The 10-day waiting period is reasonable

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By John J. Donohue

Rarely will the conservative majority on the Supreme Court issue a decision so objectionable that it draws harsh rebukes from sitting conservative, Reagan-appointed federal appellate court judges; but 2008’s Heller decision, creating an individual constitutional right to keep and bear arms, elicited just that. Judges Richard Posner and Harvie Wilkinson strongly criticized the decision as an unwarranted “new job” of unprinciplined rhetoric that violated established principles of constitutional interpretation, federalism, and the proper role of the judiciary in dealing with issues best left to the political branches. The Aug 22 decision of a federal district court judge in California, who ruled that California’s 10-day waiting period unconstitutionally burdens the Second Amendment rights of existing gun owners shows that Posner and Wilkinson had it right (Silvester v. Harris, E.D. Cal. 2014). The damage should be limited, however, since the decision will hopefully be reversed on appeal.

Continued from page 1.

With 30,000 gun deaths per year and over 350,000 shooting injuries in the U.S. — a rate dramatically higher than in any other developed nation — it is quite clear why the state of California has a legitimate interest in trying to develop a set of regulations that can reduce the high number of gun homicide and suicides. Federal law prohibits gun purchases by felons, drug addicts, certain individuals with mental illness, and those who engage in violent domestic abuse. California uses its 10-day waiting period both to aid in the cooling-off of hot heads or situationally depressed individuals and to conduct an investigation designed to weed out the unlawful purchasers. Obviously, some lines have to be drawn: a longer waiting period is more likely to reduce homicides and suicides induced by rage or depression as well as help screen out more unlawful purchasers at the cost of delaying the lawful purchasers from getting new guns. Ten states have waiting periods, and California’s waiting period — in effect since 1991 for over 20 years — is certainly a reasonable and rational compromise that balances the interest of the public and gun purchasers.

The concern expressed by Posner and Wilkinson, that special interests backed by gun industry money would be able to bleed governments and crowd federal courts with suits challenging reasonable gun regulations, has come to pass. The judge in Silvester argued that this 10-day waiting period should not apply uniformly to those who already have guns since the rationale for a cooling-off period and the need to verify their status as lawful purchasers disappears for this category of purchasers. But while the benefits of the waiting period are indeed likely to be lower for those who already possess guns, they are clearly not zero. Someone with a handgun who wants to shoot up a mall or take out an enemy may feel that a more accurate long gun or a more dangerous semi-automatic weapon will better facilitate that purpose. Conversely, the recent murder-suicide in Santa Barbara was unleashed by someone who specifically felt he needed two handguns to ensure he would succeed in committing suicide. Moreover, the judge utterly failed to understand that even if the benefits of the waiting period were diminished for those who currently owned guns, the burden of waiting these individuals wait a few days is also commensurately reduced, since they already have guns. That cannot be any way for defense or other lawful purpose.

The judge also was cavalier in dismissing the concern that his ruling would facilitate the acquisition of guns by unlawful purchasers because the state can simply track down the purchasers and retrieve the weapons. Such gun retrievals are inherently risky and expensive to undertake. Indeed, there are currently 20,000 names on California’s list of current gun owners who should relinquish their weapons because of one recent convictions or mental illness. It costs the state millions to track down these illegal owners, and it will take years to deal with the current backlog, which will only worsen if the waiting period’s elimination expands the number of new criminal purchasers. The wait period is designed precisely to stop the guns from getting into the wrong hands, and it is a cold comfort that California (unlike most other states) has a costly and underfunded program to get the guns back. The trade-off of delaying a current gun owner wait a bit longer to add to his arsenal versus having a criminal loose with more weaponry for many years clearly cuts in favor of having a minor, temporary inconvenience to avoid a major danger of dramatically longer duration.

The judge in Silvester was troubled by a “burden” that is really too minor to acknowledge and then failed to understand that complicating the process of investigation of new gun purchases will add expense and diminish the effectiveness of California’s gun regulation. Oddly, the judge seemed to think that unless the state could show that waiting periods were in effect back in 1971, the regulation must fall. This notion is absurd. As the state noted, the need for a cooling-off period for new Americans was far less back in 1971 because the opportunity to quickly buy a gun was simply not available for vast swaths of the country at that time, nor could the smaller governments of that time be expected to implement such regulations. Moreover, the nature and lethality of modern firearms is dramatically different from guns available at the time of country’s founding so whatever regulations were optimal at that point are not likely to define the scope of optimality today. Indeed, the country had no penal system or modern police force in 1791 so the entire need for self-protection was entirely different from what exists in modern America.

In striking down the 10-day waiting period for current gun owners, the judge stated that he was applying only intermediate scrutiny to the assessment. In my view, the judge applied the strictest of scrutiny to a regulation that was far from any core purpose of the Second Amendment. Few time, place, or manner restrictions on the exercise of First Amendment rights, which have long been viewed as wholly lawful, could withstand the type of overzealous scrutiny that the judge in Silvester directed at California’s waiting period. Recall that the Supreme Court stated in its 1939 decision in U.S. v. Miller that the “obvious purposes” of the Second Amendment was “to assure the continuation and render possible the effectiveness of state militias and that it "must be interpreted and applied with that end in view." Even under the Heller expansion, we must ask “what” constitutional interest is imperiled when gun owners have to wait ten days to secure their latest new firearm? Might the well-regulated militia be needed to move into action sometime in the next 10 days? What if our California resident suspects a criminal is coming soon? National Rifle Association darling John Lott has repeatedly assured us that 99 percent of the time, all one needs to do is brandish a gun to cause a criminal to desist or surrender? If brandishing will do the trick 99 percent of the time, and the gun owner can still pull the trigger on the would-be gun until the end of the waiting period brings the welcome relief of a new gun, we talking about the most minor of temporary burdens. The idea that the Second Amendment requires a state to do anything that imposes trivial inconveniences on existing gun owners is certainly a welcome thought for gun sellers but it can scarcely be defended as a matter of constitutional law or wise policy.

Former U.S. Supreme Court Chief Justice Warren Burger, a conservative, noted in 1991 that the Second Amendment: “has been the subject of one of the greatest pieces of fraud, I repeat the word ‘fraud’, on the American public by special interest groups that I have ever seen in my lifetime… a well-regulated militia — if the militia, which was going to be the state arm, was going to be well regulated, why shouldn’t 16-, 17-, and 18-or any other age persons be regulated in the use of arms the way an automobile is regulated? It’s got to be registered, that you can’t just deal with it at all. Someone asked me recently if I was for or against a bill that was pending in Congress calling for five days’ waiting period. And I said, ‘Yes, I’m very much against it, it should be thirty days’.”

Americans overwhelmingly want to keep guns out of the hands of prohibited purchasers and background checks with a reasonable period of time for investigating purchasers are essential to achieve that goal. The people of California have spoken on the issue of a 10-day waiting period for gun purchases and their will should not be stymied by turning the Second Amendment into some bullet-proof obstacle to reasonable gun control.

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