

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

THE CITY OF NEW YORK; THE CITY OF
PHILADELPHIA; and THE CITY AND
COUNTY OF SAN FRANCISCO;

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF
DEFENSE; THE UNITED STATES
DEPARTMENT OF THE AIR FORCE; THE
UNITED STATES DEPARTMENT OF THE
NAVY; THE UNITED STATES
DEPARTMENT OF THE ARMY; JAMES N.
MATTIS, in his official capacity as United
States Secretary of Defense; HEATHER A.
WILSON, in her official capacity as United
States Secretary of the Air Force; RICHARD V.
SPENCER, in his official capacity as United
States Secretary of the Navy; DR. MARK T.
ESPER, in his official capacity as United States
Secretary of the Army; DERMOT F.
O'REILLY, in his official capacity as Director
of the Defense Criminal Investigative Service;
COLONEL KIRK B. STABLER, in his official
capacity as Commander of the Air Force Office
of Special Investigations; ANDREW L.
TRAVER, in his official capacity as Director of
the Naval Criminal Investigative Service;
MAJOR GENERAL DAVID P. GLASER, in
his official capacity as Commanding General of
the United States Army Criminal Investigation
Command; and REAR ADMIRAL RICHARD
A. BROWN, in his official capacity as
Commander of the Navy Personnel Command
and Deputy Chief of Naval Personnel;

Defendants.

Civil Action No. 1:17-cv-01464

COMPLAINT

The City of New York, the City of Philadelphia and the City and County of San Francisco (collectively, the “Plaintiffs”), for their Complaint against the United States Department of Defense (“DoD”); the United States Department of the Air Force (the “Air Force”); the United States Department of the Navy (the “Navy”); the United States Department of the Army (the “Army”); James N. Mattis, in his official capacity as United States Secretary of Defense; Heather A. Wilson, in her official capacity as United States Secretary of the Air Force; Richard V. Spencer, in his official capacity as United States Secretary of the Navy; Dr. Mark T. Esper, in his official capacity as United States Secretary of the Army; Dermot F. O’Reilly, in his official capacity as Director of the Defense Criminal Investigative Service; Colonel Kirk B. Stabler, in his official capacity as Commander of the Air Force Office of Special Investigations; Andrew L. Traver, in his official capacity as Director of the Naval Criminal Investigative Service; Major General David P. Glaser, in his official capacity as the Commanding General of the Army Criminal Investigation Command; and Rear Admiral Richard A. Brown, in his official capacity as Commander of the Navy Personnel Command and Deputy Chief of Naval Personnel (collectively, the “Defendants”), state as follows:

NATURE OF THE ACTION

1. Just over one month ago, twenty-six innocent people were murdered and twenty others wounded, in a Texas church in a mass shooting that could, and should, have been prevented. As detailed below, had Defendants simply followed the law, that shooter never should have been able to purchase the weapon he used. This suit—brought by three municipalities—seeks narrowly-tailored injunctive relief to make certain that never happens again.

2. In 2012, Devin P. Kelley, then an Air Force Airman First Class, was court-martialed and convicted of assault against his wife and young stepson. He was sentenced to twelve months' confinement in a Navy brig in San Diego, California, and given a bad-conduct discharge.

3. That conviction made it illegal for Kelley to purchase or possess a firearm. And it should have blocked him from ever again purchasing any gun. But Kelley was still able to purchase an assault-style rifle as a direct result of Defendants' admitted, systemic and long-standing failure to comply with the law. Kelley then used that weapon on November 5, 2017, to massacre twenty-six people and wound twenty more.

4. More particularly, Defendants failed to comply with their unambiguous statutory obligation to report to the Federal Bureau of Investigation ("FBI") information about members of the Military Services, like Kelley, previously convicted of crimes that disqualify them from firearms possession.

5. DoD's own Inspector General admitted to the U.S. Senate, in testimony just three weeks ago, that years of written warnings from his office about this serious problem have long gone unheeded. "[T]he military services still do not consistently report . . . final disposition reports as required," he testified.¹

6. The injunction Plaintiffs now seek is intended to prevent such senseless carnage from ever again being inflicted by current or former members of the military who should be

¹ *Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS): Hearing before the Senate Judiciary Comm.*, 115th Cong. (2017) (testimony of Glenn A. Fine), <https://www.judiciary.senate.gov/meetings/firearm-accessory-regulation-and-enforcing-federal-and-state-reporting-to-the-national-instant-criminal-background-check-system-nics> ("Fine Testimony"), at 1:08:17.

blocked from acquiring guns or licenses to carry guns. No new laws are required to achieve that goal. Instead, this Court need only grant Plaintiffs' request to compel Defendants to diligently implement, and consistently apply, the unambiguous laws that have been on the books for decades. As Senator John Cornyn (R-Tex.) recently observed, achieving this life-saving goal is "as simple as just getting [Defendants] to do what they're already required to do,"² and "[t]here simply is no excuse for not enforcing the current law."³

7. While Attorney General Sessions has now launched an investigation of this issue, the problem here is not with the Attorney General. His predecessors long ago imposed the necessary legal obligations on these Defendants. The problem here is that Defendants have not met, and are still not meeting, their long-standing legal obligations. And the Attorney General—a coordinate member of the Executive Branch—lacks the power to remedy Defendants' non-compliance.

8. This suit therefore seeks judicial intervention—i.e., intervention by an independent and apolitical branch of government, fully familiar with monitoring, and maintaining, compliance with the law. This Court clearly has the authority and the jurisdiction required to remedy these long-standing wrongs. The recent U.S. Senate testimony by the DoD Inspector General that the military services have failed to take his office's recommendations "as

² Karoun Demirjian, *Gun-Control Rivals Team Up on Bill to Fix Background-Check Database*, Washington Post, Nov. 15, 2017, https://www.washingtonpost.com/powerpost/gun-control-rivals-team-up-on-bill-to-fix-background-check-database/2017/11/15/47b2ee84-ca57-11e7-8321-481fd63f174d_story.html?utm_term=.1cb37359da53.

³ *Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS): Hearing before the Senate Judiciary Comm.*, 115th Cong. (2017), <https://www.judiciary.senate.gov/meetings/firearm-accessory-regulation-and-enforcing-federal-and-state-reporting-to-the-national-instant-criminal-background-check-system-nics>, at 42:16.

seriously as they should have,”⁴ and likewise long failed “to take appropriate action to follow up on those recommendations,”⁵ makes the need for such judicial intervention clear.

9. By way of background, the National Crime Information Center (“NCIC”) is one of three databases that comprise the National Instant Criminal Background Check System (“NICS”) for gun sales. NICS was created decades ago to keep guns out of dangerous hands. As Attorney General Sessions recently observed, “NICS is critically important to protecting the American public from firearms-related violence.”⁶ The National Rifle Association agrees, applauding “efforts to ensure that the records of prohibited individuals are entered into NICS.”⁷

10. A critical component of NICS is the statutory direction from Congress to, among others, DoD, that DoD and its constituent departments regularly report specified information regarding the criminal history of members of the Military Services for inclusion in the NCIC database.

11. DoD’s own Inspector General’s reports clearly document, however, that, as far back as 1997, and continuing through the present, Defendants and their predecessors have systematically and knowingly failed to fulfill that statutory obligation, with the Kelley case just the latest manifestation of that systemic failure.

⁴ Fine Testimony, *supra* note 1, at 1:20:33.

⁵ *Id.* at 2:11:59.

⁶ Memorandum from the Attorney Gen. to the Dir. of the Fed. Bureau of Investigations and the Acting Dir. of the Bureau of Alcohol, Tobacco, Firearms and Explosives (Nov. 22, 2017), https://www.justice.gov/opa/press-release/file/1013606/download?utm_medium=email&utm_source=govdelivery (“Attorney Gen. Memo.”).

⁷ *Second Amendment, Domestic Violence, Law Enforcement Groups Support the Fix NICS Act*, <https://www.cornyn.senate.gov/content/news/second-amendment-domestic-violence-law-enforcement-groups-support-fix-nics-act>.

12. In 1997, and then again in 2015, the DoD Inspector General expressly warned Defendants and their predecessors, in writing, that they had serious compliance problems. The Inspector General told the Air Force, for example, just two years ago, that it had failed to report 32% of its disqualifying conviction dispositions to the FBI. Those were *all* dispositions that undeniably disqualified the individuals in question, like Devin Kelley, from ever purchasing a firearm.

13. Only three weeks ago, the DoD Inspector General released yet another report, dated December 4, 2017, detailing yet again Defendants' non-compliance with their reporting obligations. Across all the service branches, he reported, fully 31% of all final disposition reports were never provided to the FBI during the period from January 1, 2015 to December 31, 2016.

14. The 1997, 2015 and 2017 reports by the DoD Inspector General are far from secret documents. To the contrary, they were widely distributed both inside and outside of DoD, including to Congress, and are also available to the public.⁸

15. Yet despite those clear warnings, and in direct contravention of their official duties, Defendants still failed to repair this vital reporting system. And, today, we mourn the loss of twenty-six innocent Americans from Texas that could have been prevented.

⁸ The 1997 Report is available at <https://media.defense.gov/1997/Feb/10/2001715391/-1/-1/1/crimhist.pdf>.

The 2015 Report is available at <https://media.defense.gov/2015/Feb/12/2001713470/-1/-1/1/DODIG-2015-081.pdf>.

The 2017 Report is available at <https://media.defense.gov/2017/Dec/05/2001852278/-1/-1/1/DODIG-2018-035.PDF>.

16. The Executive and Legislative branches have had their chances to solve this long-standing problem. Both failed to do so. Intervention by this Court is therefore now both necessary and appropriate.

17. The Plaintiffs here are all past, present and future regular users of NICS or similar state databases that incorporate NICS data. In conducting background checks that directly or indirectly access NICS, Plaintiffs regularly access the records in, and rely upon the accuracy and completeness of, the NCIC database.

18. Plaintiffs are therefore each directly impacted by Defendants' systemic and long-standing failures to report disqualifying conviction dispositions, because they each continuously rely upon the accuracy and completeness of the NCIC database. Yet, as Attorney General Sessions recently observed, NICS is "only as reliable and robust as the information that federal, state, local and tribal government entities make available to it."⁹

19. Because of Defendants' past and continuing failure to provide mandated records to the background check system, an unknown number of members and former members of the Military Services—whose past convictions legally bar them from buying guns—are able to pass background checks they should fail. Those individuals can then purchase and/or carry guns they should be prevented from obtaining or carrying, potentially exposing themselves and others to substantial risk of injury.

⁹ Attorney Gen. Memo., supra note 6.

20. The irreparable injury threatened as a direct result is clear. As the DoD Inspector General recently underscored in his 2017 Report, “[a]ny missing . . . final disposition report can have serious, even tragic, consequences.”¹⁰

21. Plaintiffs therefore, together, now seek immediate injunctive relief to compel Defendants to repair this broken system, and to cure once and for all the potentially deadly gaps in the NCIC database for members or former members of the Military Services.

PARTIES

Plaintiff the City of New York

22. Plaintiff the City of New York is a municipal corporation which, acting by and through its New York Police Department (the “NYPD”), regularly conducts firearm background and criminal history checks that include searches of NICS, including NCIC and the Interstate Identification Index (“III”) database.

23. The NYPD is required, under N.Y. Penal Law § 400.00 and 38 R.C.N.Y. ch. 3, 5, to process applications for (a) permits to possess rifles or shotguns (“long gun permits”), and (b) licenses to possess or carry handguns (“handgun licenses”).

24. Prior to issuing long gun permits or handgun licenses, the NYPD conducts a background check on a permit or license applicant that includes a search in NICS, specifically NCIC and III, to ensure that the system contains no records indicating that the applicant is not allowed to possess or carry a firearm.

25. In conducting such background checks on long gun permit and handgun license applicants, the NYPD initiates a check of NICS, specifically NCIC and III, by submitting

¹⁰ Inspector Gen., U.S. Dep’t of Defense, Evaluation of Fingerprint Card and Final Disposition Report Submissions by Military Service Law Enforcement Organizations 6 (Dec. 4, 2017) (“2017 Report”).

applicants' fingerprints and other identifying information to the online portal of the New York State Division of Criminal Justice Services, which in turn queries information maintained by the Criminal Justice Information Services Division ("CJIS") of the FBI, to verify whether an applicant is legally permitted to possess a firearm. The NYPD will not issue a long gun permit or handgun license unless an applicant passes that background check and meets the other legal requirements of the City and State of New York.

26. In addition to conducting background checks in conjunction with the issuance of long gun permits and handgun licenses, the NYPD requires an NICS check in conjunction with its administration of New York City's handgun Purchase Authorization system. Before a handgun license holder may purchase a handgun from a federally-licensed gun dealer (a Federal Firearms Licensee ("FFL")), the license holder must obtain a handgun Purchase Authorization, valid for thirty days, from the NYPD. Within that thirty-day period, the license holder may purchase a handgun by presenting the Purchase Authorization to the FFL, having the FFL conduct an NICS check, and having the FFL fill out the Purchase Authorization and record that the license holder passed the NICS check. The license holder must then present the completed Purchase Authorization and firearm for inspection by the NYPD. If the Purchase Authorization confirms that the license holder has passed an NICS check at the point of purchase, the NYPD will record the handgun's make, model, caliber, and serial number on the license holder's handgun license. In this manner, the NYPD requires an NICS check at the point of purchase, and relies on the accuracy and completeness of that NICS check, in implementing the administrative process that governs legal handgun possession in New York City.

27. The NYPD also accesses NICS, specifically NCIC and III, through the New York State Division of Criminal Justice Services' online portal, to run additional background checks to determine whether or not to return firearms that it has seized to firearms licensees.

28. In performing these governmental responsibilities and essential activities with which it is tasked, the NYPD regularly accesses NICS, including the NCIC and III databases. In doing so, the NYPD necessarily relies upon the integrity and completeness of NICS, including the NCIC and III databases.

Plaintiff the City of Philadelphia

29. Plaintiff the City of Philadelphia is a municipal corporation which, acting by and through its Philadelphia Police Department (the "PPD"), regularly conducts background checks that include searches of NICS. Pursuant to Pennsylvania law, 18 P.S. § 6019, when residents of Philadelphia apply for a license to carry a firearm, they do so by making an application with the PPD.

30. The PPD is required by statute to process applications for licenses to carry firearms. Prior to issuing such licenses, the PPD is required to conduct a background check on the applicant to determine whether the applicant is lawfully permitted to carry a firearm in the City of Philadelphia.

31. In conducting such background checks, the PPD initiates, through the Pennsylvania Instant Check System ("PICS") administered by the Pennsylvania State Police, a query of the NICS databases, including NCIC. If that search reveals that the system contains no records indicating that the applicant is not allowed to possess or carry a firearm, PPD will continue to process the application. If such records are found, however, the application will be denied.

32. When continued processing of the application is warranted, PPD conducts further background investigation in accordance with Pennsylvania law. That further investigation includes receipt of reports from at least one other database into which Defendants have failed to properly report all records. Upon completion of the application process, PPD then makes a determination of whether the carry license applied for will issue.

33. In performing this governmental responsibility and essential activity with which it is tasked, the PPD regularly, through PICS, accesses NICS, including the NCIC database. In doing so, the PPD necessarily relies upon the integrity and completeness of NICS, including the NCIC database.

Plaintiff the City and County of San Francisco

34. Plaintiff the City and County of San Francisco is a municipal corporation which, acting by and through its San Francisco Police Department (the “SFPD”), regularly relies on background checks conducted through the California Law Enforcement Telecommunication System (“CLETS”). CLETS includes national data from NICS about people who are prohibited from possessing firearms.

35. The SFPD is required by Cal. Penal Code sections 13730 and 18250 to seize firearms at the scene of domestic violence incidents. Prior to releasing guns seized in domestic violence or other incidents, the SFPD is required to determine whether the potential recipient of the firearm is lawfully permitted to possess firearms. This is typically done through the process outlined in California Penal Code sections 33850-33865. Under that process, the potential recipient of the firearm applies to the California Department of Justice for a determination of whether he or she is eligible to possess firearms. The California Department of Justice then performs a background check on the potential recipient using CLETS, which includes data from

NICS. If the CLETS system shows that the potential recipient is not prohibited from possessing firearms, the California Department of Justice is required to issue written notice to that effect. California Penal Code section 33865(c). This notice is known as a “gold seal letter,” and is valid for thirty days after the State issues it.

36. When a person timely presents a gold seal letter to the SFPD and requests the return of a firearm, the SFPD conducts additional background and warrant checks to update the information in the gold seal letter. As part of these checks, the SFPD again accesses CLETS to determine whether the person is prohibited from possessing a firearm.

37. The failure of NICS to include accurate data on people who are ineligible to possess firearms due to a disqualifying criminal conviction or dishonorable discharge while serving in the military creates false positive results in CLETS, potentially leading to the return of firearms to people who are legally prohibited from possessing them.

38. In performing this governmental responsibility and essential activity with which it is tasked, the SFPD regularly indirectly accesses NICS, including the NCIC database. In doing so, the SFPD necessarily relies upon the integrity and completeness of NICS, including the NCIC database.

The Entity Defendants

39. Defendant DoD is an executive branch department of the United States government, charged with providing the military forces needed to prosecute and deter war, and with protecting the security of the United States. Defendant DoD is headquartered at the Pentagon in Arlington, Virginia, within this judicial district.

40. Defendant Air Force is the air and space military department of Defendant DoD, and is responsible for the administration and operation of the United States Air Force. Defendant Air Force is headquartered at the Pentagon in Arlington, Virginia, within this judicial district.

41. Defendant Navy is the maritime military department of Defendant DoD, and is responsible for the administration and operation of the United States Navy and the United States Marine Corps. Defendant Navy is headquartered at the Pentagon in Arlington, Virginia, within this judicial district.

42. Defendant Army is the land-based military department of Defendant DoD, and is responsible for the administration and operation of the United States Army. Defendant Army is headquartered at the Pentagon in Arlington, Virginia, within this judicial district.

The Individual Defendants

43. Defendant James N. Mattis is the United States Secretary of Defense. He is the principal defense policy advisor to the President of the United States, and is the leader of Defendant DoD, exercising authority, direction and control over Defendant DoD. Upon information and belief, Defendant Mattis is based at the Pentagon in Arlington, Virginia, within this judicial district.

44. Defendant Heather A. Wilson is the United States Secretary of the Air Force. She is the leader of Defendant Air Force, and exercises authority, direction and control over Defendant Air Force. Upon information and belief, Defendant Wilson is based at the Pentagon in Arlington, Virginia, within this judicial district.

45. Defendant Richard V. Spencer is the United States Secretary of the Navy. He is the leader of Defendant Navy, and exercises authority, direction and control over Defendant

Navy. Upon information and belief, Defendant Spencer is based at the Pentagon in Arlington, Virginia, within this judicial district.

46. Defendant Dr. Mark T. Esper is the United States Secretary of the Army. He is the leader of Defendant Army, and exercises authority, direction and control over Defendant Army. Upon information and belief, Defendant Esper is based at the Pentagon in Arlington, Virginia, within this judicial district.

47. Defendant Dermot F. O'Reilly is the Deputy Inspector General for Investigations and Director of the Defense Criminal Investigative Service of Defendant DoD. He oversees the Defense Criminal Investigative Service, which is the defense criminal investigative organization of Defendant DoD. Upon information and belief, Defendant O'Reilly is based at the Pentagon in Arlington, Virginia, within this judicial district.

48. Defendant Colonel Kirk B. Stabler is the Commander of the Air Force Office of Special Investigations. He oversees the Air Force Office of Special Investigations, which is the defense criminal investigative organization of Defendant Air Force. Upon information and belief, Defendant Stabler is based in Quantico, Virginia, within this judicial district.

49. Defendant Andrew L. Traver is the Director of the Naval Criminal Investigative Service. He oversees the Naval Criminal Investigative Service, which is the defense criminal investigative organization of Defendant Navy. Upon information and belief, Defendant Traver is based in Quantico, Virginia, within this judicial district.

50. Defendant Major General David P. Glaser is the Provost Marshal General of the Army and Commanding General of the United States Army Criminal Investigation Command. He oversees the Army Criminal Investigation Command, which is the defense criminal

investigative organization of Defendant Army. Upon information and belief, Defendant Glaser is based in Quantico, Virginia, within this judicial district.

51. Defendant Rear Admiral Richard A. Brown is the Commander, Navy Personnel Command/Deputy Chief of Naval Personnel. He oversees the Navy Corrections and Programs of Defendant Navy. Upon information and belief, Defendant Brown is based in Millington, Tennessee.

52. All of the individual Defendants are sued only in their official capacities.

JURISDICTION AND VENUE

53. This court has jurisdiction over these claims under 28 U.S.C. § 1331.

54. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and 1391(e), because acts and omissions described in this Complaint occurred in this judicial district, because the entity defendants are headquartered in this judicial district, and because the individual defendants perform some or all of their official duties in this judicial district.

FACTUAL ALLEGATIONS

NICS

55. The Department of Justice established NICS pursuant to 34 U.S.C. § 40901, as a national background check system designed to keep guns out of dangerous hands. NICS is comprised of three centralized databases maintained by the FBI's CJIS—the NICS Index, the III, and NCIC—to which courts, the military and other entities submit records of criminal activity that disqualifies individuals from possessing or carrying firearms.

56. 18 U.S.C. § 922 prohibits the sale or disposition of firearms to, and possession of firearms by, among others, people who have been convicted of certain criminal offenses or who have been dishonorably discharged from the Armed Forces.

57. NICS provides an electronic means for municipalities to obtain information about whether a permit/license applicant is legally prohibited from receiving a permit/license to possess or carry a gun, and about whether a person who has requested the return of a gun seized or otherwise possessed by law enforcement is legally entitled to possess that gun.

58. Every year, background searches through NICS prevent more than 100,000 transfers of guns to individuals who are legally prohibited from owning or possessing a gun and who attempt to purchase firearms from federally licensed dealers.¹¹

59. Each year, the accuracy and completeness of the information in NICS becomes increasingly important. As Douglas E. Lindquist, the Assistant Director of CJIS, noted in his December 6, 2017, Senate testimony: “Since 2010, the NICS has experienced a steady increase in the volume of background checks. The last three years have been record-setting and this past ‘Black Friday’ was the highest volume day in the NICS [’] history.”¹²

60. Pursuant to 34 U.S.C. § 40901(e)(1), Congress mandated that any Federal department or agency that has a record demonstrating that a person falls within one of the categories of persons to whom the sale or disposition of firearms is prohibited, must provide that information to the Attorney General “not less frequently than quarterly,” and as required by the Attorney General, “as is necessary to enable the system to operate.”

61. In 1987, the Inspector General of the Department of Defense issued Criminal Investigations Policy Memorandum Number (CPM No. 10), “Criminal History Data Reporting

¹¹ Jennifer Karberg et al., “Background Checks for Firearm Transfers, 2013-14—Statistical Tables,” U.S. Dep’t of Justice: Bureau of Justice Statistics, June 2016, <https://www.bjs.gov/content/pub/pdf/bcft1314st.pdf>.

¹² *Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS): Hearing before the Senate Judiciary Comm.*, 115th Cong. (2017) (statement of Douglas E. Lindquist), <https://www.judiciary.senate.gov/imo/media/doc/Lindquist%20Testimony.pdf>.

Requirements,” to establish policies and procedures for the defense criminal investigative organizations (“DCIOs”)¹³ to report offender criminal history data to the FBI.

62. DoD Instruction 5505.11, originally issued in 1998, in turn, mandates that DCIOs and other DoD law enforcement organizations¹⁴ submit to the FBI’s CJIS Division “offender criminal history data for all [m]embers of the Military Services investigated for offenses listed in Enclosure 2 of this instruction by DCIOs or other DoD law enforcement organizations.”¹⁵

Enclosure 2 of DoD Instruction 5505.11 includes the following offenses: assault, sexual assault, rape, manslaughter, murder, larceny, robbery and burglary.

63. Defendants DoD, Air Force, Navy and Army are each therefore obligated by law to report certain offender criminal history data for members of the Military Services for inclusion in NICS (and, more specifically, the NCIC database).

64. Defendants Mattis, Wilson, Spencer, Esper, O’Reilly, Stabler, Traver, Glaser and Brown are each required, in their official capacities, to oversee the compliance by Defendants DoD, Air Force, Navy and/or Army with these reporting obligations.

Devin P. Kelley

65. In 2012, a court martial convicted Devin P. Kelley, an Airman First Class serving at Holloman Air Force base in New Mexico, of assault on his wife and stepson. Kelley had pled

¹³ Defense criminal investigative organizations include the Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, and the Defense Criminal Investigative Services.

¹⁴ DoD law enforcement organizations include “an agency or activity, or any subdivision thereof, chartered and empowered to enforce the criminal laws of the United States on DoD property or during DoD functions anywhere in the world. A traditional DoD law enforcement organization that employs recognized law enforcement officers are those organizations designated for the security or protection of DoD property, personnel, or places that are subject to the jurisdiction, administration, or in the custody of the DoD.” Dep’t of Defense, Instruction 5505.11, at 16-17, <https://www.hsdl.org/?abstract&did=799999>.

¹⁵ *Id.* at 1-2.

guilty to two counts of domestic assault based on allegations of, on multiple occasions, striking, choking, kicking and pulling the hair of his wife and of striking a child under the age of sixteen years “on the head and body with a force likely to produce death or grievous bodily harm.”¹⁶

66. Kelley’s court-martial order left no doubt that his conviction prohibited him from possessing guns, identifying it—in bold, oversized type—as a “Crime of Domestic Violence. 18 U.S.C. § 922(g)(9).”¹⁷

67. A general court martial sentenced Kelley to twelve months’ confinement at a Navy brig in San Diego and a bad-conduct discharge. Kelley served his sentence and then left the Air Force in 2014.

68. Because the crime for which Kelley was convicted was punishable by imprisonment for a term exceeding one year, and also because he was convicted of a crime of domestic violence that met the standard set forth in 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33), the DoD, Air Force and Navy were obligated to report Kelley’s criminal history for inclusion in the NCIC database, so that he would be prevented from passing a background check and purchasing a firearm.

69. The DoD, Air Force and Navy admittedly failed to report Kelley’s criminal conviction to the FBI for inclusion in the NCIC database.¹⁸ Defendant Wilson has acknowledged

¹⁶ Kelley’s court documents are available at <https://apps.washingtonpost.com/g/documents/national/read-devin-p-kelleys-assault-and-domestic-violence-court-documents/2617/>.

¹⁷ *Id.*

¹⁸ Alex Horton, *The Air Force Says It Failed to Follow Procedures, Allowing Texas Church Shooter to Obtain Firearms*, Washington Post, Nov. 7, 2017, https://www.washingtonpost.com/news/checkpoint/wp/2017/11/06/the-air-force-says-it-failed-to-follow-procedures-allowing-texas-church-shooter-to-obtain-firearms/?utm_term=.eab27e5a1e14.

that, with respect to Kelley, it is “pretty clear that the check list [the Air Force] used was not followed by the local office” in New Mexico, and that Kelley’s records “should have been” included in NICS.¹⁹ In testimony before the Senate, Defendant Wilson “confirmed that [the] Air Force Office of Special Investigations (AFOSI) and Security Forces investigators failed to report Devin Kelley’s criminal history to the Federal Bureau of Investigation (FBI) for inclusion in their criminal history database.”²⁰

70. Upon information and belief, the Navy’s instruction applicable to Navy confinement facilities inexplicably provided that the confinement facility would *not* report information for inclusion in the NCIC database.

71. Upon information and belief, in or about April 2016, Kelley purchased the Ruger AR-556 rifle he used in the Texas church shooting from a licensed firearms dealer in San Antonio, Texas.

72. Upon information and belief, the licensed firearms dealer who sold Kelley that Ruger AR-556 rifle submitted a request for a background check through NICS, including the NCIC database, but that background check identified no disqualifying records for Kelley.

73. Had the DoD, Air Force and/or Navy complied with their reporting obligations, Kelley’s records would have appeared in NICS, and Kelley would not have passed that

¹⁹ Kathryn Watson, *Air Force Secretary Says Texas Shooter Was a “Serious Problem” in the Air Force*, CBS News, Nov. 7, 2017, <https://www.cbsnews.com/news/air-force-secretary-says-texas-shooter-was-a-serious-problem-in-the-air-force/>.

²⁰ *Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS): Hearing before the Senate Judiciary Comm.*, 115th Cong. (2017) (statement of the Hon. Heather Wilson), <https://www.judiciary.senate.gov/imo/media/doc/Wilson%20Testimony.pdf> (“Wilson Testimony”).

background check. The licensed firearm dealer would then have been prohibited from selling him the Ruger AR-556 rifle, pursuant to 18 U.S.C. §§ 922(d)(1) and (9).

74. But instead Kelley was able to purchase that Ruger AR-556 rifle and, on November 5, 2017, he used it to kill twenty-six people and injure twenty others at the First Baptist Church in Sutherland Springs, Texas.

Defendants' Long-standing Failure to Comply With Their Statutory Reporting Obligations

75. The failure of the DoD, Air Force, Navy and Army to comply with their obligations to report criminal conviction information goes far beyond the Kelley case. The DoD Inspector General has warned Defendants and their predecessors for at least two decades about their long-standing and systemic failure to comply with the law requiring them to report criminal conviction information, “repeatedly [finding] deficiencies with military services’ submission of . . . final distribution reports and other criminal history information to the FBI.”²¹

76. Indeed, as early as 1997, the DoD Inspector General evaluated compliance by the Air Force, Navy and Army with the criminal history data reporting requirements, and published the results of that evaluation on February 10, 1997 (the “1997 Report”). The 1997 Report stated that, over an eighteen-month period, the Air Force had failed to submit final case disposition reports in approximately 50% of its cases; the Navy failed to submit final disposition reports in approximately 94% of its cases; and the Army failed to submit final case disposition reports in approximately 79% of its cases.²²

77. In or about 2015, the DoD Inspector General again evaluated compliance by the Air Force, Navy and Marine Corps with the criminal history data reporting requirements, and

²¹ Fine Testimony, *supra* note 1, at 1:10:15.

²² Inspector Gen., Dep’t of Defense, Evaluation of Department of Defense Compliance with Criminal History Data Reporting Requirements 4, 20 (Feb. 10, 1997).

published the results of that evaluation on February 12, 2015 (the “2015 Report”). The 2015 Report did not include information about the Army’s compliance with its requirement to submit final disposition reports due to “data validation limits.”²³

78. The 2015 Report stated that, for convictions between June 1, 2010 and October 31, 2012, the Air Force still failed to submit final disposition reports in approximately 32% of its cases, the Navy still failed to submit final disposition reports in approximately 25% of its cases, and the Marine Corps failed to submit final disposition reports in approximately 33% of its cases.²⁴

79. On November 15, 2017, General Mark Milley, the Army’s Chief of Staff and top General, admitted that the Army likewise failed to alert the FBI of its service members’ criminal history in a “significant” amount of cases—estimating the percentages of unreported criminal dispositions by the Army to be between 10% and 20%—and acknowledged that reporting failures is “not just an Air Force problem. This is a problem across all the services where we have gaps in reporting criminal activity of people in the service.”²⁵

80. On December 4, 2017, the DoD Inspector General released a third report, evaluating compliance by the Air Force, Navy, Army and Marine Corps with their criminal history data reporting requirements (the “2017 Report”). The 2017 Report stated that, for convictions between January 1, 2015 and December 31, 2016, the Air Force failed to submit final disposition reports in approximately 14% of its cases, the Navy failed to submit final

²³ Inspector Gen., Dep’t of Defense, Evaluation of Department of Defense Compliance with Criminal History Data Reporting Requirements i (Feb. 12, 2015).

²⁴ *Id.* at 7-8.

²⁵ *Army Acknowledges Failures to Report Crime Data to FBI After Texas Shooting*, CBS News, Nov. 15, 2017, <https://www.cbsnews.com/news/army-acknowledges-failures-to-report-crime-data-to-fbi-after-texas-shooting/>.

disposition reports in approximately 36% of its cases (an increase from the 2015 Report), the Army failed to submit final disposition reports in approximately 41% of its cases (far higher than the Army's Chief of Staff estimated just three weeks earlier), and the Marines Corps failed to submit final disposition reports in approximately 36% of its cases.²⁶

81. Notwithstanding these multiple DoD internal reviews revealing long-standing and systemic failures by the DoD, Air Force, Navy, Army and Marine Corps to comply with their criminal history reporting obligations, all Defendants have failed to cure those systemic problems.

82. According to the DoD Inspector General, Defendants' failure to comply with their criminal history reporting obligations has persisted for so long because they simply "didn't take [his office's] recommendations as seriously as they should have."²⁷

83. As admitted by Defendant Wilson in her December 6, 2017, Senate testimony, "[a]lthough some corrective measures were implemented after the [2015 Report], particularly by Air Force [Office of Special Investigations], the corrections made were not retroactive and current data from this year shows that we still are not reporting all offender criminal history data as required."²⁸ Defendant Wilson further admitted that actions taken to remedy prior failures "were insufficient," and that "[o]ne of the things that was not done was a complete retroactive review . . . to ensure that previous cases that were not reported were properly reported."²⁹

²⁶ 2017 Report, *supra* note 10, at i.

²⁷ Fine Testimony, *supra* note 1, at 1:20:33.

²⁸ Wilson Testimony, *supra* note 20.

²⁹ *Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS): Hearing before the Senate Judiciary Comm., 115th Cong. (2017) (testimony of Heater A. Wilson),*

84. Defendants' admitted failure to comply with their obligations at law have left the public broadly exposed to the risk of further gun sales, the issuance of gun carry permits/licenses, and the return of guns to disqualified individuals, who can then become, in effect, ticking human time-bombs.

Plaintiffs Regularly Rely Upon Defendants' Compliance With Their Statutory Reporting Obligations

85. Plaintiffs each have governmental responsibilities, and conduct essential governmental activities, that depend upon the integrity and completeness of NICS.

86. Through this suit, Plaintiffs seek to follow their respective laws and protect their ongoing interests in, and their ongoing ability to perform, these governmental responsibilities and essential activities, which, in turn, promote public safety and keep guns away from those who are legally prohibited from possessing and/or carrying them under long-standing law.

87. Gaps in NICS directly interfere with Plaintiffs' ability to perform their governmental responsibilities and essential activities.

88. Defendants' long-standing and systemic failures to comply with their statutory criminal history reporting obligations interfere directly and specifically with the Plaintiffs' governmental responsibilities to run effective background checks on applicants seeking to possess, carry and/or retrieve firearms, and to issue permits/licenses and/or return firearms only to those eligible to receive them.

89. As a result, upon information and belief, Plaintiffs may have unwittingly issued permits or licenses to possess and/or carry a firearm; may have unwittingly returned firearms to individuals who should not have received them; and/or will continue to do so in the future,

<https://www.judiciary.senate.gov/meetings/firearm-accessory-regulation-and-enforcing-federal-and-state-reporting-to-the-national-instant-criminal-background-check-system-nics>, at 57:50.

because of Defendants' long-standing and ongoing systemic failures to comply with their reporting obligations.

90. Ensuring that all individuals with disqualifying convictions or discharges during their military service are indeed included in NICS will redress the injury that Plaintiffs are currently suffering and prevent unqualified individuals from acquiring guns or having a permit or license to carry guns in the future.

91. Until and unless Defendants consistently comply with their statutory reporting obligations, each passing day creates further opportunities for dangerous individuals who should be, but are not, blocked from purchasing and/or carrying firearms, to acquire those weapons and use them to commit deadly crimes.

COUNT I

(Relief Under Administrative Procedure Act, 5 U.S.C. § 706(1))

92. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-91 as if set forth fully herein.

93. 5 U.S.C. § 706(1) authorizes a Federal Court to "compel agency action unlawfully withheld or unreasonably delayed."

94. Agency actions reviewable under 5 U.S.C. § 706(1) include an agency's failure to take a discrete agency action that the agency is required by law to take.

95. Pursuant to 34 U.S.C. § 40901(e)(1), any Federal department or agency that has a record demonstrating that a person falls within one of the categories for whom receipt of a firearm is prohibited under 18 U.S.C. § 922(g) or (n), must provide that information to the Attorney General "not less frequently than quarterly," and as required by the Attorney General

“as is necessary to enable the system to operate in accordance with this section,” so that the information can be accurately reported in NICS.

96. Defendants DoD, Air Force, Navy and Army have records demonstrating that certain persons fall within the categories of persons for whom receipt of a firearm is prohibited under 18 U.S.C. § 922(g) or (n), but have systemically failed, and continue to systemically fail, to provide all such records to the Attorney General, and, in a significant number of instances to provide such records at all, as required by the Attorney General.

97. Defendants DoD, Air Force, Navy and Army have therefore failed to fulfill their obligations under 34 U.S.C. § 40901(e)(1).

98. The individual Defendants, acting in their official capacities, have been on notice of the foregoing failures by virtue of the 1997, 2015 and 2017 Reports yet, upon information and belief, have not cured those failures.

99. Defendants’ failure to meet their reporting obligations under 34 U.S.C. § 40901(e)(1) constitutes agency action unlawfully withheld or unreasonably delayed.

100. The failure to provide all of the information required under 34 U.S.C. § 40901(e)(1) is unreasonable, in light of the fact that the systemic failures of Defendants DoD, Air Force, Navy and Army have been known and publicly reported on multiple occasions. The individual Defendants have failed to take adequate measures to bring the DoD, Air Force, Navy and Army into compliance with law.

101. Each Plaintiff has a legal right to access and rely upon information contained in NICS, and to expect that Federal agencies will comply with Federal law in providing timely and accurate information for inclusion in NICS.

102. Defendants' failures with respect to providing timely and accurate information for inclusion in NICS have caused, and unless enjoined threaten to continue to cause, Plaintiffs and the public at large irreparable harm, for which there is no adequate remedy at law.

103. Pursuant to 5 U.S.C. § 703, Plaintiffs may bring this APA claim in "any applicable form of legal action, including actions for ... writs of prohibitory or mandatory injunction."

104. Upon compelling such agency action, this Court also has the authority to institute appropriate oversight to ensure that its instructions are followed.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a preliminary, and then final, injunction:

- A. Compelling each of the Defendants, on a schedule to be set by the Court, to locate and identify all records in Defendants' possession, custody or control, or that are generated or otherwise come into Defendants' possession, custody or control, demonstrating that a person falls within one of the categories of persons for whom receipt of a firearm is prohibited under 18 U.S.C. § 922(g) or (n), and to provide the information contained in all past and current such records to the Attorney General not less frequently than quarterly, and as required by the Attorney General, as is necessary to enable NICS to operate accurately and effectively;
- B. Compelling each of the Defendants, on a schedule to be set by the Court, to conduct a thorough review of the records and procedures of Defendants DoD, Air Force, Navy and Army, and to submit to the Court for approval a Compliance Plan to ensure that all applicable records demonstrating that a person falls within

one of the categories of persons for whom receipt of a firearm is prohibited under 18 U.S.C. § 922 (g) or (n) in Defendants' possession, custody or control, or that are generated or otherwise come into Defendants' possession, custody or control in the future, are timely and accurately reported to the Attorney General;

- C. Compelling each of the Defendants to provide a monthly report to the Court detailing their progress in conducting their review, and in preparing and implementing their Compliance Plan, until such time as the Court is satisfied that Defendants have brought themselves into full compliance with 34 U.S.C. § 40901(e)(1), and will remain in full compliance;
- D. Awarding Plaintiffs their costs and reasonable attorneys' fees in this action, including pursuant to the Equal Access to Justice Act; and
- E. Awarding such other and further relief as the Court may deem appropriate.

December 26, 2017

Respectfully submitted,

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