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Gun show background checks: Loophole closure or unfair burden?

Federal and state laws that subject some buyers of firearms to background checks while allowing other sales to occur without background checks have led to calls to revise gun laws. Federal law requires that a person “engaged in the business” of dealing in firearms obtain a federal license and follow certain requirements when selling guns, including checking the background of potential buyers to verify that they are eligible to have firearms. However, private transactions between people not in the business of dealing in firearms are largely unregulated, with no requirement that sellers check the background of potential buyers.

Because private sales often occur at gun shows, critics say that gun shows offer an easy, anonymous way for criminals, juveniles, and others who are prohibited from having weapons to obtain firearms that often are used to commit crimes. Critics advocate changing federal or state law to close what they call the “gun show loophole” by requiring background checks on potential firearm buyers at gun shows or other public venues. Such changes, they say, would not impose an undue burden or unworkable conditions on private gun-show transactions.

Others deny the existence of a loophole, noting that federal and state laws affecting firearm sales are the same no matter where a sale occurs. They argue that private transactions among noncommercial entities should remain private and that gun shows are not a significant enough source of crime guns to warrant placing burdensome requirements on private sales at gun shows.

In 1998, the most recent year for which data are available, Texas hosted more gun shows (472) than any other state, according to analysis by the U.S. Bureau of Alcohol,

Gun shows, of which Texas hosts more than any other state, are the focus of debate over whether all gun buyers at these events should be subject to background checks.

Tobacco, and Firearms of events listed in the periodical *Gun Show Calendar*. Texas gun shows accounted for more than 10 percent of all shows held in the nation that year. Pennsylvania ranked second, hosting 250 shows.

Lawmakers in the 76th and 77th Texas Legislatures introduced proposals to change state law to require background checks at gun shows, and similar proposals are being considered at the federal level.

Laws affecting gun shows

Firearms collector organizations, businesses, or individuals may organize gun shows. Most gun shows are held in public arenas, civic centers, fairgrounds, or armories and are open to the public for an admission fee. Official vendors, who may or may not hold federal firearm licenses, rent space from promoters and sell firearms, accessories, and other paraphernalia. In some cases, people who are not official vendors use parking lots or other areas to sell firearms in less formal settings.

Neither federal nor state laws regulate gun shows *per se*. However, some transactions that take place at gun shows must follow federal requirements, while other transactions need not.

People who meet the federal statutory definition of “engaged in the business” of dealing in firearms must follow federal rules — including checking the background of purchasers — wherever they sell or trade guns, including at gun shows. However, firearm transfers from people who do not meet this definition are subject to only a few limitations. As a result, gun transactions between private people at gun shows generally are not regulated.

Background checks. The federal Gun Control Act of 1968 (18 U.S.C. 44, sec. 921 et seq.) requires people who manufacture, import, or sell firearms as a business to have a federal license. The law prohibits the transfer of firearms to or the possession of firearms by certain categories of people. The Brady Handgun Violence Prevention Act of 1993 (P.L. 103-159) instituted background checks of potential gun purchasers. Under these laws, licensees must verify the identify of buyers

by inspecting government-issued identification; verify that purchasers are eligible to receive the gun by conducting a background check, usually through the Federal Bureau of Investigation (FBI); and keep certain records of gun acquisitions and dispositions.

Federal law prohibits transfers of firearms to the following categories of people and prohibits these people from possessing firearms:

- convicted felons and those indicted for felonies;
- fugitives from justice;
- users or addicts of illegal drugs;
- people adjudicated as mental defectives or committed to mental institutions;
- illegal immigrants;
- people dishonorably discharged from the military;
- people who have renounced their U.S. citizenship;
- people under court-ordered restraining orders related to harassing, stalking, or threatening an intimate partner or child of a partner; and
- people convicted of misdemeanor domestic violence.

A firearm transfer is illegal if the person transferring the firearm knew or had reasonable cause to believe that the receiver fell into one of the above categories.

Federal law also prohibits federal firearm licensees from transferring handguns to people under 21 years old and from transferring long guns (rifles and shotguns) to anyone under 18. Licensees may transfer long guns to people who live in states other than the licensee’s state of residence under certain conditions, but handguns may not be transferred to out-of-state residents.

During initial implementation of the Brady law, a five-day waiting period was required for gun transfers by federal firearm licensees in Texas and other states that did not have instant background check systems. In November 1998, the FBI established the National Instant Criminal Background Check System (NICS).

In Texas and 23 other states, federal firearm licensees contact the NICS directly for all firearm background checks. In 16 states, dealers contact a state or local agency that conducts the background check. In 10 states,

Neither federal nor state laws regulate gun shows per se, but some transactions that take place at gun shows must follow federal requirements.

dealers contact the FBI to check on purchases of long guns and contact a state agency to check the background of potential handgun buyers.

Federal licensees contact the NICS by telephone and, about 71 percent of the time, are told to proceed with the sale immediately, usually within 30 seconds after submitting information on the purchaser. Sales can be delayed for up to three business days while the NICS continues to research the purchaser. If the background check is not completed within three days, a sale can proceed at the dealer's discretion while the check continues. About 95 percent of the time, dealers are told to proceed or to deny the sale within two hours, according to NICS data. Federal funds pay for the background check system.

In its first 25 months of operation, the NICS processed about 18.5 million transactions, about half of which were put through the FBI's instant check system directly by federal firearm licensees, according to the most recent [NICS operation report](#). The FBI denied about 157,000 sales, and states that do not use the FBI system exclusively denied about the same number of sales. In about two-thirds of the sales denied by the FBI, the potential buyer was a felon; in 14 percent, the buyer had a misdemeanor conviction for domestic violence; and in the remaining cases, the buyer was disqualified because one of the other factors listed on page 2.

Federal law and private transactions. Private persons selling their own firearms need not have a federal license, inspect the identification or check the background of potential buyers, or keep records of gun transactions. A private seller may not transfer a firearm to another if the seller knows or has reasonable cause to believe that federal law prohibits the receiver of the firearm from possessing one. However, because private sellers do not conduct background checks, they often have no way of knowing whether a person is eligible to receive a gun.

Private persons also are prohibited from transferring guns to other private persons who they know or have reasonable cause to believe are not residents of the state in which the seller lives. It is a federal offense for a private seller to transfer a handgun to anyone under 18 years old and for juveniles to possess handguns. Exceptions to the prohibitions affecting juveniles include use for ranching, hunting, fishing, and target practice if the juvenile's parent or guardian provides prior written

States That Require Background Checks

The 18 states shown below require background checks on all buyers at gun shows, or they impose other requirements on buyers, such as requiring a state-issued permit or firearms identification card to buy certain types of firearms.

In some states that use the Federal Bureau of Investigation's system to check gun buyers' backgrounds, private sellers who are required to run a background check before making a sale at a gun show must prevail upon a federal firearm licensee at the show to run the check. In other states in which a state law enforcement agency runs background checks for sales by federal firearm licensees, private sellers at gun shows also must contact the agency for a check. In some of these cases, the law enforcement agency is present at the show to run the checks.

| | |
|---------------|----------------|
| California | Missouri |
| Colorado | Nebraska |
| Connecticut | New Jersey |
| Hawaii | New York |
| Illinois | North Carolina |
| Maryland | Oregon |
| Massachusetts | Pennsylvania |
| Michigan | Rhode Island |
| Minnesota | South Dakota |

Source: Americans for Gun Safety Foundation.

consent. Again, private sellers often have no way of knowing whether they would be violating these prohibitions because they do not have to inspect buyers' identification.

Texas law. While federal law sets the minimum requirements for gun purchases, states and local jurisdictions can enact more restrictive statutes. Texas law does not require private individuals to conduct any type of background check when they sell firearms at gun shows.

Eighteen states require background checks at gun shows or require a buyer to show a permit or firearms identification card, according to an April 2001 report by Americans for Gun Safety Foundation. The other 32 states require no background check for private sales at gun shows. (See box, page 3.)

Texas Penal Code, sec. 46.06 makes the following gun-related actions criminal offenses:

- to sell or give a handgun to anyone if the seller knows that the person intends to use the gun unlawfully or to commit an unlawful act;
- to sell or give or offer to sell or give a firearm to anyone under 18 years old;
- to sell a firearm to anyone who is intoxicated;
- to sell a firearm or ammunition to anyone who has been convicted of a felony within five years of the date the felon is released from prison, probation, or parole; and
- to sell or give a handgun knowingly to a person who is the subject of a protective order.

These offenses are Class A misdemeanors (punishable by up to one year in jail and/or a maximum fine of \$4,000), except for transferring a handgun to a juvenile, which is a state-jail felony (punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000). The law provides an affirmative defense to prosecution for selling or giving a firearm to a juvenile if the child's parents or guardians have given permission.

Federal and state proposals

The question of whether to regulate firearm sales at gun shows has prompted several proposals to amend Texas and U.S. law. Some argue that regulation of gun shows should reside at the federal level so as to apply to gun shows in all states. Others say the state should exercise its authority to address a problem in Texas without waiting for federal action. Still others say that instituting additional background checks would be unwise until the reporting and auditing of criminal records improves.

An overriding issue in the debate is how to define a gun show, whether by the number of firearms offered for sale or by the number of vendors. Some want the definition to encompass flea markets, swap meets, and other informal selling venues. One proposal would

define gun shows to include any place at which two or more people sell 50 or more firearms. Others say that a broad definition could mean that a few family members or others gathered in someone's home to sell or trade guns could be classified wrongly as a gun show.

Other issues in the debate include whether a "gun show loophole" exists that warrants regulation of private transactions; whether gun shows are a significant source of crime guns; and whether conducting background checks on private sales at gun shows would be burdensome or workable.

Federal legislation. Lawmakers have introduced gun-show-related bills in the 107th Congress. The two main proposals, included in various bills, are the Lautenberg proposal (after former Sen. Frank Lautenberg, D-N.J.) and the McCain-Lieberman proposal (after Sens. John McCain, R-Ariz., and Joseph Lieberman, D-Ct.), according to the Congressional Research Service. (See CRS Issue Brief, *Gun Control Legislation in the 107th Congress*, updated December 12, 2001.)

The most prominent bill containing the Lautenberg proposal is S. 767 by Sen. Jack Reed (D-R.I.). It would require all firearm transactions at gun shows, including private sales, to go through a federal firearm licensee. The McCain-Lieberman proposal, S. 890, would require special licensees to conduct background checks for sellers who did not have federal firearm licenses. As of early April, none of the gun-show bills had been reported from committee. In 1999, the Senate narrowly adopted an amendment to a juvenile justice bill that would have required background checks on all sales at gun shows, but the bill failed in the House of Representatives.

State legislation. Five bills dealing with gun shows were filed in the 77th Legislature. Only one, HB 367 by Hinojosa, et al., was reported from committee, but it died in the House Calendars Committee. HB 367 would have made it a criminal offense knowingly to sell a firearm at a gun show unless the buyer had a license to carry a concealed handgun or the seller used the NICS to check the buyer's background. Other bills would have allowed exceptions to background checks if the buyer was a peace officer and would have required that records be maintained on gun-show sales.

Still other proposals would have placed requirements on gun-show promoters, including:

- making it an offense for a promoter to allow the sale of guns at a gun show unless the sale complied with the NICS;
- requiring promoters to notify local law enforcement agencies of gun shows; and
- requiring a promoter to conduct or arrange for a federally licensed dealer to conduct a background check on anyone who bought a gun from a vendor who did not have a federal firearm license.

One bill would have allowed only federal firearm licensees to organize, promote, or operate gun shows, and another would have increased the penalties for certain firearm offenses if they occurred at gun shows.

Most proposals to change state law would require background checks on purchasers of all firearms at gun shows. Since federally licensed firearm dealers already conduct background checks, the proposals would affect only sales by private individuals. Background checks could be conducted by making all sellers at gun shows responsible for the checks; requiring that all sales go through a federally licensed firearm dealer who would conduct checks; requiring gunshow operators to run the checks; or requiring law enforcement officers at gun shows to run the checks.

A special license or registration could be created to authorize vendors who are not federal licensees to conduct background checks. These licenses could be limited to a certain number of days, such as allowing one or two 30-day licenses each year. Proponents of special licenses say they would avoid requiring occasional private sellers to become full-fledged licensees, while opponents say sellers should not be subjected to needlessly burdensome regulation. Others argue that all background checks should have to go through federal firearm licensees to prevent a dramatic expansion in the number of gun sellers and to prevent the creation of criminal “front” operations to run checks. Another proposal would limit the number of guns that a private person could sell at a gun show.

Some proposals would impose new requirements on gun-show organizers. At the state level, organizers could be required to register or to have a permit or license from a state agency or to notify a state agency of gun shows. Organizers could be required to submit a list of all vendors to a state agency or to keep an inventory of and records on all guns sold by nonlicensees. Another approach would require organizers to restrict attendance at gun shows — for example, by excluding minors.

Issues in the debate

1. Is there a gun show loophole?

Supporters of changing current law say:

Texas needs to close the loophole in federal law that allows some guns to be sold at gun shows without background checks on buyers. There is no reason why some sellers should have to conduct background checks while others can sell guns with “no questions asked.” Allowing private individuals to sell guns without conducting background checks gives them an unfair advantage over federally licensed firearm dealers, who must comply with the Brady law, and it undermines the laws designed to keep guns out of the hands of criminals, the mentally unstable, juveniles, and others.

These proposals simply would extend the reasonable policy of background checks to all gun-show sales without infringing on buyers’ or sellers’ constitutional rights. Background checks by federal firearm licensees work to keep guns out of the hands of criminals and other prohibited people, and they would do the same for private sales.

Additional legislation is needed to enforce current law. Without background checks, sellers have no way of knowing if they are complying with the law, and law enforcement officers do not know if laws are being violated. Educating private sellers about gun laws is not enough if they cannot get information about buyers’ backgrounds.

Requiring background checks at gun shows would not interfere with private sales that occur on private property. Private gun owners still could sell weapons to family members or others without a background check as long as the sale did not occur at a gun show.

The public supports background checks for all buyers at gun shows. Eighty-six percent of the 800 adults polled in February 2001 by national pollsters John Zogby and Mark Mellman said they favored a federal proposal to require everyone who buys a gun at a gun show to undergo a background check.

Opponents of changing current law say:

Gun shows do not represent a “loophole” in the law. The laws remain the same whether a sale takes place at a gun show or anywhere else. People required by

federal law to conduct background checks must do so wherever they make their sales, and private people need not conduct checks whether they make sales at their homes or at gun shows. Transactions at gun shows should continue to be treated like all other private transactions and should not be made more burdensome or restrictive than sales that take place in other locations.

The government should not interfere in private sales of firearms by lawful adults. Hunters, firearms collectors, and others should be free to engage in private transactions at gun shows like anywhere else. Creating special laws dealing with private sales at gun shows would infringe on the rights of law-abiding private buyers and sellers to assemble peaceably at gun shows, to keep and bear arms, and to exercise free speech. Requiring background checks on private sales at gun shows could be the first step toward requiring approval for all private gun transactions or banning sales of firearms between private people, and it could lead to the government keeping lists of private, law-abiding citizens. Only a minority of gun vendors at gun shows do not have federal firearm licenses.

If illegal activity occurs at gun shows, current law — which makes it illegal to transfer guns to felons, juveniles, and the mentally unstable — should be enforced better, and those who sell firearms illegally should be prosecuted. Because hundreds of people attend gun shows, including off-duty police officers, the high visibility of transactions serves to deter illegal activity. Sellers who claim they do not need a federal license but in fact are selling large numbers of guns and are engaged in the business of selling firearms already are breaking the law. If enforcement of current law presents a problem, the state should give authorities additional resources and direction or should enact stiffer penalties for breaking the law, and private sellers should be educated better about the laws.

If current enforcement is inadequate, enacting additional laws would exacerbate the problem. For example, the shooters at Columbine High School in Littleton, Colo., in April 1999, who received their

guns from people who bought them at gun shows, broke a number of state, local, and federal weapons laws. It is doubtful that another law would have stopped them. The people who bought the weapons for the shooters were lawful purchasers who would have passed a background check.

2. Are gun shows a source of crime guns?

Supporters of changing current law say:

Background checks on all sales at gun shows would eliminate an easy source of firearms for minors and convicted criminals. In a 1999 report, the [Bureau of Alcohol, Tobacco, and Firearms \(ATF\)](#) noted that, while the majority of people who visit gun shows are law-abiding citizens, people prohibited by law from obtaining firearms can obtain them at gun shows. The report also said that illegal firearms sales and trafficking occur at gun shows and that the shows can be a venue for criminal activity and a source of firearms used in crimes. Felons were involved in selling or buying firearms in about 46 percent of the cases the ATF studied for the 1999 report.

Statistics often cited from a mid-1980s National Institute of Justice (NIJ) report as proof that gun shows were a minor source of guns for criminals are woefully out of date. Those statistics apply to a period before the Brady law required background checks, even at gun stores. During the study period, criminals did not need to attend gun shows to avoid background checks. Even if gun shows are a minor source of guns for criminals, requiring background checks at the shows would make it even more difficult for them to obtain weapons.

Gun shows and flea markets are a major source of illegal gun trafficking, according to a June 2000 report by the ATF that analyzed firearm trafficking investigations between July 1996 and December 1998. Gun shows and flea markets had the second highest number of trafficked firearms per ATF investigation and were associated with about 14 percent of the investigations.

Supporters say that background checks on all sales at gun shows would eliminate an easy source of firearms for minors and convicted criminals.

States that do not require a background check of all buyers at gun shows are the source of most of the out-of-state crime guns, according a report by the Americans for Gun Safety Foundation. Nine of the top 10 states — Texas ranked fourth — that are the sources of the most out-of-state crime guns do not require background checks at gun shows, according to the report.

Gun shows have been named as sources of weapons and ammunition for potential terrorists who may want to hide their immigrant status and criminal records. A Pakistani national living in Texas who had overstayed his visa and was convicted of illegally possessing ammunition reportedly told authorities that he had bought and sold weapons at gun shows.

Opponents of changing current law say:

Studies have shown that gun-show sales are not a significant source of firearms used in crimes. Less than 2 percent of arrestees surveyed as part of a federal program reported getting their guns from a gun show, according to the NIJ's 1997 report *Homicide in Eight U.S. Cities*. A mid-1980s NIJ study of gun purchases by criminals found that gun shows were such a minor source of guns that they were not worth reporting in their own category. Only about 3 percent of juveniles in a Michigan study obtained their last handgun from a gun show.

Because of data problems, it is misleading to use statistics on gun traces to argue that background checks should be performed by private sellers at gun shows. For example, the gun traces studied generally are not a random sample of all firearms used by criminals, so they are an inappropriate basis for broader conclusions.

Background checks on private sales at gun shows would not stop criminals from using already illegal “straw man” purchases to buy weapons. In such purchases, a person without a criminal record and who can pass a background check buys a weapon and then passes the weapon to the criminal.

It is unfair to cite the threat of terrorist actions as a reason to change gun laws. The September 11

hijackers did not use guns, and instituting background checks on private gun sales would not eliminate future threats from terrorists. Foreign terrorists have no reason to use U.S. gun shows to arm themselves because they can obtain weapons easily in the cash-and-carry weapons markets in other parts of the world. The U.S. system has worked since September 11, and immigrants who have violated weapons laws have been arrested, tried, and convicted.

3. Would background checks on private sales at gun shows be burdensome or unworkable?

Supporters of changing current law say:

Conducting background checks on all firearm buyers at gun shows would not create a burden for law-abiding citizens, nor would it have an adverse impact on gun shows. At least half of gun vendors at gun shows already conduct the checks, because they are federal firearm licensees.

Background checks do not delay sales, because most checks are completed instantly over the telephone and any cost imposed on buyers or sellers would be minimal. Most likely, the federal government would continue to bear the cost, as it does for background checks on private gun-show sales in other states that use the federal system for the checks. Gun shows continue to flourish in states that require background checks; three of the five states that host the largest number of gun shows require checks.

Opponents of changing current law say:

The logistics of requiring background checks for private sales could prove unworkable and could strain the government's resources, whether private individuals ran the background checks, a new class of licensees was created to do background checks, or all sales were routed through federal firearm licensees. At present, with only federal firearm licensees running checks, the “instant” background check system sometimes has outages or wrongly denies sales.

Background checks on private sales could delay or stop some sales, because the period of three business

Opponents say that requiring background checks on private gun sales would create an unfair burden on law-abiding citizens and gun-show organizers.

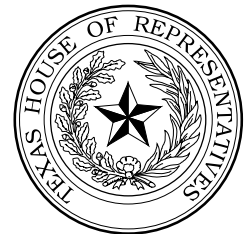
Opponents say (continued):

days allowed for the completion of checks is longer than most gun shows last. Private buyers or sellers or show promoters could be forced to bear the cost of the background checks, a cost now borne by the federal government, which appropriates tax dollars for the NICS. This would amount to a new tax on gun purchases. All of this could encourage private gun sales to occur in less safe areas, such as parking lots or at “black market” gun shows.

Requiring private individuals or gun-show promoters to obtain government permits or licenses would create an unfair burden on private, law-abiding people. Requiring gun-show promoters or gun shows to register with or be monitored by a state agency would result in miles of red tape and countless hours of bureaucratic oversight.

— by **Kellie Dworaczyk**

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