



RECOMMENDED ACTION MEMO

Agency: Federal Bureau of Investigation (FBI)
Topic: Retaining Records of Default Proceeds
Date: November 2020

Recommendation: Require records of unresolved background checks on gun buyers to be retained.

I. Summary

Description of recommended executive action

Every year, the FBI is unable to complete hundreds of thousands of background checks on gun purchasers. Federal law requires the destruction of background check records within 24 hours if the background check has been completed and the purchaser has been approved,¹ but no statutory provision applies to records when the background check has not been completed. Nevertheless, an FBI regulation requires records of incomplete background checks to be destroyed after no more than 90 days.² Meanwhile, the FBI maintains and preserves records of all background checks when gun purchasers are affirmatively found to be ineligible and the gun sales are denied.³

The failure of the FBI to retain records of incomplete background checks endangers public safety for two reasons. First, federal law allows a gun dealer to transfer a gun to a purchaser after three business days, even if the background check has not yet been completed.⁴ If this background check is still not completed after 90 days, there continues to be a risk that the purchaser is ineligible to possess the gun that he or she may now possess. The destruction of the background check record deprives the FBI of any opportunity to discover that the purchaser was ineligible and to retrieve illegally possessed weapons. Second, the destruction of these records prevents the FBI from properly auditing the background check system, identifying patterns among incomplete background checks, and improving the system's ability to make accurate determinations in a timely fashion. These problems are exacerbated when gun sales increase, as has been the case in 2020.

The FBI should promulgate a regulation allowing for the maintenance of records of gun-purchaser background checks until a determination is made that the gun purchaser does not fall within one of the categories of people prohibited by federal or state law from purchasing or possessing guns. Under this proposal, the FBI would be better able to complete its background

¹ Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, § 511, 125 Stat. 552 (2011); see also 18 U.S.C. § 922(t)(c)(2).

² 28 C.F.R. § 25.9(b)(1)(ii), (c), (d).

³ 28 C.F.R. § 25.9(b)(1)(i).

⁴ 18 U.S.C. § 922(t)(1)(B)(ii).

check, based on information it might receive after the 90-day cutoff, and would be able to properly improve the background check system.

Overview of process and time to enactment

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the notice and comment rulemaking (NCRM) process.⁵ To amend the regulation, the FBI will be required to issue a notice of proposed rulemaking (NPRM), provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the Federal Register. A rule generally goes into effect thirty days after it is published.⁶ This multi-phase process generally extends for a year.

In addition, the Privacy Act of 1974 sets out requirements for government databases containing records that can be retrieved by personal identifying information.⁷ It is not clear whether these procedural requirements would apply here. The DOJ's Office of Privacy and Civil Liberties ensures DOJ's compliance with the Privacy Act and is the entity best positioned to make that decision.

II. Current state

Gun purchaser background checks

The Brady Handgun Violence Prevention Act of 1993 (the Brady Act) requires any federally licensed firearms dealer (FFL) to perform a background check before selling a firearm.⁸ Background checks are currently the most effective way of preventing guns from falling into the wrong hands. The National Instant Criminal Background Check System (NICS) was created by the FBI to implement the background checks required by the Brady Act.⁹ From its inception on November 30, 1998, until December 31, 2019, NICS processed 333,004,066 background checks. The system undertook 28,369,750 checks in 2019 alone.¹⁰ Because of these background checks, NICS denied 103,592 firearms transactions in 2019, bringing the total number of denied transactions to 1,700,558 since the system's inception.¹¹

⁵ 5 U.S.C. § 553.

⁶ Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

⁷ Privacy Act of 1974, 5 U.S.C. § 552a (2020); Office of Mgmt. & Budget, Exec. Office of the President, "Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act," OMB Circular No. A-108 (2017):15-17 [hereinafter "OMB Reporting Under the Privacy Act"].

⁸ Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, § 102(b) (codified at 18 U.S.C. § 922(t)).

⁹ See 34 U.S.C. § 40901.

¹⁰ Federal Bureau of Investigation, "2019 NICS Operations Report," accessed October 19, 2020, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view> (hereafter "2019 NICS Operations Report").

¹¹ *Id.*

Under the regulations governing NICS, states have been given the option to either to assign state or local officials as points of contact (POCs) for NICS to complete a check; or have the FBI's NICS examiners complete the check.¹² When a person tries to buy a gun from an FFL, the FFL must contact the NICS, either through the FBI or a state-designated official, to conduct the background check.¹³ The NICS check determines whether the purchaser matches any records in the NICS database of people identified as prohibited from possessing firearms under federal law (specifically under 18 U.S.C. § 922(g) or (n)) or state law. If no matches are found, the sale may proceed. If a match or “hit” is found, the NICS examiner or state-designated official conducts a more thorough search of the records, and then instructs the FFL to either proceed with, deny, or delay the transaction.

Most NICS background checks are completed very quickly.¹⁴ However, when there is a match in the system, NICS will require the transaction to be delayed while further investigation is undertaken. From January 1, 2019, through December 31, 2019, approximately 11% of all transactions were given an initial “delay” status, following referral to NICS.¹⁵ After three business days, if no final response is received from NICS, federal law allows the FFL (at its discretion) to proceed with the sale of the firearm—even if the background check is not complete.¹⁶ This is known as a “default proceed” transaction. In 2019, there were 261,312 transactions handled by the NICS that could not be resolved within three business days.¹⁷

If a background check is not complete within three business days, NICS will continue to work on, and attempt to complete the check.¹⁸ If, in pursuing further investigation as part of the background check, a firearms purchaser is found to be prohibited (and, consequently, the original sale should not have occurred), the FBI or state official contacts the relevant FFL to ascertain whether a sale did indeed occur following the three business day “delayed transfer” period.¹⁹ If such a sale has occurred in a state that relies on the FBI to process NICS checks, the FBI refers the case to the ATF, which is supposed to undertake a firearm retrieval process.²⁰ It is not clear how often the guns subject to a retrieval order are actually recovered.

Of course, not every transaction that proceeds after the expiry of the three business days will involve a prohibited purchaser, and some prospective gun purchasers decide not to move forward with the purchase, regardless of whether the sale is allowed. However, some FFLs do move forward and complete sales to purchasers who have not been affirmatively approved by NICS, and sometimes these purchasers are later determined to have been prohibited from

¹² 28 C.F.R. § 25.2 (defining “POC (Point of Contact)”), 25.6 (explaining the system).

¹³ See 28 C.F.R. § 25.6.

¹⁴ On average, from 2016-2019, over 89% of checks were dealt with and determined “immediately” (i.e. either to the NICS). See 2019 NICS Operations Report p.14.

¹⁵ *Id.* at 21.

¹⁶ 18 U.S.C. § 922(t)(1)(B)(ii).

¹⁷ 2019 NICS Operations Report p.22.

¹⁸ *Id.*; 28 C.F.R. § 25.2 (defining “open” transactions).

¹⁹ 2019 NICS Operations Report p.22; 28 C.F.R. § 25.2 (defining “delayed” transfer).

²⁰ 2019 NICS Operations Report p.22.

purchasing or possessing guns. In fact, this “default proceed” provision allowed at least 2,989 prohibited purchasers to buy guns in 2019 before a background check was cleared.²¹

Record-keeping regulations

The Brady Act provides that “[i]f receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall.... destroy all records of the system with respect to the call ...and all records of the system relating to the person or the transfer.” The act does not specify the time period in which these records must be destroyed.²²

The Brady Act does not mention the possibility that a background check may be inconclusive or unresolved because the system is unable to determine whether the purchaser falls within one of these categories, and does not specify whether records of such unresolved background checks may be retained or destroyed.

The Brady Act does include the following provision.

No department, agency, officer, or employee of the United States may—

- (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or
- (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922(g) or (n) of title 18 or State law, from receiving a firearm.²³

Litigation over the timeline

After the Brady Act became law, the DOJ proposed a regulation that allowed records of approved transactions (including those affirmatively approved by NICS) to be kept for 18 months.²⁴ Then, in the final regulation issued in 1998, the FBI reduced this time period to six months, presumably due to gun lobby pressure.²⁵ The National Rifle Association still sued, claiming that temporary retention of NICS records of allowed transfers violates three provisions of the Brady Act: (1) the requirement that the system “destroy” records of approved transactions, (2) the prohibition against the government “requiring that any [NICS] record... be recorded at or transferred to a [government] facility,” and (3) the prohibition against the

²¹ *Id.*

²² 18 U.S.C. § 922(t)(2)(C).

²³ Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, § 103(i) (codified at 34 U.S.C. § 40901(i)).

²⁴ National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 30,430, 30,432 (proposed June 4, 1998).

²⁵ National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303, 58,304 (October 30, 1998).

government "using the [NICS] system ... to establish any system for the registration of firearms."²⁶

The DC Circuit Court of Appeals rejected these claims in *NRA of Am., Inc. v. Reno*,²⁷ but the DOJ weakened the requirement anyway, reducing the retention period to 90 days for approved transactions.²⁸ Then in 2004, Congress included a rider in an appropriations act that required the destruction of these records within 24 hours.²⁹

FBI rules addressing unresolved transactions

Subsequently, the FBI weakened its rules even further. In addition to requiring the destruction of approved transaction records within 24 hours, it specifically addressed unresolved background checks, recognizing that it was creating a new category, not explicitly covered by the Brady Act, and "not covered by the Omnibus 24-hour destruction provision." The FBI explained:

"Open" transactions are those non-canceled transactions where the FFL has not yet been notified of the final determination. In such cases, additional information is needed before the NICS examiner can verify whether a "hit" in the database demonstrates that the prospective purchaser is disqualified from receiving a firearm under state or federal law.³⁰

The new regulation set the deadline for the destruction of unresolved ("open") background checks at 90 days, but did not explain why these records needed to be destroyed or why this time period was chosen.³¹

Appropriations rider and current regulations

In 2012, the rider regarding the destruction of approved background check records was included in the appropriations act in a form that made it permanent. The rider states:

Hereafter, none of the funds appropriated pursuant to this Act or any other provision of law may be used for ... (2) any system to implement subsection 922(t) of title 18, United States Code, that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from possessing or receiving a firearm no more than 24 hours after the system advises a Federal firearms licensee that possession or receipt of a firearm by the

²⁶ *NRA of Am., Inc. v. Reno*, 216 F.3d 122, 126 (2000).

²⁷ *Id.*

²⁸ National Instant Criminal Background Check System Regulation, 66 Fed. Reg. 6,470 (January 22, 2001).

²⁹ Consolidated and Further Continuing Appropriations Act 2004, Pub. L. No. 108-199, § 617, 118 Stat. 95 (2004).

³⁰ National Instant Criminal Background Check System Regulation, 69 Fed. Reg. 43,892, 43,897 (July 23, 2004).

³¹ *Id.*

prospective transferee would not violate subsection (g) or (n) of section 922 of title 18, United States Code, or State law.³²

Under the current regulations, records of background checks exist in the form of the NICS audit log.³³ Furthermore:

- When a purchaser passes a NICS background check and a firearm sale is affirmatively approved, federal law requires the FBI to destroy the record of the NICS search within 24 hours.³⁴
- Where a transaction is denied—either immediately or following investigation by a NICS examiner—the FBI retains the records of the applicable background check indefinitely.³⁵
- Under current federal regulations, when a background check is not complete within three business days, NICS has up to 90 days to complete the background check before all pending records are purged from its system.³⁶

In fact, an unresolved background check will drop out of the NICS examiner's queue after 30 days, and the records are purged after 88 days to ensure compliance with this federal regulation.³⁷ As a result, each year, hundreds of thousands of background checks are never completed. In 2018, 201,323 transactions were purged—unresolved—from the FBI's system after 88 days.³⁸ Similar numbers were recorded for 2017 (212,617) and 2016 (216,744).³⁹ All told, the FBI did not complete more than 1.1 million background checks from 2014 through July 2019, reflecting a trend stretching back many years.⁴⁰ Since the records are purged, it becomes impossible to know how many people purchased a firearm without a completed background check. More seriously, it is unknown how many purchases would have been blocked if the background checks had been completed.

The purging of these records also prevents the FBI from using them to improve the effectiveness of the background check system. This demonstrates the need not only to lengthen the three business day “delay transfer” period described above, but also the need to give the FBI more time to complete background checks and retain information until those checks are completed.

³² Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, § 511, 125 Stat. 552 (2011).

³³ 28 C.F.R. § 25.9.

³⁴ 28 C.F.R. § 25.9(b)(1)(iii), (c), (d). Subsection (c) and (d) refer to the destruction of “allowed” transactions, meaning both those that are affirmatively approved and those that remain unresolved.

³⁵ 28 C.F.R. § 25.9(b)(1)(i).

³⁶ 28 C.F.R. § 25.9(b)(1)(ii), (c), (d).

³⁷ Congressional Research Service, “Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation,” October 17, 2019, <https://fas.org/sgp/crs/misc/R45970.pdf>.

³⁸ US Department of Justice, Federal Bureau of Investigation, “Letter to Joshua Eaton, CQ Roll Call,” November 20, 2019, <https://www.documentcloud.org/documents/6564864-SKM-C25819120207490.html>.

³⁹ *Id.*

⁴⁰ *Id.*

The FBI needs accurate information from other law enforcement agencies to complete a background check, but faces a lack of relevant information in the NICS automated system. While the FBI provides its own records of those who commit federal crimes, the only way NICS receives records of state-level convictions and other records is through voluntary submissions from individual state agencies. As a result, NICS has limited access to information, because not all states report all of their data in the time necessary to complete a full background check. Therefore, a NICS examiner has to spend time contacting various reporting agencies or sourcing relevant information elsewhere.

The database faces particular challenges when it comes to records relating to domestic violence and mental health, which are often grossly underreported to NICS.⁴¹ There are various reasons for the underreporting, including the fact that many agencies are not available 24/7 for orders to be validated; the process required to submit orders is time-consuming; and, in certain circumstances, the relevant agency lacks awareness that the record should be sent to the appropriate database in the first place.⁴² Furthermore, there are wide discrepancies between varying state laws related to the requirements for reporting mental health records. Other challenges arise in connection with the reporting of criminal records due to lack of a final disposition; a lack of fingerprints; or a failure to submit the conditions of a prisoner's release or details of active warrants regarding a person's fugitive status to the NICS databases.⁴³

Background checks under the Obama administration

In 2015, the nation witnessed the tragic consequences of an unresolved background check when a man shot and killed nine worshipers at the Emanuel AME Church in Charleston, South Carolina. Although he should have failed a background check because of his history of unlawful controlled substance use, his background check was not processed within three days. In this case, the dealer proceeded to transfer the gun after the three days elapsed. Approximately two months later, the shooter used that gun to murder the churchgoers.

In response to this shooting, the background check system has come under increased scrutiny, but neither Congress nor the FBI has made any significant changes to the system.⁴⁴

Background check under the Trump administration

The past year has seen a surge in NICS background checks. The highest number of NICS firearm background checks in a single day and the highest number in a single week since

⁴¹ Giffords Law Center to Prevent Gun Violence, "For the Record: NICS and Public Safety," December 2016, <https://giffords.org/wp-content/uploads/2019/06/Giffords-Law-Center-For-The-Record-NICS-and-Public-Safety.pdf>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ The only relevant change to the system involves the use of the National Data Exchange (N-DEX), an additional database containing information about ineligible people. See Ann Givens and Andrew Knapp, "FBI to Add Major Law Enforcement Database to Gun Background Check System," The Trace, July 10, 2018, <https://www.thetrace.org/2018/07/fbi-background-check-system-nics-ndex-charleston/>.

November 30, 1998, (when NICS became operational), both occurred in March 2020, at the beginning of the COVID-19 pandemic.⁴⁵ Indeed, five of the 10 highest days and eight of the 10 highest weeks of NICS background checks occurred in 2020.⁴⁶ Even in January and February 2020, there were 19% and 18% increases, respectively, in the number of NICS background checks on gun purchases, compared to January and February 2019.⁴⁷ March 2020, however, saw an 85% increase in the number of NICS background checks on gun purchases, compared to March 2019. And, astoundingly, June and July 2020 saw 148% and 135% increases, respectively, in the number of NICS background checks on gun purchases compared to June and July 2019. Although the increase in NICS background checks on gun purchases has decreased substantially in August and September, September 2020 still saw a 66% increase compared to September 2019. In total, 14,848,326 NICS background checks on gun purchasers were conducted from January 1, 2020, through September 30, 2020, which represents a 95% increase compared to the previous year.⁴⁸

Such a spike in NICS checks and accompanying purchases poses a threat on a number of fronts. In particular, a concentrated surge of attempted firearm purchases in a short timeframe puts additional strain on the NICS background check system, and increases the risk that a greater number of background checks will not be completed fully, or that crucial information will be missed. Ensuring that records remain available beyond the 90 day cut-off point, and until a background check is complete, would go a long way to relieve pressure on the NICS examiners, and ensuring that firearms are not transferred to people who may ultimately turn out to be prohibited persons.

III. Proposed action

A. Substance

The next administration should promulgate a regulation amending 28 C.F.R. § 25.9(b)(1)(ii), to require the maintenance of records of gun purchaser background checks until a determination is made that the gun purchaser does not fall within one of the categories of people prohibited by federal law from purchasing or possessing guns. (Conforming amendments may also need to be made to other provisions in the regulations, such as 28 C.F.R. § 25.9(c)'s reference to the destruction of records of "allowed" transactions.)

Retaining incomplete background check records would enable NICS to identify additional purchasers who unlawfully purchased or possessed firearms. Retaining incomplete background

⁴⁵ US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Top 10 Highest Days/Weeks," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_top_10_highest_days_weeks.pdf/view.

⁴⁶ *Id.*

⁴⁷ US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Month/Year by State/Type," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state_type.pdf/view. Calculations include any NICS check conducted by an FFL in relation to the application to purchase a firearm.

⁴⁸ *Id.*

check records would be also invaluable to help identify shortfalls in the reporting process. Preserving the records means the FBI will continue to have access to the data that can be used to improve the system. If a large number of transactions remain open at the 88-day mark for a particular reason (for example, because a record could not be confirmed because the relevant agency was unavailable; a criminal history record lacked sufficient detail for a NICS operator to make a final determination; or an arrest record lacked a final disposition), the continued existence of the records will enable the FBI to focus its efforts on improving these kinds of records. If, for example, mental health records from certain states were noticeably under-reported compared to those from the majority of other states, the FBI would be able to spend more time on improving the “reporting performance” of these jurisdictions.

B. Process

In order to amend this regulation, the DOJ must put the new version of the rule through the notice and comment rulemaking process, as specified in the Administrative Procedure Act.⁴⁹

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must explain the nature of the rulemaking, the reason for the change, and the legal authority under which the rule is proposed.

Then, the agency must accept public comments on the proposed rule for a period of at least 30 days. Received comments must be reviewed, and the DOJ must respond to significant comments, either by explaining why it is not adopting proposals, or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the Federal Register, along with a concise explanation of the rule’s basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

In order to extend the retention of incomplete background check records, the FBI may also be required to amend its System of Records Notice (SORN) regarding this information.⁵⁰ This may require publication of an updated SORN in the Federal Register. The DOJ’s Office of Privacy and Civil Liberties is the entity that would most likely determine whether this is necessary.⁵¹

IV. Legal justification and vulnerabilities:

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency’s statutory authority, violating a constitutional right, not following rulemaking procedures, or being arbitrary or capricious agency action.⁵² While the regulation proposed above would likely face judicial challenges, there is a reasonable likelihood that a court would uphold the

⁴⁹ 5 U.S.C. § 553.

⁵⁰ See 28 C.F.R. § 16.96(p); Privacy Act of 1974; System of Records; 84 Fed. Reg. 54175 (Oct. 19, 2019) (amending the Privacy Act notice for NICS).

⁵¹ United States Department of Justice, Office of Privacy and Civil Liberties, “Frequently Asked Questions,” accessed October 19, 2020, <https://www.justice.gov/opcl/faq>.

⁵² 5 U.S.C. § 706.

regulation.

DOJ's authority to promulgate the new regulation

As described above, the DOJ's authority over the NICS regulations stems from the Brady Act's requirement that the attorney general create NICS and promulgate regulations to ensure the privacy and security of the information of the system.⁵³ In addition, the DOJ has authority to fill in ambiguities in the law.

In promulgating regulations required by statute, federal agencies often fill in the gaps between the statutory language and practicable regulations. Moreover, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," although the measure of deference will vary depending on "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."⁵⁴

When an agency, such as the FBI, promulgates a regulation interpreting a statute it enforces, such interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue."⁵⁵ If the intent of Congress is clear, that is the end of the matter.⁵⁶ But "if the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute."⁵⁷

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change and demonstrate an awareness of the new policy.⁵⁸ It would therefore be acceptable for the FBI to propose changes to the regulations to require the retention of background check records (beyond 90 days), as long as the agency provides good reasons for such change, and an explanation of why such change may ignore or disregard any "facts and circumstances that underlay or were engendered by the prior policy."⁵⁹ In turn, whether the agency's interpretation is permissible depends on whether it is a "reasonable interpretation" of the enacted text, and is not "arbitrary or capricious."⁶⁰

A court would likely find federal law to be ambiguous as to whether the FBI may retain records of incomplete NICS checks. The law explicitly states that records of approved NICS checks

⁵³ 34 U.S.C. § 40901(h).

⁵⁴ *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

⁵⁵ *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009).

⁵⁹ *Id.*

⁶⁰ *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011).

must be destroyed. That language, however, does not apply to records of NICS checks where the FBI has not been able to determine whether the purchaser is eligible to possess guns. As described below, with respect to an “arbitrary and capricious challenge,” the DOJ can reasonably interpret the Brady Act and appropriations rider to allow for the retention of unresolved background checks records.

Differences between NICS data and a gun registry

Opponents may argue that retaining background check data amounts to the creation of a central gun registry. As described above, in *NRA of Am., Inc. v. Reno*, the NRA argued that temporary retention of audit log data, specifically NICS records of allowed transfers, violates three provisions of the Brady Act: (1) the requirement that the system “destroy” records of approved transactions, (2) the prohibition against the government “requiring that any [NICS] record ... be recorded at or transferred to a [government] facility,” and (3) the prohibition against the government “using the [NICS] system ... to establish any system for the registration of firearms.”⁶¹ However, the lower court and the appellate court dismissed the NRA’s complaint “finding nothing in the Brady Act to require immediate destruction” of NICS records.⁶² The courts also found the attorney general’s interpretation reasonable, that the Brady Act does not prohibit the temporary retention of NICS records for up to six months, to “audit the background check system to ensure its accuracy and privacy,”⁶³ and “that the Audit Log is not a ‘system for ... registration’ within the meaning of section 103(i)(2).”⁶⁴

In *NRA of Am., Inc. v. Reno*, the Attorney General illustrated the difference between the Audit Log and the central registry of machine guns:

“The machine gun registry contains information on all machine guns not possessed by the United States, including data on the weapons themselves, dates of registration, and the names and addresses of persons entitled to possess them. Far less comprehensive, the Audit Log includes no addresses of persons approved to buy firearms, nor any information on specific weapons, nor even whether approved gun purchasers actually completed a transaction. And unlike the machine gun registry, information in the Audit Log is routinely purged after six months. The Audit Log therefore represents only a tiny fraction of the universe of firearm owners.”⁶⁵

The appellate court concluded the “Log’s deficiencies as a system for registering firearms make it unlikely that it would be used for that purpose” and that simply containing the “names of persons approved to buy firearms in the past six months” was not enough to “convert the Log into a ‘system for the registration’ of firearm owners.”⁶⁶

⁶¹ 216 F.3d at 126.

⁶² *Id.*

⁶³ *Id.* at 124.

⁶⁴ *Id.* at 126.

⁶⁵ *Id.* at 131 (internal citation omitted).

⁶⁶ *Id.* at 131-32.

Courts have also determined that a firearm registry is not created in violation of 18 U.S.C. § 926(a)⁶⁷ or the Consolidated and Continuing Appropriations Act of 2012 (the 2012 Act),⁶⁸ when “a narrow subset of information relating to a specific set of transactions” is sought from a “specific set of FFLs.”⁶⁹ Further, the courts have interpreted “consolidating and centralizing” in the 2012 Act as contemplating a “large-scale enterprise relating to a substantial amount of information,” not the “mere collection of some limited information.”⁷⁰

Notably, even records of approved gun sales can exist in some form. Federal law requires FFLs to retain records of gun sales for at least 20 years (including details of the firearm purchased and the purchaser),⁷¹ and this does not constitute a “registry”.⁷²

More importantly, the FBI already retains records of background checks where a transaction is denied indefinitely.⁷³ Background checks of people who “might” or “could” be denied a firearm purchase (because the NICS has been unable to make a determination one way or another) should also be maintained indefinitely, or at least until the check is complete.

Likely constitutional arguments

The NRA believes the ability to purchase a gun without a completed background check after three business days is “a critical safety valve” in federal law that “ensures that Americans’ rights to acquire firearms are not arbitrarily denied because of bureaucratic delays, inefficiencies, or mistakes in identity”.⁷⁴ While acknowledging that the three business days are a necessary safety check, the NRA believes that anything longer would contradict the principle that the government may not arbitrarily deprive a person of their rights without making a case against that person. The intent of the proposed regulation, of course, is not to deny Americans their right to own guns, but merely to ensure that guns are only sold to those people who are entitled to

⁶⁷ 18 U.S.C. § 926(a) prohibits DOJ from promulgating a “rule or regulation” that requires FFL record information be “recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof” or that establishes a “system of registration of firearms, firearms owners, or firearms transactions or dispositions.”

⁶⁸ The Consolidated and Continuing Appropriations Act of 2012 “prohibits ATF from using the allocated funds ‘for salaries or administrative expenses in connection with consolidating or centralizing within the Department of Justice the records, or any portion thereof, of acquisition and disposition of firearms maintained by [FFLs],’” 10 *Ring Precision*, 722 F.3d at 722 (citing Pub. L. No. 112-55, 125 Stat. 552, 609 (2011)).

⁶⁹ 10 *Ring Precision, Inc. v. Jones*, 722 F.3d 711, 722 (2013)(citing Pub. L. No. 112-55, 125 Stat. 552, 609 (2011)); see also *National Shooting Sports Foundation*, 716 F.3d 200 (D.C. Cir. 2013).

⁷⁰ *Id.* (citing *Blaustein*, 365 F.3d at 289).

⁷¹ 18 U.S.C. § 923(g)(1)(A). See also 27 C.F.R. § 478.129 (stating that such records must be maintained for at least 20 years).

⁷² 18 U.S.C. § 923(g)(1)(A). See also 27 C.F.R. § 478.129 (stating that such records must be maintained for at least 5 years).

⁷³ 28 C.F.R. § 25.9(b)(1)(i).

⁷⁴ “Background Check Bill Seeks to Create Backdoor Gun Prohibition, While Bloomberg Group Piles On”, NRA-Institute for Legislative Action, July 17, 2015 (<https://www.nraila.org/articles/20150717/background-check-bill-seeks-to-create-backdoor-gun-prohibition-while-bloomberg-group-piles-on>).

own them. In addition, the proposed regulation does not directly affect the sale or transfer of firearms in these cases, but rather allows the FBI to retain records of instances where these transactions may have occurred.

Furthermore, even gun registries have been upheld against constitutional challenges.⁷⁵ Consequently, constitutional challenges against the proposed regulation are not likely to succeed.

Rulemaking procedures

By following the NCRM process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence-reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.⁷⁶

In particular, the ATF should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.⁷⁷ The agency must address the concerns raised in all non-frivolous and significant comments.⁷⁸ The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.⁷⁹

⁷⁵ *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009) (finding that registration "merely regulated gun possession" rather than prohibiting it); *Heller v. District of Columbia* ("*Heller III*"), 801 F.3d 264 (D.C. Cir. 2015) (firearm registration generally does not violate the Second Amendment, but certain aspects of registration do not survive review, such as knowledge of the law testing, re-registration requirements, limiting registration to one handgun per month, and requirement to bring the firearm in person to register).

⁷⁶ See Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," 92 N.C.L. Rev. 721, 737-38 (2014) (describing "first" and "second" order inquiries into an agency's decision making). See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

⁷⁷ 5 U.S.C. § 553(c).

⁷⁸ *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).

⁷⁹ *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).

Arbitrary and capricious challenge under the APA

A court will invalidate the regulation if the agency action or conclusion is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸⁰ The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, establishing a nexus between the facts and the agency’s choice.⁸¹

Therefore, to withstand a potential judicial challenge that the new regulation is an arbitrary and capricious action by the FBI, the agency must acknowledge that it is changing its policy, demonstrate that it considered all factors pertinent to the issue in its decision-making, and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy based on sound evidence, empirical or otherwise. Second, it should contain an acknowledgment of reliance interests, and address why those interests are outweighed by public safety factors.

1. Evidence supporting a new policy

The threat posed by guns in the hands of people who are not eligible to possess them is clear. Federal law prohibits certain categories of persons from purchasing firearms, laws which have protected many Americans from gun violence. However, persons prohibited can bypass this prohibition if NICS is not able to identify them before the background check records are destroyed. The tragic consequences of this loophole were demonstrated in the shooting at Emanuel AME Church in Charleston in 2015. The FBI’s current practice of destroying incomplete background check records deprives the FBI of any chance to identify similar transfers before they enable similar tragedies. The data provided above regarding the number of default proceeds and the surge in background checks in 2020, also underscores the importance of changing this regulation.

2. Public safety factors outweigh reliance interests

People who purchase firearms after default proceeds (after the three business day deadline passes) may assume that records of their background check have been destroyed. If this regulation is finalized, that assumption would be incorrect. However, this reliance interest, to the extent that it exists, is outweighed by the positive benefits of the proposed regulation as described above. These records are also subject to strict privacy protections. “Access to data stored in the NICS is restricted to duly authorized agencies.”⁸² The information in the audit log is only directly accessible to the FBI, and solely “for the purpose of conducting audits of the use

⁸⁰ 5 U.S.C. § 706(2)(A).

⁸¹ See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸² 28 C.F.R. § 25.8(b).

and performance of the NICS, except that” information related to a potential violation of law or regulation may be shared with “appropriate authorities,” and only the NICS transaction number and date of an allowed transaction may be shared with the ATF in the form of an Individual FFL audit log for the inspection of individual FFLs.⁸³ The audit log may not be used for any other reason or by any other individual not explicitly identified.⁸⁴ To ensure compliance, the audit log is “monitored and reviewed on a regular basis to detect any possible misuse of NICS data.”⁸⁵ Further, an individual who misuses, or is unauthorized to use the audit log, may be fined and subject to “cancellation of NICS inquiry privileges.”⁸⁶ These provisions guard against improper use of these records.

⁸³ 28 C.F.R. § 25.9(b)(2), (4). The ATF may not have access to “more than 60 days worth of allowed or open transaction records originating at the FFL.”

⁸⁴ 28 C.F.R. § 25.9(b)(3).

⁸⁵ 28 C.F.R. § 25.9(b)(3).

⁸⁶ 28 C.F.R. § 25.11.