

An Updated Background Check System Will Help Prevent Gun Violence

Guns and Crime, 2012

Formed in 2006, Mayors Against Illegal Guns is a coalition of over 550 mayors who support reforms to fight illegal gun trafficking and gun violence in the United States, while still respecting the Second Amendment.

The background check system designed by Congress in 1993 to prohibit dangerous people from purchasing guns is not working effectively. But with the enforcement of critical new regulations, the National Instant Criminal Background Check System (NICS) could be an effective tool in preventing gun violence. One such regulation would require the names of all people known to be dangerous or criminal be registered in the NICS database, and those names should be referenced every time a gun is purchased.

In 1968, assassins gunned down Martin Luther King, Jr. and Robert F. Kennedy. In the wake of that double tragedy, Congress passed the first federal laws to limit access to guns, by prohibiting dangerous people, like felons, drug abusers, and the mentally ill from purchasing or possessing guns.

In 1993, Congress passed the Brady Bill, named for President [Ronald] Reagan's press secretary James Brady, who had been critically wounded in the assassination attempt on President Reagan. The Brady Bill created a system of background checks that helped to make real the purpose of the 1968 law.

The System Is Broken

Unfortunately, incomplete records and loopholes in the law have stopped background checks from doing their job:

- The Columbine [Colorado, April 20, 1999] killers got around the system by using guns bought at a gun show from an unlicensed seller: no paperwork, no questions asked.
- At Virginia Tech [Virginia, April 16, 2007], a killer got a gun he should have been prohibited from buying because his records were never reported to the FBI's gun background check system.
- The shooter in Tucson [Arizona, January 8, 2011] also got a gun he should have been prohibited from buying because his records weren't in the database—and then got a second gun because lax federal regulations frustrated the intent of the law.

Most murders that take place with illegal guns do not make the headlines. Every day, 34 Americans are murdered with guns, and most of them are possessed illegally. Since 1968, more than 400,000 Americans have been killed with guns.

The system needs to be fixed. Creating a comprehensive system to keep guns out of the hands of dangerous people requires two steps:

Step one: Get all the names of people who should be prohibited from buying a gun into the background check system.

Step two: Close the loopholes in the background check system by requiring a background check for every gun sale.

STEP ONE: Get All the Names of People Who Should Be Prohibited from Buying a Gun into the Background Check System.

Context: NICS, the National Instant Criminal Background Check System, which is used to conduct background checks on prospective gun buyers, is missing millions of records. Federal law requires records concerning the mentally ill, drug abusers, perpetrators of domestic violence, and other people who are forbidden, under current state and federal law, from having guns to be included in the system. The problem of missing records became obvious in 2007, when Seung Hui Cho, who was prohibited from owning a gun due to mental illness, was not listed in the background check system and was therefore able to buy two guns to commit the Virginia Tech massacre. Congress responded by passing the NICS Improvement Amendments Act [in 2008], which encourages states to share records. As a result, the number of records in NICS' Mental Defective File increased significantly under the new law, from nearly 300,000 in 2006 to more than 1.1 million today. The murders in Tucson, however, show that problems persist. The shooter, Jared Loughner, was able to buy a shotgun less than a year after admitting to the U.S. Army that he was a regular drug abuser because the armed forces had not forwarded his name to NICS. Today, there are just over 2,000 people listed as drug abusers in NICS.

Revised legislation would strengthen the NICS system in six ways:

Funding: Fully fund the NICS Improvement Amendments Act to help agencies and states cover the costs of gathering records and making them electronically available to the FBI.

The legislation, enacted in 2008, is failing to achieve its goals in part because Congress has supplied only 5.3% of the authorized amount from Fiscal Year 2009 through Fiscal Year 2011. That money was supposed to be available to states to help cover the cost of gathering and supplying records.

The revised law would guarantee full funding to states and federal agencies to comply with reporting requirements to the NICS database.

Penalties: Establish tougher penalties for states that do not comply with the law by cutting more of their Justice Department funding.

The NICS Improvement Amendments Act establishes only minor penalties for non-compliance. It sets out a timeline, and in each year starting in Fiscal Year 2011 states are required to turn over a target percentage of the records they have naming people who should not be allowed to buy guns under federal law. If they do not comply, they could face cuts to a portion of their federal justice assistance funding. The potential cuts are small, however: only 3% to 5% of a single grant (Byrne Justice Assistance Grants or JAG), which provides about \$300 million a year nationwide to states. Furthermore, DOJ [Department of Justice] has almost total discretion to reduce or waive them.

Federal agencies are not following the law.

Revised legislation would put in place tighter deadlines and stricter penalties for states to comply with the law and submit records. States would be required to turn over 75% of their records within two years of enactment and 90% of their records within six years or they would face cuts not only to JAG grants, but also to other Justice Department programs that normally guarantee a share to each state, such as the State Criminal Alien Assistance Program (SCAAP, \$249 million a year); Title II grants for juvenile justice (\$60 million a year); Juvenile Accountability Block Grants (JABG, \$46 million a year), and Enforcing Underage Drinking Laws Block Grants (\$20 million a year). Furthermore, these penalties would rise to 50% of each grant.

Why it matters: Across the country, the total potential penalties that face all states combined under the current NICS Improvement Amendments Act are only about \$15 million.

Federal reporting: Require every federal agency to certify to the Attorney General twice a year that all relevant records have been submitted.

Under the NICS Improvement Amendments Act, each Federal agency must provide to DOJ, at least quarterly, the name of any person it is aware is federally prohibited from buying guns. Current law does not, however, hold any person accountable for guaranteeing an agency's compliance. And federal agencies are not following the law. For example, only three agencies have sent any records on drug abusers to the FBI.

Revised legislation would hold agencies accountable for quarterly reporting by requiring the head of each agency to report to the Attorney General, twice a year, about the number of records it has shared in each category of prohibited person. Each report would include the agency head's written certification that all relevant records have been transmitted.

Why it matters: Even though Jared Loughner admitted to the U.S. Army that he regularly abused drugs, the Army did not submit his name to the FBI for inclusion in NICS as required by law, and less than a year later, Loughner was able to pass a background check and buy a shotgun. Later, Loughner bought the Glock he used to kill six people and injure 13 others.

Mental health definitions: Clarify the definition of mentally ill people who are prohibited from having guns to ensure that dangerous people are included in NICS.

Two critical changes are needed to ensure that people who are mentally ill are listed in NICS. First, the system should include people who have been suspended or expelled from a federally funded college or university because of mental illness. Second, it should include people who are compelled by a court to take medication for mental illness or to get other mental health care, even if they are not "committed" to in-patient treatment, as the ATF [Bureau of Alcohol, Tobacco, Firearms, and Explosives] currently interprets the law.

Why it matters: Jared Loughner was deemed too mentally ill to come to school without a note from a mental health professional, but safe enough to buy a gun.

Drug abuse definitions: Clarify the definition of drug abusers who are prohibited from having guns to ensure that dangerous people are included in NICS.

Since 1968, federal law has prohibited anyone "who is an unlawful user of or addicted to any controlled substance" from possessing any gun. The revised law would do two things to enforce that prohibition. First, it would reverse the overly narrow interpretation that ATF and the FBI now give to the law. They interpret it to apply only to people who have had a drug-related arrest, a drug-related conviction, a failed drug test, or an admission of drug use within the previous year. The revised law would change that one-year prohibition to a five-year prohibition. Second, the revised law would require federal courts to report to NICS anyone sentenced to mandatory drug treatment even if the requirement was part of a diversionary program that does not result in conviction.

Due process: Safeguard the rights of people who are listed in NICS.

The revised legislation would continue to ensure that individuals who were wrongly included in NICS as a prohibited purchaser are able to seek relief and be removed from the list of prohibited gun purchasers. For example, those who were arrested on a drug charge within the past five years but can show they have recovered from their addiction would be able to regain their gun rights. So would people who had been mentally ill but have

recovered and no longer present a risk.

Step Two: Close the Loopholes in the Background Check System by Requiring a Background Check for Every Gun Sale.

Context: Even if the NICS database included the name of every person prohibited from having a gun under federal or state law, it would still be easy and legal to obtain guns with no background check, no questions asked. That is because the current law only applies to gun sales by federally licensed dealers.

The new law would require that non-licensed people selling guns ensure that the buyer has undergone a background check in NICS.

Under current federal law, only persons "engaged in the business" of selling guns are required to get a license, keep paperwork, and conduct background checks. People who maintain they are collectors or only occasionally sell guns are not required to do these checks. Such sellers often congregate at gun shows, which is why many refer to this exception as the "gun show loophole." But felons can exploit the loophole whether they are at a gun show or not—buying guns with no background checks at unlicensed sellers' homes, via classified ads, or even in some cases on the internet. Experts estimate that over six million guns a year—perhaps 40% of all sales—are made by unlicensed private dealers not subject to the law.

Background checks:

The new law would require that non-licensed people selling guns ensure that the buyer has undergone a background check in NICS. Sellers would be able to do so in three ways. First, the seller can go to a licensed dealer to have a background check run on the buyer. The revised law would cap the fee for conducting these background checks on behalf of private sellers at \$15. Second, the seller can inspect a permit issued to the buyer by a state or local government that confirms they have passed a background check within the previous five years. Third, the seller can go to or contact a law enforcement official for the background check at the time of purchase.

Why it matters: ATF has reported that over 27% of the guns involved in its criminal trafficking investigations were tied to trafficking by unlicensed sellers, and over 30% were tied to trafficking at gun shows.

Reasonable exceptions:

Similar to the Brady Law, revised legislation would exempt certain gun permittees and some types of transactions from background checks:

- Sales to a federally licensed dealer, manufacturer or wholesaler (including sales of curio or relic firearms to a licensed collectors);
- Sales to law enforcement;
- Transfers of guns to an immediate family member, grandchild, or grandparent;
- Inheritance of guns; and
- Sharing guns while hunting, at a shooting range, or at a competition.

Further Readings

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