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## **Enforcement of the Brady Act, 2006**

ATF investigations and United States Attorneys' prosecutions of firearm applicants denied by an FBI/NICS check in 2006

by Ronald J. Frandsen

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## **Enforcement of the Brady Act, 2006**

### **Abstract**

The Brady Handgun Violence Prevention Act (Brady Act) requires criminal history background checks by the Federal Bureau of Investigation (FBI) and State agencies on persons who attempt to purchase a firearm from a licensed dealer. In 2006, the FBI alone denied a firearm to nearly 70,000 persons due to National Instant Criminal Background Check System (NICS) records of felonies, domestic violence offenses, and other prohibiting factors. Enforcement of the Brady Act, 2006 reports on investigations and prosecutions of persons who were denied a firearm by the FBI in 2006. The report describes how the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) screens denied-person cases and retrieves firearms that were obtained illegally. Statistics presented include the charges most likely to be filed against denied persons by United States Attorneys and the results of prosecutions.

### **Disclaimer**

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## Enforcement of the Brady Act, 2006

### 1. Background

**The Brady Act.** The Brady Handgun Violence Prevention Act (Brady Act) was enacted in 1993 to provide a method for blocking transfers of firearms to prohibited persons. From February 28, 1994 to November 30, 1998, the interim Brady provisions, 18 U.S.C. 922(s), required a Federal Firearms Licensee (FFL) to request a background check on a handgun applicant by the Chief Law Enforcement Officer (CLEO) of the jurisdiction where the licensee operated. A handgun could be transferred if a notice of denial was not transmitted to the FFL within five days by the CLEO.

**National Instant Criminal Background Check System.** Pursuant to the permanent provisions of the Brady Act, 18 U.S.C. 922(t), the National Instant Criminal Background Check System (NICS) began operations on November 30, 1998. The NICS allows a licensee to contact the system by telephone or other electronic means for information, to be supplied immediately, on whether receipt of a firearm by a transferee would violate Federal or State law. In addition to regulation of handgun sales, the permanent provisions mandate background checks on long gun purchasers and persons who redeem a pawned firearm. A licensee has the option of requesting a check on a person who attempts to pawn a firearm.

A NICS inquiry is not required if a transferee presents a State permit qualified by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) as an alternative to the point-of-transfer check. Qualified permits allow a transferee to possess, acquire, or carry a firearm, and were issued not more than five years earlier by the State in which the transfer is to take place, after verification by an authorized government official that possession of a firearm by the transferee would not be a violation of law. A permit issued after November 30, 1998 qualifies as an alternative only if the information available to the State authority includes the NICS.

The NICS process begins when a licensee receives a completed Firearms Transaction Record (ATF Form 4473) and a government-issued photo identification from an applicant. Completion of a State disclosure form may also be required. Submitting false information in regard to a firearm transaction is illegal under Federal law and many State statutes.

A licensee initiates a NICS check by contacting either the Federal Bureau of Investigation (FBI) or a point of contact (POC) agency designated by State government. The FBI and the POC agencies always check three major Federal databases, the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Index. If the transferee is not a citizen of the United States, the NICS will query Bureau of Immigration and Customs Enforcement (ICE) records. A POC may check additional State records. A check may include contacting an agency that maintains a record that the FBI or POC cannot access directly.

After a search of available Federal and State records, the checking agency responds with a notice to the licensee that the transfer may proceed, may not proceed, or is delayed pending further review of the applicant's record. If further review of a record indicates that the transfer would not violate Federal or State law, the checking agency notifies the licensee that the transfer may proceed. If the licensee does not receive a response within three business days, the transfer may proceed at the licensee's discretion. A person who is not allowed to proceed may appeal to the FBI or POC and submit information to correct the record on which the denial was based.

**NICS Denials in 2006.** The FBI conducted nearly 5.3 million NICS transfer checks in 2006 and denied nearly 70,000 applications, a denial rate of 1.3%. The NICS was accessed for almost all of the estimated 2.9 million transfer and permit checks conducted by State agencies for the year. State agency denials were estimated to be nearly 55,000, a denial rate of 1.9%. (Table 1).

**Table 1. Background checks on firearm applicants processed by the FBI and State agencies in 2006**

	FBI / NICS <sup>a</sup>		State agencies <sup>b</sup>	
	Number	Percent	Number	Percent
Applications	5,262,752		2,947,148	
Denials / Denial rate	69,930	1.3%	54,809	1.9%
Appeals / Appeal rate	10,437	14.9%	12,239	22.3%
Appeals reversed / Reversal rate	3,200	30.7%	5,718	46.7%
Reasons for denials:				
Felony indictment/conviction	25,259	36.1%	24,488	44.7%
Other criminal history <sup>c</sup>	19,908	28.5%	---	---
State law prohibition	---	---	3,329	6.1%
Domestic violence				
Misdemeanor conviction	6,874	9.8%	5,923	10.8%
Restraining order	3,034	4.3%	2,025	3.7%
Drug use or addiction	6,083	8.7%	524	1.0%
Fugitive	4,235	6.1%	5,113	9.3%
Illegal or non-immigrant alien	1,109	1.6%	198	0.4%
Mental illness or disability	405	0.6%	3,103	5.7%
Other prohibitions <sup>d</sup>	3,023	4.3%	10,106	18.4%
	69,930	100%	54,809	100%

-- Not applicable

<sup>a</sup>Firearm transfer transactions reported by the FBI NICS Section.

<sup>b</sup>Estimates of background checks on transfer and permit applicants from the Firearm Inquiry Statistics (FIST) program. Nearly all of these checks access the NICS.

<sup>c</sup>Includes State prohibitors, multiple DUI's, non-NCIC warrants, and other disqualifiers.

<sup>d</sup>Includes juveniles, persons dishonorably discharged from the Armed Services, persons who have renounced their U. S. citizenship, and other unspecified persons.

NICS checking agencies most often block the transfer of a firearm or a permit to a person whose records indicate a felony indictment or conviction, a fugitive warrant, unlawful drug use or addiction, a mental defective adjudication or an involuntary commitment to a mental institution, illegal or non-immigrant alien status, a domestic violence restraining order, or a misdemeanor domestic violence conviction. These and other prohibitors are stated in the Gun Control Act (GCA), 18 U.S.C. 922. A NICS denial may also be based on a State law prohibition.

The majority of FBI denials (65%) were caused by a felony indictment or conviction, or other criminal history (which includes State prohibitors), with domestic violence misdemeanor convictions and restraining orders also accounting for a significant percentage (14%) of the denials. The same factors also caused the majority of denials by State and local agencies in 2006. (Table 1).

## **2. ATF Investigations**

NICS denial data is electronically transmitted by the FBI on a daily basis to ATF's Brady Operations Branch. Standard referrals by the FBI contain data on prohibited persons who unlawfully attempted to purchase a firearm. Some prohibited persons obtain a firearm during an "open transaction," where the FBI has not completed a check in three business days and the dealer is allowed to transfer the firearm. When the FBI finds a prohibitory record and is informed by the dealer that a transfer occurred, a "delayed denial" referral is made to ATF.

As a way to assist ATF investigations, the FBI NICS Section implemented a system enhancement that ranks a delayed denial transaction based on ATF categories applicable to the specific denial and separates the ranked delayed denials from the standard referrals. (*NICS Operations 2005*, FBI CJIS Division, January 2006, [http://www.fbi.gov/hq/cjisd/nics/ops\\_report2005/ops\\_report2005.pdf](http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2005.pdf)).

In addition, Brady Operations queries the daily NICS referrals to identify collateral (pre-pawn) checks where a person who attempted to pawn a firearm was found to be prohibited. Research by Brady Operations that covered October 2001 to November 2005 concluded that collateral checks have a denial rate of 3.3%, which is over two times greater than the overall FBI denial rate. The pawnbroker who requested the collateral check is contacted to find out if the denied person left the pawnshop with the firearm. If the denied person still possesses the firearm, the referral is expedited in the same manner as a delayed denial. If the pawnbroker received the firearm, the denial is processed as a standard referral.

Brady Operations searches databases available to ATF for additional data on denied persons referred by the FBI. After an initial screening, denials are referred to the 19 ATF field divisions serviced by Brady Operations (four other divisions' territory are only comprised of POC States). Delayed denials are required to be referred within 48 hours. Routinely, delayed denials are referred within 24 hours of receipt from the FBI. All

referrals are made in accordance with criteria established for the Federal judicial districts within each division’s territory. ATF and United States Attorneys have developed referral criteria for all 94 judicial districts that reflect the types of cases most likely to merit prosecution. Cases involving restraining orders, domestic violence misdemeanors, non-immigrant aliens, violent felonies, warrants, and indictments are most often included in referral criteria.

In 2006, the FBI referred 77,233 NICS denials to Brady Operations. After screening, Brady Operations referred 9,432 denials (12% of the cases) within the established guidelines to field divisions. Cases that did not meet guidelines were held in a database. The referred transactions included 3,073 delayed denials and 6,359 standard referrals (100 delayed and 334 standard denials were later overturned because subjects were found to not be prohibited). About 68% of the referrals involved a case where the denied person was subject to a protective order or had a domestic violence misdemeanor conviction or a felony conviction. The six most common reasons for referral accounted for almost 95% of the cases. (Table 2.)

**Table 2. NICS denials by FBI referred to ATF field divisions in 2006**

	Cases	Percent
FBI denials referred to ATF Brady Operations	77,233	100.0%
Brady Operations referrals to ATF field divisions		
Delayed denials	2,973	3.9%
Overturned delayed denials	100	0.1%
	<hr/> 3,073	<hr/> 4.0%
Standard referrals	6,025	7.8%
Overturned standard referrals	334	0.4%
	<hr/> 6,359	<hr/> 8.2%
Total referrals to field	9,432	12.2%
Not referred	60,736	78.7%
Overturned	7,065	9.1%
Reasons for referrals to ATF field divisions		
Domestic violence misdemeanor	2,272	24.1%
Subject to protective order	2,105	22.3%
Convicted felon	2,053	21.8%
Under indictment or information	905	9.6%
Unlawful user of controlled substance	792	8.4%
Illegal or unlawful alien	763	8.1%
Other reasons <sup>a</sup>	542	5.7%
	<hr/> 9,432	<hr/> 100.0%

<sup>a</sup>The category “other reasons” is compiled from seven other prohibiting categories utilized by the Brady Operations Branch to refer denials for field investigation.

A NICS coordinator in each ATF division receives and distributes referrals to the appropriate field office. (A flowchart depicting the processing of NICS denials is attached to this report.) A State point of contact may also refer denials to the nearest field office. Special agents at the field offices verify conviction and prohibition information and conduct additional investigations. The FBI or the POC is notified if ATF determines that a person should not have been denied.

In a delayed denial case, the agent contacts the firearm purchaser and seizes or takes an abandonment of the firearm or coordinates a transfer of the firearm to a licensed dealer or to a third party who is not a prohibited person. In POC States, a retrieval may be handled by local law enforcement, a statewide firearms unit, or ATF, depending on jurisdiction over the dealer and the applicant.

In addition to the delayed denials, a small number of 2006 standard referrals potentially involved unlawful firearm possession. Field offices investigated a total of 2,600 unlawful possession cases that began in 2006. In about 30% of the cases the subject was found to not be prohibited, which is the same rate at which the FBI reversed NICS denials upon appeal in 2006.

A retrieval of a firearm (or firearms) by ATF from a prohibited person occurred in 1,480 (57%) of the unlawful possession cases. Firearm dispositions in these cases included 728 (28% of total cases) transferred to a non-prohibited third party, 620 (24%) returned to the dealer, 71 (3%) seized by ATF, and 61 (2%) abandoned by the transferee. The subject could not be located in only 72 (3%) cases. (Table 3.)

**Table 3. 2006 NICS denial cases involving unlawful firearm possession**

Outcome of ATF investigation	Delayed	Standard	All Cases	Percent
Total	2,490	110	2,600	100%
Retrieval of a firearm <sup>a</sup> by:				
Transfer to third party	718	10	728	28.0%
Return to firearms dealer	615	5	620	23.8%
Seizure by ATF	68	3	71	2.7%
Abandonment by transferee	60	1	61	2.3%
	1,461	19	1,480	56.9%
Subject not prohibited	763	30	793	30.5%
Firearm not transferred	125	59	184	7.1%
Unable to locate subject	71	1	72	2.8%
Given to local law enforcement	41	0	41	1.6%
Referred to other agency	28	0	28	1.1%
Other outcomes	1	1	2	0.1%

<sup>a</sup>A subject may have been in possession of more than one firearm.

### 3. Prosecutions by U.S. Attorneys

When an investigation is complete, the field office and the U.S. Attorney decide whether the case merits prosecution. A case that is not deemed appropriate for Federal prosecution may be referred to a State prosecutor. If the U.S. Attorney decides to prosecute, an arrest is made or a warrant is issued.

The field offices declined to refer 9,410 NICS denial cases for prosecution in 2006. The most common reasons for declinations were that Federal or State guidelines were not met (3,972 cases, 42%), there was no prosecutive merit (1,929 cases, 21%), or a closure by a supervisor (1,575 cases, 17%). (Table 4.)

**Table 4. 2006 NICS denial cases declined by ATF field offices**

Reason for case declination	Delayed	Percent	Standard	Percent	All cases	Percent
Total	2,807	100.0%	6,603	100.0%	9,410	100.0%
Federal / state guidelines not met	655	23.3%	3,317	50.2%	3,972	42.2%
No prosecutive merit	800	28.5%	1,129	17.1%	1,929	20.5%
Closed by supervisor	275	9.8%	1,300	19.7%	1,575	16.7%
Not a prohibited person	631	22.5%	226	3.4%	857	9.1%
No potential	428	15.2%	391	5.9%	819	8.7%
Referred to another agency	15	0.5%	234	3.5%	249	2.6%
Other reasons	3	0.1%	6	0.1%	9	0.1%

Note: The number of cases declined is obtained from NForce. On occasion the field office will close the case initially transferred from the Brady Operations Branch and open a case under a different number; therefore the number of prosecuted cases will seem low compared to the number of cases referred to the field.

Charges against 171 persons were referred for prosecution (see *Methodology*). A total of 273 charges were referred, with 242 charges (89%) based on subsections of the Gun Control Act, 18 U.S.C. 922. The most common charges referred were submitting falsified information when buying firearms (125 charges, 46%) and possession of a firearm by a convicted felon (51 charges, 19%). (Table 5.)

**Table 5. Charges in 2006 NICS denial cases referred for prosecution**

18 USC 922		Delayed	Standard	All charges <sup>a</sup>	Percent
Subsection	Charge definition				
	Total <sup>b</sup>	172	101	273	100.0%
(a)(6)	Falsified information when buying firearms	70	55	125	45.8%
(g)(1)	Possession of firearm by convicted felon	29	22	51	18.7%
(n)	Receive/ship/transport firearm after indictment	19	1	20	7.3%
(g)(9)	Possession of firearm after domestic abuse charge	17	3	20	7.3%
(g)(3)	Possession of firearm by drug user	9	2	11	4.0%
Other		11	4	15	5.5%
	Total 18 USC 922	155	87	242	88.6%
	Other statutes	17	14	31	11.4%

<sup>a</sup>In a small number of cases, two counts of a charge were filed. Thus, the total number of counts is slightly higher than the total number of charges.

<sup>b</sup>Six charges were for State offenses; the remainder were Federal charges.

Of the 273 charges referred, 99 (36%) had been declined by a U.S. Attorney as of October 24, 2007. A guilty plea was obtained on 70 charges (26%). Three charges (1%) resulted in guilty verdicts at trial. (Table 6.) A defendant in the Northern District of Oklahoma was found guilty on two of these charges and a defendant in the District of Maine was found guilty on the third charge. Forty-nine charges (18%) were dismissed after indictment. Reasons for dismissals were not specified in the records. However, it appears that many of these charges were dismissed in exchange for a defendant's plea of guilty to a different charge.

**Table 6. Judicial status of charges in 2006 NICS denial cases referred for prosecution**

Judicial status	Delayed	Standard	All charges	Percent
Total	172	101	273	100.0%
Declined by prosecutor	60	39	99	36.3%
Guilty plea by defendant	39	31	70	25.6%
Dismissed after indictment	30	19	49	17.9%
Pending action by prosecutor	23	6	29	10.6%
Indictment, information or complaint filed	17	4	21	7.7%
Guilty verdict at trial	2	1	3	1.1%
Pretrial diversion	0	1	1	0.4%
Unknown	1	0	1	0.4%

Of the 73 charges that resulted in a guilty plea or verdict, 28 (38%) were for falsifying information when buying firearms and 19 (26%) involved possession of a firearm by a convicted felon. Sixty-five charges (89%) were based on 18 U.S.C. 922.

**Table 7. Charges in guilty pleas and verdicts, 2006 NICS denial cases**

18 USC 922		Delayed	Standard	All charges	Percent
Subsection	Charge definition				
	Total	41	32	73	100.0%
(a)(6)	Falsified information when buying firearms	13	15	28	38.4%
(g)(1)	Possession of firearm by convicted felon	9	10	19	26.0%
(g)(9)	Possession of firearm after domestic abuse charge	8	0	8	11.0%
(n)	Receive/ship/transport firearm after indictment	7	0	7	9.6%
Other		2	1	3	4.1%
	Total 18 USC 922	39	26	65	89.0%
	Other statutes	2	6	8	11.0%

#### 4. Judicial District Summary

The District of Arizona had the highest number of unlawful possession investigations (187) and also the most case declinations (503). The Northern District of Indiana had the highest number of charges referred for prosecution (28) and also the most charges that resulted in a guilty plea or verdict (9). The nine guilty pleas in the Northern District of Indiana were obtained from nine separate defendants (See *Methodology*).

**Table 8. Judicial district summary, 2006 NICS denial cases**

Districts with the most unlawful possession cases

Arizona	187
South Carolina	160
Georgia Northern	140
Kansas	118
Louisiana Western	110

Districts with the most case declinations

Arizona	503
Texas Southern	440
Georgia Northern	427
South Carolina	396
Kentucky Eastern	372

Districts with the most charges referred for prosecution

Indiana Northern	28
Maine	20
Ohio Northern	17
Georgia Northern	14
South Carolina	11

Districts with the most charges that resulted in a guilty plea or verdict

Indiana Northern	9
Alabama Southern	6
Iowa Southern	4
Maine	4
Oklahoma	4
South Carolina	4
Wyoming	4

## **5. NICS Denial Cases as a Subset of ATF Cases and Weapon Offenses**

Very little data is available for 2006 on other types of firearms cases that could be compared to the NICS denial cases. However, it does seem clear that the NICS denial cases make up a small percentage of firearms cases prosecuted by U.S. Attorneys. In fiscal year 2005, ATF initiated 28,526 firearms investigations and ATF-led investigations resulted in the conviction of 8,353 defendants for firearms-related offenses (*ATF 2005 Annual Report*, [http://www.atf.treas.gov/pub/gen\\_pub/2005annual\\_report.pdf](http://www.atf.treas.gov/pub/gen_pub/2005annual_report.pdf)). In fiscal year 2006, the Department of Justice prosecuted 10,425 Federal firearms cases against 12,479 defendants (*Project Safe Neighborhoods Fact Sheet*, [http://www.psn.gov/Training/atlanta\\_conf07/07sep17-factsheet.html](http://www.psn.gov/Training/atlanta_conf07/07sep17-factsheet.html)).

## **6. Methodology**

The Brady Operations Branch provided REJIS with statistics on denied person cases received from the FBI's NICS Section and referred to ATF field offices after screening. Brady Operations obtained records for REJIS on field office and U.S. Attorney processing from ATF's case management system (NForce). A total of 9,432 cases were referred by Brady Operations to field offices during 2006. The records received from the case management system contained 9,961 separate NICS numbers and probably include some cases that were opened in 2005. The records reflect activity up to October 24, 2007.

No personal identifiers were included in the records. Cases or charges could only be distinguished by NICS numbers. In calculating the number of persons referred for prosecution and the number of persons convicted, it was assumed that each separate NICS number represented one person. However, it is possible that a person could have more than one NICS number.

### **Additional Contributors**

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