

ADDITIONAL FIREARM REGULATIONS

Close the gun show loophole! No private sales!
We just need sensible regulations!

After every mass shooting there is a call for new and expanded regulations on the sale of firearms. Typical proposals call for “closing the gun show loophole” or requiring that sales by private individuals be made through a licensed dealer and subjected to background checks. As with all regulatory proposals, one has to ask such fundamental questions as whether regulation is needed and whether the proposed regulations would actually accomplish the stated goals. For that one needs to know the facts.

THE EXISTING REGULATIONS - NICS

A cartoon by Paul Noth in the March 8, 2018, edition of *The New Yorker* showed a customer at a pharmacy counter covered with handguns and a semi-automatic military style rifle. The caption has the pharmacist telling the customer, “I’ll need to see some I.D. for the Claritin.” It is funny, clever, and the implication that one can purchase a firearm more easily than a decongestant is readily accepted. But is it accurate? Before we can have a serious discussion about new regulations or changes to existing ones, we first must understand the existing regulatory framework, how it functions, any deficiencies in the existing regulations or their implementation, and how the regulations or their implementation might be improved.

The present National Instant Criminal Background Check System (NICS) became operational in 1998. It requires that all persons purchasing any firearm from a “dealer” holding a federal firearms license (an “FFL”) be subject to a background check to insure the

purchaser is not prohibited from purchasing or owning a firearm. The Gun Control Act of 1968 as amended by the Firearms Owners' Protection Act of 1986 defines "dealer" broadly as any person who is "engaged in the business of selling firearms at wholesale or retail," "repairing firearms," or "making or fitting special barrels, stocks, or trigger mechanisms to firearms," or who is a pawnbroker. 18 U.S. Code § 921 [\[REF LINK\]](#) The requirement that the person or entity be "engaged in the business of selling firearms" refers to someone who deals in firearms "as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms." *Id.* It does not include "a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." *Id.* Thus, anyone who regularly sells firearms as a means of livelihood must obtain a federal firearms license and is required to perform background checks for all sales. The federal firearms licensing system is administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), an agency of the U.S. Department of Justice.

When a buyer wishes to purchase a firearm from an FFL dealer, the buyer first must complete a Form 4473 [\[REF LINK\]](#) providing basic identifying information like name and date of birth, and stating under penalty of law that he or she is the actual buyer of the firearm. That latter requirement is intended to prevent "straw man" purchases for third parties who themselves are not permitted to purchase firearms. The buyer next must check boxes on the Form indicating whether the buyer has been convicted of a felony, is a fugitive from justice, has been dishonorably discharged from the armed forces, is a subject of a domestic violence restraining order, or has been found by a court to have a mental illness, among other things. If the buyer answers, "yes" to any of those questions, he or she will be prevented from buying the firearm. If they answer "no" the dealer will next run the buyer's name through the FBI's National Instant Criminal Background Check System, or NICS, to see if any records show the buyer was not telling the truth.

Most of the NICS background checks are handled directly by the FBI, although some are processed by the states using the same federal databases. NICS checks processed by the FBI in 2015 generally took about eight (8) minutes if done over the phone [[REF LINK](#)] If processed over the Internet, they typically were completed in two (2) minutes or less. *Id.* Assuming nothing is disclosed by the background check, the sale is completed and the buyer can leave with the firearm.

Although no reason will be given, a dealer submitting a background check will receive one of three responses:

- 1) Proceed – No disqualification found; sale permitted.
- 2) Deny – Disqualification found; sale not permitted.
- 3) Delay – Something in the database suggests possible disqualification and requires further investigation. The sale is delayed for the statutory three (3) days allowed for investigation. If no final determination is made within that 3-day window the FFL has discretion whether to sell the firearm or not. *Id.* The FBI continues to investigate for up to an additional 90 days after which the transaction is purged as required by law.

An immediate determination usually is made in over 90% of searches handled by the FBI. Less than 10% fall into the “delay” category [[REF LINK](#)]. In all cases, if it is later determined by the FBI that the sale should not have been permitted, the buyer and firearm are placed on a list for retrieval by the ATF.

In theory, the FBI should have a definitive list of people who are prohibited from purchasing firearms. In reality, the system is only as good as the databases being searched and the efforts made to keep them updated with current information. That and other cases of human error are where problems have occurred in the past. The NICS data consists of three national databases: the National Crime Information Center (NCIC), which contains information on wanted persons, protection orders, and other persons identified as relevant to the NICS searches; the Interstate Identification Index (III), which accesses

criminal history records; and the NICS Indices, which contains information on prohibited persons as defined in the Gun Control Act of 1968. That last Index, the NICS Indices, includes individuals who are prohibited by federal or state law from possessing or receiving a firearm who might not be included in the other two databases.

The problem historically has been incomplete or inaccurate reporting of data to these databases. While federal departments and agencies are required by law to provide such data, many do not have procedures and systems in place to do so consistently or reporting has been haphazard. The November 2017, Sutherland Springs Church shooter was able to purchase the firearms he used to kill 26 people and wound another 20 only because the Air Force failed to report his court martial and conviction for domestic assault; both of which would have prevented the purchase had they been in the NICS database.

In 2013, the Justice Department initiated a major effort to improve compliance by federal agencies with the data reporting requirements. Federal agencies were required to identify relevant records within their possession, develop a plan to ensure that those records were made available to NICS, and certify annually that they are making all relevant records available to NICS. At the end of 2007, federal agencies had submitted just over four million records to NICS but that number had risen to nearly 8.5 million by the end of 2016.

Because of the Tenth Amendment to the U.S. Constitution, States cannot be compelled to submit data to the federal database. Indian tribal authorities also cannot be forced to submit data. State voluntary compliance in supplying records varies widely, in part because many states have not yet adopted fully computerized record-keeping, but also because of the failure and lack of will to commit the necessary resources and funding to the task. Remember that the federal government cannot constitutionally force the states to collect or submit data – it can only reward them if they do or take things away if they do not. In 2008, the federal government provided increased funding for states to digitize criminal records and criminal database submissions

have improved since then. But the submission of mental health records remains problematic, in part because of another federal law.

The 1996 Health Insurance Portability and Accountability Act (“HIPAA”) safeguards the privacy of patient medical records, limits who can see them, and gives patients substantial control in determining who can access their medical and psychological histories [\[REF LINK\]](#). HIPAA contains exceptions allowing the release of confidential health information to law-enforcement authorities without the patient's consent in limited circumstances such as those involving child abuse or domestic violence. There is no specific HIPAA exception for firearm background check reporting, however, and states are left to make the determination of whether to report for themselves. The NICS Improvement Amendments Act of 2007 basically sought to bribe states to provide mental-health-related records by tying such reporting to federal funding of state law-enforcement activities. Some states responded favorably, while others continued to keep such records private. Despite the federal monetary incentive, a 2012 federal GAO review showed that as of October 2011, half of all states had contributed less than 100 mental health records to the NICS database and 17 of those states and all five territories had each contributed less than 10 records. [\[REF LINK\]](#).

From the foregoing, one can see that the design of the existing background check system is fundamentally sound. The problems are those inherent in any system that relies on a reasonably complete and up to date database and on human input and decision making to make it function effectively. History generally shows that those are the areas where the existing system has failed.

Thus we have the general problem of a database that lacks complete or current information because states and some federal agencies are simply not providing the data. We then have specific failures such as an individual who had been court martialled and had a conviction for domestic violence who nevertheless passed the NICS background check because the Air Force failed to report the data. The FBI itself is

also subject to human error as evidenced by the June 2015 shootings at a Charleston, South Carolina Church. The shooter's earlier arrest for narcotics possession was in the database, so the FBI examiner flagged the NICS request as a "delay" and began an investigation to determine whether the shooter was barred from purchasing a firearm. The arrest report incorrectly listed the arresting authority and efforts to determine the ultimate disposition took some time. As a result, the FBI examiner did not learn that the shooter had admitted the possession charge – a disqualifying fact – until after the 3 day period had expired and the shooter had taken possession of the firearms he ultimately used in the Church shooting.

In 2015, the FBI reported referral of 3,648 cases to the ATF for firearm retrieval, but that number was reduced substantially in 2017 after review [\[REF LINK\]](#). An internal FBI review and subsequent audit identified 1,092 transactions from 2008 through 2013 where the FBI recorded a denial within 3 days but firearm retrieval was still required. A sampling of 306 of those cases disclosed 59 instances where purchase approval was granted but should have been denied [\[REF LINK\]](#). 54 of the 57 approvals were corrected within the 3 day period but only after the firearm had been transferred to the purchaser. The dealer was able to recover the firearm in all but 16 of the cases and ATF recovered the remaining firearms without incident. *Id.* When the FBI does decide a sale should not have been made and refers the matter to ATF, recovery of the firearm should be made a high priority; something that has not always occurred in the past [\[REF LINK\]](#).

The reverse is also true, however. In 2015, FBI examiners denied 3,625 transactions that were later reversed on appeal [\[REF LINK\]](#). The primary reason for reversal was that fingerprints in the database did not match the buyer; suggesting that the buyer simply had the same name and date of birth as the person in the database.

In 2011, NICS employed 230 examiners and processed 16.5 million background checks. The same number of employees processed 23.1 million checks in 2015 [\[REF LINK\]](#). Sufficient resources should be allocated to insure that the FBI can consistently meet the 3 day

deadline. Extending that deadline would not be fair to legitimate purchasers and the cost of insuring the deadline is met is a reasonable balancing of the rights at issue.

More consideration also should be given to prosecuting those who attempt to illegally purchase a firearm. The FBI processed more than 51 million NICS transactions from 2008 to 2014 and denied 556,496 of these transactions or 92,749 transactions per year on average. *Id.* It is a federal crime to lie on the Federal Form 4473, but only 8 percent of those barred from buying guns are arrested after unsuccessfully trying to purchase one, and even fewer are actually brought to trial [[REF LINK](#)]. From 2008 through 2015, the various U.S. Attorneys' Offices considered only 254 subjects for prosecution and declined to prosecute the vast majority of them. *Id.*

In fairness, it can be difficult to prove these cases because prosecutors must convince a jury that the buyer intended to lie, and did not just make a mistake or misunderstand the Form. There also is a practical problem. With nearly 93,000 denied transactions per year, the Justice Department lacks the resources to prosecute and try even a fraction of the offenders. Some would argue the important thing is that the buyer did not get a firearm, and that scarce law enforcement and prosecution resources are better used elsewhere. But an unpublished study funded by the U.S. Department of Justice has demonstrated that persons who are denied the purchase of a firearm are more likely to be arrested in the five years following the denial than in the five years before it. Tien J. M., *Recidivism of Denied Prospective Firearm Purchasers*, Structured Decisions Corp. (May 2008) [[REF LINK](#)].

Without a comprehensive and up to date database, no background check will ever prevent dangerous and disqualified individuals from purchasing firearms ***because they will not be in the database!*** New or different regulations will not fix that problem. The only solution is to see that such individuals are entered into the database in a timely fashion. That means that states, territories, tribal authorities and other sources of information somehow must be motivated to provide not

only criminal data in a timely fashion, but also mental health data. Federal agencies like the Air Force need to have policies and procedures in place to insure court martial and other conviction data is properly collected and timely reported to the database.

The bottom line is that the existing system has the ability to work if the issues discussed above are addressed. And those issues cannot simply be ignored by the proponents of new regulations or changes to existing regulations. Outside of banning particular firearms, setting age limits for firearm purchases, and similar bright line restrictions, ANY effective regulation of firearms will have at its core some type of background check requirement – and that requirement will need a comprehensive, up to date database if it is to function effectively. Why not fix that problem now within the context of an existing system that generally works as intended before you try to reinvent the wheel?

If you are going to impose new or revised regulations, what problem is it you intend to address? You cannot begin to craft regulatory solutions without knowing how mass shooters and other criminals acquire the firearms they use. For that you need to ask:

HOW DO CRIMINALS GET THEIR FIREARMS? WHAT DOES THE DATA SHOW?

Mass Shooters

The Mother Jones news organization maintains, compiles and publishes a database on mass shootings. The current version of that database contains data on 98 mass shooting events over the last 35 years. The organization recently published a comprehensive analysis that looked at 62 mass shootings between 1982 and 2012 analyzing a number of variables including how the shooters obtained the firearms used in the attack and the types of firearms used. Of the 143 firearms possessed by the killers, more than three quarters (75%) were obtained legally. When analyzed by shooting, the firearms were

obtained legally in 49 of the shootings (nearly 80%) and illegally in 12. No determination could be made in the remaining case.

The average age of the shooters was 35. The majority of them were mentally troubled and many displayed signs of mental health problems before the shootings. All but two of the cases involved lone shooters. The Mother Jones database is updated regularly and now contains data on 98 mass shootings over the last 35 years. [\[REF LINK\]](#).

A chart showing some of the recent or better known mass shootings and how the shooters acquired their firearms appears below.

LOCATION	DATE	ACQUISITION OF FIREARMS
High School Parkland FL	02/14/2018	Legally purchased AR-15
First Baptist Church Sutherland Springs TX	11/05/2017	Legally purchased, but Air Force failed to enter disqualifying conviction in database
Las Vegas Strip	10/01/2017	Legally purchased with several firearms fitted with Bump Stocks
Pulse Nightclub Orlando FL	06/12/2016	Legally purchased rifle & handgun
Emanuel AME Church Charleston SC	06/17/2015	Legally purchased, but should have been barred by background check
Sandy Hook Elem. School	12/14/2012	Used Mother's legally purchased AR-15 style rifle after killing her
Century Theater Aurora CO	07/20/2012	Legally purchased rifle, shotgun & handgun
Fort Hood	11/05/2009	Legally purchased handgun
Virginia Tech	04/16/2007	Legally purchased handguns
Columbine HS	04/20/1999	Legally purchased rifle, shotguns & handguns illegally resold to minors

Based on that limited sampling, the problem does not appear to be the adequacy of existing regulations. What seems to be needed is better reporting of criminal convictions and mental problems, better follow up on reports of potential violence and proper implementation of existing regulations. Fairness requires, however, that some of the specific

regulatory suggestions be compared to all available data to evaluate whether more regulation might make a difference.

As noted above, the Mother Jones database now contains information on 98 mass shootings since 1982. One data point shows how the shooters acquired the firearms used in all of those shootings. In evaluating the efficacy of various proposed regulations, we can ignore the 8 shootings where the firearms were stolen from family members or others and the 2 where the shooters (a Sheriff's Deputy and National Guard member) used their service firearms. As for the others:

- Only two (2) of the shooters acquired the firearms used, in whole or in part, at a gun show.¹
- Six (6) were purchased, in whole or in part, from third-party individuals. Two of these, the ISIS inspired San Bernardino shooting and the Columbine shooting, appear to have intentionally used a "straw man" to avoid regulations and purchase the firearms used in the attack.
- One (1) was a gift from a family member.
- One (1) was legally assembled from component parts.
- None of the firearms appeared to have been acquired by inheritance.

Clearly, there is no gun show loophole that needs to be closed. Only two shooters out of nearly 100 acquired the firearms at a gun show. Acquisitions from private individuals, including gifts from family

¹ The Columbine High School shooters, assisted by the 18 year old girlfriend of one of them, purchased the rifle and two shotguns used in the shooting at the Tanner Gun Show in Denver, Colorado. They bought the Tec-9 semi-automatic handgun responsible for most of the carnage from an individual. Because the shooters were minors, the handgun sale was illegal under both state and federal law and that individual seller was prosecuted. While the gun show acquisitions were made by the girlfriend as a straw purchaser, this was not necessary as Colorado law allowed minors to purchase long guns like the rifles and shotguns purchased at the show. Federal law prohibited such sales to minors by licensed dealers, but not by individuals.

members accounted for seven (7) shootings, although the shooters in two (2) of those cases also purchased firearms from dealers. A regulation conceivably could be crafted that required all such sales (and gifts) be made through a licensed dealer and be subject to a background check. Compliance and enforcement would be obvious problems with any such regulation; especially among those who fear having their ownership becoming a part of the system and their firearms subject to confiscation at some later date.

But what are the relative costs and benefits of any such regulation, even if it could be enforced? With the exception of the San Bernardino shooting, there is no evidence that any of these individual purchases were made to evade regulations or that background checks would have prevented the purchases. If you exclude the two events where shooters also purchased firearms from dealers (and therefore presumably could have purchased all of the firearms from that source) and the one involving a firearm given as a gift, only four (4) of the 98 shootings involved firearms acquired solely from third-party individuals.

Criminals in General

That was the data on mass shooters. What does the data show about crime and criminals in general? Before we delve into the numbers, it should be remembered that the individuals being discussed are, by definition, persons who are willing to break the law and to use violence when doing so. It therefore must be assumed that they will not hesitate to ignore or circumvent any laws and regulations intended to prevent them from obtaining firearms.

As a general rule, criminals acquire their firearms primarily through theft, or from other criminals, through the black market, or from acquaintances or family. The Department of Justice reported in 1985 that only one in five convicted felons obtained firearms through legal avenues such as retail stores; a percentage that has since declined even further. *Few criminals get guns through legal channels*, The

Spokesman-Review (October 1985). In 1992, a study by the ATF interviewed 100 criminals incarcerated under the enhanced penalty provisions of the federal armed career criminal statute (18 U.S.C. §924 (e)). Despite evasive responses, the study reported that 37% of those career criminals obtained their firearms from street sales or the black market, 34% from criminal acts (i.e. theft) or from criminal associates (i.e. drug dealers, co-conspirators, etc.), 8% from relatives, 7% from legitimate firearm dealers and 6% from flea markets and gun shows. U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, *Protecting America: The Effectiveness of the Federal Armed Career Criminal Statute* (March 1992) [[REF LINK](#)].

A 1997 Bureau of Justice Statistics survey of prison inmates convicted of crimes involving firearms found that nearly 80% acquired their firearms from “street or illegal sources” or from “friends or family”. The street and illegal sources included theft or burglary (10%), drug dealers and street purchases (21%) and black market sales (8.2%). Friends or family acquisitions included purchases or trades (12.8%), rented or borrowed firearms (18.5%) and “other” friends or family arrangements (8.3%). Just 12% of the criminals obtained firearms from licensed dealers and only 1.7% acquired firearms at a gun show or flea market. Harlow C. W., *Firearm Use by Offenders*, Bureau of Justice Statistics (2001) [[REF LINK](#)]. The survey also showed that criminals who carried firearms tended to use them. Roughly half of those carrying a firearm during the offense for which they were convicted discharged it and 23% of the state prison inmates injured or killed someone. *Id.* Interestingly, around 8% of the inmates who used a firearm reported carrying a military style semi-automatic rifle when committing their crimes, while 8 out of 10 carried a handgun. *Id.*

A search of the literature revealed no more recent studies of the issue, but a 2016 study in Pittsburgh analyzed 762 cases where firearms came into possession of the Police Firearm Tracking Unit. Most of the cases involved a single perpetrator and in fully 79% of them, the individual was carrying a firearm that did not belong to him. More than 30% of those firearms were reported stolen when owners were contacted but it could not be determined whether 44% of the firearms

were stolen or not. Fabio A., et al., *Gaps continue in firearm Surveillance: Evidence from a large US city Bureau of Police*, *Social Medicine* 10 (1), 13-21 (2016) [[REF LINK](#)]. That 79% figure is consistent with the 1992 ATF study and the 71% combined figure reported therein for firearms acquired from street/black market sales and thefts. It also comports generally with the 80% figure reported in the 1997 study by Harlow; especially if one views skeptically the 39.6% of firearms claimed to have been acquired voluntarily from friends and family members. It is difficult to know exactly how many firearms are stolen on an annual basis, but ATF estimates the number at more than 500,000 per year based on studies done in the 1990s. U.S. Department of the Treasury and U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* (2000) [[REF LINK](#)]. A 2012 study estimated the number at 600,000 from private residences alone. Braga A. A., et al., *Interpreting the empirical evidence on illegal gun market dynamics*, *Journal of Urban Health*, 89(5):779-793 (2012) [[REF LINK](#)].

As with the mass shooter data, there clearly is no gun show loophole requiring additional regulation. Very few of the criminals discussed above acquired their firearms from licensed dealers and no regulation is likely to impede illegal street and black market sales or the theft of firearms. Unlike the mass shooter data, however, a substantial percentage of the criminals claimed to have obtained their firearms from friends and family. At first glance, requiring registration and background checks of those acquisitions seems like a productive area for regulation.

But the point initially emphasized must be considered. We are talking about criminals, and specifically criminals who are willing to use firearms in the commission of their crimes. It is the height of naïveté to believe that they will comply with regulations requiring them to appear before a licensed dealer to undergo a background check before acquiring a firearm from a friend or family member. The burden of such regulations therefore would likely fall solely upon law abiding owners of firearms for whom such regulation is not needed.

Regulations and the resources to enforce them must be targeted where they can be effective, and a focus on private firearm sales is likely a misallocation of resources in light of the data:

Using resources in a cost-effective manner can maximize the life-saving capabilities of the resources devoted toward risk reduction through regulation. As an example, imagine we have the option of spending \$1 million to comply with two forms of regulation. One regulation will save a thousand lives while the other will save only one life. Which option do we choose? The answer may seem obvious, but often the numbers are not so clear. Economic efficiency helps us identify the option that gets us the most bang for our buck, and helps policymakers save as many lives as possible.

The Role of Regulatory Impact Analysis in Federal Rulemaking, Morrall and Broughel, Mercatus Center at George Mason University (2014) at 4 [\[REF LINK\]](#).

While a balancing of costs vs benefits makes common sense, it also is a requirement for all Federal regulations having a significant economic impact. Executive Order 12866 signed by President Clinton in 1993 replaced two similar Orders previously signed by President Reagan [\[REF LINK\]](#). That Order has been the cornerstone of White House administrative policy ever since and embodies a regulatory philosophy that:

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.... In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.

An agency must consider both the costs and the benefits of any proposed regulation which then may be adopted by the agency only upon a reasoned determination that the benefits of the intended regulation justify its costs. To implement the policy and provide oversight, agencies are required for each economically significant regulation to prepare a regulatory impact analysis evaluating the costs and benefits and the alternatives to the proposed regulation including the alternative of no regulation.

A cost/benefit analysis is not the only, or even the first, element in a regulatory impact analysis. The first step is to identify “the existence and nature of the problem the agency seeks to solve, because there can be no benefits unless the regulation actually solves a real problem.” Morrall and Broughel, *supra* at 6. If regulations are intended to solve a real problem, an agency next needs a reasonable expectation that the proposed regulation will in fact achieve the desired result, and an impact analysis helps in confirming that expectation. *Id.* While one can argue whether the regulations here at issue would be “economically significant”, the policies and logic underlying Executive Order 12866 cannot be ignored. Whether applying common sense or Federal regulatory policy, it is difficult if not impossible to justify the regulation of gun show transactions or individual sales based solely on mass shootings. And the societal and other costs of such regulation are substantial when weighed against the slim likelihood of compliance by other criminals seeking to obtain firearms.

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Author Note: Like many young men growing up in the rural South, the author owned a .22 caliber rifle and a shotgun, both of which were used for hunting and sport shooting. He no longer hunts and has passed the .22 rifle on to his son, but he still owns firearms for recreation and personal defense. He is not a member of the NRA and has no vested interest in the gun debate, but is tired of hearing heated arguments presented on both sides of the issue without bothering to learn the facts.