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Brady Center lawsuit to use “smart” gun mandate to trigger handgun ban in New Jersey

By David Kopel

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Early this month [I wrote about](#) New Jersey’s “smart” gun mandate. The statute bans the sale of all ordinary handguns in New Jersey within 30 months of the date when “at least one manufacturer has delivered at least one production model of a personalized handgun to a registered or licensed wholesale or retail dealer in New Jersey or any other state.” N.J. Stats. sect. [2C:58-2.2](#) et seq. A so-called “smart” gun is one with some kind of technology such that only the owner is supposed to be able to fire it. As detailed in my previous post, American police and other citizens appear to have very little interest in such guns, in part because of reliability problems.

The 30-month countdown to the ban on handgun sale is triggered by a report from the New Jersey Attorney General:

2. a. On the first day of the sixth month following the effective date of P.L.2002, c.130 (C.2C:58-2.2 et al.), the Attorney General shall report to the Governor and the Legislature as to the availability of personalized handguns for retail sales purposes. If the Attorney General determines that personalized handguns are not available for retail sales purposes, the Attorney General, every six months thereafter, shall report to the Governor and the Legislature as to the availability of personalized handguns for retail sales purposes until such time as the Attorney General shall deem that personalized handguns are available for retail sales purposes and so report to the Governor and the Legislature. In making this determination, the Attorney General may consult with any other neutral and detached public or private entity that may have useful information and expertise to assist in determining whether, through performance and other relevant indicators, a handgun meets the statutory definition of a personalized handgun set forth in N.J.S.2C:39-1.

b. For the purposes of this section, personalized handguns shall be deemed to be available for retail sales purposes if at least one manufacturer has delivered at least one production model of a personalized handgun to a registered or licensed wholesale or retail dealer in New Jersey or any other state. As used in this subsection, the term “production model” shall mean a handgun which is the product of a regular manufacturing process that produces multiple copies of the same handgun model, and shall not include a prototype or other unique specimen that is offered for sale.

N.J. Stats. sect. [2C:58-2.3](#). *See also* sects. [2C-58-2.4](#) (on the first day of the 24th month after the AG report, Superintendent of State Police must publish a list of “personalized gun” models); [2C:58-2.5](#) (as of the first day of the sixth month after publication of Superintendent’s list, no firearms retailer may sell or import any normal handgun).

Earlier this week, the Brady Campaign filed a lawsuit seeking a writ of mandamus to compel the New Jersey Attorney General to issue the aforesaid report, declaring that the statutory conditions have been met. This would initiate the countdown to the prohibition of the sale of normal handguns. The [complaint](#) alleges that the New Jersey Attorney General has never issued the reports, except for a possible report in 2003 which the Attorney General is presently unable to find. The complaint further alleges that the statutory condition for the handgun ban has been met, since for at least a brief time, one retailer in Maryland and one in California had such a gun in their inventory. The suit was filed in Superior Court, the New Jersey trial court of general jurisdiction.

Unlike in almost all other states, the Attorney General in New Jersey is not elected by the people, but is instead appointed by the Governor. The same is true for District Attorneys. Accordingly, neither the Attorney General nor the District Attorneys are directly accountable to the people.

The Brady claims that the Attorney General has a nondiscretionary duty to produce the reports seems at least arguably plausible. However, it might be that only the Governor or the Legislature have standing to seek a writ of mandamus to compel the reports, since they are the entities for whom the reports are to be written, according to the statute.

The statutory definition of what is called a “personalized handgun” does appear to leave the Attorney General with some discretion in deciding whether a particular gun is sufficiently reliable:

dd. “Personalized handgun” means a handgun which incorporates within its design, and as part of its original manufacture, technology which automatically limits its operational use and which cannot be readily deactivated, so that it may only be fired by an authorized or recognized user. The technology limiting the handgun’s operational use may include, but not be limited to: radio frequency tagging, touch memory, remote control, fingerprint, magnetic encoding and other automatic user identification systems utilizing biometric, mechanical or electronic systems. No make or model of a handgun shall be deemed to be a “personalized handgun” unless the Attorney General has determined, through testing or other reasonable means, that the handgun meets any reliability standards that the manufacturer may require for its commercially available handguns that are not personalized or, if the manufacturer has no such reliability standards, the handgun meets the reliability standards generally used in the industry for commercially available handguns.

N.J. Stats. sect. [2C-39-1\(dd\)](#). [Armatix](#), the German manufacturer whose “smart” handgun are at issue, makes a non-”personalized” version of its handgun, so the statute appears to give Armatix carte blanche to define its reliability standard as low as it wants. Absent relying on Armatix’s obvious self-interest, the Attorney General must decide whether “the handgun meets the reliability standards generally used in the industry for commercially available handguns.” The

problem is that there are no such industry standards. [Voluntary firearms industry standards](#) are set by the Sporting Arms and Ammunition Manufacturers Institute (SAAMI), in cooperation with the American National Standards Institute (ANSI). The SAAMI/ANSI standards cover topics such as how much pressure ammunition is allowed to create in the firing chamber, but do not cover how often a firearm is supposed to function properly when the trigger is pressed.

The lawsuit represents the Brady Center's return to its founding policies from the mid-1970s. At the time, the group called itself the National Council to Control Handguns. In 1976, the group supported and donated to the backers of [a Massachusetts ballot initiative to confiscate all handguns](#). (The initiative was defeated 69%-31%, in part because of staunch opposition from police.) That same year, the group's leader, Nelson "Pete" Shields [explained his national strategy](#): "The first problem is to slow down the number of handguns being produced and sold in this country. The second problem is to get handguns registered. The final problem is to make possession of all handguns and all handgun ammunition—except for the military, police, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal." (Richard Harris, "A Reporter at Large: Handguns," *New Yorker*, July 26, 1976, p. 58.)

Should the Brady Campaign succeed in its lawsuit, the result would be slightly different from what Shields envisioned. There would be a ban on prospective sales, but not confiscation of handguns which are already owned. There would be no exemption for sporting clubs or collectors. Not all handguns would be banned, since "smart" guns would still be allowed, so the ban would only apply to somewhat more than 99.9999% of handguns.

The Armatix handgun is sold in Europe, [costs \\$1,800](#), and is available only in .22 caliber. For self-defense, .22 is generally considered better than nothing, but as having far too little stopping power to be a good choice. The gun is supposed to work only if it is very close to a special watch that the owner is wearing, but there could be another disabling mechanism. Interestingly, Armatix has [filed a patent for a remote "kill switch"](#) for gun. This would mean that the gun could be disabled without the owner's consent, by whoever had access to a kill switch, and including by satellite. This introduces a reliability problem not faced by normal handguns.

Banning all handgun sales except for a .22 caliber \$1800 model almost certainly violates *District of Columbia v. Heller*. In New Jersey, "the remedy [of mandamus] must be denied where equity or paramount public interest so dictates." *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294, 302 (1953). If the issuance of a writ of mandamus would initiate a process which would result in violation of "the supreme Law of the Land" (U.S. Const. art. VI), the New Jersey Superior Court might consider the *Garrou* rule to be applicable.

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