

RECOMMENDED ACTION MEMO

Agency: Department of Defense (DoD)
Topic: Reporting to the National Instant Criminal Background Check System (NICS)
Date: November 2020

Recommendation: Take aggressive actions to ensure that any court martial that disqualifies a servicemember from purchasing or possessing a firearm under federal law is reported to NICS.

I. Summary

Description of recommended executive action

Federal law requires the Department of Defense (DoD) to provide records to the National Instant Criminal Background Check System (NICS) identifying people prohibited from purchasing or possessing firearms, including people who have been convicted through court martials of felony-level crimes and misdemeanor crimes of domestic violence. Yet, the DoD has persistently been unable to fully carry out its obligation to report these individuals to NICS.

Under this proposal, the DoD would take aggressive action to ensure that these individuals are reported to NICS, including the following:

- Strengthening its implementation plan under the Fix NICS Act of 2018, including by shortening the relevant timelines
- Issuing military orders requiring the appropriate personnel to fulfill their NICS reporting obligations
- Demoting those military personnel who fail to fulfill their NICS reporting obligations
- Withholding bonus pay from political appointees within DoD who fail to fulfill their NICS reporting obligations

Overview of process and time to enactment

The DoD is already two decades behind in fulfilling its NICS reporting obligations. Yet, an individual who has been convicted through a court martial of a disqualifying crime could walk into a gun store and attempt to purchase a gun on any day. The urgency of the danger to public safety requires immediate action. The next administration should prioritize this problem so that the DoD is in full compliance with its NICS reporting obligations by mid-2022 at the latest.

II. Current state

The Brady Act and DoD records

Enacted in 1993, the Brady Handgun Violence Prevention Act (Brady Act) required the attorney general to create NICS, which became operational in 1998. NICS is the system used by the Federal Bureau of Investigation (FBI), and state, tribal, and local agencies to conduct background checks on firearms purchasers and transferees. NICS contains information

identifying people who are prohibited from purchasing or possessing firearms under federal or state law.¹

Federal, state, tribal, and local courts and agencies submit information in various forms to NICS about people who are legally ineligible to possess firearms. The Brady Act authorized the attorney general to secure information about these people from federal departments and agencies. More importantly, that law mandated that the head of each department or agency furnish this information to NICS at the attorney general's request.² The DoD has information about people who have been convicted through court martials of felony-level crimes and misdemeanor crimes of domestic violence. People who have been convicted of such crimes are not eligible to possess firearms under federal law.³

Longstanding military policies and instructions require reporting to NICS. In 1987, long before the Brady Act became law, the DoD inspector general issued a memorandum to establish policies and procedures for the defense criminal investigative organizations (DCIOs) to report offender criminal history data to the FBI.⁴ DoD Instruction 5505.11, originally issued in 1998, in turn, mandates that DCIOs and other DoD law-enforcement organizations submit criminal history data, including fingerprints and disposition data to the FBI's Criminal Justice Information Services (CJIS) Division.⁵ CJIS maintains the files of the National Crime Information Center (NCIC), which are accessed when a background check is conducted through NICS.⁶ Each branch of the military is therefore already obligated by law to report certain offender criminal history data for members of the military for inclusion in NICS (and, more specifically, the files of NCIC).

DoD's failure to report to NICS

The DoD has persistently been unable to carry out its obligation to fully report these individuals to NICS. This failure is well-documented. Indeed, as early as 1997, the DoD inspector general evaluated compliance by the Air Force, Navy and Army with the criminal history data reporting requirements, and published the results of that evaluation. The 1997 report stated that, over an eighteen-month period, the Air Force failed to submit appropriate records in approximately 50% of its cases; the Navy failed to submit final records in approximately 94% of its cases; and the Army failed to submit records in approximately 79% of its cases.⁷

Reporting to NICS by both federal and state agencies became the focus of congressional attention again following the fatal shooting of 32 students and faculty at Virginia Tech in 2007. The Virginia Tech shooter was ineligible to possess firearms, but the State of Virginia had failed

¹ Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1993); Federal Bureau of Investigation, "National Instant Criminal Background Checks System (NICS) 2018 Operations Report," accessed October 14, 2020, <https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view>.

² Brady Handgun Violence Prevention Act § 103(e)(1) (now codified at 34 U.S.C. § 40901(e)(1)).

³ 18 U.S.C. § 922(g).

⁴ See Inspector Gen., Dep't of Defense, "Evaluation of Department of Defense Compliance with Criminal History Data Reporting Requirements," February 10, 1997, 4, 20.

⁵ *Id.*, see also Office of the Inspector General of the Department of Defense, "DoD Instruction 5505.11: Fingerprint Reporting Requirements," October 31, 2019, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550511p.pdf>.

⁶ 28 C.F.R. §§ 25.2, 25.4.

⁷ Inspector Gen., Dep't of Defense, "Evaluation of Department of Defense Compliance with Criminal History Data Reporting Requirements," February 10, 1997, 4, 20.

to properly report records about him to NICS.⁸ As a result Congress enacted the NICS Improvement Amendments Act of 2007.⁹ Although the primary focus of this legislation was NICS reporting by states, the Act also imposed an affirmative duty on federal departments and agencies to report disqualifying information to NICS in electronic form on a quarterly basis.¹⁰ To incentivize compliance, the attorney general is required to provide an annual report to Congress on each department's or agency's success.¹¹

The DoD's reporting to NICS improved, but in 2015, the DoD inspector general reported that the same problems persisted, and the Air Force still failed to submit approximately 32% of its qualifying records; the Navy still failed to submit approximately 25% of its qualifying records; and the Marine Corps failed to submit approximately 33% of its qualifying records.¹²

The Sutherland Springs shooting and its aftermath

On November 5, 2017, a gunman opened fire at a church in Sutherland Springs, Texas, killing 26 people and injuring an additional 20. The gunman was a former member of the Air Force who had been convicted in a court-martial after a brutal assault on his wife and stepson. The Air Force admitted that it had failed to report the conviction to NICS properly, enabling the shooter to purchase the guns used in the massacre.

Soon thereafter, on December 4, 2017, the DoD inspector general released a third report, similar to the 1997 and 2015 reports, evaluating compliance by the Air Force, Navy, Army and Marine Corps with their criminal history data reporting requirements. The 2017 report stated that, for convictions between January 1, 2015 and December 31, 2016, the Air Force failed to submit final disposition reports in approximately 14% of its cases, the Navy failed to submit final disposition reports in approximately 36% of its cases, the Army failed to submit final disposition reports in approximately 41% of its cases, and the Marines Corps failed to submit final disposition reports in approximately 36% of its cases. The DoD inspector general acknowledged the seriousness of these failures by saying, "[a]ny missing . . . final disposition report can have serious, even tragic, consequences."¹³

The Sutherland Springs shooting and the subsequent DoD inspector general report brought the DoD's reporting failures to the attention of policymakers nationwide. The DoD acting inspector general testified to Congress in April 2018 that these problems persisted because the DoD simply "didn't take [his office's] recommendations as seriously as they should have."¹⁴

⁸ See Michael Luo, "Cho's Mental Illness Should Have Blocked Gun Sale," *N.Y. Times*, April 20, 2007, <https://www.nytimes.com/2007/04/20/us/20cnd-guns.html>.

⁹ See NICS Improvement Amendments Act of 2007 (NIAA), Pub. L. No. 110-180, 121 Stat. 2559 (2008).

¹⁰ *Id.* § 101(a) (codified at 34 U.S.C. § 40901(e)(1)(C)-(D)).

¹¹ *Id.* (codified at 34 U.S.C. § 40901(e)(1)(E)).

¹² Inspector Gen., Dep't of Defense, "Evaluation of Department of Defense Compliance with Criminal History Data Reporting Requirements," February 12, 2015, i.

¹³ Inspector Gen., U.S. Dep't of Defense, "Evaluation of Fingerprint Card and Final Disposition Report Submissions by Military Service Law Enforcement Organizations," December 4, 2017, 6 ("2017 Report").

¹⁴ In addition, three municipalities, who use NICS to fulfill their legal obligations, sued DoD and its constituent military departments to compel the department's more thorough compliance. However, in January 2019, the Fourth Circuit affirmed the dismissal of their claim, holding both that the appellants lacked constitutional standing and failed to establish subject matter jurisdiction under the Administrative Procedure Act. See *City of New York v. United States DoD*, 913 F.3d 423 (4th Cir. 2019). Another lawsuit, brought by families of the victims, is ongoing, however. See *Holcombe v. United States*, 388 F. Supp. 3d 777 (2019) (granting in part and denying in part the plaintiffs' motion to dismiss for lack of jurisdiction).

Fix NICS and the current status at the DoD

In response to the Sutherland Springs shooting, Congress again amended the statute governing NICS to improve inter-agency reporting.¹⁵ The Fix NICS Act of 2018 requires the head of each federal department or agency with disqualifying records, in coordination with the attorney general, to establish a four-year implementation plan to maximize reporting, including annual benchmarks, and an estimated deadline for full compliance. Second, the head of each federal department or agency must now certify twice per year that they are uploading criminal records information to NICS and provide the number of records submitted.¹⁶

Fix NICS holds departments and agencies that fail to report accountable in two ways. First, the attorney general must make a semiannual “substantial” compliance determination based on the department or agency’s implementation plan; publish on the DOJ’s website; and report to Congress on any department or agency that has failed to submit the required certification or comply with its implementation plan. Second, the law makes political appointees at non-compliant departments and agencies ineligible for bonus pay for each fiscal year from 2019 through 2022 until the department or agency achieves substantial compliance with its implementation plan.¹⁷

In November 2019, the attorney general published the first report on federal agencies’ and departments’ compliance with Fix NICS. Although Fix NICS requires these reports to be published semiannually, this report covered the first three reporting periods required by the act. According to the report, the DoD was the only federal department or agency that certified that it had failed to comply with its NICS reporting obligations, and this failure continued through all three reporting periods.¹⁸

The report also provided a summary of the DoD’s implementation plan. The plan provided that the DoD would not publish an agency NICS implementation policy until June 2021, would not update all relevant agency policies to incorporate its NICS implementation policy until June 2023, and would not be in compliance with either the NICS Improvement Amendments Act of 2007 or Fix NICS until September 2023.¹⁹

However, a DoD [inspector general report](#), issued in February 2020, claimed the DoD is in “100%” compliance with its NICS reporting obligations. This report did not describe its methodology, and the basis for this claim is unclear.²⁰

¹⁵ Fix NICS Act, Pub. L. No. 115-141, Div. S, Title VI (2018).

¹⁶ *Id.* § 602.

¹⁷ *Id.* § 602(1) (codified at 34 U.S.C. § 40901(e)(1)(F)-(I)).

¹⁸ Dep’t of Justice, “The Attorney General’s Semiannual Report on the Fix NICS Act,” November 2019, <https://www.justice.gov/ag/page/file/1217396/download> (indicating on page 6 that a certification was received from DoD, and in Appx A, page 2, that DoD failed to comply with its reporting obligations).

¹⁹ Appx B., page 8

²⁰ Dep’t of Defense, Office of Inspector General, “Evaluation of DoD Law Enforcement Organization Submissions of Criminal History Information to the Federal Bureau of Investigation,” February 21, 2020, https://media.defense.gov/2020/Feb/25/2002254091/-1/-1/1/DODIG-2020-064_REDACTED.PDF.

A much more transparent account of federal agencies' compliance with the requirements of Fix NICS came when the Government Accountability Office (GAO) issued a report in July 2020.²¹ Among other things, the report reiterated the deadlines noted in the November 2019 AG report, including that DoD would not update all relevant agency policy until June 2023. The GAO report also stated:

According to DoD officials, not all components or law enforcement agencies can track how many records they submit to the III or NCIC databases because their computer systems are not capable of providing this information. As a result, DoD certified that it is not in compliance with the Fix NICS Act's record submission requirements. To address this issue, DoD reported in its implementation plan that it plans to acquire a system that can track these record submissions. This system is to be evaluated by DoD's Office of Cost Assessment and Program Evaluation in September 2020, reach initial operating capability by September 2021, and enable DoD to be compliant with the Fix NICS Act by September 2023.

III. Proposed action

Description of substance

The DoD should take aggressive action to ensure that these individuals are reported to NICS. The first thing the DoD should do is work with the attorney general to strengthen the DoD's Fix NICS implementation plan. As described above, the DoD's current plan unnecessarily delays the relevant timelines so that the DoD is not required to come into full compliance until September 2023. This deadline is unacceptable. The DoD should be in full compliance by mid-2022 at the latest. Furthermore, the current plan does not include "a needs assessment, including estimated compliance costs,"²² even though the Fix NICS Act explicitly requires federal agencies' plans to include these assessments.²³ The DOJ must provide the DoD with technical assistance if necessary to help the DoD fulfill these obligations.²⁴

Secondly, the DoD must issue military orders requiring the appropriate personnel to fulfill their NICS reporting obligations. As described below, military orders have much of the force of law, and failure to obey them can result in criminal penalties.

Description of the process for the new administration

The DoD should update its NICS implementation policy and all relevant agency policies within a short period of time. This step in the process can be completed long before the June 2023 deadline set by the DoD's current implementation plan. The next administration should make it a priority for the DoD to complete this step in the process within a few months of taking office, and before June 2021 at the latest. This new policy should assign NICS reporting obligations to the appropriate servicemembers and give them the full force of military orders.

As noted above, the DoD's Office of Cost Assessment and Program Evaluation should have evaluated a new system for tracking record submissions by September 2020. The next

²¹ Government Accountability Office, "GUN CONTROL DOJ Can Further Improve Guidance on Federal Firearm Background Check Records," July 2020, <https://www.gao.gov/assets/710/707986.pdf>.

²² *Id.* at Table 7.

²³ 34 U.S.C. § 40917(b)(2).

²⁴ 34 U.S.C. § 40901(e)(1)(J).

administration must begin implementing this system immediately, so that the DoD can be in full compliance by mid-2022 at the latest.

In addition, giving military orders the force of law means not hesitating to hold those who disregard these orders accountable. At the very least, military personnel who fail to comply with their NICS reporting obligations should be demoted.

Finally, the Fix NICS Act explicitly authorized the withholding bonus pay from political appointees within the DoD who fail to fulfill their NICS reporting obligations. The DoD should not hesitate to make use of this authority when appropriate.

The DoD's failure to fulfill its NICS reporting obligations is dangerous, illegal, and unacceptable, especially in the context of the military. In contrast, the actions described above are reasonable, achievable, and proportional responses to the threat to public safety posed by this failure.

The DoD's NICS reporting failures violate the law

As described above, the Brady Act, the NICS Improvement Amendments Act of 2007, and Fix NICS each unambiguously require all federal departments and agencies, including the DoD, to report to NICS. The DoD is not meeting these legal obligations. In fact, the DoD's own inspector general's reports clearly document that, as far back as 1997, and continuing through the present, the DoD has systematically and knowingly failed to fulfill these obligations.

The DoD inspector general has warned the DoD for at least two decades about this long-standing and systemic failure to comply with the law requiring it to report criminal conviction information, "repeatedly [finding] deficiencies with military services' submission of...final distribution reports and other criminal history information to the FBI."²⁵ There can be no question that the DoD should take all necessary actions to come into compliance with the law.

The DoD's reporting failures imperil public safety

Given the danger that exists when a prohibited person has not been reported to NICS, these lag times are unacceptable and threaten public safety. Both the Virginia Tech and Sutherland Springs shootings amply demonstrated the horrific results that can occur when people who have become ineligible to possess firearms are not properly reported to NICS. As long as the DoD fails to properly report every disqualifying court martial to NICS, the danger of similar tragedies persists.

The DoD's NICS reporting failures are particularly unacceptable since the military arms service members and trains them in the usage of firearms, giving them greater skills with weapons designed to inflict fatal injuries in combat situations. Along with the authority that commanders have to provide service members with these skills should come a responsibility to ensure that service members don't use these skills to commit acts of violence against civilians. Reporting to the NICS is crucial to fulfilling this responsibility. A service member who has been convicted in a court-martial of a felony-level crime or domestic violence, yet possesses a firearm, poses the same, if not greater, threat to public safety than a civilian convicted of a similar crime. That

²⁵ Dep't of Defense, Office of Inspector General, "Evaluation of DoD Law Enforcement Organization Submissions of Criminal History Information to the Federal Bureau of Investigation," February 21, 2020, https://media.defense.gov/2020/Feb/25/2002254091/-1/-1/1/DODIG-2020-064_REDACTED.PDF.

information must be reported to NICS so that these individuals are not able to pass a background check to buy a gun.

The nature of the military makes these failures even less acceptable

The DoD's failure to ensure that court-martials are properly reported to NICS is particularly shocking, given the discipline expected within the military. Servicemembers who fail to obey lawful orders of their superiors can be punished through court martials.²⁶ As one commentator has described

...commanders continue the tradition borrowed from King George III of controlling behavior within the military by deciding whom to punish, how, and for what conduct; given that a much wider swathe of conduct is potentially criminal in the military than outside of it, this is enormous power. Not only do commanders decide whom to prosecute and for what crimes; they also decide whom to alternatively discipline outside of the courtroom and whom not to discipline at all...Such wide-ranging authority to respond to misconduct does not operate in a vacuum. It is coupled with commanders' vast administrative and operational powers over individuals under their command. Such power includes, *inter alia*, the authority to evaluate and promote,... certify fitness for deployments; it also includes the power to order members, if in an operational setting, to take the next hill or fly the next sortie.²⁷

Senior officers should order those in the proper positions to ensure that court martials are properly reported to NICS, and commanders should use their authority to ensure that those who fail to obey these orders are held accountable.

The military exists to protect and defend our country from acts of violence. As such, the requirement that the DoD properly report to NICS fulfills the purpose of the military directly. The DoD's continuing failure to fulfill this responsibility is an embarrassment.

Reporting to NICS should be one of the military's highest priorities

The military often sees itself as a world apart, separate and exempt from the norms of civilian life. Nevertheless, the law recognizes that the military and civilian worlds can impact one another. While a federal statute, known as the Posse Comitatus Act, enacted in 1878, prohibits the military from being used for domestic law enforcement activities, an exception applies when expressly authorized by the Constitution or Congress.²⁸ Congress has expressly authorized the sharing of information between the military and law enforcement, and federal law states "The needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account in the planning and execution of military training or operations."²⁹

Besides constituting a violation of the laws mentioned above, the DoD's failure to fulfill its NICS reporting obligations is inconsistent with these longstanding, well-recognized principles. Until now, the military has failed to sufficiently take into account civilian law enforcement's need for

²⁶ 10 U.S.C. § 890-892.

²⁷ Rachel E. VanLandingham, "Military Due Process: Less Military & More Process," *Tul. L. Rev.* 94 no.1, (November 2019), 19-20.

²⁸ Congressional Research Service, "The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law," November 6, 2018, <https://fas.org/sgp/crs/natsec/R42659.pdf>.

²⁹ 10 U.S.C. § 271(b).

information about service members and former service members who are not legally eligible to possess firearms. The time is far past due to remedy these deficiencies.

IV. Risk analysis

There is little legal risk involved in the actions proposed above. The most likely area of dispute, however, involves the effects of these actions on individual members of the military. However, the DoD's authority to hold personnel accountable for failure to fulfill NICS reporting requirements is clear.

The secretary of the DoD can issue military orders requiring the appropriate personnel to report to NICS. To some extent, these orders may already exist, but personnel have not complied with them. Disobeying these orders constitutes an "offense" punishable by court-martial under the Uniform Code of Military Justice (UCMJ).³⁰ Dereliction of duties is also an offense, and simple negligence is the proper standard for determining whether nonperformance of military duty is derelict within the meaning of the UCMJ.³¹ Court-martial convictions for dereliction of duties have been upheld for, among other things, failing to record the weather properly,³² provide adequate financial support for a spouse,³³ or verify amusement game cash receipts.³⁴

Disobeying orders and dereliction of duties can be punished through a court-martial, but would more likely be punished through one of the non-judicial methods listed in UCMJ. One of these methods is demotion.³⁵ The USMJ authorizes commanding officers to "in addition to or in lieu of admonition or reprimand" impose "reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction."³⁶ Additionally, an officer of the grade of major, lieutenant commander, or above is authorized to impose "reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades."³⁷

Once military personnel have received proper orders to fulfill their NICS reporting obligations, they must treat these obligations as part of their military duties. If they fail to obey these orders, or are derelict in these duties, they must be subject to demotion.

In addition, the Fix NICS Act made political appointees at non-compliant departments and agencies ineligible for bonus pay for each fiscal year from 2019 through 2022, until the department or agency achieves substantial compliance with its implementation plan.³⁸ As noted above, the DoD's current implementation plan has so far failed to include all the elements required by the Fix NICS Act. These political appointees should therefore be considered ineligible for bonus pay during this time period at least.

³⁰ 10 U.S.C. §§ 890-892.

³¹ 10 U.S.C. § 892; *United States v. Lawson*, 36 M.J. 415, 1993 CMA LEXIS 55 (C.M.A. Apr. 19, 1993).

³² *United States v. Dellarosa*, 30 M.J. 255 (C.M.A. 1990).

³³ *United States v. Blanks*, 77 M.J. 239 (C.A.A.F 2018).

³⁴ *United States v. Bankston*, 22 M.J. 896 (N.M.C.M.R 1986).

³⁵ 10 U.S.C. § 815.

³⁶ 10 U.S.C. § 815(b)(2)(D).

³⁷ 10 U.S.C. § 815(b)(2)(H)(iv).

³⁸ 34 U.S.C. § 40901(e)(1)(F)-(I).

V. Conclusion

The DoD's continuing failure to fulfill its NICS reporting obligations puts us all in danger, and places the DoD in violation of the law. An aggressive response is necessary for the next administration to fix this problem. Issuing military orders with the force of law to compel DoD personnel to fulfill these obligations, and holding personnel accountable when they do not comply are responsible measures proportional to the risks. The next administration should not hesitate to take these steps.