

GUN SHOW UNDERCOVER: ARIZONA

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Executive Summary

On January 8, 2011, Jared Loughner, a mentally ill drug abuser wielding a Glock semi-automatic pistol with a 33-round extended magazine, shot and killed six people in Tucson, Arizona, wounding thirteen more, including U.S. Congresswoman Gabrielle Giffords. Even though the U.S. Army had rejected Loughner after admitting to a history of drug abuse during his application to enlist, it failed to share this information with the FBI, as required by law.¹ As a result, Loughner's name was never entered into the National Instant Criminal Background Check System (NICS), a database used to screen prohibited purchasers from buying guns. Less than a year later, Loughner was able to pass a background check and purchase a shotgun,² and only one year after that, Loughner bought the Glock gun that he used in the Tucson shootings.³

Like the tragedies at Columbine and Virginia Tech, the Tucson shooting raised questions about the gun background check system: why did the system fail? And, what are the major gaps in the background check system that make it easy for felons, the mentally ill, drug abusers, and other federally prohibited persons⁴ to buy guns?

Just two weeks after the tragic shooting in Tucson, Arizona, the City of New York sent undercover investigators to the Crossroads of the West gun show in Phoenix, Arizona – 120 miles from Tucson and one of thousands of such shows that occur across the country every year.

The investigation sought answers to two different questions:

Question 1: How easy is it to buy a gun without a background check?

Result: An undercover investigator bought a Glock 9-millimeter pistol, similar to the weapon used by Jared Loughner, from a private seller without a background check. Under current law, this no-background-check sale is legal assuming the man making the sale is in fact only an occasional seller. The investigator also bought three high-capacity 33-round magazines like the one Loughner used.

Question 2: Would private sellers sell guns to people who said they probably could not pass a background check?

Result: An undercover investigator bought two 9-millimeter semi-automatic pistols from two different private sellers. In these buys, the investigator told the sellers “I probably couldn't pass a background check.” Both sellers sold the gun despite a federal law making it illegal to sell a gun to an individual the seller “knows” or “has reason to believe” is a prohibited purchaser.

Context: Gun Sales Without Background Checks

In the United States, federal law prohibits dangerous people, including criminals, the mentally ill, and drug abusers from owning guns. In 1993, the FBI established the National Instant Check System (NICS), which contains federal and state records indicating whether a person is a prohibited purchaser.

Current federal law recognizes two classes of individuals who sell firearms: federally licensed gun dealers who are “engaged in the business” of selling guns and unlicensed, “private” sellers who make occasional sales from their personal collections.⁵ Federal law requires licensed dealers to conduct background checks of their buyers,⁶ but private sellers are exempt from this requirement because it is presumed that they only sell guns occasionally. This private sellers’ exemption is often referred to as the “gun show loophole” because gun shows provide a central marketplace for prohibited purchasers to connect with private sellers who make anonymous gun sales. Even though federal law exempts private sales from background checks, it is a felony for private sellers to sell a gun to an individual they “know” or “have reason to believe” is a prohibited purchaser.⁷

Data suggest that private sales are common. According to some estimates, 40 percent of all gun sales in the United States take place through private sales.⁸

Gun Shows Linked to Crime

Gun shows are a unique marketplace that typically feature both private sellers and federally licensed gun dealers selling guns side by side. According to federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), this creates an environment where criminals can easily and anonymously purchase firearms from private sellers: “Gun shows leave a major loophole in the regulation of firearms sales” and “provide a large market where criminals can shop for firearms anonymously.”⁹ However, by ATF’s own account, “it is difficult to determine the precise extent of criminal activities at gun shows,”¹⁰ in part because private sales are typically unrecorded, cash transactions. According to ATF, 27 percent of illegally trafficked guns are connected to private sellers and 30 percent are connected to gun shows.¹¹

Gun shows have been linked to mass shootings and other gun crimes:

- **Columbine:** All four of the guns used by the teenage shooters at Columbine High School were bought at gun shows from private sellers.¹² To help them buy the guns, the shooters enlisted the help of Robyn Anderson, an 18-year-old senior. In a statement to the Colorado House Judiciary Committee, Anderson reported “I wish it would have been more difficult. I wouldn’t have helped them buy the guns if I had faced a criminal background check.”¹³
- **Trafficking of U.S. guns into Mexico:** According to ATF, increased gun trafficking to Mexico is caused in part by “a readily accessible source of firearms and ammunition originating in mostly the secondary market, such as gun shows, flea markets, and private sales.”¹⁴ The Special Agent in Charge of ATF’s Phoenix Field Division testified before Congress in 2009 that “drug traffickers are able to obtain firearms and ammunition more easily in the U.S., including sources in the secondary market such as gun shows and flea markets.”¹⁵ As Dennis Burke, the United States Attorney for Arizona said on January 25, 2011, “Mexican drug lords go shopping for weapons in Arizona.”¹⁶
- **Terrorism:** In 2001, Ali Boumelhem was caught attempting to ship to Hezbollah guns, ammunition, flash suppressors, and other material that he and his brother Mohamed had bought at Michigan gun shows.¹⁷ Other investigations have linked gun shows to potential terrorists in Florida and Texas.¹⁸
- **Street crime:** For example, one investigation of illegal sales at gun shows and flea markets in Alabama led to charges against 13 people who ATF estimated had trafficked 70,000 firearms over the past several decades.¹⁹ Hundreds of these guns were connected to homicides, robberies, assaults, and drug and sex crimes, including one that was used in the attempted murder of a Chicago police officer.²⁰

The Undercover Investigation

New York City's investigation documented gun sales at the Crossroads of the West Gun Show at the Arizona State Fairgrounds in Phoenix on January 22 - 23, 2011. The City organized a team of undercover investigators, most of whom have prior law enforcement experience. Investigators used sophisticated video and audio recording devices. Cameras were concealed and had lenses no larger than the tip of a ballpoint pen. On Saturday, January 22, investigators observed sellers, and purchases were made on Sunday, January 23.

The Arizona investigation sought answers to two questions:

Question 1: How easy is it to buy a gun without a background check?

To answer this first question, an investigator approached a private handgun seller and after a couple of minutes of conversation purchased a Glock 9-millimeter without a background check. The only identifica-

tion the seller needed to complete the sale was the investigator's Arizona driver's license. Under current federal law, this no-background-check sale is legal, assuming the person selling the gun was making only occasional gun sales. This gun is similar to the Glock used by Jared Loughner. The undercover investigator also bought three high-capacity, 33-round magazines like the ones Loughner used.

Question 2: Would private sellers sell guns to buyers who said they probably could not pass a background check?

To answer this second question, an investigator conducted "integrity tests." He purchased two 9-millimeter semi-automatic pistols from two different private sellers. In both cases, before the transaction was completed, he told the seller he "probably couldn't pass" a background check. Both sellers sold the gun despite a federal law making it illegal to sell a gun to an individual the seller "knows" or "has reason to believe" is a prohibited purchaser.

PURCHASED WITHOUT BACKGROUND CHECKS AT A PHOENIX GUN SHOW: JANUARY 23, 2011

SIG SAUER



- Sig Sauer Sig Pro 2009 9mm
- Purchase Price: \$500
- Gun came with (3) 10-round magazines
- Also purchased (3) 15-round extended magazines

SMITH & WESSON



- Model 5906
- Purchase Price: \$450
- Gun came with (2) 10-round magazines
- Also purchased (3) 30-round extended magazines

GLOCK



- Glock 17 9mm with Rail
- Purchase Price: \$480
- Gun came with (2) 17-round extended magazines
- Also purchased (3) 33-round extended magazines

Investigator tells private seller that he **"probably couldn't pass a background check"** and seller completes the sale

Purchase made by an investigator without a background check

Failing The Private Seller Integrity Test

It is a federal felony for anyone to sell a gun to someone they “know” or “have reason to believe” is a prohibited purchaser. Below are excerpts from the transcript of an illegal sale involving a private seller at a gun show in Phoenix, Arizona on January 23, 2011. The investigator bought a Sig Sauer Sig Pro 2009 9mm for \$500.



① Seller Highlights That Without A Background Check, The Gun Will Be Difficult To Trace.

Seller: The good thing is, though, if you don't like it, you can just sell it later and it's not in your name.



② Investigator Tells Private Seller That He Probably Couldn't Pass A Background Check.

Investigator: So you're not one of those, you know, dealer guys, right?

Seller: No. No tax, no form, you don't have to do transfers or nothing. Just need to see an Arizona ID and that's it with me.

Investigator: So no background check?

Seller: No.

Investigator: That's good because I probably couldn't pass one, you know what I mean?

Seller: [Seller looks down, shakes his head, and proceeds]



③ Private Seller Completes The Sale.

Investigator: Yeah, I like this, man. You take five for it? Cash. Right now. [...]

Seller: Yeah, that's good. [Seller counts the money] [...]

Investigator: Are you going to be here, like, next time, in case I got problems?

Seller: I should be here, but otherwise, just send it to Sig.

The City's 2009 Investigation of Illegal Sales at Gun Shows Leads to New Business Practices

The integrity tests in Arizona were similar to the City's 2009 investigation conducted at seven gun shows in Nevada, Tennessee, and Ohio. In October 2009, the City of New York announced the results of that investigation: 19 of 30 gun sellers approached by investigators – 63 percent – violated federal law by selling guns to an investigator who said he “probably couldn't pass a background check.”²¹ In the wake of the 2009 investigation, operators of four of the seven investigated gun shows have suspended no-background-check sales and adopted other measures, including additional signage and security, to enforce that policy. At the time of the investigation, those four gun shows hosted approximately 200 private sellers offering an estimated 2,600 guns for sale without background checks, in just one weekend. One of the private sellers who failed the integrity test was Robert Daly. In July 2010, Daly was accused by ATF of illegally selling guns at gun shows and was the subject of an ATF search warrant.²² When the warrant was executed at Daly's home in Mesa, Arizona, ATF agents seized 799 guns.²³

Proposed Solutions

Solution 1: Resources and Leadership to Enhance Enforcement of Existing Gun Laws

For years, ATF has had to fight gun trafficking with its hands tied behind its back. It lacks a Senate-confirmed Director,²⁴ adequate resources,²⁵ and operates under a web of restrictions Congress has imposed to hobble its effectiveness.²⁶ With adequate resources and a stronger mandate from Washington, ATF could

immediately do more to reduce the flow of illegal guns by enhancing enforcement of existing laws at gun shows, particularly in those states that are a top source of guns trafficked within the United States and into Mexico.

The background check system itself is also undermined by a lack of resources and action in Washington. In the wake of the Virginia Tech shooting, where the shooter should have failed a gun background check but didn't because his mental health records were never forwarded to the background check system, Congress passed the NICS Improvement Amendments Act. Since then, Congress has only appropriated 5.3 percent of what it said was necessary to get all of the records in the system. In addition, many federal agencies have submitted zero records to the system. Among other solutions, Congress should guarantee full funding to get the records into the system, establish tougher penalties for states that do not comply, and require federal agencies to certify each year that they are in compliance with the law.

Solution 2: Background Checks for All Gun Sales

Enforcing existing gun laws will only go so far as long as a loophole exists that enables criminals and other dangerous people to buy guns without background checks. Congress should change the law to require a background check for every gun sale.²⁷ State laws requiring background checks for every handgun sold at a gun show are associated with reduced interstate gun trafficking. The 16 states and the District of Columbia that require background checks for all handgun sales at gun shows have a crime gun export rate that is more than 60% lower than states that do not (7.5 crime guns per 100,000 inhabitants versus 19.8 crime guns).²⁸

Endnotes

¹ NICS Improvement Amendments Act of 2007, Public Law No. 110-180; see also, James Grimaldi, “Reno-era policy kept Jared Loughner off FBI gun list,” *Washington Post* (Jan. 18, 2011).

² See e.g., John Cloud, “The Troubled Life of Jared Loughner,” *Time* (Jan. 15, 2011).

³ Id.

⁴ People prohibited from possessing guns include (1) convicted felons, (2) fugitives, (3) drug addicts and abusers, (4) people with serious histories of mental illness, (5) aliens who are in the United States illegally or (with certain exceptions) on a nonimmigrant visa, (6) persons dishonorably discharged from the Armed Forces, (7) those who have renounced U.S. citizenship, (8) subjects of domestic-violence restraining orders and (9) domestic violence misdemeanants. 18 U.S.C. § 922(g) (2010). In addition, people cannot buy guns while they have pending felony charges. 18 U.S.C. § 922(n) (2010).

⁵ 18 U.S.C. § 921(a)(21)(C) (2010).

⁶ 18 U.S.C. § 922(t) (2010).

⁷ 18 U.S.C. § 922(d) (2010).

⁸ Garen J. Wintemute et al., Private-Party Gun Sales, Regulation, and Public Safety, 363 *New Eng. J. Med.* 508 (Aug. 5, 2010).

⁹ U.S. Department of Justice, Department of the Treasury and ATF, Gun Shows: Brady Checks and Crime Gun Traces, at 26 (1999).

¹⁰ Id. at 9.

¹¹ These figures overlap to some extent. Some illegal guns connected to gun shows are trafficked through licensed dealers. See U.S. Dep’t of Treasury, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Following the Gun: Enforcing Federal Law Against Firearms Traffickers, 13 (2000) (gun shows were associated with 25,862 out of 84,128 total trafficked firearms connected to the prosecutions examined in the report).

¹² David Olinger, “Following the guns,” *Denver Post*, Aug. 1, 1999, available at <http://extras.denverpost.com/news/shot0801.htm>. The teenagers bought three guns directly at one show; at a fourth, they met a private seller who later delivered the fourth gun to them.

¹³ Lynn Bartels, “Gun dealers rejected Columbine killers,” *Denver Rocky Mountain News*, at 4A (Jan. 27, 2000).

¹⁴ William Hoover and Anthony P. Placido, Statement to the U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, Law Enforcement Responses to Mexican Drug Cartels (Mar. 17, 2009). ATF Agents Hoover and Placido testified that 10 percent of those killed in 2007 and in early 2009, as well as 8 percent of those killed in 2008 had been police, military, security officers, or other public officials.

¹⁵ William Newell, Special Agent in Charge, Phoenix Field Division, ATF, Statement before the United States House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies (Mar. 24, 2009). This trafficking likely contributes to the fact that 90% of guns recovered and traced from Mexican crime scenes originated from gun dealers in the United States. See U.S. Government Accountability Office, Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges, GAO-09-709 (June 18, 2009), available at <http://www.gao.gov/new.items/d09709.pdf>. According to this report, between 2004 and 2008, 87% of guns recovered and traced from Mexican crime scene crimes were originally sold by U.S. gun dealers; between 2006 and 2008, the proportion is more than 90%. Id. This report relies on the metric for the number of guns recovered and traced between 2006 and 2008 because it is more consistent with the time period of trace data analyzed in this report.

¹⁶ James Grimaldi and Sari Horwitz, “ATF fears cuts would imperil effort against gun trafficking,” *Washington Post* (Jan. 30, 2011).

¹⁷ See *United States v. Boumelhem*, 339 F.3d 414, 418 (6th Cir. 2003); see also Susan Page, “McCain: Terrorists bypass laws by using gun shows,” *USA Today*, Nov. 27, 2001, available at <http://www.usatoday.com/news/sept11/2001/11/27/guns.htm>.

¹⁸ See Susan Page, supra note 17; Eric Holder Jr., “Keeping Guns Away from Terrorists,” *The Washington Post*, October 21, 2001; Jeremy Schwartz, “Sentencing in Weapons Case is Delayed, Alice Storcowner Asrar Faces Additional Accusations of Weapons Possession,” *The Corpus Christi Caller-Times* (Jan. 29, 2002).

¹⁹ “A Gun Probe Yields Hundreds of Weapons Used in Crimes,” *Associated Press* (March 4, 2007).

²⁰ Id.

²¹ The video and other details are available at <http://www.gunshowundercover.org>, including a report on the investigation, Gun Show Undercover, at http://www.gunshowundercover.org/images/FE/chain-266siteType8/site226/client/Gun_Show_Undercover_report.pdf.

²² Nathan Gonzalez, “ATF Seizes Guns in Raid of East Mesa Home,” *The Arizona Republic* (July 13, 2010).

²³ See Order dated Dec. 27, 2010, In re: Non-Judicial Civil forfeiture Proceeding involving Bureau of Alcohol, Tobacco, Firearms and Explosives, seizure of: 799 Firearms, No. 2:10-mc-124 (filed Dec. 27, 2010).

²⁴ Marian Wang, “Firearms agency keeps gun tracing records secret,” *Tucson Sentinel* (January 17, 2011), available at http://www.tucson-sentinel.com/nationworld/report/011711_firearms_records.

²⁵ See “Budget Delays Force Hiring Freeze at Federal Crime Fighting Agencies,” *USA Today* (Jan. 12, 2007), available at http://www.usatoday.com/news/washington/2007-01-12-crime-fighting_x.htm; Michael J. Sullivan, Testimony Before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science & Related Agencies, at 3 – 4, Apr. 8, 2008.

²⁶ For example, ATF cannot require licensed dealers to physically check their inventory against their records, because of an appropriations rider known as the “Tiahrt Amendment.” Consolidated Appropriations Act 2010, Pub. L. No. 111-117, Div. B, Tit. II (2009) (banning “any rule requiring a physical inventory of any” federal firearms licensee). Also, ATF cannot deny an application in a business name because one of the principals of the proposed dealership has broken federal firearms law (including while running another dealership), absent a felony conviction. See 18 U.S.C. § 923(d)(1) (2010). John Diedrich, “Wiped clean: Facing federal scrutiny, gun shop got new lease on life with simple ownership change,” *Milwaukee Journal-Sentinel* (Jan. 3, 2010), available at <http://www.jsonline.com/watchdog/watchdogreports/80518507.html>. Furthermore, for the vast majority of violations, ATF cannot fine dealers or suspend their licenses; it must either seek license revocation or do nothing. See 18 U.S.C. § 923(e) (2010). In fact, to revoke a license (or to deny a license renewal) ATF has to follow a twelve-step procedure that takes, on average, more than a year. U.S. Dep’t of Justice, Office of the Inspector General, Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives, Report No. I-2004-005 (July 2004) at 40, 42, available at <http://www.usdoj.gov/oig/reports/ATF/e0405/final.pdf> (analyzing denials and revocations concluded in FY 2001 or 2002). A revocation is automatically stayed pending an administrative hearing. 18 U.S.C. § 923(f)(2) (2010).

²⁷ This requirement should include reasonable exceptions for transfers of guns by inheritance, transfers among immediate family members, or sales to people who have certain gun permits.

²⁸ Mayors Against Illegal Guns, Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking, 15 (2010), available at http://www.mayorsagainstillegalguns.org/downloads/pdf/trace_the_guns_report.pdf.