firearms. It is interesting to note that in his recent groundbreaking interpretation of the Second Amendment, which effectively wiped out the “slippery slope” argument, Justice Scalia explicitly stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>32</sup> It would be hard to find a more commercial setting for the sale of arms than a gun show.

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26. S.B. 1385, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 54.1-4201.2 (as introduced Jan. 14, 2009 by the Senate Courts of Justice Committee).

27. Legislative Information System, Bill Tracking: S.B. 1385, 2009 Session, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=sb1385> (last visited July 20, 2009).

28. Press Release, Christopher Newport University, Virginia Voters Slightly Less Upbeat about Direction of State (Jan. 18, 2008), *available at* [http://universityrelations.cnu.edu/news/2008/01\\_18\\_08voters.html](http://universityrelations.cnu.edu/news/2008/01_18_08voters.html).

29. Press Release, Mayors Against Illegal Guns, American Overwhelmingly Support Common Sense Measures to Stop Illegal Guns, New National Poll Finds (Apr. 10, 2008), *available at* <http://www.mayorsagainstillegalguns.org/html/media-center/pr006-08.shtml> (finding that eighty percent of Second Amendment rights advocates “support prohibiting suspected terrorists from purchasing guns,” and seventy percent want to require background checks at gun shows).

30. *Id.*

31. *See, e.g.*, Press Release, National Rifle Association, Anti-Gun Show Bill Defeated for a Second Time in Virginia Senate (Feb. 4, 2009), *available at* <http://www.nra.org/NewsReleases.aspx?id=12084>.

32. *Dist. of Columbia v. Heller*, 554 U.S. \_\_\_, 128 S. Ct. 2783, 2816–17 (2008).

