



Testimony

Can Texas Keep Weapons from the Hands of Dangerous Criminals?

Prepared by Derek M. Cohen, PhD

In the wake of recent shootings in Odessa, El Paso, Sutherland Springs, and Plano, many Texas gun control proponents have demanded that state leadership “do something” in the hopes of preventing future tragedies. However, these demands often redound to a clear violation of an explicit right enumerated both in the United States and Texas constitutions—the individual right to keep and bear arms for lawful self-defense—while failing to empirically demonstrate the positive change the proposed policy changes seek to achieve. Nonetheless, some legislative proposals and executive actions floated in the wake of these tragedies may improve public safety and responsible firearm ownership through the explicit targeting of more pervasive types of firearm violence.

However, the charge put before this committee is to “Examine Second Amendment legislation passed since the 84th Legislative Session including open carry, campus carry, and lowering the license to carry fee. Determine the impact these laws have made on furthering and protecting Second Amendment rights. Make recommendations that may further protect and enhance Texans’ Second Amendment right to bear arms.” To summarize, it can be said unequivocally that **no pro-Second Amendment legislation coincided with an increase in firearm violence. In fact, firearm violence has continued to fall in conjunction with the passage of pro-Second Amendment legislation.**¹

Put simply, this specific hearing asks what can be done in statute to keep weapons out of the hands of those who should not possess them. Hypothetically, this can be accomplished before (via background checks and related enforcement) or after (via surrender or confiscation) an individual deemed dangerous comes into possession of the weapon. However, neither set of policy solutions will likely prevent future tragic incidents from occurring, but both represent a quantifiable risk to law-abiding gun owners.

Will “expanding” background checks keep Texans safe?

First, it is necessary to understand how the vast majority of background checks for firearm purchases are conducted. Nearly every new firearm already enters the market through a federal firearm license (FFL) holder. Since 1994, each FFL must conduct a background check when a firearm is transferred, if not sooner during the purchasing process. It is illegal for any non-FFL holder “to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce” (18 U.S. Code § 922). One who “engage[s] in the business” is statutorily defined as “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, but such term shall not include a person who makes 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” (18 U.S. Code § 921). The language following the “but” represents the private sale exemption and is colloquially referred to as the “gun show loophole,” even though many gun show traders possess an FFL and comply with federal law.

To understand how the expansion of background checks would work in practice, one must first understand how the background check process currently functions. In 1993, Congress passed the Brady Handgun Violence Prevention Act, named for President Reagan’s press secretary Jim Brady, who became paralyzed following a gunshot received during an assassination attempt on the president. Among other measures, the Brady Bill mandated that all firearm sales through FFL holders be subject to passing a background check as a bare minimum condition for purchase. States were free to add conditions for purchase beyond what was specified by the legislation.

¹ Cohen, D. M. (2019). *Come and take it: What will and will not improve public safety in firearm violence prevention*. Texas Public Policy Foundation. <https://www.texaspolicy.com/come-and-take-it-what-will-and-what-will-not-improve-public-safety-in-firearm-violence-prevention/>

To facilitate this background check requirement, the Federal Bureau of Investigation (FBI) launched the National Instant Criminal Background Check System (NICS) in 1998. Relevant information is voluntarily reported to the NICS system by state and local law enforcement. The NICS system contains three separate databases:

1. National Crime Information Center (NCIC)—Though the NCIC preexists NICS by 3 decades, this database was integrated into the system post-Brady. Any NICS check includes a search of the NCIC. The NCIC contains information on pending warrants, protective orders, missing persons, and other key factors relevant to one's fitness to purchase and possess firearms.
2. The NICS Index—This database exists exclusively for firearm background checks and contains information relevant to firearm possession that is not included in the other two databases. This includes disqualifying mental health history, immigration status, and exclusion factors codified in state law.
3. The Interstate Identification Index (I3)—Also existing pre-Brady, the I3 contains arrest and indictment information for felonies and serious misdemeanors. This database is commonly accessed by licensing agencies, as the data contained therein is most useful to informing licensing decisions across state lines.

A NICS check will include querying all three databases.

When an individual seeks to purchase a firearm from an FFL holder, the individual must complete a Bureau of Alcohol, Tobacco, and Firearms (ATF) Form 4473. When fully completed, this form functions as an affidavit that the applicant is not a prohibited possessor under state or federal law. Once complete, the FFL holder contacts the NICS Operation Center online or over the telephone to begin the background check process.

The three aforementioned databases are then queried. Shortly thereafter, the FFL holder is given one of three instructions: (a) proceed, (b) deny, or (c) delay. If instructed to proceed, the sale or transfer is completed, as no disqualifying history was discovered. If denied, the transfer is halted, and the case is flagged. Finding a match in one of the databases with an inconclusive outcome results in a delay, while further investigation is conducted. What happens during these delays varies by state.

These databases are populated through voluntary reporting from relevant entities. This includes direct reporting of final convictions, mental health records, drug abuse records, and domestic violence records. The federal government cannot compel states or subordinate agencies to

report relevant information, although states may compel state and local agencies to do so. Under Government Code § 411.052, Texas mandates that court clerks report to DPS narrowly defined disqualifying information, which is then relayed to NICS. In Texas, disqualifying information is:

1. a person ordered by a court to receive inpatient mental health services under Chapter 574, Health and Safety Code;
2. a person acquitted in a criminal case by reason of insanity or lack of mental responsibility, regardless of whether the person is ordered by a court to receive inpatient treatment or residential care under Chapter 46C, Code of Criminal Procedure;
3. a person determined to have mental retardation and committed by a court for long-term placement in a residential care facility under Chapter 593, Health and Safety Code;
4. an incapacitated adult individual for whom a court has appointed a guardian under Title 3, Estates Code, based on the determination that the person lacks the mental capacity to manage the person's affairs; or
5. a person determined to be incompetent to stand trial under Chapter 46B, Code of Criminal Procedure.

Texas is known as a “non-point-of-contact” (non-POC) state, meaning that the background check is conducted via the NICS system as opposed to state or local law enforcement. A minority of states (21) have passed some form of POC check. In those states, state or local law enforcement is responsible for the relevant queries and ostensibly has access to additional state and local databases that may contain relevant disqualifying information.

Since 1998, there have been [1,662,655 denials](#) arising from a NICS background. Nearly two thirds of all denials are from those with a disqualifying criminal history or a fugitive from justice designation. Should an individual fail the NICS check, the FBI refers the application to the ATF for investigation into the individual lying on Form 4473. If the allegation is found to have merit, it is referred to the relevant United States attorney for prosecution. However, the lack of prosecution relating to failed background checks by federal and local officials indicate that there may be little danger from most of those who improperly seek to purchase a firearm. “Officials from the Executive Office for United States Attorneys said that prosecuting denial cases can require significant effort and may offer little value to public safety compared to other cases involving gun violence. Selected state officials said that denial investigations [can take law enforcement officials away from their core duties.](#)”

These highlight some of the challenges from increasing reliance on NICS. First, the overly broad nature of denial criteria and the growing list of prohibited possessors may increasingly ensnare law-abiding, safe possessors who statutorily qualify for NICS reporting. For example, through executive order, President Barack Obama mandated that the Social Security Administration report that disability and supplemental security insurance (SSI) recipients who have a “designated payee” be characterized as “mentally defective.” This population includes individuals with single diagnoses of [autism or depression](#), two common issues in society.

Secondly, background checks have proven ineffective in stopping mass shooters. The “[vast majority](#)” of weapons used in mass shootings have been legally acquired after the to-be murderers passed a NICS-processed investigation. The only way to truly stop mass shooters from acquiring their weaponry through legal means would be a system so intrusive and cumbersome that nearly all law-abiding citizens—those who haven’t so much as a parking ticket—would be ensnared as well. This illustrates the concern with measures that broaden the scope of the NICS system, such as increasing reporting requirements from state databases to the NICS system.

Currently, 21 states have enacted state-specific background check requirements for private sales of handguns, 19 of which extend the requirement to cover all private firearm purchases—that is, enact mandatory universal background checks, which is what the Texas House Democratic Caucus’s proposal calls for. Some studies into the efficacy of laws closing the private sale exemption have shown weak correlation with reductions in violent crime and suicide while [others have shown none](#). Systemic reviews of the literature have deemed evidence supporting these reductions insufficient.²

None of the 21 states that have further restricted private party transfers exempt family transfers, as would be the case of Lt. Gov. Patrick’s proposal. Similarly, no states currently have anything in place like that proposed in the memo, supposedly circulated by Attorney General Bob Barr, requiring NICS background checks for “all advertised commercial sales, including sales at gun shows.” As mentioned above, the vast majority of sales taking place at a gun show are processed in accordance with federal law, as nearly 75% of gun show exhibitors possess an FFL. This proposal would affect non-FFL holders by requiring private transfers be conducted through an FFL or a “transfer agent.” The newly created transfer agents would not possess an FFL but would be authorized by the ATF to conduct the NICS background checks. This would also mandate certain recordkeeping

standards for the transfer agent. While the agent and seller would enjoy civil indemnification similar to that featured in Gov. Greg Abbott’s proposal, this proposal punishes non-compliance through civil penalties. Both proposals have yet to be evaluated through research. However, the same scarcity of evidence applies to expanded use of background checks.

In addition to the mandatory expansion of background checks, the proposal in the governor’s *Texas Safety Action Report* takes an incentive-based approach. This recommendation suggests the Legislature incentivize private party transfers to be facilitated through FFL holders with a nominal fee authorized for the background check. Specifically, it calls on the Legislature to “include legal protection for the seller, should the buyer later commit a crime that involves the weapon,” if the seller utilizes FFL holders ([10](#)).

However, it is not clear that a seller today faces significant legal liability if a gun (or ammunition) sold is used later to commit a crime. A number of Texas courts have held the opposite, in fact, often through summary judgment. For instance, the 285th District Court of Bexar County, Texas, “ordered summary judgment in favor of defendant sporting goods company in a wrongful death action filed by plaintiffs that alleged defendant negligently sold a handgun in violation of 18 U.S.C.S. § 922(d) to the person who shot and killed the decedent” (*Peek v. Oshman’s Sporting Goods, Inc.*). It is unclear whether providing immunity for gun sellers would in fact provide an incentive to voluntarily utilize background checks.

Whether or not there is any liability for gun sellers, the bigger issue remains the problems with the expansion of background checks, whether through mandate or incentives. The research shows that background checks have proven ineffective in stopping mass shooters. And we have noted as well that the overly broad nature of denial criteria and the growing list of prohibited possessors may increasingly ensnare law-abiding, safe possessors who statutorily qualify for NICS reporting.

[The proposal](#) that Texas adopt “a law that works in conjunction with the proposed federal *Protecting Communities and Preserving the Second Amendment Act of 2019*” has multiple aspects, but much of it focuses on the increased use of criminal background checks. Since Texas is a non-POC state, any NICS denial is directly referred by the FBI to the ATF for investigation. The ATF, in turn, refers inappropriate purchase attempts to the relevant U.S. attorney’s office for prosecution. This proposal would seek to improve this

2 Hahn, R. (2005). Firearms laws and the reduction of violence: A systematic review. *American Journal of Preventative Medicine*, 28(2), 40-71. <https://doi.org/10.1016/j.amepre.2004.10.005>

process but still faces the limitations on the usefulness of background checks.

In all, the idea that background checks can be expanded to a point that would-be mass shooters are stopped is not well thought out. Too often our inductive reasoning tries to identify patterns in these infrequent, high visibility events with the belief that if we can just stop a common pitfall from occurring, the event itself can be prevented. This presumes perfect knowledge of what an individual will do in the future with little to no conforming data to what they have done in the past. For many mass shooters, the tragic incident is the first irrefutable event dispositive of their dangerousness, albeit too late.

What about removing weapons from “prohibited possessors?”

When someone has lawful possession of firearms and later becomes a “prohibited possessor,” there is an open question of how those weapons are taken from the individual. Only seven states³ provide a statutory framework providing all prohibited possessors clear guidelines for the sale or relinquishment of their weapons. These states require an affidavit or other proof that the weapons are in the possession of an FFL holder or law enforcement agency. Of course, the fatal conceit of this program is that it requires recently convicted criminals—a group not renowned for adherence to formal and informal social norms—to honestly disclose the existence of weapons not known to the court.

Requiring law enforcement to fulfill these orders can be dangerous, as well. [Cases exist](#) where the mandated seizure

of weapons has escalated to [fatal situations](#). Further, law enforcement has [little want or capacity](#) for preemptively enforcing court orders in today’s climate. Finally, the very act of seizing guns from prohibited possessors does not incapacitate them from harming themselves or others.

Conclusion

Once given a modicum of critical thought, the facial validity of popular gun control proposals often gives way to confusing red tape, dubious constitutionality, unclear enforcement, and a guaranteed expansion in the use of force on behalf of the state. Expanding background checks and gun seizures offer no exception to this rule. Sadly, no amount of aggressive policy will prevent all tragedies from happening, and the current evidence fails to establish much of a beneficial effect at all.

This is not to say nothing can be done. Detection and softer, proactive interventions in schools can help identify youth and young adults struggling with mental health issues. Allowing flexible education environments where the curriculum fits the learning and emotional needs of the students are preferable to locking children in a one-size-fails-all model. Strengthening social institutions, like churches and civic organizations, can help combat the persistent malaise of our present moment in history. None of these solutions represent a panacea, but rather a rich tapestry of functional civil society where those who are hurting amongst us are not relegated to the shadows. Too many have fomented there, and a few have reemerged to do the unspeakable. ★

3 California, Connecticut, Hawaii, Massachusetts, Nevada, New York, Pennsylvania

ABOUT THE AUTHOR



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Dr. Cohen was instrumental in the passage of the First Step Act, federal legislation that borrowed from successful changes to prisons and sentencing that he had helped pass in conservative states. In previous legislative sessions, Dr. Cohen has successfully worked on issues of occupational licensure, truancy reform, and orders of nondisclosure. In addition to leading the Foundation’s work on criminal justice, he is also the lead researcher of firearms policy.

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