RESOLVED, That the American Bar Association urges applicable governmental entities to take all appropriate measures to ensure that the National Criminal Instant Background Check System (NICS) is as complete and accurate as possible, so that all persons properly categorized as prohibited persons under 18 U.S.C. § 922(g), are included in the NICS system;

FURTHER RESOLVED, That the American Bar Association urges the United States Department of Justice to immediately rescind its memorandum that advises other federal agencies that they need not report to the Federal Bureau of Investigation (FBI), for inclusion in the NICS system, persons who fail voluntary drug tests, including applicants to the military who are rejected for military service because they have been deemed to be drug abusers, and likewise urges the United States Department of Defense and any other federal agencies to immediately rescind any similar policies they have in effect;

FURTHER RESOLVED, That the American Bar Association urges the United States Department of Justice, and its Bureau of Alcohol, Tobacco, Firearms and Explosives, to revise existing policy to extend to up to five years the time period that drug abusers and addicts should remain on the NICS prohibited list;

FURTHER RESOLVED, That the American Bar Association supports the rights of persons who are listed in the NICS system to administratively challenge and seek judicial review of any such listing;

FURTHER RESOLVED, That the American Bar Association urges applicable governmental entities to devote adequate resources to fund complete and accurate implementation of the NICS system.
REPORT

The Bar Association of the District of Columbia (“BADC”) urges the American Bar Association (“ABA”) to adopt a Resolution to support the completeness and accuracy of the National Instant Criminal Background Check System (“NICS”), which Federal Firearms License holders must check in advance before selling firearms to prospective purchasers. The Resolution would establish as general ABA policy the principle that all persons prohibited by federal law from possessing firearms should be included in the NICS database.

A. Overview of ABA Policy

The ABA has a longstanding history of supporting legislation and adequate funding of regulatory agencies involved in implementing gun safety laws designed to reduce gun violence in the United States and elsewhere. Prior to the landmark Gun Control Act of 1968, in 1965, the ABA supported legislation to amend the Federal Firearms Act of 1934 to provide for licensing of firearms dealers, and prohibiting sales of firearms to minors, felons and persons under felony indictment, and those adjudicated mentally incompetent. In 1976, the ABA supported legislation which included provisions to upgrade the standards of eligibility for Federal Firearms License holders, provisions to require background checks of such applicants and make conferral of such licenses discretionary rather than mandatory, and provisions to mandate a waiting period prior to firearms purchases so that a criminal background check could be performed by the Bureau of Alcohol, Tobacco and Firearms. In 1983, the ABA called for the enactment of appropriate penalties to deter firearms-related crimes, and opposed efforts to repeal provisions of the Gun Control Act of 1968. In 1993, the ABA endorsed legislation to limit the availability of assault weapons. In 1994, the ABA reaffirmed its previous policies regarding the regulation of firearms, encouraged multi-disciplinary education in an effort to prevent and reduce gun violence, and supported amending the Gun Control Act of 1968 to expand the list of persons prohibited from receiving or possessing firearms. In 1996, the ABA supported amending the Gun Control Act of 1968 to create a private cause of action to persons injured or damaged as a result of violation of that law’s provisions, or provisions of state, territorial or municipal firearms laws. In 1998, the ABA supported a comprehensive approach to address gun violence by young persons at schools. In 2001, the ABA opposed legislation to create special legal immunity for the firearms industry from civil tort liability. And of particular relevance is that in 2004, the House of Delegates adopted a resolution, advanced by the then-Special Committee on Gun Violence, calling on Congress to “fully implement” NICS, including providing adequate funding.

The ABA has had limited success in enacting these polices into law. While the Assault Weapons Ban supported by the ABA was enacted 1994, for example, that law included a 10-year sunset provision which expired in 2004. There are certain administrative changes, however, that can be adopted immediately, even in the absence of Congressional action, to enhance the enforcement of laws already on our books in a manner that will materially improve gun safety. The BADC believes that the current Resolution is consistent with past ABA policy positions, and represents a modest step forward in attempting to advance firearms safety laws and regulations within the United States.
B. Existing U.S. Firearms Prohibitions

Existing United States law makes it a federal felony offense for certain specified categories of persons to ship, transport, receive or possess firearms in the United States. Among the categories of prohibited persons listed in 18 U.S.C. § 922(g) are (1) convicted felons, (2) fugitives, (3) any persons who is an unlawful user of or addicted to any controlled substance, (4) any person adjudicated as a mental defective or who has been committed to a mental institution, (5) illegal aliens, (6) persons dishonorably discharged from the Armed Forces, (7) U.S. citizens who have renounced their U.S. citizenship, (7) persons subject to a domestic violence restraint order that was entered after due notice, and (9) persons convicted of misdemeanor domestic violence.

These laws prohibiting certain persons from purchasing firearms are enforced, in part, through NICS, the national instant check system that was adopted as a part of the Brady Handgun Violence Prevention Act (Pub. L. 103-159), on November 30, 1993. Under this NICS system, Federal Firearms License holders are generally required by law to utilize the NICS background check system maintained by the Federal Bureau of Investigation (“FBI”) to determine if it is legal to sell a firearm to a prospective purchaser. According to the Brady Campaign to Prevent Gun Violence, in the years since this requirement and its “do not sell” list became effective on February 28, 1994, the NICS system has prevented more than 1.9 million prohibited persons from buying firearms.

C. NICS Changes Enacted After the Virginia Tech Shootings

The NICS system is far from perfect, however, as America was reminded a little over four years ago, on April 16, 2007, when a horrible school tragedy took place on the campus of the Virginia Polytechnic Institute and State University, in Blacksburg, Virginia. In this “Virginia Tech massacre,” assailant Seung-Hui Cho shot and killed 32 people and wounded many others before committing suicide, in one of the deadliest shooting incidents by a single gunman in U.S. history. Subsequent investigations revealed that Cho had previously been declared mentally ill by a Virginia special justice, who had also ordered Cho to attend treatment, thereby rendering him a “prohibited person” under 18 U.S.C. § 922(g)(4). Despite this fact, however, Cho had been able to purchase handguns without detection by NICS, because of gaps in the NICS system and problems with inadequate and delayed reporting of state mental health adjudications to the FBI for inclusion in NICS.

In the wake of the Virginia Tech massacre, legislation was introduced in Congress, and on January 8, 2008, the NICS Improvement Act of 2007 (Pub. L. 110-180), was ultimately signed into law by then-President George W. Bush. The NICS Improvement Act was designed to update and improve the NICS system, by providing financial incentives for states to modernize and fully report applicable mental health records to federal authorities for inclusion in the NICS database, while also imposing new financial penalties on states if they fail to achieve expected standards. The NICS Improvement Act also added a new provision allowing persons whose names were included in the NICS database, and who believed they had been placed there improperly, to administratively and judicially challenge their inclusion, so that the NICS system could be more complete and accurate.
While the NICS Improvement Act primarily focused on improving the NICS system with respect to missing state mental health records, other information relevant to other categories of prohibited persons under 18 U.S.C. § 922(g) unfortunately continued to elude the NICS system. In particular, known illegal drug users and addicts, despite being listed as prohibited persons under 18 U.S.C. § 922(g)(3), have not been reported on a reliable basis to federal authorities for inclusion in the NICS automated database.

D. The Recent Tucson Massacre & Continued Gaps in the NICS System

On January 8, 2011, U.S. Representative Gabrielle Giffords was holding a constituent meeting called “Congress on Your Corner” at a Safeway supermarket near Tucson, Arizona. Giffords had set up a table outside the store, and about 20-30 people were gathered nearby when a gunman, later identified as 22-year old Jared Lee Loughner, drew a pistol and shot Giffords at point-blank range in the head. Loughner then proceeded to fire at other members of the crowd, apparently at random, from a weapon later reported to be a 9mm Glock model 19 semi-automatic pistol with a 33-round magazine; his activities were captured on videotape. After Loughner ran out of ammunition in the first magazine, he stopped to reload, but dropped the loaded magazine from his pocket to the sidewalk, where a bystander grabbed it. Other bystanders then intervened and were able to tackle and subdue Loughner.

Before the shooting spree ended, nineteen people were injured by gunfire, six of them fatally, including U.S. District Court for the District of Arizona Chief Judge John M. Roll. Others killed included three of Rep. Giffords’ constituents, her 30-year old community outreach director, and 9-year old Christina Taylor Green, who had been born on September 11, 2001. Rep. Giffords herself was in critical condition; while waiting for help to arrive, Giffords' intern, Daniel Hernandez Jr., applied pressure to the gunshot wound; Hernandez is credited with saving Rep. Giffords' life. Rep. Giffords was rushed to the University Medical Center, and within 38 minutes of the shooting she underwent emergency surgery. Part of Rep. Giffords' skull was removed to prevent further brain damage caused by swelling. Rep. Giffords has remarkably survived, and appears to be advancing well during her long and arduous rehabilitation process.

The suspect, Jared Lee Loughner, was immediately arrested and detained, and he has since been arraigned in federal criminal court on multiple murder charges. Loughner had previously attended Pima Community College, but school authorities had suspended him after receiving complaints of his inappropriate behavior in class. In October 2010, Loughner chose to drop out rather than obtaining the mental evaluation and clearance required for him to re-enroll. Following Loughner’s federal arraignment and various competency evaluations, U.S. District Judge Larry A. Burns on May 25, 2011 declared him presently incompetent, after a staff psychologist at the U.S. Medical Center for Federal Prisoners agreed with a defense psychiatrist that Loughner was mentally unfit to stand trial, due to symptoms of schizophrenia.

Police reports reveal that Loughner purchased a Glock pistol at a Sportsman’s Warehouse store not long after dropping out, and less than six weeks before the January 2011 shooting incident. According to court records, Loughner had two previous arrests, one of which was for drug possession. U.S. Army officials have also said that Loughner had earlier attempted to enlist, but his application had been rejected as "unqualified" for service in 2008. Army officials have privately told the Washington Post and other press outlets that Loughner was rejected by the Army because he failed a drug-screening process.
E. The Need for Further NICS Improvements

According to various media sources, Jared Lee Loughner successfully purchased a firearm from Sportsman’s Warehouse in Tucson less than a year after U.S. Army officials report that he was rejected by the Army for failing a drug-screening process. This was the same store Loughner later went back to in November 2010 to purchase the Glock semi-automatic pistol that he used in the January 8, 2011 rampage. Both of these transactions were subject to the requirement of the NICS instant background check, but Loughner’s name was not included in the NICS “do not sell” list. As Mayors Against Illegal Guns, an organization representing the chief executives of more than 550 of the nation’s cities and towns, recently noted:

The shootings in Arizona supply the latest example of the system’s serious flaws. Under federal law, drug abusers and addicts are prohibited from buying guns. Loughner was arrested on drug charges in 2007 and rejected from enlistment from the U.S. Army in 2008 after admitting to habitual drug use. Less than a year later, he passed a background check and bought a shotgun. If the system had worked and records were available to demonstrate Loughner’s drug offense and abuse, he would have failed that background check.

http://www.mayorsagainstillegalguns.org/html/media-center/pr001-11.shtml Noting that over 400,000 Americans (34 each day) have been murdered with firearms since 1968, the group has called for a fix to “the broken background check system.” http://www.washingtonpost.com/wp-dyn/content/article/2011/01/18/AR2011011804524.html?wprss=rss_nation

One key reason why Loughner’s name was not in the NICS system was because of a U.S. Department of Justice policy adopted under U.S. Attorney General Janet Reno, which had advised federal agencies not to report people who had voluntarily taken drug tests, for fear that this might deter them from seeking treatment. The U.S. Department of Justice has not yet publicly released this memorandum adopted under Attorney General Reno.

In large part as a result of this memorandum, the number of drug abusers and addicts in the NICS database has plummeted dramatically over the past decade, according to a recent article in the Washington Post:

Few drug abusers wind up on the NICS list as being ineligible to purchase a firearm because of that abuse or addiction. The current number of people who are listed in that database is 2,092, or less than 1 percent of the 6 million names, according to NICS data. Of those who tried to buy firearms between 1998 and 2008 but were prohibited, drug abusers made up about 8 percent, or 65,000, the data show.

According to John A. Strong, the FBI section chief who oversees NICS, the FBI does occasionally receive some reports from the military, “although if you are trying to get into the military and flunk the drug test, that’s a voluntary test and you are exempted. The [Justice Department] has decided to exempt voluntary drug tests. They did not want to have a chilling effect on those seeking treatment.” Id.

According to the Washington Post, this DOJ policy adopted over a decade ago has continued in effect, despite the NICS Improvement Act of 2007, and its direction to all federal agencies to forward to the FBI the names of those ineligible under federal law to buy a gun from a licensed dealer – and to send these names at least quarterly, “notwithstanding any other law.” U.S. Department of Defense (“DOD”) spokespersons have verified that DOD has not changed its own policy previously enacted in the wake of the earlier Reno memo, despite the adoption of the NICS Improvement Act of 2007, and they confirm that military applicants who fail drug tests still are not generally reported to the FBI for inclusion in the NICS system. Id.

After learning of this issue, U.S. Senator Charles Schumer – the principal sponsor of the NICS Improvement Act of 2007, joined other colleagues in writing a letter to U.S. Attorney General Eric H. Holder, Jr. on January 16, 2011. The letter states, in pertinent part, as follows:

As you know, current federal law explicitly prohibits the sale or transfer of a firearm to “an unlawful user of or addicted to any controlled substance” (18 USC 922(d)(3)). It has been widely reported that the alleged shooter, Jared L. Loughner, was known to be a regular user of illicit drugs. Indeed, in news reports earlier this week, Army officials confirmed that the gunman was prevented from enlisting in the military because he admitted to using marijuana excessively in his interview with a recruiter. Just as this admission barred his entrance to the military, it should also have disqualified him from purchasing a firearm.

I therefore urge you to examine the issued regulations regarding the legal definition of a drug abuser, and clarify them to include situations in which individuals make an admission of illicit drug use to agents of the federal government, such as military recruiters. In addition, we urge the administration to order military recruiters and other agents of the federal government to report such admissions to the National Instant Criminal Background Check System in the future.

Had this reporting requirement been in place, Loughner would likely have been prevented from purchasing a firearm. We should fix this reporting loophole so that future tragedies can be prevented.

The BADC agrees with this approach, and calls upon the ABA to lend its support to this effort to promote a more complete and accurate NICS background check system. The issue of whether the U.S. Department of Justice will modify its position adopted under Attorney General Reno
appears to be under active consideration, and immediate support from the ABA would promote greater inclusion of illegal drug abusers and addicts in the NICS system – an inclusion that apparently used to exist.

The BADC does not believe that increased reporting of illegal drug abusers and addicts to the NICS system will significantly deter their seeking of drug treatment. And even if it did, the risks of having statutorily prohibited persons obtain firearms in this context is simply too great. Reporting illegal drug abusers and addicts to NICS will not permanently scar such persons improperly. Currently, admitted illegal drug abusers and addicts remain on the NICS prohibited list for only one year, under the rules of the Bureau of Alcohol, Tobacco, Firearms and Explosives. Although this Resolution suggests that this one-year limit be reconsidered by the Department of Justice,¹ the NICS Improvement Act of 2007 provides for new administrative and judicial remedies to those who believe they were improperly named as “prohibited persons,” and this Resolution would expressly support a process that includes such rights. The Department of Justice might even utilize this new administrative and judicial process to encourage drug treatment in other ways, perhaps by allowing demonstrated rehabilitation to serve as a basis for early removal from NICS listing, as opposed to the current system that simply removes certain persons from the NICS list automatically, based on the mere passage of a short window of time.

The Resolution also supports adequate funding to ensure the complete and accurate implementation of the NICS system by federal, state and local governments. This provision is independently important. According to Mayors Against Illegal Guns, since the NICS Improvement Act enactment, federal appropriators have granted only 5.3% of the authorized amounts for NICS improvements during FY 2009-11. In part as a result of Congress’ failure to follow through with such funding, many states have made little or no progress in submitting additional records (even mental health records) to the FBI for inclusion in the NICS database. According to the Mayors’ group, because of chronic underfunding, ten states still have no people at all flagged as mentally ill in NICS (Alaska, Delaware, Hawaii, Idaho, Massachusetts, Minnesota, New Mexico, North Dakota, Pennsylvania and Rhode Island), and another 18 states each have less than 100 people listed as mentally ill in the NICS database.

Significant gaps in the NICS database system clearly remain. According to the Wall Street Journal, between November 30, 1998 and December 31, 2010, mental-illness prohibitions accounted for just 0.74% of all NICS denials. A September 2010 study by the National Center for State Courts estimated that there should be roughly twice as many mental-health records in the NICS database as there currently are, based on responses from 42 of 56 states and territories. http://online.wsj.com/article/SB20001424052748704515904576076200491395200.html

¹ The Mayors Against Illegal Guns has called for this 1 year to be extended to 5 years. See “A Plan to Prevent Future Tragedies,” http://fixgunchecks.s3.amazonaws.com/191/7a/f43/a_plan_to_prevent_future_tragedies.pdf. The instant Resolution is more flexible, calling for NICS listing of “up to 5 years” following confirmed drug use. This flexibility would allow the BATFE, for example, to establish different periods of NICS listing for different categories of illegal drug abusers and addicts – if BATFE determines, for example, that illegal heroin abusers should remain on the NICS database longer than confirmed marijuana abusers such as Loughner.
There is broad public support for such improvements to the NICS system. In a January 14, 2011 poll, for example, 90% of respondents supported fixing gaps in the government NICS database in order to prevent the mentally ill, drug abusers and others from buying guns. And 89% of Americans (including 89% of gun owners) supported full funding to enforce the NICS Improvement Act’s provisions to prevent persons with a history of mental illness from buying guns. See http://www.mayorsagainstillegalguns.org/html/media-center/pr006-11.shtml. Unfortunately, it appears that Congress may be on the verge of cutting this important program. As Senator Schumer noted, in a February 10, 2011 letter to the House Appropriations Committee’s Chair and Ranking Member, under that Committee’s proposals to roll back appropriations to 2008 levels, funding for the NICS Improvement Act would be eliminated entirely. http://www.schumer.senate.gov/mobile/record.cfm?id=331039& As Senator Schumer also noted, “By gutting funding for our only program that helps keep guns out of the hands of people like Jared Loughner and the Virginia Tech shooter, we would take a major step backwards in our efforts to keep guns out of the hands of deranged individuals.” Id. The BADC thus believes that this Resolution should be considered by the House of Delegates, to lend the ABA’s immediate support to these important efforts to ensure that the NICS database remains adequately funded, and to seek additional appropriations as necessary to promote its purposes.

F. Recent Congressional Action

Although the BADC does not believe that Congress needs to act for the Executive Branch to adopt the administrative changes described in this Resolution, the BADC does note that Sen. Schumer has recently introduced legislation that would require these and other affirmative steps.

On March 2, 2011, Sen. Schumer introduced S.436, the “Fix Gun Checks Act of 2011,” which is co-sponsored by Senators Gillibrand and Kerry. The overall bill is considerably broader than the BADC’s resolution, but Section 104 of S.436 would essentially mandate certain parameters of this resolution, by clarifying that an inference shall be drawn that a person is an unlawful user of a controlled substance (and thus should be listed in the NICS system) based on:

- a conviction for the use or possession of a controlled substance within the past 5 years;
- an arrest for the use or possession of a controlled substance within the past 5 years;
- an arrest for the possession of drug paraphernalia within the past 5 years; if testing has demonstrated the paraphernalia contained traces of a controlled substance;
- a drug test administered within the past 5 years demonstrating that the person had used a controlled substance unlawfully; or
- an admission to using or possessing a controlled substance unlawfully within the past 5 years.

Section 104 also would establish a similar inference for current or former members of the Armed Forces who faced disciplinary or other administrative actions within the past 5 years based on confirmed use of a controlled substance, including a court-martial conviction, nonjudicial punishment, or an administrative discharge based on use of a controlled substance or drug rehabilitation failure. The legislation would also include, within the definition of a person “addicted to any controlled substance,” any person ordered by a court into a diversion program
designed for abusers of or addicts to controlled substances, as a part of a criminal or judicial delinquency proceeding.

Sections 101 and 102 of S.436 would also impose a certification requirement and certain penalties on state and federal agencies to ensure that they fully report prohibited persons for inclusion in the NICS database.

S.436 also contains several other provisions, including a background check requirement for all firearms sales, and its overall parameters are thus considerably broader than this Resolution which the BADC now submits to the ABA. And while Section 104 of S.436 is largely consistent with the general goals of this Resolution, as previously noted, the BADC does not believe any Congressional action is actually necessary in order for the Executive Branch to adopt the administrative policies necessary to effectuate the changes recommended herein.

G. Conclusion

It is sometimes said, by gun rights organizations and their sponsors who have opposed many of the firearms policies that the ABA historically has supported, that “we don’t need more gun laws, we just need to enforce the ones we have.” The BADC’s current proposal will hopefully promote that universally shared goal by supporting administrative polices designed to improve the enforcement of firearms statutes that already exist as the law of our land. The BADC urges the ABA House of Delegates to adopt this Resolution at its 2011 Annual Meeting, as an improvement in existing U.S. policy, and as modest, immediate and common-sense response to the Tucson shooting tragedy, based on lessons learned.

Annmaria Steward, President
Bar Association of the District of Columbia
August 2011
GENERAL INFORMATION FORM

Submitting Entity: The Bar Association of the District of Columbia

Submitted By: Annamaria Steward, President

1. **Summary of Resolution(s).** To adopt, as ABA policy, that all persons prohibited by federal law from possessing firearms should be included in the National Instant Criminal Background Check System (NICS); and to support adequate funding by federal, state and local governments to assure that the NICS system is as complete and accurate as possible.

2. **Approval by Submitting Entity.** Approved by the Bar Association of the District of Columbia’s Board of Directors on May 10, 2011.

3. **Has this or a similar resolution been submitted to the House or Board previously?** A similar resolution was submitted by the Bar Association of the District of Columbia shortly before the 2011 ABA Midyear Meeting in Atlanta, but was withdrawn to allow Delegates more time to consider these issues. There have also been a number of firearms safety resolutions in the past that were submitted to and adopted by the ABA. Several of these are referenced in the Report submitted with this Resolution. The Bar Association of the District of Columbia believes this Resolution is in accord with past ABA policies.

4. **What existing Association policies are relevant to this resolution and how would they be affected by its adoption?** As discussed in the Report, the ABA has a longstanding history of supporting legislation and adequate funding of regulatory agencies involved in implementing gun safety laws designed to reduce gun violence in the United States and elsewhere. Prior to the landmark Gun Control Act of 1968, in 1965, the ABA supported legislation to amend the Federal Firearms Act of 1934 to provide for licensing of firearms dealers, and prohibiting sales of firearms to minors, felons and persons under felony indictment, and those adjudicated mentally incompetent. In 1976, the ABA supported legislation which included provisions to upgrade the standards of eligibility for Federal Firearms License holders, provisions to require background checks of such applicants and make conferral of such licenses discretionary rather than mandatory, and provisions to mandate a waiting period prior to firearms purchases so that a criminal background check could be performed by the Bureau of Alcohol, Tobacco and Firearms. In 1983, the ABA called for the enactment of appropriate penalties to deter firearms-related crimes, and opposed efforts to repeal provisions of the Gun Control Act of 1968. In 1993, the ABA endorsed legislation to limit the availability of assault weapons. In 1994, the ABA reaffirmed its previous policies regarding the regulation of firearms, encouraged multi-disciplinary education in an effort to prevent and reduce gun violence, and supported amending the Gun Control Act of 1968 to expand the list of persons prohibited from receiving or possessing firearms. In 1996, the ABA supported amending the Gun Control Act of 1968 to create a private cause of action to persons injured or damaged as a result of violation of that law’s provisions, or provisions of state, territorial or municipal firearms laws. In 1998, the ABA supported a comprehensive approach to address gun violence by young persons at schools. In 2001, the ABA opposed legislation to create
special legal immunity for the firearms industry from civil tort liability. And most recently, in 2004, the ABA adopted a resolution, advanced by the then-Special Committee on Gun Violence, calling on Congress to “fully implement” NICS, including providing adequate funding.

5. What urgency exists which requires action at this meeting of the House?

The U.S. Justice Department was recently asked by Sen. Charles Schumer and others to reconsider its earlier memorandum, adopted under Attorney General Reno, that advised federal agencies that they need not report to NICS the names of persons whose failed drug tests were taken voluntarily – a policy which has caused the number of drug abusers and addicts in the NICS system to plummet. Given that Sen. Schumer has claimed that the DOJ’s internal policy is inconsistent with the NICS Improvement Act of 2007’s requirement that all qualifying records be provided to the FBI for inclusion in NICS “notwithstanding any other law,” this policy now appears to be under active review. In addition, the U.S. House Appropriations Committee recently announced that it would seek to return all funding to pre-2008 levels. As Sen. Schumer noted, this plan would have the effect of eliminating all funding appropriated under the NICS Improvement Act. If the ABA waits to address this topic, important policy and funding decisions may be made without ABA input. And, of course, any delays in making the NICS background check system more complete and accurate may lead to additional gun violence, as sales are made in the interim to federally prohibited persons whose names are not within the NICS database. Presently, only 2,072 names of illegal drug abusers and addicts are in the NICS system, nationwide, and this woefully inadequate situation should not be allowed to persist.

6. Status of Legislation. (If applicable). Sen. Schumer has recently introduced a bill in the United States Senate, S.436, denominated the “Fix Gun Checks Act of 2011.” While that bill in its entirety is considerably broader than this Resolution, Section 104 of S.436 would mandate several of the proposals set forth in this Resolution.

7. Cost to the Association. (Both direct and indirect costs): None known; likely nominal.


10. **Contact Person.** (Prior to the meeting)

    Gregory S. Smith, President-Elect  
    Bar Association of the District of Columbia  
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    913 East Capitol Street, S.E.  
    Washington, D.C. 20003  
    202.460.3381 (cell) / 877.809.9113 (fax)  
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11. **Contact Person.** (Who will present the report to the House?)

    Gregory S. Smith, President-Elect  
    Bar Association of the District of Columbia  
    c/o Law Offices of Gregory S. Smith  
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EXECUTIVE SUMMARY

SUMMARY OF THE RESOLUTION

The Resolution urges applicable governmental entities to take all appropriate measures to ensure that the National Criminal Instant Background Check System (NICS) is as complete and accurate as possible, so that all persons properly categorized as persons prohibited from possessing firearms under federal law are included in the NICS system. The Resolution would also adopt for the first time as ABA policy the principle that persons who are listed in the NICS system should have a right to administratively challenge and seek judicial review of any such listing, and would call upon all applicable governmental entities to devote adequate resources to fund complete and accurate implementation of the NICS system.

SUMMARY OF THE ISSUE WHICH THE RESOLUTION ADDRESSES

The NICS instant background check system, passed as a part of the Brady Handgun Prevention Act in 1993, requires Federal Firearms License holders to utilize the NICS system maintained by the FBI to determine if it is legal to sell a firearm to a prospective purchaser. Unfortunately, the NICS system contains serious gaps, as various records flagging individuals as prohibited persons have not properly been forwarded to the FBI for inclusion in the NICS database. In particular, many records of illegal drug abuse or addiction are missing, in part because of a U.S. Department of Justice memorandum adopted in the 1990s, which advised federal agencies that positive drug test results need not be forwarded to the FBI if the testing was voluntary. Under current Justice Department regulations, many drug abusers and addicts are also automatically removed from the NICS database after a period of only one year. Since this DOJ policy’s adoption, the number of illegal drug abusers and addicts in the NICS system has plummeted, from over 65,000 in the 1990s to only 2,072 today. This allowed Jared Lee Lochner, the assailant who shot Rep. Gabrielle Giffords and 18 others, to buy a firearm without being in the NICS database, even though the U.S. Army had rejected him for illegal drug abuse.

In addition, despite Congress’ adoption of the NICS Improvement Act in the wake of the 2007 Virginia Tech massacre – legislation that was designed to improve state and other governments’ reporting of mental health-disqualifying records for inclusion in the NICS database – recent studies show that this process has been hampered by underfunding and delays. Only 5.3% of the authorized funds have been appropriated, and 10 states have yet to provide any mental health records to the FBI for inclusion in the NICS database, while 18 other states have provided less than 100 names. Moreover, concerns have recently arisen that the U.S. House of Representatives may cut NICS Improvement Act funding altogether in the current fiscal year.
EXPLANATION OF HOW THE PROPOSED POLICY POSITION WILL ADDRESS THE ISSUE

The instant Resolution would reiterate as ABA policy that federal, state and local governments should take steps as needed to ensure that the NICS database is as complete and accurate as possible, and declare that all persons prohibited by federal law from possessing firearms should be included in the NICS database. The Resolution also would specifically urge the Justice Department to rescind its memorandum advising federal agencies that they need not report voluntary drug test failures, and urge other federal agencies such as the Department of Defense to rescind their regulations adopted as a result of that memorandum. The Resolution also would extend ABA policy by specifically urging the Justice Department to reconsider its policy of automatically removing illegal drug abusers and addicts from the NICS database after only one year, and support the rights of persons to administratively and judicially challenge their inclusion in the NICS database. And it would reiterate that governments at all levels should devote adequate resources to fund complete and accurate implementation of the NICS system.

SUMMARY OF ANY MINORITY VIEWS OR OPPOSITION WHICH HAVE BEEN IDENTIFIED

The Bar Association of the District of Columbia is not currently aware of any objections to this resolution. A previous version of the Resolution filed shortly before the 2011 ABA Midyear Meeting in Atlanta was withdrawn, following objections received by the Bar Association of the District of Columbia from Delegates who believed they had not had adequate time to evaluate that version of the Resolution.