

**NLWJC - Kagan**

**DPC - Box 009 - Folder 011**

**Crime - Brady Law National Instant  
Criminal Background Check System  
(NICS)**

Crime - Brady - NCIS

# National Gun-Check System Draws Fire From Both Sides

By DAVID S. CLOUD

Staff Reporter of THE WALL STREET JOURNAL  
**WASHINGTON**—It will be a harried holiday season for Jim Kessler. Thousands of telephone calls an hour will be coming his way, each one representing a customer seeking a gun.

Mr. Kessler isn't a businessman. He is a Federal Bureau of Investigation agent who is overseeing development of a national computer system designed to conduct nearly instantaneous background checks on almost anyone buying a firearm. The nationwide database, aimed at weeding out felons and others prohibited from owning guns, will start next month when the checks become mandatory. But it isn't finished yet.

"I've had some long nights," the 52-year-old Mr. Kessler says. "We want this to succeed."

## Ambivalence on Both Sides

At times, it seems no one else does. Major gun-control groups, such as Handgun Control Inc., are ambivalent about the so-called instant-check system, upset that it will replace the five-day federal waiting period for handgun purchases in force since 1994. Even its arch rival, the National Rifle Association, which proposed computerized background checks in the early 1990s as a less-onerous alternative to the waiting period, is cooling on the idea as the Dec. 1 start-up date approaches.

"We are in favor of instant-check systems," says the NRA's chief lobbyist, James Baker. "But we're not in favor of a number of things the FBI is doing."

It is an enormous undertaking. The nation's 70,000 licensed gun dealers will have to get approval each time a customer wants to buy any type of firearm, including rifles and shotguns. In most states, dealers will contact the FBI directly through a toll-free telephone number; in others, they will go through a state contact linked to the FBI's criminal-records system. In either case, the FBI is expecting tens of thousands of calls a day and as many as 10 million a year.

The agency has brought on 500 new workers at its Clarksburg, W.Va., data-processing center to conduct the checks, although initial screening will be done by a subcontractor. In 80% of the cases, the FBI predicts, approval of the gun purchase will take no more than a few minutes, while a customer's name and date of birth are run through the system. If no hits turn up, the sale will be immediately approved. If the name turns up a criminal history, the FBI has three days to investigate further to determine whether the buyer is prohibited from owning a weapon.

The FBI system pulls together in electronic form millions of criminal records stored in the agency's own databases and in states across the country, but it remains very much a work in progress. Many state records aren't close to being fully automated, even though the Justice Department has handed out more than \$250 million since 1994 to help tackle the job.

The FBI has a very complete record of

## No Sale on Guns

Law-enforcement officials conducted nearly 2.7 million background checks on prospective handgun buyers in 1997. About 69,000, or 2.6%, were rejected based on state or federal laws, including the Brady Handgun Violence Prevention Act of 1993.

Reasons for Rejections		Rates in the States	
Felony convictions or under indictment	81.7%	Rejection rates in selected states in various regions of the U.S.:	
Fugitives	6.9%	NUMBER OF APPLICATIONS	NUMBER REJECTED
Domestic violence:		RATE	
Misdemeanor convictions	9.1%	ARKANSAS	1.4%
Restraining orders	2.1%	CALIFORNIA	0.9%
State prohibitions	6.1%	IDAHO	4.5%
Mental illness or disability	0.9%	NEW JERSEY	0.8%
Drug addicts	1.6%	OHIO	6.9%
Local prohibitions	0.9%	VIRGINIA <sup>2</sup>	1.3%
Other <sup>1</sup>	11.7%		

<sup>1</sup>Includes illegal aliens, juveniles and dishonorable military discharges. <sup>2</sup>Includes handguns and long guns.  
 Source: Department of Justice

felony arrests, which is a good starting point for deciding whether individuals can legally buy a gun. But in order to determine definitively, the FBI must know what happened to the people after the arrest: Were they convicted? Is an indictment still pending? Are they fugitives? The problem is that electronic records about case dispositions are even spottier.

In general, big states such as California, New York and Pennsylvania are well along in the process; others aren't even close. "We're just in the infant stages," concedes Jimmy Dukes, head of Mississippi's effort to improve its criminal-records database.

## Local Jurisdictions

According to the latest Justice Department estimates, there were 57 million records on criminals nationwide at the end of 1997. Of these, 34 million are electronically available, but only 20 million of the criminal histories specify the disposition of cases.

Without the dispositions available online, the FBI will have the laborious task of tracking down individual names manually by calling local jurisdictions to determine the outcome of an arrest. In those cases, the "instant" check system slows to a crawl. If no case disposition is found within three days, the FBI policy will be to reject the sale.

There are even bigger holes in the system. Firearms sold by nonlicensed dealers at gun shows will be exempt from background checks altogether—a loophole President Clinton recently said should be closed. Likewise, the system is supposed to kick out names of illegal immigrants who, by law, are prohibited from purchasing guns. But the Immigration and Naturalization Service still hasn't supplied the FBI with its database of names of undocumented workers in useable form.

Then there are statutory reasons why the instant-check system may never be complete. Some states, including Colorado

and Illinois, restrict access to medical records that show whether someone was committed to a psychiatric institution. In many cases, such individuals are barred from owning guns. Also hard to track are misdemeanor charges for domestic assault, which disqualify people from owning a gun.

For these and other reasons, the system has its skeptics. Robert Walker, president of Handgun Control, says one result will be to remove responsibility for conducting background checks now routinely done in many states by local law enforcement and put it in the hands of the FBI, which isn't as familiar with local records and dealers.

The FBI's Mr. Kessler concedes: "Somebody from Ohio who has been there most of their life can read those things

quick. We're going to have to learn this process."

Gun-shop owners worry about losing sales if the system is swamped with calls. Virginia and a handful of other states already do automated background checks, and dealers there have had mixed assessments. "When it works, it's great," says Barry Hopkins, a manager of Green Top Sporting Goods near Richmond, Va. "When it doesn't, it's a nightmare."

## Last-Minute Changes

Just getting the FBI system going hasn't been easy. This summer, the Justice Department decided that gun sales by pawn shops would be covered, which forced the FBI to find the capacity to handle another two million calls a year.

Then, in October, at the urging of the NRA and other gun-owner groups, Congress repealed authority for the FBI to charge dealers a user fee of as much as \$18 for each background check. Instead, Congress opted to appropriate \$47 million to pay for the cost. But the move had an unintended consequence. Many of the 25 states that have volunteered to help the FBI conduct the checks had planned to charge their own fees to gun shops. Now at least three states, Florida, Colorado and New Mexico, are threatening to withdraw; the loss of Florida, a major gun-sales state, would especially put a strain on the FBI system. Justice Department officials are scrambling to come up with a way to reimburse states for their costs.

The FBI remains confident in the system. "It's as full court a system as you could design," says Doug Domin, the FBI's deputy assistant director in the information-services division. "And we're dealing with the changes, even though it's at the 11th hour."

THE WALL STREET JOURNAL

THURSDAY, NOVEMBER 12, 1998

## *Tobacco-Tax Plan to Fund Programs On Smoking Is Approved in California*

By KEITH PERINE

*Staff Reporter of THE WALL STREET JOURNAL*

A California ballot initiative proposing a tobacco tax to fund smoking prevention programs was approved yesterday after absentee ballots from last week's election were counted.

Proposition 10 imposes a 50-cent-a-pack tax on cigarettes and equivalent tax increases on other tobacco products. Together, the taxes are expected to generate as much as \$750 million a year, which will be used to fund statewide antismoking efforts aimed primarily at children and pregnant women.

The measure was one of the most closely watched and hotly contested of the 61 popular initiatives appearing on ballots across the country in the Nov. 3 election. Until yesterday, the vote was statistically too close to call: Before the absentee-ballot count, the measure had received just 50.1% of votes cast. Ultimately, Proposition 10 passed by a mere 57,070 votes of 7.6 million

ballots counted.

"It was a very, very tough fight," actor-director Rob Reiner, the initiative's key proponent, told a crowd in Los Angeles. "We had, unfortunately, a very formidable foe in the tobacco industry."

Revenue also will fund child immunizations, vision and hearing tests, prenatal care and childhood drug and alcohol-abuse treatment. The initiative creates state and county commissions to oversee the programs.

The victory comes as the Clinton administration is considering renewing its antismoking efforts, including proposing a tobacco tax in its budget for the fiscal year that begins Oct. 1, 1999. The revenue would likely be earmarked for programs with a direct link to tobacco, such as cancer research or aid to tobacco farmers. The per-pack tax would likely be smaller than the \$1.10-a-pack boost killed by the Senate Republican leadership last spring.



Jose Cerda III

09/24/98 07:54:16 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP, Thomas L. Freedman/OPD/EOP

cc:

Subject: Brady Act

BR, et.al.:

I guess Michael didn't want to budge on any of this stuff yet, so OMB has asked DOJ not to get into it at their meeting tomorrow...jc3

----- Forwarded by Jose Cerda III/OPD/EOP on 09/24/98 07:50 PM -----



Jose Cerda III

09/24/98 04:46:14 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc: Leanne A. Shimabukuro/OPD/EOP, Elena Kagan/OPD/EOP, Thomas L. Freedman/OPD/EOP

Subject: Brady Act

BR:

I think it makes sense to have DOJ try and get the records piece fixed. The fee is still a good battle -- arguably a better battle. However, we should still try and get a freebie federal page article on the fee/records issue before the a conference report comes out. Tom: what do we need for you to get your pals to get this done?

Jose'

----- Forwarded by Jose Cerda III/OPD/EOP on 09/24/98 04:42 PM -----




David J. Haun

09/24/98 04:32:52 PM

Record Type: Record

To: Michael Deich/OMB/EOP, Jose Cerda III/OPD/EOP

cc: Kenneth L. Schwartz/OMB/EOP, theodore wartell/omb/eop, patricia e. romani/omb/eop, Edward H. Chase/OMB/EOP

Subject: Brady Act 

I spoke to Colgate and he understands our position on the fee issue. He is asking for guidance on the records retention issue however.

The current Brady act allows the government to retain records for up to 18 months and DOJ has written the software in the insta-check system to do this. The Appropriations language would reduce the records retention to 24 hours. If this is enacted, it will take DOJ 6-9 months to reprogram the system and effectively delay implementation of the insta-check system. Justice would like to try to negotiate with the appropriators on the records retention issue and get them to agree to retaining the records for 6 months instead of 18 months. Revising the software for a 6 month retention period would not delay the implementation of the insta-check system.

The problem with negotiating and fixing the records retention issue is that we will be making the appropriations better and therefore harder to oppose. Not fixing the records retention issue could potentially delay implementation of insta check and make the Administration's opposition stronger.

Colgate would like guidance on whether they can negotiate with the appropriators on the records retention issue. He and AG have a meeting with Mollohan tomorrow morning at 10:00 on appropriations issues in general.



Jose Cerda III

08/10/98 04:12:56 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Michelle Crisci/WHO/EOP, Elena Kagan/OPD/EOP  
cc: Leanne A. Shimabukuro/OPD/EOP  
Subject: Re: Status of NICS User Fee (Brady Bill name checks)

We are preparing to get the NICS reg out by Wednesday -- last chance for alternative plans...jose

----- Forwarded by Jose Cerda III/OPD/EOP on 08/10/98 04:11 PM -----

**G. E. DeSeve**

08/10/98 04:10:43 PM

Record Type: Record

To: Bruce W. McConnell/OMB/EOP, Jose Cerda III/OPD/EOP  
cc: robert l. nabors/omb/eop, adrienne c. erbach/omb/eop, victoria wassmer/omb/eop  
Subject: Re: Status of NICS User Fee (Brady Bill name checks)

NICS. By all means go ahead. Check with Justice and Jose on the desired roll out strategy.

and

The Real Story Regarding Current Brady Attacks

Crime - Brady - NCS

They're Trying to Kill the Brady Law

- Despite its proven effectiveness, the gun lobby has launched a full scale effort to sabotage the Brady Law when the FBI takes responsibility for Brady background checks in November of this year. Two changes have been proposed which, if adopted, would effectively kill the Brady Law.

Not Permitting The FBI To Charge A Fee Would Help Kill The Brady Law

- While they lack the votes to directly repeal the Brady Law, the gun lobby has convinced some members of Congress to deny the FBI the money it needs to conduct background checks on gun buyers.
- Starting in November, the Brady Law will require the FBI to take over from state and local law enforcement agencies the processing of around 7 million requests for gun purchaser background checks annually. This new responsibility will require the FBI to deploy over 800 people conducting tens of thousands of gun purchaser background checks each day of the year at an annual cost of around \$100 million. Without the funds to cover these costs, the FBI will be unable to conduct the checks which keep guns out of the hand of felons, fugitives and other dangerous persons.
- School districts, day care centers, charities and other organizations that seek background checks on prospective teachers, child care workers, school bus drivers and other employees all pay the FBI a fee to cover the costs of those checks. Background check fees have been the primary funding source for Brady background checks conducted by state and local law enforcement officials over the last four years. Now, just four months before the FBI takes over responsibility for Brady background checks, the gun lobby wants to change the rules to give gun purchasers a special exemption from background check fees. A special exemption for background checks fee for gun purchasers would deny the FBI the money necessary to conduct gun purchaser background checks.
- Some have suggested that the Congress could provide the FBI the funds necessary to cover its costs in this area, *but no funds have been identified to meet this need.* In addition, because of the way the Brady law works, if its costs are covered by a direct appropriation rather than a fee, the FBI will have to handle background checks which would otherwise have been done by the states, and its personnel and other costs will increase accordingly. *There is no indication that the Congress is really going to cover the FBI's operating costs with a direct appropriation, so if the fee is killed, Brady background checks have effectively been killed.*

Why?

## Not Permitting The FBI To Keep Certain Records Would Help Kill The Brady Law

- The gun lobby also wants to sabotage the effectiveness of the computer system which will handle Brady background checks by making it impossible to prevent fraudulent submissions to the system from being caught.
- The gun lobby wants to force the FBI to immediately destroy records of these background checks which come back clean. Such a requirement would substantially undercut the reliability of the background check process. If the FBI is forced to immediately destroy records of the name the gun dealer sends in for a check, there will be no way for the FBI to audit its records to determine if false names are being submitted by a gun dealer. Furthermore, there will be no way to check whether gun dealers are running background checks for legitimate or illegitimate reasons.
- Forcing the FBI to destroy records necessary to the effective operation of the background check system (and necessary to preserving the privacy of those in the system) is merely another thinly veiled attempt to gut the Brady Law.

how does  
this work?



Crime-Brady law-NICS

and

crime - ammo clips



Jose Cerda III

08/07/98 06:57:35 PM

Record Type: Record

To: Michelle Crisci/WHO/EOP

cc: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Christa Robinson/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP

Subject: Wednesday Event

MC:

Per your request, here's some text for Rahm on what we're supposed to be doing next Wednesday. NB: While the Brady reg must go out next week, it's still unclear as to whether we can time its publication specifically on Wednesday. I have calls in to main DOJ to check w/them, but the timing is contingent on Freeh and his conversations with the House appropriators. Also, it's worth noting that California is not a Brady-- and won't generally be impacted by Brady II or the NICS.

state

BR/EK/CR: Let me know if I didn't get this right...jose iii

**Banning Large Capacity Military Magazines.** The Assault Weapons Ban that passed as part of the 1994 Crime Act prohibited the future import, manufacture and sale of large capacity magazines that held more than 10 rounds of ammunition. However, the Assault Weapons Ban also grandfathered the possession and sale of those clips already in existence. As a result, it is estimated that hundreds of thousands of large capacity clips continue to be sold -- and that some even continue to be imported. This is especially troubling for the Administration because this Spring we determined that firearms that can accept these magazines could not be legally imported. Thus, next Wednesday, the President will come out in support of legislation introduced by Senators Feinstein to close the "loophole" on the domestic sale of these clips.

**Implementing the Brady National Instant Criminal Background Check (NICS).** The President will also talk about the steps the Administration's is taking to implement and strengthen the Brady Law -- as well as condemn Congressional efforts to undermine it. Next week, we will publish a regulation to begin implementing the NICS system of computerized background checks. However, we won't be able to do make this system work if certain amendments promoted by the gun lobby -- and attached to the Justice Department's appropriations -- aren't defeated.



Jose Cerda III

07/23/98 02:32:50 PM

Record Type: Record

To: Michelle Crisci/WHO/EOP, Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP  
cc: Leanne A. Shimabukuro/OPD/EOP  
Subject: Firearms Follies

Rahm/Bruce/Elena:

The Child Safety Lock amendment to the Senate CJS approps bill, which failed Monday night, triggered a bit of an uproar that continued until late last night. In brief, 3 important amendments came up:

(1) Smith (of New Hampshire) offered an amendment complicating implementation of the Brady Insta-Check system. It passed by a vote of 69-31 and is discussed below.

(2) Sessions raised the juvie bill, but it was ultimately deferred. Both D's and R's agreed to try and negotiate a time agreement for sometime in September.

(3) Durbin and Chafee offered their CAP bill, but it was tabled on 69-31 vote. The CAP amendment did not include Treasury and DOJ's changes, and was amended to include NRA-supported language linking increased gun tracing with the increased prosecution of federal gun cases.

The Brady amendment is of particular interest, especially if we're thinking of doing an in August to announce our support for extending the 5-day waiting period. Generally, the amendment would:

(1) prohibit the FBI from retaining any records from background checks (the FBI currently plans to keep records of its checks for up to 18 months for audit purposes);

(2) prohibit the FBI from charging a fee for each check (the FBI currently plans to charge gun dealers about \$15 per check to cover the operating costs of Insta-Check); and

(3) create a federal cause of action for anyone aggrieved by a violation of this provision, as well as allow successful plaintiffs to be awarded damages and attorney's fees.

This provision undermines Brady in several ways. Most importantly, though, it will put us in the position of either underfunding the Insta-Check system (estimated at \$80 million per year) or robbing from other FBI crime accounts (i.e., terrorism) to fund Insta-Check. An even more likely result, however, is that the FBI will procure a separate appropriation for Insta-Check that will effectively cut other, less popular priorities were fighting for in the overall CJS bill (i.e., Legal Services). Additionally, a similar, and perhaps worse, version of this amendment may come up on the House CJS bill today or tomorrow.

To date, Democratic appropriators have not wanted to fight on this issue. The NRA has characterized the Brady user fee as a "gun tax" and the FBI's record-keeping requirement as "federal gun registration." Moreover, the Administration is a bit split on how to approach this

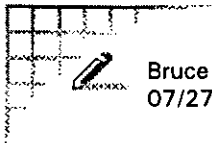
issue. OMB feels strongly that we don't have the money to cut a deal and ask for a separate FBI appropriation. Justice prefers being able to charge a fee, but will settle for a separate appropriation that comes out of somebody else's funds. The FBI will do whatever it takes to protect its budget, no matter what we decide. And Treasury is concerned that, in trying to cut a deal, we will look to save money and exempt pawnbrokers from Brady Checks (estimated to save \$30 million and strongly supported by many pro-gunners).

My recommendation, though it pains me to say this, is that we link our support for extending the 5-day waiting period to a CJS/Brady-based veto threat. We could accuse the R's of undermining Brady and of currying favor with the NRA; threaten to veto the CJS bill over this; and challenge Congress to strengthen -- not weaken -- Brady by extending the 5-day waiting period. As it stand, we are already likely to veto the CJS bill over Legal Services and census sampling -- and Brady is a much more popular issue. We could do this in early August just after Congress leaves, and also use it as an opportunity to criticize Congress' lack of progress on the overall budget.

In the meantime, I would also recommend that we get w/OMB, Leg. Affairs, DOJ and Treasury -- and discuss what a possible compromise might look like. Do we really need to charge \$15 per check? Does the FBI really need to hold on to all records for a year and a half? Etc...

Let me know your thoughts. Forgive the long e-mail,

Jose'



Bruce N. Reed  
07/27/98 08:24:57 AM

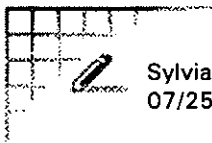
Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: Re: Impact of Senate CJS Appropriations Amendment on the NICS User Fee Proposal

----- Forwarded by Bruce N. Reed/OPD/EOP on 07/27/98 08:29 AM -----



Sylvia M. Mathews  
07/25/98 12:47:40 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc:

Subject: Re: Impact of Senate CJS Appropriations Amendment on the NICS User Fee Proposal

FYI. I had asked our folks to check on this. Your thoughts about timing? We could wait and see what happens on CJS and do it while POTUS is on vaca as news one day.

----- Forwarded by Sylvia M. Mathews/OMB/EOP on 07/25/98 12:46 PM -----

**Victoria Wassmer**

07/23/98 12:22:20 PM

Record Type: Record

To: Sylvia M. Mathews/OMB/EOP@EOP

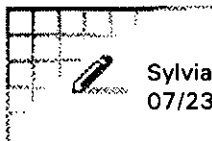
cc: See the distribution list at the bottom of this message

bcc:

Subject: Re: Impact of Senate CJS Appropriations Amendment on the NICS User Fee Proposal


I talked with DOJ and they have checked with their Legislative staff who believe that to publish the NICS user fee rule now would be inflammatory given the Senate CJS amendment. But, DOJ does not have adequate time for public comment on the proposal. Consequently, the answer to your question is that it would be wise to delay for a couple of weeks, but DOJ would need to publish this rule by the end of August at the latest in order to not jeopardize the NICS operational deadline of November 30th.

Sylvia M. Mathews



Sylvia M. Mathews  
07/23/98 11:28:32 AM

Record Type: Record

To: Victoria Wassmer/OMB/EOP@EOP  
cc: See the distribution list at the bottom of this message  
bcc:  
Subject: Re: Impact of Senate CJS Appropriations Amendment on the NICS User Fee Proposal 

What is the ramification if the proposed rule does not go out for another couple of weeks? (not that that is going to happen, I would just like to know if asked)

Victoria Wassmer

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**Victoria Wassmer**

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07/22/98 03:40:29 PM

Record Type: Record

To: Sylvia M. Mathews/OMB/EOP@EOP  
cc: Donald R. Arbuckle/OMB/EOP@EOP, Adrienne C. Erbach/OMB/EOP@EOP, Virginia A. Huth/OMB/EOP@EOP  
Subject: Impact of Senate CJS Appropriations Amendment on the NICS User Fee Proposal

NOTE TO: Sylvia Mathews  
THROUGH: Don Arbuckle  
FROM: Victoria Wassmer  
RE: Impact of Legislation on the NICS User Fee Proposed Rule

This is a note to follow-up on your question to Don regarding the legislative situation for the FBI's National Instant Criminal Background Check System (NICS) user fee proposed rule. The Senate CJS appropriations Bill yesterday adopted a Smith (R-NH) amendment, 69-31, that would prevent the FBI from charging a user fee to fund the implementation of NICS. During a brief debate on the floor, Senator Kohl (D-WI) charged the amendment as a veiled attempt to gut the Brady Law.

At this time we have no knowledge of a similar provision in the House version of CJS, although an amendment could be introduced on the floor. Given the prediction from Legislative Affairs that it is highly unlikely a CJS appropriations bill would be completed and out of conference before the end of September-early October, the OMB staff recommendation, and the DOJ preference, is for OIRA to clear the proposed rule for public comment as soon as practicable. This would still allow time for DOJ to change course in the fall before issuing the final rule, if necessary.

Please let me know if you have any further questions.

Crime-Brady Law - Legislation

and

" " - NICS



Jose Cerda III

07/28/98 04:09:23 PM

Record Type: Record

To: Michelle Crisci/WHO/EOP

cc: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP, Christa Robinson/OPD/EOP

Subject: Brady Announcement

MC:

Bruce asked me to forward this to Rahm. It's an outline of our suggested Brady event:

Proposed Brady Event -- Next week, the President could make the following 3-part announcement to strengthen the Brady law, which has stopped an estimated 242,000 prohibited persons from purchasing handguns:

(1) Announce final Brady Rule. The Administration could publish the proposed final rule implementing the National Insta-Check System (NICS). Under NICS, the FBI will implement a national computerized system of background checks and extend background checks to the purchase of all firearms (not just handguns). The rule would go into effect at the end of November.

(2) Call for an extension of Brady's 5-day waiting period. The President could call for a permanent extension of the Brady law's waiting period, which is set to expire when NICS is implemented in November. A national 5-day waiting period would continue to allow local law enforcement to review gun purchases before they are finalized -- further ensuring that prohibited persons do not buy firearms.

(3) Oppose Congressional efforts to undermine Brady. Senator Smith (R-NH) has offered an amendment to the Commerce-Justice-State (CJS) appropriations bill that would seriously undermine the Brady law. Smith's amendment would: prohibit the FBI from collecting a fee to pay for Brady background checks; require the immediate destruction of all background check records; and allow aggrieved persons to sue the government over these provisions. The President could threaten to veto the CJS bill over these provisions.

Crime-Brady - NCIS

person who has been determined not to be prohibited from owning a firearm; (2) the implementation of any tax or fee in connection with the implementation of 18 U.S.C. 922(t); provided, that any person aggrieved by a violation of this provision may bring an action in the federal district court for the district in which the person resides; provided, further, that any person who is successful with respect to any such action shall receive damages, punitive damages, and such other remedies as the court may determine to be appropriate, including a reasonable attorney's fee. The provisions of this section shall become effective one day after enactment.'

Mr. SMITH of New Hampshire. Mr. President, I ask for the yeas and nays on my amendment.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Amendment No. 3234 to Amendment No. 3233

Mr. SMITH of New Hampshire. Mr. President, I send a second-degree to my own amendment and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from New Hampshire [Mr. Smith] proposes an amendment numbered 3234 to amendment No. 3233.

Mr. SMITH of New Hampshire. I ask unanimous consent reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

In the pending amendment, strike all after the word ``SEC.'' and insert in lieu thereof the following:  
``Sec. .None of the funds appropriated pursuant to this Act or any other provision of law may be used for (1) any system to implement 18 U.S.C. 922(t) that does not require and result in the immediate destruction of all information, in any form whatsoever, submitted by or on behalf of any person who has been determined not to be prohibited from owning a firearm; (2) the implementation of any tax or fee in connection with the implementation of 18 U.S.C. 922(t); provided, that any person aggrieved by a violation of this provision may bring an action in the federal district court for the district in which the person resides; provided, further, that any person who is successful with respect to any such action shall receive damages, punitive damages, and such other remedies as the court may determine to be appropriate, including a reasonable attorney's fee. The provisions of this section shall become effective upon enactment.''

Mr. SMITH of New Hampshire. Mr. President, this amendment relates to

[[Page S8626]]

the Federal Bureau of Investigation's new National Instant Criminal Background Check System, otherwise known as the NICS, which is scheduled to take effect on December 1 of this year.

The so-called Brady Act had two provisions. One of those provisions was an interim provision, and the other was a permanent provision. In the interim provision is the waiting period for gun purchases that is now in effect but which will expire on November 29 of this year.

Now, the permanent provision, which takes effect on December 1, mandates--I emphasize the word ``mandate''--mandates the establishment

of a National Instant Criminal Background Check System, known as the NICS, which is to be operated by the Department of Justice.

The purpose of this National Instant Criminal Background Check is to prevent the purchase of guns by persons with criminal backgrounds who are prohibited otherwise from owning firearms. Under this new system, persons seeking to buy guns will be required to submit certain identifying information for clearance through this NICS.

Now, this raises serious concerns. I have concerns here that the FBI has stated that in cases where the NICS background check does not locate a disqualifying record, information about that individual, according to the language, will only be retained temporarily for audit purposes and will be destroyed after 18 months.

My question to my colleagues is this: Why hold on to this information for 18 months? These are innocent people who have no disqualifying record. They are entitled, under the second amendment, to own their firearms. I don't think any records ought to be kept for 18 minutes, let alone 18 months. There is simply no reason that the FBI needs to retain private information on law-abiding American citizens--in this case, gun owners--for any time at all, let alone for 18 months.

There are no legitimate audit purposes for retaining private information on law-abiding gun owners in the FBI. Now, we have seen abuses. We have seen files turning up from the FBI on individuals who happen to appear in the White House, and on and on and on. This is an opportunity to abuse the privacy rights of millions of American gun owners. It is simply wrong if you didn't do anything. If your record is clear and there is no disqualifying information, then there should be no record kept, period.

I have heard a lot from law-abiding gun owners in the country who view this FBI gun owners ID record retention scheme as an ominous step toward national gun registration, which I believe is probably the ultimate goal here. Justifiably, in my view, they see this plan as a threat to their second amendment right under the Constitution of the United States. I agree with them. I feel deeply about this. I emphasize again that FBI files have been abused, and to keep, for any period of time--especially as long as 18 months--files on people who have done nothing wrong, in the FBI, is wrong.

Stated simply, my legislation will put a stop to the FBI's plan to keep records of private identifying information on law-abiding citizens who buy guns. My amendment will require the immediate destruction of all information submitted by or on behalf of any person who has been determined not to be prohibited from owning a firearm.

Mr. President, my amendment has another purpose as well. The Department of Justice has proposed to charge fees--a gun tax, if you will--for the NICS, using the authority of a provision in the 1991 Commerce, Justice, State Appropriations Act.

As Appropriations Committee Chairman Stevens noted when he introduced the No Gun Tax Act of 1998 earlier this year, the 1991 Appropriations Act was passed 2 years before the law establishing the National Instant Criminal Background Check System.

Moreover, as Chairman Stevens properly observed, the 1991 act "was never intended to allow fees under the NICS program." "This limited 1991 authority," Senator Stevens noted, "allowed fees only to process fingerprint identification records and name checks for noncriminal justice \* \* \* and licensing purposes." "It was not intended," concluded Senator Stevens, "to apply to programs like the NICS program, which checks the criminal background of purchasers and has nothing to do with licensing."

In introducing his No Gun Tax Act of 1998, which I was honored to cosponsor, Senator Stevens also aptly observed that, "The imposition of a fee would encourage some to try to obtain firearms on the black market." "No matter how you feel about gun control," Senator Stevens said, "we should all do what we can to make sure that the new background check system works."

My amendment would prevent the use of funds by the Department of



Justice for the ``implementation of any tax or fee'' in connection with the implementation of this new National Instant Criminal Background Check System.

Under the second amendment, law-abiding American citizens have the right to own a firearm. And if the Congress, in its wisdom, decides that we are going to have this background check and a person is not disqualified, he or she should not have to pay for it. It is their constitutional right to have a weapon if they are honest, law-abiding citizens, and they should not have to pay a fee because somebody said they needed to check to find out if they were honest people or not. It is wrong. This is ``big brother,'' Mr. President, and it is wrong.

So my amendment would create a civil cause of action, as well, on behalf of any person who is aggrieved by a violation of this act, which can be brought in the Federal district court for the district in which the person resides. So if your rights are violated, then you have a right to take this matter to court, as any citizen would. If successful, such a lawsuit would entitle the gun owner wronged by a violation of the provisions of my amendment to an award of damages and any other remedies deemed to be appropriate by the court, including attorney's fees.

We must not allow a trampling of the second amendment. We must not allow fees to be charged to people who have done nothing except own a firearm and be legal, law-abiding citizens. They should not have to pay a fee. I hope this amendment will have broad support. The sound operation of the new National Instant Criminal Background Check requires neither the retention of ID records on law-abiding gun purchasers nor the imposition of a user-fee gun tax.

So, in conclusion, let me just say, No. 1, my amendment says if the background check is conducted, no record is kept if you have done nothing wrong, you are a law-abiding person, and you are entitled to that gun. No record is kept, period. Secondly, no fee is charged. Thirdly, if records are kept in violation of this act, then you have a remedy in court.

That is the amendment, Mr. President. So I say to my colleagues, if you support the second amendment and the rights of law-abiding people not to be harassed, you will support my amendment. We have seen harassment by the IRS, and this will invite harassment by the FBI if we do not stop this process. How many files will be retained? What information will be used on these people in these files? When I think of the FBI and I think of a file held in the FBI on somebody, I think of someone perhaps doing something wrong or being accused of doing something wrong. These people have done nothing wrong, except own a gun. That is not wrong; that is legal under the Constitution of the United States.

Mr. President, I ask for the yeas and nays on my amendment.

The PRESIDING OFFICER (Mr. Gorton). Is there a sufficient second?

There is not a sufficient second.

Mr. GREGG. Mr. President, is the Senator asking for the yeas and nays on the second-degree amendment?

Mr. SMITH of New Hampshire. Yes.

Mr. GREGG. You are going to want yeas and nays on both?

Mr. SMITH of New Hampshire. The second-degree amendment will be the first one voted on. I would be happy to vitiate them on the second vote, but I need to have a vote on the second-degree amendment.

Again, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. Under the previous order, we will go back to the Boxer amendment.

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Mrs. BOXER. Mr. President, Senator Biden has sent word over that his

**NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM**

**REMARKS OF ELEANOR D. ACHESON  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF POLICY DEVELOPMENT  
U.S. DEPARTMENT OF JUSTICE  
CONSULTATION WITH LAW ENFORCEMENT  
CONCERNING THE BRADY LAW  
U.S. DEPARTMENT OF THE TREASURY  
JULY 16, 1997**

**I. INTRODUCTION -- THE NICS IS ON SCHEDULE.**

- The Brady Act requires the National Instant Criminal Background Check System, known by the acronym "NICS" to be operative by November 30, 1998. The Justice Department, with the FBI at the forefront, has been working in close cooperation with the ATF to develop and implement the NICS system; and we are on schedule to meet the November 30, 1998 deadline. When it goes on-line, the NICS, which will draw principally on existing federal and state records systems, will have the capability to search state and federal files for information on persons prohibited from possessing a firearm -- within 30 seconds.

**II. THE STATES WILL PLAY A VITAL ROLE IN THE NICS.**

- The NICS builds on the tradition of decentralized maintenance of criminal history records by state and local entities. The states, through the Brady Act Task Group, have played an important role in developing the design of the NICS, and the states will have a primary role in collecting, storing, and disseminating criminal history information.

### III. HOW THE NICS WORKS.

- The NICS will operate as follows: When a person goes to a licensed firearms dealer to buy a gun -- both handguns and long guns will be covered by the permit provisions of the Act -- the dealer will call a point of contact (POC), who in most cases will be a state law enforcement officer. The dealer will provide the POC with the prospective purchaser's identifying information, and the POC will check whether the prospective gun buyer is prohibited under state and local records from getting a gun either because the person has a criminal history or falls within another prohibited category.
- If the state and local check does not disclose any disqualifying information, the second step of the NICS check looks at national databases that are already in existence. The most important of these is the Interstate Identification Index (III), an ongoing federal/state initiative, which contains federal criminal records and provides leads to more than 25 million state and federal criminal history records. Additional databases are the National Criminal Information Center (NCIC) Hot Files, which include information on persons prohibited from obtaining a firearm because they are subject to a protective order, fugitives from justice, or felons under a deportation order. In addition to these databases, the NICS will also check the "NICS Index," which will contain records that are provided by federal agencies on the other categories of persons prohibited by the Gun Control Act from obtaining a firearm, such as persons who have renounced their citizenship, illegal aliens, or unlawful users of a controlled substance.

- Because the NICS will rely heavily on information maintained by the states and because state records on the categories of persons prohibited from possessing firearms are not complete, the automated system will not always provide definitive information within 30 seconds on whether a person is prohibited from purchasing a gun. In this case, further research by the POC will be required. For example, state criminal history records may indicate that the person has been convicted of a crime, but local information may be needed to determine whether the crime is a felony. In such cases, the POC typically will be able to determine a prospective purchaser's eligibility within a few hours. The Justice Department fully expects that the vast majority of NICS checks will be performed within 30 seconds.

#### **IV. UPDATED CRIMINAL HISTORY RECORDS ARE ESSENTIAL.**

- Ultimately, the NICS system will only be as good as the state criminal history records on which it depends. Therefore, it is essential to improve the accuracy, completeness, and automation of state criminal history records. To assist the states in accomplishing this goal, the Justice Department has already distributed \$112 million to the states to help them improve their criminal history records under the National Criminal History Improvement Program (NCHIP). At the national level, the Justice Department is working with the states to make the III even more comprehensive. Presently, thirty-two states participate in the III, and the majority of remaining states will be part of the III by the end of 1998.

**V. IT IS CRUCIAL FOR STATES TO DESIGNATE POCs.**

- State interests will best be served when the states designate state officials to serve as POCs for the NICS system, although the FBI will serve as POC for any state that declines to designate a state POC. When states provide POCs, NICS checks will be more up to date, accurate, and efficient. The state POCs will likely have access to state and local records that are unavailable to a federal POC, and the state POCs will have a greater familiarity with state and local records in their jurisdiction and can interpret these records more easily than a federal POC. Moreover, it is greatly to the states' advantage to designate a state POC, because the states will have greater control in determining who is barred from obtaining a firearm within the jurisdiction, and the state POCs will have the ability to enforce state laws that prohibit additional categories of individuals from obtaining a firearm.

**VI. CONCLUSION -- THE IMPORTANCE OF CONTINUED STATE PARTICIPATION.**

- The Justice Department, the FBI, ATF, and many other federal, state, and local law enforcement officials are engaged in extensive efforts to make the NICS as effective and efficient as possible when it goes on-line next year. The participation of state and local law enforcement in designing the NICS thus far has been essential and the continued input of state and local law enforcement is needed to make the NICS system live up to its potential. In particular, state and local enforcement should encourage state criminal justice agencies to designate state POCs and update criminal history records. The NICS will be more effective and less burdensome than the interim Brady

system, which already prevents approximately 6,600 felons and other prohibited persons from purchasing handguns each month. The Brady Act has already reduced crime and saved lives. With the continued valuable participation and support of the states, the NICS will be even more effective in preventing prohibited persons from obtaining firearms and, thus, reducing crime, saving lives of law enforcement and civilians alike and making our communities safer.