

THE THIRD WAY CULTURE PROJECT



**MISSING RECORDS:  
Holes in Background Check System  
Allow Illegal Buyers to Get Guns**

*A Third Way Report*

*by*

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## Executive Summary

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Every year, approximately 8 million individuals submit themselves for an FBI or state-sponsored background check in order to purchase a firearm. The system is designed to stop prohibited buyers—felons, illegal aliens, domestic abusers, those committed involuntarily to a mental institution, those dishonorably discharged from the military, fugitives from justice, and other barred categories—from obtaining a gun. The system, known as the National Instant Criminal Background Check System (NICS), is only as good as the records provided by state and local authorities into the national database.

In a 2002 report released by Americans for Gun Safety (now an initiative within Third Way), we found that the state of this background check system was grim:

*“Most states have done a haphazard and ineffective job in automating these crucial records and have allowed almost ten thousand convicted felons to acquire guns over the last 30 months (as well as an unknown number of domestic abusers, illegal aliens, and those mentally ill). In short, the National Instant Criminal Background Check System, America’s front line defense against illegal gun buyers, is in a dangerous state of disrepair in all but a few states.”<sup>1</sup>*

This report led to new efforts by state authorities to shore up their records, as well as bipartisan federal legislation to fix the NICS system introduced by polar adversaries in the gun debate.<sup>1</sup> In 2003, the legislation passed the House, but it stalled in the Senate.

This report takes another look at the state of the background check system, five years later. We release it in the wake of the most lethal gun crime in American history—one with direct relevance to the troubles with the background check system. An illegal buyer, Seung-Hui Cho, was able to pass a background check because his data was missing from the system. He purchased two firearms which he used to kill 32 people and wound 29 others at Virginia Tech University.

In this new report, we conclude that the background check system is better and more accurate than five years ago, but still deeply flawed, particularly in certain areas like mental health disqualifications. Dangerous holes in the system remain because states have not adequately completed the important tasks of collecting and automating all of the records necessary to disqualify illegal gun buyers from passing a

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<sup>1</sup> Gun safety advocates Carolyn McCarthy (D-NY) and Charles Schumer (D-NY) joined with gun rights advocates John Dingell (D-MI) and Larry Craig (R-ID) in the House and Senate.

check to obtain a firearm. On the positive side, the records of those who have committed felony crimes or have directed violence toward women have shown significant improvement. On the negative side, it is still virtually impossible to stop a person who has been involuntarily committed to a mental institution from passing a background check and buying a gun.

For example, since our 2002 report, the number of disqualifying mental health records in the national database has increased from about 90,000<sup>ii</sup> to 234,628.<sup>iii</sup> While that looks like real improvement, there are at minimum 2.6 million such records that should be in the database. That means that 91% of those adjudicated mentally ill or involuntarily committed cannot be stopped by a gun buyer background check. Moreover, approximately 40% of the records available were supplied by the Department of Veterans Affairs, not by individual states.<sup>iv</sup> To underscore this problem, although roughly two out of every 100 background checks turns up an ineligible buyer, only 1 of every 30,000 prospective gun buyers was rejected for reasons of mental health.

Our key findings are as follows:

- One-fourth of felony convictions are still not available in the automated NICS database used for approving or denying firearms purchases.
- In 2005, 3,215 criminals obtained a firearm simply because missing records meant the background check could not be completed within the allotted three-business day timetable.
- Only one out of every 30,000 prospective gun buyers was rejected for reasons of mental health—a number that is shockingly low given the number of people involuntarily institutionalized or adjudicated mentally ill.
- More than 9 out of 10 disqualifying mental health records are not in any system used to screen gun buyers.
- Domestic violence and restraining order records are among the most improved in the system.

## Background: The Gun Buyer Instant Check System

In 1968, Congress passed a law in the wake of the Kennedy and King assassinations to make it illegal for felons and other potentially dangerous people to purchase firearms. Buyers in all 50 states had to sign a form stating that they had not been convicted of a felony crime, dishonorably discharged from the military, renounced their citizenship, involuntarily institutionalized in a mental health facility or adjudicated mentally ill, under a restraining order, as well as other disqualifying offenses before purchasing a firearm. But it was not until 1993, when Congress passed the Brady Law, that these buyers' backgrounds were checked and verified.

From 1993 to 1998, authorities were given 7 days to check the veracity of these sworn statements. In fact, no gun could be transferred from a licensed firearms dealer to a buyer without a 7-day waiting period. Beginning on December 1, 1998, the background check system was made instantaneous, and the waiting period was eliminated. Now the buyer's name and identification would be transmitted to the NICS system by a licensed gun seller. It would be run through a computer database. And the seller would receive one of two responses within minutes—*proceed or delay*. Proceed meant that there was no potentially disqualifying record and the sale could proceed immediately. Delay meant that a potentially disqualifying record was found and that the sale could not proceed until further notice.

Once the delay instruction is given, the FBI has three business days to determine whether the buyer is qualified or barred from possessing a firearm. Within three business days, the seller will either be notified to proceed with the sale (no disqualifying record was found) or deny the sale (a disqualifying record was found). But if after three business days the check is not completed, the seller may transfer the gun to the buyer unless prohibited by state law. That is known as a *default proceed*. If it is later discovered that the buyer was disqualified, law enforcement is notified and sent to retrieve the firearm.

Approximately 90% of the 8 million yearly background checks are completed within minutes (all *proceeds*), and about 10% are completed within hours, days or weeks (all *delays*). Of the 10% that are originally delayed, about one in 5 is ultimately denied. According to the Bureau of Justice Statistics, 48 million background checks were conducted between 1999 and 2004, with 896,000 rejections—a 1.9% rate.

The system, however, is only as good as the records in the database. When the NICS system began, many states had relatively good automated records for those who had been *arrested* for a felony crime, but terrible records of those who had been *convicted*. The case disposition records often remained in dusty filing cabinets in paper files. Other records used to disqualify potential gun buyers were simply non-existent. The records of those deemed mentally incompetent were often kept separate and

private. Records of those overstaying student or tourist visas were not integrated into the system. Domestic violence records were extremely spotty.

Every year, Congress sent money to the states to improve their criminal history records, but some states did very little. As a result, every year more than 3,000 criminals—mostly felons—passed a background check simply because the 3-day searching period expired. And countless others passed a check because no record was in the system. We don't ever find out about these buyers unless a well-publicized crime is committed.

In 2002, Americans for Gun Safety issued a report that exposed the flaws in this system. It spawned scores of newspaper stories, television reports, and even federal legislation. States vowed to improve their records, and our findings show that many have. But the system is still flawed enough that Seung-Hui Cho was able to clear a check that should have netted him. This report looks at the progress made over the 5 years since.

## **Felony Records: Gaps allowed 3,215 criminals to obtain a firearm**

In our 2002 report, 58% of felony conviction records were automated in state systems.<sup>v</sup> By January 2006, according to the Bureau of Justice Statistics, roughly 75% were automated and in the system.<sup>vi</sup> That means that in three out of four cases, the NICS system can accurately and quickly determine whether a person in the system for a felony arrest was convicted, and in one out of four cases the disposition of the arrest must be determined manually.

In 2005 alone, the lack of automated records allowed 3,215 prohibited buyers to obtain a firearm because the FBI could not find the disqualifying record within 3 business days. This is just the tip of the iceberg, as the records of other disqualified individuals—such as those for mental health—may not be flagged at all.

**Every year, more than 3,000 criminals—mostly felons—passed a background check simply because the 3-day searching period expired.**

**Percentage of Automated Felony Available Records by State  
(As of January 1, 2004)**

STATE	1999 <sup>vii</sup>	2004 <sup>viii</sup>
Alabama	28%	45%
Alaska	76%	n/a
Arizona	50%	58%
Arkansas	33%	81%
California	65%	75%
Colorado	6%	17%
Connecticut	65%	100%
Delaware	75%	94%
Florida	68%	73%
Georgia	69%	70%
Hawaii	89%	90%
Idaho	58%	66%
Illinois	57%	n/a
Indiana	6%	45%
Iowa	84%	95%
Kansas	46%	43%
Kentucky	59%	n/a
Louisiana	24%	n/a
Maine	39%	n/a
Maryland	n/a	90%
Massachusetts	72%	100%
Michigan	76%	80%
Minnesota	72%	41%
Mississippi	40%	2%
Missouri	52%	76%
Montana	85%	30%
Nebraska	55%	62%
Nevada	38%	37%
New Hampshire	80%	80%
New Jersey	85%	84%
New Mexico	31%	32%
New York	84%	88%
North Carolina	94%	89%
North Dakota	32%	n/a

Ohio	53%	65%
Oklahoma	26%	32%
Oregon	50%	n/a
Pennsylvania	46%	n/a
Rhode Island	60%	86%
South Carolina	68%	70%
South Dakota	84%	98%
Tennessee	6%	23%
Texas	55%	n/a
Utah	60%	64%
Vermont	57%	n/a
Virginia	71%	84%
Washington	79%	n/a
West Virginia	15%	40%
Wisconsin	65%	77%
Wyoming	79%	73%

## Mental Health Records: A Needle in a Haystack

Under federal law, anyone “adjudicated as a mental defective or has been committed to a mental institution” is prohibited from possessing a firearm. But states have done such a poor job of adding these records to the NICS system that over the last 8 years, stopping a severely mentally ill person from buying a gun through the NICS system is a matter of pure chance.

In our 2002 report, we found that the entire NICS system contained only 90,000 records of those disqualified under the mental health provision of the law—nearly all of the records made up of those institutionalized in Veterans hospitals. Of this list of 90,000, only 41 records were supplied by states. At the time, the General Accounting Office reported that at least 2.6 million people should have been in the system.<sup>ix</sup>

By 2006, 234,628 disqualifying mental health records were in the system.<sup>x</sup> That means that if the GAO’s 2000 estimate is still correct (and it is probably low), at least 91% of those adjudicated mentally ill or involuntarily committed still cannot be stopped by a gun buyer background check.

Since instant checks began on December 1, 1998, only 2,608 denials were based on the mental health disqualification.<sup>xi</sup> During that period, 78 million background checks were performed on potential gun buyers. That means that for every 100,000 buyers, 3.3—or one in 30,000—were rejected because of mental health.

In its biennial survey of state efforts to comply with the Brady Law, the Department of Justice found that twenty-eight states supply zero or very few mental health

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records, 5 states supply some records, and 17 states either supply a large number or have a large number of disqualifying mental health records in their own databases.<sup>xii</sup> But even when states supply records, they are not always accurate or available. Indeed, Virginia does one of the best jobs of including these records, yet Seung-hui Cho still wasn't in the system. And some states that keep the records, only respond to background checks that occur within that state.

### Mental Health Records by State (2005)

<b>Few or No Records<sup>2</sup></b>	Alaska, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, Wyoming.
<b>Some Records<sup>3</sup></b>	Hawaii, Illinois, Iowa, New York, Oklahoma.
<b>Many Records<sup>4</sup></b>	Alabama, California, Colorado, Connecticut, Delaware, Georgia, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, Oregon, Pennsylvania, Utah, Virginia, Washington, Wisconsin.

### Domestic Violence Records: Showing Improvement

Domestic violence misdemeanants and those under a restraining order are prohibited from possessing or buying a firearm. In our 2002 report, we found that these domestic violence records were spotty at best. Back then, 15 states supplied zero domestic violence misdemeanor records to NICS, and 13 states provided no restraining order records. And we learned that 42% of the NICS denials for domestic violence came from one state—Kentucky—which had an aggressive system to maintain the database.<sup>xiii</sup>

This is especially troublesome as the Department of Justice estimates that 40% of women killed with firearms are murdered by an intimate partner.<sup>xiv</sup> That is, in part, why Congress in 1996 expanded the 1968 Gun Control Act to include those convicted of domestic violence misdemeanors from purchasing a firearm.

In the five years since this report, domestic violence records have shown the most improvement. Only six states still do not supply domestic violence misdemeanor records to NICS (Indiana, Maine, Mississippi, New York, North Dakota, and Ohio), and

<sup>2</sup> Either no records or only those incompetent to stand trial or not guilty by reason of insanity.

<sup>3</sup> Allows some mental health files to be accessed by checking agencies.

<sup>4</sup> Adds those involuntarily institutionalized into a database.



only four fail to provide restraining order files into the national database (Hawaii, Nevada, New Jersey, and Utah).<sup>xv</sup> The national protection order file now holds 949,810 records.<sup>xvi</sup>

As a result, the proportion of those denied a firearm for reasons of domestic violence or a restraining order has increased year-by-year to about 15.5% of all denials.<sup>xvii</sup>

## **Conclusion: A New Urgency**

In 2000, 58.8% of those stopped by NICS and state and local agencies from purchasing a firearm were denied because of a felony conviction record.<sup>xviii</sup> In 2005, the proportion was down to 43.1%.<sup>xix</sup> This is actually a positive development, because it shows that records in other areas have become more complete. Beyond domestic violence, the number of illegal alien records increased from 700,000<sup>xx</sup> to 3.3 million.<sup>xxi</sup> The number of entrants in the National Sex Offender registry increased from 260,000 in 2003 to 414,000 in January 2006. The database now includes 1.2 million wanted persons, compared to 900,000 in 2003. And an all-encompassing “denied persons” file now has 368,000 entrants, compared to 42,000 in 2003.<sup>xxii</sup>

In the intervening years, rejections for wanted fugitives, illegal aliens, drug addicts, those who have renounced their citizenship, and the dishonorably discharged have all marched higher. This is real evidence that the system has improved since our first report in 2002.

But the background check system to purchase a firearm is far from foolproof. In too many states, supplying even the most basic felony conviction records is an afterthought. There are still far too many background checks that cannot be completed within the allotted three days, after which a suspected criminal is handed a gun. And in certain categories, like mental health, the system is based on pure happenstance, where a few people, in a few jurisdictions of a few states may be in the system, but most are not.

In most states, and in most cases, NICS is simply unable to stop a person from purchasing a firearm based on mental illness. Even in states that supply some or all records, they are often so protected that they are useless for background checks in any other state. It is both frightening and alarming that only one out of every 30,000 people were rejected for a gun due to severe mental illness. And every so often this lapse in records results in a tragedy. In 2007, it was at Virginia Tech. In 2002, it was the Our Lady of Peace Church in Long Island. In 2000, it was in Wakefield, Massachusetts. And then there are other crimes that make only the local papers or the thousands of firearms-related suicides each year.

In the years since our first report, erstwhile adversaries in the gun debate have teamed up to introduce legislation to provide more money to states to improve their

records and to deny some money from states that failed to do so. It introduced a carrot and stick approach to a problem that was causing senseless tragedy in this country. Republican Larry Craig, who sits on the board of the National Rifle Association, joined with Democrat Chuck Schumer, who authored the Brady Law and Assault Weapons Ban, to introduce the bill. Congresswoman Carolyn McCarthy, who came to Congress to do something about guns in the aftermath of her husband's senseless death and the shooting of her son by a madman on the Long Island Railroad, teamed with the NRA's favorite Democrat John Dingell in companion legislation in the House. Yet five years later, the bills have not reached the President's desk.

Our recommendations are the same in 2007 as they were in 2002, and those recommendations are embodied in the bill we helped to draft. The linchpin of our entire system to keep guns out of the hands of dangerous people is the background check.

As the nation learned with the horror at Virginia Tech, the firearms background check is only as good as the records in the database. We must treat the improvement of these records with the same urgency that we treat the crimes that these missing records cause to occur.

## Endnotes

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<sup>i</sup> Americans for Gun Safety, "Broken Records: How America's Faulty Background Check System Allows Criminals to Get Guns," Jim Kessler and Ed Hill, January 2002.

<sup>ii</sup> General Accounting Office, "Gun Control: Options for Improving the National Instant Background Check System," March 2000.

<sup>iii</sup> Bureau of Justice Statistics, "Improving Criminal History Records for Background Checks, 2005," July 2006.

<sup>iv</sup> GAO, March 2000.

<sup>v</sup> Americans for Gun Safety, "Broken Records: How America's Faulty Background Check System Allows Criminals to Get Guns," Jim Kessler and Ed Hill, January 2002.

<sup>vi</sup> Bureau of Justice Statistics, "Improving Criminal History Records for Background Checks, 2005," July 2006.

<sup>vii</sup> Americans for Gun Safety, "Broken Records: How America's Faulty Background Check System Allows Criminals to Get Guns," Jim Kessler and Ed Hill, January 2002.

<sup>viii</sup> Bureau of Justice Statistics, "Overview of Criminal History Record Systems," Table 1, June 28, 2005.

<sup>ix</sup> General Accounting Office, "Gun Control: Options for Improving the National Instant Criminal Background Check System," March 2000.

<sup>x</sup> Bureau of Justice Statistics, "Improving Criminal History Records for Background Checks, 2005," July 2006.

<sup>xi</sup> Federal Bureau of Investigations, CJIS division via e-mail from Stephen Fischer, May 4, 2007.

<sup>xii</sup> Bureau of Justice Statistics, "Survey of State Procedures Related to Firearm Sales, 2005," November 2006.

<sup>xiii</sup> Americans for Gun Safety, "Broken Records: How America's Faulty Background Check System Allows Criminals to Get Guns," Jim Kessler and Ed Hill, January 2002.

<sup>xiv</sup> Department of Justice, Office of Justice Programs, Homicide Tables Website.

<sup>xv</sup> Bureau of Justice Statistics, "Survey of State Procedures Related to Firearm Sales, 2005," November 2006.

<sup>xvi</sup> Bureau of Justice Statistics, "Improving Criminal History Records for Background Checks, 2005," July 2006.

<sup>xvii</sup> Bureau of Justice Statistics, "Background Checks for Firearm Transfers, 2000 through 2005," 2001 through 2006.

<sup>xviii</sup> Bureau of Justice Statistics, "Background Checks for Firearm Transfers, 2000," July 2001.

<sup>xix</sup> Bureau of Justice Statistics, "Background Checks for Firearm Transfers, 2005," November 2006.

<sup>xx</sup> Americans for Gun Safety, "Broken Records: How America's Faulty Background Check System Allows Criminals to Get Guns," Jim Kessler and Ed Hill, January 2002.

<sup>xxi</sup> Bureau of Justice Statistics, "Improving Criminal History Records for Background Checks, 2005," July 2006.

<sup>xxii</sup> Bureau of Justice Statistics, "Improving Criminal History Records for Background Checks, 2003 and 2005," May 2003 and July 2006.