

**MEMO** *Published January 30, 2013 · Updated January 30, 2013 · 10 minute read*

# **Would Universal Background Checks Make a Difference?**

**Jim Kessler, Lanae Erickson, & Sarah Trumble**

In 2011, 16,454,952 did it. They went to a licensed firearms dealer to purchase a gun and submitted to a background check. The year before, it was 14,409,616. <sup>1</sup> And since the Brady Law took effect in 1994, 172,093,365 have gone to a federally licensed gun dealer and passed a background check to purchase a firearm. <sup>2</sup> If it's good enough for nearly 200 million people, why isn't it good enough for everyone else?

The background check is the linchpin of our nation's gun laws. In 1968, after the King and Kennedy assassinations, Congress passed the first major gun law. It prohibited felons, those adjudicated mentally ill, those dishonorably discharged, fugitives from the law, and certain other groups from purchasing or possessing firearms. It required all gun stores to be federally licensed and determined that anyone in the business of selling firearms must get a federal license as well. It banned the mailing of firearms and stipulated that people had to buy guns in the state where they lived. But before 1993, the main requirement of the law—the provision that prohibited certain people from buying or owning guns—was left to the honor system. No background check was deemed necessary to determine the legality of any buyer. <sup>3</sup> It was the Brady Law that made it so all sales from licensed gun dealers required a background check. <sup>4</sup> But in a compromise, it left private sales—that is, person-to-person sales—unregulated.

Bipartisan legislation will shortly be introduced to require that most private sales be conducted through a federally licensed firearms dealer and that buyers submit to a background check. This memo explains why a universal background check law is an essential and effective policy change, explains why it is not inconvenient for gun owners, and rates the quality of the National Instant Check System (NICS).

## **Why is a Universal Background Check Law Essential?**

### **1) It will play a critical role in stopping illegal gun trafficking.**

In a typical year there are roughly 500,000 crimes committed with firearms. <sup>5</sup> In about 145,000 of these crimes, a firearm is recovered by police and successfully traced for investigative purposes. <sup>6</sup>

- In 9 out of 10 gun crimes in which there was a trace, the person using the gun in the crime was not the person who originally bought it. <sup>7</sup>
- In 1 out of 3 gun crimes, the crime was committed in one state but the gun was originally bought in another. <sup>8</sup> (It is illegal to purchase guns out-of-state.) <sup>9</sup>

- The typical age of a person arrested for a crime with a firearm is 19. <sup>10</sup> (The legal age to purchase a handgun is 21.) <sup>11</sup>

Taken together, these facts point to a massive web of gun trafficking that ferries guns from the legal market to the shadow black market. And it indicates that much of that black market is supplied through person-to-person sales that are practically unfettered under federal law.

A universal background check law would make the sale of a firearm from an unlicensed individual to a criminal illegal and prosecutable. This alone would have a huge impact on “gun trafficking”—which is a term of art but not currently an actual federal crime. It would help dry up the shadow market by requiring background checks for those who seek to stockpile firearms (perhaps purchased through gun shows, the internet, newspaper want ads, and elsewhere) for the purposes of selling to criminals and minors.

## **2) Felons and gun runners have figured out how to exploit the unregulated private market.**

When the Brady Act was first signed into law, background checks snagged a lot of illegal buyers. In its first four years, 2.4% of those who submitted to a background check were denied. <sup>12</sup> In the most recent four years for which data is available, the denial rate was down to 1.53%. <sup>13</sup> This is true despite the fact that the background check system itself is much better today than it was 15 years ago. There are, among others, far more records on felony convictions, mental health disqualifications, and illegal immigration status in the NICS database than there were when the denial rate was much higher.

But this decrease in denials is driven by self-selection. Prohibited buyers now know they will be tripped up by a background check, so they use proxies (straw buyers who purchase guns for them) and the private sales market (gun shows, gun traffickers, and other venues) to obtain firearms. A quarter of sellers at gun shows are not federal licensees and (in most states) do not have to perform a single background check no matter how many guns they sell, according to a past DOJ study. <sup>14</sup> Many advertise that fact on their table next to their inventory, with signs saying things like “no questions asked”. As long as these private sales remain virtually unregulated, prohibited buyers can avoid the checks required at federally licensed dealers, and the illicit market can conveniently flourish.

## **3) Straw buyers have little to fear from the law.**

As George Costanza said, “it’s not a lie if you believe it’s true.” Under current law, it is illegal for a private individual to sell to felons, minors, and other prohibited buyers—but ONLY if it can be proven that the seller knew the buyer was a member of a prohibited class. <sup>15</sup> That

standard is so high that a person is only slightly more likely to be prosecuted under this statute than they are to be attacked by an alligator. <sup>16</sup>

This free pass to sell to anyone using the defense that “I didn’t know he was an ex-con” is the lubricant that makes the shadow market in crime guns flow. A simple background check requirement would eliminate the high bar of “knowing” and would make all sales occur under the same set of rules, instead of creating a speedy self-checkout line for those who want to avoid a background check.

## **Are Background Checks Convenient?**

### **1) Millions submit to background checks every year.**

As noted above, nearly 200 million people have gone through a background check to buy a gun. Any licensed gun dealer can perform the check, and there are roughly 60,000 current federal licensees from which to choose. <sup>17</sup> To put that number into perspective, imagine every McDonald’s you’ve ever seen and multiply by five. For every one McDonald’s, there are 5 licensed gun dealers in America. <sup>18</sup> Even in remote areas, people don’t have to travel far.

### **2) Checks are fast.**

On average, it takes NICS 7 seconds to answer a call for a background check. <sup>19</sup> 92% of background checks are completed within several minutes. <sup>20</sup> And NICS is open 17 hours a day, every day of the year except Christmas. <sup>21</sup>

In the 8% of checks that take longer, it is often because there is an issue that requires extra investigation. <sup>22</sup> For example, a NICS check may uncover a felony arrest, but it might take several hours or days to determine the final disposition of that arrest. If the check cannot be completed in 3 business days, the purchaser may take possession of the gun.

### **3) Family members would be exempt.**

Most serious background check proposals exempt sales or transfers between family members from the necessity of conducting a check and allow for exceptions for those who borrow guns to hunt, so long as the gun is transferred while on hunting grounds.

### **4) NICS can handle it.**

An oft-mentioned statistic estimates that as many as 40% of firearms sales are conducted without a background check.<sup>23</sup> A universal background check law, it would seem, could add about 7 million checks to the system.

But this 40% figure is almost certainly a fiction, as *The Washington Post* recently documented.<sup>24</sup> To recap, the 40% figure is extremely old (by gun policy standards)—dating back to a 1994 survey of gun owners. And the sample size is so tiny—251 gun owners—that it makes any conclusions dubious. If respondents couldn't recall how they obtained their firearm, it was counted as a private sale. Finally, respondents were asked if they bought from a federally licensed gun dealer. Thus, they had to be so proficient at understanding the just-passed congressional gun law that they'd have to know that certain sellers are federally licensed to answer correctly.

Presuming that the number is far, far lower than 40%, given the reasons outlined above, it is clear that the NICS system can handle it. Currently, NICS experiences huge surges when gun sales spike, including during the holidays, after a major shooting, or after the election of a Democratic president. None of these surges have overwhelmed the system, and neither will adding those for private sales.

## How Effective is NICS?

NICS is a good system, but not a great one.

In some areas, it does an exceptional job. The system is practically certain to snag anyone who has a previous felony conviction. Records of domestic violence and restraining orders have greatly improved over the years. And even mental health records have substantially increased in number in NICS.<sup>25</sup> But still, for every 10,000 people who submit to a background check, only 5 are denied based on mental illness.<sup>26</sup>

Much of the blame for the shortcomings of NICS belongs to the states, and some to the design of the original Brady Law. For example, when the Brady Law was passed, the gun lobby was adamant that NICS not in any way be used as a proxy for a national firearms registry. So not only are records of background checks destroyed within 24 hours, but the check itself does not use identifying markers such as Social Security numbers.<sup>27</sup>

States are supposed to supply disqualifying records to the federal database, but in some cases they do a horrible job. Pennsylvania, for example, has only one disqualifying mental health record in its database.<sup>28</sup> Oklahoma has two.<sup>29</sup> Virginia recently improved its mental health record contributions, but only after a crazed killer erroneously cleared a background check and purchased several firearms that he used at Virginia Tech.<sup>30</sup> But it's worth noting that many of the current legislative proposals for a universal background

check requirement would actually improve NICS as well, by incentivizing states to update their records or providing them with additional funding to make such updates possible.

All in all, NICS performs quickly and well. The system gets better every year, both in efficiency and in effectiveness.

## **Conclusion**

The Second Amendment confers an individual right to own firearms, but that right does not extend to terrorists, criminals, or those who are seriously mentally ill. The only time Second Amendment rights are even questioned is when a criminal or a mentally ill person obtains a firearm in violation of the law and commits a heinous crime. Recent polls have found 92% of all Americans <sup>31</sup> and 77% of NRA members <sup>32</sup> support such a law. Nearly 200 million law-abiding gun owners have gone through a background check already. If it's good enough for these gun owners, it should be good enough for the rest of us.

Universal background checks are well within our Second Amendment freedoms: they preserve the right for those who are responsible and deny it to those who would abuse the right for evil purposes.

Not every proposed gun law would have a large impact on crime and public safety. Universal background checks would.



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## ENDNOTES



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