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### Cease Fire: Win-Win Strategy on Gun Policy for the Obama Administration

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# Cease Fire: A “Win-Win” Strategy on Gun Policy for the Obama Administration

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Allen Rostron\*

In the months leading up to Election Day in 2008, Americans faced a steady stream of gloomy economic news. Around the world, stock markets tumbled. Leading companies in the financial sector collapsed or were on the brink of ruin, saved only by massive government bailouts. Most industries experienced significant slowdowns in sales, if not staggering drops. Sales of new homes, for example, plunged from their already low levels,<sup>1</sup> and automakers suffered their worst sales slump since World War II.<sup>2</sup> Shoppers “went into hibernation,” according to the National Retail Federation’s chief economist.<sup>3</sup>

Amidst all the trouble, one industry had reason to celebrate. Sales of firearms increased significantly in the weeks surrounding the election, driven by fears that the political success of Barack Obama and other Democratic candidates would eventually bring tighter legal restrictions on guns.<sup>4</sup> All over the country, gun dealers reported that their sales were at record high levels.<sup>5</sup> “I’ve been in business for 12 years, and I was here for Y2K, September 11, Katrina,” said a Virginia gun store owner. “And all of those were big events, and we did notice a spike in business, but nothing on the order of what we are seeing right now.”<sup>6</sup> Customers flocked to buy guns because they believed Obama is a “gun-snatcher,” explained a Texas dealer, and “[h]e wants to take our guns from us and create a socialist society policed by his own police force.”<sup>7</sup> Data on background checks of those seeking to purchase firearms confirmed the anecdotal accounts, with the Federal Bureau of Investigation reporting that the number of checks conducted in the

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<sup>1</sup> See Michael M. Grynbaum, *Outlook Grows More Dire for Housing Market*, N.Y. TIMES, Nov. 26, 2008, at A4.

<sup>2</sup> Robert Schoenberger, *Auto Sales Are Worst Since WWII; No Maker Spared; Next Move; Start Year-End Clearing*, PLAIN DEALER (Cleveland), Nov. 4, 2008, at C1.

<sup>3</sup> Ylan Q. Mui, *Consumers Not Sold on Sales; Retailers Slash Prices but Cannot Stop Sector’s Steep Slide into the Holidays*, WASH. POST, Nov. 15, 2008, at D1.

<sup>4</sup> Kirk Johnson, *Buying Guns for Fear of Losing the Right to Bear Them*, N.Y. TIMES, Nov. 7, 2008, at A20.

<sup>5</sup> See Associated Press, *Fearing New Laws, Gun Enthusiasts Are Loading Up; Stores Report Sales Jump Related to Election*, RICHMOND TIMES DISPATCH (Va.), Nov. 8, 2008, at A4.

<sup>6</sup> Kevin Bohn, *Gun Sales Surge After Obama’s Election*, CNN.COM, Nov. 11, 2008, <http://www.cnn.com/2008/CRIME/11/11/obama.gun.sales/index.html>, available at LEXIS, CNN COM File.

<sup>7</sup> Johnson, *supra* note 4 (quoting Jim Pruett).

first week of November 2008 was up almost fifty percent compared to the same week of the previous year.<sup>8</sup>

While generating a quick surge in sales for the gun industry, the 2008 election results may have a more significant and complicated effect on the controversial policy issues surrounding guns and how they should be regulated. After several years in which momentum generally swung strongly in favor of the National Rifle Association (NRA) and its allies, the 2008 election gave a much-needed boost to gun control advocates, providing a valuable opportunity to reassess the issue and its future. Should the Obama administration, bolstered by increased Democratic majorities in both houses of Congress, make an aggressive push for new legislation tightening legal restrictions on firearms, move in the opposite direction and adopt a more gun-friendly stance, or perhaps just do nothing and hope that the issue receives as little attention as possible?

This article lays out a strategic approach to the gun issue for the Obama administration. As a candidate, Obama promised to try to overcome old dividing lines and partisan bickering. The gun issue gives him an excellent opportunity to translate that rhetoric into action. Gun control has been one of the most bitterly controversial political and cultural issues in recent decades, but despite the hostility and distrust surrounding it, the issue offers substantial room for building consensus and forging compromises. President Obama should announce that he wants to see real progress made on improving America's laws regulating firearms, but that he will not support any proposal unless it significantly enhances gun rights as well as gun control. In other words, Obama should call for legislators and interest groups on both sides of the issue to work together on combinations of measures that promote the socially beneficial use of guns while reducing their harmful misuse.

This approach emphasizes compromise, not only in the sense of brokering deals between gun control advocates and gun rights supporters, but also in the sense of taking a middle path between pursuing ideal policies and paying attention only to pragmatic political considerations. The Obama administration cannot ignore political realities, but at the same time it should not be ruled exclusively by them. Its approach must blend principle with practicality. Supporting "win-win" measures that bolster gun control and gun rights would enable Obama to make some constructive steps towards improving law and policy concerning guns, while minimizing the political risk to his administration and party and reducing the bitterness of the gun debate.

These prescriptions for the future cannot be fairly assessed without a clear understanding of the past and how we arrived at the present state of affairs. This Article therefore begins with an overview of the gun issue and a review of recent major developments in the political war over guns. In particular, the Article examines and draws lessons from the role played by guns in the 2008 presidential campaigns and elections. Although the NRA de-

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<sup>8</sup> Bohn, *supra* note 6.

voted enormous resources to convincing gun owners that Barack Obama posed a serious threat, Obama managed to downplay the issue, neither emphasizing nor repudiating his support for reasonable gun control measures. After looking back at how the gun issue has played out in recent years, the Article looks forward and lays out a strategy for the Obama administration. Rather than ducking the issue or just continuing the partisan squabbles that have accomplished little in the past, the Obama administration should declare that it plans to move forward with proposals that simultaneously seek to reduce misuse of guns while protecting their lawful, responsible use. The Article describes examples of the sorts of proposals from each side of the controversy that could be included in new firearms legislation. Learning from the pitfalls and building on achievements of the past, the Obama administration can make progress on the gun issue with a strategy that emphasizes the compatibility of gun rights and sensible gun control.

### I. GUNS IN AMERICA

Americans have a lot of guns. Studies suggest that there are currently about 270 million firearms in civilian hands in the United States,<sup>9</sup> and that approximately thirty-five to forty percent of households have at least one gun.<sup>10</sup>

The number of crimes, injuries, and deaths involving guns has decreased significantly from peak levels reached in the early 1990s, but it remains high. The Department of Justice estimates that each year in America about 500,000 victims of violent crimes will face an offender armed with a gun.<sup>11</sup> Each year, about 30,000 people in the United States die from homicides, suicides, and accidents with guns,<sup>12</sup> and about 70,000 suffer non-fatal injuries from being shot.<sup>13</sup> These numbers put the United States far above other similarly developed countries in rates of firearm deaths, injuries, and crimes.<sup>14</sup> The total social cost America pays for misuse of firearms has been estimated at \$100 billion per year.<sup>15</sup>

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<sup>9</sup> See SMALL ARMS SURVEY, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 39 (2007).

<sup>10</sup> See L. Hepburn et al., *The U.S. Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJ. PREVENTION 15, 15–18 (2007), available at <http://injuryprevention.bmj.com/cgi/content/full/13/1/15>.

<sup>11</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES tbl.66 (2008).

<sup>12</sup> NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTR. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., WISQAR INJURY MORTALITY REPORTS 2005, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html) (last visited May 10, 2009) [hereinafter MORTALITY REPORTS].

<sup>13</sup> NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTR. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., WISQAR NONFATAL INJURY REPORTS 2007, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last visited May 10, 2009) [hereinafter NONFATAL INJURY REPORTS].

<sup>14</sup> See David Hemenway, *The Public Health Approach to Reducing Firearm Injury and Violence*, 17 STAN. L. & POL'Y REV. 635, 635 (2006).

<sup>15</sup> See PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS 115 (2000).

Of course, guns can be used to prevent crimes as well as to commit them. Law enforcement officers and private citizens use guns to kill several hundred criminals per year and to wound over a thousand more.<sup>16</sup> In many other instances, armed citizens deter or interrupt crimes without firing a shot. The annual number of such defensive uses of guns by private citizens is a matter of great controversy, with government survey data suggesting the number is less than 100,000 per year and some researchers contending the number could be as high as 2.5 million per year.<sup>17</sup> Likewise, an enormously complex controversy exists over how legal restrictions on guns affect crime rates, with some statistical analyses indicating that crime decreases when laws make it easier for people to carry concealed guns, and other studies reaching opposite conclusions.<sup>18</sup>

Guns are, without a doubt, one of America's most intensely divisive cultural issues. But when it comes to specific positions and policies, there is actually a high level of consensus. Public opinion polls consistently show that large majorities of Americans favor tougher gun control laws but also believe the right to have a gun should be protected.<sup>19</sup> Despite the widespread agreement on these basic points, Americans are sharply divided in their fundamental feelings about guns, with some cherishing guns as symbols of traditional values, freedom, and rugged individualism, and others associating guns with fear, mistrust, and death.<sup>20</sup> As it charts a course for policy on guns, the Obama administration will have to deal with this complex emotional atmosphere surrounding the issue.

## II. POLITICAL BATTLES OVER GUNS

The Obama administration will have to deal also with the sense of frustration and despair generated by years of incessant political strife over guns. At the same time, President Obama can draw some encouraging and important lessons from the way the gun issue played out in the 2008 campaigns and elections.

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<sup>16</sup> See MORALITY REPORTS, *supra* note 12; NONFATAL INJURY REPORTS, *supra* note 13.

<sup>17</sup> See David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1430–32 (1997).

<sup>18</sup> Compare JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (2d ed. 2000), with Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003).

<sup>19</sup> See, e.g., Press Release, Harris Interactive, Second Amendment Supreme Court Ruling Matches with Public Opinion from the Harris Poll (June 26, 2008), available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=922](http://www.harrisinteractive.com/harris_poll/index.asp?PID=922); Press Release, Jeffrey M. Jones, Americans in Agreement with Supreme Court on Gun Rights; Nearly Three in Four Say Second Amendment Guarantees Right of Americans to Own Guns (June 26, 2008), available at <http://www.gallup.com/poll/108394/Americans-Agreement-Supreme-Court-Gun-Rights.aspx>.

<sup>20</sup> See Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3 (2003); Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53 (2002).

For years, conservative politicians have been successfully exploiting guns as a cultural “values” issue. As Senator Jim Inhofe famously quipped, the Republican recipe for electoral success has been “God, gays, and guns.”<sup>21</sup> Gun control was a losing issue, said the conventional wisdom, and Democrats shied away from it. The federal ban on assault weapons expired in 2004, and efforts to renew it were unsuccessful.<sup>22</sup> A year later, Congress enacted legislation giving the gun industry special immunity from tort liability.<sup>23</sup> After Hurricane Katrina struck the Gulf Coast, the NRA achieved enactment of federal and state laws to prohibit confiscation of guns during future emergencies.<sup>24</sup>

The tide turned against gun control in the courts as well. In March 2007, the U.S. Court of Appeals for the D.C. Circuit issued a dramatic decision that broadly construed the Second Amendment right to keep and bear arms and struck down the District of Columbia’s laws banning handguns and requiring other guns to be kept unloaded and locked up in the owner’s home.<sup>25</sup>

Just a month later, in April 2007, tragic events once again brought national attention to the gun issue, when a student at Virginia Tech used two pistols to murder thirty-two people in the deadliest shooting spree in American history.<sup>26</sup> The nation’s response to the Virginia Tech episode seemed to be, more than anything else, one of resignation. These sorts of tragedies had occurred in the past, triggering a lot of talk and plenty of proposals, but no real constructive changes. Like many Democratic politicians, much of the American public had become jaded and lost hope that progress could ever be made on the issue.

While the gun control movement struggled to gain traction, the NRA and its allies were in a position of strength and actually faced a danger of being hampered by their own success. Special interest groups always have a complicated relationship with success. To attract support, a cause must look like it has a chance to achieve its objectives, because few want to waste their efforts on an endeavor that is certain to fail. But on the other hand, an organization can be so successful that it reduces its own significance or even renders itself obsolete. If the mission has already been accomplished, and there is no sign of any realistic threat of a reversal, it becomes difficult to stir

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<sup>21</sup> Timothy J. Burger, *Inhofe: Counting on ‘God, Gays, and Guns’*, ROLL CALL, Oct. 20, 1994, available at LEXIS, ROLLCL File.

<sup>22</sup> See Editorial, *Gutless on Guns; Failure to Renew the Assault-Weapons Ban Is a Failure of Leadership*, DES MOINES REG., Sept. 11, 2004, at 12A.

<sup>23</sup> Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 3(b), 119 Stat. 2095, 2097 (2005) (codified at 15 U.S.C. § 7902(b) (2008)).

<sup>24</sup> Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 523–24 (2008).

<sup>25</sup> *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff’d sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

<sup>26</sup> Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASH. POST, Apr. 7, 2007, at A1.

complacent supporters to the same extent as when an issue is more genuinely in doubt. Ideally, an interest group can continually convince its supporters that it is simultaneously on the brink of great accomplishments and utter disasters, telling them that it is winning great victories and promising that it is poised to win more, but at the same time warning that the opposing forces are very strong and threaten everything the organization holds most dear. The NRA generally has done this well, convincing supporters that it is winning the fight for gun rights but that those rights continually remain in serious peril. In recent years, however, some wondered if the NRA might be reaching the point where it would have trouble arousing alarm about gun control.<sup>27</sup>

In addition to those complicating factors, the NRA faced a dilemma because of the particular candidates who wound up in the 2008 presidential race. The Democratic race quickly narrowed to a trio of candidates—Barack Obama, Hillary Clinton, and John Edwards—whom the NRA regarded as unequivocal enemies of guns and freedom. The NRA normally would expect to find a much better crop of candidates in the Republican field, but Rudy Giuliani and Mitt Romney, the early frontrunners, had supported gun control in the past and had to attempt tortuous flip-flops on the issue as presidential candidates.<sup>28</sup>

John McCain, the candidate who soon emerged as the GOP favorite, had been a reliable vote against gun control legislation for many years.<sup>29</sup> As he tried to outmaneuver George Bush for the GOP presidential nomination in 2000, McCain shifted to a more middle-of-the-road position on guns.<sup>30</sup> After losing that race, the “maverick” Senator went further left and joined forces with Andrew McKelvey, a liberal billionaire starting a new gun control organization called Americans for Gun Safety.<sup>31</sup> McCain starred in radio and television ads asking Colorado and Oregon voters to approve ballot measures that would close the “gun show loophole” by requiring background checks for all firearm sales at gun shows.<sup>32</sup> Both measures passed, and McCain soon appeared in gun-safety ads that ran in movie theaters in

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<sup>27</sup> See, e.g., Conor Clarke, *Shooting Blanks*, NEW REPUBLIC, Jan. 1, 2007, at 8; Leonard Doyle, *A Torrid Time for NRA: There's No One to Fight*, SEATTLE POST-INTELLIGENCER, Nov. 4, 2007, at I6; Noam N. Levey, *Political Clout of NRA Is Waning; The Group's Success Has Made the Issue of Gun Control Less Urgent—and May Deprive the GOP of a Weapon*, L.A. TIMES, June 14, 2008, at A1.

<sup>28</sup> See Craig Gordon, *NRA Sees a New Rudy; The Former Anti-Gun Mayor Tells Crowd at Meeting that 9/11 Gave Him a New Respect for the 2nd Amendment*, NEWSDAY (New York), Sept. 22, 2007, at A7; Scott Helman, *Romney Retreats on Gun Control*, BOSTON GLOBE, Jan. 14, 2007, at A1.

<sup>29</sup> See JOHN VELLECO, GUN OWNERS OF AMERICA POLITICAL VICTORY FUND, JOHN MCCAIN'S GUN CONTROL PROBLEM, <http://goapvf.org/mccain.htm> (last visited May 10, 2009).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* For an explanation of the gun show issue, see *infra* notes 79–83 and accompanying text.

the summer of 2001 before the big-budget epic *Pearl Harbor*.<sup>33</sup> McCain then teamed up with Joe Lieberman to introduce legislation that would close the gun show loophole on a national basis.<sup>34</sup> The NRA called McCain “one of the premier flag-carriers for the enemies of the Second Amendment,”<sup>35</sup> and gave him a “C” rating when he was up for reelection to the Senate in 2004.<sup>36</sup>

From the very start, the 2008 presidential race thus tilted in a direction that pleased gun control advocates, with the leading Democratic candidates solidly on the gun control side, and the leading Republicans having provided significant support to gun control efforts in the past. Through the first several months of primaries and caucuses, the gun issue had a very low profile, with no candidate making much of an effort to draw attention to it.

That changed suddenly and unexpectedly in April 2008 when controversy flared over Barack Obama’s observation that economic frustration drives people in small towns in Pennsylvania and the Midwest to become “bitter” and to “cling to guns or religion.”<sup>37</sup> That statement, made at a closed-door fundraiser in San Francisco, would be Obama’s most serious gaffe of the campaign and would serve as a powerful lesson about the danger of incautiously mentioning the gun issue. With a crucial primary in Pennsylvania coming up, Hillary Clinton pounced on Obama’s remarks, saying they were “elitist” and “patronizing” to people who consider guns and hunting important parts of their culture and heritage.<sup>38</sup>

A few days later, on the one-year anniversary of the Virginia Tech shootings, Obama and Clinton met in Philadelphia for what would turn out to be the final debate of the Democratic race. Pressed to say how they thought the Supreme Court should rule on the constitutionality of the District of Columbia’s handgun ban, both candidates dodged the question. Obama said he had not read the briefs or heard all the evidence; Clinton likewise claimed she did not know the facts of the case well enough to offer a definite answer.<sup>39</sup> The Democratic candidates clearly preferred to downplay the issue and steer clear of staking out specific positions.

Meanwhile, with John McCain having sewn up the GOP nomination, the NRA announced that it would spend \$40 million on the upcoming elections, including \$15 million specifically devoted to attacks on Barack

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<sup>33</sup> VELLECO, *supra* note 29.

<sup>34</sup> Gun Show Loophole Closing and Gun Law Enforcement Act of 2001, S. 890, 107th Cong. (2001).

<sup>35</sup> Elisabeth Bumiller, *Courting N.R.A., McCain Criticizes Obama and Clinton on Gun Control*, N.Y. TIMES, May 17, 2008, at A13.

<sup>36</sup> David Kopel, *Voting on Target*, NAT’L REV. ONLINE, Nov. 2, 2004, <http://www.nationalreview.com/kopel/kopel200411021307.asp>, available at LEXIS, NATREV File.

<sup>37</sup> Katherine Q. Seelye & Jeff Zeleny, *Obama, Now on the Defensive, Calls ‘Bitter’ Words Ill-Chosen*, N.Y. TIMES, Apr. 13, 2008, at A1.

<sup>38</sup> Mike Dorning, *Democrats Cling to a Fight; Obama Defends His ‘Bitter’ Remark, Turns Rebuke on Clinton*, CHI. TRIB., Apr. 14, 2008, at 1.

<sup>39</sup> See Senator Hillary Clinton and Senator Barack Obama, *Democratic Presidential Candidates Debate* (Apr. 16, 2008), in LEXIS, FEDNEW File.



Obama.<sup>40</sup> That expenditure would be enormous compared to the \$1.86 million the NRA spent on negative advertising against John Kerry in 2004, and the mere \$212,695 it devoted to bashing Al Gore in 2000.<sup>41</sup>

The impact of the NRA's efforts would depend a lot on the outcome of the constitutional litigation concerning the District of Columbia's gun laws. At the end of June 2008, the Supreme Court ruled by a 5–4 vote that the District's laws violated the Second Amendment.<sup>42</sup> In the enormous burst of commentary on the Supreme Court's decision, the clear consensus was that the Court had done Obama a huge favor.<sup>43</sup> A decision embracing the District of Columbia's position—that the Second Amendment protects a right to have guns only for those serving in an organized military capacity such as in the National Guard—would have immediately transformed gun rights into one of the most contentious topics in the presidential race. Instead, the Supreme Court's gun-friendly decision greatly aided Obama's efforts to defuse the issue.

From that point on in the race, the candidates said little about guns. The Obama campaign's "Blueprint for Change," a statement of policy positions running more than eighty pages in length, never mentioned the gun issue.<sup>44</sup> On his website, Obama had just a paragraph characterizing gun control as part of his plan to stimulate urban prosperity.<sup>45</sup> Obama mentioned guns briefly during his nomination acceptance speech at the Democratic National Convention in August,<sup>46</sup> but otherwise did not bring up the issue. The McCain campaign was equally quiet on the subject.<sup>47</sup> In her speech at the Republican convention, vice presidential nominee Sarah Palin criticized Obama's remark about "bitter" people clinging to guns.<sup>48</sup> But aside from that, none of those delivering major addresses at the Republican convention—John McCain, Rudy Giuliani, Mike Huckabee, Fred Thompson, Joe

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<sup>40</sup> Scott Helman, *NRA Ads to Portray Obama as Threat to Gun Owners*, BOSTON GLOBE, July 2, 2008, at A6.

<sup>41</sup> BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, GUNS & THE 2008 ELECTIONS: COMMON SENSE GUN LAWS WON, THE NRA LOST, & WHAT IT MEANS 10–11 (2008), available at <http://www.bradycenter.org/xshare/pdf/reports/guns-2008election.pdf> [hereinafter GUNS & THE 2008 ELECTIONS].

<sup>42</sup> District of Columbia v. Heller, 128 S. Ct. 2783 (2008), *aff'g* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).

<sup>43</sup> See, e.g., Jeff Jacoby, Op-Ed., *A Silver Bullet for Obama?*, BOSTON GLOBE, June 29, 2008, at D9; George F. Will, Op-Ed., *Two Rulings May Help Obama*, CHARLESTON GAZETTE (W. Va.), June 29, 2008, at 2C; Mike Madden, *Supreme Court Gun Ruling Could Backfire*, SALON.COM, June 27, 2008, [http://www.salon.com/news/feature/2008/06/27/scotus\\_guns/index.html](http://www.salon.com/news/feature/2008/06/27/scotus_guns/index.html), available at LEXIS, SALON File.

<sup>44</sup> Blueprint for Change, Obama and Biden's Plan for America, available at <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf> (last visited May 10, 2009).

<sup>45</sup> Barack Obama and Joe Biden: The Change We Need—Urban Policy, [http://origin.barackobama.com/issues/urban\\_policy/](http://origin.barackobama.com/issues/urban_policy/) (last visited May 10, 2009).

<sup>46</sup> See *infra* note 61 and accompanying text.

<sup>47</sup> Roger Simon, *On Guns, McCain Misses the Mark*, POLITICO, Oct. 29, 2008, <http://www.politico.com/news/stories/1008/15045.html>, available at LEXIS, POLTICO File.

<sup>48</sup> Sarah Palin, Governor of Alaska, Republican Vice Presidential Nominee, Remarks at the 2008 Republican National Convention (Sept. 3, 2008), in LEXIS, FEDNEW File.

Lieberman, and (via satellite) George Bush—mentioned guns.<sup>49</sup> Not a word was said about the issue by anyone in the presidential or vice-presidential candidates’ debates.<sup>50</sup>

As the campaigns headed into their final weeks, the NRA launched a slew of ads attacking Obama, but despite the NRA’s efforts, the gun issue remained of little interest to most voters. Polls showed that gun policy was well down on the list of issues that mattered most to voters.<sup>51</sup>

When Election Day finally arrived, the results favored Democrats and therefore generally looked good from the gun control perspective. Obama’s decisive win included victories in many states where conventional wisdom said the gun issue would hurt him, such as Virginia, North Carolina, Florida, Pennsylvania, Ohio, Michigan, Minnesota, Wisconsin, Nevada, New Mexico, and Colorado. In U.S. Senate and House races, candidates endorsed by the Brady Campaign to Prevent Gun Violence, the nation’s leading gun control organization, vastly outperformed their rivals endorsed by the NRA.<sup>52</sup>

While warning that the election results posed dire threats to gun rights, the NRA comforted its supporters by declaring that these results actually represented a kind of triumph of the NRA’s agenda. In the NRA’s view, “the many Democratic gains occurred only because the party has run so far from the gun control issue.”<sup>53</sup> The NRA thus suggested that Democrats based their campaign strategies on a realization that Americans want more gun rights and not more gun control. In turn, however, the NRA essentially conceded that its enormous effort to make guns an important issue in the 2008 election had been a failure.

Gun control advocates agreed, in part, with the NRA’s assessment. The Brady Campaign acknowledged that “guns were certainly not the dominant issue” in the election,<sup>54</sup> but argued that the issue’s low profile was actually a dramatic, positive development for gun control advocates. The election showed that “the NRA cannot deliver a decisive block of single-issue voters, and its advertising dollars can’t sway elections.”<sup>55</sup> Obama and other candidates favoring sensible gun control measures had successfully neutralized the issue.

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<sup>49</sup> Transcripts of these speeches are in LEXIS’s Federal News Service (FEDNEW) file.

<sup>50</sup> Transcripts of the debates are in LEXIS’s Federal News Service (FEDNEW) file and at <http://www.debates.org/pages/debtrans.html> (last visited May 10, 2009).

<sup>51</sup> See, e.g., Sean Whaley, *Gun Control Debate Cools Off*, LAS VEGAS REV.-J., Aug. 25, 2008, at 1B; Kevin Friedl & Mary Gilbert, *Minds on Their Money*, NAT’L J., July 2, 2008, available at LEXIS, NTLJNL File.

<sup>52</sup> GUNS & THE 2008 ELECTIONS, *supra* note 41, at 20–21.

<sup>53</sup> News Release, Nat’l Rifle Ass’n, Election 2008 and the Long Road Ahead (Nov. 7, 2008), <http://www.nra.org/Legislation/Federal/Read.aspx?id=4226>.

<sup>54</sup> GUNS & THE 2008 ELECTIONS, *supra* note 41, at 4.

<sup>55</sup> *Id.* at 24.

### III. A STRATEGY FOR THE OBAMA ADMINISTRATION

Having won the race to the White House, Obama now must decide how to approach the gun issue as president. The most obvious strategy might be simply to ignore the issue completely. In other words, Obama might choose never to say or do anything about guns, and to have his administration de-emphasize the issue as much as possible. Many advisors and Democrats in Congress would certainly recommend that approach as the safest from a political perspective. With enormously serious and difficult issues facing him, from fixing the economy to resolving the wars in Iraq and Afghanistan, no one could reasonably blame Obama for concluding that it does not make sense to expend any effort and political capital on an intensely divisive issue like guns.

While avoiding the issue would be an understandable move, the Obama administration should follow a different course. America's inability to enact sensible gun policies is a national disgrace that claims thousands of lives and wastes billions of dollars every year.<sup>56</sup> President Obama and the Democratic leadership in Congress should not pretend that the problem does not exist, even though it poses such treacherous political risks and has persisted for so long. They should make a point of very prominently and directly taking on the gun issue. The key is that they should do so in a way that is unmistakably even-handed and that promotes gun rights as much as gun control. Such an approach would have two main components: fostering public discussion of gun policy and offering what I refer to as "win-win" gun policy proposals.

#### A. *Talking About Guns*

Barack Obama should start by talking about the issue. Guns certainly cannot be his top policy priority, but he has been elected for a four-year term, and at some point he can and should bring his acclaimed oratorical skills to bear on the great American gun debate.

Obama campaigned as a person who wants to overcome lines that have unnecessarily divided the country. Making progress on the gun issue would be a remarkable way to show that was not mere rhetoric. Guns are a subject on which sensible policy compromises should be possible. Indeed, the overwhelming majority of Americans agree on the most basic points. They believe that people have a right to own and use guns, but also that governments should be able to regulate guns in reasonable ways.<sup>57</sup> Despite that fundamental consensus, Americans have lined up on opposite sides of the battle over guns, remaining suspicious and scornful of those with different perspectives, rather than coming together on the middle ground.

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<sup>56</sup> See *supra* notes 11–15 and accompanying text.

<sup>57</sup> See *supra* note 19 and accompanying text.

Obama should deliver a speech that sincerely and seriously acknowledges the merit of many arguments on both sides of the debate. The truth is that guns can be used to do bad things, but they also can be used to do good things. They can be used to commit terrible crimes, and they can be used to save lives. As a result, the goal should be to promote the socially beneficial uses of guns while reducing the prevalence of their misuse.

This dual nature of guns is reflected in the very different feelings that people have about them. For many Americans, guns have overwhelmingly positive associations. To them, guns are about families and traditions, about growing up and spending time learning to shoot and to hunt, and about each generation passing something on to the next. For many other Americans, guns have completely different connotations. For example, to a young person in an inner city, guns may be associated with only bad things, like being scared, having grandparents who are afraid to go outside, or knowing someone who was shot. President Obama could accomplish a lot just by eloquently acknowledging and describing these very different experiences and resulting feelings, and by pushing Americans to try to see things from perspectives other than their own.

As the first African-American person to serve as president, Obama has made many people think more deeply than before about the role that race plays in many aspects of our society. He could do the same in talking about the historical and contemporary significance of guns in this country. He could explain how discriminatory restrictions on access to weapons in early America were a crucial part of maintaining the subjugation of slaves and even free blacks.<sup>58</sup> He could talk about the dual role that guns played in the era after the U.S. Civil War, when malevolent groups like the Ku Klux Klan used them to wage campaigns of hateful violence, even as others used them heroically to defend their families and communities against such terrorism. He could also candidly acknowledge the racial dimension that tragically persists with respect to gun violence today. Homicide rates for African-Americans, particularly young black males, are shockingly high, and the vast majority of the killings are done with guns.<sup>59</sup>

Obama touched on the right themes on a few rare occasions during his campaign. Pressed to respond to the Supreme Court’s decision striking down District of Columbia gun laws, Obama said that reasonable gun regulations should survive Second Amendment challenges, and he promised that as president he would uphold the constitutional rights of law-abiding gun-owners and hunters. “I know that what works in Chicago may not work in Cheyenne,” he acknowledged, but “[t]oday’s decision reinforces that if we act responsibly, we can both protect the constitutional right to bear arms and

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<sup>58</sup> See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 335–39 (1991).

<sup>59</sup> See, VIOLENCE POLICY CTR., BLACK HOMICIDE VICTIMIZATION IN THE UNITED STATES: AN ANALYSIS OF 2004 HOMICIDE DATA 2 (2007), available at <http://www.vpc.org/studies/blackhomicide.pdf>.

keep our communities and our children safe.”<sup>60</sup> Likewise, during his nomination acceptance speech at the Democratic National Convention in August, Obama said, “The reality of gun ownership may be different for hunters in rural Ohio than for those plagued by gang violence in Cleveland, but don’t tell me we can’t uphold the Second Amendment while keeping AK-47s out of the hands of criminals.”<sup>61</sup> On each occasion, Obama struck two key themes, emphasizing the need to respect different perspectives on guns and recognizing that maintaining gun rights and having sensible gun controls are not mutually exclusive goals. As president, he should seize the opportunity to repeat and to expand on these themes.

Talking about guns and their complex role in American society obviously will not, by itself, solve the nation’s very real and serious problems with gun violence, but it is a crucial first step. President Obama can accomplish a lot by making clear, through detailed and candid discussion of the issue, that he sincerely wants to do something constructive with respect to gun policy rather than just score political points. He can reiterate and expand upon the same themes that he used effectively on the few occasions during the presidential campaign when he addressed the issue—the legitimacy of different perspectives on guns and the compatibility of gun rights and sound gun controls.

### B. “Win-Win” Policy Proposals

Having made clear that the nation needs to be able to have a serious, constructive dialogue about guns, President Obama should declare that he is ready to move forward to consider specific policy proposals, but with one new, vital caveat: he will not support any legislation relating to guns unless it promotes both gun rights and gun control. In other words, nothing will be enacted unless it genuinely provides a “win-win” situation for both sides by protecting law-abiding citizens’ socially beneficial gun use while preventing harmful misuse of guns.

In some instances, this could mean developing a single policy proposal that would appeal to both gun control and gun rights advocates. For example, both sides of the debate share an interest in stronger enforcement of existing gun laws.<sup>62</sup> The NRA emphatically called for tougher enforcement of gun laws during the Clinton administration, saying that the nation needed better enforcement of the laws already on the books, rather than any new laws.<sup>63</sup> The NRA is likely to return to that theme in response to any serious

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<sup>60</sup> Joseph Curl, *Candidates Differ on Overturned Gun Ban; McCain Backs ‘Victory’; Obama Stakes out Middle Ground*, WASH. TIMES, June 27, 2008, at A16.

<sup>61</sup> Barack Obama, U.S. Senator of Ill., Democratic Presidential Nominee, Remarks at the 2008 Democratic National Convention (Aug. 28, 2008), in LEXIS, FEDNEW File.

<sup>62</sup> See Jeff Dickerson, Op-Ed., *Goals Match NRA’s: Moms Should Redirect Efforts at Enforcing Existing Gun Laws*, ATLANTA J.-CONST., May 16, 2000, at 8A.

<sup>63</sup> See, e.g., Peter Slevin & John Mintz, *NRA Uses Atlanta Police Killing as Ammunition; Group Criticizes Law Enforcement Under Clinton*, WASH. POST, Mar. 25, 2000, at A2.

push for enactment of new legal restrictions on firearms. Gun control advocates should jump at the chance to join forces with the NRA on this point, and proposals for enhancing enforcement should be ripe material for the sorts of compromise and consensus toward which the Obama administration should be pushing.

Another good example can be found in efforts to revise the procedures for federal regulatory oversight of gun dealers. Under current law, when the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) determines that a licensed firearms dealer has violated legal requirements, ATF must choose between the weak sanction of merely giving a warning and the severe sanction of revoking the dealer’s license to sell firearms.<sup>64</sup> With the support of the NRA, the gun industry, and the Bush administration,<sup>65</sup> members of Congress proposed legislation that would give ATF the power to impose a graduated range of administrative penalties, such as fines and temporary suspensions of licenses.<sup>66</sup> Gun control proponents have complained about the same problem in the past, pointing out that the lack of graduated penalties “assures that dealers who deserve discipline short of revocation will go unpunished.”<sup>67</sup> Although gun control and gun rights advocates naturally do not see eye to eye on how severe the penalties should be for various violations,<sup>68</sup> the fact that they do agree on the benefits of creating a more flexible, graduated penalty structure indicates there is common ground on which a compromise could be struck.

In many other instances, achieving a “win-win” result would mean bundling together a set of measures that would include some policies favored by each side. Crafting such legislation is not an impossible or unrealistic task. Indeed, the most recent federal enactment concerning guns fits precisely into this mold. Shortly after the Virginia Tech shootings in April 2007, the NRA began negotiating with Democratic congressional leaders to come up with a compromise bill that would improve the databases of the National Instant Criminal Background Check System (NICS) used by the FBI to screen potential gun purchasers. The legislation, entitled the NICS Improvement Amendments Act of 2007,<sup>69</sup> eventually passed by unanimous

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<sup>64</sup> See INST. FOR LEGISLATIVE ACTION, NAT’L RIFLE ASS’N, H.R. 4900: THE “BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES REFORM AND FIREARMS MODERNIZATION ACT OF 2007” (2008), available at <http://www.nraia.org/Issues/FactSheets/Read.aspx?id=224&issue=018>.

<sup>65</sup> See NAT’L SHOOTING SPORTS FOUND., CONGRESSMEN INTRODUCE PRO-GUN BILL IN HOUSE, available at <http://www.nssf.org/legal/links/hr4900.cfm> (last visited May 10, 2009); *Justice Department Proposes Flexible Penalties for FFLs*, SHOOTING INDUSTRY, July 1, 2007, at 8, available at LEXIS, ALLNWS File.

<sup>66</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives Reform and Firearms Modernization Act of 2007, H.R. 4900, 110th Cong. (2007).

<sup>67</sup> HANDGUN CONTROL & CTR. TO PREVENT HANDGUN VIOLENCE, THE ENFORCEMENT FABLE: HOW THE NRA PREVENTED ENFORCEMENT OF THE NATION’S GUN LAWS 9 (2000), available at <http://www.gunlawsuits.org/pdf/defend/fable.pdf>.

<sup>68</sup> See, e.g., BRADY CTR. TO PREVENT GUN VIOLENCE, “TRIVIAL VIOLATIONS”? THE MYTH OF OVERZEALOUS FEDERAL ENFORCEMENT ACTIONS AGAINST LICENSED GUN DEALERS 2 (2006), available at <http://www.bradycenter.org/xshare/pdf/reports/trivial-violations.pdf>.

<sup>69</sup> Pub. L. No. 110-180, 122 Stat. 2559.

consent in each house of Congress, with support both from gun control groups like the Brady Campaign and from steadfast defenders of gun rights like the NRA.<sup>70</sup> The statute provides financial support for states to improve the records they provide for NICS regarding individuals prohibited from having guns, particularly those disqualified because they have been adjudicated mentally defective or committed to a mental institution.<sup>71</sup> At the same time, the statute contains provisions intended to prevent people from being unfairly prohibited from having guns. The NICS improvement legislation illustrates the feasibility of coming up with packages of measures that serve both to help keep guns out of the wrong hands and to protect the gun rights of responsible, law-abiding citizens.

President Obama should invite the NRA and its allies in Congress to work alongside gun control advocates to put together similar compromises. At the very least, this approach would give Obama a clear and well-defined stance on guns, thereby discouraging the egregious sorts of misimpressions and paranoia that will persist as long as he remains inscrutably quiet on the issue. For example, during the 2008 campaigns, the NRA circulated what it purported to be Obama's "Ten Point Plan to 'Change' the Second Amendment," a list including extreme measures such as banning all handguns, prohibiting any use of firearms for home defense, shutting down ninety percent of gun dealers, and passing federal legislation negating all state laws permitting people to carry concealed weapons.<sup>72</sup> Neutral fact-checkers declared that these claims were unsubstantiated and misleading,<sup>73</sup> but the NRA's scare tactics undoubtedly influenced some people. By making crystal clear what sorts of reasonable measures he actually would support, Obama can discourage distortions of his agenda while working toward significant policy reforms.

The following are just a few examples of the types of good policy proposals that can be put on the table by gun control advocates.

### 1. *Universal Background Checks*

One of the primary objectives of policymaking with respect to guns in America should be to make the background check system as comprehensive, thorough, and effective as possible. That system is the cornerstone of efforts to keep guns out of the wrong hands. Since the passage of the Brady law in 1993, the government has blocked more than 1.6 million attempted

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<sup>70</sup> See Rostron, *supra* note 24, at 553–54.

<sup>71</sup> See *id.* at 554–55.

<sup>72</sup> See Bob Paul Revere Lowry, Opinion, *NRA Says Obama Plans to Disarm Americans*, DAILY TIMES (Salisbury, Md.), Aug. 22, 2008.

<sup>73</sup> See, e.g., *NRA Ads Are Off Target About Obama and Guns*, WASH. POST, Sept. 24, 2008, at A4; D'Angelo Gore & Brooks Jackson, *NRA Targets Obama*, FACT CHECK.ORG, Sept. 22, 2008, [http://www.factcheck.org/elections-2008/nra\\_targets\\_obama.html](http://www.factcheck.org/elections-2008/nra_targets_obama.html) (updated Sept. 29, 2008); CNN Political Ticker, *Fact Check: Does Obama Want to Ban Guns and Rifles?*, Sept. 23, 2008, [http://politicalticker.blogs.cnn.com/2008/09/23/fact-check-does-obama-want-to-ban-guns-and-rifles/#more\\_20006](http://politicalticker.blogs.cnn.com/2008/09/23/fact-check-does-obama-want-to-ban-guns-and-rifles/#more_20006).

purchases of guns by convicted felons and others legally prohibited from having firearms.<sup>74</sup>

Unfortunately, the background check system’s coverage is limited in ways that significantly impair its effectiveness. Federal laws require a person to undergo a background check only if purchasing a gun from a licensed firearm dealer.<sup>75</sup> If the seller is not a licensed dealer, no background check is required, whether that seller is a neighbor, a stranger on the street, or someone selling a gun through a classified ad placed in a newspaper or posted on a website. This limit on the reach of the background check system makes acquisition of guns too easy for convicted felons and others who should not have access to firearms.<sup>76</sup> A few states, such as California, have gone beyond what federal law demands and made background checks a universal requirement for all gun acquisitions, regardless of the seller’s identity.<sup>77</sup> That approach should be incorporated into federal law so that it applies nationwide. A recent survey found that over eighty percent of Americans favor such a move, with the support being equally strong among conservatives and liberals, among McCain voters and Obama voters, and among those who own guns and those who do not.<sup>78</sup>

## 2. *Gun Shows*

While requiring background checks for all gun acquisitions would be the ideal policy, a more limited but helpful step in the same direction would be to require a background check for everyone who buys a firearm at a gun show. Under current federal law, no special rules apply to the sale of firearms at gun shows. In other words, a licensed dealer who sells firearms at gun shows must do background checks, but unlicensed sellers at gun shows face no such requirement.<sup>79</sup> Gun shows thus make it particularly easy for convicted criminals and other people who would fail background checks to find lots of unlicensed individuals offering large quantities of guns for sale with no questions asked.<sup>80</sup> The federal statutes should be amended so that every purchaser of a firearm at a gun show is required to undergo a background check.

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<sup>74</sup> BRADY CTR. TO PREVENT GUN VIOLENCE, *BRADY BACKGROUND CHECKS: 15 YEARS OF SAVING LIVES* 6 (2008), available at <http://www.bradycenter.org/xshare/pdf/reports/brady-law-15years.pdf>.

<sup>75</sup> 18 U.S.C.A. § 922(t) (West 2008).

<sup>76</sup> See BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, *GUN VIOLENCE IN AMERICA: PROPOSALS FOR THE OBAMA ADMINISTRATION* 5 (2008), available at <http://www.bradycampaign.org/xshare/pdf/politics/obama-transition-memo.pdf> [hereinafter *GUN VIOLENCE IN AMERICA*].

<sup>77</sup> CAL. PENAL CODE §§ 12072(d), 12082 (West 2008).

<sup>78</sup> See Memorandum from Robert Green & Matt Bechak, Penn, Schoen & Berland Assocs., Inc., to Paul Helmke, President, Brady Campaign to Prevent Gun Violence (Nov. 18, 2008), <http://www.bradycampaign.org/xshare/pdf/memo-11-18-08.pdf>.

<sup>79</sup> See Anthony A. Braga & David M. Kennedy, *Gunshows and the Illegal Diversion of Firearms*, 6 GEO. PUB. POL’Y REV. 7, 8–10 (2000).

<sup>80</sup> See *id.* at 10–20.



The NRA and the National Shooting Sports Foundation (NSSF), the gun industry's principal trade association, have stated that they would not oppose legislation requiring background checks for all sales at gun shows if logistical details, such as the length of time permitted for the government to complete the checks, could be worked out in satisfactory ways.<sup>81</sup> Congress came close to passing legislation on this issue in 1999 but could not decide whether the time allowed for the checks should be three days or twenty-four hours.<sup>82</sup> Given that only a tiny fraction of checks take more than a few hours to complete,<sup>83</sup> legislators should be able to work out that sort of detail and come up with a measure that implements background checks for all sales without unduly hampering the operation of gun shows.

### 3. *Terrorism*

The attacks in Mumbai, India, in late November 2008 illustrated the degree of horror that terrorists can produce with firearms.<sup>84</sup> Despite the serious risks posed by terrorism today, the United States does not have any law that prohibits people on the government's watch lists of suspected terrorists from purchasing or possessing guns. The government therefore may be able to stop a suspected terrorist from getting on an airplane, but not from buying a gun.<sup>85</sup> Legislation has been proposed that would address this danger by giving the U.S. Department of Justice discretion to block the sale of a gun when the background check reveals that the purchaser is on a terrorist watch list.<sup>86</sup> This legislation would give the government the option of allowing a sale to proceed when the government does not want the suspect to become aware that he is on a terrorist watch list, and it would also protect individual rights by providing for court review where the government opts to reject the attempted purchase.<sup>87</sup>

Terrorism is obviously a real and serious threat. Gun owners know that, as do the organizations and politicians who work most aggressively in support of gun rights. Indeed, the NRA's chief spokesperson, Executive Vice President Wayne LaPierre, has emphasized that policymaking on guns should be informed by the increased threat of terrorism facing the United

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<sup>81</sup> See Richard Simon, *Outlook Dims for Gun Control Bills in Congress*, L.A. TIMES, Nov. 5, 1999, at A1; William C. Symonds et al., *Under Fire*, BUS. WK., Aug. 16, 1999, at 62, 68.

<sup>82</sup> David Jackson, *House Rejects Gun Control Legislation; Weapons-Show Sales Are Key Issue in Defeat*, DALLAS MORNING-NEWS, June 19, 1999, at 1A.

<sup>83</sup> See FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS), 2000 OPERATIONS 40 (2001), available at [http://www.fbi.gov/hq/cjisd/nics/oper-rpt/operations\\_report\\_2000.pdf](http://www.fbi.gov/hq/cjisd/nics/oper-rpt/operations_report_2000.pdf).

<sup>84</sup> See Keith Bradsher, *Armed Teams Sowed Chaos with Precision*, N.Y. TIMES, Nov. 29, 2008, at A1.

<sup>85</sup> See, e.g., Rachel Graves, *Post-9/11 Firearms Debate Intensifies; NRA Fights Closing Loopholes, Even if It Means Terror Suspects Can Still Buy Guns*, Hous. CHRON., Apr. 17, 2005, at A1.

<sup>86</sup> See, e.g., Denying Firearms and Explosives to Dangerous Terrorists Act of 2007, S. 1237, 110th Cong.

<sup>87</sup> *Id.*

States today.<sup>88</sup> LaPierre and others like him argue that the risk of terrorism should not be used as a justification for broad, across-the-board restrictions on the rights of law-abiding Americans.<sup>89</sup> But whatever the merits of that view, putting special restrictions on those who have been specifically identified as suspected terrorists should be a completely different matter. Giving the federal government discretion to block purchases of weapons by those on the terrorist watch lists should be a measure that everyone on both sides of the gun debate can support.

#### 4. *Gun Dealers*

Several other simple reforms would improve the rules governing licensed gun dealers. For example, although dealers must do background checks on customers who want to buy guns, dealers are not required to do such checks on their employees before letting them handle and sell guns.<sup>90</sup> The NSSF already encourages gun dealers to do background checks on employees,<sup>91</sup> and it should be a simple and uncontroversial step for federal legislation to make that practice mandatory and to permit dealers to screen employees using the same NICS system already in place for background checks on gun buyers.<sup>92</sup>

Another flaw in current laws permits a dealer whose federal firearms license has been revoked for some reason, such as for repeatedly violating federal regulations, to transfer all of his remaining stock from his “business inventory” to his “personal collection” and sell it off without background checks.<sup>93</sup> Legislation could easily fix this problem by requiring that dealers selling off inventory after license revocations remain subject to the same legal requirements that apply to licensed dealers.<sup>94</sup>

#### 5. *Retention of NICS Records*

Under regulations issued by the Bush Administration in 2004, within twenty-four hours after a buyer has passed a background check, all records evidencing that the check occurred must be destroyed.<sup>95</sup> The government previously maintained such records for ninety days in order to allow for audits that would ensure background checks were being done properly and

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<sup>88</sup> See WAYNE LAPIERRE, GUNS, FREEDOM, AND TERRORISM (2003).

<sup>89</sup> See, e.g., *id.* at 1–10.

<sup>90</sup> See Press Release, U.S. Congresswoman Carolyn McCarthy, Rep. Carolyn McCarthy Introduces Bill Requiring Background Checks for Gun Store Employees (July 31, 2008), available at <http://carolynmccarthy.house.gov/?sectionid=155&sectiontree=155&itemid=776>.

<sup>91</sup> See *NSSF Provides Employee Background Checks*, SHOOTING INDUSTRY, Dec. 2000, at 28, available at LEXIS, ALLNWS File.

<sup>92</sup> See H.R. 6676, 110th Cong. (2008).

<sup>93</sup> See Press Release, U.S. Congressman Mark Steven Kirk, Kirk, McCarthy, Shays, Castle, and N.Y. Mayor Bloomberg: Close Gun Dealer “Fire Sale” Loophole (July 31, 2008), available at [http://www.house.gov/list/press/il10\\_kirk/Fire\\_Sale.html](http://www.house.gov/list/press/il10_kirk/Fire_Sale.html).

<sup>94</sup> See H.R. 6664, 110th Cong. (2008).

<sup>95</sup> 28 C.F.R. § 25.9(b)(1)(iii) (2009).

that convicted criminals and other prohibited purchasers had not been mistakenly allowed to buy guns.<sup>96</sup> When the government realized that a mistake had occurred, it would initiate efforts to retrieve the weapon from the person erroneously permitted to obtain it. The government undertook hundreds of such retrieval actions every year.<sup>97</sup> The Bush administration adopted the regulation requiring next-day destruction of NICS records even though a General Accounting Office study warned that the policy would adversely affect public safety.<sup>98</sup> Restoration of the ninety-day retention rule would be a reasonable step to improve the effectiveness of the background check system.

Although the NRA strongly opposes a ninety-day retention policy,<sup>99</sup> this is a technical issue that should be of little interest to the vast majority of gun owners. Whether records generated by background checks are stored for twenty-four hours or ninety days is not something that has an adverse impact on anyone legally qualified to purchase and possess guns. Restoring the ninety-day retention policy should be feasible without inciting widespread controversy, because it improves the background check system and helps stop illegal acquisition of guns without imposing restrictions on lawful gun purchasers and owners.

### C. *Protecting Gun Rights*

Again, the goal should be to group these gun control proposals with measures that would protect and expand gun rights, creating legislative packages that draw support from both sides of the gun debate. Gun rights supporters should have no shortage of legislative and regulatory measures to suggest, and gun control advocates should look carefully at these proposals with an open mind about the possibility that some could be part of reasonable compromises.

For example, one of the NRA's top legislative priorities in recent years has been to expand opportunities for people to carry concealed guns. Forty states now have the type of permissive "right-to-carry" laws that the NRA favors, while eight have more restrictive laws and only two—Illinois and Wisconsin—prohibit concealed guns completely.<sup>100</sup> In addition, forty-four states permit people to carry guns openly, such as in holsters that are not concealed, and a push is now underway to increase that number.<sup>101</sup> While the trend has been strongly in the NRA's favor on this issue, a number of pro-

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<sup>96</sup> GUN VIOLENCE IN AMERICA, *supra* note 76, at 2.

<sup>97</sup> U.S. GEN. ACCOUNTING OFFICE, GUN CONTROL: POTENTIAL EFFECTS OF NEXT-DAY DESTRUCTION OF NICS BACKGROUND CHECK RECORDS 8–12 (2002), available at <http://www.gao.gov/new.items/d02653.pdf>.

<sup>98</sup> *Id.* at 3–5.

<sup>99</sup> See, e.g., Nat'l Rifle Ass'n v. Reno, 216 F.3d 122, 126 (D.C. Cir. 2000).

<sup>100</sup> INST. FOR LEGISLATIVE ACTION, NAT'L RIFLE ASS'N, RIGHT-TO-CARRY 2008 (2008), available at <http://www.nrila.org/Issues/FactSheets/Read.aspx?ID=18>.

<sup>101</sup> See Donna Leinwand, *Four States Considering Open-Carry Gun Laws; Among Last Holdouts in U.S., Debate Invokes Wild West, Deterring Crime*, USA TODAY, Feb. 12, 2009, at 3A.

posals remain on the table. For example, many bills have been introduced in Congress that would create a national system of “reciprocity” for concealed weapons permits, so that people with licenses to carry concealed guns in their home states would be allowed to carry concealed guns when visiting other states that also issue licenses for their residents to carry concealed guns.<sup>102</sup> Other bills would make smaller changes such as requiring the Federal Bureau of Prisons to provide secure places for prison employees to store any firearms they carry while traveling to and from work,<sup>103</sup> or improving the federal laws that exempt qualified current and former law enforcement officers from state laws prohibiting the carrying of concealed handguns.<sup>104</sup>

Gun control supporters understandably oppose these measures and worry about the risks of allowing more people to carry guns in more situations. The reality, however, is that carrying guns is already permitted in most of the country, and that is not going to change. Simply opposing every measure that would expand in any way the ability to carry guns is not the most productive strategy for the Obama administration and gun control supporters in Congress. They should focus their energies on developing ways to satisfy the objectives of these gun rights proposals while simultaneously achieving net gains in public safety. Supporting the creation of a national system of “reciprocity” for concealed gun licenses, for example, might be a worthwhile move if the legislation pressed states to standardize and strengthen their training requirements, qualification screening procedures, and license revocation procedures.

In state legislatures, various other types of “gun rights” legislation have been introduced, such as laws expanding the right to use guns to defend against intruders in one’s home<sup>105</sup> and laws requiring businesses to let their employees keep guns in their cars in office parking lots.<sup>106</sup> Although these issues primarily have been treated as matters of state rather than federal law, they also might be addressed in some respects by packages of gun legislation orchestrated by the Obama administration. Again, gun control proponents have many sensible concerns about these kinds of proposals, but they may be able to find some respects in which they could safely concede some ground while crafting restrictions that ensure the additional legal leeway being given to gun owners will be used responsibly.

Many other bills have been introduced in Congress in recent years that promote the interests of gun owners or the gun industry in some respects but might not pose any real concerns for gun control supporters. For example, legislation has been proposed to require ATF to make video recordings when

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<sup>102</sup> See, e.g., Respecting States Rights and Concealed Carry Reciprocity Act of 2008, S. 3207, 110th Cong. (2008); Secure Access to Firearms Enhancement (SAFE) Act of 2008, H.R. 5782, 110th Cong. (2008).

<sup>103</sup> See Federal Correctional Workers Safety Act of 2008, H.R. 5674, 110th Cong. (2008).

<sup>104</sup> See, e.g., Law Enforcement Officers Safety Act of 2007, S. 376, 110th Cong. (2007).

<sup>105</sup> See Chris Joyner, *Taking Up Arms Against Intruders: ‘Castle Doctrine’ Laws, Justifying Use of Deadly Force on Home Turf, Gain Ground*, USA TODAY, NOV. 21, 2007, at 3A.

<sup>106</sup> Mary Swanton, *NRA and Companies Duel over Gun Legislation*, INSIDE COUNSEL, Mar. 2006, at 74.

it tests firearms or ammunition.<sup>107</sup> Another bill would allow companies in the firearms and ammunition industries to pay their excise taxes on a quarterly basis, rather than on a bi-weekly basis as under current law.<sup>108</sup> Other measures would benefit hunters without posing any real danger from a gun control perspective, such as laws requiring that hunting be considered when the federal government makes decisions about management and use of federal lands.<sup>109</sup>

Some gun control advocates may recoil at the thought of compromise and insist on steadfastly opposing anything the NRA favors. That sort of “zero sum” or “us versus them” mentality has not been a winning strategy for the gun control movement, and it is time to try a different approach. Gun control advocates should analyze gun rights proposals in light of the harms they will produce; they should focus on fighting those proposals that significantly threaten public safety, and in return accept those proposals that pose only phantom dangers or risks that are minimal and can be controlled or mitigated.

#### CONCLUSION

“Let us resist the temptation,” Barack Obama urged in his election-night victory speech, “to fall back on the same partisanship and pettiness and immaturity that has poisoned our politics for so long.”<sup>110</sup> Obama did not mention guns that night, but the gun issue provides a striking opportunity for him to follow through on his promise of overcoming old divisions and strife to accomplish constructive policy changes.

This will be a challenge for all the reasons that have made the nation’s approach to gun policymaking such an embarrassment for so long. The gun rights community is highly suspicious of Obama’s intentions. Yet the NRA has vowed to give the benefit of the doubt to the president. “I hope he keeps his campaign statements,” Wayne LaPierre said. “If he does, we’ll be cheering for him.”<sup>111</sup>

Winning cheers from the most militant quarters of the NRA for a reasonable approach to gun control may be too much to expect Obama’s administration to achieve. But having repeatedly defied great odds in his ascent to the presidency, Obama should go ahead and aim for a significant breakthrough on the gun issue. He should speak candidly about guns and their complex role in this country, acknowledge the ways in which their use can be socially beneficial as well as harmful, and push hard for adoption of com-

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<sup>107</sup> Fairness in Firearm Testing Act, H.R. 1791, 110th Cong. (2007).

<sup>108</sup> Firearms Fairness and Affordability Act, S. 3331, 110th Cong. (2008).

<sup>109</sup> See Hunting Heritage Protection Act, S. 408, 110th Cong. (2007); Protecting the Second Amendment and Hunting Rights on Federal Lands Act of 2008, H.R. 5646, 110th Cong. (2008).

<sup>110</sup> Barack Obama, President-Elect of the United States, Remarks of President-Elect Barack Obama: Election Night in Chicago, IL (Nov. 4, 2008), in LEXIS, FEDNEW File.

<sup>111</sup> *Gun Sales Rise in Ohio, Stay Flat in Ross County*, CHILICOTHE GAZETTE (Ohio), Nov. 21, 2008, at 3.

binations of policy reforms that promote the use of guns as instruments of protection and that reduce the incidence of their misuse. If nothing comes of his efforts, Obama at least will have made clear that his administration and party are committed to striking a fair balance between protecting gun rights and promoting sensible controls and safety. And if Obama succeeds in re-orienting the gun debate toward reasonable policymaking instead of shrill bickering, genuine progress may be achieved toward finally establishing a comprehensive and effective set of reasonable controls on guns.