



November 14, 2017

VIA Electronic Delivery and UPS

Director Christopher Wray
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Assistant Director Douglas Lindquist
Federal Bureau of Investigation
Criminal Justice Information Services Division
1000 Custer Hollow Road
Clarksburg, West Virginia 26306

Re: *Elimination of Fugitive from Justice Entries from the NICS Index*

Dear Director Wray and Assistant Director Lindquist:

Giffords Law Center to Prevent Gun Violence (Giffords Law Center)—a not-for-profit organization dedicated to finding sensible solutions that will prevent further gun violence—and its counsel Democracy Forward Foundation write to request that the Federal Bureau of Investigation (FBI) immediately resume maintenance of “fugitive from justice” identifications in the National Instant Criminal Background Check System (NICS). As explained below, the FBI’s decision in February 2017 to purge the NICS database of all of these identifications, and to stop effective enforcement of NICS background checks on fugitives from justice, was questionable, unexpected, and potentially very dangerous. The recent mass shooting in Sutherland Springs, Texas makes it painfully evident that the failure to maintain complete and accurate records of individuals who are statutorily prohibited from purchasing firearms can result in tragedy.¹

¹ The tragic events in Sutherland Springs, sadly, are not unique. As an audit of the background check system by the Office of the Inspector General noted, “even an isolated NICS process breakdown can have tragic consequences, as evidenced by the June 2015 fatal shooting at a Charleston, South Carolina church, where the NICS process, with timely and accurate data from local agencies, could have prevented the alleged shooter from purchasing the gun he allegedly used.” Office of the Inspector General, U.S. Dep’t of Justice, *Audit of the Handling of Firearms Purchase*

Accordingly, Giffords Law Center calls on the FBI, in coordination with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), to correct this decision.

As you are aware, NICS, which was created to implement the 1993 Brady Handgun Violence Prevention Act, requires background checks for firearms transfers that go through federally licensed dealers. These background checks determine, among other things, whether the would-be gun purchaser is a “fugitive from justice.”² If the would-be purchaser qualifies as a “fugitive from justice” within the meaning of the statute, transfer of the gun (and possession by the fugitive) is illegal.³ Since NICS was launched in 1998, the federal background check system has prevented more than 2.8 million prohibited gun transfers,⁴ including 180,000 denials of transfers to individuals who were fugitives from justice.⁵

On February 15, 2017, with little or no public input, the FBI announced that, following a Department of Justice determination, it had revised the definition of a “fugitive from justice” for the purposes of the NICS database. Specifically, whereas the prior definition had required only an outstanding arrest warrant, to meet the FBI’s new, more restrictive standard, a fugitive from justice must have: (1) fled the state that issued an arrest warrant; (2) done so to avoid prosecution for a crime or to avoid giving testimony in a criminal proceeding; and (3) be subject to a current or imminent criminal prosecution or testimonial obligation.⁶ This decision resolved an ongoing disagreement about the appropriate standard between the FBI and ATF.⁷

Inexplicably, the FBI memorandum announcing this new standard also directed the FBI Criminal Justice Information Services Division’s NICS Section to “**immediately remove all NICS Index entries**” coded as fugitives from justice. It further stated that “**entries will not be permitted** under the . . . ‘fugitive from justice’ category until further notice.”⁸

Even if the FBI’s revised definition of fugitive of justice is assumed to be legally correct,⁹ purging the NICS database of every single individual previously identified as a fugitive from justice was an unjustifiable, alarmingly overbroad, and dangerous decision. As the Department of Justice itself has noted, “[t]he disagreement between ATF and FBI on the Fugitive from Justice category applies to one subset of that category, not the entire universe.”¹⁰

Denials Through the National Instant Criminal Background Check System ii (Sept. 2016), <https://oig.justice.gov/reports/2016/a1632.pdf> (hereinafter DOJ OIG Report).

² 18 U.S.C. § 921.

³ *Id.* at § 922(d)(2); *id.* at § 922(g)(2).

⁴ Jennifer Karberg *et al.*, *Background Checks for Firearm Transfers, 2013–14—Statistical Tables*, US Department of Justice: Bureau of Justice Statistics, June 2016, <https://www.bjs.gov/content/pub/pdf/bcft1314st.pdf>.

⁵ FBI, *Federal Denials: Reasons Why the NICS Section Denies (November 30, 1998–October 31, 2017)*, https://www.fbi.gov/file-repository/federal_denials.pdf (last visited Nov. 13, 2017).

⁶ FBI, U.S. Dep’t Justice, *New Guidance Regarding Persons Who Are Fugitives from Justice* 1-2 (Feb. 15, 2017), <https://www.documentcloud.org/documents/3493269-Fugitive-From-Justice-Guidance-State.html> (hereinafter FBI Memo).

⁷ DOJ OIG Report at iii-iv.

⁸ FBI Memo at 1 (emphases added).

⁹ Giffords Law Center and Democracy Forward Foundation do not concede the legality of the FBI’s revised definition, and only accept the assumption of its legality for the limited purpose of this letter.

¹⁰ DOJ OIG Report at iv n.2.

Indeed, it appears that at least two-thirds of the “fugitives from justice” previously identified in NICS would still qualify as fugitives from justice under the new standard.¹¹

It is unclear on what basis the FBI is now barring new entries into NICS that identify fugitives from justice. The FBI memo provided no date by which this restriction would expire, and it is not clear whether the FBI has lifted it in the nine months that have passed since its implementation. Given that there are only 788 individuals identified as fugitives from justice currently in the NICS database, down from approximately 500,000 such identifications prior to the FBI Memo, it appears that the bar is still effectively in place—and that some substantial number of fugitives who would meet any legal standard for ineligibility are not currently in the system.¹² As such, any one of these potentially dangerous fugitives could currently walk into a licensed gun dealer, pass a criminal background check, and walk out with a gun.

Giffords Law Center has long applauded NICS as an important tool for reducing gun violence, and has made specific recommendations for improving its effectiveness.¹³ It is, therefore, alarming that the FBI would limit the effectiveness of NICS by purging records and inexplicably failing to enforce an important and commonsense protection to keep guns out of the hands of fugitives. Giffords Law Center calls upon the FBI, in coordination with ATF, to take all necessary steps to restore the purged data, resume the collection of fugitive from justice information, and recover any guns that were illegally transferred as a result of the data purge. Giffords Law Center is also available to discuss alternatives that might enhance public safety by improving the operation of NICS, including the issues addressed herein.

Respectfully, we request that the FBI provide a written response to this letter by the close of business on December 5, 2017, and advise Giffords Law Center of the basis for the actions discussed herein and its plans to address these issues. Please contact Robin Thurston at (202) 701-1775 or rthurston@democracyforward.org if you have any questions or would like to discuss this matter further. We look forward to receiving your response.

Thank you for your attention to this issue.

¹¹ DOJ OIG Report at iii (noting that of the fugitive from justice “transactions that were denied by the FBI in this category from November 1999 through May 2015, there were 49,448 instances in which ATF did not agree with the FBI’s denial determination”). As noted above, as of the date of this letter, the FBI reports that nearly 180,000 total transactions were denied based upon the fugitive from justice prohibition.

¹² See FBI, *Active Records in the NICS Indices*, https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view (last updated Oct. 31, 2017); Ann Givens, *Gun Background Check Change Could Put Weapons in Fugitives’ Hands*, Trace (March 13, 2017), <https://www.thetrace.org/2017/03/gun-background-check-change-fugitives/>.

¹³ See Americans for Responsible Solutions & the Law Ctr. to Prevent Gun Violence, *For the Record: NICS and Public Safety* (Dec. 2016), <http://lawcenter.giffords.org/wp-content/uploads/2016/12/NICS-and-Public-Safety.pdf>.

Sincerely,

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