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Gun Control: Federal Law and Legislative Action in the 114th Congress

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Summary

In the 114th Congress, the Senate debated several gun proposals following two high-fatality mass shootings in December 2015 and June 2016. After both shootings, Senate debate coalesced around the following issues:

- Should the Attorney General be given the authority to deny firearms (and explosives) transfers to persons she determines to be "dangerous terrorists"?
- Should federal background check requirements be expanded to include intrastate firearms transfers among private, unlicensed persons?
- Should grants be provided or withheld to encourage state, local, municipal, tribal, and territorial authorities to improve computer access to records on persons prohibited from possessing firearms for the purposes of background checks?
- Should definitions related to mental incompetency in federal gun control regulations be codified or revised?

Debate on the latter three issues mirrored congressional debate that followed the December 2012, Newtown, CT, mass shooting. Similar efforts were made in the House of Representatives to bring gun control proposals to the House floor for general debate and votes, but those efforts proved unsuccessful. While Congress did not pass any of these proposals, Congress included a provision in the 21st Century Cures Act (P.L. 114-255) that codified certain Department of Veterans' Affairs procedures related to benefit claims, mental incompetency determinations, and gun control.

In December 2015, the Senate debated several gun control amendments during consideration of the Restoring Americans' Healthcare Freedom Reconciliation Act (H.R. 3762). Two of those amendments (S.Amdt. 2910 and S.Amdt. 2912) addressed firearms transfers and dangerous terrorists. Another amendment (S.Amdt. 2908) would have expanded federal firearms background check requirements to cover private, intrastate transfers between non-gun dealers, when such transfers were arranged in public fora, such as on the Internet or at a gun show or flea market. Still another amendment (S.Amdt. 2914) would not have expanded the scope of federal background check requirements, but included provisions to improve background checks.

In June 2016, the Senate again debated several gun control amendments during consideration of the FY2017 Departments of Commerce and Justice, Science, and Related Agencies (CJS) Appropriations bill (H.R. 2578, the expected vehicle for S. 2837). One amendment (S.Amdt. 4750) would have expanded the scope of federal background check requirements and captured more private, intrastate firearms transfers than the amendment (S.Amdt. 2908) to H.R. 3762. In addition, several amendments were considered that would have addressed firearms transfers and dangerous terrorists (S.Amdt. 4720, S.Amdt. 4749, S.Amdt. 4858, and S.Amdt. 4859). As before, another amendment (S.Amdt. 4751) would not have expanded the scope of federal background checks requirements, but included provisions to improve information sharing for background check purposes on persons who are ineligible to receive or possess firearms.

For context, this report provides background on the two major federal gun control statutory frameworks: the National Firearms Act of 1934 (NFA), as amended, and the Gun Control Act of 1968 (GCA), as amended. It provides analysis of the Senate amendments offered in the 114th Congress that would have addressed the above listed issues. It tracks the status of gun control-related appropriations for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Federal Bureau of Investigation National Instant Criminal Background Check System (NICS) Section, National Criminal History Improvement Program (NCHIP), and NICS Amendments Record Improvement Program (NARIP).

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Developments in the 114th Congress

The 114th Congress debated several gun control proposals following two high-fatality mass shootings in December 2015[1] and June 2016.[2] In both cases, the offenders attempted to justify their murderous rampages with, and were quite possibly influenced by, radical Islamic views.[3] According to the Federal Bureau of Investigation (FBI), one of the offenders had been watch-listed as a suspected terrorist, but had been removed from the watchlist before he purchased his firearm from a federally licensed gun dealer. After both shootings, congressional gun control debate coalesced around the following issues:

- Should the Attorney General be given the authority to deny firearms (and explosives) transfers to persons she determines to be "dangerous terrorists"?
- Should federal background check requirements be expanded to include intrastate firearms transfers among private, unlicensed persons?
- Should grants be provided or withheld to encourage state, local, municipal, tribal, and territorial authorities to increase computer access to records on persons prohibited from possessing firearms for the purposes of background checks?
- Should definitions related to mental incompetency in federal gun control regulations be codified or revised?

Debate on the latter three issues mirrored congressional debate in the Senate that followed the December 2012, Newtown, CT, mass shooting.[4] While Congress did not pass any of these proposals, Congress included a provision in the 21st Century Cures Act (P.L. 114-255) that codified certain Department of Veterans' Affairs (VA) procedures that address benefit claims, mental incompetency determinations, and firearms transfer and possession eligibility.

For context, this report provides background on the two major federal gun control statutory frameworks: the National Firearms Act of 1934 (NFA), as amended,[5] and the Gun Control Act of 1968 (GCA), as amended.[6] It also provides analysis of several Senate-considered amendments in the 114th Congress that would have addressed the above listed issues.

VA Benefits, Mental Incompetency, and Firearms Eligibility

Since 1998, the VA has been providing records on beneficiaries for whom a fiduciary (a person selected to manage veterans' benefits) has been appointed to the Federal Bureau of Investigation (FBI) for firearms-related background checks, because the appointment of a fiduciary is based on a determination that the beneficiary is "mentally incompetent" under veterans law.[7] Based on this

[1] On December 2, 2015, two offenders shot to death 14 people and nonfatally wounded another 22 people in San Bernardino, CA, at a social services center. Both offenders were killed by police while resisting arrest.

[2] On June 12, 2016, an offender shot 49 people to death and nonfatally wounded over 50 others in an Orlando, FL, nightclub. After a three-hour standoff with police, the assailant was killed by police. It is unknown at this time whether any of the victims might have been killed in the crossfire between the police and assailant during a hostage rescue operation.

[3] Scott Shane, "The Enduring Influence of Anwar al-Awlaki in the Age of the Islamic State," *CTC Sentinel*, July 2016, p. 15.

[4] See CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by William J. Krouse.

[5] 26 U.S.C. §5801 et seq.

[6] 18 U.S.C. §921 et seq.

[7] 38 C.F.R. §3.353(a).

VA determination, the beneficiary is also considered "adjudicated as a mental defective" under the GCA, because he or she "lacks the mental capacity to contract or handle their own affairs."[8]

Pursuant to the NICS Improvement Amendments Act of 2007 (NIAA; P.L. 110-180), the VA has been required to notify beneficiaries of the ramifications of mental incompetency determinations and a potential loss of their gun rights. The act also required the VA to provide those beneficiaries with an avenue of administrative relief, by which they could appeal such determinations and have their rights restored.[9] In the 21st Century Cures Act (P.L. 114-255), Congress included a provision that codified certain VA procedures related to mental incompetency determinations and potential loss of gun rights.[10]

December 2015 Debate, Post-San Bernardino, CA, Mass Shooting

Following the December 2015, San Bernardino, CA, mass shooting, President Barack Obama called on Congress to pass a "No Fly, No Buy" act.[11] In the 109th Congress, Representative Carolyn McCarthy introduced the "No Fly, No Buy" act (H.R. 1195), a bill that would have prohibited any individual from shipping, transporting, possessing, or receiving a firearm or ammunition if he or she were known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety and, hence, were watch-listed on either the "No Fly" or "Automatic Selectee" watchlists. It would have also prohibited anyone from knowingly transferring a firearm or ammunition to such a person. This proposal, however, has not been introduced since the 111th Congress.[12] Over time, it was superseded by a proposal that has become known as the "Terror Gap" proposal (described below).

Under current law, simply being on a terrorist watchlist is not grounds to deny a firearms transfer.[13] Nevertheless, after the September 11, 2001, terrorist attacks, the Department of Justice (DOJ) began screening individuals against a watchlist of known or suspected terrorists during firearms- and explosives-related background checks.[14] In addition, under then-Attorney General Alberto Gonzalez, DOJ developed a proposal that would authorize the Attorney General to deny a firearms transfer to any person deemed to be a particularly "dangerous terrorist."[15] Senator Frank Lautenberg and Representative Peter King first introduced this proposal (S. 1237/H.R. 2074) in the 110th Congress, and it became known as the "Terror Gap" proposal.[16] In the 114th Congress Senator Dianne Feinstein and Representative King reintroduced this proposal (S. 551 and H.R. 1076).

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[8] 18 U.S.C. 922(g)(4) and 27 C.F.R. §478.11.

[9] P.L. 110-180; January 8, 2008; 121 Stat. 2559.

[10] P.L. 114-255, December 13, 2016; 130 Stat. 1307, codified at 38 U.S.C. §5501A.

[11] Olivia Lowenberg, "Should People on the No-Fly Lists Be Allowed to Buy Guns? Connecticut Says No; Connecticut Is Moving to Keep People on Government Watch Lists from Obtaining Gun Permits, A Move President Obama Has Urged Congress to Make on the Federal Level. However, the Idea Has Drawn Criticism from Both Sides of the Gun Debate," *Christian Science Monitor*, December 10, 2015, http://www.csmonitor.com/USA/Politics/2015/1210/Should-people-on-no-fly-lists-be-allowed-to-buy-guns-Connecticut-says-no.-video.

[12] For "No Fly, No Buy" bills in the 110th and 111th Congresses, see H.R. 1167 and H.R. 2401, respectively.

[13] Eric Lichtblau, "Debate and Confusion over Tangle of Watch Lists," *New York Times*, June 23, 2016, Section A, p. 20.

[14] In fact, such a screening policy was adopted by the Administration of then-President George W. Bush under Homeland Presidential Security Directive 6 (HSPD-6) in November 2004. For further information, see CRS Report R42336, *Terrorist Watch List Screening and Background Checks for Firearms*, by William J. Krouse.

[15] Herb Jackson, "Lautenberg Bill Aims To Close 'Terror Gap," *Record* (Bergen County, NJ), April 28, 2007, p. A04.

[16] Ibid.

On December 3, 2015, the Senate debated several gun control amendments during consideration of the Restoring Americans' Healthcare Freedom Reconciliation Act (H.R. 3762). Senator Feinstein offered an amendment (S.Amdt. 2910) that included the text of S. 551, the "Terror Gap" proposal. It is noteworthy that this proposal made no specific mention of the "No Fly" list or any other terrorist watchlist maintained by the federal government. Neither would the "Terror Gap" proposal, nor any of the related amendments described below, have provided for a blanket prohibition for all persons on the "No Fly" list, or any other terrorist watchlist maintained by the federal government, from receiving or possessing firearms. All the same, under the "Terror Gap" proposal, a terrorist watchlist check during a firearms- or explosives-related background check could possibly be the precipitating event that would prompt the Attorney General to make a "dangerous terrorist" determination about some individual. Senator John Cornyn offered a related amendment (S.Amdt. 2912) that would have provided judicial review of a "dangerous terrorist" determination prior to a firearms-related background check denial.

Senators Joe Manchin and Pat Toomey offered an amendment (S.Amdt. 2908) that would have amended the NICS Improvement Amendments Act of 2007 (P.L. 110-180) to encourage state and local authorities to make firearms eligibility disqualifying records available to the FBI for the purposes of firearms-related background checks. This amendment would have also expanded federal firearms background check requirements to cover private, intrastate transfers between non-gun dealers, when such transfers were arranged in a public forum, such as on the Internet or at a gun show or flea market. Supporters of the Manchin-Toomey amendment maintain that this bill would have provided for "comprehensive" background checks.[17]

Senator Chuck Grassley offered an amendment (S.Amdt. 2914) that also included provisions intended to improve background checks, but did not include any provisions that would have expanded background check requirements. Alternatively, the Grassley amendment included provisions that would have loosened certain restrictions on interstate handgun commerce between federally licensed gun dealers and private persons. In addition, the Grassley amendment included several provisions that would have increased penalties for certain violations of the GCA (e.g., providing a firearm to a convicted felon), while modifying mandatory sentencing provisions for other provisions of that act. While the Senate and House Committees on the Judiciary have reported standalone bills with those penalty and sentencing provisions,[18] the Senate blocked the amendments discussed on procedural grounds. Similar, but unsuccessful, efforts were made in the House of Representatives to bring gun control proposals to the floor for general debate and votes.

June-July 2016 Debate, Post-Orlando, FL, Mass Shooting

Following the June 12, 2016, Orlando, FL, mass shooting, Senator Christopher Murphy and other Democrats successfully advocated for the consideration of gun control legislation.[19] In the House,

[17] The Senate previously considered this amendment following the Newtown, CT, mass public shooting in April 2013. For further information, see CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by William J. Krouse.

In the 114th Congress, Representatives Peter King and Mike Thompson introduced the Public Safety and Second Amendments Rights Protection Act of 2015 (H.R. 1217), which includes language which is identical to the Manchin-Toomey amendment.

[18] Both the House and Senate Judiciary Committees reported bills with similar provisions. For further information, see CRS Report R44226, *Sentence Reform Acts: S. 2123 and H.R. 3713*, by Charles Doyle.

[19] Seung Min Kim and Burgess Everett, "Democrats End Filibuster, Announce GOP to Hold Gun Votes," *Politico*, June 15, 2016, updated on June 16, 2016.

Representative John Lewis and other Democrats made an unsuccessful bid to convince the Leadership to bring gun control legislation up for general consideration.[20]

Senate Action

When the Senate took up the FY2017 Departments of Commerce and Justice, Science, and Related Agencies (CJS) Appropriations bill (H.R. 2578, the expected vehicle for S. 2837), several gun control-related amendments were debated. Senator Murphy offered an amendment (S.Amdt. 4750) that would have expanded federal background check requirements and captured more private, intrastate firearms transfers than under the Manchin-Toomey amendment. Supporters of the Murphy amendment maintain that it would have required "universal" background checks, although it too included exceptions, albeit under narrower circumstances than under the Manchin-Toomey amendment.[21] The Senate, however, rejected further consideration of the Murphy amendment on procedural grounds.[22] While the Manchin-Toomey amendment (S.Amdt. 4716) was also filed, the Senate did not take it up. The Senate also rejected a procedural motion on an amendment offered by Senator Grassley (S.Amdt. 4751) that included some provisions that were identical to those included in the amendment he previously offered in December 2015 to the Health Care Reconciliation bill (H.R. 3762).[23]

In addition, the Senate considered several other amendments (S.Amdt. 4720, S.Amdt. 4749, S.Amdt. 4858, and S.Amdt. 4859) that would have authorized the denial of firearms and explosives transfers to any person whom the Attorney General deemed to be a "dangerous terrorists." While some of those amendments made reference to the "No Fly" list, all of these amendments were loosely modeled on the "Terror Gap" proposal. None of these amendments would have prohibited anyone from receiving or possessing a firearm simply because they were on the "No Fly" list, a claim mistakenly but repeatedly made by many media outlets. All but one of those "Terror Gap" amendments were blocked on procedural votes.

The Senate voted on a procedural motion on a "Terror Gap" proposal (S.Amdt. 4858) that has commonly been referred to as the "Collins compromise."[24] In what has been described as a "test vote," the Senate rejected a motion (46 to 52) to recommit H.R. 2578 to the Committee on the Judiciary with instructions to report the bill back with the language of the Collins compromise. But the 52 votes against that motion were not enough to suggest that the Senate would be able to obtain the 60 votes likely required to amend the bill successfully.[25]

[20] Amber Phillips, "House Democrats' Sit-In Lasted 26 Hours. House Republicans Held One That Lasted 35 Days," *Washington Post*, June 23, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/06/23/house-democrats-sit-in-lasted-26-hours-house-republicans-did-one-that-lasted-35-days/.

[21] The Murphy amendment reflected the language of a bill previously introduced by Senator Chuck Schumer and Representative Jackie Speier (S. 2934 and H.R. 3411).

[22] Anna Redalat, "Senate Rejects Murphy Background-Check Provision and 'Terror Gap' Bill," *Newtown Bee*, June 24, 2016.

[23] Ibid.

[24] Seung Min Kim, "Collins Gun Plan Survives Test Vote, Remains in Limbo," *Politico*, June 23, 2016.

[25] Karoun Demirjian, "Bipartisan Gun Control Compromise Fails to Nab 60 Votes, but Survives First Hurdle," *Washington Post*, June 23, 2016, p. A13.

House Action

Just before the July 4, 2016, recess, House Democrats sought to force votes on gun control issues by occupying the House floor.[26] The Speaker of the House, Representative Paul Ryan, voiced qualified support for bringing counterterrorism legislation to the House floor for consideration. In turn, the House Majority Leader, Representative Kevin McCarthy, proposed an alternative "Terror Gap" proposal (H.R. 5611) that included provisions related to firearms and terrorist watchlist screening, including new provisions that would have provided potentially denied persons with greater recourse to legal redress at initial stages of the denial process, as well as other counterterrorism provisions.[27] However, efforts to bring that bill before the Committee on Rules broke down when Democrats sought a rule to amend that bill with other gun control-related amendments, including a bill to expand background checks (H.R. 1217) that is nearly identical to the Manchin-Toomey amendment described above.[28]

ATF Appropriations and Other Gun Safety Funding Requests

Until December 2015, legislative action in the 114th Congress was largely confined to providing an FY2016 appropriation for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the lead federal agency charged with administering and enforcing federal firearms laws. During consideration of the FY2016 Commerce, Justice, Science, and Related Agencies (CJS) appropriations bill (H.R. 2578), the House passed several amendments that would have prevented the Administration from implementing certain gun control measures, including an ATF-proposed administrative framework to reclassify certain ammunition cartridges that might be used in certain types of "handguns" as "armor piercing." While these House-passed amendments were not included in Consolidated Appropriations Act, 2016 (P.L. 114-113), other long-standing gun control limitations were left in place.[29] For FY2017, the Senate Committee on Appropriations reported a bill (S. 2837) that would have provided ATF with $1.259 billion, and the House Committee reported a bill (H.R. 5393) that would have provided ATF with $1.258 billion.

The Administration has requested increased funding for "gun safety," most of which was or would have been provided under the act and bills mentioned above. However, Congress has not provided a requested $10 million for gun violence research. Since FY1997, Congress has prohibited the Centers for Disease Control and Prevention (CDC) from "advocating or promoting gun control."[30] CDC-sponsored "gun violence" research in the past was viewed by at least some Members of Congress as insufficiently objective. Consequently, Congress included this limitation in the CDC appropriation from FY1997 through FY2011. Congress extended this limitation to the entire Department of Health and Human Services for FY2012,[31] and has done so every fiscal year thereafter.[32]

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[26] Matthew Dally, "Rebellious Democrats Disrupt House, Stage Protest over Guns," Associated Press, June 23, 2016.

[27] Rema Rahman, "House Bill Assailed from Right and Left," *Roll Call*, July 6, 2016.

[28] Karoun Demirjian, "Members of House Won't Debate Guns Before Heading Home for Summer," *Washington Post*, July 13, 2016, p. A03.

[29] See CRS Report R44189, *Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF): FY2016 Appropriations*, by William J. Krouse.

[30] Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, September 30, 1996, 110 Stat. 3009, 3009-244.

[31] Consolidated Appropriations Act, 2012 P.L. 112-74, December 23, 2011, 125 Stat. 786, 1085.

[32] Consolidated Appropriations Act, 2016, P.L. 114-13, December 18, 2015, 129 Stat. 2242, 2620.

On September 29, 2016, President Obama signed into law a Continuing Appropriations Act, 2017 (P.L. 114-203), which funds most of the federal government through December 9, 2016, at the same levels as appropriated for FY2016. This continuing resolution also extends the long-standing gun control limitations discussed above through that date.

Federal Regulation of Firearms

The ongoing struggle between gun control and gun rights advocates has resulted in what has been described as a divisive fault line in the American body politic.[33] Gun control advocates generally view the prevalence of firearms in the United States as causing more harm than good. In their view, guns intensify violence by escalating the chances that a crime victim will die in a robbery, aggravated assault, or domestic dispute.[34] They observe that most American gun violence involves "attacks on intimate partners," "gang and drug beefs in disadvantaged neighborhoods," and "suicides," not necessarily in that order.[35] They observe further that there is considerable overlap between mental illness and suicide,[36] and the use of a gun in a suicide attempt nearly always proves fatal.[37] They contend that level of gun violence in the United States is out of line with other industrialized nations and that those nations' experience shows that progressive gun control laws have successfully reduced crime and other forms of gun violence.[38] Gun control supporters, moreover, often view the use of firearms for self-defense or to resist a tyrannical government as impractical and unnecessary, especially in countries with well-developed democratic institutions and rule of law like in the United States.[39]

Gun rights supporters, conversely, view firearms as a viable and necessary means of self-defense against predatory criminals and during times of civil unrest and a consequent breakdown in the rule of law.[40] Many gun rights supporters maintain that some gun control laws do not significantly reduce crime, and firearms possession by law-abiding Americans could serve to deter crime in some circumstances.[41] Indeed, many gun rights supporters view armed self-defense with a firearm as a "natural right" that precedes but is enshrined in the U.S. Constitution.[42] In short, they view the prevalence of firearms in the United States as a guarantor of freedom and security for individuals, as well as the wider civic body, and as a means to deter oppressive or tyrannical governments. In addition, gun rights supporters often pursue and enjoy hunting, marksmanship, and other shooting sports. Gun rights views have been bolstered to a degree by the Supreme

[33] Matthew Kauffman, "A Deeper Divide: The Gun Control Debate After Newtown," *Frontline*, February 19, 2013.

[34] Philip J. Cook and Kristin A. Goss, *Gun Debate: What Everyone Needs to Know*, Oxford University Press, 2014, p. 59.

[35] Ibid, p. 68.

[36] Ibid, p. 72.

[37] Matthew Miller, Catherine Barber, and Deborah Azrael, "Firearms and Suicide in the United States," in *Gun Violence and Mental Illness*, edited by Liza H. Gold and Robert I. Simon, American Psychiatric Association Publishing, 2016, pp. 31-48.

[38] David Hemenway, *Private Guns, Public Health*, University of Michigan Press, 2004, p. 199.

[39] Joshua Horwitz and Casey Anderson, "A Symposium on Firearms, the Militia, and Safe Cities: Merging History, Constitutional Law and Public Policy: Article: Public Policy Approach: Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences," *Albany Government Law Review*, 1 Alb. Gov't L. Rev. (2008), p. 496.

[40] Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right*, University of New Mexico Press, 2013, pp. 219-224.

[41] John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun-Control Laws*, 3rd ed., University of Chicago Press, 2010, pp. 227-234.

[42] Alan Korwin and David Kopel, *The Heller Case: Gun Rights Affirmed!*, Bloomfield Press, 2008, pp. 273-276.

Court's *Heller* and *McDonald* decisions,[43] which interpreted the Second Amendment to the U.S. Constitution as guaranteeing law-abiding citizens an individual right to possess an operable handgun in their home for the purpose of self-defense.

Statutory Structure

Two major federal statutory frameworks regulate the commerce in and possession of firearms: the National Firearms Act of 1934 (26 U.S.C. §5801 et seq.)[44] and the Gun Control Act of 1968, as amended (18 U.S.C. Chapter 44, §921 et seq.). Supplementing federal law, many state firearms laws are stricter than federal law. For example, some states require permits to obtain firearms and impose a waiting period for firearms transfers. Other states are less restrictive, but state law cannot preempt federal law. Federal law serves as the minimum standard in the United States.

The ATF is the lead federal law enforcement agency charged with administering and enforcing federal laws related to firearms and explosives commerce. To manage firearms commerce, ATF issues licenses to firearms manufacturers, importers, dealers, pawnbrokers, and collectors. It also inspects these federal firearms licensees (FFLs) to monitor their compliance with federal and state law. While there are statutory prohibitions against ATF, or any other federal agency, maintaining a registry of firearms or firearms owners, current law requires FFLs to maintain a distributed system of firearms transfer records that allow ATF agents to trace, potentially, the origins of a firearm from manufacturer or importer to a first retail sale and buyer. ATF agents assist other federal agencies, as well as state and local law enforcement, with criminal investigations. The ATF also makes technical judgements about firearms, including the appropriateness of importing certain makes and models of firearms and firearms parts.

The term "firearm" means (a) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (b) the frame or receiver of any such weapon; (c) any firearm muffler or firearm silencer; or (d) destructive device.[45] Such term does not include an antique firearm.[46] Firearms are activated by a trigger pull, which causes a firing pin to strike a cartridge primer detonating a small amount of explosive that ignites propellant. The burning propellant produces high pressures that push the projectile(s) out of the muzzle of the barrel at high, accelerating rates of speed. By most estimates, there are over 300 million firearms available for transfer to, and possession by, private persons in the United States.[47]

[43] District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 561 U.S. 742 (2010). For further information, see CRS Report R44618, *Post-Heller Second Amendment Jurisprudence*, by Sarah S. Herman.

[44] Prior to the National Firearms Act, in 1919, Congress passed legislation that levied a tax on firearms to help defray costs associated with the First World War. In 1937, Congress passed the Pittman-Robertson Act and levied a tax on ammunition. Today, these taxes are known as the Firearms and Ammunition Excise Tax (FAET), which are administered by the Department of the Treasury's Trade and Tax Bureau (TTB). For more information, see CRS Report R42992, *Guns, Excise Taxes, and Wildlife Restoration*, by M. Lynne Corn and Jane G. Gravelle.

[45] The term "firearm" is defined at 18 U.S.C. §921(a)(3).

[46] The term "antique firearm" is defined at 18 U.S.C. §921(a)(16).

[47] The Government Accountability Office (GAO) recently estimated that there were an estimated 350 million firearms in the United States as of 2013. See *Firearms Data: ATF Did Not Always Comply with the Appropriations Act Restriction and Should Better Adhere to Its Policies*, GAO-16-552, June 2016, pp. 1 and 49 (footnote 1).

The National Firearms Act of 1934 (NFA)

The NFA was originally designed to make it difficult to obtain types of firearms perceived to be especially "dangerous and unusual" or to be the chosen weapons of "gangsters," most notably machine guns and short-barreled shotguns. This law also regulates firearms, other than pistols and revolvers, which can be concealed on a person (e.g., pen, cane, and belt buckle guns). It taxes all aspects of the manufacture and distribution of such weapons, and it compels the disclosure (through registration with the Attorney General) of the production and distribution system from manufacturer to buyer.

Machine guns—or fully automatic firearms—have been banned from private possession since 1986, except for those legally owned and registered with the Secretary of the Treasury as of May 19, 1986.[48] In other words, manufacturing licenses for machine guns have not been issued for non-military or law enforcement purposes since that date, but machine guns and conversion kits legally held by civilians prior to that date are generally available for transfer under the conditions described below. According to one estimate, as of November 2007, there were approximately 182,600 machine guns available for transfer to civilians in the United States based upon an audit of the ATF-maintained National Firearms Registry and Transfer Record (NFRTR).[49] Under the NFA, a machine gun is defined as:

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term also includes the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.[50]

To deal in NFA firearms, a person is required to be a federally licensed gun dealer (federal firearms licensee, or FFL) under the Gun Control Act of 1968 (described below) and also be a special occupational taxpayer (SOT) under the NFA. Class I SOTs are importers of NFA firearms; Class II SOTs are manufacturers of NFA firearms; and Class III SOTs are dealers. NFA firearms are often referred to as Class III weapons, for Class III dealers. The NFA imposes a $200 manufacturing tax and a $200 transfer tax each time a firearm is transferred from an unlicensed individual.[51] For non-tax exempt transfers, ATF places a tax stamp on the tax paid transfer document upon the transfer's approval. The transferee may not take possession of the firearm until he holds the approved transfer document. Private persons, who are not otherwise prohibited by law, may acquire an NFA firearm in one of three ways:

- a registered owner of an NFA firearm may apply for ATF approval to transfer the firearm to another person residing in the same state or to an FFL in another state;
- an individual may apply to ATF for approval to make and register an NFA firearm (except machine-guns); or
- an individual may inherit a lawfully registered NFA firearm.

[48] P.L. 99-308, §102(9); 100 Stat. 449, 452-453; codified at 18 U.S.C. §922(o)(1).

[49] John Brown, "182,619—Is That All There Is," *Small Arms Review*, vol. 13, no. 9, June 2010, p. 22.

[50] 26 U.S.C. §5845(b).

[51] Transfers of NFA-covered firearms incur a tax of $200 except for those classified as "any other weapon," which are taxed at a reduced $5 rate. Certain NFA firearm transfers are tax-exempt. They include transfers to a lawful heir from an estate; transfers between federal firearms licensees, who are also SOTs; and transfers of "unserviceable firearms."

It is a felony to receive, possess, or transfer an unregistered NFA firearm. Such offenses are punishable by a fine of up to $250,000, imprisonment for up to 10 years, and forfeiture of the firearm and any vessel, vehicle, or aircraft used to conceal or convey the firearm.[52] To the extent it can be known, legally registered NFA machine guns are rarely used in crime.

The Gun Control Act of 1968 (GCA)

As stated in the GCA, the purpose of federal firearms regulation is to assist federal, state, and local law enforcement in the ongoing effort to reduce crime and violence. In the same act, however, Congress also stated that the intent of the law is not to place any undue or unnecessary burdens on law-abiding citizens in regard to the lawful acquisition, possession, or use of firearms for hunting, trapshooting, target shooting, personal protection, or any other lawful activity. The GCA, as amended, contains the principal federal restrictions on domestic commerce in firearms and ammunition. The statute requires:

- all persons manufacturing, importing, or selling firearms *as a business* to be federally licensed; prohibits the interstate mail- or Internet-order sale of all firearms;
- prohibits interstate sale of handguns generally;
- sets forth categories of persons to whom firearms or ammunition may not be sold, such as persons under a specified age or with criminal records;
- authorizes the Attorney General to prohibit the importation of non-sporting firearms;
- requires that dealers maintain records of all commercial gun sales; and
- establishes special penalties for the use of a firearm in the perpetration of a federal drug trafficking offense or crime of violence.

Licensed Dealers and Firearms Transfers

Persons who are federally licensed to be "engaged in the business" of manufacturing, importing, or selling firearms are known as "federal firearms licensees (FFLs)."[53] As summarized by ATF in January 2016 guidance:

> A person engaged in the business of dealing in firearms is a person who "devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms."
>
> Conducting business "with the principal objective of livelihood and profit" means that "the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection."
>
> Consistent with this approach, federal law explicitly exempts persons "who make occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms."[54]

[52] 26 U.S.C §§5861(d) and (j); 26 U.S.C §5872; 49 U.S.C §§781-788.

[53] The term "engaged in the business" is defined at 18 U.S.C. §921(a)(21).

[54] U.S Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Do I Need a License to Buy and Sell Firearms?*, January 2016, p. 2, https://www.atf.gov/file/100871/download. For further information on this ATF

Under current law, FFLs may ship, transport, and receive firearms that have moved in interstate and foreign commerce. FFLs are currently required to verify with the FBI or state and local authorities through a background check that unlicensed persons are eligible to possess a firearm before subsequently transferring a firearm to them. FFLs must also verify the identity of non-licensed transferees by inspecting a government-issued identity document (e.g., a driver's license).

Unlicensed persons are generally prohibited from engaging in firearms-related interstate or foreign commerce. In contrast, FFLs may engage in interstate firearms transfers among themselves without conducting background checks. Licensees may transfer long guns (rifles and shotguns) to unlicensed out-of-state residents, as long as the transactions are face-to-face and not knowingly in violation of the laws of the state in which the unlicensed transferees reside. FFLs, however, may *not* transfer handguns to unlicensed out-of-state residents.[55] Since 1986, there have been no similar restrictions on the interstate transfer of ammunition. Furthermore, a federal firearms license is not required to sell ammunition; however, such a license is required to either manufacture or import ammunition.

Also, since 1986, FFLs are statutorily authorized to do business temporarily away from their licensed premises, at properly organized gun shows or at events sponsored by any national, state, or local organization devoted to the collection, competitive use, or other sporting use of firearms in the communities that are located in their state, as long as those gun shows and events are held in the state in which their licensed premises are located.[56]

In addition, FFLs are statutorily required to submit "multiple sales reports" to the Attorney General if any person purchases two or more handguns within five consecutive business days. As described below, FFLs are required to maintain records on all acquisitions and dispositions of firearms. They are obligated to respond to ATF agents requesting firearms tracing information within 24 hours. Under certain circumstances, ATF agents may inspect, without search warrants, their business premises, inventory, and gun records.

Unlicensed Persons and Intrastate Private Firearms Transfers

Unlicensed persons are generally prohibited from acquiring firearms from out-of-state sources (except for long guns acquired from FFLs under the conditions described above).[57] Unlicensed persons are also prohibited from transferring firearms to anyone who they have reasonable cause to believe are not residents of the state in which the transaction occurs.[58] It is also notable that firearms or ammunition transfers initiated through the Internet are subject to the same federal laws as transfers initiated in any other manner.

Age Eligibility

Federally licensed gun dealers, or federal firearms licensees (FFLs), are prohibited from transferring a long gun or long gun ammunition to anyone less than 18 years of age, or a handgun

guidance, see CRS Legal Sidebar WSLG1476, *President Obama Announces Executive Actions to "Reduce Gun Violence"*, by Rodney M. Perry, Rodney M. Perry, and Sarah S. Herman.

[55] 18 U.S.C. §922(b)(3).

[56] 18 U.S.C. §923(j).

[57] 18 U.S.C. §922(a)(3).

[58] 18 U.S.C. §922(a)(5).

or handgun ammunition to anyone less than 21 years of age.[59] Since 1994, moreover, it has been a federal offense for any unlicensed person to transfer a handgun or handgun ammunition to anyone less than 18 years of age. It has also been illegal for anyone under 18 years of age to possess a handgun or handgun ammunition (there are exceptions to this law related to employment, ranching, farming, target practice, and hunting).[60]

Prohibited Persons

Under current law, there are nine classes of persons prohibited from shipping, transporting, receiving, or possessing firearms or ammunition:

- persons convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
- fugitives from justice;
- unlawful users or addicts of any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802);
- persons adjudicated as "mental defective" or committed to mental institutions;[61]
- unauthorized immigrants and nonimmigrant visitors (with exceptions in the latter case);[62]
- persons dishonorably discharged from the U.S. Armed Forces;
- persons who have renounced their U.S. citizenship;
- persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner; and

[59] 18 U.S.C. §922(b)(1).

[60] 18 U.S.C. §922(x).

[61] Under 27 C.F.R. §478.11, the term "adjudicated as a mental defective" is defined to include

> a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence or a mental illness, incompetency, condition, or disease, (1) is a danger to himself or others, or (2) lacks the mental capacity to manage his own affairs. The term also includes (1) a finding of insanity by a court in a criminal case and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. Sections 850a, 876(b).

This definition was promulgated by an ATF final rule (*Federal Register*, vol. 62, no. 124, June 27, 1997, p. 34634).

It is noteworthy that in wake of the December 2012, Newtown, CT, mass shooting, the ATF issued proposed regulations to clarify further individuals who might fall under this definition. As discussed below, however, this proposed regulation has not been made final. For further information, see U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, "Amended Definition of 'Adjudicated as a Mental Defective' and 'Committed to a Mental Institution' (2010R-21P)," 79 *Federal Register* 774, January 7, 2014.

[62] Until 2011, ATF interpreted this provision to apply to any noncitizen whose immigration status was "nonimmigrant alien," regardless of whether the alien had been required to obtain a visa prior to arrival at a U.S. port of entry. In 2011, ATF was informed by the DOJ Office of Legal Counsel (OLC) that its interpretation was too broad and that the prohibition "applies only to nonimmigrant aliens who must have visas to be admitted, not to all aliens with nonimmigrant status." See 2011 WL 6260326 (O.L.C) (Oct. 28, 2011). As such, nonimmigrants who enter the country validly without a visa (e.g., under the Visa Waiver Program) are eligible to purchase firearms and ammunition; however, those individuals must meet a residency requirement, which requires them to demonstrate that they have "the intention of making a home" in the state where they wish to purchase the firearm. See 77 *Federal Register* 33625-33634 (June 7, 2012). For more information, see CRS Legal Sidebar WSLG1467, *Firearms Eligibility for Foreign Nationals in the United States*, by Vivian S. Chu et al.

- persons convicted of a misdemeanor crime of domestic violence.[63]

In addition, there is a 10th class of persons prohibited from shipping, transporting, or receiving (but not possessing) firearms or ammunition:

- persons under indictment in any court of a crime punishable by imprisonment for a term exceeding one year.[64]

It also unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any of the prohibited persons enumerated above, if the transferor (seller) has reasonable cause to believe that the transferee (buyer) is prohibited from receiving those items.[65]

Firearms Rights Restoration or "Disabilities Relief"

Under the GCA, there is also a provision that allows the Attorney General (previously, the Secretary of the Treasury) to consider petitions from a prohibited person for "relief from disabilities" and have his firearms transfer and possession eligibility restored.[66] Since FY1993, however, a rider on the ATF annual appropriations for salaries and expenses has prohibited the expenditure of any funding provided under that account on processing such petitions.[67] While a prohibited person arguably could petition the Attorney General, bypassing ATF, such an alternative has never been successfully tested. As a result, the only way a person can reacquire his lost firearms eligibility is to have his civil rights restored or disqualifying criminal record(s) expunged or set aside, or to be pardoned for his crime. As described below, however, Congress provided other avenues of relief for a person "adjudicated as a mental defective" under the NICS Improvement Amendments Act of 2007 (P.L. 110-180).

ATF Regulation of Domestic Firearms Commerce

ATF regulates the U.S. firearms industry by inspecting FFLs to monitor their compliance with the GCA and NFA, and to prevent the diversion of firearms from legal to illegal channels of commerce. Despite its crime-fighting mission, ATF's business relationships with the firearms industry and larger gun-owning community have been a perennial source of tension, which from time to time has been the subject of congressional oversight.[68] Nevertheless, under current law,

[63] 18 U.S.C. §922(g).

[64] 18 U.S.C. §922(n).

[65] 18 U.S.C. §922(d).

[66] 18 U.S.C. §925(c). See also Relief from Disabilities under the Act, 27 C.F.R. §478.144.

[67] For FY1993, see P.L. 102-393; 106 Stat. 1732 (1992). For FY2016, see P.L. 114-113; 129 Stat. 2242, 2302 (December 18, 2015). The FY2016 limitation provides: "That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. §925(c)."

[68] For example, in the 109th Congress, the House Judiciary Crime subcommittee held two oversight hearings examining ATF firearms enforcement operations at guns shows in Richmond, VA, in 2005. ATF agents reportedly provided state and local law enforcement officers with confidential information from background check forms (ATF Form 4473s), so that officers could perform residency checks on persons who had otherwise legally purchased firearms at those gun shows. Questions were also raised as to whether ATF agents had profiled gun purchasers at those gun shows on the basis of race, ethnicity, and gender. See U.S. Congress, House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, *Oversight Hearing on the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) Parts I & II: Gun Show Enforcement*, February 15 and 28, 2006. Also see Department of Justice, Office of the Inspector General, The Bureau of Alcohol, Tobacco, Firearms and Explosives' Investigative Operations at Gun Shows, I-2007-007, June 2007.

ATF Special Agents (SAs)[69] and Industry Operations Investigators (IOIs)[70] are authorized to inspect or examine the inventory and records of an FFL *without search warrants* under three scenarios:[71]

- in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL;
- to ensure compliance with the record-keeping requirements of the GCA—not more than once during any 12-month period, or at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or
- when such an inspection or examination is required for determining the disposition of one or more firearms in the course of a criminal investigation.

By inspecting the firearms transfer records that FFLs are required by law to maintain, ATF SAs and IOIs are able to trace guns from their domestic manufacturer or importer to the first retail dealer that sold those firearms to persons in the general public, generating vital leads in homicide and other criminal investigations. In addition, by inspecting those records, ATF investigators sometimes discover evidence of corrupt FFLs dealing in firearms "off the books," straw purchases, and other patterns of illegal behavior.

Gun Trafficking and Straw Purchases

Criminal "gun trafficking" essentially entails the movement or diversion of firearms from legal to illegal markets.[72] Therefore, it follows that the entire GCA is arguably a statutory framework designed to combat gun trafficking domestically, particularly interstate gun trafficking.[73] ATF has developed a nationwide strategy to reduce firearms trafficking and violent crime by preventing convicted felons, drug traffickers, and juvenile gang members from acquiring firearms from gun traffickers.[74] Gun trafficking cases include, but are not limited to, the following activities:

- straw purchasers or straw purchasing rings;

[69] For FY2016, Congress provided ATF with funding for 2,536 SA positions.

[70] For FY2016, Congress provided ATF with funding for 834 IOI positions.

[71] 18 U.S.C. §923(g)(1)(B).

[72] U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Project Gunrunner: The Southwest Border Initiative*, ATF P 3317.6, March 2009, available at http://www.atf.gov/publications/download/p/atf-p-3317-6.pdf.

It is noteworthy that in 2006 the U.S. Sentencing Commission amended its guidelines to include the following definition: "firearms trafficking" occurred if an offender, "regardless of whether anything of value was exchanged," engaged in the following activities: (1) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and (2) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual (a) whose possession or receipt of the firearm would be unlawful; or (b) who intended to use or dispose of the firearm unlawfully. See United States Sentencing Commission, *Guidelines Manual*, §2K2.1(b)(5) (November 2006).

[73] With regard to Southwest Border gun trafficking, it is significant to note that the GCA does not include any provisions that directly address smuggling firearms out of the United States, across international boundaries, to countries like Mexico. However, the Arms Export Control Act (AECA; 22 U.S.C. §2778 et seq.) does include provisions that directly address such cross-border illegal arms trafficking.

[74] U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Office of Field Operations, *Project Gunrunner: A Cartel Focused Strategy*, September 2010.

- trafficking in firearms by corrupt federally licensed gun dealers;
- trafficking in firearms by unlicensed dealers (i.e., persons who deal in firearms illegally as the principal source of their livelihood);
- trafficking in stolen firearms; and
- trafficking of secondhand firearms acquired from unlicensed persons at gun shows, flea markets, and other private venues.[75]

Unlike other forms of contraband, almost all illegal firearms used criminally in the United States were diverted at some point from legal channels of commerce.[76] ATF works to reduce firearms-related crime with two approaches, industry regulation and criminal investigation.

A "straw purchase" occurs when an individual poses as the actual transferee, but he is actually acquiring the firearm for another person. In effect, he serves as an illegal middleman. As part of any firearms transfer from an FFL to a private person, the GCA requires them to fill out jointly an ATF Form 4473. In addition, the FFL is required to verify the purchaser's name, address, date of birth, and other information by examining a government-issued piece of identification, most often a driver's license. Among other things, the purchaser attests on the ATF Form 4473 that he is not a prohibited person, and that he is the "actual transferee/buyer."[77] Hence, straw purchases are known as "lying and buying for the other guy." Straw purchases are illegal under two provisions of the GCA.

> If the purchaser makes any false statement to a FFL with respect to any fact material to the lawfulness of a prospective firearms transfer, it is a federal offense punishable under 18 U.S.C. §922(a)(6). This provision also captures misrepresentations such as presenting false identity documents. Violations are punishable by up to 10 years of imprisonment under 18 U.S.C. §924(a)(2).[78]
>
> It is also illegal for any person knowingly to make any false statement with respect to the records that FFLs are required to maintain under 18 U.S.C. §924(a)(1)(A). This provision, however, also captures misrepresentations related to licensure and other benefits under the GCA. Violations are punishable by up to five years of imprisonment under 18 U.S.C. §924(a)(1)(D).

Straw purchases, however, are not easily detected, because their illegality only becomes apparent when the straw purchaser's true intent is revealed by a subsequent transfer to the actual buyer (third party). In many cases, the actual buyer may be a prohibited person, who would not pass a background check. Under such a scenario, if the straw purchaser knew or had reasonable cause to know the actual transferee was a prohibited person, he would also be in violation of 18 U.S.C. §922(d), for which the penalty is up to 10 years of imprisonment.[79] It would also be a violation

[75] U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Following the Gun: Enforcing Federal Laws against Firearms Traffickers*, June 2000, p. 11.

[76] Greg Ridgeway, Glenn L. Pierce, and Anthony A. Braga et al., *Strategies for Disrupting Illegal Firearms Markets: A Case Study of Los Angeles*, RAND Corporation, 2008, p. 1.

[77] On the ATF Form 4473, question 11a reads: "Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you."

[78] In *Abramski v. United States*, the Supreme Court held that a person who buys a firearm for someone else while falsely claiming that he is acquiring it for himself makes a material misrepresentation punishable under 18 U.S.C. §922(a)(6), even if the person for whom he bought the firearm is otherwise eligible to be transferred a firearm. For further information, see CRS Legal Sidebar WSLG991, *Supreme Court Decides Last Firearms Challenge for the 2013-2014 Term*, by Vivian S. Chu.

[79] 18 U.S.C. §924(a)(2).

for the prohibited person to possess or receive the firearm under 18 U.S.C. §922(g), for which the penalty is also up to 10 years of imprisonment.[80]

Alternatively, the actual buyer may not be a prohibited person, but may be seeking to acquire firearms without any paper trail linking him to the acquisition of the firearm. Under such a scenario, however, the straw purchase and subsequent illegal transfer would be even less apparent for several reasons. Under federal law, it is *legal* for an unlicensed, private person to purchase firearms and then resell them or give them away, as long as the

- transferees *are not* prohibited or underage persons;
- transferors *do not* deal in firearms in a volume that would require licensing; and
- transfers are *intrastate*, as generally only federally licensed gun dealers can legally transfer firearms *interstate*.

Hence, individuals may buy several firearms at a time with the intention of giving those firearms away as presents to anyone, as long as they do not present those firearms to persons who are underage; out-of-state residents; or prohibited persons. They may also buy firearms and, then, sell those firearms at any time, as long as selling firearms is not the principal objective of their livelihood and profit, in which case they would be required to be federally licensed to deal in firearms. Furthermore, no federal background checks are required for recipients of subsequent intrastate firearms transfers.

On the other hand, if the suspected straw purchaser were observed departing the licensed gun dealer's place of business and traveling immediately to another locale, where he transferred the firearm(s) to another person, there would be a reasonable suspicion that he was a straw purchaser. However, the actual buyer would not have committed a crime unless it could be proven that he had sponsored the straw purchase.[81] Usually, such illegal arrangements become clear when the straw purchaser is interviewed by agents and admits to having bought the firearms for the third party, non-prohibited person. Moreover, depending on the time that elapses between the initial straw purchases and subsequent transfers to the actual buyer (third party), the illegality of the transfers may not become apparent until the actual buyer's true intent is revealed, when he either transports those firearms across state lines to be sold or bartered, attempts to smuggle them across an international border, or engages in some other illegal act.

Sometimes, the behavior of the prospective transferee (straw purchaser) may raise reasonable suspicions. For example, during a controversial ATF Phoenix-based investigation known as "Operation Fast and Furious," several of the individuals under indictment made multiple purchases from the same FFL of multiple semiautomatic firearms. Raising suspicions further, they paid for these firearms with thousands of dollars in cash. Indeed, FFLs contacted ATF about these suspicious transfers, prompting the investigation. They did so, in part, because they realized that these firearms might be traced back to their businesses and they probably wanted to avoid any negative attention that those traces might bring back on them. It is notable that if an FFL believes a firearms transfer to be suspicious, he may choose not to sell those firearms to the individuals in question. If he should proceed with the transfer, however, as long as he had conducted the required criminal background check on the prospective buyer, and he and the prospective buyer had filled out the proper paperwork, his obligations under federal law would have been fulfilled.

[80] Ibid.

[81] It is unlawful for any person to aid, abet, counsel, command, or solicit a criminal act (18 U.S.C. §2).

In summation, with regard to interstate transfers, it is unlawful for any person who is not federally licensed to deal in firearms to transport or receive a firearm into his own state of residence that was obtained in another state.[82] In addition, it is unlawful for any person who is not federally licensed to deal in firearms to deliver a firearm to another unlicensed person who resides in a state other than the transferor's state of residence.[83] Violations of either provision are punishable by a fine and/or not more than five years of imprisonment.[84] It is also unlawful to smuggle firearms, or any other merchandise contrary to U.S. law from the United States.[85] Violations are punishable by a fine and/or not more than 10 years of imprisonment.[86]

Brady Handgun Violence Prevention Act, 1993

As amended by the Brady Handgun Violence Prevention Act, 1993 (Brady Act), the GCA requires background checks be completed for all unlicensed persons seeking to obtain firearms from federal firearms licensees.[87] Private transactions between persons "not engaged in the business" are not covered by the recordkeeping or the background check provisions of the GCA. These transactions and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances.

The Brady Act included two provisions (interim and permanent). During a five-year interim provision, FFLs were required to contact state and local government officials to conduct background checks on unlicensed persons seeking to acquire a handgun. State and local government officials had up to five business days to conduct such checks.[88]

During the permanent provision, which has been in effect since late 1998, FFLs are required to conduct a name-based background check on unlicensed buyers seeking to acquire a firearm (handgun and long gun) through a computer system that would check a preexisting computerized index of felony criminal history records, as well as any other computer systems that might include pertinent records disqualifying an individual from receiving, possessing, transporting, or shipping a firearm under federal or state law.[89] To these ends, the Brady Act required all federal agencies holding any disqualifying information on individuals to make that information available to the Attorney General.

National Instant Criminal Background Check System (NICS)

On November 30, 1998, the FBI activated the National Instant Criminal Background Check System (NICS) to facilitate firearms-related background checks, when the permanent provisions

[82] 18 U.S.C. §922(a)(3).

[83] 18 U.S.C. §922(a)(5).

[84] 18 U.S.C. §924(a)(1)(D).

[85] 18 U.S.C. §554.

[86] Ibid.

[87] P.L. 103-159, November 30, 1993, 107 Stat. 1536. Congress passed the Brady Act after nearly six years of sometimes contentious debate. As originally introduced in the 100th Congress, the Brady bill (H.R. 975 and S. 466) called for a seven-day waiting period on handgun transfers. Supporters deemed this waiting period necessary to give law enforcement officials the time necessary to conduct a thorough background check. Later versions of the bill would have implemented a five-business-day waiting period. Opponents of the waiting period called for an "instant" computerized criminal history background check systems as had been implemented in four states (VA, FL, MD, and DE).

[88] 18 U.S.C. §922(s).

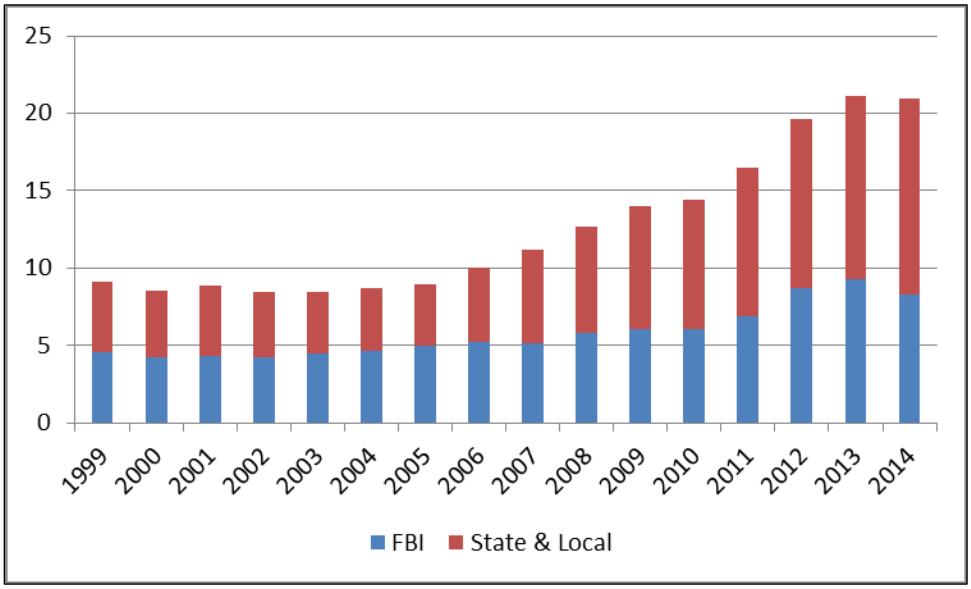
[89] 18 U.S.C. §922(t).

of the Brady Act became effective. Through NICS, FFLs conduct background checks on non-licensee applicants for both handgun and long gun transfers. As part of NICS checks, the system will respond to an FFL or state official with a NICS Transaction Number (NTN) with one of three outcomes: (1) "proceed" with transfer or permit/license issuance, because a prohibiting record was not found; (2) "denied," indicating a prohibiting record was found; or (3) "delayed," indicating that the system produced information that suggested there could be a prohibiting record.

Under the last outcome, a firearms transfer may be "delayed" for up to three business days while NICS examiners attempt to ascertain whether the person is prohibited.[90] At the end of the three-day period, an FFL may proceed with the transfer at his discretion if he has not heard from the FBI about the matter. The FBI, meanwhile, would continue to work the NICS adjudication for up to 90 days, during which the transaction is considered to be in an "open" status. If the FBI ascertains that the person is not in a prohibited status at any time during the 90 days, then the FBI would contact the FFL through NICS with a proceed response. If the person is subsequently found to be prohibited, the FBI would inform ATF and a firearms retrieval process would be initiated.

Figure 1. NICS Transactions

(1999 through 2014, in millions)



Source: U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System (NICS) Operations*, 2014, p. 12.

The FBI handles background checks entirely for most states, while other states serve as full or partial points of contact (POCs) for state and local firearms background check purposes. In POC states, federally licensed gun dealers contact a state agency, and the state agency contacts the FBI for background checks.[91]

[90] Accessing Records in the System, 28 C.F.R. §25.6.

[91] In 13 states, state agencies serve as full POCs and conduct Brady background checks for both long gun and handgun transfers. In four states, state agencies serve as partial POCs for handgun permits; in four other states, state agencies serve as partial POCs for handgun transfers only. In these eight partial POC states, checks for long gun transfers are

As **Figure 1** shows, under the permanent Brady Act provisions, the FBI and state and local agencies conducted over 202 million NICS transactions from 1999 through 2014. Of these transactions, the FBI conducted 93.5 million transactions, and state and local law enforcement authorities in POC states conducted 109.1 million transactions. There is a one-to-one correspondence between FBI NICS transactions and individual background checks, and the 93.5 million FBI transactions—that is, background checks—resulted in 1.17 million denials (1.2%).

It is noteworthy that some POC state background checks involved more than one background check transaction. The FBI does not report on how many state and local background checks correspond with those transactions. Nor does the FBI report the total number of state and local firearms transfer or license denials. The Bureau of Justice Statistics (BJS), however, collects and analyzes the data as part of its Firearm Inquiry Statistics Program and reports annually on the total number of firearms-related background checks and related denials conducted under the Brady Handgun Violence Prevention Act (P.L. 103-159).

In June 2016, BJS reported that the 109.1 million POC state NICS transactions referenced above corresponded with 74.1 million individual background checks.[92] Those POC state checks resulted in 1.34 million denials (1.8%). In summation, BJS estimated that the FBI and POC state and local agencies together have conducted 167.5 million firearms-related background checks from November 1998 through calendar year 2014, resulting in 2.5 million denials (1.5%) of firearms transfers or permits.[93]

NICS Denials and Voluntary Appeals File

Under no circumstances is an FFL informed about the prohibiting factor upon which a denial is based. Consequently, the FFL cannot inform the denied person why he was denied. Under the Brady background check process, however, a denied person may challenge the accuracy of the underlying record(s) upon which his denial is based. He would initiate this process by requesting (usually in writing) the reason for the denial from the agency that conducted the NICS check (the FBI or POC). The denying agency has five business days to respond to the request. Upon receipt of the reason and underlying record for the denial, the denied person may challenge the accuracy of that record. If the record is found to be inaccurate, the denying agency is legally obligated to correct that record.

As with other screening systems, particularly those that are name-based, false positives occur as a result of Brady background checks, but the frequency of these misidentifications is unreported. Nevertheless, the FBI has taken steps to mitigate false positives. In July 2004, DOJ issued a regulation that established the NICS Voluntary Appeal File (VAF), which is part of the NICS Index. DOJ was prompted to establish the VAF to minimize the inconvenience incurred by some

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conducted entirely through the FBI. In the 30 non-POC states, the District of Columbia, and five territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands), federally licensed gun dealers contact the FBI directly to conduct background checks through NICS for both handgun and long gun transfers. For state agencies (POCs), background checks may not be as expeditious, but they may be more thorough because state agencies may have greater access to databases and records that are not available through NICS. According to the Government Accountability Office (GAO), this is particularly true for domestic violence misdemeanor offenses and protective orders. For further information, see GAO, *Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System*, GAO-02-720, July 2002, p. 27.

[92] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2013-2014—Statistical Tables*, June 2016, NCJ 249849, by Jennifer C. Karberg, Ronald J. Frandsen, Joseph M. Durso, Trent D. Buskirk, and Allina D. Lee.

[93] Ibid.

prospective firearms transferees (purchasers) who have names or birth dates similar to those of prohibited persons. So as not to be misidentified in the future, these persons agree to authorize the FBI to maintain personally identifying information about them in the VAF as a means to avoid future delayed transfers. Current law requires that NICS records on approved firearm transfers, particularly information personally identifying the transferee, be destroyed within 24 hours.[94]

NICS Improvement Amendments Act of 2007

Congress passed the NICS Improvement Amendments Act (NIAA) of 2007 (P.L. 110-180)[95] following the April 2007 Virginia Tech tragedy.[96] This act includes provisions designed to encourage states, tribes, and territories (states) to make available to the Attorney General certain records related to persons who are disqualified from acquiring a firearm, particularly records related to domestic violence misdemeanor convictions and restraining orders, as well as mental health adjudications. To accomplish this, the act establishes a framework of incentives and disincentives, whereby the Attorney General is authorized to make grants, waive a grant match requirement, or reduce a law enforcement assistance grant depending upon a state's compliance with the act's goals of bringing firearms-related disqualifying records online.

Under the act, two provisions authorized the Attorney General to make grants available to states to improve further electronic access to records, including court disposition and corrections records, which are necessary to fully facilitate NICS background checks. The Attorney General is required to report annually to Congress on federal department and agency compliance with the act's provisions. The Attorney General, in turn, has delegated responsibility for grant-making and reporting to DOJ's Bureau of Justice Statistics (BJS). BJS designated the grant program under the act as the "NICS Act Record Improvement Program (NARIP)," although congressional appropriations documents generally referred to it as "NICS improvement" or the "NICS initiative" program.

As shown in **Table 1**, Section 103(e) of the act included an authorization for appropriations for FY2009 through FY2013. The act directed that the grants provided under this authorization be made "in a manner consistent" with the National Criminal History Improvement Program (NCHIP).[97] The act also requires that between 3% and 10% of each grant be allocated for a relief from disabilities program for persons adjudicated mentally defective or unwillingly committed to a mental institution, whereby they can petition to have their gun rights restored.

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[94] For FY1999 and every year thereafter, Congress has included a provision in the annual CJS appropriations acts that prohibits DOJ from using appropriated funds to levy a fee for NICS firearms-related background checks. This provision was crafted to counter a Clinton Administration proposal to levy a $5 fee for such checks. For FY2004 and every year thereafter, along with the fee prohibition, Congress has included a provision that requires the FBI to destroy background check records on persons who are eligible to receive firearms within 24 hours. This provision was originally part of the FY2004 Tiahrt amendment, known for its sponsor Representative Todd Tiahrt, and was crafted in response to a 90-day audit log that was maintained by the FBI during the Clinton Administration for audit and other purposes. In the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55; November 18, 2011; 125 Stat. 552, 632), Congress inserted futurity language ("hereafter") in this provision that appears to make it permanent law.

[95] P.L. 110-180; January 8, 2008; 121 Stat. 2559.

[96] On April 16, 2007, a student at Virginia Polytechnic Institute and State University shot 32 people to death and wounded 17 others.

[97] Under the Brady Act (P.L. 103-159), Congress authorized a grant program known as the National Criminal History Improvement Program (NCHIP), the initial goal of which was to improve electronic access to firearms-related disqualifying records, particularly felony conviction records. For further information, see Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Criminal History Program (NCHIP): Improving Criminal History Records for Background Checks, 2005*, July 2006.

Table 1. NICS Improvement Authorizations and Appropriations Under P.L. 110-180

(dollars in millions)

Fiscal Year	Section 103(e)	Section 301(e)	Actual Appropriation
FY2009	125	62.5	10.000
FY2010	250	125.0	20.000
FY2011	250	125.0	16.567
FY2012	125	62.5	5.000
FY2013	125	62.5	12.000
Total	875	437.5	63.567

Sources: NICS Improvement Amendments Act, 2007 (P.L. 110-180); Omnibus Appropriations Act, 2009 (P.L. 111-8); Consolidated Appropriations Act, 2010 (P.L. 111-117); Department of Defense and Full-Year Continuing Appropriations Act, 2011 (P.L. 112-10); Consolidated and Further Continuing Appropriations Act 2012 (P.L. 112-55); and Consolidated and Further Continuing Appropriations Act, 2013 (P.L. 113-6).

Also, as shown in **Table 1**, Section 301(e) of the act included an additional authorization for appropriations for the same fiscal years to improve state court computer systems and the timeliness of criminal history dispositions. Under both authorizations, up to 5% of all grants may be set aside to provide assistance to tribal governments. To have been eligible for grants under either section, states must be certified by ATF that they have established a relief from disabilities program for persons adjudicated "mentally defective" or committed to a mental institution.[98]

As an additional incentive, Section 102 of P.L. 110-180 also provided that on January 8, 2011, any state that had provided at least 90% of disqualifying records would be eligible for a waiver of the 10% match requirement under NCHIP for two years.[99] To be eligible for that waiver, as well as Sections 103 and 301 grants, states were required to provide BJS with a reasonable estimate of the number of NICS-related disqualifying records that they held within 180 days of enactment (July 6, 2008).

In consultation with the National Center for State Courts (NCSC) and SEARCH Group, Inc.,[100] BJS has collected several rounds of estimates.[101] For FY2011, 47 of 56 states and territories provided estimates, but the precision of these estimates collectively were deemed insufficient to determine whether the NCHIP 10% matching grant waiver ought to be awarded to any of these states or territories. BJS, NCSC, and SEARCH are currently working on a statistical model with which to assess these estimates.[102]

[98] According to the Office of Justice Programs (OJP) as of December 18, 2014, by year, ATF has certified the following 27 states: in 2009, Nevada, New York, Oregon; in 2010, Florida, Idaho, Illinois, New Jersey, Texas, Wisconsin; in 2011, Arizona, Iowa, Kansas, Kentucky, North Dakota, Virginia; in 2012, Indiana, Missouri, Nebraska, West Virginia; in 2013, Alabama, Delaware, Louisiana, Maryland, Utah; and, in 2014, Alaska, Hawaii, South Carolina. ATF certified Connecticut in 2011, but the state has since changed its law and is no longer certified.

[99] For FY2005-FY2010, BJS invoked its discretionary authority to increase the match requirement to 20%. For FY2011, BJS reportedly reduced the match requirement to 10%, the percentage match requirement set out under the Crime Identification Technology Act (CITA; P.L. 105-251); CRS conversation with BJS on March 7, 2011.

[100] SEARCH is a nonprofit organization of the States that serves as a national clearinghouse for collecting, sharing, and analyzing information, best practices, and services and solutions for justice information sharing.

[101] U.S. Department of Justice, *Report to Congress Pursuant to Requirements of the NICS Improvement Amendments Act of 2007 (*P.L. 110-180*)*, July 2013, p. 9.

[102] Ibid, pp. 9-10.

To further encourage compliance, Section 104 of P.L. 110-180 included a schedule of discretionary and mandatory reductions in Byrne Justice Assistance Grants (JAG)[103] for states that did not provide certain percentages of disqualifying records:

- for a two-year period (January 8, 2011, through January 8, 2013), the Attorney General could have withheld up to 3% of JAG funding from any state that provided less than 50% of disqualifying records;
- for a five-year period (January 8, 2013, through January 8, 2018), the Attorney General may withhold up to 4% of JAG funding from any state that provides less than 70% of disqualifying records; and
- after January 8, 2018, the Attorney General is required to withhold 5% of JAG funding from any state that provides less than 90% of disqualifying records.

The act also allows the Attorney General to waive the mandatory 5% cuts if a state provides substantial evidence that it is making reasonable compliance efforts.

For FY2014, FY2015, and FY2016, Congress continued to appropriate funding for these purposes, notwithstanding the lapsed authorizations for appropriations under the act, but the Committees on Appropriations merged the NCHIP and NARIP program accounts, and refocused the combined program generally on firearms-related background check records improvement.

- Under the Consolidated Appropriations Act, 2014 (P.L. 113-76), Congress appropriated $58.5 million for this program, renamed the "NICS Initiative," of which not less than $12.0 million was made available to make grants under P.L. 110-180.
- Under the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235), Congress appropriated $73.0 million for the NICS Initiative, of which not less than $25.0 was made available to make grants under P.L. 110-180.
- Under the Consolidated Appropriations Act, 2016 (P.L. 114-113), Congress appropriated the same amount for FY2016 as was appropriated for FY2015 with the same condition.

Through FY2015, BJS had not provided any NCHIP 10% matching grant waivers. Nor had BJS levied any of the discretionary penalties described above. Nevertheless, House Committee on Appropriations report language for FY2015 indicated

> The Committee directs that grants made under the broader NCHIP authorities be made available only for efforts to improve records added to NICS. Additionally, the Department [DOJ] shall prioritize funding under NARIP authorities with the goal of making all States NICS Improvement Amendments Act of 2007 (NIAA) compliant. The Department also shall apply penalties to noncompliant States to the fullest extent of the law.[104]

Senate report language and the explanatory statement accompanying the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235) were silent on this issue of the reward and penalty provisions of P.L. 110-180.

[103] For further information, see CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program: In Brief*, by Nathan James.

[104] U.S. Congress, House Committee on Appropriations, *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2015*, Report together with Minority Views (To accompany H.R. 4660), 113th Cong., 2nd sess., May 15, 2014, H.Rept. 113-448 (Washington: GPO, 2014), p. 59.

Salient Gun Control Issues in the 114th Congress

On December 3, 2015, and June 16, 2016, the Senate debated gun control-related amendments that would have (1) authorized the Attorney General to deny the transfer of firearms or the issuance of firearms and explosives licenses to known or suspected dangerous terrorists; (2) expanded federal firearms-related background check requirements; (3) increased background check system access to records on persons prohibited from receiving and possessing firearms; and (4) revised and/or codified definitions related to mental incompetency and guns.

Table 2. Senate-Considered Gun Control Amendments to H.R. 3762 and H.R. 2578 by Selected Issue Areas

Amendments and Sponsor	No Fly, No Buy or Terror Gap	Comprehensive or Universal Background Checks	Increasing Data Sharing on Prohibited Persons	Mental Incompetency and Firearms Eligibility
Restoring Americans' Healthcare Freedom Reconciliation Act (H.R. 3762)				
S.Amdt. 2908 (Manchin/Toomey)		X	X	X
S.Amdt. 2910 (Feinstein)	X			
S.Amdt. 2912 (Cornyn)	X			
S.Amdt. 2914 (Grassley)			X	X
FY2017 Departments of Commerce and Justice, Science, and Related Agencies (CJS) Appropriations bill (H.R. 2578, the expected vehicle for S. 2837)				
S.Amdt. 4720 (Feinstein)	X			
S.Amdt. 4749 (Cornyn)	X			
S.Amdt. 4750 (Murphy)		X	X	X
S.Amdt. 4751 (Grassley)	X		X	X
S.Amdt. 4858 (Collins)	X			
S.Amdt. 4859 (Johnson)	X			

Table 2 shows the Senate amendments and their sponsors to two bills, the Restoring Americans' Healthcare Freedom Reconciliation Act (H.R. 3762) and the FY2017 Departments of Commerce and Justice, Science, and Related Agencies (CJS) Appropriations bill (H.R. 2578, the expected

vehicle for S. 2837). In addition, there is discussion of proposals to study "mass violence" and legislative action related to funding ATF and other gun safety initiatives. "No Fly, No Buy" or "Terror Gap" Proposal

On December 2, 2015, the day of the San Bernardino mass public shooting, President Barack Obama called on Congress to pass legislation that would prevent known or suspected terrorists on a "No Fly" terrorist watchlist from acquiring a gun. While such legislation had not been offered for several Congresses,[105] the President was likely referring rhetorically to the "Terror Gap" proposal.[106] In the 114th Congress, Representative King reintroduced the "Terror Gap" proposal (H.R. 1076), and Senator Dianne Feinstein introduced a similar proposal (S. 551), formally entitled as the Denying Firearms and Explosives to Dangerous Terrorists Act of 2015. The June 12, 2016, Orlando, FL nightclub mass shooting sparked similar calls for legislative action.

Background

Following the September 11, 2001, terrorist attacks, the U.S. government reevaluated its terrorist screening procedures. In February 2004, the DOJ and FBI modified the NICS background check procedures and recalibrated NICS to query an additional file in the National Crime Information Center (NCIC) that included terrorist watchlist records. Prior to that, the FBI did not conduct terrorist watchlist queries as part of firearms background checks because being a known or suspected terrorist was not a disqualifying factor for firearms transfer and possession eligibility; nor is it today under current law. Under the new procedures, information related to the subjects of NICS-generated terrorist watchlist matches have been passed on to the FBI Counterterrorism Division and special agents in the field, who are usually members of Joint Terrorism Task Forces (JTTFs). These FBI agents, in turn, verify the match between the individual and the watchlist record, and they check for information that would prohibit that individual—the prospective transferee, licensee, or permittee—from possessing firearms or explosives (e.g., illegal immigration or fugitive status).

While the modified NICS procedures initially generated little public opposition, those procedures called three possible issues into question. One, should terrorist watchlist checks be incorporated statutorily into the firearms- and explosives-related background check processes? Two, given certain statutory prohibitions related to prohibiting a firearms registry, should approved firearm transfer records be maintained on a temporary basis to determine whether persons of interest in counterterrorism investigations have obtained firearms? Three, should the Attorney General be granted authority to deny a firearms transfer based solely on a terrorist watchlist match? Since the 109th Congress, several related legislative proposals have been introduced. Several of those bills would have addressed the retention of firearms-related transfer records. Another proposal would

[105] "No Fly, No Buy" bills were introduced that would have prohibited any known or suspected terrorists on the No Fly List from receiving, possessing, transferring, or shipping firearms or ammunition in the 109th, 110th, and 111th Congresses. Representative Carolyn McCarthy introduced those bills (H.R. 1195, H.R. 1167, and H.R. 2401). This proposal was not reintroduced in subsequent Congresses.

[106] In the 110th Congress, Senator Frank Lautenberg and Representative Peter King first introduced the Denying Firearms and Explosives to Dangerous Terrorists Act (S. 1237/H.R. 2074) based on a legislative proposal developed by DOJ to authorize the Attorney General to deny the transfer of firearms or the issuance of firearms (and explosives) licenses/permits to persons determined to be "dangerous terrorists." In the 111th Congress, they reintroduced this bill (S. 1317/H.R. 2159), which supporters dubbed the "Terror Gap" proposal. In the 112th Congress, they introduced similar bills (S. 34 and H.R. 1506). And, in the 113th Congress they reintroduced their bills (S. 34 and H.R. 720) once more. When the Senate considered the Safe Communities, Safe Schools Act of 2013 (S. 649) in April 2013, Senator Lautenberg also filed an amendment (S.Amdt. 734) to that bill, which was nearly identical to S. 34. The Senate leadership, however, set S. 649 aside before consideration of S.Amdt. 734. In addition, Representative James Moran included similar provisions in the NRA Members' Gun Safety Act of 2013 (H.R. 21).

have prohibited persons watch-listed as terrorists for aviation security purposes on the "No Fly" list from firearms transfer or possession eligibility.

December 2015 Legislative Action

Following the President Obama's call to pass the "No Fly, No Buy" act, on December 3, 2015, Senator Feinstein offered the language of the Terror Gap bill (S. 551) as an amendment (S.Amdt. 2910) to the Restoring Americans' Healthcare Freedom Reconciliation Act (H.R. 3762). The Senate rejected a motion to waive a point of order made against the amendment by roll call vote (45-54). Senator John Cornyn offered an alternative amendment (S.Amdt. 2912) to H.R. 3762 that would require the Attorney General to file an emergency petition with a "competent court of jurisdiction" prior to prohibiting a firearms transfer to an otherwise eligible person, who had been determined to be a "dangerous terrorist." A point of order was also raised against the Cornyn amendment, and it too was ruled out of order.

On December 6, 2015, however, President Barack Obama again called on Congress "to act to make sure no one on the no-fly list is able to buy a gun" in a nationally broadcasted Oval Office address. On the next day, Representative Mike Thompson filed a discharge petition on H.R. 1076. As of December 18, the petition had 173 signatures. On December 9, 2015, Representative Thompson moved to recommit a bill, the Red River Private Property Protection Act (H.R. 2130), back to committee with instructions to report the bill back to the House amended with the language of H.R. 1076. The chair ruled this motion out of order because the amendment was not germane to the bill, and the chair's ruling was sustained by a vote of 246-182, preventing further consideration of this amendment.

June/July 2016 Legislative Action

On June 15, 2016, Senator Christopher Murphy and other Senators advocated for 15 hours on the Senate floor for votes on the "No Fly, No Buy" and "universal" background check proposals. During consideration of the FY2017 Commerce, Justice, Science, and Related Agencies Appropriations bill (H.R. 2578, the expected vehicle for S. 2837), the Senate considered several amendments related to firearms- and explosives-related background checks and terrorist watchlist screening. Among those amendments were the

No Guns for Terrorists Act (S.Amdt. 4720) offered by Senator Dianne Feinstein;

Stop Terrorists from Buying Guns While Protecting Constitutional Rights for Law-Abiding Americans Act (S.Amdt. 4749) offered by Senator John Cornyn;

Terrorist Firearms Prevention Act of 2016 (S.Amdt. 4858) offered by Senator Susan Collins; and

S.Amdt. 4859, offered by Senator Ron Johnson.

The Senate did not pass any of these amendments and H.R. 2578 was set aside by the Senate leadership.

In the House of Representatives, Representative John Lewis led Democrats in a 26-hour "sit-in" in an ultimately unsuccessful attempt to convince the House leadership to bring gun control bills to the House floor for debate and votes. Instead, the House Speaker, Representative Paul Ryan, brought several counterterrorism bills to the floor. The Majority Leader, Representative Kevin McCarthy, introduced the Homeland Safety and Security Act (H.R. 5611), which includes provisions that would address gun background checks and terrorist watchlists, as well as several other provisions related to counterterrorism. The bill did not receive floor action.

In short, these Senate and House amendments would have authorized the Attorney General to deny a firearms transfer to any person she deemed to be a "dangerous terrorist." All these amendments would have provided some level of redress or remedy to persons improperly watch-listed or mistakenly identified as a known or suspected terrorist and, as a consequence, denied a firearms transfer. However, most of these proposals generally provided such redress and remedy in federal circuit or district court after the denial with no provision for notification as to the reason for the denial, the Cornyn amendment, in contrast, would have required some level of judicial review prior to the denial and the McCarthy bill would have required notification of the reason for the denial with some form of judicial oversight or hearing at or near the time of denial.

Comprehensive or Universal Background Checks

During consideration of a Health Care Reconciliation bill (H.R. 3762) and FY2017 Department of Justice appropriations bill (H.R. 2578), the Senate considered two amendments (S.Amdt. 2908 and S.Amdt. 4750) that would have expanded federal background check requirements to cover private, intrastate firearms transfers on December 3, 2015, and on June 16, 2016, respectively. These and other amendments (S.Amdt. 2914 and S.Amdt. 4751) also included provisions to increase information sharing on persons who are ineligible to receive or possess firearms for background check purposes. Among those amendments were the

- Public Safety and Second Amendment Rights Protection Act of 2015 (S.Amdt. 2908) offered by Senators Joe Manchin and Pat Toomey;
- Protecting Communities and Preserving the Second Amendment Act of 2015 (S.Amdt. 2914) offered by Senator Charles Grassley;
- Fix Gun Checks Act of 2016 (S.Amdt. 4750), offered by Senator Christopher Murphy; and
- Protection Communities and Preserving the Second Amendment Act of 2016 (S.Amdt. 4751) offered by Senator Grassley.

Similar amendments were considered previously by the Senate in the 113th Congress, following the December 2012, Newtown, CT, mass shooting.[107]

The Administration supported expanding background checks, as was called for in President Obama's post-Newtown plan to reduce gun violence. As discussed above, under current law, intrastate transfers between unlicensed persons, who are not "engaged in the business" of dealing in firearms "as a regular course of ... business with the principal objective of livelihood and profit," are not covered by the recordkeeping or the background check provisions of the GCA. Nevertheless, such private transactions and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances.

Proponents of greater gun control view the fact that unlicensed persons engaging in intrastate firearms transfers are not subject to the recordkeeping and Brady Act background check requirements of the GCA as a "loophole" in the law, particularly within the context of gun shows. This circumstance arguably flowed from two developments. First, in 1986, Congress amended the GCA to allow FFLs to transfer firearms to unlicensed persons at gun shows located within the state of their business;[108] however, prohibitions on interstate transfers still applied. Second, in 1994, Congress passed the "Brady Act" and amended the GCA to require background checks be

[107] See CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by William J. Krouse.

[108] 18 U.S.C. §923(j),

completed for all unlicensed persons seeking to obtain firearms from FFLs; however, it does not require background checks for intrastate (in-state) firearms transfers between unlicensed persons.

The Manchin-Toomey Amendment

On December 3, 2015, during Senate consideration of the Restoring Americans' Healthcare Freedom Reconciliation Act (H.R. 3762), Senators Joe Manchin and Patrick Toomey offered an amendment (S.Amdt. 2908) that would have required intrastate (same state) firearms transfers between unlicensed persons (private transfers) be processed through FFLs and, thus, it would have required a background check on the recipient (transferee/buyer). Supporters have dubbed the Manchin-Toomey amendment as the "comprehensive" background check proposal, because the background check requirements described above would have been expanded to transfers between unlicensed persons arranged at a "gun show" or "pursuant to advertisement, posting, display or other listing on the Internet or other publication by the transferor of his intent to transfer, or the transferee of his intent to acquire, a firearm." In the House, Representatives Peter King and Mike Thompson introduced a nearly identical measure, the Public Safety and Second Amendment Rights Protection Act of 2015 (H.R. 1217).

In addition, the Manchin-Toomey amendment (S.Amdt. 2908) would have amended the Brady Act (P.L. 103-159) to authorize appropriations for NCHIP at $100 million annually for FY2016-FY2019. Both proposals would also amend the NICS Improvement Amendments Act of 2007 (P.L. 110-180) to require states to implement plans to provide records on all prohibited persons to the FBI, or face reductions in their JAG funding. Such plans would have addressed

- NICS accessibility to all prohibiting records,
- establishing qualitative and quantitative benchmarks for evaluative purposes, and
- potential JAG reductions for not meeting those benchmarks.

For example, under both proposals, states that did not meet certain benchmarks would face a 10% reduction in JAG funding in year one, an 11% reduction in year two, a 13% reduction in year three, and a 15% reduction in year four. Moreover, if a state failed to submit such a plan to the Attorney General, it would have faced those reductions immediately, whereas if the states submitted such plans, the Attorney General would have been given discretion whether to make those reductions, even when the states had not met established benchmarks.

S.Amdt. 2908 would have also amended P.L. 110-180 to reshape the NARIP program and authorize appropriations of $100 million annually for FY2016-FY2019 for this program. Under the amendment, grant funding could have been used to

- carry out assessments of the needs of states and state court systems;
- implement policies, systems, and procedures for the automation and submission of records on prohibited persons;
- create electronic systems to allow for the submission of such records;
- allow states to perform their own background checks; and
- develop and maintain disability relief programs.

S.Amdt. 2908 would have also required that states match any $1 in grant funding with $3 in state funding for assessments. It would have mandated further that all grant funding be used to improve records accessibility for NICS. It would have continued to reserve up to 5% of total available funding for Indian tribal governments.

Murphy Amendment

On June 16, 2016, during Senate consideration of the FY2017 CJS Appropriations bill (H.R. 2578, the expected vehicle for S. 2837), Senator Christopher Murphy offered an amendment (S.Amdt. 4750) to expand federal background check requirements that would have captured private, intrastate firearms transfers under a wider set of circumstances than under the Manchin-Toomey amendment. Indeed, Title II of the amendment is entitled, "requiring a background check for every firearm sale." Hence, supporters have dubbed the Murphy amendment as the "universal" background check proposal, although it too includes exceptions, albeit under narrower set of circumstances than under the Manchin-Toomey amendment. The Murphy amendment reflects the language of a bill previously introduced by Senator Chuck Schumer and Representative Jackie Speier, the Fix Gun Checks Act (S. 2934 and H.R. 3411).

The Murphy amendment (S.Amdt. 4750) also included provisions to increase availability to NICS of prohibiting records related to firearms transfer and possession eligibility that were nearly identical those included in the Manchin-Toomey amendment (S.Amdt. 2908) described above.

Grassley Amendments

By comparison, Senator Grassley offered amendments (S.Amdt. 2914 and S.Amdt. 4751), during consideration of H.R. 3762 and H.R. 2578, respectively, that would have also amended P.L. 110-180 to reshape the NARIP program. S.Amdt. 2914 would have authorized appropriations of $20 million annually for FY2013-FY2017 for this program, whereas S.Amdt. 4751 would have authorized appropriations or $125 million annually for FY2016-FY2020. Both amendments would have refocused the grant program on mental health records exclusively. Beginning 180 days after enactment, both amendments would have required the Attorney General to reduce JAG grant funding by 5% annually for states that have not provided prohibiting records to the FBI on at least 90% of persons "adjudicated mentally incompetent" or "committed to a psychiatric hospital," and by 10% annually following five years from enactment for the same reasons. It would have also amended the Brady Act (P.L. 103-159) and required federal courts to provide records on persons prohibited from possessing firearms for reasons related to mental incompetency and commitment to the FBI for inclusion in NICS. It would also have required federal agencies to report annually to Congress on the number of records they submit to NICS.

Mental Incompetency and Firearms Eligibility

The Manchin-Toomey, Grassley, and Murphy amendments included provisions that would have addressed the issue of mental incompetency and firearms eligibility. While the Senate blocked all these amendments on procedural grounds, Congress included a provision in an enacted bill that addresses VA mental incompetency determination procedures that hinge on the ATF definition of "adjudicated as a mental defective." In addition, the Obama Administration published several related regulations.

Veterans, Mental Incompetency, and Firearms Eligibility

When Congress considered the NICS Improvement Amendments Act of 2007 (P.L. 110-180), some opposition to the underlying bill coalesced around an assertion that, under those amendments, any veteran who was or had been diagnosed with Posttraumatic Stress Disorder

(PTSD)[109] and was found to be a "danger to himself or others would have his gun rights taken away ... forever."[110] However, a diagnosis of PTSD in and of itself is not a disqualifying factor for the purposes of gun control under the NICS improvement amendments, previous law, or current law. The Veterans' Medical Administration has rarely submitted any disqualifying records on VA medical care recipients to the FBI for inclusion in NICS for any medical/psychiatric reason (like PTSD). While veterans with PTSD or any other condition, who have been involuntarily committed under a state court order to a VA medical facility because they posed a danger to themselves or others, are ineligible to ship, transport, receive, or possess a firearm or ammunition under federal law, the Veterans' Medical Administration would not always make a related referral about that ineligibility to the FBI. Instead, the state in which the court resides would submit the disqualifying record to the FBI, if such a submission would be appropriate and permissible under state law.[111]

Also, under the GCA, there is a provision that allows the Attorney General (previously, the Secretary of the Treasury) to consider petitions from a prohibited person for "relief from disabilities" and have his firearms transfer and possession eligibility restored.[112] Since FY1993, however, a rider on the ATF annual appropriations for salaries and expenses has prohibited the expenditure of any funding provided under that account on processing such petitions.[113] As a result, except for as provided under P.L. 110-180, the only way a person can reacquire his lost firearms eligibility is to have his civil rights restored or disqualifying criminal record(s) expunged or set aside, or to be pardoned for his crime. Consequently, prior to P.L. 110-180, a mental defective-related NICS referral by the VA to the FBI related to PTSD or any other condition could have been considered a life-long prohibiting factor with regard to firearms eligibility.

Under P.L. 110-180, Congress included provisions that require the VA to inform veterans and other beneficiaries (surviving spouses and dependents) beforehand that by having a fiduciary appointed on their behalf they will be considered "mentally incompetent" and, as a consequence, will lose their firearms eligibility under federal law. In addition, the act requires the VA to establish a process under which veterans or other beneficiaries who have been deemed mentally incompetent may file for administrative relief and possibly have their gun rights restored if they are able to demonstrate that they are no longer afflicted by a disqualifying condition. The act makes the same requirement of any other federal agency that makes such a referral to the FBI. As a condition of federal assistance, the same requirement is made of states as well.

According to the BJS, as of June 1, 2012, there were 153,298 files in the NICS mental defective file, which had been referred to the FBI by the VA. Those VA files accounted for 99.3% of mental defective files (154,458) referred to the FBI by a federal department or agency. According to the FBI, as of December 31, 2015, there were 263,492 files, a 71.9% increase over the early count, or

[109] PTSD is an anxiety disorder that can occur after one has been through a traumatic event. Symptoms may manifest soon after the trauma, or may be delayed. For further information, see U.S. Department of Veterans' Affairs, National Center for Posttraumatic Stress Disorder, Fact Sheet, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_what_is_ptsd.html.

[110] Larry Pratt, "Veterans Disarmament Act to Bar Vets from Owning Guns," September 23, 2007, http://www.prisonplanet.com/articles/september2007/230907Disarmament.htm.

[111] For further information on the treatment of mental illness and substance abuse for the purposes of gun control, see Donna M. Norris, M.D., et al., "Firearm Laws, Patients, and the Roles of Psychiatrists," *American Journal of Psychiatry*, August 2006, pp. 1392-1396.

[112] 18 U.S.C. §925(c). See also Relief from Disabilities Under the Act, 27 C.F.R. §478.144.

[113] For FY1993, see P.L. 102-393; 106 Stat. 1732 (1992). The limitation provides "that none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." For FY2016, see P.L. 114-113, 129 Stat. 2302 (2015).

98.8% of the mental defective files (260,381) referred to the FBI by a federal department or agency.

In the view of some Members of Congress, it is questionable that other federal agencies, such as the Social Security Administration, that provide similar disability and income maintenance benefits to persons who are mentally incapacitated, refer relatively few, if any, firearms-related disqualifying records about beneficiaries whom they serve to the FBI. Moreover, there are other individuals in the U.S. population who are similarly incapacitated due to their age-related infirmities or mental disabilities, but in many cases there are no mechanisms for state or local authorities to make similar referrals to the FBI. As a consequence, even with the changes put in place by P.L. 110-180, those Members of Congress may view the VA's continued referral of firearms-related disqualifying records on veterans who have had a fiduciary appointed on their behalf, but who had not behaved in a threatening or dangerous manner, to be an unwarranted indignity placed on individuals who had served their country honorably in the Armed Forces.

Other Members of Congress would maintain that the VA has dutifully complied with the law and that public safety is enhanced by making those referrals to the FBI. They might also argue that opposition to the VA policy waned between November 1998 and the 2007 congressional debate, demonstrating that veterans who were "adjudicated mental defective" rarely, if ever, sought to acquire and were subsequently denied firearms in a manner that could be described as an injustice. Those Members would likely underscore that, in their view, the VA's current policy does not diminish national recognition of those veterans' honorable service. Rather, the VA's policy has been implemented to protect those veterans and others from the harm that might result if they acquired a firearm and used it improperly due to reasons possibly related to their mental incompetency.

Manchin-Toomey Amendment

The Manchin-Toomey (S.Amdt. 2908) to H.R. 3762 would have amended veterans law to prohibit the VA from turning records on veterans or other beneficiaries who had been determined mentally incompetent over to the FBI for inclusion in NICS index unless certain notification and review conditions were met. Under these amendments, the Secretary of Veterans Affairs first would have been required to provide to a beneficiary, who has been deemed mentally incompetent for VA purposes, notification that includes (a) the determination made by the Secretary; (b) a description of the implications of such a determination upon one's firearms eligibility under federal law; and (c) the right to request review by the board that would be established by the VA or a court of competent jurisdiction.

Within 180 days of enactment, the Manchin-Toomey amendment would have required the Secretary of Veterans Affairs to establish a board that would have reviewed, upon request by a VA beneficiary, whether the individual's status as mentally incompetent for the purpose of receiving benefits prevented him from possessing firearms under the GCA. As mentioned above, a VA beneficiary would have had the option to request such a review from this board or from a court of competent jurisdiction. Under the Manchin-Toomey provision, the board would have been able to consider the individual's honorable discharge or decoration in determining whether he or she "cannot safely use, carry, possess, or store firearms due to mental incompetency." A beneficiary who receives a determination from the board also would have been permitted to seek judicial review in federal court of the board's decision. It appears that until this review process is complete, a person would not have been considered "adjudicated as a mental defective" for purposes of firearms eligibility. As such, it appears that the Secretary, by implication, would not have been permitted to make a NICS referral during this period of time.

If a beneficiary did not request review by a board or court of competent jurisdiction within 30 days after receiving the initial notification from the Secretary, then the beneficiary who was to be determined mentally incompetent would have been considered "adjudicated as a mental defective" for purposes of the GCA. This suggests that the Secretary would not have been able to make a NICS referral until the 30-day period has passed.

For VA beneficiaries who had already been considered "adjudicated as a mental defective" after being determined mentally incompetent by the VA, the Manchin-Toomey amendment would have required the Secretary to provide, within 90 days of enactment, written notice to these individuals of the opportunity for administrative review and appeal, as would have been established by the amendment. Furthermore, the amendment would have also required the Secretary to review and revise all policies and procedures whereby beneficiaries are determined to be mentally incompetent, so that any individual "who is competent to manage his own financial affairs, including receipt of Federal benefits, but who voluntarily turns over the management thereof to a fiduciary is not" considered "adjudicated mentally defective" for purposes of the GCA. Within 30 days of conducting this review, the Secretary would have been required to submit to Congress a report detailing the results of the review and any resulting policy and procedural changes.

On June 15, 2016, Senator Manchin submitted a nearly identical amendment (S.Amdt. 4716) during consideration of the FY2017 Departments of Commerce and Justice, Science, and Related Agencies (CJS) Appropriations bill (H.R. 2578, the expected vehicle for S. 2837); however, the amendment was not brought to a vote.[114]

Grassley Amendment

The Grassley amendments (S.Amdt. 2914 and S.Amdt. 4751) to H.R. 3762 and H.R. 2578 would have amended veterans law to prohibit the Department of Veterans' Affairs (VA) from turning records on veterans or other beneficiaries who had been deemed mentally incompetent to the FBI for inclusion in NICS without "the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such person is a danger to himself or herself, or others."

In addition, both Grassley amendments (S.Amdt. 2914 and S.Amdt. 4751) to H.R. 3762 and H.R. 2578 would have replaced the term "adjudicated as a mental defective" with the term "mentally incompetent" in both 18 U.S.C. Section 922(d) and (g), and would have amended the GCA to define the terms, "has been adjudicated mentally incompetent or has been committed to a psychiatric hospital," "order or finding," and "psychiatric hospital." These definitions and other language would have narrowed the scope of whose records, and under what circumstances, a federal or state agency could refer to the FBI for inclusion in the NICS mental defective file.

Murphy Amendment

By comparison, the Murphy amendment (S.Amdt. 4750) would have codified the ATF current law regulatory definition of "adjudicated as a mental defective," which as described below is much wider in scope than the proposed definition in the Grassley amendment.

[114] In the 114th Congress, Representatives Peter King and Mike Thompson introduced a measure, the Public Safety and Second Amendment Rights Protection Act of 2015 (H.R. 1217), which was nearly identical to the Manchin-Toomey amendment. In addition, the Senate previously considered this amendment following the Newtown, CT, mass public shooting in April 2013. For further information, see CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by William J. Krouse.

Mental Health Legislation

In addition, on December 3, 2015, Speaker of the House Paul Ryan indicated that he favored further consideration of mental health reform proposals in lieu of gun control legislation.[115] He asserted that part of the discussion surrounding mental health legislation is who should not have access to guns due to their mental incapacities.[116] A possible legislative vehicle in the House was the Helping Families in Mental Health Crisis Act of 2015 (H.R. 2646), sponsored by Representative Tim Murphy. However, H.R. 2646 did not include any provisions that directly addressed mental incompetency and gun control.

On the Senate side, by comparison, a potential legislative vehicle was the Mental Health Reform Act of 2015 (S. 1945), sponsored by Senator Bill Cassidy. Senator Cornyn indicated that a bill he had introduced, the Mental Health and Safe Communities Act of 2015 (S. 2002), would have likely also been considered, if and when the Senate debated mental health care reform. Like the Grassley amendments, S. 2002 included a provision (in Title III) that would have amended the Gun Control Act of 1968 with a statutory definition of "adjudicated mentally incompetent" that is arguably narrower than the current law regulatory definition of "adjudicated mental defective."

Congress included the Helping Families in Mental Health Crisis Act in the 21st Century Cures Act (Division B of P.L. 114-255).[117] Although this act did not include any of the provisions included in the amendments described above, it did include a provision that addressed veterans' benefits, mental incompetency, and gun control.

P.L. 114-255 Provision Codifying VA Mental Incompetency Determinations[118]

In December 2016, Congress included a provision in the 21st Century Cures Act (P.L. 114-255) that codified elements of the VA's implementation of NIAA.[119] Section 14017 of this act amended 38 U.S.C. with a new Section 5501A to prohibit the VA Secretary from making certain determinations of mental competency about VA benefits claimants, unless the claimant is:

- notified of the proposed adverse determination and the supporting evidence;
- provided an opportunity to request a hearing to address such a proposed adverse determination;
- given the opportunity to present evidence, including an opinion from a medical professional or other person, on his or her capacity to manage his or her own monetary benefits paid to or for him or her by the Secretary under this title; and
- given the opportunity to be represented by counsel at a hearing and to bring a medical professional or other person to provide relevant testimony at any such hearing at no expense to the government.

[115] Donovan Slack, Paul Singer, and Erin Kelly, "Republicans Say No to New Gun Control Legislation After San Bernardino," *USA Today*, December 3, 2015.

[116] Bridgit Bowman, "Rift over Guns Threatens Mental Health Package," *Roll Call*, February 10, 2016.

[117] For further information, see CRS Report R44718, *The Helping Families in Mental Health Crisis Reform Act of 2016 (Division B of P.L. 114-255)*, coordinated by Erin Bagalman.

[118] This section was written with the assistance of Scott D. Szymendera.

[119] P.L. 114-255, December 13, 2016; 130 Stat. 1307; codified at 38 U.S.C. §5501A. For further information, see CRS Report R44718, *The Helping Families in Mental Health Crisis Reform Act of 2016 (Division B of P.L. 114-255)*, coordinated by Erin Bagalman.

In short, this provision gives benefit claimants the ability to present evidence from their own health care providers and have counsel present during an administrative hearing to contest a determination of mental incompetency by the VA.

Administrative Proposals

As part of President Obama's post-Newtown plan to reduce gun violence, the Attorney General undertook a comprehensive review of federal law to identify "potentially dangerous individuals" who ought not be trusted with firearms.[120] Both the ATF and Social Security Administration (SSA) published draft rules that addressed mental incompetency and firearms transfer and possession eligibility. Neither rule has been made permanent, however.

Under current law, any person who has been "adjudicated as a mental defective" or who has been committed to a mental institution is ineligible to possess or receive firearms or ammunition.[121] Under 27 C.F.R. §478.11, the term "adjudicated as a mental defective" is defined to include

> a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence or a mental illness, incompetency, condition, or disease, (1) is a danger to himself or others, or (2) lacks the mental capacity to manage his own affairs. The term also includes (1) a finding of insanity by a court in a criminal case and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. Sections 850a, 876(b).

Under the same section, the term "committed to a mental institution" is defined to include

> A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness, It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Under the same section, the term "mental institution" is defined to include

> mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

As part of the President's gun violence reduction plan, the Department of Health and Human Services (HHS) published a proposed rule that addressed the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, a provision that had been interpreted possibly to be a legal barrier that prevented some states from sharing records with the FBI about persons who had been "adjudicated mental defective."[122]

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[120] White House, "Progress Report on the President's Executive Actions to Reduce Gun Violence," December 2, 2013, p. 2, http://www.whitehouse.gov/sites/default/files/docs/november_exec_actions_progress_report_final.pdf.

[121] 18 U.S.C. §922(g)(4)

[122] See Department of Health and Human Services, "Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS)," 7 *Federal Register* 784-796, January 7, 2014. For further information, see CRS Report R43040, *Submission of Mental Health Records to NICS and the HIPAA Privacy Rule*, coordinated by Edward C. Liu.

ATF Proposed Rulemaking

On January 7, 2014, ATF published a notice of proposed rulemaking to amend the definition of "adjudicated as a mental defective.[123] The draft rule seeks to clarify that that the term includes

1. any person found not guilty by reason of mental disease or defect;
2. any federal, state, local, and military courts that can find persons incompetent to stand trial or not guilty by reason of insanity, mental disease or defect, lack of mental responsibility, or insanity, by removing the reference to "articles 50a and 72b of the UCMJ" and adding "by a court in a criminal case"; and
3. any person found guilty but mentally ill by a court in a criminal case in a jurisdiction that provides such a finding.

In addition, the draft rule seeks to clarify that the term "committed to a mental institution" includes

1. involuntary commitment for either inpatient or outpatient treatment.

As part of this rulemaking, ATF considered whether commitments that occur when persons are under the age of 18 years ought to be included. In addition, the draft rule underscored that voluntary admission to a mental institution or a temporary admission for observation would not fall under the term "committed to a mental institution." However, in the latter case, it would be included if such an admission turns into a qualifying commitment as a result of a formal commitment by a court, board, commission, or other lawful authority.

Social Security Administration (SSA) Proposed Rulemaking[124]

On May 5, 2016, the Social Security Administration (SSA) published a proposed rulemaking to identify on a prospective basis individuals receiving Disability Insurance benefits, who meet the definition given above of "adjudicated mental defective."[125] As described below, the VA has been making similar determinations since the inception of the NICS program in 1998. Such determinations would be based on

- has filed a claim for Social Security or SSI benefits based on a disability;
- has been determined to have an impairment (or combination of impairments) that meets or medically equals the criteria of one of the mental disorders specified in SSA's Listing of Impairments;
- a primary diagnosis code based on mental impairment, which is basis for the disability;
- has a primary diagnosis code based on a mental impairment;
- has attained age 18 but not yet attained Social Security's full retirement age (currently 66); and

[123] U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, "Amended Definition of "Adjudicated as a Mental Defective" and Committed to a Mental Institution" (2010R-21P)," 79 *Federal Register* 774, January 7, 2014.

[124] This section was written with the assistance of William R. Morton.

[125] Social Security Administration, "Implementation of the NICS Improvement Amendments Act of 2007," 81 *Federal Register* 27059, May 5, 2016.

- has had a representative payee appointed because he or she has been determined by SSA to be mentally incapable of managing benefit payments.[126]

On December 19, 2016, the SSA published a final version of this rule, with an effective date of January 18, 2017; and SSA NICS referrals to begin on December 19, 2017.[127]

Proposed Mass Violence Commission and Study

The Manchin-Toomey amendment (S.Amdt. 2908) and the Grassley amendments (S.Amdt. 2914 and S.Amdt. 4751) included provisions that would require studies of mass violence and mass shootings.

Commission on Mass Violence

The Manchin-Toomey amendment would have provided for the establishment of a National Commission on Mass Violence. The commission would have been tasked with studying the availability and nature of firearms, including the means of acquiring firearms; issues related to mental health; and all positive and negative impacts of the availability and nature of firearms on incidents of mass violence or in preventing mass violence. Under this provision, the Senate Majority Leader and the Speaker of the House would have appointed six members each to serve on the commission within 30 days of enactment. The provision would have stipulated further that not more than six commission members could have been from the same party. The commission members would have been charged with empaneling a field of non-elected experts in four categories: firearms, mental health, school safety, and mass media. It would have required an interim report within three months of the commission's first meeting and a final report within six months of that date.

Study on the Causes of Mass Shootings

The Grassley amendments would have required the Attorney General to instruct the Director of the National Institutes of Justice (NIJ) to conduct a study of the "various sources and causes of mass shootings including psychological factors, the impact of violent video games, and other factors." In this endeavor, the NIJ Director would have been instructed to contact with the National Academy of Sciences to conduct this study jointly with a panel of five experts.

FY2017 ATF Appropriations and Other Gun Safety Funding

The Administration's FY2017 budget request included $1.306 billion for ATF. This amount was $66.1 million above the FY2016 appropriation. This proposed increase included $11.8 million in technical and base adjustments to anticipate inflation and other variable costs and $54.3 million in budget enhancements. As part of President Barack Obama's gun safety initiative, these budget enhancements included

- $35.6 million for ATF to hire 80 additional special agents and 120 industry operations investigators;

[126] Ibid.

[127] Social Security Administration, "Implementation of the NICS Improvement Amendments Act of 2007," 81 *Federal Register* 91702-91715, December 19, 2016.

- $4 million (including eight positions) to upgrade the National Integrated Ballistics Information Network (NIBIN) and ballistic imaging hardware and software;
- $5.7 million and 22 positions to help process federal firearms and explosives licenses and National Firearms Act (NFA) applications, and expand the use of firearms trace data by ATF and other federal, state, and local law enforcement agencies; and
- $9 million to integrate ATF's disparate case management systems into a Next Generation Case Management system.

The FY2017 budget request also called for the repeal of two appropriations limitations that prevent ATF from (1) requiring federal firearms licensees (FFLs) to inventory their gun stocks prior to annual inspections[128] and (2) changing an administrative definition of "curios and relics."[129] In addition, the President's gun safety initiative included

- $35 million for the Federal Bureau of Investigation (FBI) to address an increase in firearms background checks through the National Instant Criminal Background Check System (NICS);
- $55 million for grants to state, local, tribal, and territorial authorities under the National Criminal History Improvement Program (NCHIP) and NICS Amendments Record Improvement Program (NARIP, P.L. 110-180); and
- $10 million for gun violence research.

As discussed above, NICS was established by the FBI in November 1998 to facilitate firearms background checks. Through both NCHIP and NARIP, the DOJ Office of Justice Programs provides grants to states and territories to improve NICS accessibility to state records on persons prohibited from acquiring firearms under federal or state law.

The Senate Committee on Appropriations rS. 3040 reported a bill (S. 2837) that would have provided ATF with $1.259 billion for FY2017. On June 7, 2016, the House Committee on Appropriations reported a bill (H.R. 5393) that would have provided ATF with $1.258 billion for FY2017. Both bills included ATF funding limitations with regard to FFL inventory taking and curios and relics, which the Administration had requested to be removed. With regards to NICS, report language accompanying both bills indicates that within the amounts that would be appropriated for the FBI funding was provided to fully support NICS. For NCHIP and NARIP,

[128] Congress included this proviso in the ATF salaries and expenses appropriations language, for FY2004 and every year thereafter, through FY2013, which prohibits that agency from using any appropriated funding to require federally licensed gun dealers (otherwise referred to as federal firearms licensees, or FFLs) to conduct inventories prior to an ATF inspection. This provision was originally part of the FY2004 Tiahrt amendment, known for its sponsor in CJS appropriations subcommittee markup, Representative Todd Tiahrt. The Tiahrt amendment included three other provisos that limit ATF's authority to release unexpurgated firearms trace data publically, require that certain caveats about the limitations of trace data be appended to any such public data releases, and requires the FBI to destroy records on approved firearms-related background checks through the National Instant Criminal Background Check System within 24 hours.

[129] Congress included this proviso in the ATF salaries and expenses appropriations language, for FY1996 and every year thereafter, through FY2013, in response to an ATF regulatory proposal to amend the definition of "curios or relics," because of concerns about the volume of surplus military firearms—particularly World War II era firearms—that could be potentially imported into the United States. For the definition of "curios or relics," see 27 C.F.R. §478.11, which generally include firearms that are 50 years old, of museum interest, or derive a substantial amount of their value from the fact that they are novel, rare, bizarre, or because they are associated with some historical figure, period, or event. For a list of "curios and relics," go to https://www.atf.gov/firearms/curios-relics.

the Senate bill would have provided $75 million and the House bill, $73 million. Under both bills, not less than $25 million of the amounts given above would have been designated for purposes under P.L. 110-180.

Neither committee included funding for gun research in the House- and Senate-reported Departments of Labor, Health and Human Services (HHS), and Education Appropriations bills (and H.R. 5926). Both Committees included a limitation in these bills that has prohibited the Centers for Disease Control and Prevention (CDC) since FY1997 and HHS since FY2012 from using appropriated funding to advocate or promote gun control.[130] Another provision was also included in these bills that has prohibited any department or agency since FY2012 from engaging in "publicity or propaganda" related to restricting any legal consumer product, including the advocacy or promotion of gun control.

At issue, in 1996, was CDC-sponsored research by Dr. Arthur L. Kellermann, who had his findings published in 1993 in the *New England Journal of Medicine*.[131] It is significant to note that, in 1996, the House Committee on Appropriations heard testimony[132] from several witnesses who either provided "scathing attacks" or "passionate defenses" of Kellermann's work.[133] At issue, in 2011, were three National Institutes of Health (NIH)-sponsored research initiatives that examined links between alcohol availability and gun violence, as well as parental gun ownership as a hazard to children.[134]

In the aftermath of the December 2012, Newtown, CT, mass shooting, President Obama released a plan, *Now Is the Time*, to reduce gun violence, in which he asserted that "research on gun violence is not advocacy."[135] President Obama issued a memorandum directing CDC and other agencies within HHS to "conduct or sponsor research into the causes of gun violence and the ways to prevent it."[136]

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[130] On June 14, 1996, during subcommittee mark-up of the FY1997 Labor, HHS, and Education appropriations bill (H.R. 3755), Representative Jay Dickey offered an amendment that would have redirected $2.6 million in funding away from a CDC program that had previously funded research on the risks of gun death and injury associated with gun ownership. While the Dickey amendment was not approved, the subcommittee gave voice vote approval to an amendment by Committee Chair, Representative Robert Livingston. This amendment read as follows:

> Provided further, That none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control.

While this language was not offered by Representative Dickey, it has become known as the "Dickey" amendment.

[131] Arthur L. Kellerman, et al., "Gun Ownership as a Risk Factor for Homicide in the Home," in the *New England Journal of Medicine*, 329 (1993):1084-91.

[132] U.S. Congress, House Committee on Appropriations, Subcommittee on Labor, Health and Human Services, and Education, *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1997*, Part 7,Testimony of Members of Congress and Other Interested Individuals and Organizations, 104th Cong., 2nd sess., March 6, 1996, pp. 926-970.

[133] Paul Gallant and Joanne Eisen, "Kellerman, Arthur L. (1955-)," *Guns in American Society: An Encyclopedia of History, Politics, Culture, and the Law*, ABC-CLIO, LLC, Santa Barbara, CA, 2012, p. 471.

[134] Brian Doherty, "You Know Less Than You Think About Guns: The Misleading Uses, Flagrant Abuses, and Shoddy Statistics of Social Science About Gun Violence," *Reason*, February 2016, http://reason.com/archives/2016/01/05/you-know-less-than-you-think-a.

[135] White House, *Now Is the Time: The President's Plan to Protect Our Children and Our Communities by Reducing Gun Violence*, January 16, 2013, http://www.wh.gov/now-is-the-time.

[136] White House, Presidential Memorandum, "Engaging in Public Health Research on the Causes and Prevention of Gun Violence," January 16, 2013, https://www.whitehouse.gov/the-press-office/2013/01/16/presidential-memorandum-engaging-public-health-research-causes-and-preve.

On September 29, 2016, President Obama signed into law a Continuing Appropriations Act, 2017 (P.L. 114-203), which funded most of the federal government through December 9, 2016, at nearly the same levels as appropriated for FY2016. For those activities and projects funded under P.L. 114-203, the act provided an across-the-board decrease of 0.496% for the period October 1, 2016, through December 9, 2016.[137]

On December 10, 2016, the President signed into law a Further Continuing and Security Assistance Appropriations Act, 2017 (P.L. 114-254), which funds most of the federal government through April 28, 2017, at nearly the same levels as appropriated for FY2017. For those activities and projects funded under P.L. 114-154, the act provides an across-the-board decrease of 0.1901% for the period, December 10, 2016, through April 28, 2017.[138]

Like the previous FY2017 continuing resolution, P.L. 114-254 also extends the long-standing gun control limitations on ATF, CDC, HHS, and the Departments of Labor and Education discussed above through that date.

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[137] See CRS Report R44653, *Overview of Continuing Appropriations for FY2017 (H.R. 5325)*, coordinated by James V. Saturno.

[138] See CRS Report R44723, *Overview of Further Continuing Appropriations for FY2017 (H.R. 2028)*, coordinated by James V. Saturno.