

MEMORANDUM

TO INTERESTED PARTIES

FROM GIFFORDS

DATE NOVEMBER 14, 2017

RE A FRAMEWORK FOR IMPROVING BACKGROUND CHECKS AFTER SUTHERLAND SPRINGS

The Sutherland Springs shooting and subsequent statements by the Air Force has brought to light a number of loopholes in the background check system for gun purchases. These loopholes endanger American lives by allowing dangerous people to pass background checks and thereby obtain access to firearms despite being legally ineligible to do so.

As seen in Texas, the background check system is only as effective as the records it contains. In 2007, the state of Virginia's failure to report an individual determined by a court to be a danger to self or others—thus legally disqualified from gun possession—to the background check system enabled that person to obtain the guns used to kill 32 people in the Virginia Tech shooting. Subsequently, Congress passed, and President Bush signed, the [NICS Improvement Amendment Act \(NIAA\)](#). This law was designed to address the lack of proper records in the National Instant Criminal Background Check System (NICS), the system used for gun purchaser background checks.

The NIAA requires federal agencies, including the Department of Defense, to provide the Attorney General with information about any person prohibited from possessing firearms for inclusion in NICS. The NIAA also provides funding incentives to states to improve their reporting to NICS. In the years immediately following the law's enactment, these incentives proved to be effective in increasing reporting: the number of prohibiting mental health records included in NICS, like that of the Virginia Tech shooter, increased 700% from 2007 to 2014.

There are 11 categories of people prohibited from possessing firearms, including convicted felons, domestic abusers, individuals committed to mental institutions, fugitives, unlawful users of controlled substances, and people subject to domestic violence protective orders. Following the Sutherland Springs shooting, the [Air Force released a statement](#) admitting that the shooter was prohibited from possessing firearms based on a conviction for domestic assault, but that this conviction was not entered into the National Crime Information Center, one of the databases that links to NICS. The Air Force did not explain the reason for its failure to report the Sutherland Springs shooter to NICS.

Unfortunately, the failure of the Air Force to report the Sutherland Springs shooter was not an isolated case. In fact, a 2015 Department of Defense report found that, over a 28-month period, the Air Force failed to provide the proper information in 32% of qualifying offenses, including both felonies (or the military equivalent of felonies) and domestic violence. The report found similar failures by the Navy and Marine Corps. According to [the Associated Press](#), such failures have been continuing for the past 20 years.

A PROPER LEGISLATIVE RESPONSE

To address these issues, Congress should consider legislation to strengthen reporting to the background check system by both federal and state agencies, and close loopholes in the background check requirement itself. Below are four steps that Congress should take to make American communities safer from gun violence.

I. FEDERAL REPORTING

A proper legislative response to the revelations described above would aim to ensure that all federal agencies report all prohibited individuals to NICS. The Department of Defense must take prompt corrective action to fix the previous deficiencies with respect to its reporting. [“The Domestic Violence Loophole Closure Act,”](#) introduced by Senators Heinrich and Flake, would address this issue with respect to records of domestic violence offenses and would provide accountability for DOD in the form of required notices for missed deadlines and annual reports to Congress.

The bill does not, however, address DOD’s reporting of other categories of people prohibited from possessing firearms. These categories include individuals found guilty of non-domestic violence offenses punishable by imprisonment for a term exceeding one year, people subject to domestic violence protective orders, and people found incompetent to stand trial or not guilty by reason of insanity, or people recently found to be unlawfully using a controlled substance. The NIAA already requires DOD to report records of all of these categories to NICS in addition to domestic violence records, but there is no indication that DOD has done a better job of fulfilling this part of its obligation.

Other federal agencies are subject to the same obligation to report to NICS as DOD, but it is unclear to what extent these obligations are being fulfilled throughout the federal government. In December 2016, the Social Security Administration attempted to fulfill its obligation under the NIAA to report to NICS by promulgating a regulation requiring such reporting; at the behest of the gun lobby, however, Congress and President Trump responded by [revoking that rule](#), effectively preventing the Social Security Administration from complying with NIAA requirements. Given the obvious public safety threat due to incomplete records in NICS, Congress should not continue to hinder progress on this issue.

2. STATE REPORTING

States are also failing to properly report convicted domestic abusers and other prohibited individuals to NICS. Many states have not yet created protocols to distinguish misdemeanor domestic violence convictions from other misdemeanor convictions in their records. Similarly, many states do not provide sufficient information to NICS about domestic violence protective orders. Without this information, NICS cannot readily identify whether a conviction or protective order disqualifies the person from possessing a gun—meaning the domestic abusers can still pass a NICS background check. In fact, according to the GAO, inadequacies in the available records allowed domestic abusers to pass background checks and obtain guns over [6,700 times](#) between 2006 and 2015.

Consequently, Congress should pass [HR 4183, the Domestic Violence Records Reporting Improvement Act](#), recently introduced by Reps. Ryan Costello (R-PA) and Kathleen Rice (D-NY). This bill addresses the lack of reporting of domestic violence records to NICS by incentivizing states to submit complete records in two ways. First, it requires

states to use their [National Criminal History Improvement Program \(NCHIP\) grants](#)—generally available to encourage states to improve criminal history and related records—for purposes that contribute to the reporting of domestic violence records to NICS unless they have already submitted a certain percentage of such records.

Second, the bill makes [NICS Act Record Improvement Program \(NARIP\) grants](#) more available to states to improve submission of domestic violence records by waiving the current requirement that states have a program to restore gun rights to individuals formerly subject to mental health disqualifiers. These programs must also meet certain legal requirements for states to be eligible for NARIP grants. As of 2016, 21 states did not have qualifying programs and thus did not receive this grant funding.

Domestic violence records are not the only [state criminal history records](#) missing from NICS. Congress should increase the overall funding available to states for the improvement of their reporting systems and reward states for continuing to make progress in meeting benchmarks for improving their reporting. Congress should consider penalizing states that have failed to make similar progress toward improving the number of records they have reported.

3. CLOSING DOMESTIC VIOLENCE LOOPHOLES

Building on a more complete background check system, legislation introduced by Senators Amy Klobuchar (D-MN) in the Senate as the [Protecting Domestic Violence and Stalking Victims Act \(S 1539\)](#) and by Reps. Debbie Dingell (D-MI) and Dan Donovan (R-NY) in the House as the [Zero Tolerance for Domestic Abusers Act \(HR 3207\)](#), seeks to close loopholes in federal gun prohibitions that allow violent abusers to continually access guns.

Current federal law prohibits individuals convicted of misdemeanor domestic violence from purchasing or possessing firearms, but only if the victim and perpetrator had a qualifying relationship. These qualifying relationships include individuals who are a current or former spouse; parent, parent of a child in common; current or former cohabitant; or a person similarly situated to a spouse, parent or guardian. This limited definition leaves individuals in non-cohabitating dating relationships unprotected and their abusers free to legally access firearms. In reality, [women are now just as likely to be killed by dating partners as by spouses](#).

Federal law also prohibits individuals convicted of felony stalking from owning or accessing firearms. However, felony stalking charges are often pled down to the misdemeanor level, and those misdemeanor convictions then are not required to be entered into NICS and thus do not prohibit the abuser from gun possession. As stalking is a strong indicator of [future violence against women](#), any person convicted of a stalking crime should be prohibited from accessing guns. S 1539 and HR 3207 seek to close both of these loopholes, known as the “boyfriend loophole” and the “stalker gap,” to make victims of domestic violence and their families safer from violent abusers.

4. THE BACKGROUND CHECK REQUIREMENT

Finally, the background check system will only prevent an ineligible person from accessing a gun if the person from whom he or she is buying the gun is required to use the system. If a gun seller is not required to run a background

check on a gun buyer, it does not matter how many records are in NICS or whether the buyer is included in those records.

Under federal law, only licensed firearms dealers are required to conduct background checks on gun buyers. Unlicensed “private” sellers are not. Consequently, [between 20% and 40%](#) of gun sales and transfers occur without a background check.

These private transfers include those made over the internet, at gun shows, and through classified ads. The private sale loophole means that in most states, guns can easily fall into the hands of dangerous people, including people prohibited from gun ownership and who are included in the background check system. This may include felons, domestic abusers, and individuals deemed by a court as a danger to themselves or others, as identified through the proposals in this report. A system that requires background checks on some firearms transactions but not others dramatically reduces the effectiveness of all other gun laws.

In the absence of action at the federal level, it is up to states to close this lethal loophole. Nineteen states have extended [the background check requirement](#) to at least some private sales.

A background check should be conducted for the vast majority of gun sales, including sales conducted by unlicensed sellers. Senator Chris Murphy has introduced [S 2009, “The Background Check Expansion Act,”](#) which would require a background check for every sale or transfer of a firearm. This bill, in conjunction with the proposals set forth in this proposal, would prevent many dangerous people from accessing guns, and would save many lives.

Similarly, HR 4240, introduced by Reps. Peter King and Mike Thompson in the House as [“The Public Safety and Second Amendment Protection Act,”](#) would extend the background check requirement to gun sales at gun shows and gun sales via an advertisement or listing online or in a publication. It would also provide states with funding for reporting to NICS subject to certain conditions.

UNANSWERED QUESTIONS

The American public has been left with many unanswered questions in the wake of the Sutherland Springs shooting. Elected officials should take action as outlined above to close loopholes in our laws, but they should also demand answers from federal and state government. We shouldn’t have to wait until the next mass shooting to find out. Some questions to consider:

- Why did Department of Defense (DOD) protocols fail in the case of the Sutherland Springs shooter?
- How many other similarly dangerous people should have been reported by DOD but weren’t?
- What steps has DOD already taken to correct the long-standing deficiencies in its reporting to NICS, and what steps are still to be taken?
- How well do the appropriate people within DOD understand their obligations with respect to NICS reporting?

- Does the DOD do a better job reporting to NICS people who fall within other prohibited categories, such as people found incompetent to stand trial or not guilty by reason of insanity, or recently convicted of unlawfully using a controlled substance?
- Do other federal agencies have similar problems with their NICS reporting?
- What particular problems do states face in improving their reporting to NICS?
- Would the background check system be more effective if the FBI and state agencies had more time to complete the checks?
- Can more information about federal and state reporting to NICS be made available to the public?

Are there other groups of identifiably dangerous people who are not subject to the federal gun prohibitions and therefore are not reported to NICS, but should be?

ABOUT GIFFORDS

Giffords is a nonprofit organization dedicated to saving lives from gun violence. Led by former Congresswoman Gabrielle Giffords and her husband, Navy combat veteran and retired NASA astronaut Captain Mark Kelly, Giffords inspires the courage of people from all walks of life to make America safer.