

**TERRORISTS AND GUNS: THE NATURE OF THE
THREAT AND PROPOSED REFORMS**

HEARING

BEFORE THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

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TERRORISTS AND GUNS: THE NATURE OF THE THREAT AND PROPOSED REFORMS

WEDNESDAY, MAY 5, 2010

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:16 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Pryor, Burr, Kaufman, Collins, and Graham.

OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. Good morning. The hearing will come to order. We welcome the witnesses. Mayor Michael Bloomberg, Commissioner Raymond Kelly, I know you were held up in Washington traffic. I am sure this never happens in New York City. But I do want to just assure you that the last person to appear late at a hearing because she was held up in Washington traffic was Secretary Janet Napolitano. So there is good precedent here.

We thank all the witnesses for being here today. Of course, I want to begin by extending, on behalf, I am sure, of all the Members of our Committee and really the entire American family, our special thanks to Mayor Bloomberg, Commissioner Kelly, and all who work with you in New York City government and live in that great city for their grace under pressure, which remains still about the best definition I know of courage. I'd also like to thank you for the brilliant law enforcement investigative work that you and your colleagues in the Federal, State, and local law enforcement communities did to bring Faisal Shahzad to justice just 53 hours after his attempted terrorist attack on Times Square.

This hearing on what Congress and the Federal Government can do to keep firearms out of the hands of terrorists was scheduled long ago, but its urgency has certainly been made clear by the events of the past 4 days.

In fact, our growing understanding of the dimensions of the plot to attack Times Square certainly should remind us of a reality that I fear we sometimes forget, which is that global Islamist extremism terrorists have declared war on America, and they are attacking our homeland with increasing frequency. In fact, they have attempted to carry out more than a dozen attacks on America in just the last year. Most of them have been stopped before any damage could be done, again, by extraordinary law enforcement work. But

four of the attempted attacks broke through our homeland defenses, including the failed attempts on Christmas Day over Detroit and last Saturday night in New York City.

And here is the fact that I hope will focus our concern and attention and hopefully motivate our action this morning: The only two terrorist attacks on America since September 11, 2001, that have been carried out successfully and taken American lives were carried out with firearms.

The most lethal was in November of last year when an Army doctor, Nidal Hasan, opened fire with a semiautomatic pistol at a processing center at Fort Hood, Texas, killing 13 Americans and wounding 30 others. Fort Hood was the deadliest terrorist attack on America since September 11, 2001, and the deadliest domestic terrorist attack against American troops in the history of our country. It was carried out by one man with two guns: An FN 5.7-millimeter pistol and an older Smith and Wesson revolver.

In June of last year, in an event that not too many people remember, an American named Carlos Bledsoe, who changed his name to Abdulhakim Muhammad, shot and killed a U.S. Army recruiter and seriously wounded another at an Army-Navy Recruiting Station in Little Rock, Arkansas, simply because they were wearing the uniform of the U.S. military. He did so with a SKS semiautomatic rifle.

In other recent cases, homegrown terrorist cells have stockpiled firearms while planning attacks specifically against personnel at Fort Dix, New Jersey, and at the Marine Corps Base in Quantico, Virginia.

Thankfully, again, great law enforcement work stopped both of those plots. But had these planned attacks succeeded, many other Americans would surely have lost their lives, as over 160 did in the attacks in Mumbai, India, in November 2008, which were also carried out largely with firearms.

So the threat we meet to discuss and attempt to prevent is real. Terrorists armed with semiautomatic and high-powered weapons can inflict heavy casualties in seconds. While it is true that homegrown terrorists, which we are seeing increasingly in this country, are generally—but not always—less sophisticated than those sponsored and trained overseas by al-Qaeda and other terrorist groups, the truth is that they may also be harder to detect and stop, particularly if they are operating essentially on their own. And the easy availability of lethal weapons ensures that these homegrown terrorists can legally obtain sufficient firepower to cause terrible damage.

As Senator Frank Lautenberg, Congressman Peter King, Mayor Bloomberg, and Commissioner Kelly know and will make clear this morning, we are simply not doing all we can do to stop terrorists from buying guns.

The stark fact is that the U.S. Department of Justice (DOJ) has no authority to block the sale of firearms to suspected terrorists even when the Department knows they are about to purchase guns.

This, unfortunately, is not a rare occurrence. The number of times suspected terrorists have been allowed, with the government's knowledge, to buy guns in recent years is stunning and infuriating. This morning, the Government Accountability Office

(GAO) will testify that in the last 6 years, terrorist suspects, people on watchlists, have tried to buy guns more than 1,200 times, and in 91 percent of those cases, they did buy guns. In the other 9 percent, they were stopped because they were on some other list, such as having had a criminal record of some kind.

I think most Americans understand and once they hear these facts certainly will agree that this has to change, and that we can block terrorists from obtaining guns without compromising constitutional Second Amendment rights. In fact, a recent survey done by Republican pollster Frank Luntz showed that over 80 percent of National Rifle Association (NRA) members believe that suspected terrorists should not be allowed to buy guns.

In 2007, the Bush Administration proposed legislation to give the Attorney General the discretion to prevent the sale of firearms to watchlisted terrorists. It was not enacted. Senator Lautenberg and Congressman King had previously introduced legislation to do exactly that, and they have introduced that legislation in this Congress. It is, in my opinion, a straightforward, bipartisan bill supported by mayors and others all over the country, but particularly the mayors whose cities are prime targets of terrorists, including the large, diverse coalition of mayors that Mike Bloomberg leads. In my personal opinion, the bill should be enacted as quickly as possible to close this dangerous loophole before another suspected terrorist is able to buy firearms legally and use them to kill Americans.

Senator Collins.

OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman.

Our Nation remains a target for terrorists. Whether sent from overseas or radicalized within the United States, terrorists continue to target innocent men, women, and children. Their callous disregard for life was on full display in New York City this past Saturday.

Had it not been for an alert street vendor and the courageous action of the New York Police Department (NYPD), many lives would have been lost, and many people would have been injured.

I applaud the quick and effective investigative work by Federal, State, and local authorities that led quickly to the identification and arrest of the suspect who allegedly placed the car bomb in the midst of Times Square.

This attempted attack reminds us once again that terrorists are unrelenting in their desire to kill Americans. We cannot let down our guard, and we must continue to meet this ongoing threat with strength and resilience.

From Fort Hood to the skies over Detroit and now to Times Square, our Nation must come to grips with the terrorist threat, particularly the threat of homegrown terrorism.

An alert citizenry is one of the best defenses against terrorist attacks. Signs in the New York City subway system read: "If You See Something, Say Something." The U.S. Capitol Police ask those of us who work on Capitol Hill to pay close attention to "help be the eyes and ears with our local law enforcement." And as we saw in

Times Square, an alert citizen can be our best line of defense against terrorist attacks.

Senator Lieberman and I have introduced bipartisan legislation that would encourage individuals to report suspicious activity to the appropriate officials. The legislation is straightforward: It would protect individuals from lawsuits when they, in good faith, report suspicious behavior that may indicate terrorist activity. Our colleague Peter King has introduced the bill on the House side. Given the recent events in New York City, I encourage the Senate Judiciary Committee to pass this important bill.

During the past 8 years, significant resources have been devoted to the prevention of a terrorist attack using a biological, chemical, or nuclear weapon. But as recent attacks have shown, the improvised explosive device (IED) remains the weapon of choice for most terrorists. Indeed, in 2009 alone, there were more than 3,700 terrorist incidents involving an IED worldwide.

The materials used to construct IEDs are ubiquitous. Gas cans and propane tanks, available at any home improvement store, allegedly formed the core of the Times Square bomb. When terrorists can turn items that can be found in an average family's garage into a weapon of death and destruction, it underscores the need for intelligence collection to identify threats as well as the need for vigilance by State and local authorities, business owners, and all citizens to learn the warning signs that distinguish legitimate activity from the precursors to a terrorist attack.

Of course, terrorists can also choose to use firearms, and that is the issue that brings us here today.

For many Americans, including many Maine families, the right to own guns is part of their heritage and way of life. This right is protected by the Second Amendment.

And so this Committee and this Congress face a difficult issue today: How do we protect the constitutional right of Americans to bear arms, while preventing terrorists from using guns to carry out their murderous plans?

Let me note that this dilemma does not arise when we apply the terrorist watchlist to the purchase of explosives.

One of the more important accomplishments since September 11, 2001, has been the creation of a consolidated terrorist watchlist based on information from all parts of the intelligence community and the Federal Bureau of Investigation (FBI).

Our watchlist system, properly implemented, can be an effective mechanism for preventing individuals with suspected terrorist ties from boarding an aircraft. It also alerts law enforcement and border protection officials to more carefully screen potential terrorists, and it allows the State Department to revoke visas of foreign individuals with terrorist ties who are attempting to travel to the United States.

But the fact remains that the evidence used to compile the watchlist is often fragmentary and can be of varying degrees of credibility. As our late colleague Senator Ted Kennedy discovered when his name was included, the watchlist can be inaccurate. It is not, in other words, the equivalent of a criminal history report. And, indeed, the latest DOJ Inspector General's report concluded that approximately 35 percent of those sampled from the list were

left on the list based on outdated information or material unrelated to terrorism.

Incidents of mistaken application of the terrorist watchlist are very unfortunate, but those errors usually result only in the restriction of a privilege, such as the right to board a plane or to travel to the United States from overseas. The expansion of the watchlist system to potentially deprive law-abiding Americans of a constitutional right is wholly different and raises many critical questions.

So as we consider what at first blush seems to be an obvious step that we should take, we must carefully consider these questions:

Are appropriate protections included within the watchlisting process to justify the potential denial of a constitutional right?

If not, what procedural protections should be afforded those who are erroneously denied the ability to purchase a firearm?

What guidelines are needed to constrain the Attorney General's discretion to prevent law-abiding Americans from purchasing a firearm?

Let me emphasize that none of us wants a terrorist to be able to purchase a gun. But neither should we want to infringe upon a constitutional right of law-abiding Americans.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator Collins.

We will begin with Senator Lautenberg and Congressman King to describe the legislation, and then be honored to hear responses to this and anything else they want to testify to from Mayor Bloomberg and Commissioner Kelly.

Senator Lautenberg, you have been a real leader on this. The bill you have introduced, I want to say for the record, has been referred to the committee of legislative jurisdiction, the Judiciary Committee. We are holding this hearing today in the dispatch of our responsibility to inquire as to the impact passage of your legislation could have on our homeland security. So I thank you very much for being here, and we welcome your testimony now.

**TESTIMONY OF HON. FRANK R. LAUTENBERG,¹ A U.S.
SENATOR FROM THE STATE OF NEW JERSEY**

Senator LAUTENBERG. Thanks very much, Mr. Chairman, Ranking Member Collins, and Members of the Committee. I want to offer my welcome to Mayor Bloomberg and to Commissioner Kelly. Each of them has enormous responsibility, conducted very well across the river from New Jersey, and one cannot help but note, as has been done amply, I think, by Senator Collins as well as yourself, the incredibly brilliant police work that went on to get this guy before he was able to leave the country. It was fantastic.

Mr. Chairman, I want to thank you for holding this critical hearing, and I would like to thank my fellow witnesses for joining us here today. And I thank Representative Peter King for introducing the legislation in the House.

This past Saturday, we were reminded yet again that terrorists are determined to kill Americans on American soil. This story is now a little old, but shocking enough to further review it. It is so

¹The prepared statement of Senator Lautenberg appears in the Appendix on page 44.

hard to believe. An empty sport utility vehicle (SUV) packed with explosives and a timing device was discovered in Times Square, one of the most visited places in America.

The terrorist behind this plot planned to set off an explosion and murder as many innocent Americans as possible. We were fortunate that this makeshift car bomb did not explode this time.

But as officials claim they will do everything they can to stop a future terror attack, a loophole in our guns and explosives laws gives terrorists the upper hand.

This loophole—known as the “terror gap”—allows known and suspected terrorists to purchase military-grade explosives and firearms legally in our country. And mindful of what Senator Collins said so clearly, we do not want to rob people of a constitutional right, but I kind of do not like saying but I am going to do it, and that is, to err on the side of protection is the chance sometimes we have to take. And it can be challenged in our court system without a problem.

As GAO will testify today, just last year, a person on the terror watchlist was cleared to buy explosives by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Well, how can that be? To put it simply, right now the Federal Government cannot block the sale of explosives or firearms to someone simply because they are on the terrorist watchlist. It sounds pretty frightening to me. It defies common sense, but it is the law of the land.

In fact, some of the very same explosive agents that are used to make roadside bombs in Iraq and Afghanistan are available for sale legally to known and suspected terrorists here in our country.

But we know that terrorists do not only use explosives, firearms are also a weapon of choice. In fact, the U.S. citizen who was arrested at John F. Kennedy (JFK) Airport in connection with the Times Square car bomb had a loaded gun in the car as he drove to the airport. And if you look at Mumbai and other recent terrorist attacks, we see that assault weapons and small explosives are being used more and more times. The fact is that they are able to compact these horrible weapons into smaller packages, and that is why we need to change this law.

Convicted felons, domestic abusers, and the mentally ill are forbidden from buying guns and explosives, but nothing in our laws keeps fanatics on the terror watchlist from purchasing guns and explosives. That is hard to believe, but unfortunately, it is true. And now this terror gap in our laws is not some theoretical concept. Not only can documented terrorists buy firearms legally in our country, they do.

I have requested reports from the GAO about the number of times that the terror gap has been exploited, and here is what we have learned to date: From 2004 to February of this year, terrorists tried to buy guns and explosives 1,228 times. I think the Chairman referred to this—in 91 percent of those cases they were given the OK to buy a gun. Imagine. So 10 percent, roughly, of these people were unable to buy guns.

But because of this terror gap, America is effectively hanging out the welcome sign for terrorists to arm themselves. Now, I have introduced legislation in the Senate to close the terror gap, and Rep-

representative King has offered, as I mentioned, a nearly identical proposal in the House.

Our legislation very simply would give the U.S. Attorney General the power to review and deny guns and explosives to known and suspected terrorists. It does not sound like it is an impediment to living in this country. This common-sense legislation is not anti-gun. It is anti-terrorist.

In fact, a gun owner who objects to the Attorney General's finding has the power under my legislation to challenge the ruling. And that is why support for the legislation is widespread.

The Bush Administration, which fiercely defended gun rights, asked Congress to pass my legislation. Attorney General Eric Holder has indicated his support for our legislation. Former Governor of New Jersey Tom Kean, the Chairman of the 9/11 Commission, has urged Congress to close this dangerous loophole. And police chiefs across the country have endorsed our legislation.

Now the gun lobby tries to argue that gun owners opposed the bill. Not true.

Republican pollster, Mr. Luntz, mentioned before, recently found that 82 percent of the NRA members want Congress to close the terror gap.

Mr. Chairman, everyone talks about making our country safer from terrorism. This is our chance to actually do it. And I thank you again for holding this hearing.

Chairman LIEBERMAN. Thank you very much, Senator Lautenberg.

Congressman King, welcome. He is the Ranking Member of Homeland Security on the House side, a real stalwart fighter for the security of the American people. We welcome your testimony now.

TESTIMONY OF HON. PETER T. KING,¹ A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. KING. Thank you very much, Chairman Lieberman, Ranking Member Collins. I want to thank you for the opportunity to be here today. I want to thank you publicly and tell you what a privilege it has been to be able to work with you on matters of homeland security in a totally bipartisan manner, always putting the country first. It has really been an honor for me to be able to work with you closely on these issues.

I also want to commend Senator Lautenberg for his legislation, and I would, of course, pay special tribute to Mayor Bloomberg and Commissioner Kelly. The actions of the last 72 to 96 hours in apprehending the terrorist in New York, really showing 100 percent police professionalism, is really a testament to the work that goes on day in and day out by the NYPD under the leadership of Commissioner Kelly and Mayor Bloomberg and all that the city has done in spending literally hundreds and hundreds of millions of dollars to protect itself against Islamist terrorist attack. Again, the whole world and the whole country observed this over the last several days, but this is really just a manifestation of what goes on

¹The prepared statement of Mr. King appears in the Appendix on page 46.

every day in New York under the leadership of Commissioner Kelly and Mayor Bloomberg.

Mr. Chairman, I would ask that my testimony be inserted into the record.

Chairman LIEBERMAN. Without objection.

Mr. KING. Mr. Chairman, I concur with all the remarks of Senator Lautenberg, and to me it is an issue of common sense. As you stated, we are at war with Islamist terrorism. It is an enemy which is coming at us overseas and now more recently and more frequently right here at home.

One of the reasons for that is our product overseas has been effective under both administrations in stopping terrorists from coming into the country, and that has been a success. Al-Qaeda, though, is always adapting, and what they are now doing is attempting to find Americans in this country, people who are legally in the country, whether it was the Najibullah Zazi case back in September, or this recent case on Saturday evening, and others where they recruit Americans who are under the radar screen, that do not have known ties to al-Qaeda. It is harder for us to follow them, so we have to expect more attacks from those already within the country.

Now, the plus side is that, again, it is harder for terrorists to come in, and also it means that those who are here, those who have not received the sophisticated training overseas are more likely to rely on whatever weapons they can get a hold of. And when we see that terrorists can have access to guns, to explosives, as Senator Lautenberg said, I would ask—all of us were here on September 11, 2001, and we remember that afternoon of September 11 and the next day saying: What could we have done to prevent this? How could we have stopped this attack from happening?

I would just say if we find out that Islamist terrorists such as we saw on Saturday night or others who actually have terrorist connections even more than someone who is not known, someone who actually has terrorist connections, has gone out and bought weapons and carries out a massacre, whether it is in Times Square, Chicago, New Jersey, Tennessee, or anywhere, carries out an attack, or as we saw at the recruiting station in Arkansas, we would say, How did we allow this to happen? And then we have to explain to the American people even though we knew this person was a terrorist, even though we know that al-Qaeda has declared war against us, even though we knew that we were facing a threat here at home, we still allowed that person who is on a terrorist list to buy a weapon and go out and slaughter people. I mean, just think what the American people would think of us. If there is the extent of lack of faith in government today, can you imagine what it would be if we allowed that to happen? There would be blood on our hands. We would be responsible for the deaths of all those people.

That is why this legislation is common sense, and Senator Collins mentioned the fact that, there is the possible violation of a constitutional right. I agree with that completely. In the legislation that I have, we provide legal mechanisms that after a person is notified they are on the terrorist watchlist, they can go to court and they can challenge it. I think Senator Lautenberg even has more

extensive protections. His legislation was drawn up after the GAO report. I would certainly be willing to adapt my legislation to comport entirely with Senator Lautenberg's. No one wants somebody to be on a list wrongly. But the fact is that if we balance the equities, if we look at what we are facing, we are facing a possible slaughter of American citizens, possible murder of American citizens by al-Qaeda supporters, by Islamist militants, by Islamist terrorists, to me there is no real debate here, so long as there are sufficient protections in here. The protections are here, but to me if we balance the equities, it is on the side of protecting the American people.

We saw guns were bought for the potential attacks at Fort Dix. Senator Lieberman mentioned the attacks at the recruiting station in Arkansas. We saw Major Hasan with the attack that he carried out at Fort Hood. So these were domestic terrorists. They were people who did not even have, as I said, a terrorist record. Just think how much worse it would be if we allowed someone with a terrorist record to buy those weapons. And when we realize that 91 percent of those who are on the terrorist watchlist were able to apply for weapons and were able to purchase them, it seems to me outrageous.

And this should not be a partisan issue in any way. As Senator Lautenberg said, the Bush Administration was certainly as pro-gun as any Administration we have had. They strongly supported this legislation. They asked for this legislation and my understanding is the Obama Administration supports it as well.

With bipartisan legislation such as this is targeted and is dealing with a real and present danger. Maybe if this were the year 2000, we would say, well, OK, it is a Tom Clancy novel or someone who is speculating. How many more attacks and potential attacks do we have to have before all the American people and, more importantly, all of the House and Senate realize this is a real enemy that is here, it is amongst us, and we have to do what we can to protect the American people?

So I thank you very much for holding this hearing. I look forward to working in a bipartisan way, whatever adjustments we have to make, Senator, to make sure that the legislation is entirely compatible, if there are other reasonable protections that people want in the legislation. This is not a work of art. There is no pride of authorship here. I will be glad to change it in any way we can so long as the bottom line is the American people are protected from domestic terrorists who have guns, and that is the essence of where I am coming from. To me, it is common sense. It is the only logical step we can take, especially after seeing what happened on Saturday night, how close this enemy is.

So with that, I thank you for allowing me to testify, and as we say in the House, I yield back the balance of my time.

Chairman LIEBERMAN. I accept it.

Senator LAUTENBERG. Please excuse me. I must run.

Chairman LIEBERMAN. I understand, Senator. Thank you very much.

Mayor Bloomberg, thanks for being here. This was scheduled a long time ago, and I appreciate the fact that, notwithstanding the events of recent days, you have taken the time to come here. I

could say a lot about you. All of it is good. Well, most of it is good. [Laughter.]

At a time when it is clear that the American people have lost confidence in so many ways in so much of their government, I think you set a standard of leadership and competence in making the government work, and I thank you for that, as well as everything else we have thanked you for this morning.

TESTIMONY OF HON. MICHAEL R. BLOOMBERG,¹ MAYOR, CITY OF NEW YORK

Mayor BLOOMBERG. Well, thank you very much. I can say some good things about you, Senator Lieberman, Ranking Member Collins, Senator Pryor, and Senator Graham. Thank you for having us today. It is a great opportunity for us to tell the Homeland Security and Governmental Affairs Committee what is going on in our city and why we need some help from Washington.

As Senator Lautenberg and you said, today the Government Accountability Office released new data showing that suspects on the terrorist watchlists were able to buy guns and explosives from licensed U.S. dealers well over 1,000 times. That is a serious and dangerous breach of national security, and it really raises a very basic question: When gun dealers run background checks that they have to by law send to the FBI, shouldn't FBI agents have the authority to block sales of guns and explosives to those on the terrorist watchlists and deemed to dangerous to fly? I actually believe that they should. And so do the 500 mayors who are part of our bipartisan coalition of Mayors Against Illegal Guns.

But right now, the fact is they do not. And as Senator Lautenberg and Congressman King have just said, it is time to close this terror gap in our gun laws.

At a time when the threat of terrorism is still very real, as we in New York City know all too well, I think it is imperative that Congress close this terror gap in our gun laws, and close it quickly. The car bomb the NYPD found in Times Square on Saturday night was not the only attempted terrorist attack on our city since September 11, 2001. Far from it. And sadly, we do not think it will be the last.

Since 1990, there have been more than 20 terrorist plots—or actual attacks—against our city and that is why it is so critical for Congress to fully fund homeland security programs like the Securing the Cities Initiative, and to take other steps that will help us fight terrorists and make it even harder for them to attack us.

In the last year alone, the NYPD, working closely with Federal authorities, prevented two major planned attacks on our city. The first was last May, when terrorists purchased guns and explosives as part of a planned attack on a temple and Jewish center in the Bronx. The second was in September, when the city and Federal authorities broke up a plot to detonate explosives in the New York City subway system. And, of course, attacks and planned attacks have not been limited to New York.

As everyone sadly knows, in 2007, six men were arrested for plotting to attack Fort Dix in New Jersey, about 60 miles outside

¹The prepared statement of Mayor Bloomberg appears in the Appendix on page 48.

of New York City, with an arsenal of high-powered firearms. Last June in Little Rock, Arkansas, a man opened fire at a military recruiting station, killing one private and wounding another. At the time of the shooting, the FBI was already investigating this man after his arrest in Yemen with a fake Somali passport. He was charged with murder and 16 counts of terrorist acts.

And on November 5, 2009, Major Nidal Hasan shot 43 people at Fort Hood, killing 13. We know Hasan was able to buy a handgun despite having been under investigation by the FBI for links to terrorism. After the Fort Hood shooting, I wrote an op-ed with Governor Tom Kean, Chair of the 9/11 Commission, urging Congress to close the terror gap. Our message was that we cannot wait for another Fort Hood to happen before we take action.

As Mr. King said, the Bush Administration first proposed closing the gap in 2007. But because nothing has happened, people who may want to do our country harm have had no trouble buying guns and explosives, as the GAO report clearly shows.

It is important to note that the legislation before you today would give FBI agents the ability to make exceptions when they determine that blocking a sale might tip off a suspect who is under investigation. It is exactly the reverse issue. And the bill also allows those on the list to appeal their status to the Justice Department and to challenge the determination in court.

Attorney General Eric Holder supported closing the terror gap in testimony before the Senate Judiciary Committee last year, and so does the vast majority of Americans. And, Senator Lieberman, as you pointed out and so did Senator Lautenberg, a December poll by Republican pollster Mr. Luntz found that 82 percent of NRA members support closing the terror gap.

Of course, it is true that even if the terror gap in our background check system were to be fixed, terror suspects and other dangerous people would still be able to go to gun shows to buy guns without any background check at all, and that is why our coalition of mayors is also urging Congress to close the gun show loophole.

I might point out that Mr. Luntz also found the same 82 percent in favor of closing the gun show loophole as well as the terror gap.

In New York City, we are doing everything humanly possible to prevent another terrorist attack. Under Commissioner Kelly's leadership, the New York City Police Department has developed one of the world's most advanced counterterrorism programs, and thousands of our best police officers work on counterterrorism and intelligence every day.

A key element of any smart counterterrorism strategy is to make it harder for terrorists to strike. That is why air passengers walk through metal detectors. That is why our police officers randomly check bags in the subway. That is why our police patrol sensitive locations. And that is why it is just common sense to give the FBI the authority to keep terror suspects from buying guns and explosives.

Let me close by saying something about the Second Amendment. Our Founding Fathers did not write the Second Amendment to empower people who wanted to terrorize a free state; they wrote it to protect people who could defend "the security of a free state."

Today the security of our free state is being tested by terrorists, and I urge you to take common-sense steps in this law to strengthen law enforcement—including closing the terror gap—and to protect the American people from more attacks.

Thank you very much.

Chairman LIEBERMAN. Thanks very much, Mayor Bloomberg. That was excellent testimony.

Commissioner Kelly, thanks for being here. I know I have said it to you before, but when I talk to law enforcement people around the country, they all feel that the standard of law enforcement in this country is set by the NYPD, and if anything under your leadership, you have raised that banner even higher. Thank you for being here. We welcome your testimony now.

**TESTIMONY OF HON. RAYMOND W. KELLY,¹ POLICE
COMMISSIONER, CITY OF NEW YORK**

Mr. KELLY. Well, thank you very much. Mr. Chairman, Senator Collins, and Senator Graham, thank you for the opportunity to be here.

Terrorists are determined to attack this country by any means. Saturday's attempted car bomb attack on Times Square is but the latest example.

Since September 11, 2001, New York City has been the subject of 11 plots of which we know. Each of them was defeated through close cooperation between the NYPD and our Federal partners. Each highlights one of the myriad ways terrorists might try to attack New York: With homemade bombs, by torching bridge cables, or releasing cyanide in the subways.

The police department trains constantly to defend against every type of threat, especially those from guns and explosives. Obviously, the more we can do to deny would-be terrorists access to these weapons, the safer we will all be. That is why it is urgent that we close the terror gap in our Nation's gun laws. Failure to do so places this country at even greater risk.

Last year, I testified before this Committee about the NYPD's response to the commando-style assault on Mumbai, India, in November 2008. As you may recall, that attack was carried out by small teams of operatives using AK-56 assault rifles. By sustaining the operation for hours, they maximized the casualties.

As part of our comprehensive response to what happened in Mumbai, we have held tactical drills and tabletop exercises with officers from our Special Operations Division based on that scenario.

We have trained more than 250 additional officers in the use of heavy weapons so that they will be able to supplement the work of our emergency service officers in a crisis.

We have also decided to use the instructors in our Firearms and Tactics Unit as another reserve force.

All of our police recruits now receive basic instruction in three types of heavy weapons.

We have taken these and other measures because we believe an attack involving active shooters is always a possibility. Likewise, we must also guard against terrorists armed with homemade

¹The prepared statement of Mr. Kelly appears in the Appendix on page 50.

bombs, whether a car bomb like the one we saw in Times Square or stashed inside backpacks for a suicide mission like the one planned for last September in New York City subways. Our subway bag search program, which we implemented immediately after the 2005 London bombings, is designed to counter such a threat.

In recent years, we have also conducted undercover operations demonstrating the ease with which terrorists in this country can purchase explosive ingredients such as chlorine and ammonium nitrate.

These efforts are part of a robust counterterrorism program we built from the ground up in 2002 when we realized that it, in addition to our focus on crime-fighting, the police department needed to build the intelligence collection, analysis, and infrastructure protection capabilities to defend New York City from another terrorist attack.

We established the Nation's first municipal Counterterrorism Bureau, and we restructured our Intelligence Division.

We recruited the best that the Federal Government had to offer to head those two operations.

We created a new civilian intelligence program to support our field commanders with timely information and analysis.

We tapped the incredible linguistic diversity of the police department. We assigned native speakers of languages such as Urdu, Arabic, and Pashto to counterterrorism duties.

We strengthened our patrols of key infrastructure in the city, including bridges, tunnels, and a host of landmarks and other sensitive locations.

We forged collaborative relationships with the private sector, with law enforcement organizations up and down the east coast, and with Federal agencies, especially the FBI and the Department of Homeland Security (DHS).

All of our collective efforts would benefit from the passage of this bill, which would exclude anyone who is on a terrorist watchlist from being able to legally purchase a gun, obtain a permit to buy explosives, or a license to sell them.

From the standpoint of the NYPD, it would also complement the aggressive anti-gun strategies we already have in place. Under Mayor Bloomberg's leadership, New York City has become a national leader in combating gun violence. And the police department has made significant progress in stemming the flow of illegal guns into the city.

It is a principal reason we have been able to drive conventional crime down by 40 percent since the beginning of 2002, even after we took on the additional responsibility of counterterrorism. But we are by no means declaring victory. We know there are still far too many guns available to criminals who are determined to obtain them. The same is true for international terrorist organizations, which in all likelihood are plotting the next attack as we speak.

This legislation would go a long way in stopping them from exploiting a dangerous loophole and succeeding in their mission. For that reason, I hope that Congress will pass this legislation without delay. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks very much, Commissioner Kelly. We will do 7-minute rounds of questioning.

The fact that you are here so soon after the events of the last 4 days gives us an opportunity, before we get to the terror gap and the gun bill, just to ask you if you have any immediate, I might say, lessons learned from the last 4 days. From my perspective looking at it, a lot of what we hoped would happen in a post-terrorism attempt situation with cooperation between Federal, State, and local government happened, and it happened brilliantly. But, Mayor and Commissioner, you were there, you were on the ground. Give us your reaction first to the cooperation between levels of government and, second, if you came away this early with any lessons learned.

Mayor BLOOMBERG. Well, I came away pleased in the sense that the public saw something and did something, as Senator Collins pointed out, we keep telling the public what to do, turn security over to the professionals. You can be the eyes and the ears, but they are the ones with boots on the ground that we want to defend us. And, two, that all of the training that Commissioner Kelly and the NYPD, Commissioner Cassano and the Fire Department of New York (FDNY), and Commissioner Bruno in our Office of Emergency Management do together and with Federal agencies and State agencies showed itself instantly. A police officer was called over. It happened to be a mounted cop on his horse, saw there was something wrong, right away got the other police officers in the area to start pulling people back. They were well trained in doing that. They called in the fire department, and you saw a group of people working together. Thank God it was not worse than it was. The explosives did not go off. But had they gone off, I think it is fair to say that the professionals that were called in did what they had to do to protect us, and that should give us comfort for the future. But I think as Commissioner Kelly will tell you, we are the target. We are going to be the target again. And the next attack or attempted attack will be different. We do not know what that is, but that is why we keep training for any eventuality.

Chairman LIEBERMAN. Commissioner Kelly.

Mr. KELLY. Mr. Chairman, it was clearly a team effort. The Joint Terrorism Task Force (JTTF), the FBI Joint Terrorism Task Force in New York City, is the largest in the country, and the oldest. And we worked seamlessly on this case, as we have on many others, although sometimes people seem to question that. But the relationship is strong and certainly a very productive one, as this investigation showed.

I think it also illustrated the benefits of technology. We were able to cull information from databases that was very helpful. The key finding in this case was the vehicle identification number (VIN), the hidden VIN on the vehicle, and then very quickly we identified the owner; and also through using the Federal databases, we were able to link up telephone numbers that led us to this suspect in short order.

So as a lot of people have said, 53 hours, I think, is a remarkable amount of time at least as far as the arrest process is concerned, to bring this case to closure.

Chairman LIEBERMAN. I could not agree more. I was pleased to understand that some of the databases that are within the Department of Homeland Security, which, of course, this Committee over-

sees—Congressman King's does in the House—were very helpful to you: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), of course, the Transportation Security Administration (TSA). And they were able to bring that to bear very quickly in the case. Correct?

Mr. KELLY. Yes, sir. Very true.

Chairman LIEBERMAN. Incidentally, I want to say to you, Mayor, I was thinking about those two street vendors, and I was comparing them—I am getting to an age where I remember things that a lot of people who are around who are younger do not remember, but I remember the Kitty Genovese case, the horrible case where a lot of people watched a woman being attacked and did nothing. This was the dramatic contrast to that. Two people seeing something suspicious, not really clearly the problem, immediately going to the police officer on the scene, and that prevented something worse from happening.

So whatever has changed—and I give you credit for the campaign that you have conducted in New York to alert citizens to their role, because we are an open country, we have an enemy coming at us at home. They care not about their own lives and certainly not about the lives of innocent American civilians. We simply cannot stop, no matter how hard we try, every attempt, and that is where the citizenry becomes 300 million plus more security providers for our country. So I thank you for that.

Commissioner Kelly, let me ask you a question about this proposal here, and I want to say very briefly that I think people understand it. The Brady gun law now says if you apply from a federally licensed gun seller, your name is run across databases. Some of them automatically disqualify you, if, for instance, you have a criminal record. Others, including the terrorism watchlist, essentially raise a red flag that delays the purchase for 3 days, during which law enforcement is informed.

Oddly, strangely, in this case, though the Department of Justice may be informed that your name is on a terrorism watchlist, they cannot stop you from buying a gun. That is a gap we are trying to fill here with this legislation.

Commissioner, apart from the obvious fact that you want to keep a gun out of the hands of somebody who is a suspected terrorist, talk a little bit about what the purchase of a gun may say about the moment in a would-be terrorist activity. In other words, might it suggest that person is about to go operational?

Mr. KELLY. Certainly that is a possibility. Now, we are still gathering information about Faisal Shahzad's purchase of a gun, but we know that he purchased a weapon in March in Connecticut, and he had it with him in the car that he drove to JFK Airport on Monday night. So it appears from some of his other activities that March is when he decided to put this plan in motion. He came back from Pakistan February 3, 2010, this year, so it may very well be an indicator of putting something, catastrophic in motion.

Chairman LIEBERMAN. My time is up, and I am going to yield to Senator Graham in a minute. I just want to stress what I think has been said, that in the Lautenberg-King legislation, it does not mandate that the person on the terrorism watchlist be prohibited from buying a gun. It gives the Department of Justice the authority

to do so. Obviously, there may be cases where the Justice Department decides it wants the gun purchase to go forward because they are following that individual and he or she may lead to other co-conspirators.

Senator Graham.

OPENING STATEMENT OF SENATOR GRAHAM

Senator GRAHAM. Thank you, Mr. Chairman. Just for the record, we have a chance here to have a really good discussion about some very important issues. You took time away from a very busy day job, both of you, to come and help the country focus, I think. And, Mr. King, I have really enjoyed working with you, and we have a little difference of opinion on this particular issue. But the idea that America has gaps in her defenses is really a timely topic. And we do. We have gaps in our defenses in securing our Southern Border. We have gaps in our defenses by allowing people to overstay their visas. All 19 hijackers were here illegally, but they did not cross the border of Mexico. They came here on a visa. They had multiple driver's licenses. It is so easy to fake documents. And we are still, almost 10 years out now and I do not think we have learned all the lessons we should have learned.

But there is one thing we can agree on here. I was in New York Sunday night at the Marriott Marquis, the very place where this SUV was found, and I could not have been better treated by the police department and by the people at the hotel. I went to a Yankees game Monday, and they won 4 to 1. So to anybody who is worried about going to New York, go. I have never seen a more professional group of people other than the U.S. military, at the ball game, on the streets, all over the place. And it was a wonderful experience. So New York is open for business, and you are going to be well taken care of. But there is a risk to getting out of bed. Maybe a meteorite hits you at home.

So it is a responsible thing to do for Americans to be talking about topics such as this, but there has to be balance here, and I am in the camp that I am not so sure this is the right solution to what the dangers are.

The D.C. gun ban law was an experiment that if you had a law against owning a hand gun, you would be safer. I do not think that worked. And the Supreme Court said that went too far, and they are about to issue a ruling here soon to determine whether or not gun ownership is an individuals right. I would argue that will affect the outcome of this legislation.

I am not going to ask you to give me specific numbers, but here is a general question. There are 1,228 people on the watchlist that tried to purchase a handgun. Is that right?

Mayor BLOOMBERG. Numbers like that.

Senator GRAHAM. What percentage of those people are facing terrorism charges now?

Mayor BLOOMBERG. I do not know, Senator, but let me start out by saying I could not agree with you more. Border security—this country does not have control of its borders, and it should. Forty percent of the undocumented here are visa overstays. Forged documents, anybody can forge a passport or a green card or a Social Security card.

Senator GRAHAM. Absolutely.

Mayor BLOOMBERG. And we should do something about that.

Senator GRAHAM. Amen.

Mayor BLOOMBERG. We should get control of our borders. We track people when they come through immigration. We do not track them when they leave.

Senator GRAHAM. Absolutely.

Mayor BLOOMBERG. So we do not know who is overstaying. We should fix that. We have documents that are too easy to fake, and it is a joke. We have to get control of immigration in this country.

Senator GRAHAM. Absolutely.

Mayor BLOOMBERG. We need immigrants, but we should be choosing who comes here, what skills they have, where they are coming from, and not let who wants to come here determine that. So I am 100 percent with you.

Senator GRAHAM. Yes, and you have been very forward-leaning in a balanced way, and that is why I look forward to working with you on fixing immigration comprehensively.

Mayor BLOOMBERG. When it comes to reasonable restrictions, which the Supreme Court said are acceptable and consistent with the Second Amendment, I think this is a reasonable restriction. I do not know whether any of the 1,100 or 1,200 on the watchlist are facing charges at the moment, those that bought guns. Maybe Mr. Kelly can tell you, but I do know that if society decides that these people are too dangerous to get on an airplane with other people, then it is probably appropriate to look very hard before you let them buy a gun.

Senator GRAHAM. I totally understand what you are saying, but we are talking about a constitutional right here, and the reason I brought that up, Mayor and Mr. Kelly, if all of these people are fanatics and every one of them on the watchlist is a terrorist planning an attack, it would be odd that 1,228 who we know tried to buy a gun, none of them are being charged with a terrorism-related offense. So there is a disconnect here between what we are saying and reality. There are 400,000 people on the terrorist watchlist. What percentage of them are American citizens?

Mr. KELLY. I could not give you an answer.

Senator GRAHAM. Well, the law prohibits purchase of a gun unless you are an American citizen or a legal resident alien. So I think we are talking about a fairly small percentage of 400,000 people. And the NRA—some people believe banning handguns is the right answer to the gun violence problem. I am not in that camp. I believe my right to own a gun should not be infringed because some nut is going to take a gun and use it wrongfully. I just think you should prosecute him very swiftly and forcefully. I am all into national security. I want us to take our Social Security cards and make them biometric. I want to stop reading these guys their Miranda rights. Mr. King and I are so much on board here. Your son is a former marine. Is that right? He was a fighter pilot, right?

Mr. KELLY. My son?

Senator GRAHAM. Yes.

Mr. KELLY. My son is a former fighter pilot.

Mr. KING. The commissioner is a marine also, from Vietnam.

Senator GRAHAM. Well, I knew I liked you. Now I know why.

At the end of the day, Mr. Chairman, you have been great on this issue. Nobody in their right mind would expect a marine to read someone caught on the battlefield their rights. You catch them and you interrogate them lawfully to gather intelligence. Your special unit is probably the best in the world at this. But I do not think it is smart for us to say that the homeland is not part of the battlefield. You get to America, you get a much better deal, you get rewarded? If you can be caught in Pakistan and intelligence gathering can happen with the intelligence agency without your Miranda warnings being given, why should you get a better deal when you get here. Even if you are an American citizen helping the enemy, you should be viewed as a potential military threat, not some guy who tried to commit a crime in Times Square.

So I will look forward to working with the New York City Police Department, the Mayor of New York, and Peter King to devise a law that recognizes we are at war, that when you capture someone like you all did—and it was a marvelous piece of not police work alone but of a combination of intelligence gathering and police work—that you would have the opportunity to hold the suspect because they represent a military threat to our country even though they are a citizen. You ought to be able to gather intelligence before you did anything else, because what I want to know more about this guy is not how he committed the crime, but what led him to commit the crime and who he worked with, and Miranda warnings are counterproductive, in my view. So we need a law that would allow you to go to a judge somewhere, like a Foreign Intelligence Surveillance Act (FISA) judge, and hold a suspect like this and working with the intelligence officials of this country to gather intelligence, then make a good prosecutorial decision.

Now, back to this issue at hand. The problem I have is that the watchlist, when you look at the numbers, has so many problems with it that I think it is not appropriate to go down the road that we are going because a constitutional right is involved. That is my only concern, and I understand from the Mayor's perspective and the police chief's perspective how you feel about this issue. But please understand that I feel differently not because I care less about terrorism.

Mayor BLOOMBERG. Senator, perhaps we can allay your fears a little bit. The watchlist is accessed a billion times a year, and the error rate is probably as low as on any large list. Keep in mind, you in Congress have passed laws preventing convicted felons from buying a gun. That does not mean every convicted felon is going to commit another crime. You have a law that says you cannot sell guns to minors. That does not mean that if we gave guns to every minor they would all use them and kill somebody. But I think—I know we disagree on this—it is a reasonable position to take, and there is the ability to contest if you are on the list. And if there are problems with the list, let us fix the list rather than not use it.

Senator GRAHAM. Well, maybe we will have a good discussion about how to fix the list, and I would just end with this. I know my time is up. It is hard for me to believe that if 1,228 people have tried to buy guns who are on the list and 91 percent of them are allowed to buy guns and none of them are being prosecuted for any

terrorism-related offense, we have a good connect here. There is a disconnect somewhere between the people on the list and people we are actually going to prosecute. And before we subject innocent Americans who have done nothing but have the wrong name at the wrong time to having to go into court and pay the cost of going to court to get their gun rights back, I want to slow down and think about this.

Mr. KING. Senator Graham, could I just reply to something you said about Mirandizing?

Senator GRAHAM. Absolutely.

Mr. KING. I agree with you and I believe Senator Lieberman completely on this. My reading of the Supreme Court decisions is that you can declare an American citizen an enemy combatant because they have moved the battlefield from Afghanistan and Pakistan here to the United States, and we should find legislation to refine that and define it. José Padilla, as far as I am concerned, he was an enemy combatant.

Senator GRAHAM. Right. Let me just set the record straight from my perspective. The Fourth Circuit held that Padilla, an American citizen, could be held as an enemy combatant. We have had case law that says an American citizens overseas could be held as an enemy combatant. The Supreme Court has yet to rule on this issue.

It is my belief that the Supreme Court would allow the Congress to write a law that said the homeland is part of the battlefield. I cannot imagine the Supreme Court of the United States saying that the homeland is not part of the battlefield and that when it comes to an American citizen, they have a responsibility under the Constitution not to betray their country. And once you go down that road, then you should be viewed not as a common criminal but a military threat, and you cannot try an American citizen in military commissions. I helped write that law. But they can be tried in Federal court. There is a place for Federal court, and the charge of treason should always be on the table. No one was killed in this instance, thank God. But if it is proven that this man committed an act of treason against his fellow citizens, I want to keep that charge available to our government. So that is my view of that.

Mr. KING. Senator, I believe Justice Sandra Day O'Connor in the *Hamdi v. Rumsfeld* case did say that Americans can be held as enemy combatants. I agree with you there is some question. Obviously, they cannot be tried in a tribunal. I think a method should be laid out where they can be interrogated—

Senator GRAHAM. I totally agree with you.

Mr. KING [continuing]. And we get all the intelligence we possibly can.

Senator GRAHAM. And let the people in New York help us write this law because they know more about it than anybody in the country, quite frankly.

Mr. KING. Thank you, Senator.

Chairman LIEBERMAN. Thanks, Senator Graham. I must say I am troubled by your concerns about this proposal because I think it is very limited. And what can I say?

In this Committee, I have argued that we should more broadly apply the terrorism watchlist to give secondary screening to people before they board airplanes. This was something a lot of us reached

a conclusion about after the Abdulmutallab case, the Detroit bomber, because in the current state of operation, only people on two of the more limited lists—the No Fly and Selectee List—are actually given secondary screening when they show up for an airplane. It seems to me that if anybody is on a terrorism watchlist because somebody suspects that they may be a terrorist, it is in the interest of everybody else on that plane and of society to at least stop them and give them a secondary screening.

Incidentally, that would have presumably found that Abdulmutallab had the explosives on his person, but leave the specifics of that aside.

To me, the same is true here. If somebody is on a terrorism watchlist—most of the people on the terrorism watchlist are foreign nationals, but there are a good number of Americans. And why would we not want to give the Department of Justice discretionary authority when one of them comes in to buy a gun, a suspected terrorist, that after review of this during the 3-day waiting period to say, no, he cannot have a gun, or she cannot have a gun, they may be about to go out and try to kill some Americans? I just do not see an argument that is based on the rights of law-abiding citizens to own guns.

Listen, if you have a criminal record today and that turns up when you go in to buy a gun in a federally licensed gun dealer, you cannot buy that gun. You do not have a choice. Now, that does not compromise the rights of law-abiding citizens to buy guns. Here we are not even making it that strong. Senator Lautenberg and Mr. King are not even trying to make it that strong. They are just saying give the Department of Justice discretionary authority—

Senator GRAHAM. Can I take a shot at that? No pun intended. [Laughter.]

Chairman LIEBERMAN. You are my friend so—

Senator GRAHAM. Probably a bad choice of words. No, you are my friend, and, quite frankly—

Chairman LIEBERMAN. But I do not get your concern about—

Senator GRAHAM. Well, let me try to explain it to you. I know I talk slowly. I will talk slower. I have got an accent. I assume that your inability to understand my argument is based on me, not you, and I will—

Mr. KING. Senator Graham, you are talking slowly enough.

Chairman LIEBERMAN. I think I understand it. I just do not agree with it.

Senator GRAHAM. Here is the argument, Mr. Lieberman. There is no constitutional right to get on an airplane without being screened of which I know. When the Founders sat down and wrote the Constitution, they did not consider flying. And I do not believe that the Constitution protects any of us from being able to get on an airplane without being screened, and here is the big elephant in the room. What if all of the secondary screening happens to be 99 percent Muslim males? And that is where we are headed with this thing.

Chairman LIEBERMAN. Only if they are on the terrorism watchlist.

Senator GRAHAM. Yes, but here is the issue about profiling.

Chairman LIEBERMAN. Not because they are Muslim males.

Senator GRAHAM. We are at war, and we have to realize the profile of the enemy, and you do not want to focus on law-abiding American Muslim males who are serving in the military unjustifiably. So as you said, Mayor Bloomberg, this is not about a religion. There are plenty of people in this country of the Muslim faith who are fighting and dying for this country. So we have to watch what we are doing and what we are saying here.

But, Senator Lieberman, we are talking about a Second Amendment right, and some of the people pushing this idea are also pushing the idea of banning handguns. And I do not think banning handguns makes me safer, because every criminal who wants a gun seems to be able to get one. And I do not believe taking this concept of gun ownership and denying it, after you have not been convicted in a lawful court of a felony, where you get your day in court with a lawyer and a jury. I think you are going too far here, because there is a huge difference between losing your gun rights based on a felony charge that was proven by a court of law and appealed and is a conviction on the books than being on some list that is at best suspect. And if everybody is that dangerous on the list, those who tried to buy a gun, nobody can tell me how many are being prosecuted. So I have a lot of concern that this is not going in the right direction because we are dealing with a constitutional right. And I am very concerned about our gaps in our defenses, but maybe I am not making a good argument here to you, but it makes perfect sense to me that losing the ability to own a gun, which is a constitutional right, using this list the way it is constructed is unnerving at best. Thank you.

Chairman LIEBERMAN. Well, you and I will continue this argument. But no one is trying to ban handguns here. I am not, and I certainly would not support that. Some may, but this is far from that.

The Second Amendment constitutional right, just like the First, our most prized right—free speech, assembly, petitioning your government, freedom of religion—they are not unlimited. And to me, this is an extraordinarily limited law that is being proposed by Congressman King and others to say that somebody who is a suspected terrorist cannot buy a gun. We will continue that discussion, I am sure.

I want to ask just a few more questions, and actually what I am about to ask would be to slightly expand the databases against which gun purchasers are related.

Mayor Bloomberg, you said, quite correctly, that Nidal Hasan was not on a terrorism watchlist, but he was the subject of an active Joint Terrorism Task Force investigation. Because of reportedly the email contact that he had with Anwar al-Awlaki, the radical cleric in Yemen, there is a larger FBI database of people who are subjects of investigation.

Congressman King, I was going to ask you—and, of course, this does not need to be done by law. It could be done by the FBI, by regulation, and I am going to ask him about in the second panel.

For this precautionary system that we are talking about, wouldn't it make sense to also ask that somebody coming in to purchase a gun be run through the larger database that the FBI has of people under active investigation?

Mr. KING. Senator, I would fully agree with that, and like you, being somewhat familiar with the case of Major Hasan, even though all the records have not been made available to us, yes, using that case as a classic example, I agree with you completely.

Chairman LIEBERMAN. Thank you.

Commissioner, just a couple more questions quickly. NYPD has a program called Operation Nexus. It reaches out to businesses that sell or lease certain types of material and equipment that can be used to facilitate terrorist activities. I wanted to ask you to just talk a little bit about it and how it has worked and whether you think the Federal Government ought to try to encourage other communities to adopt the same kind of program.

Mr. KELLY. Well, I was the U.S. Customs Service commissioner before I was police commissioner, and there actually is a program roughly similar to that in Customs. It had to do specifically with the airplane parts leaving the country, and that is, quite frankly, where I got the idea.

Nexus is an outreach program on the part of the department where we go to businesses that may unwittingly be used by terrorists, even garden supply stores as far as fertilizer is concerned. We go to marinas and insecticide spraying companies. We have gone to conventions of storage facility owners, that sort of thing. And we have made about probably 50,000 visits since the beginning of this program, which started in 2002. It gives them a certificate and gives them a way of notifying us if they see something of a suspicious nature.

As a matter of fact, the British authorities came here in 2003 and said quite openly that they looked at this program and copied it, and it was helpful in Operation Crevise, which I am sure you are familiar with, in which there was ammonium nitrate stored in the storage facility in the United Kingdom.

I see no downside in doing a similar program. People are under no obligation to call us, but the business owners who are approached seem to be supportive, seem to like it. They feel like they are sort of in the game, you might say. We give them a certificate that says NYPD, and it has been helpful in a series of leads.

Chairman LIEBERMAN. I appreciate that, and I think we are going to look at it and see if we can urge other communities to adopt it.

There has been some reference here to the so-called gun show loophole, and that is not specifically the topic of this hearing, but it obviously is another concern that we have about the ability of would-be terrorists to buy firearms at gun shows without having to go through the checks, including the ones that we are trying to expand and toughen here, that they would if they walked into a federally licensed gun shop.

I am going to ask both the Commissioner and the Mayor, I believe the NYPD did an investigation of gun shows recently and reached what I thought were some very important conclusions about it. I wonder if either of you wanted to share that with our Committee.

Mayor BLOOMBERG. Senator, it was a private group that we had hired that did the investigation, but let me just for the record explain what the gun show loophole is.

Chairman LIEBERMAN. Please.

Mayor BLOOMBERG. The Federal laws require background checks if you buy a gun from a dealer. There is an exemption at a gun show, ostensibly so that if you owned one gun and you wanted to sell it to me, we would not have to go through any of the investigatory process.

Chairman LIEBERMAN. Right.

Mayor BLOOMBERG. The trouble is that if you go to gun shows, you will find people coming in not with one gun to sell but with hundreds of guns to sell. They are fundamentally dealers. They have the same size inventory as the legally registered gun dealers who go to these gun shows, but the law does not apply to them. I do not think that Congress meant that loophole to be a way around having professional sellers of guns avoid the regulation that you have to do a background check. It was meant for individual purchases, for one gun or two, and it has been used for something different. And so closing that gun show loophole, requiring the same processes for non-registered dealers, but who are effectively dealers, as you do for registered dealers would just help the government keep guns out of those that the Federal Government has already legislated should not have them—convicted felons and minors, people with severe mental problems. And there are some categories, and I think the terror gap is just another one of the categories.

I am sympathetic to Senator Graham's concerns. I think he is a very thoughtful Senator, and he has put a lot of time into this. I would argue, and hopefully will be able to convince him and everybody else in Congress, that this is consistent with the other laws that the Congress has passed and that the Supreme Court has said are reasonable.

Chairman LIEBERMAN. Thank you. Commissioner, tell us a little, as best you recall, about some of the findings of that study. I saw something about it, and I was struck by, frankly, just how willing a lot of the gun show dealers are to break the law.

Mr. KELLY. Well, again, as the Mayor said, this investigation was done by private investigators, but we are obviously concerned about the gun show loophole. It has been known. You know, it is talked about on the street. Certainly, in some States it is more of a problem than others. We have certain States that seem to contribute excessively to the guns that we find on the streets of our city, and gun shows sort of predominate in a lot of those States.

Mayor BLOOMBERG. Let me just add one other thing, Senator.

Chairman LIEBERMAN. Go right ahead.

Mayor BLOOMBERG. In our investigation at these gun shows, we made sure that the seller of the gun, who was somebody that we had hired, said to the potential buyer, "If you had to go through a background check, would you pass?" And 63 percent—and we have them all on tape—said, "Absolutely not. I would not pass."

So there is no question what is happening here. People who could not go to a reputable dealer—and 99 percent of the gun dealers in this country are reputable.

Chairman LIEBERMAN. Right.

Mayor BLOOMBERG. And they do insist on the background check. People who cannot buy guns that way go to gun shows to avoid the

Federal law, and I do not think that Congress wants that to happen. They in their good judgment passed the law. It should be enforced.

Chairman LIEBERMAN. I agree. Congressman King, Mayor Bloomberg, Commissioner Kelly, thanks very much for your testimony. Thanks for taking the time in the middle of everything else you are doing to come. It truly helps us draw attention to this gap, and hopefully it will encourage our colleagues to vote to close the gap. Have a good day. Thank you.

Mr. KING. Thank you, Senator.

Chairman LIEBERMAN. Thank you. We will call the second panel. We will give the first panel a moment or two to find their way out.

[Pause.]

Chairman LIEBERMAN. The hearing will come back to order, and we will call the second panel: Daniel D. Roberts, Assistant Director, Criminal Justice Information Services Division (CJIS) of the FBI; Eileen Larence, Director of Homeland Security and Justice at the U.S. Government Accountability Office; Sandy Jo MacArthur, Assistant Chief of Administrative Services at the Los Angeles Police Department; and Aaron Titus, who is the Privacy Director at the Liberty Coalition.

I thank all of you for being here. While the room is not quite as crowded as it was for the first panel, your testimony is very important to us. The statements you submitted for the record will all be made, without objection, part of the record of this hearing, and we would welcome your testimony now. We will begin with Mr. Roberts.

**TESTIMONY OF DANIEL D. ROBERTS,¹ ASSISTANT DIRECTOR,
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE**

Mr. ROBERTS. Good morning, Chairman Lieberman, Ranking Member Collins, and Members of the Committee. It is my pleasure to address you today regarding the FBI's efforts to respond to attempted purchases of firearms from licensed dealers and applications for firearms and explosives permits from State agencies by Known or Appropriately Suspected Terrorists (KSTs) listed on the Nation's consolidated watchlist.

First, I want to make it clear that the FBI does not take a passive approach to persons suspected of being involved or associated with terrorism. Our Joint Terrorism Task Forces are engaged every day, and across the country, in following up leads, monitoring intelligence, and otherwise pursuing information about suspected terrorists who may be trying to obtain the means by which they and their associates can do harm to this country and its citizens.

Our efforts to identify watchlisted KSTs attempting to obtain firearms includes, but is not limited to, the use of the National Instant Criminal Background Check System (NICS) process. The Brady Handgun Violence Prevention Act of 1993 requires a Federal Firearms Licensee (FFL) to contact the NICS before any firearm transfer to a non-licensee so the NICS can perform a background

¹The prepared statement of Mr. Roberts appears in the Appendix on page 52.

check to determine whether the receipt of a firearm by the prospective transferee would violate Federal or State law. Background checks are initiated through one of three NICS Contracted Call Centers, a State-designated Point of Contact, or through the NICS E-Check Web site via the Internet.

When the NICS was first established, each State either elected to perform their own checks, have the FBI perform the checks, or share the responsibility with the FBI. Some States charge a fee for firearms checks while the FBI NICS section by law cannot. In calendar year 2009, over 14.3 million checks were conducted by the FBI and State Points of Contact. From February 2004 to December 2009, there were 1,225 total valid KST matches and 109 total denials of KST matches.

Once the descriptive information for the proposed transferee is entered into the NICS system, the NICS personnel conduct a name search for the matching records in three databases. The databases are the National Crime Information Center (NCIC), which contains, among other things, information on wanted persons and protection orders; the Interstate Identification Index (III), which contains criminal history records; and the NICS Index, which contains the names and information concerning persons subject to one or more of the disqualifiers contained in the Brady Act. The NICS Index includes individuals who have been determined to be prohibited from possessing a firearm by Federal law for reasons that are not reflected in the NCIC or III systems, such as mental health concerns. If the transferee indicates that he or she is not a U.S. citizen, then the NICS also queries databases of the Department of Homeland Security to ensure that the transferee's immigration status does not preclude them from obtaining a firearm.

One of the files queried by the NICS contained within the NCIC is the KST file. The KST file is populated by the Terrorist Screening Center (TSC) with descriptive identities maintained on persons who are known terrorists or for whom there is a reasonable suspicion that they are terrorists. This file is managed by the Terrorism Screening Center and is known as the Terrorist Screening Database (TSDB). The FBI NICS Command Center examiner will contact TSC immediately to inform them a NICS hit to an NCIC KST record has occurred and to attempt to confirm the transferee's identity to further validate an accurate match has been made. If the TSC and the FBI NICS Section determines the subject of the NICS transaction does appear to be a match, then the TSC will forward the information to the FBI's Counterterrorism Division.

Within the Counterterrorism Division of the FBI, the first step performed immediately is to determine if there is an active FBI investigation on the KST. If there is, the FBI case agent is immediately notified and placed in direct contact with the FBI NICS examiner to determine whether there is any information in the case file, or known to the case agent, that would disqualify the KST under the Brady Act from possessing a firearm. Since this process was initiated in 2004, approximately 1,200 such encounters have occurred, and in approximately 90 percent of those, no prohibiting information was found to deny the transfer.

If the FBI case agent does not provide any State or federally prohibitive information and no prohibitive information was returned

from the query of the NICS databases, then the FBI NICS Command Center examiner contacts the FFL and changes the transaction status from delay to proceed. If the determination cannot be made in 3 business days, the FFL is entitled by law to transfer the firearm. If prohibiting information is discovered after 3 business days and the firearm has been transferred, the ATF is contacted and initiates a separate process to retrieve the firearm. In a case involving a watchlisted KST, this would occur in coordination with the JTTF.

If an individual believes they have been erroneously denied a firearm transfer, they may submit a request to appeal their denial decision. As mandated by law and Federal regulation, the FBI NICS Section will respond to the individual's written request by providing the general reason for their denial within 5 business days after receiving the individual's correspondence. Under the current procedures, the individual's reason for denial will be one of the 10 Federal prohibitors and never the KST hit itself.

In summary, the FBI has and will use every lawful and appropriate investigative and analytical tool at its disposal to scrutinize and monitor any attempt by a watchlisted KST to acquire a firearm or to obtain an alternate firearm or an explosives permit. While those tools and techniques have their limits, we believe they have been highly effective when dealing with the regulated sale of firearms.

Thank you very much, and I look forward to your questions.

Chairman LIEBERMAN. Thanks, Mr. Roberts. That was actually very helpful to be taken through the steps, and I will have some questions for you when we get to that point.

Ms. Larence, thanks for being here, and obviously we are citing your work a lot, so please tell us more about it.

TESTIMONY OF EILEEN R. LARENCE,¹ DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. LARENCE. Thank you, Mr. Chairman. I appreciate the opportunity to discuss our review of how the Federal Government uses the terrorist watchlist when checking the backgrounds of individuals who want to buy a firearm or obtain certain firearm or explosives licenses or permits, as well as the results of these checks.

As discussed earlier, being on the watchlist does not automatically disqualify someone from possessing or receiving firearms or explosives; rather, there must be a disqualifying factor, such as a felony conviction or immigration violation.

Over the years, Mr. Chairman, as you recognized in your opening statement, this condition has raised concerns about individuals using firearms and explosive to conduct acts of terror in the United States, concerns that have grown with recent incidents. GAO began in 2005 to review the use of the watchlist for these background checks and made a number of recommendations which the FBI has implemented. For example, the Bureau now handles all checks, including those from State and local law enforcement agencies, that are potential or actual matches to the watchlist.

¹The prepared statement of Ms. Larence appears in the Appendix on page 55.

My testimony today will give an update on three areas of our work. First, I will provide current statistics on how often individuals on the watchlist have been deemed eligible to possess or receive firearms or explosives. Second, I will describe how the information from background checks is used and shared to support investigations and counterterrorism activities. And, finally, I will discuss factors to consider if the Attorney General is given the authority to deem individuals ineligible to possess or receive firearms or explosives based on an assessment of the terrorist threat posed.

As has been stated, since February 2004, when the FBI began running background checks against watchlist records, through February of this year, in 1,119 cases, or about 91 percent of the time, individuals on the watchlist were deemed eligible to possess or receive firearms or explosives. Three of these cases involved explosives. About 9 percent of the time, watchlisted individuals were deemed ineligible or denied. Data the FBI collected between April 2009 and February of this year show denials were due most often to prohibiting factors in State law, felony convictions, and indictments, among other things.

According to the FBI, the 1,119 cases involved about 650 unique people because 450 of them tried to make purchases or obtain licenses or permits more than once and 6 of them more than 10 times. In addition, we learned that several of the individuals matched to the watchlist during background checks were also on the Transportation Security Administration's No Fly List. As you know, people on this list are deemed to be a threat to civil aviation or national security and are, therefore, stopped from boarding a plane. But none of these individuals were deemed ineligible for firearms or explosives because there were no legally disqualifying factors.

Our work also showed that the FBI does not check all records in the watchlist, and we asked if this posed a security vulnerability. According to officials with the FBI's Terrorist Screening Center, the database used to conduct checks only accepts those records from the watchlist that contain enough biographic information to readily determine if the person being checked is an exact match to the person on the watchlist. Not all watchlist records contain sufficient information such as a full name and date of birth. The officials stated that the majority of records not checked, however, are related to foreign nationals, who would not be prospective purchasers of firearms or explosives within the United States. We are continuing to assess this issue.

We also learned that if a check results in a positive match to the watchlist, FBI counterterrorism officials can work with FBI personnel who conduct the checks, the Bureau's Terrorist Screening Center, ATF, gun dealers, and State and local law enforcement agencies to obtain more information to verify a match, confirm eligibility, and enhance case files and investigations. The FBI issued guidance in 2005 to its field units explaining how to do this.

We do know that once a dealer is informed that an individual is deemed eligible to purchase a firearm, the FBI section conducting the checks must destroy certain identifying information about that individual within 24 hours, and if deemed eligible for a permit within 90 days. Information on denials can be retained indefinitely.

In contrast, information obtained by FBI case agents or counterterrorism officials to support investigations and counterterrorism efforts can be retained and shared. The 2005 guidance explains to case agents in the field how they can share information with other Federal, State, and local entities consistent with State law. In addition, the FBI Counterterrorism Division now routinely analyzes background check information for watchlisted individuals to identify patterns and threats and disseminates monthly reports throughout the Bureau. FBI officials noticed that the individuals discussed in these reports range from those who are somewhat of a concern to those who represent a significant threat. Similarly, the Terrorist Screening Center shares information on positive watchlist encounters daily with some Federal, State, and local entities.

Finally, as the Congress debates whether to give the Attorney General authority to deem individuals ineligible for firearms or explosives because information indicates that the person might use them in connection with terrorism, we continue to maintain that the Attorney General should be required to develop guidelines for these decisions. The development of such guidelines delineating under what circumstances he would deem someone ineligible would be consistent with the development of standards, criteria, and examples used for determining when to deny a person entry to the country or the boarding of a plane. Guidelines would also provide a means for holding the Attorney General accountable for using this authority carefully and help to ensure that private and civil liberties are protected.

Mr. Chairman, that concludes my statement. I would be happy to answer any questions.

Chairman LIEBERMAN. Thanks very much.

I just want to draw attention to something you said, and we will come back to it because it really is important, that several—the term you used—of the people on the list that applied to purchase a gun were on the No Fly List, and that is a very small list. My recollection—I do not know if you know, Mr. Roberts, but it is about 2,000. In other words, those are the ones that if they show up to go on a plane, they are immediately pulled aside, not for secondary screening but they grab them. And it is amazing that some of those have not been stopped from buying a gun. So I will come back to that because I want to get into the inner workings of what happens after the hit is made.

The next witness is Sandy Jo MacArthur, Assistant Chief of the Los Angeles Police Department (LAPD). I really appreciate your taking the time and making the effort to come across the country. LAPD has another great counterterrorism program and a great police department, and I thank you for representing all the members of the department here this morning.

**TESTIMONY OF SANDY JO MACARTHUR,¹ ASSISTANT CHIEF,
OFFICE OF ADMINISTRATIVE SERVICES, LOS ANGELES PO-
LICE DEPARTMENT**

Ms. MACARTHUR. Thank you. Good morning, Chairman Lieberman, Senator Collins, and distinguished Committee Members. Thank you for holding this hearing on firearms and terrorism.

I represent the city of Los Angeles and the Los Angeles Police Department. I have been an LAPD officer for 30 years, and I am now an Assistant Chief. During the years that I have served, we have dealt with extraordinary violence in the streets of Los Angeles involving hard-core criminals, gang members, and weapons. We have been the target of terrorist threats, including threats to our airports and threats by domestic terrorist groups. Our experience with responding to and investigating such violent crimes has helped us define how to most effectively stop such violence through prevention efforts. Our efforts allow our city today to boast of crime rates not seen in Los Angeles since the 1950s. This has not occurred by accident but rather by using our experiences and continuously improving our policing efforts. Today I am going to address three issues of interest to this Committee.

First, there is a belief that it is not a matter of if, but when, one of our national urban communities is once again attacked either by a foreign or domestic terrorist in the form of gang members, hardened criminals, Islamist terrorists, or the lone wolf.

Second, I want to explain the scope of the term "prevention" and what the LAPD has incorporated into our first responder training to address a terrorist incident or multiple location attack.

And, third, I want to talk about the role legislation can play in support of local law enforcement's fight against terrorism and violence and closing the terror gap.

In February 1997, two armed gunmen held over 100 LAPD officers at bay for nearly an hour in the infamous North Hollywood Bank shootout. They utilized rifles and expended hundreds of rounds of ammunition, similar to the weaponry used by terrorist cells today. It was local law enforcement that finally ended the confrontation.

In May 2005, four Muslim radical suspects, armed with shotguns, went on a crime spree in Southern California. As a result of local law enforcement and the Los Angeles Joint Terrorism Task Force, they uncovered a larger and greater conspiracy and prevented the suspects' planned attacks to maximize the number of casualties in Southern California.

In November 2008, we watched in horror as terrorists executed multiple attacks in Mumbai, India, with rifles and explosives. This past week in Times Square, we had yet another near miss, and thanks to vigilant citizens and the New York police officers, the plot was foiled. In all cases, it was local law enforcement who responded first.

The potential for an attack on the United States exists. Continued threats from foreign or domestic terrorist groups or a Mumbai-style attack is a real danger. Radical prison gangs direct gang members not incarcerated to target innocent individuals, law en-

¹The prepared statement of Ms. MacArthur appears in the Appendix on page 69.

forcement, and government entities for violence. Individual extremists such as Timothy McVeigh demonstrated just how violent and devastating one angry, deranged individual can be.

After Mumbai, the LAPD realized that our street officers were not prepared to respond to a simultaneous multi-event attack on the City of Los Angeles and worked with other law enforcement agencies to evolve the first responders' capabilities to defend the region. We realized that local law enforcement is the first line of defense to prevent and to respond to violent or potentially violent incidents.

Prevention is far greater than simply preventing a crime from occurring. It includes the mandate that during a violent event patrol officers must prevent further mayhem or loss of life. The patrol officer is key to preventing violent incidents from escalating into events that end in mass casualties such as Mumbai. We cannot solely rely on SWAT teams or counterterrorism officers.

To address this gap in tactical patrol capabilities, we embarked on a multi-agency, regional effort to evolve our first responder tactics. We understand that our ability to react in minutes rather than hours saves lives. The result of our efforts are new patrol tactics we refer to as our Multiple Assault Counter-Terrorism Action Capabilities (MACTAC). These tactics are similar to our military's tactics that have been perfected and are currently in use overseas as we fight terrorism.

To date, we have trained over 6,000 of the LAPD's officers and approximately 200 officers from around the country. We have over 1,100 officers now trained in the use of patrol rifles. This training can standardize local law enforcement's tactics and allow seamless support in the event that a city has the need to call in mutual aid to resolve an incident. These 21st Century policing tactics are key to the successful prevention of casualties during a violent encounter and to provide officers the ability to engage indiscriminate shooters, respond rapidly to an unfolding violent incident, and has significantly raised the tactical competency of our street-level officers in Los Angeles.

Finally, we need government to support the continued development of an integrated intelligence capability and standardized tactical training to keep our Nation safe. Training is costly but critically important in the prevention and the fight against terror and violence. The training we have developed has the potential to standardize the tactics used by over 700,000 local law enforcement officers throughout the country.

As we know, the first several hours of any violent terrorist incident will be the responsibility of the local law enforcement who will be placed in harm's way and expected to neutralize an attack. Providing these front-line officers standardized tactical training will transform these first responders into a coordinated team, able to prevent further violence; a true force multiplier against domestic or international terrorism. The cost of providing that training is well worth the lives that are certain to be saved, and Federal and financial support would be an investment in our Nation's safety.

Training is only part of the equation. It is of paramount importance that we continue to improve our information-sharing capabilities between Federal, State, and local law enforcement agencies

regarding intelligence collection, to prevent weapons from getting into the hands of the potential terrorist, while offering law-abiding citizens their constitutional protections. This can stop terrorist attacks in their tracks. Thank you for this opportunity to speak today.

Chairman LIEBERMAN. Thank you very much, Ms. MacArthur.

Thanks for being here representing the Liberty Coalition. The Minority recommended you as a witness, and we are glad to have you and look forward to hearing you now.

TESTIMONY OF AARON TITUS,¹ PRIVACY DIRECTOR, LIBERTY COALITION

Mr. TITUS. Thank you, Chairman Lieberman, Ranking Member Collins, and Members of the Committee. My name is Aaron Titus. I am the Privacy Director for the Liberty Coalition.

The Liberty Coalition works with more than 80 partner organizations from across the political spectrum to preserve the Bill of Rights, personal autonomy, and individual privacy. The Liberty Coalition works with but does not speak for our partners.

I am aware that many in this audience have been personally affected by gun violence. Managing guns and other weapons is a matter of public concern. Regardless of one's position on gun safety and gun control, the Supreme Court has unambiguously ruled that the right to bear arms is an individual, constitutionally enumerated right. The Second Amendment is not absolute, and the government may regulate the right to bear arms in many ways.

But S. 1317 goes too far. The bill should be titled "The Gun Owners Are Probably All Terrorists Act" because it strips citizens of their constitutional right to keep and bear arms without any meaningful due process. And S. 2820 should be called the "National Firearm Registry Act" because it creates a national firearm registry. So I suggest that we call it what it is. If you would like to make a national firearm registry, then go through the proper process, call it what it is, and have a meaningful public debate.

S. 2820 creates a massive database of names and detailed personal information of every law-abiding citizen who purchases a gun. The bill disingenuously purports to target terrorists. But in fact, only one ten-thousandth of 1 percent of these records belong to people on watchlists. Every year, only 200 new watchlist records will be created, but the system will generate more than 14 million records on law-abiding citizens. Once collected, there is no limit on what the information may be used for and no legal requirement to ever delete it. At the very least, we should call this bill what it is. It is a National Gun Registry Act.

Reading S. 1317, one would think that it is lawful for convicted terrorists to own guns. That is simply not true. Convicted terrorists cannot own guns. Not only that, but today's discussion totally misses the point. This Committee should not spend time debating on whether to take away terrorists' guns, bombs, cell phones, or any other instruments of terror. If a person is a dangerous terrorist, then he should be thrown in jail. The only things a real, con-

¹The prepared statement of Mr. Titus appears in the Appendix on page 75.

victed terrorist should own are an orange jumpsuit and a pair of leg chains.

Assuming for a moment that everyone on a watchlist is a terrorist, as this bill suggests, then I propose that this Committee start throwing every single one of those hundreds of thousands of people in jail, starting today. But you and I know that the Constitution will not let you do that. And if you cannot throw citizens in jail for being on a watchlist, you cannot revoke their Second Amendment rights either.

Right now, a citizen who is denied a firearms purchase has the right to know exactly why, and appeal. But S. 1317 changes that. If a citizen's name is on a watchlist, the Attorney General does not have to tell him why he was denied, if he thinks that tipping off the citizen might compromise national security.

If a citizen is able to appeal the decision in court, things only get harder and more confusing. Neither the citizen nor his attorney can see the evidence against him. They can only see summaries and redacted versions. Not even the judge may consider the unredacted evidence.

A citizen will lose his appeal if the Attorney General can prove, by a preponderance of the evidence, not that the individual poses a risk, or that the person is a terrorist, or even that the person is under investigation; rather, the Attorney General must only demonstrate that the citizen has been placed on a watchlist. Once that has been proven, the appeal is over, and the citizen loses his Second Amendment right to keep and bear arms.

The citizen will not have a chance to introduce evidence of innocence, abuse of executive discretion, or mount any other meaningful defense. I have heard of this type of judicial system being applied to non-citizens, but never to citizens of the United States, and especially on a matter of constitutional importance.

Times may have changed, Mr. Chairman, but fortunately the Constitution has not.

Criminal and terrorist investigations must be kept confidential. But S. 1317 misunderstands that investigation is not guilt. Suspicion is not a conviction. And the law has a technical word for people who have not been convicted of a crime. It is called "innocent."

Terror watchlists have no meaningful element of due process and are, therefore, fundamentally different from other lists scanned by the National Instant Criminal Background Check System. Terror watchlists by their nature are designed to be overbroad. A name on a terror watchlist is evidence of government interest in a person, not proof of terrorism.

The bald allegation of a suspicion of terrorist inclinations is insufficient evidence to overcome an individual's right to bear arms. Mr. Chairman, suspicion is not a conviction.

S. 1317 takes away a citizen's right to face his accusers. This bill takes away a citizen's right to appeal. This bill takes away a citizen's right to due process. And if you cannot throw them in jail because they are on a watchlist, then you cannot revoke their Second Amendment rights either.

Mr. Chairman, this bill is unconstitutional, and I urge this Committee to reject S. 1317 and S. 2820.

I am happy to respond to questions.

Chairman LIEBERMAN. Thanks, Mr. Titus. You will not be surprised to hear that I disagree with you, but I appreciate the fact that you stated your case and did it thoughtfully.

Let me begin by picking up on your testimony, Mr. Roberts, and using some of the numbers in the study that GAO and Ms. Larence did of the 1,225 or 1,228 cases that we have talked about where there was a match by a potential gun purchaser with the terrorism watchlist, and this goes down—the 91 percent of those who were not stopped because they hit some mandatory rejection database like a criminal record, 650 unique people.

So what happened? And I would just state for the record, I am not sure we have ever said this. As I understand it—and please confirm it for me—it was by executive action that the Department of Justice, not by legislative action, began to apply the names of people applying for gun licenses to the terrorism watchlist. Is that correct? In other words, it was not legislatively mandated.

Mr. ROBERTS. In terms of the database that we check?

Chairman LIEBERMAN. Yes.

Mr. ROBERTS. That is correct. There is no mandate that we check certain databases. We are open to checking many of them.

Chairman LIEBERMAN. Correct. And so to some extent, the reason why this hit on the terrorism watchlist from a potential gun purchaser is not reason of itself, as other hits are on other watchlists, to deny the gun permit is because Congress has never legislated on that. In other words, you do not have the authority by executive order, without congressional authorization, to not only apply to additional watchlists but to then prohibit a gun purchase, correct?

Mr. ROBERTS. That is correct. We are limited to the 10 prohibitors that are in the Brady Act.

Chairman LIEBERMAN. Now, as I mentioned, the Bush Administration attempted, in 2007, to add that discretionary authority, and obviously the legislation that we have discussed today would do the same. What, generally speaking, happens to those 650 unique people? In other words, when somebody on a terrorism watchlist comes in to apply for a gun permit to buy a gun, the FBI, we know now, cannot deny that purchase.

Mr. ROBERTS. That is right.

Chairman LIEBERMAN. But what happens? I presume that some extra attention is paid to those people. Can you talk about that?

Mr. ROBERTS. That is absolutely correct. The FFL gets a notice from our NICS section that they are to delay the transaction, which buys us basically 3 days to do some additional investigation, at which point we immediately notify the Terrorism Screening Center of the KST hit that we found in NCIC.

We work with the Terrorism Screening Center and then the FBI's Counterterrorism Division to make sure everybody is in the loop and that everybody knows that this person on the KST list is attempting to buy a firearm.

We then talk to the FBI case agent, and find out if there is additional information that he or she may have in his or her possession that would preclude the firearms transaction. In other words, the case agent may know that individual is under sealed indictments, may know that there was an arrest that we did not know about

that was not in III or something to that effect, a prohibitor that is under the Brady Act now. So we would explore that, and we would also provide to him the information about the KST attempting to purchase a firearm and the FFL that he or she was using to do that.

Chairman LIEBERMAN. Fine. Let me ask the next question. The 3 days passes. The individual on the terrorism watchlist purchases the gun. For the information of the public, let alone the Committee, I presume that is not the end of it for the FBI. In other words, can the public have some reassurance that these people are being watched, basically?

Mr. ROBERTS. That is absolutely correct. It could be a key piece of evidence for the JTTF agent who is working that case. And let me just say that of the times that we have had the 3-day waiting period expire and the individual on the KST list was subsequently transferred a firearm, we have never had to go back to ATF to have that gun retrieved for a KST hit. We have in other instances, but not in a KST hit.

Chairman LIEBERMAN. So the question was raised earlier, what has happened to those people? In other words, we have no evidence that they have gone ahead and committed a terrorist act. Is that a fair conclusion or do we not really know?

Mr. ROBERTS. Well, I think it is a case-by-case basis, and I think it is up to the individual case and the individual case agent to determine where it goes from there and whether the fact that the individual on the KST list is attempting to buy a firearm is relevant to his or her case or not. Each case is going to be completely different. It could very well be that the JTTF agent decides that additional scrutiny is necessary of that individual and, for example, put additional surveillance on that individual or some other investigative technique.

Chairman LIEBERMAN. I presume that if somebody who had risen to a high enough level of concern to be on the No Fly List comes in to buy a gun, the FBI is going to pay special attention to that.

Mr. ROBERTS. I can assure you that all of these KSTs get special attention and are immediately dealt with, both at our office in the CJIS Division as well as at the Counterterrorism Division.

Chairman LIEBERMAN. Do I understand that today you are not authorized to say whether the FBI is in favor or against this legislation?

Mr. ROBERTS. I am not authorized to do that. That is a Department of Justice call, and I have not been authorized to do so.

Chairman LIEBERMAN. I gather from previous testimony and just hearsay that Attorney General Holder has said he would support such legislation, but I gather that that has not been specifically conveyed to you.

Mr. ROBERTS. It has not. I have not been part of those discussions.

Chairman LIEBERMAN. Let me ask you then the next question, which I asked Commissioner Kelly. Maybe it is self-evident. To what extent can one conclude that the purchase of a firearm by somebody who is a terrorism suspect and, therefore, on the watchlist may indicate that person is moving to activate, to be operational, to actually carry out a terrorist attack?

Mr. ROBERTS. It is probably a better question for our Counterterrorism Division to answer than me, but I will say that it could very well be or it may not be. There is a whole host of range of answers there regarding each separate case. But I think I would have to defer to the Counterterrorism Division of the FBI for a better answer to that question.

Chairman LIEBERMAN. Am I right that everybody who is a KST has a case officer?

Mr. ROBERTS. It may not be an FBI case officer, but most of them are.

Chairman LIEBERMAN. Yes. So presumably somebody on the No Fly List who came in to purchase a gun—

Mr. ROBERTS. Should have an FBI case agent.

Chairman LIEBERMAN. Would have an FBI case officer.

Mr. ROBERTS. Or a JTTF case agent.

Chairman LIEBERMAN. Yes, exactly. So, in other words, if this was a person being followed and the gun was purchased, there would be up to each case officer to determine whether that was an indication that this individual, based on the full range of information they had, was about to go active.

Mr. ROBERTS. That is correct, because it is my understanding that many or at least some of the individuals on the KST list may be those types of cases where they are providing material support in the form of funding to, say, Hezbollah and not necessarily an operational type of case.

Chairman LIEBERMAN. Right. Let me ask you a different kind of question, which is about potentially expanding the list that the FBI runs the potential gun purchasers against, which is cases—I used the words “active investigation.” I know that is a term of art, and I may have overused it. But those are cases where there is some interest in an individual, but not to the level that they have made it to the terrorism watchlist. And here, mindful of the kinds of constitutional concerns, it just seems to me that knowing that any action here can ultimately be brought to court by a defendant, that you would want to know whether that person has gone in to buy a gun.

So I do not know whether you are able to indicate what you think about the idea that we have been talking about, about urging the FBI to expand the list that runs the potential gun purchasers against.

Mr. ROBERTS. Well, I will start by saying that the law does not preclude us or limit us to checking any databases. The challenge here is—and I think you are generally talking about querying the FBI's Automated Case Support (ACS) system.

Chairman LIEBERMAN. The ACS list, and I gather you are going to a new system called Sentinel.

Mr. ROBERTS. At some point, right. The problem there is that, as I mentioned in my testimony, several of the States do the gun checks themselves, Point of Contact States such as Connecticut. They would not have access to ACS. There are security issues, there are a host of technical concerns, but mostly security issues since ACS is a classified network and contains classified information. So it is a difficult question and a very technically challenging question.

Chairman LIEBERMAN. We will continue this discussion. I may send a letter over just asking some questions about it to see if it can be helpful in preventing terrorists from obtaining guns.

Ms. MacArthur, let me ask a related question. I understand that the LAPD has been tracking purchases of weapons and ammunition for purposes of developing intelligence regarding imminent violence and criminal use of firearms. I wonder if you could describe what the Department has been doing and whether your results have been successful, and obviously particularly whether they have all been related to attempts to prevent firearms from being acquired by terrorists.

Ms. MACARTHUR. We have been tracking both the firearms purchases as well as the ammunition purchases, and the ammunition purchases are not yet automated in the State. So what we have right now is several of our task forces that are particularly successful have been our violent crime task forces that actually will go out to various dealers on a random basis and sometimes not so random basis, depending on the investigations that may be going on, pull their files and bring them in, and then we begin to run who has purchased the ammunition. What we have found in particular is that there are many times when we have actually been able to flag people who have criminal convictions that would prevent them from buying the ammunition if they had been run into a system.

We do follow-ups. We have arrested people. We have sent people back to prison. We find people on felony probation and parole, people who have domestic violence, which is a big problem in Los Angeles—I think it is across the country—that have purchased ammunition and should not have been able to purchase it.

So we find that these lists have become very valuable in terms of not just the terrorism front, but the violence front in general.

Chairman LIEBERMAN. Very good. In your testimony, you described how the Mumbai attacks demonstrated to the LAPD that reliance on SWAT teams would not be sufficient to prevent a violent event like Mumbai from escalating. I wonder if you could explain what the LAPD has done to better prepare front-line police officers to respond to that kind of attack.

Ms. MACARTHUR. Yes. As we watched Mumbai, and several incidents, actually, across the world over the last 10 or 15 years, we started to understand—as you know, we developed the SWAT team. We are the first one in the country to have it. We are very proud of it, and we find it very useful.

However, watching Mumbai in particular, having multiple incidents occur is really counter to what SWAT teams are designed for. We have a SWAT team, and they respond to one incident at one time, contain, control, and manage it hopefully in a safe manner.

What you saw with Mumbai is multiple attacks almost simultaneously, and we saw the first responders were the people who were going to run into harm's way.

Typically, what we have trained our officers in law enforcement across the country for years is to get to the situation, assess it, contain it, control it, and then hopefully call in additional units for assessment. We understand that is where we are going to lose lives. So what we did is we brought together a multi-agency and multi-disciplinary approach when we were developing the new tactics. We

brought in law enforcement from across Southern California, including Las Vegas. We brought in tactical team members from our SWAT teams. And we also brought in several of our officers who have just returned from Iraq and Afghanistan. And we looked at how to better police in an urban environment in a terrorist attack situation.

What we found was typically our officers, as most officers, either ride as a one-person car or a two-person car, and two people are not sufficient to go down range to deal with the threat. But at the same time, we do not have the opportunity to wait for 40 people to respond in a SWAT configuration. So we are utilizing the tactics that are used by our military. We have designed a total different approach for what we now ask officers to do when you have a violent incident unfolding, is to assess, announce through communications what you have, assemble a team of no less than four, and then act, which is quite different than what we have been training in the past.

We have now been doing training with our region, and it allows an officer from Los Angeles Police Department with our port police, with our school police, with our sheriffs, and with Las Vegas, as officers arrive on scene, to marry up with other officers from other agencies, all being trained in the same tactics in what we consider going down range and dealing with the threat, neutralizing the threat, and hopefully preventing additional mayhem and loss of life.

What we also found when we were looking at this is that we were sorely underrepresented in the weapons system. We have officers out there with sidearms, and we had very few officers that were out there with rifles. So we have really stepped up our approach to arming our officers so that our officers can meet the terrorists with equal or superior weaponry.

So as I stated earlier, we have over 1,100 officers that are now trained with the police rifle. They carry them in their police cars every single day. And we understand that they are going to probably have to use those in an environment that we have described earlier.

So we have presented at the International Association of Chiefs of Police and several other agencies throughout the country, and everybody from our police administrators to our tacticians have acknowledged that this was a gap for some time now. So we invite people to come into our agency to do the training. We have sent people to other agencies, to the East Coast as well, to do training. And we see this as protecting our line officers and protecting the citizens who will be victims of such attacks.

Chairman LIEBERMAN. Very impressive and reassuring.

Ms. Larence, just one question. I appreciate the recommendations that GAO made from its study in this regard, and I was interested in your call for some guidelines for the action of the Justice Department here. And I wanted to ask you to just talk a little bit more, flesh out a little bit the general idea that you have here.

Ms. LARENCE. Well, as you know, people can be nominated to the terrorist watchlist based on a reasonable suspicion they pose a terrorist threat but are not necessarily directly linked to terrorism. And so the concept of guidelines would be for the Department of

Justice to determine what kinds of links, what kinds of evidence, or what information in the record would raise to the level of concern that the person would be a threat that would merit a denial of a firearm or explosive.

We have guidelines, criteria, and examples that the Department uses to place people on the No Fly List. So depending, for example, on a person's affiliation with certain organizations, the strength of that affiliation might determine what level of threat the person poses.

I think sometimes people may be concerned if someone has unfettered discretion, so we think guidelines on using this discretion would be consistent with the way the government operates other screening processes.

Chairman LIEBERMAN. Mr. Roberts, what do you think about that?

Mr. ROBERTS. It is not my call. It is a policy call at the Department of Justice, and we will be glad at the NICS process to handle it any way that the policy and the law requires.

You had asked earlier about the numbers on the No Fly List, and the number is about 8,600 people on that No Fly List, which is quite a bit smaller than what is on the KST list currently, which is some 270,000 on the KST list right now.

Chairman LIEBERMAN. Right. Thanks. I am afraid that I have to go on to another meeting. I thank all of you for your prepared testimony and for your delivered testimony. It has been to me an interesting, informative hearing. There is some disagreement, but it is healthy, and I think we have had a good airing of it here today.

As I mentioned briefly earlier, this is for our Committee a subject matter oversight hearing pursuant to our homeland security authority. The actual legislation in this regard is in the Judiciary Committee, and so what happens to it depends on that committee. But I hope that they will see fit to bring it out soon.

The record of the hearing will remain open for 15 days for additional statements or questions from the witnesses or the Members of the Committee. Usually it is the Members of the Committee who ask the questions and the witnesses who provide the answers and statements. But I thank you very much for your testimony, and with that the hearing is adjourned.

[Whereupon, at 12:25 p.m., the Committee was adjourned.]

APPENDIX



United States Senate
Committee on Homeland Security and Governmental Affairs
Senator Joseph I. Lieberman

Opening Statement
Chairman Joseph I. Lieberman
Homeland Security and Governmental Affairs Committee
“Terrorists and Guns: The Nature of the Threat and Proposed Reforms”
May 5, 2010

Good morning and thanks to the witnesses who have come to testify today.

I want to extend a special thanks to Mayor Bloomberg and Commissioner Kelly, and all who work with them and live in their great city, for their grace under pressure and the brilliant investigative work they and their colleagues in the federal and state law enforcement communities did to bring Faisal Shahzad to justice 53 hours after his attempted terrorist attack on Times Square.

This hearing on what Congress and the federal government can do to keep firearms out of the hands of terrorists was scheduled long ago but its urgency has certainly been made clear by the events of the past four days.

Our growing understanding of the plot to attack Times Square reminds us that Islamist extremists have declared war on America. In fact, they have attempted attacks on America more than a dozen times in just the last year. Most have been stopped by our counter terror forces before any damage could be done. But four broke through our homeland defense, including the failed attempts on Christmas Day over Detroit, and last Saturday night in New York.

And here is the fact that should focus our concentration this morning: The only two terrorist attacks on America since 9/11 that have been carried out and taken American lives were with firearms.

The most lethal was in November of last year when an Army doctor, Nidal Hasan, opened fire with a 5.7 millimeter, semi-automatic pistol and an older Smith and Wesson revolver at a processing center at Fort Hood, Texas, killing 13 Americans and wounding 30 others. Fort Hood was the deadliest terrorist attack in the U.S. since September 11 and the deadliest domestic terrorist attack against U.S. troops in the history of our country. It was carried out by one man with two guns.

In June of last year, Carlos Bledsoe, who changed his name to Abdulhakim Muhammad, shot and killed a U.S. Army recruiter and seriously wounded another in Little Rock, Arkansas, with an SKS semiautomatic rifle. In another recent case, homegrown terrorist cells stockpiled firearms while planning attacks against personnel at Fort Dix, New Jersey, and at the Marine Corps Base in Quantico, Virginia.

Thankfully, great law enforcement work stopped both plots. But had these planned attacks succeeded, many other Americans would have lost their lives, as over 160 did in the attacks in Mumbai, India, in 2008, which were also carried out largely with firearms.

The threat is all too real. Terrorists armed with semi-automatic and high-powered weapons can inflict heavy casualties in seconds. While it is true that homegrown terrorists are generally less sophisticated than those sponsored and trained overseas by Al Qaeda, they may also – particularly if acting alone – be harder to detect and stop. And the easy availability of lethal weapons ensures that these homegrown terrorists can legally obtain sufficient firepower to cause terrible damage.

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As Senator Lautenberg, Congressman King, Mayor Bloomberg and Commissioner Kelly will make clear today we are simply not doing all we can do to stop terrorists from buying guns.

The stark fact is that the U.S. Department of Justice has no authority to block the sale of firearms to terrorist when DOJ knows they are about to do so.

This unfortunately is not a rare occurrence. The number of times suspected terrorists have been allowed to buy guns in recent years is stunning and infuriating. This morning, the Government Accountability Office will testify that in the last six years, terrorist suspects on watchlists have tried to buy guns more than 1,200 times, and in 91 percent of those cases, they were allowed to buy guns.

In the other 9 percent, they were stopped by some other factor such as a criminal record.

Most Americans understand this has to change, and it can be done without compromising Second Amendment rights. In fact, a recent study done by Frank Luntz showed that over 80 percent of NRA members believe that suspected terrorists should not be allowed to buy guns.

In 2007, the Bush Administration proposed legislation to give the Attorney General the discretion to prevent the sale of firearms to watchlisted terrorists. It was not enacted. Senator Lautenberg and Representative Pete King have re-introduced that legislation in this Congress. It is a straightforward, bipartisan bill supported by mayors all over the country whose cities are prime targets of terrorists, including the coalition of mayors that Mayor Bloomberg has led. In my opinion, the bill should be enacted as quickly as possible to close this dangerous loophole before another suspected terrorist is able to buy firearms legally and use them to kill Americans.

Statement of
Senator Susan M. Collins

“Terrorists and Guns: The Nature of the Threat and Proposed Reforms”

Committee on Homeland Security and Governmental Affairs
May 5, 2010

★ ★ ★

Our nation remains a target for terrorists. Whether sent from overseas or radicalized within the United States, terrorists continue to target innocent men, women, and children. Their callous disregard for life was on full display in New York City this past Saturday.

Had it not been for an alert street vendor and the courageous action of the New York Police Department, many lives would have been lost, and many people would have been injured.

I applaud the quick and effective investigative work by federal, state, and local authorities that led to the identification and arrest of the suspect, Faisal Shahzad, who allegedly placed the car bomb in the midst of Times Square.

This attempted attack reminds us once again that terrorists are unrelenting in their desire to kill Americans. We cannot let down our guard, and we must continue to meet this ongoing threat with strength and resilience.

From Fort Hood to the skies over Detroit and now to Times Square, our nation must come to grips with the terrorist threat, particularly the threat of homegrown terrorism.

An alert citizenry is one of our best defenses against terrorist attacks. Signs on the New York City subway system read: “If You See Something, Say Something.” The U.S. Capitol Police ask those who work on Capitol Hill to pay close attention to “help be the eyes and ears with our local law enforcement.” And, as we saw in Times Square, an alert citizen can be our best line of defense against an attack.

Senator Lieberman and I introduced bipartisan legislation that would encourage individuals to report suspicious activity to appropriate officials. The legislation is straight-forward: it would protect individuals from lawsuits when they, in good faith, report suspicious behavior that may indicate terrorist activity. Given the recent events in New York, I encourage the Senate Judiciary Committee to pass this important bill.

During the past eight years, significant resources have been devoted to the prevention of a terrorist attack using a biological, chemical, or nuclear weapon. But as recent attacks have shown, the improvised explosive device - or IED - remains the weapon of choice for terrorists. In 2009 alone, there were more than 3,700 terrorist incidents involving an IED worldwide.

The materials used to construct IEDs are ubiquitous. Gas cans and propane tanks, available at any home improvement store, allegedly formed the core of the Times Square bomb. When terrorists can turn items that can be found in a family's garage into an instrument of death and destruction, it underscores the need for intelligence collection to identify threats as well as the need for vigilance by state and local authorities, business owners, and all citizens to learn the warning signs that distinguish legitimate activity from the precursors to a terrorist attack.

Of course, terrorists can also choose to use firearms, and that is the issue that brings us here today.

For many Americans, including many Maine families, the right to own guns is part of their heritage and way of life. This right is protected by the Second Amendment.

And so this Committee confronts a difficult issue today: how do we protect the constitutional right of Americans to bear arms, while preventing terrorists from using guns to carry out their murderous plans?

Let me note that a similar dilemma does not arise with application of the watchlist to the purchase of explosives.

One of the more important accomplishments since September 11, 2001, has been the creation of a consolidated terrorist watchlist based on information from all parts of the Intelligence Community and the FBI.

Our watchlist system, properly implemented, can be an effective mechanism for preventing individuals with *suspected* terrorist ties from boarding an aircraft. It also alerts law enforcement and border protection officers to more carefully screen *potential* terrorists, and allows the State Department to revoke visas of foreign persons with terrorist ties who are attempting to travel to the United States.

But the evidence used to compile the watchlist is often fragmentary and can be of varying degrees of credibility. As our late colleague Senator Ted Kennedy found out when his name was included, the watchlist can be inaccurate. For example, the latest DoJ Inspector General's report concluded that approximately 35 percent of those sampled remained on the watchlist

based on outdated information or material unrelated to terrorism. It is not, in other words, the equivalent of a criminal history report.

Incidents of mistaken application of the terrorist watchlist are very unfortunate, but those errors now result only in the restriction of a privilege, such as the right to board a plane or to travel to the U.S. from overseas. The expansion of the watchlist system to potentially deprive law-abiding Americans of a constitutional right, however, is wholly different and raises many critical questions.

As Congress considers the application of the terrorist watchlist to activities protected by the Constitution, we must carefully consider these questions:

- Are appropriate protections included within the watchlisting process to justify the denial of a constitutional right?
- If not, what procedural protections should be afforded those who are erroneously denied the ability to purchase a firearm?
- What guidelines are necessary to constrain the Attorney General's discretion to prevent law-abiding Americans from purchasing a firearm?

None of us wants a terrorist to be able to purchase a gun. But neither should we want to infringe upon a constitutional right of law-abiding Americans.

Frank R. Lautenberg

UNITED STATES SENATOR FOR NEW JERSEY



FOR IMMEDIATE RELEASE:
Wednesday, May 5, 2010

CONTACT:
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LAUTENBERG STATEMENT AT HOMELAND SECURITY AND GOVERNMENT AFFAIRS HEARING ON TERROR GAP LEGISLATION

Mr. Chairman and Ranking Member Collins,

I want to thank you for holding this critical hearing, and I'd like to thank my fellow witnesses for joining us here today.

This past Saturday we were reminded yet again that terrorists are determined to kill Americans on American soil. An empty SUV packed with explosives and a timing device was discovered in Times Square, one of the busiest places in America.

The terrorist behind this plot planned to set off an explosion and murder as many innocent Americans as possible. We were fortunate that this makeshift car bomb did not explode this time.

But as officials claim they will do everything they can to stop a future terror attack, a loophole in our guns and explosives laws gives terrorists the upper hand. This loophole—known as the “Terror Gap”—allows known and suspected terrorists to purchase military-grade explosives and firearms legally in our country.

As GAO will testify today—just last year, a person on the terror watch list was cleared to buy explosives by the ATF. How can that be? To put it simply: right now, the Federal Government cannot block the sale of explosives or firearms to someone because they are on the terrorist watch list.

It defies common sense, but it is the law of the land.

In fact, some of the very same explosive agents used to make roadside bombs in Iraq and Afghanistan are available for sale legally to known and suspected terrorists here in the U.S.

But we know that terrorists don't only use explosives—firearms are also a weapon of choice. In fact, the U.S. citizen who was arrested at JFK Airport Monday night in connection with the Times Square car bomb had a loaded handgun in the car he drove to the airport. And if you look at Mumbai and other recent terrorist attacks, we see that assault weapons and small explosives are being used more and more.

That's why we need to change the law.

Convicted felons, domestic abusers and the mentally ill are forbidden from buying guns and explosives, but nothing in our laws keeps fanatics on the terror watch list from purchasing guns and explosives. That is hard to believe—yet, unfortunately, it is true. Now this Terror Gap in our laws is not some theoretical concept. Not only can documented terrorists buy firearms legally in our country—they do.

I've requested reports from the GAO about the number of times the Terror Gap has been exploited—and here's what we have learned to date: From 2004 to February of this year, terrorists tried to buy guns and explosives 1,228 times. In 91 percent of those cases, they were given the OK to buy the guns.

Because of this Terror Gap, America is effectively hanging out the "Welcome Sign" for terrorists to arm themselves. I have introduced legislation in the Senate to close the Terror Gap—and Representative King has offered a nearly identical proposal in the House.

Our legislation would give the U.S. Attorney General the power to deny guns and explosives to known and suspected terrorists. This commonsense legislation is not anti-gun—it's anti-terrorist.

In fact, a gun owner who objects to the Attorney General's finding has the power under my legislation to challenge the ruling. That's why support for my legislation is widespread.

The Bush Administration, which fiercely defended gun rights, asked Congress to pass our legislation. Attorney General Eric Holder has indicated his support for our legislation. Tom Kean, the chairman of the 9-11 Commission, has urged Congress to close this dangerous loophole.

And police chiefs across the country have endorsed our legislation. Now the gun lobby tries to argue that gun owners oppose our bill.

But that's simply not true.

Republican pollster Frank Luntz recently found that 82 percent of National Rifle Association members want Congress to close the Terror Gap.

Mr. Chairman, everyone talks about making our country safer from terrorism—this is our chance to actually do it.

Thank you again for holding this hearing.

May 5, 2010

Testimony of Representative Peter King
Senate Committee on Homeland Security and Governmental Affairs

I'd like to start by thanking Chairman Lieberman, Ranking Member Collins, and members of the committee for holding this hearing and inviting me to testify on this important issue of guns and terrorism.

As Ranking Member of the House Homeland Security Committee, I know that the threat of terrorism is real, whether it is international or domestic, or carried out with firearms or weapons of mass destruction. The reality is that there are people who wish to do us harm. This is why we must pass legislation that tightens our nation's security, closes existing loopholes and eliminates any opportunities for terrorists to attack.

In order to address the issue in regards to accessing firearms, I have introduced the *Denying Firearms and Explosives to Dangerous Terrorists Act of 2009* (H.R. 2159). This legislation closes a loophole that allows those individuals on the terror watch list to legally purchase firearms in this country.

In the United States, an individual seeking to purchase a firearm must pass the National Instant Criminal Background Check System (NICS). If the background check reveals that the individual matches any of the prohibitive criteria, a firearm transfer may not occur.

Under current law, being a known or suspected terrorist is not a disqualifying criterion from legally purchasing a firearm or explosive. Absent of any other prohibitive criteria, a firearm transfer is permitted to occur, even if the individual is on a terror watch list.

Our legislation closes this terror loophole by giving the Attorney General the authority to deny the sale, delivery, or transfer of firearms or issuance of permits to individuals believed to be terrorists. It also grants the Attorney General the authority to revoke any firearm licenses of known or suspected terrorists. Finally, it establishes guidelines for individuals who wish to challenge the Attorney General's determination.

This need for this legislation is exemplified by the figures released today by the Government Accountability Office (GAO) on NICS checks and the terror watch list. According to the study, since 2004, FBI data showed that 1,225 NICS checks were a match with terror watch list records. Of those matched, 91 percent of the transfers were permitted to go through due to a lack of other prohibiting criteria. This means that over 1,100 legal purchases of weapons or explosives were made over a six-year period by individuals on a terror watch list.

We must do all we can to keep our cities and communities safe from terror and violence. Closing the terror loophole will add another layer of protection to ensure that guns are only accessible to responsible Americans and not to known or suspected terrorists.

In closing this gap, we also provide a valuable tool to law enforcement agents, which is why this bill has the support of New York City Police Commissioner Ray Kelly and has been endorsed by the International Association of Chiefs of Police.

In addition, the House bill has bipartisan co-sponsorship and has also been endorsed by both the Bush administration and by Attorney General Eric Holder under the current administration. Finally, it has been endorsed by Mayors Against Illegal Guns, a coalition of over 500 mayors from across the country who see the value in this legislation in keeping their residents safe.

We cannot afford another incident like those in Fort Dix or Fort Hood, where individuals suspected of terrorist activity legally obtained weapons that were used to kill innocent Americans. We cannot allow anymore acts of violence on account of weapons legally falling into the hands of those who wish to commit acts of terror. We must do all that is possible to put tighter rules in place to assist law enforcement in their brave efforts to keep our cities and neighborhoods safe and secure.

The war on terror must be fought from all directions if we're going to stay a step ahead of our enemies. Passing this legislation and closing the terror gap is one very important part of the process. Again, I thank the members of the committee for inviting me here to testify and thank them for recognizing the importance of holding a hearing on this important issue.

**TESTIMONY OF MAYOR MICHAEL R. BLOOMBERG
HOMELAND SECURITY AND GOVERNMENT AFFAIRS COMMITTEE
WEDSDAY, MAY 5th, 2010, 10AM**

Good morning, Chairman Lieberman, ranking member Collins, and members of the Homeland Security and Government Affairs Committee. Thank you for the opportunity to testify today.

Today, the Government Accountability Office has released new data showing that suspects on the terrorism watch lists were able to buy guns and explosives from licensed U.S. dealers 1,119 times between 2004 and 2010. That is a serious and dangerous breach of national security – and it raises a very basic question:

When gun dealers run background checks, should FBI agents have the authority to block sales of guns and explosives to those on the terror watch lists – and deemed to dangerous to fly? I believe strongly that they should. And so do the 500 mayors who are part of our bi-partisan coalition of Mayors Against Illegal Guns. But right now, they don't. As Senator Lautenberg and Congressman King have just said, it is time to close this "terror gap" in our gun laws.

At a time when the threat of terrorism is still very real, as we in New York City know all too well, it is imperative that Congress close this terror gap in our gun laws – and close it quickly. The car bomb the NYPD found in Times Square on Saturday night was not the only attempted terrorist attack on our city since 9/11 – far from it. And sadly, it won't be the last.

Since 1990, there have been more than 20 terrorist plots – or actual attacks – against our City. That's why it's so critical for Congress to fully fund homeland security programs like the "Securing the Cities" initiative – and to take other steps that will help us fight terrorists and make it harder for them to attack us.

In the last year alone, the NYPD – working closely with federal authorities – prevented two major planned attacks on our City. The first was last May, when terrorists purchased guns and explosives as part of a planned attack on a Temple and Jewish Center in the Bronx. The second was in September, when the City and federal authorities broke up a plot to detonate explosives in the New York City subway system. And, of course, attacks and planned attacks have not been limited to New York.

In 2007, six men were arrested for plotting to attack Fort Dix in New Jersey, about sixty miles outside of New York City, with an arsenal of high-powered firearms. Last June in Little Rock, Arkansas, a man opened fire at a military recruiting station, killing one private and wounding another. At the time of the shooting, the FBI was already investigating the man after his arrest in Yemen with a fake Somali passport. He was charged with murder and 16 counts of terrorist acts.

And on November 5, 2009, Major Nidal Hasan shot 43 people at Fort Hood – killing 13. We know Hasan was able to buy a handgun despite having been under investigation by the FBI for links to terrorism. After the Fort Hood shooting, I wrote an op-ed with Governor Tom Kean, Chair of the 9/11 Commission, urging Congress to close the Terror Gap. Our message was that we can't wait for another Fort Hood to happen before we take action.

The Bush Administration first proposed closing the gap in 2007. But because nothing has happened, people who may want to do our country harm have had no trouble buying guns and explosives, as the GAO report clearly shows.

It's important to note that the legislation before you today would give FBI agents the ability to make exceptions when they determine that blocking a sale might tip off a suspect who is under investigation. And the bill also allows those on the list to appeal their status to the Justice Department -- and challenge the determination in court.

Attorney General Eric Holder supported closing the Terror Gap in testimony before the Senate Judiciary Committee last year. And so does the vast majority of Americans. A December poll by Republican pollster Frank Luntz found that 82% of NRA members support closing the Terror Gap.

Of course, even if the Terror Gap in our background check system were to be fixed, terror suspects and other dangerous people would still be able to go to gun shows to buy guns without any background check at all, which is why our coalition of mayors is also urging Congress to close the Gun Show Loophole.

In New York City, we are doing everything humanly possible to prevent another terrorist attack. Under Commissioner Kelly's leadership, the New York City Police Department has developed one of the world's most advanced counter-terrorism programs. One thousand of our best officers work on counter-terrorism and intelligence efforts every day.

A key element of any smart counter-terrorism strategy is to make it harder for terrorists to strike. That's why air passengers walk through metal detectors. That's why our police officers randomly check bags in the subway. That's why our police officers patrol sensitive locations. And that's why it's just common sense to give the FBI the authority to keep terror suspects from buying guns and explosives.

Let me close by saying: this is not about the Second Amendment. Our founding fathers did not write the Second Amendment to empower people who wanted to terrorize a free state; they wrote it to protect people who could defend "the security of a free state." Today, the security of our free state is being tested by terrorists.

I urge you to take common sense steps to strengthen law enforcement -- including closing the terror gap -- and to protect the American people from more attacks.

Thank you.

Prepared Statement of the Honorable Raymond W. Kelly
Police Commissioner, City of New York
Senate Committee on Homeland Security & Governmental Affairs
Dirksen Senate Office Building – SD-342
Wednesday, May 5, 2010 - 1000 hrs.

Senator Lieberman, Senator Collins, members of the committee. Thank you for this opportunity to testify.

Terrorists are determined to attack this country by any means. Saturday's attempted car bomb attack on Times Square is but the latest example.

Since September 11th, 2001, New York City has been the subject of eleven plots that we know of. Each of them was defeated through close cooperation between the NYPD and our federal partners. Each highlights one of the myriad ways terrorists might try to attack New York: with homemade bombs, by torching bridge cables, or releasing cyanide in the subways.

The Police Department trains constantly to defend against every type of threat, especially those from guns and explosives. Obviously, the more we can do to deny would-be terrorists access to these weapons, the safer we will be. That is why it is urgent that we close the terror gap in our nation's gun laws. Failure to do so places this country at even greater risk.

Last year, I testified before this committee about the NYPD's response to the commando-style assault on Mumbai, India in November 2008. As you may recall, that attack was carried out by small teams of operatives using AK-56 assault rifles. By sustaining the operation for hours, they maximized the casualties.

As part of our comprehensive response to what happened in Mumbai, we've held tactical drills and tabletop exercises with officers from our Special Operations Division based on that scenario.

We've trained more than 250 additional officers in the use of heavy weapons so that they will be able to supplement the work of our Emergency Service officers in a crisis.

We've also decided to use the instructors in our Firearms and Tactics Unit as another reserve force.

All of our police recruits now receive basic instruction in three types of heavy weapons.

We've taken these and other measures because we believe an attack involving active shooters is always a possibility. Likewise, we must also guard against terrorists armed with homemade bombs, whether a car bomb like the one we saw in Times Square or stashed inside backpacks for a suicide mission like the one planned for last September in New York

City subways. Our subway bag search program, which we implemented immediately after the 2005 London bombings, is designed to counter such a threat.

In recent years, we've also conducted undercover operations demonstrating the ease with which terrorists in this country can purchase explosive ingredients such as chlorine and ammonium nitrate.

These efforts are part of a robust counterterrorism program we built from the ground up in 2002, when we realized that in addition to our focus on crime-fighting, the Police Department needed to build the intelligence collection, analysis, and infrastructure protection capabilities to defend New York City from another terrorist attack.

We established the nation's first municipal Counterterrorism Bureau, and we restructured our Intelligence Division.

We recruited the best that the federal government had to offer to head those two operations.

We created a new civilian intelligence program to support our field commanders with timely information and analysis.

We tapped the incredible linguistic diversity of the Police Department and assigned native speakers of languages such as Arabic, Urdu, and Pashto to counterterrorism duties.

We strengthened our patrols of key infrastructure in the city, including bridges, tunnels, and a host of landmarks and other sensitive locations.

We forged collaborative relationships with the private sector, with law enforcement organizations up and down the east coast, and with federal agencies, especially the FBI and the Department of Homeland Security.

All of our collective efforts would benefit from the passage of this bill, which would exclude anyone who is on a terrorist watch list from being able to legally purchase a gun, obtain a permit to buy explosives or a license to sell them.

From the standpoint of the NYPD, it would also complement the aggressive anti-gun strategies we already have in place. Under Mayor Bloomberg's leadership, New York City has become a national leader in combating gun violence. And the police department has made enormous progress in stemming the flow of illegal guns into the city.

It is a principal reason we've been able to drive conventional crime down by 40% since the beginning of 2002, even after we took on the additional responsibility of counterterrorism. But we're by no means declaring victory. We know there are still far too many guns available to criminals who are determined to obtain them. The same is true for international terrorist organizations, which in all likelihood are plotting the next attack as we speak.

This legislation would go a long way in stopping them from exploiting a dangerous loophole and succeeding in their mission. For that reason, I hope the congress will pass it without delay.

Statement for the Record
Daniel D. Roberts
Assistant Director, Criminal Justice Information Services
Federal Bureau of Investigation

“Terrorists and Guns: The Nature of the Threat and Proposed Reforms”
U.S. Senate Committee on Homeland Security and Governmental Affairs
May 5, 2010

Good morning Chairman Lieberman, Ranking Member Collins and Members of the Committee. It is my pleasure to address you today regarding the FBI’s efforts to respond to attempted purchases of firearms from licensed dealers and applications for firearms and explosives permits from state agencies by Known or Appropriately Suspected Terrorists (KSTs) listed on the nation’s consolidated watch list.

First, I want to make it clear that the FBI takes a proactive approach to investigating persons suspected of being involved or associated with terrorism. Our Joint Terrorism Task Forces are engaged every day, across the country, in following up leads, monitoring intelligence, and otherwise pursuing information about suspected terrorists who may be trying to obtain the means by which they or their associates can do harm to this country and its citizens.

Our efforts to identify watchlisted KSTs attempting to obtain firearms includes, but is not limited to, use of the National Instant Criminal Background Check System (NICS) process. The Brady Handgun Violence Prevention Act of 1993 (Brady Act) requires a Federal Firearms Licensee (FFL) to contact the NICS before any firearm transfer to a non-licensee, so the NICS can perform a background check to determine whether the receipt of a firearm by the prospective transferee would violate federal or state law. (Applicants for explosives-related licenses or alternate firearms permits are also subject to NICS checks.) Background checks are initiated through one of three NICS Contracted Call Centers, a state designated state Point-of-Contact, or through the NICS E-Check Web site via the Internet.

Once the descriptive information for the proposed transferee is entered, the NICS conducts a name search for matching records in three databases. The databases are the National Crime Information Center (NCIC), which contains, among other things, information on wanted persons and protection orders; the Interstate Identification Index (III), which contains criminal history records; and the NICS Index, which contains the names and information concerning persons subject to one or more of the disqualifiers contained in the Brady Act. The NICS Index includes individuals who have been determined to be prohibited from possessing a firearm by federal law for reasons that are not reflected in the NCIC or III systems. If the transferee indicates that he or she is not a U.S. citizen, then the NICS also queries databases of the Department of Homeland Security, U.S. Immigration and Customs Enforcement, to ensure that the transferee’s immigration status does not preclude them from obtaining a firearm.

One of the files queried by the NICS contained within the NCIC is the KST File. The KST File is populated by the Terrorist Screening Center (TSC) with descriptive identities maintained on

persons who are known terrorists or for whom there is a reasonable suspicion that they are terrorists. This file is a subset of the full consolidated watchlist managed by the TSC, known as the Terrorist Screening Database or TSDB. The TSDB also exports other subsets to other authorized screening points—such as the No-Fly list used at U.S. and foreign airports. Any NICS query that results in a “hit” in the KST File automatically causes that transaction to be transferred to a NICS Legal Instruments Examiner (Examiner).

Following the hit in the KST, the NICS Contracted Call Center provides to the FFL the NICS Transaction Number (NTN) and transfers the call to a NICS Examiner while the FFL remains on the phone. Upon transfer, the NICS Examiner, located at the FBI Criminal Justice Information Services (CJIS) Division in Clarksburg, West Virginia, then compares the data on the NICS search screen to the subject’s information to determine whether the hit is, in fact, a valid match. If the hit appears to be a valid match, the NICS Examiner informs the FFL the transaction is delayed for further research and transfers the transaction to the NICS Command Center. The FFL is not informed that the reason for the initial delay is because of a potential KST match. If the NICS Examiner in the NICS Command Center discovers independent reasons to deny the transaction – for example, a record of a felony conviction, the FFL will be informed of the denial, but research on the KST hit will continue. If there are no independent reasons for denial, the transaction will be delayed, the FFL will be advised of the delay, and the process below will be followed. In this case, the FFL is not permitted to transfer the firearm until after three business days from the date the transaction was created.

The NICS Command Center Examiner who retrieves the KST-related transaction will contact the FFL to gain additional information to assist in the identification of the individual such as the individual’s address, driver’s license, social security number, or alien registration number as applicable. The NICS Command Center Examiner will also contact the TSC to inform them a NICS hit to an NCIC KST record has occurred and to attempt to confirm the transferee’s identity to further validate an accurate match has been made. If a coordinated effort by the TSC and the NICS Section determines the subject of the NTN does not appear to be a match, based on the subject’s name and descriptive information, the NICS Section will continue to research all remaining databases on the transaction and complete the transaction.

If the TSC and the NICS Section determine the subject of the NTN does appear to be a match, then the TSC will forward the information to the Terrorist Screening Operations Unit (TSOU) who, in turn, will forward the information to the Counterterrorism Watch Unit (CT Watch)/Case Agent. Once the CT Watch/Case Agent has been notified, the CT Watch/Case Agent must contact the NICS Section within 72 hours from the time the transaction was made.

Once contact has been made with the CT Watch/Case Agent, the NICS Command Center Examiner advises a match to a KST record has occurred and seeks further information to assist in making a final determination. The CT Watch/Case Agent coordinates with the Joint Terrorism Task Force (JTTF) to provide the NICS Section any additional information the JTTF may have that indicates the KST is prohibited from receiving a firearm or explosives.

The attempt by a KST to buy a firearm or obtain an alternate permit constitutes a positive “encounter.” An encounter is simply a contact by a watchlisted person that is reported to the

TSC and, in turn, the FBI's Counterterrorism Division (CTD). There are many other forms of encounters the FBI tracks including, e.g., border checks by U.S. Customs and Border Protection and visa applications at U.S. Embassies abroad. An attempt to purchase a firearm from an FFL resulting in a NICS check is just one form of encounter.

Within the CTD, the first step – performed immediately – is to determine if there is an FBI investigation on the KST. If there is, the FBI Case Agent is immediately notified and placed in direct contact with a NICS Examiner to determine whether there is any information in the case file, or known to the Case Agent, that would disqualify the KST under the Gun Control Act from possessing a firearm. As previously mentioned, contact with the NICS Section is expected to occur within 72 hours, the three business days NICS is permitted to delay the transaction. If there is no investigation, the FBI Case Agent will open one based on the encounter in the United States of a watchlisted KST attempting to possess a firearm and/or explosives. Since this process was initiated in 2004, approximately 1,200 (+) such encounters have occurred and in approximately 90 percent of those, no prohibiting information was found to deny the transfer.

While waiting for this contact/information from the CT Watch/Case Agent, if the NICS Section identifies prohibitive information, in any of the databases searched by the NICS, the transaction is denied. If the NICS Section does not identify prohibitive information in any of its research, the NICS Section must not proceed with the transaction until contact is completed with the CT Watch/Case Agent, regardless of the existence of or lack of other records returned during the search. The NICS Section will await telephone contact with the CT Watch/Case Agent before making a final status determination.

If the CT Watch/Case Agent does not provide any state or federally prohibitive information and no prohibitive information was returned from the query of the NICS databases, then the NICS Command Center Examiner contacts the FFL and changes the transaction status from delay to proceed. If prohibiting information is discovered and the transaction has not been denied for other reasons, then the NICS Command Center Examiner contacts the FFL and changes the transaction status from delay to deny. If the determination cannot be made in three business days, the FFL is entitled by law to transfer the firearm. If prohibiting information is discovered after the three business days and the firearm has been transferred, the Bureau of Alcohol, Tobacco, Firearms and Explosives is contacted and initiates a separate process to retrieve the firearm. In a case involving a watchlisted KST, this would occur in coordination with the JTTF.

Regardless of whether the transaction is given the green light to proceed or is denied, the encounter is noted at the time and its import is assessed in the same manner as all newly discovered pieces of intelligence about the subject of the investigation. In this situation, in a given investigation, the attempt may, in combination with other factors, lead to enhanced investigative methods, such as surveillance. What the attempt to buy a firearm means in a counterterrorism investigation, and as a result the subsequent actions it warrants, necessarily must be evaluated on a case-by-case basis. In addition, this new piece of intelligence is provided to the National Counterterrorism Center and, in turn, to the U.S. Intelligence Community. Federal and state law enforcement partners are also notified as appropriate.

In summary, the FBI, working with its partner agencies through the JTTF, has and will use every lawful and appropriate investigative and analytical tool at its disposal to scrutinize and monitor any attempt by a watchlisted KST to acquire a firearm or obtain an alternate firearm or an explosives permit. While those tools and techniques have their limits, we believe they have been highly effective when dealing with the regulated sale of firearms.

United States Government Accountability Office

GAO

Testimony
Before the Senate Committee on
Homeland Security and Governmental
Affairs, U.S. Senate

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TERRORIST WATCHLIST SCREENING

FBI Has Enhanced Its Use of Information from Firearm and Explosives Background Checks to Support Counterterrorism Efforts

Statement of Eileen R. Larence,
Director, Homeland Security and Justice



GAO-10-703T

May 5, 2010

TERRORIST WATCHLIST SCREENING

FBI Has Enhanced Its Use of Information from Firearm and Explosives Background Checks to Support Counterterrorism Efforts

Highlights of GAO-10-703T, a testimony before the Committee on Homeland Security and Governmental Affairs, U.S. Senate

Why GAO Did This Study

Membership in a terrorist organization does not prohibit a person from possessing firearms or explosives under current federal law. However, for homeland security and other purposes, the FBI is notified when a firearm or explosives background check involves an individual on the terrorist watchlist. This statement addresses (1) how many checks have resulted in matches with the terrorist watchlist, (2) how the FBI uses information from these checks for counterterrorism purposes, and (3) pending legislation that would give the Attorney General authority to deny certain checks. GAO's testimony is based on products issued in January 2005 and May 2009 and selected updates in March and April 2010. For these updates, GAO reviewed policies and other documentation and interviewed officials at FBI components involved with terrorism-related background checks.

What GAO Recommends

GAO is not making new recommendations, but has made prior recommendations to the Attorney General to help ensure that background checks involving individuals on the terrorist watchlist are properly handled and that allowable information from these checks is shared with counterterrorism officials, which the FBI has implemented. GAO also suggested that Congress consider adding a provision to any future legislation that would require the Attorney General to define when firearms or explosives could be denied, which has been included in a subsequent bill.

View GAO-10-703T or key components. For more information, contact Eileen Larence at (202) 512-6510 or larencee@gao.gov.

What GAO Found

From February 2004 through February 2010, FBI data show that individuals on the terrorist watchlist were involved in firearm or explosives background checks 1,228 times, 1,119 (about 91 percent) of these transactions were allowed to proceed because no prohibiting information was found—such as felony convictions, illegal immigrant status, or other disqualifying factors—and 109 of the transactions were denied. In response to a recommendation in GAO's January 2005 report, the FBI began processing all background checks involving the terrorist watchlist in July 2005—including those generated via state operations—to ensure consistency in handling and ensure that relevant FBI components and field agents are contacted during the resolution of the checks so they can search for prohibiting information.

Based on another recommendation in GAO's 2005 report, the FBI has taken actions to collect and analyze information from these background checks for counterterrorism purposes. For example, in April 2005, the FBI issued guidance to its field offices on the availability and use of information collected as a result of firearm and explosives background checks involving the terrorist watchlist. The guidance discusses the process for FBI field offices to work with FBI personnel who conduct the checks and the Bureau of Alcohol, Tobacco, Firearms and Explosives to obtain information about the checks, such as the purchaser's residence address and the make, model, and serial number of any firearm purchased. The guidance states that any information that FBI field offices obtain related to these background checks can be shared with other counterterrorism and law enforcement agencies. The FBI is also preparing monthly reports on these checks that are disseminated throughout the FBI to support counterterrorism efforts.

In April 2007, the Department of Justice proposed legislative language to Congress that would provide the Attorney General with discretionary authority to deny the transfer of firearms or explosives to known or suspected "dangerous terrorists." At the time of GAO's May 2009 report, neither the department's proposed legislative language nor related proposed legislation included provisions for the development of guidelines further delineating the circumstances under which the Attorney General could exercise this authority. GAO suggested that Congress consider including a provision in any relevant legislation that would require the Attorney General to establish such guidelines; and this provision was included in a subsequent legislative proposal. If Congress gives the Attorney General authority to deny firearms or explosives based on terrorist watchlist concerns, guidelines for making such denials would help to provide accountability for ensuring that the expected results of the background checks are being achieved. Guidelines would also help ensure that the watchlist is used in a manner that safeguards legal rights, including freedoms, civil liberties, and information privacy guaranteed by federal law and that its use is consistent with other screening processes. For example, criteria have been developed for determining when an individual should be denied the boarding of an aircraft.

United States Government Accountability Office

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to discuss the government's use of the terrorist watchlist to screen individuals who are attempting to purchase a firearm or obtain a firearm or explosives license or permit, and related actions to determine if the person poses a threat to homeland security. Under current federal law, there is no basis to automatically prohibit a person from possessing firearms or explosives because the individual appears on the terrorist watchlist. Rather, there must be a disqualifying factor (i.e., prohibiting information) under federal or state law, such as a felony conviction or illegal immigration status. Questions about how well the government is using and sharing terrorism-related information in order to identify potential threats that individuals may pose were also raised as a result of the November 2009 shootings at Fort Hood, Texas, and the December 25, 2009, attempted airline bombing.

In January 2005, we reported that from February through June 2004, individuals on the terrorist watchlist were allowed to proceed with firearm transactions 35 times because the background checks revealed no prohibiting information.¹ As a result of that review, we identified opportunities for the Federal Bureau of Investigation (FBI) to ensure that background checks initiated by state agencies are consistently and properly handled and that the maximum amount of allowable information from background checks is consistently shared with counterterrorism officials. We made recommendations aimed at addressing these issues, which the FBI implemented. We updated this work in a May 2009 report, which included both firearm and explosives background checks.² The number of transactions involving individuals on the watchlist that were allowed to proceed had increased to 865 through February 2009. We also discussed the potential implications of then pending proposed legislation that would give the Attorney General discretionary authority to deny such transactions if he reasonably believes that the person may use a firearm or explosives in connection with terrorism. We suggested that in any relevant legislation, Congress consider requiring the Attorney General to establish guidelines on how he would exercise this discretion—delineating under

¹See GAO, *Gun Control and Terrorism: FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005).

²See GAO, *Firearm and Explosives Background Checks Involving Terrorist Watch List Records*, GAO-09-125R (Washington, D.C.: May 21, 2009).

what circumstances transactions could be denied—and this provision was included in a subsequent legislative proposal.

My testimony today updates our prior work and discusses (1) the number of times firearm and explosives background checks have been a match to the terrorist watchlist and related outcomes, (2) actions the FBI has taken to use information from these background checks to support investigations and other counterterrorism activities, and (3) pending legislation that would give the Attorney General authority to deny firearms and explosives transactions based on terrorist watchlist concerns and related issues.

My statements are based on reports GAO issued in January 2005 and May 2009.³ In conducting our prior work, we reviewed documentation obtained from and interviewed officials at FBI components and state agencies with responsibilities for conducting background checks on individuals attempting to purchase firearms or obtain a firearm or explosives license or permit. Our previously published reports were conducted in accordance with generally accepted government auditing standards and contain additional details on the scope and methodology for those reviews. In addition, my testimony contains updated information on firearms and explosives background checks involving individuals on the terrorist watchlist. For the updates, we reviewed documentation obtained from and interviewed officials at relevant FBI components to discuss efforts to collect, analyze, and share information related to these checks with counterterrorism officials. We also obtained data on firearm and explosives background checks that resulted in valid matches with individuals on the terrorist watchlist from February 2004 (when the FBI first started checking against terrorist watchlist records) through February 2010. We discussed the sources of data with FBI officials as well as the policies and procedures that FBI officials used to maintain the integrity of the data, and determined that the data were sufficiently reliable for the purposes of this review. We conducted our updated work in March and April 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings based on our audit objectives.

³GAO-05-127 and GAO-09-125R.

Background

The mission of the FBI section that operates the National Instant Criminal Background Check System (NICS Section) is to ensure national security and public safety by providing the accurate and timely determination of a person's eligibility to possess firearms and explosives in accordance with federal law. Under the Brady Handgun Violence Prevention Act and implementing regulations, the FBI and designated state and local criminal justice agencies use NICS to conduct checks on individuals before federal firearms licensees (gun dealers) may transfer any firearm to an unlicensed individual.⁴ Also, pursuant to the Safe Explosives Act, in general, any person seeking to (1) engage in the business of importing, manufacturing, or dealing in explosive materials or (2) transport, ship, cause to be transported, or receive explosive materials must obtain a federal license or permit, respectively, issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).⁵ To assist ATF, in February 2003, the FBI began conducting NICS background checks on individuals seeking to obtain a federal explosives license or permit. Persons prohibited by federal law from possessing firearms or explosives include convicted felons, fugitives, unlawful controlled-substance users and persons addicted to a controlled substance, and aliens (any individual not a citizen or national of the United States) who are illegally or unlawfully in the United States, among others.⁶

One of the databases that NICS searches is the FBI's National Crime Information Center (NCIC) database, which contains criminal justice information (e.g., names of persons who have outstanding warrants) and also includes applicable records from the Terrorist Screening Center's (TSC) consolidated terrorist screening database.⁷ In general, individuals who are reasonably suspected of having possible links to terrorism—in addition to individuals with known links—are to be nominated for inclusion on the consolidated terrorist watchlist by the FBI and other members of the intelligence community. One of the stated policy

⁴Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

⁵See Safe Explosives Act, Pub. L. No. 107-296, 116 Stat. 2135, 2280 (2002) (Title XI, Subtitle C of the Homeland Security Act of 2002), as amended.

⁶See 18 U.S.C. § 922(g), § 842(i).

⁷TSC—an organization administered by the FBI—was established in 2003 to develop and maintain the U.S. government's consolidated terrorist screening database and to provide for the use of watchlist records during security-related screening processes. Specifically, the database contains information about individuals "known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism."

objectives of the government's consolidated watchlist is the coordinated collection of information for use in investigations and threat analyses. Terrorist watchlist records in the NCIC database are maintained in the Known or Suspected Terrorist File (formerly the Violent Gang and Terrorist Organization File), which was designed to provide law enforcement personnel with the means to exchange information on known or suspected terrorists.

About 90 Percent of NICS Transactions Involving Individuals on the Terrorist Watchlist Have Been Allowed to Proceed Because There Was No Legal Basis Identified to Deny the Transactions

In May 2009, we reported that from February 2004 through February 2009, a total of 963 NICS background checks resulted in valid matches with individuals on the terrorist watchlist.⁸ Of these transactions, approximately 90 percent (865 of 963) were allowed to proceed because the checks revealed no prohibiting information, such as felony convictions, illegal immigrant status, or other disqualifying factors. Two of the 865 transactions that were allowed to proceed involved explosives background checks. The FBI does not know how often a firearm was actually transferred or if a firearm or explosives license or permit was granted, because gun dealers and explosives dealers are required to maintain but not report this information to the NICS Section. About 10 percent (98 of 963) of the transactions were denied based on the existence of prohibiting information. No transactions involving explosives background checks were denied.

For today's hearing, we obtained updated statistics from the FBI through February 2010. Specifically, from March 2009 through February 2010, FBI data show that 272 NICS background checks resulted in valid matches with individuals on the terrorist watchlist.⁹ One of the 272 transactions involved an explosives background check, which was allowed to proceed because the check revealed no disqualifying factors under the Safe Explosives Act. According to FBI officials, several of the 272 background checks resulted in matches to watchlist records that—in addition to being in the FBI's Known or Suspected Terrorist File—were on the Transportation Security Administration's "No Fly" list. In general, persons on the No Fly list are deemed to be a threat to civil aviation or national security and therefore should be precluded from boarding an aircraft. According to FBI officials, all of these transactions were allowed to

⁸GAO-09-125R.

⁹According to FBI data, there were approximately 14 million NICS backgrounds checks during this 12-month period.

proceed because the background checks revealed no prohibiting information under current law.

In total, individuals on the terrorist watchlist have been involved in firearm and explosives background checks 1,228 times since NICS started conducting these checks in February 2004, of which 1,119 (about 91 percent) of the transactions were allowed to proceed while 109 were denied, as shown in table 1.¹⁰

Table 1: Number of NICS Transactions Involving Individuals on the Terrorist Watchlist, February 2004 through February 2010

Calendar year	Valid matches	Allowed to proceed	Denied
2004 (beginning in February)	48	43	5
2005	149	141	8
2006	179	153	26
2007	287	259	28
2008	246	228	18
2009	272	250	22
2010 (through February)	47	45	2
Total	1,228	1,119	109

Source: FBI.

According to the FBI, the 1,228 NICS transactions with valid matches against the terrorist watchlist involved about 650 unique individuals, of which about 450 were involved in multiple transactions and 6 were involved in 10 or more transactions.

Based on our previous work, the NICS Section started to catalog the reasons why NICS transactions involving individuals on the terrorist watchlist were denied. According to the NICS Section, from April 2009 through February 2010, the reasons for denials included felony conviction, illegal alien status, under indictment, fugitive from justice, and mental defective.

In October 2007, we reported that screening agencies generally do not check against all records in TSC's consolidated terrorist watchlist because

¹⁰We could not reconcile with NICS Section officials why the 1,228 total matches differed from the combined total from our May 2009 report (963) and recent update (272).

screening against certain records (1) may not be needed to support the respective agency's mission, (2) may not be possible due to the requirements of computer programs used to check individuals against watchlist records, or (3) may not be operationally feasible.¹¹ Rather, each day, TSC exports applicable records from the consolidated watchlist to federal government databases that agencies use to screen individuals for mission-related concerns. We raised questions about the extent to which not screening against TSC's entire consolidated watchlist during NICS background checks posed a security vulnerability. According to TSC officials, not all records in the consolidated watchlist are used during NICS background checks. The officials explained that in order for terrorist information to be exported to NCIC's Known or Suspected Terrorist File, the biographic information associated with a record must contain sufficient identifying data so that a person being screened can be matched to or disassociated from an individual on the watchlist. The officials noted that since not all records in TSC's consolidated watchlist contain this level of biographic information required for this type of screening, not all records from the watchlist can be used for NICS background checks. According to TSC officials, the majority of records that do not contain sufficient identifying data are related to foreign nationals who would not be prospective purchasers of firearms or explosives within the United States and therefore would not be subject to NICS checks. We are continuing to review this issue as part of our ongoing review of the terrorist watchlist.

FBI Has Taken Actions to Use Information from NICS Checks to Support Counterterrorism Efforts

The FBI has taken additional actions to use information obtained from NICS background checks to support investigations and other counterterrorism activities. These actions include providing guidance to FBI case agents on how to obtain information related to NICS checks and efforts to analyze and share information on individuals matched to the terrorist watchlist.

¹¹See GAO, *Terrorist Watchlist Screening: Opportunities Exist to Enhance Management Oversight, Reduce Vulnerabilities in Agency Screening Processes, and Expand Use of the List*, GAO-08-110 (Washington, D.C.: Oct. 11, 2007).

**FBI Has Provided
Guidance to Case Agents**

The FBI has provided guidance to its case agents on how to obtain information on individuals matched to the terrorist watchlist during NICS background checks. According to FBI Counterterrorism Division officials, TSC notifies the division when a NICS background check is matched to an individual on the terrorist watchlist. After verifying the accuracy of the match, the Counterterrorism Division will advise the FBI case agent that the individual attempted to purchase a firearm or obtain a firearm or explosives license or permit. The division will also provide the agent with contact information for the NICS Section and advise the agent to contact the section to answer additional questions. According to Counterterrorism Division officials, the case agent is also advised to contact ATF to obtain a copy of the form the individual used to initiate the transaction.

For verified matches, NICS Section personnel are to determine if FBI case agents have information that may disqualify the individual from possessing a firearm or explosives—such as information that has been recently acquired but not yet available in the automated databases searched by NICS. To assist the division in searching for prohibiting information, NICS Section personnel are to share all available information that is captured in the NICS database with the case agent—name, date of birth, place of birth, height, weight, sex, race, country of citizenship, alien or admission number, type of firearm involved in the check (handgun, long gun, or other), and any exceptions to disqualifying factors claimed by an alien. According to FBI officials, these procedures have been successful in enabling the NICS Section to deny several gun transactions involving individuals on the terrorist watchlist based on disqualifying factors under current law. The FBI did not maintain specific data on the number of such denials.¹⁴

In response to a recommendation made in our January 2005 report, FBI headquarters provided guidance to its field offices in April 2005 on the types of additional information available to a field office and the process for obtaining that information if a known or suspected terrorist attempts to obtain a firearm from a gun dealer or a firearm or explosives license or permit. Regarding gun purchases, the guidance notes that if requested by an FBI field office, NICS personnel have been instructed to contact the gun dealer to obtain additional information about the prospective

¹⁴Our prior reports contain additional details on NICS procedures for handling firearm and explosives background checks involving the terrorist watchlist. See GAO-05-127 and GAO-09-1234.

purchaser—such as the purchaser's residence address and the government-issued photo identification used by the purchaser (e.g., drivers license)—and the transaction, including the make, model, and serial number of any firearm purchased. According to the guidance, gun dealers are not legally obligated under either NICS or ATF regulations to provide this additional information to NICS personnel. If the gun dealer refuses, the guidance notes that FBI field offices are encouraged to coordinate with ATF to obtain this information. ATF can obtain a copy of the form individuals must fill out to purchase firearms (ATF Form 4473), which contains additional information that may be useful to FBI counterterrorism officials.¹³

Regarding a firearm or explosives permit, the FBI's April 2005 guidance also addresses state permits that are approved by ATF as alternative permits that can be used to purchase firearms. Specifically, if requested by an FBI field office, NICS personnel have been instructed to contact the gun dealer to obtain all information from the permit application. Further, the guidance notes that the use and dissemination of state permit information is governed by state law, and that the FBI has advised state and local agencies that also issue firearm or explosives permits to share all information with FBI field personnel to the fullest extent allowable under state law. According to the guidance, any information that FBI field offices obtain related to NICS background checks can be shared with other law enforcement, counterterrorism, or counterintelligence agencies, including members of an FBI Joint Terrorism Task Force that are from other federal or state law enforcement agencies.¹⁴

In general, under current regulations, all personal identifying information in the NICS database related to firearms transfers that are allowed to proceed (e.g., name and date of birth) is to be destroyed within 24 hours after the FBI advises the gun dealer that the transfer may proceed.

¹³In general, under federal law, while gun dealers are required to maintain certain records of firearms transactions, they "shall not be required to submit to the Attorney General reports and information with respect to such records and the contents thereof, except as expressly required." See 18 U.S.C. § 923(g)(1)(A). Such records may be inspected or examined under certain circumstances upon issuance of a warrant and without a warrant in certain specified circumstances such as "in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the [federal firearms] licensee." See 18 U.S.C. § 923(g)(1)(B).

¹⁴Joint Terrorism Task Forces are teams of state and local law enforcement officials, FBI agents, and other federal agents and personnel whose mission is to investigate and prevent acts of terrorism.

Nonidentifying information related to each background check that is allowed to proceed (e.g., NICS transaction number, date of the transaction, and gun dealer identification number) is retained for up to 90 days. By retaining this information, the NICS Section can notify ATF when new information reveals that an individual who was approved to purchase a firearm should have been denied. ATF can then initiate any firearm retrievals that may be necessary. According to NICS Section officials, the section has made no firearm-retrieval referrals to ATF related to transactions involving individuals on the terrorist watchlist to date. Under provisions in NICS regulations, personal identifying information and other details related to denied transactions are retained indefinitely. The 24-hour destruction requirement does not apply to permit checks. Rather, information related to these checks is retained in the NICS database for up to 90 days after the background check is initiated.

FBI is Analyzing and Sharing Information from NICS Checks

The FBI is analyzing and sharing information on individuals matched to the terrorist watchlist to support investigations and other counterterrorism activities. In our May 2009 report, we noted that the FBI is utilizing a TSC database to capture information on individuals who attempted to purchase a firearm and were a match to the watchlist. Specifically, the FBI began analyzing each separate instance to develop intelligence and support ongoing counterterrorism investigations. Further, we reported that in October 2008, the FBI's Counterterrorism Division conducted—for the first time—a proactive analysis of the information related to NICS background checks involving individuals on the terrorist watchlist that is captured in the TSC database. This analysis was conducted to identify individuals who could potentially impact presidential inauguration activities. Based on the value derived from conducting this analysis, the Counterterrorism Division decided to conduct similar analysis and produce quarterly reports that summarize these analytical activities beginning in May 2009.

In updating our work, we found that the FBI's Counterterrorism Division is now issuing these analytic reports on a monthly basis. According to division officials, the reports contain an analysis of all NICS background checks during the month that involve individuals on the terrorist watchlist. The officials noted that the individuals discussed in the reports range from those who are somewhat of a concern to those who represent a significant threat. The reports are classified and distributed internally to various components within the FBI, including all FBI field offices and Joint Terrorist Task Forces. The officials stated that these reports have played a key role in a number of FBI counterterrorism investigations. According to

Counterterrorism Division officials, the names of individuals discussed in the reports are shared with other members of the intelligence community for situational awareness and follow-on analytical activity.

TSC also generates reports that cover all instances of screening agencies coming in contact with an individual on the terrorist watchlist, including those related to NICS transactions. TSC provides the reports to numerous entities, including FBI components, other federal agencies, and state and local information fusion centers.¹⁵ These reports are distributed via the FBI's Law Enforcement Online system.¹⁶ At the time of our updated review, TSC was exploring the possibility of electronically communicating this information to the intelligence community as well.

According to officials from the FBI's Counterterrorism Division, for investigative purposes, FBI and other counterterrorism officials are generally allowed to collect, retain, and share information on individuals on the watchlist who attempt to purchase firearms or explosives.

If the Attorney General Is Given Statutory Authority to Deny Transactions, Guidelines Would Help to Ensure Accountability and Civil Liberties Protections

In our May 2009 report, we noted that the Department of Justice (DOJ) provided legislative language to Congress in April 2007 that would have given the Attorney General discretionary authority to deny the transfer of firearms or the issuance of a firearm or explosives license or permit under certain conditions. Specifically, such transactions could be denied when a background check on an individual reveals that the person is a known or suspected terrorist and the Attorney General reasonably believes that the person may use the firearm or explosives in connection with terrorism. The legislative language also provided due process safeguards that would afford an affected person an opportunity to challenge an Attorney General denial.

At the time of our 2009 report, neither DOJ's proposed legislative language nor then pending related legislation included provisions for the development of guidelines further delineating the circumstances under

¹⁵In general, fusion centers are collaborative efforts of two or more agencies that provide resources, expertise, and information to the center with the goal of maximizing their ability to detect, prevent, investigate, and respond to criminal and terrorist activity.

¹⁶The FBI's Law Enforcement Online is an official U.S. government system for use only by authorized members of the law enforcement, criminal justice, and public safety community. Information presented in this system is considered sensitive but not classified and is for official law enforcement, criminal justice, and public safety use only.

which the Attorney General could exercise this authority.¹⁷ We suggested that Congress consider including a provision in any relevant legislation to require that the Attorney General establish such guidelines, and this provision was included in a subsequent legislative proposal.¹⁸ Such a provision would help DOJ and its component agencies provide accountability and a basis for monitoring to ensure that the intended goals for, and expected results of, the background checks are being achieved. Guidelines would also help to ensure compliance with Homeland Security Presidential Directive 11, which requires that terrorist-related screening—including use of the terrorist watchlist—be done in a manner that safeguards legal rights, including freedoms, civil liberties, and information privacy guaranteed by federal law.¹⁹

Furthermore, establishing such guidelines would be consistent with the development of standards, criteria, and examples governing nominations to, and the use of, the watchlist for other screening purposes. Because individuals are nominated to the terrorist watchlist based on a “reasonable suspicion” standard, the government generally has not used their inclusion on the watchlist to automatically deny certain actions, such as automatically prohibiting an individual from entering the United States or boarding an aircraft. Rather, when an agency identifies an individual on the terrorist watchlist, agency officials are to assess the threat the person poses to determine what action to take, if any, in accordance with applicable laws or other guidelines. For example, the Immigration and Nationality Act, as amended, establishes conditions under which an alien may be deemed inadmissible to the United States.²⁰ Also, the former White House Homeland Security Council established criteria for determining which individuals on the terrorist watchlist are deemed to be a threat to civil aviation or national security and, therefore, should be precluded from boarding an aircraft. Subsequent to the December 25, 2009, attempted terrorist attack, the President tasked the FBI and TSC to work with other relevant departments and agencies—including the Department of Homeland Security, the Department of State, and the Central Intelligence Agency—to develop recommendations on whether adjustments are

¹⁷See H.R. 2159.

¹⁸See S. 1317.

¹⁹The White House, *Homeland Security Presidential Directive/HSPD-11, Subject: Comprehensive Terrorist-Related Screening Procedures* (Washington, D.C.: Aug. 27, 2004).

²⁰See, for example, 8 U.S.C. § 1182.

needed to the watchlisting nominations guidance, including the No-Fly criteria.²¹ These efforts are ongoing.

At the time of our May 2009 report, DOJ was noncommittal on whether it would develop guidelines if legislation providing the Attorney General with discretionary authority to deny firearms or explosives transactions involving individuals on the terrorist watchlist was enacted. Subsequent to that report, Senator Lautenberg introduced S. 1317 that, among other things, would require DOJ to develop such guidelines. We continue to maintain that guidelines should be a part of any statutory or administrative initiative governing the use of the terrorist watchlist for firearms or explosives transactions.

Mr. Chairman, this concludes my statement. I would be pleased to respond to any questions that you or other Members of the Committee may have.

Contacts and Acknowledgments

For additional information on this statement, please contact Eileen Larence at (202) 512-6510 or larencee@gao.gov. In addition, Eric Erdman, Assistant Director; Jeffrey DeMarco; and Geoffrey Hamilton made key contributions to this statement. Contact points for our offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

²¹The White House, *Summary of the White House Review of the December 25, 2009, Attempted Terrorist Attack* (Washington, D.C.: Jan. 7, 2010).

**Testimony of
Sandy Jo MacArthur
Assistant Chief of Police
Los Angeles Police Department**

Chairman Lieberman, Senator Collins and Distinguished Committee Members, thank you for holding this hearing on Firearms and Terrorism.

I am representing the City of Los Angeles and the Los Angeles Police Department. I have been an LAPD officer for over 30 years and am now an Assistant Chief of Police. During the 30 years I have served, the LAPD has dealt with extraordinary violence in the streets of Los Angeles involving hard core criminals, gangs and weapons. We have also been the target of terrorist threats, including threats to our airport and threats by domestic terrorist groups. Our experience with responding to and investigating such violent crimes helped us define how to most effectively stop such violence through prevention efforts. Our efforts allow our City today to boast of crime rates not seen in LA since the 1950's. This has not occurred by accident, rather by using our experiences and continuously improving our policing efforts. Today, I will address three issues of interest to this committee:

- First, the belief that it is **Not a Matter of "IF, but When"** one of our national urban communities is attacked by either a foreign or domestic terrorist in the form of gang members, hardened criminals, Islamic terrorists or the lone wolf.

- Second, to understand the scope of the term "prevention" and what the Los Angeles Police Department has incorporated into first responder training to address a terrorist incident or multiple location attack.

- Third, the role legislation can play in support of local law enforcement's fight against terrorism and violence.

In February 1997, two armed gunmen held over a hundred LAPD officers at bay for nearly an hour in the infamous North Hollywood Bank of America Robbery. They utilized high powered rifles and expended hundreds of rounds of ammunition, similar to the weaponry utilized by terrorist cells. It was local law enforcement that finally ended the confrontation.

In May of 2005, four Muslim radical suspects – armed with shotguns – went on a crime spree in Southern California. Eleven times they robbed or attempted to rob gas stations. It was the work of local law enforcement that discovered during a search warrant body armor, knives, and other evidence of the crime. Additional evidence led these well trained detectives to quickly understand they were dealing with a homegrown terrorist organization. As a result the Los Angeles Joint Terrorism Task Force (JTTF), comprised of local law enforcement officers and FBI special agents working together, uncovered a larger and greater conspiracy and prevented the suspects planned attacks "to maximize the number of casualties" using long guns and homemade explosives in Southern California.

In November 2008 the world watched in horror as terrorists executed multiple attacks in Mumbai, India, utilizing long guns, explosive devices and grenades. It was local law enforcement that were the first responders to the incident. The question immediately came to mind, "Was the LAPD prepared to handle a Mumbai-style attack?"

The potential for another North Hollywood shootout, continued threats from domestic terrorist groups, or a Mumbai-style attack is a real danger in the United States. There are radical prison gangs throughout the country that direct gang members not incarcerated to target individuals, law enforcement and government entities for violence. Individual extremists such as Timothy McVea demonstrated just how violent and devastating one angry, deranged individual can be. And, of course, the concern of a terrorist attack since 9/11 is very real. The LAPD has studied, and continues to study, all of these and similar events in an effort to evolve the first responders' capabilities to defend the City of Los Angeles. These and other experiences provide law enforcement with many lessons. For example, the North Hollywood Bank Robbery Shootout caused the LAPD to reevaluate the weapon systems that were provided to first responders. At that time the Department introduced the Patrol Rifle to the street officer on a very limited basis. The key is to prepare officers to respond and to uncover these extremists before they inflict harm. Local law enforcement is the first line of defense to prevention and to responding to violent or potentially violent events.

The LAPD has a strong history of working toward preventing crime. The LAPD has employed a number of strategies including enhanced community outreach and a tip-line in order to uncover crimes before they occur. The iwatch program, which allows citizens to report suspicious terrorist-related behaviors, is the latest program developed by LAPD to prevent violent crimes. We understand that prevention is far greater than simply preventing a crime from occurring. It is a given that violent events will occur and prevention includes the mandate that during a violent event an officer must

prevent further mayhem and/or loss of life. We are known throughout the world for having created the first Special Weapons And Tactics (SWAT) team in the nation, concentrating our tactical and weapons expertise into a highly trained unit that is able to respond on a moment's notice to handle highly volatile, potentially violent incidents and prevent such incidents from escalating. SWAT has been extremely successful. However, today we now know that the average patrol officer is key to preventing violent incidents from escalating into events that end in mass casualties such as Mumbai.

As a result of the Mumbai attacks the LAPD realized that much more needs to be done in the area of routine patrol tactics to prepare our front line officers so that they can respond to, defend, and prevent casualties during a violent attack within the City.

To address this gap in tactical patrol capabilities we embarked on a multi-agency, regional effort to evolve our first responder tactics so that when such an incident occurs we are able to provide a rapid response to react and neutralize the incident, thus preventing mass casualties. We understand that our ability to react in minutes rather than hours saves lives. Traditionally, street officers responding to an incident will attempt to neutralize the threat, and in many cases contain it and request the assistance of a SWAT or specialized tactical team who are experts in de-escalating incidents in progress. Violent criminals and terrorists have studied law enforcement tactics and adjusted their violent actions accordingly. We now understand that our officers must respond, assess, and act immediately to prevent further violence in many terrorist-type events.

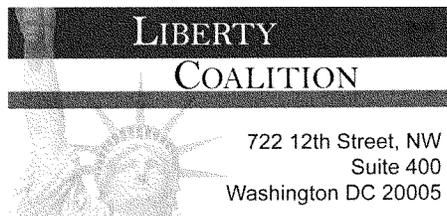
The result of our multi-agency efforts is new patrol tactics we refer to as our Multiple Assault Counter-Terrorism Action Capabilities or MACTAC. These tactics are similar to our military's tactics that have been perfected and are currently in use in our fight against terror overseas. My team and I have presented the MACTAC concepts at various conferences including the International Association of Chiefs of Police, Police Executive Research Forum and the National Tactical Officers Association. Both Police Executives and Tactical Experts believe this is critical to contemporary law enforcement. To date we have trained over 6000 of the LAPD's 9960 sworn police force and approximately 200 officers from around the country. This training can standardize local law enforcements' tactics and allow seamless support in the event that a city has the need to call in mutual aid to resolve an incident. These 21st century policing tactics are key to the successful prevention of and response to casualties during a violent encounter with a hardened criminal or a terrorist. This training provides us with the ability to engage indiscriminate shooters, respond rapidly to an unfolding violent incident and has significantly raised the tactical competency of our street level officers.

Training is costly and governmental support for such training is important in prevention and the fight against terror and violence. This training has the potential to standardize the tactics used by over 700,000 local law enforcement officers throughout the country. The nation's 12,000 FBI Special Agents are indeed some of the best investigators in the world, and the training they receive sets the benchmark for law enforcement. Their training is standardized. However, the first several hours of a violent

terrorist incident will be the responsibility of local law enforcement. It will be the more than 700,000 local law enforcement officers in the U.S. on the front lines fighting crime on a daily basis that will be placed in harm's way and expected to neutralize the attack and restore peace. Providing these 700,000 front line officers standardized tactical training will transform these first responders into a coordinated team, able to prevent further violence; a true force multiplier against domestic or international terrorism. The cost of providing that training is well worth the lives that are certain to be saved.

Finally, the suspects in all of the examples I have provided today have continuously demonstrated that their weapon of choice is a long gun. They are very well equipped with long guns, homemade explosive devices, and enough ammunition to keep the incident fluid for an extended period of time. It is of paramount importance that our governmental leaders understand that the tools we use to prevent weapons from getting into the hands of convicted felons, persons convicted of committing domestic violence or those who have been committed to a psychiatric hospital must be applied to those who are believed to be potential terrorists. We have the appropriate tools. Please allow law enforcement to utilize them to keep our cities safe.

Mr. Chairman and members of the Committee, thank you for inviting me to speak today. I am ready to answer any questions you may have.



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**Written Statement of the
Liberty Coalition**

Aaron Titus

**Privacy Director, Liberty Coalition
Attorney, J.C. Neu & Associates**

**before the
Senate Committee on Homeland Security and Government Affairs**

Chairman Lieberman, Ranking Member Collins and Members of the
Committee.

The Liberty Coalition (<http://www.libertycoalition.net>) works to organize, support, and coordinate transpartisan public policy activities related to civil liberties and basic rights. We work in conjunction with more than 80 partner organizations from across the political spectrum¹ that are interested in preserving

¹ The Liberty Coalition does not speak for its Coalition Partners. Liberty Coalition Partners currently include: Alliance for Patient Safety, American Association for Health Freedom, American Association of Small Property Owners, American Civil Liberties Union, American Families United, American Policy Center, Americans for Tax Reform, Amnesty International, Andrew Jackson Society, Appeal for Privacy Foundation, Arab American Institute, Association of American Physicians and Surgeons, Bill of Rights Defense Committee, Bob Barr, former Member of Congress, and Chairman and CEO of Liberty Strategies, LLC, Boston Tea Party, Campaign For Liberty, Center for Financial Privacy and Human Rights, Chicago Committee to Defend the Bill of Rights, Citizens Against Government Waste, Citizens for Health, Citizens in Charge Foundation, Clinical Social Work Federation, Common Cause, Competitive Enterprise Institute, Concerned Foreign Service Officers, (CARCLE) Congress Against Racism and Corruption in Law Enforcement, Cyber Privacy Project, Criminal Justice Policy Foundation, Citizen Outreach, Citizens Committee for the Right to Keep and Bear Arms, Center for Liberty & Community, Defending Dissent Foundation, Democrats.com, DownsizeDC.org, Drug Policy Alliance, Educator Roundtable, Ethics in Government Group, Electronic Frontier Foundation, Electronic Privacy Information Center, Equal Justice Alliance, Fairfax County Privacy Council, First Amendment Foundation, The Freedom and Justice Foundation, Government Accountability Project, International Center for the Study of Psychiatry and Psychology (ICSPP), Institute for Liberty, International Association of Whistleblowers, The Libertarian Party, Libertarian Party of Texas, Liberty Dollar, Meyda Online Info Security, Privacy, and Liberties Studies, Mothers Against the Draft, MoveOn.org Political Action, The Multiracial Activist, Muslim Public Affairs Council, National Coalition of Mental Health Professionals and Consumer, National Coalition of Organized Women (NCOW), National Iranian American Council, National Judicial Conduct and Disability Law Project, Inc., National Security Whistleblowers Coalition, National Whistleblowers Center, Natural Solutions Foundation, New Grady Coalition, New York Tax Reform Organization, OpenCarry.org, Pain Relief

the Bill of Rights, personal autonomy and individual privacy. The Liberty Coalition does not speak on behalf of these organizations, and my testimony today may not reflect the position of any single Coalition Partner.

We are saddened, alarmed, and angered by gun violence and terrorist acts, such as the incident in Times Square a few days ago. We can all agree that the world would be better if we each beat our proverbial swords into plow-shares and spears into pruning-hooks. But that day has not yet arrived. Guns and other weapons do exist, and managing them is a matter of public concern. Reasonable minds may and do come to differing conclusions about gun control, gun safety, and whether gun ownership makes people safer.² The Liberty Coalition takes no official position on "gun control" *per se*. However, we are very alarmed at legislative attempts, though well-intentioned, which strip away individual Constitutional protections.

Today's hearing examines two bills, S.1317 "Denying Firearms and Explosives to Dangerous Terrorists Act of 2009" and S.2820, "Preserving Records of Terrorists & Criminal Transactions Act of 2009" ("PROTECT Act of 2009"). In reality, these two bills should be re-named the "Gun Owners Are Probably Terrorists Act," and the "National Firearm Registry Act," respectively. Collectively these bills strip citizens of their enumerated Constitutional Right to Bear Arms without any meaningful due process, and create a national firearms registry. The same Constitutional Due Process provided by the 5th and 14th Amendments that prevents Congress from incarcerating a citizen based on mere suspicion also prevents Congress from revoking a citizen's Second Amendment right to bear arms. For that and other reasons, the Liberty Coalition opposes these bills.

More importantly, today's discussion misses the point entirely. This committee should not spend time debating whether to take away Terrorists' guns, bombs, cell phones, cars, or other instruments of terrorism. If a person is a dangerous terrorist, then he should be thrown in jail. As a felon, convicted terrorists should not, and cannot under current law, own guns.

The only things a real, convicted terrorist should own are an orange jumpsuit and a pair of leg chains, but S.1317 is based on the assumption that all

Network, People for the American Way, Patient Privacy Rights Foundation, Privacy Activism, Pullins Report, Reason Foundation, Republican Liberty Caucus, Rutherford Institute, Semmelweis Society International, Inc., The 3.5.7 Commission, Townhall, U.S. Bill of Rights Foundation, VelvetRevolution.us, Veterans Affairs Whistleblowers Coalition, Virginia Citizens Defense League, Inc., and The Woodhull Freedom Foundation.

² This point is demonstrated no better than references to a wealth of reputable research cited in the *District of Columbia v. Heller* dissent.

individuals on terrorist watch lists are terrorists. Unfortunately, the details of terror watch lists are kept secret within the Executive Branch, and it is impossible to tell whether the assumption is correct. If it is true, that is if each person on a terror watch list is really a dangerous terrorist as this bill suggests, then this committee should stop talking about taking away terrorists' guns, and start throwing each and every person on a terror watch list in jail, effective immediately.

How S.1317 Works

A person may be added to one of more than a dozen Federal watch lists, tip-off lists or terrorist watch lists based on "reasonable suspicion" of terrorist activity. Other reasons for adding a person include , mistake or misidentification, or if a terrorist steals a person's identity. An innocent citizen placed on the list will have no administrative recourse to ensure that he or she is removed from a list.

When a citizen of the United States, fully protected by the Constitution applies to purchase a firearm, his or her personal information is run through the National Instant Criminal Background Check System (NICS), and the name is run against several databases to ensure that he is not a convicted felon, drug addict, fugitive, or has some other monitored restriction or legal disability. In addition, the person's name will be run against one or more terrorist watch lists. If the system returns an initial match, the result will be delayed, and NICS personnel will investigate further. If S.1317 becomes law and the match is confirmed, then NICS will return a "Denied" signal to the gun dealer, and the purchase will be denied.³ Furthermore, the personal information of the individual will be kept on file indefinitely.⁴

Under current law, a citizen has the right to know exactly why he was denied the purchase of a firearm. With this information, the person can correct the record or appeal the decision. However, Under S.1317, the person will only receive "actual notice of the Attorney General's determination," if the Attorney General determines that such notice would not likely "compromise national

³ "The Attorney General may deny the transfer of a firearm under section 922(t)(1)(B)(ii) of this title if the Attorney General—(1) determines that the transferee is known (or appropriately suspected) to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism, or providing material support or resources for terrorism; and (2) has a reasonable belief that the prospective transferee may use a firearm in connection with terrorism." S. 1317 p. 2, lines 14-24.

⁴ GAO, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005), 33.

security."⁵ Due to the secret nature of the watch lists, the Attorney General may determine that simply tipping off the person that they are on a terror watch list may compromise national security, thus rendering the notice clause illusory. In that case, the person would receive a "Denied" signal from NICS, with no further information about the reason for the denial, nor with any recourse to obtain the reason for denial.

The citizen may never know why he or she was denied a firearms permit, if the Attorney General determines that the mere disclosure of the determination may compromise national security.⁶ The citizen may ask why he or she was denied,⁷ but the Attorney General is not required to answer or correct erroneous information within the system.⁸ Consequently, the citizen will be unable mount a meaningful appeal to the Attorney General's decision. Further, even if the Attorney General explains the reason for the denial, the citizen would have no way to know that their right to appeal expires after 60 days after the notice.⁹

Assuming that the citizen appeals the decision in court, things only get harder and more confusing. First, the citizen must rely on summaries or a redacted version of the documents upon which the Attorney General made his decision.¹⁰ Neither the citizen nor his attorney has a right to see or rebut the evidence presented against him. Not even the court may consider the unredacted documents to determine whether the Attorney General acted reasonably in denying the firearms permit.¹¹

⁵ S. 1317 p. 13, lines 6-10.

⁶ "any information upon which the Attorney General relied for this determination may be withheld from the petitioner, if the Attorney General determines that disclosure of the information would likely compromise national security."

⁷ S. 1317, p. 13, lines 1-5.

⁸ S. 1317, p. 13, lines 6-9.

⁹ "The petition shall be filed not later than 60 days after the petitioner has received actual notice of the Attorney General's determination under section 922A or 922B of this title." S.1317, p. 11 lines 7-8.

¹⁰ "To make this showing, the United States may submit, and the court may rely upon, summaries or redacted versions of documents containing information of the disclosure of which the Attorney General has determined would likely compromise national security. Upon request of the petitioner or the court's own motion, the court may review the full, undisclosed documents ex parte and in camera. The court shall determine whether the summaries or redacted versions, as the case may be, are fair and accurate representations of the underlying documents. The court shall not consider the full, undisclosed documents in deciding whether the Attorney General's determination satisfies the requirements of section 922A or 922B." S.1317, p. 11. *See also* S.1317, p. 9 line 1; p. 9, lines 15-24.

¹¹ *Ibid.*

A citizen will lose his appeal if the Attorney General can prove, by a preponderance of the evidence,¹² not that the individual poses a risk, or that the person is a terrorist, or even that the person is under investigation; rather, the Attorney General must only demonstrate that the person has been placed a terror watch list.

Once that has been proven, a process which affords the citizen no due process, no right to appeal, nor guarantees any reasonable notice or information to the actual fact that the citizen is on a terror watch list, the appeal is over and the citizen loses his Second Amendment Right to Bear Arms. The individual will not have a chance to introduce evidence of mistaken identity, abuse of Executive discretion or mount any other meaningful defense.

In other words, S.1317 allows the Attorney General to unilaterally revoke a person's Second Amendment Right to Bear Arms by a bald assertion of terrorist inclinations, founded on "suspicion"¹³ and "reasonable belief," thus rendering the notion of a citizen's right to appeal illusory and impotent.

Effect on Gun Dealers

The bill also reduces Due Process protections for gun dealers. S. 1317, strips gun dealers of their right to appeal a revoked license in court, and replaces it with the right to notice and hearing before the Attorney General.¹⁴

Terror Watch Lists

Need for Secret Government Investigations

The nature of criminal and terrorist investigations necessitates that certain information be kept confidential. The Liberty Coalition does not oppose confidential criminal and terrorist investigations, or even targeted, focused lists of individuals of interest. But what S.1317 misunderstands is that "investigation" is not "guilt," and "suspicion" is not "conviction."

¹² "The court shall sustain the Attorney General's determination upon a showing by the United States by a preponderance of evidence that the Attorney General's determination satisfied the requirements of section 922A or 922B, as the case may be." S. 1317, p. 11, line 7.

¹³ Note that S.1317 generally uses the term "appropriately suspected." "Appropriately suspected" has no definition in the Act, nor in federal statute, nor in case law. It is the opinion of the Liberty Coalition that "appropriately suspected" is legally indistinguishable from "suspected," and is probably a euphemism for appearance on a terror watch list.

¹⁴ S 1317, p. 7, line 14; S. 1317, p. 10, lines 18-22.

The existing lists upon which NICS draws are fundamentally different from terror watch lists. The NICS system already checks the background of gun purchasers against lists of "felons, fugitives, unlawful drug users, and aliens illegally or unlawfully in the United States."¹⁵ What makes these lists effective is that they are based on appropriate and transparent legal standards of due process. In theory, denying a firearm to a person who appears on a list of "convicted terrorists" would not violate due process. However, revoking Second Amendment rights based solely on a list of "suspected terrorists" certainly does violate due process.¹⁶

Weaknesses of Terror Watch Lists

The weaknesses of terror watch lists are numerous and well-documented.¹⁷ The ACLU has entered a statement before this committee which explains in great detail the design flaws, excessive error rates, rapid expansion, and other problems of existing watch lists. I commend to the Committee the ACLU's examination of this important issue.

Watch lists are growing at an unprecedented rate. In January 2005 the most updated version of the Terrorist Screening Database (TSDB) had 237,615

¹⁵ GAO, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005), 1.

¹⁶ As vividly illustrated by the film, *Minority Report*.

¹⁷ *Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO Report to Congressional Requesters, GAO-03-322, April 2003; *DHS Challenges in Consolidating Terrorist Watch List Information*, Department of Homeland Security, Office of Inspector General, OIG-04-31, August 2004; *Review of the Terrorist Screening Center (Redacted for Public Release)*, Justice Department, Office of the Inspector General, Audit Report 05-27, June 2005; *Review of the Terrorist Screening Center's Efforts to Support the Secure Flight Program (Redacted for Public Release)*, Justice Department, Office of the Inspector General, Audit Report 05-34, August 2005; *Follow-Up Audit of the Terrorist Screening Center (Redacted for Public Release)*, Justice Department, Office of the Inspector General, Audit Report 07-41, September 2007; *Audit of the U.S. Department of Justice Terrorist Watchlist Nomination Processes*, U.S. Department of Justice, Office of the Inspector General Audit Report 08-16, March 2008; *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, Justice Department, Office of the Inspector General, Audit Report 09-25, May 2009; *Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program*, Department of Homeland Security, Office of Inspector General, OIG-00-103, September 2009. *DHS Challenges in Consolidating Terrorist Watch List Information*, Department of Homeland Security, Office of Inspector General, OIG-04-31, August 2004; DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), p. 83, available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>; DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (Sept. 2007), pg 12 available at: <http://www.justice.gov/oig/reports/FBI/a0741/final.pdf>; *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, Justice Department, Office of the Inspector General, Audit Report 09-25, May 2009; DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), pg 49, available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>;

active records, representing approximately 170,000 unique individuals.¹⁸ By 2009 that number had grown to 1.1 million identities and approximately 400,000 unique individuals.¹⁹ The lack of transparency leaves the public to wonder who these people might be, whether one out of every 750 people in the United States is a suspected terrorist, or whether the drastic increase in the database is due to poor design and over-collection.

Bloated watch lists create more false positives,²⁰ unnecessarily impinge on civil liberties, and have a corrosive effect on security. Focused watch lists can be highly effective security and investigatory tools.

The Liberty Coalition is concerned about the burden that poorly managed watch lists put on ordinary Citizens. Government and press reports are replete with examples of innocent individuals whose lives have been affected or ruined when their names are placed on a secret watch list.

Due Process and Redress

Government authorities must be able to maintain the secrecy and confidentiality of investigations.²¹ But with these substantial new powers, adequate Constitutional protections must be built in to address errors and abuses, which will inevitably occur. Among these is an administrative process to be removed from a watch list, a process which does not currently exist. No statute or regulation provides a path for more than the estimated 400,000 individuals who are on a watch list.

Inappropriate Uses for Terror Watch Lists

Terror Watch lists, by their nature, are designed to be over-broad.²² A name on a terror watch list is evidence of a government interest in an individual

¹⁸ DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), pg 49, available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>.

¹⁹ *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, Justice Department, Office of the Inspector General, Audit Report 09-25, May 2009.

²⁰ Jeanne Meserve, *Name on government watch list threatens pilot's career*, CNN.com, August 22, 2008, <http://www.cnn.com/2008/US/08/22/pilot.watch.list/index.html?iref=newssearch>;

<http://www.aclu.org/technology-and-liberty/unlikely-suspects>; Lizette Alvarez, *Meet Mikey, 8: U.S. Has Him on Watch List*, New York Times, January 13, 2010;

²¹ "Terrorist and criminal watch lists—sometimes referred to as watchout, target, or tip-off lists—are important tools for law enforcement and homeland security purposes." GAO, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005), 1.

²² "In general, individuals who are 'reasonably suspected' of having possible links to terrorism—in addition to individuals with known links—are to be nominated for inclusion on the consolidated watch list by the FBI and other

or an investigation, not proof of terrorism. The bald allegation of a suspicion of terrorist sympathies is insufficient evidence to overcome an individual's interest in their Right to Bear Arms. Such a showing would not come close to overcoming even the most basic level of scrutiny.

I understand the inevitability, and the need for confidential government investigations, but an investigation, or a mere "suspicion" as this bill puts it, cannot be grounds for infringing upon or revoking the Constitutionally enumerated Right to Bear Arms. Suspicion is not a conviction.

Second Amendment

Regardless of one's position on gun safety and gun control, the Supreme Court has unambiguously ruled that the Right to Bear Arms is an individual right.²³ As with all Constitutionally protected rights, the Second Amendment is not absolute, and the government may regulate the Right to Bear Arms in a number of circumstances, including prohibiting the carrying of weapons "by felons and the mentally ill, ...in sensitive places such as schools and government buildings, or ... [requiring] conditions and qualifications on the commercial sale of arms."²⁴

The recent Supreme Court decision on the Second Amendment, *District of Columbia v. Heller* does not establish a level of scrutiny for evaluating Second Amendment restrictions. However, "The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."²⁵ Other enumerated individual rights, such as First Amendment Speech protections are subject to at least intermediate scrutiny, which requires that a restriction on that right be based upon "substantial evidence."²⁶

S.1317 would not stand up to intermediate scrutiny, because a mere allegation of a suspicion of terrorist sympathies cannot constitute evidence

members of the intelligence community." GAO, *NICS and Terrorist Watch List Records*, GAO-09-125R (Washington, D.C.: May 21, 2009), 24.

²³ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008) ("...we find that [the Second Amendment] guarantee[s] the individual right to possess and carry weapons in case of confrontation.")

²⁴ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17, (2008).

²⁵ *Heller* at 2821 (Emphasis in original).

²⁶ "In particular this Court in First Amendment cases applying intermediate scrutiny, has said that our "sole obligation" in reviewing a legislature's "predictive judgments" is "to assure that, in formulating its judgments," the legislature "has drawn reasonable inferences based on substantial evidence." *Heller* at 2860, J. Breyer Dissenting, citing *Turner*, 520 U.S. at 195.

"substantial" enough to overcome an individual's interest in their Right to Bear Arms.

Due Process

Current Law

Based on the title of S.1317, one would think that convicted terrorists were allowed to own guns. However, nothing could be further from the truth. In reality, "convicted felons [including terrorists] , fugitives, unlawful drug users, and aliens illegally or unlawfully in the United States" are prohibited by federal law from receiving firearms.²⁷ Current law recognizes that merely appearing on a terror watch list is not proof of terrorist activities. Consequently, individuals are not prevented from owning, purchasing, or carrying a gun because they appear on a watch list.

Names are added to terror watch lists with a "better safe than sorry" attitude,²⁸ and NICS background checks already flag individuals who appear on terror watch lists, giving investigators additional time to research whether the transaction should be allowed.²⁹ "During presale screening of prospective firearms purchasers, NICS searches terrorist watch list records generated by numerous federal agencies, including the Departments of Justice, State, and Homeland Security."³⁰

S.1317 Due Process

The 5th and 14th Amendments guarantee Due Process of law before an individual liberty interest may be taken away by the Federal or State governments. In our adversarial legal system, the Constitution has always tied the hands of well-meaning government magistrates. The Bill of Rights is highly suspicious of unfettered government power. S.1317, as currently written,

²⁷ GAO, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005), 1.

²⁸ "In general, individuals who are 'reasonably suspected' of having possible links to terrorism—in addition to individuals with known links—are to be nominated for inclusion on the consolidated watch list by the FBI and other members of the intelligence community." GAO, *NICS and Terrorist Watch List Records*, GAO-09-125R (Washington, D.C.: May 21, 2009), 24.

²⁹ GAO, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005), 2.

³⁰ GAO, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005), 3.

demonstrates a basic distrust of the courts and strips away all meaningful Due Process.

While the bill implements a key GAO recommendation that the Attorney General issue guidelines for exercising this new authority,³¹ S.1317 contains so many flaws that any guidelines would be like giving swimming lessons in a rip tide.

Denying the enumerated Constitutional Right to Bear Arms based on a secret list of suspect people is Constitutionally repugnant. The discretionary power to revoke the Second Amendment requires checks, balances, due process, and a meaningful opportunity for redress. S.1317 and S.2820 lack such due process.

In order to satisfy Due Process protections, any bill which limits the Second Amendment must, at a minimum provide: an adversarial proceeding before a neutral arbiter, through which a person may challenge the Attorney General's determination to deny a firearm sale, as well as their inclusion on a watch list; access to and a right to challenge the information on which the decision is based, where the arbiter is unrestricted in the evidence which he or she may consider; and a meaningful administrative procedure for removal from watch lists.

National Firearms Registry

S.2820, "Preserving Records of Terrorists & Criminal Transactions Act of 2009" ("PROTECT Act of 2009"), makes two changes to federal law. First, it requires officials to retain personal information of gun license applicants who appear on a terror watch list for a minimum of 10 years.³² Second, and more importantly, S.2820 substantially weakens privacy protections currently built into NICS, creating a defacto National Firearms Registry.

As stated in a 2005 GAO report, "...the purpose of NICS is to determine the lawfulness of proposed gun transactions, not to provide law enforcement agents with intelligence about lawful gun purchases by persons of investigative

³¹ S. 1317 p. 17, line 21.

³² "If the national criminal background check system indicates that a person attempting to purchase a firearm or applying for a State permit to possess, acquire, or carry a firearm is identified as a known or suspected member of a terrorist organization in records maintained by the Department of Justice or the Department of Homeland Security, including the Violent Gang and Terrorist Organization File, or records maintained by the Intelligence Community... all records generated in the course of the check of the national criminal background check system, including the ATF Form 4473, that are obtained by Federal and State officials shall be retained for a minimum of 10 years." S. 2820, § 2(a).

interest,"³³ but S.2820 changes that. The new law states, "If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall— ... **not less than 180 days after the transfer is allowed**, destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer."³⁴

This means that all personal information of each and every law-abiding citizen who purchases a gun will be saved in a government database for an indefinite period of time, and at least 6 months.

S.2820 disingenuously purports to target terrorists, but in fact is designed to be a National Firearms Registry, generating just 200 new records on "suspected terrorists" annually, and more than 14 million new records³⁵ on law-abiding citizens each year. Once collected, a federal database will retain all personal information, including name, address, social security number (if given), phone number, etc. regarding every legal gun purchase by every law-abiding citizen in the country for at least six months. The information may be used for investigative or other purposes, with no legal requirement to ever delete the information.

The law presents other problems, too. For example, the law provides no notice to the gun purchaser that their personal information is being captured and stored by the Federal Government. The law also makes it unclear whether local gun dealers are now authorized to store sensitive personal information, and under what conditions.

At the very least, S.2820 should be amended to notify each gun purchaser that their personal information will be stored for not less than 6 months in a national gun owner database, that it may be used for any purpose, may be stored in any unsecure warehouse or office desk, and may be accessed and referenced by any person, or potentially placed on a public website.

³³ GAO, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005), 15.

³⁴ 18 USC 922(t)(2)(C) as amended by S.2820, § 3(a).

³⁵ Based on average "verified matches" to terror watch lists for 2004-2009 in GAO reports; and CRS data on NICS transactions in 2009.

Summary

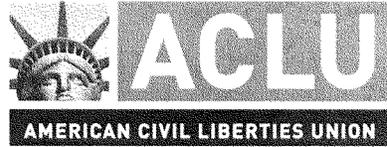
Today's debate on whether to take terrorists' guns away misses the point. If a person is a dangerous terrorist, then the Congress should throw them in jail. If everyone on the terror watch list is really a dangerous terrorist as S.1317 asserts, then this committee should introduce legislation to throw each and every person on the terror watch list in jail. But Constitutional due process prohibits incarceration based on mere suspicion. And the Constitution also won't let Congress take away an individual's Second Amendment rights based on mere suspicion.

The logical underpinnings S.1317 dictate that other Constitutionally enumerated rights could be annulled by a simple assertion of terrorist activities. Such legislation might provide that, in addition to disarming people on terror watch lists, the Attorney General would have discretion to prevent anyone on a terror watch list from making inappropriate public speeches, participating in dangerous religious activities or unauthorized terror-related demonstrations. To ensure that people on watch lists and their lawyers do not abuse the court system, anyone on a terror watch list could be denied the right against self incrimination, as well as a right to counsel. To protect national security, sensitive evidence and witnesses would remain secret. If the trial of a citizen on the terror watch list is thrown out on a technicality, the Attorney General would have the right to bring the charges repeatedly, until he or she can secure a conviction.

Terrorist watch lists are fundamentally different from lists of convicts, people adjudicated to be addicted to drugs, illegal aliens, or similar groups. Any type of secret list which is used as prima facie proof of guilt, and deprives a citizen of a Constitutionally enumerated right without due process of law is unconstitutional.

In short, S.1317 should be re-named the "Gun Owners Are Probably Terrorists Act," because it gives the Attorney General the discretion to deny someone the enumerated Constitutional Right to Bear Arms, based on "suspicion" and "belief" of terrorist inclinations. In addition, S.1317 would turn NICS into a defacto National Firearm Registry. It will collect detailed personal information like name, address, phone number, social security number for every person who applies for a gun permit, with no requirement to ever delete the information.

The Liberty Coalition respectfully urges this committee to reject S.1317 and S.2820.



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**Written Statement of the
American Civil Liberties Union**

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**before the
Senate Committee on Homeland Security and Government Affairs**

Chairman Lieberman, Ranking Member Collins, and Members of the Committee.

The American Civil Liberties Union has over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide. We are one of the nation's oldest and largest organizations advocating in support of individual rights in the courts and before the executive and legislative branches of government. In particular, throughout our history, we have been one of the nation's foremost protectors of individual privacy and due process protections.

We write today about the use of terror watch lists to screen gun purchases. The ACLU believes that the current terror watch list process is deeply flawed. Evidence from numerous government reports document ill-designed and inaccurate lists with serious inadequacies in the process for placing and removing individuals from the list. Even worse, the lists are shrouded in secrecy: who is on the list, the standard for placement on the list, and the requirements for removal from the list are all secret. Given these problems, we do not believe that anyone should be deprived of the right to purchase a gun, or the right to fly, or any other benefit of membership in civil society based solely on placement on a terror watch list.

The ACLU does not oppose the creation of all lists. Law enforcement and intelligence agencies have a difficult job. Faced with masses of sometimes conflicting information, very tight timeframes and difficult decisions, lists can provide clarity and a focus for allocating

resources. Lists like those of the FBI 10 Most Wanted Fugitives and larger databases like the National Criminal Information Center (NCIC) system (a national listing of fugitives) have proved to be valuable law enforcement tools. However these lists are effective because they are based on appropriate legal standards and the processes for placement on the list are transparent. Unfortunately that is not the case for the government's secretive terror watch lists. More than eight years after its inception only one thing is clear: the watch list system is broken.

Legislation

Two bills pending in the Senate directly address the issue of screening individuals seeking firearm permits against a list of terrorist watch lists: S. 1317, Denying Firearms and Explosive to Dangerous Terrorists Act of 2009, and S. 2820, Preserving Records of Terrorist & Criminal Transactions Act of 2009. Both bills place undue faith on the accuracy and reliability of the inconsistent and inherently unreliable terrorist watch lists.

Section 2(a) of S. 1317 allows the Attorney General to deny the transfer of a firearm or explosive to any individual who

is known (or appropriately suspected) to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism, or providing material support or resources for terrorism; and (2) has a reasonable belief that the prospective transferee may use a firearm in connection with terrorism.

“Appropriately suspected” is not defined in the Act nor is it defined in federal statute or case law. The Act also does not contain any guidance about the legal standard necessary to establish appropriate suspicion. Since it is the policy of the Executive Branch to consolidate all terrorism related information into a central list, it is likely that the phrase “appropriately suspected” will mean that the individual appears on a terrorist watch list, either the master list compiled by the Terrorist Screening Center (TSC) or one of the smaller lists crafted from this master list.¹

S. 1317 further states that “any information upon which the Attorney General relied for this determination may be withheld from the petitioner, if the Attorney General determines that disclosure of the information would likely compromise national security.” Section 2(g)(1). If an individual challenges the denial, “[w]ith respect to any information withheld from the aggrieved party ... the United States may submit, and the court may rely upon, summaries or redacted versions of documents containing information the disclosure of which the Attorney General has determined would likely compromise national security.” Section 2(g)(2).

S. 2820 mandates that anyone on a terrorist watch list who undergoes a background check pursuant to a firearm purchase shall have his or her information stored for ten years and all

¹ HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 6: DIRECTIVE ON INTEGRATION AND USE OF SCREENING INFORMATION TO PROTECT AGAINST TERRORISM governs collection and aggregation of terrorism related information. For a detailed discussion of some of the smaller lists created from the TSC master list please see page 69 of THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES, JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, Audit Report 09-25, May 2009, pg 3 available at <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>

purchasers shall have their information stored for 180 days. This is contrary to current practices where all personal information relevant to a background check is discarded within 24 hours of the completion of the check.

In summary, S. 1317 allows the Attorney General to bar anyone who appears on a terrorist watch list from purchasing a firearm or explosive. Anyone who challenges this determination will be unable to discover the evidence against them. Even the judge ruling on the appropriateness of this determination will have to rely on summaries and redacted information. S. 2820 extends the retention period of personal information on all gun buyers with particular attention to those who appear on a terror watch list. Both measures directly tie gun ownership and licensing to use of terror watch lists that have been shown to be inaccurate.

Watch Lists Have Been Mismanaged

It might seem intuitive that known terrorists shouldn't be able to buy guns. The difficulty of this proposition, however, lies in determining exactly which people should be denied permission to purchase a firearm. In the absence of a trial and conviction for a terrorism-related offense, the decision rests solely on the discretion of the Attorney General, with no real opportunity to challenge the basis for the decision. Unfortunately the national security establishment's record in creating and managing watch lists of suspected terrorists has been a disaster that too often implicates innocent persons while allowing true threats to proceed unabated. This regrettable outcome is partly a result of mismanagement and partly due to the deceptive difficulty of creating identity-based systems for providing security. These failures have been documented in a long string of government reports, yet even as the lists continue to grow there is little evidence the problems are being solved.²

The reports of a variety of oversight entities are remarkably consistent in their criticisms, with two recurring themes – persistent design flaws and ongoing, unacceptable error rates.

Design Flaws

The reports consistently expose flaws in how the lists are created and maintained:

² GAO REPORT TO CONGRESSIONAL REQUESTERS, GAO-03-322 TERRORIST WATCH LISTS SHOULD BE CONSOLIDATED TO PROMOTE BETTER INTEGRATION AND SHARING (April 2003); DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-04-31 DHS CHALLENGES IN CONSOLIDATING TERRORIST WATCH LIST INFORMATION (August 2004); JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 05-27 REVIEW OF THE TERRORIST SCREENING CENTER (REDACTED FOR PUBLIC RELEASE) (June 2005); JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 05-34, REVIEW OF THE TERRORIST SCREENING CENTER'S EFFORTS TO SUPPORT THE SECURE FLIGHT PROGRAM (REDACTED FOR PUBLIC RELEASE) (August 2005); JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 07-41, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (REDACTED FOR PUBLIC RELEASE) (September 2007); U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL AUDIT REPORT 08-16, AUDIT OF THE U.S. DEPARTMENT OF JUSTICE TERRORIST WATCHLIST NOMINATION PROCESSES (March 2008); JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 09-25, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES (May 2009); DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-00-103, EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM, (September 2009).

- An August 2004 report documented a chain of problems that have bedeviled the government's attempts to create a unified watch list. The report criticized the Department of Homeland Security's (DHS) continued failure to assume responsibility for creating the list, with the result that responsibility continued to shift among agencies, creating "an absence of central oversight and a strategic approach to watch list consolidation."³
- The Department of Justice Inspector General's (DOJ IG) 2005 review of the Terrorist Screening Center's (TSC) internal controls found "significant deficiencies in the design or operations of the internal control structure that, in our judgment, could adversely affect the TSC's ability to effectively organize a coordinated approach to terrorist screening." The IG identified "weaknesses" in "1) information technology oversight and review, 2) data accuracy and completeness, 3) staffing/hiring of personnel, 4) training provided to call center staff; 5) management of the call center, and 6) strategic planning."⁴
- In 2007 the DOJ IG found that "the TSC was operating two versions of the TSDB [Terrorist Screening Data Base] in tandem and the TSC had not taken adequate steps to ensure that the content of the two databases was identical."⁵ The IG discovered significant numbers of duplicate records, 20 percent of which had inconsistent information with regard to "identifying information, handling instructions, or watch list export designation."⁶ Further, the IG found the FBI sometimes enters nominations into the TSDB without submitting them to National Counterterrorism Center (NCTC) and the TSC: "*As a result, the TSC is unable to ensure that consistent, accurate, and complete terrorist information is disseminated to frontline screening agents in a timely manner. Moreover, the TSC had determined that the TSDB contained over 2,000 watchlist records that did not belong in the database. This TSC review also identified at least eight records that were missing from the downstream databases and were therefore not available to frontline screening agents.*"⁷
- A 2009 report found that "the FBI failed to nominate many subjects in the terrorism investigations that we sampled, did not nominate many others in a timely fashion, and did not update or remove watchlist records as required ... 78 percent of the initial watchlist nominations we reviewed were not processed in established FBI timeframes."⁸

³ DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL DHS CHALLENGES IN CONSOLIDATING TERRORIST WATCH LIST INFORMATION (August 2004) available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG-04-31_Watch_List.pdf

⁴ DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), p. 83, available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>.

⁵ DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (Sept. 2007), pg 12, available at: <http://www.justice.gov/oig/reports/FBI/a0741/final.pdf>

⁶ *Id.* at 22.

⁷ *Id.* at 12.

⁸ JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES, Audit Report 09-25 (May 2009)

Error Rates

Unacceptably high error rates are another familiar theme:

- In 2005 the TSC audited a sample of the FBI's Violent Gang and Terrorist Organization File (VGTOF) records, the TSDB's feeder database for domestic terrorism identities, and found a 40% error rate. Yet TSC took no follow-up action to ensure errors would be corrected before VGTOF records were put into the TSDB.⁹
- Late in 2007 an examination of the TSC's quality assurance program found that 38 percent of the records audited "continued to contain errors or inconsistencies that were not identified through the TSC's quality assurance efforts."¹⁰
- A 2009 audit found that 35% of the nominations to the lists were outdated, many people were not removed in a timely manner, and tens of thousands of names were placed on the list without predicate.¹¹

These are just a small sampling of the damning evidence in oversight reports produced over the last several years. They paint a picture of a process that is broken and that – after eight years of operation – shows no sign of improvement.

Worse, even as these problems persist, the watch lists continue to grow. In January 2005 the most updated version of the TSDB had 237,615 active records, representing approximately 170,000 unique individuals.¹² By 2009 that number had grown to 1.1 million identities and approximately 400,000 unique individuals.¹³ It is difficult to believe that more than 200,000 new terrorists were identified during that time, or that adding almost 800,000 names to the list actually made us safer. Instead it seems more likely that this rapid expansion stems from poor design and continuing errors that place people on these lists with little evidence they pose real threats.

Meanwhile, actual threats to security remain unobstructed by this system. Indeed, confessed terrorist Najibullah Zazi flew to the U.S. in January 2009 after training in a Pakistani terrorist camp and successfully smuggled a homemade bomb into New York City later that year, before flying back to Colorado where he voluntarily met with FBI agents. Chicagoan David Headley, a confessed conspirator in the 2008 terrorist attacks in Mumbai, India, flew extensively

⁹ DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), p 61-62 available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>.

¹⁰ DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (Sept. 2007), p 31 available at: <http://www.justice.gov/oig/reports/FBI/a0741/final.pdf>

¹¹ JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES (May 2009), Audit Report 09-25

¹² DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), p 49, available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>.

¹³ DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST WATCHLISTS NOMINATION PRACTICES (May 2009), p 115 available at: <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>

from 2002 to 2009 to attend Pakistani terrorist camps and scout targets in India and Europe.¹⁴ The secrecy and lack of accountability over our government's watch list programs doesn't aid security, it harms it.

Focused Watch Lists: Good For Security And Liberty

To be effective, terrorist watch lists must be exactly that: lists focused on true terrorists who pose a genuine threat of taking over or taking down an aircraft. Bloated watch lists are bad not only because they cast many innocent travelers as suspected terrorists, but also because they dissipate the focus that those screeners should be keeping on true terrorists. A terrorist watch list that is discrete and focused has a greater chance of being productive, and a lesser chance of being unfair; not only is it better for civil liberties, but more likely to provide a security benefit. False accusations hassle and humiliate individuals; false positives divert security resources. This is truly a case where good security and civil liberties are aligned.

In 2004, then-TSA chief David M. Stone actually boasted to Congress about the rapidity with which the no-fly list was being expanded, as if that were automatically something good:

Prior to 9/11, there were fewer than 100 names on the "no-fly" list. Today, TSA provides carriers with "no-fly" and "selectee" lists that have been dramatically expanded. New names are being added every day as intelligence and law enforcement agencies submit new names for consideration. . . . Continued expansion will be possible as integration and consolidation of various watchlists by the Terrorist Screening enter (TSC) progresses. . .¹⁵

Six years later, despite the massive expansion of the TSC watch lists, the NCTC failed to properly identify would-be Christmas bomber Umar Farouk Abdulmutallab as a potential threat to aviation. Yet NCTC Deputy Director Russell Travers told this Committee that the watch list architecture "is fundamentally sound," and suggested that the lists would soon be getting bigger: "The entire federal government is leaning very far forward on putting people on lists."¹⁶ The "continued expansion" of watch lists is not itself helpful, however, and unless the names being added to the list are of high quality, the expansion is likely to be counterproductive. Watch lists have a natural tendency to become bloated simply because security workers have every incentive to add names, and no incentives to clear them. Swamping the names of truly dangerous terrorists in a sea of other names is not good for security, as we learned last Christmas.

¹⁴ See Jane Perlez, *American Terror Suspect Traveled Unimpeded*, New York Times, (Mar. 25, 2010) at: <http://www.nytimes.com/2010/03/26/world/asia/26pstan.html>; and Sean Gardiner, *Police Let Terrorist Slip Through*, Wall Street Journal, (Apr. 26, 2010) at: http://online.wsj.com/article/SB10001424052748703441404575205954118455716.html?mod=WSJ_hps_MIDDLE_TopStories

¹⁵ *9/11 Commission Recommendations on Civil Aviation Security Before the Subcommittee on Aviation of the House Committee on Transportation and Infrastructure*, 108th Cong. (August 25, 2004) (Testimony of David M. Stone), available at <http://www.house.gov/transportation/aviation/08-25-04/stone.pdf>.

¹⁶ See *The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-Screening, Hearing of the S. Comm. On Homeland Security and Governmental Affairs*, 111th Cong. (2010) (Statement of Russell Travers, Deputy Director National Counterterrorism Center); and Mike McIntire, *Ensnared by Error on Growing U.S. Watchlist*, New York Times, (Apr. 6, 2010) at: <http://www.nytimes.com/2010/04/07/us/07watch.html?pagewanted=all>

These problems are not hypothetical. They have real consequences for law enforcement and safety. An April 2009 report from the Virginia Fusion Center states

According to 2008 Terrorism Screening Center ground encounter data, al-Qa'ida was one of the three most frequently encountered groups in Virginia. In 2007, at least 414 encounters between suspected al-Qa'ida members and law enforcement or government officials were documented in the Commonwealth. Although the vast majority of encounters involved automatic database checks for air travel, a number of subjects were encountered by law enforcement officers.¹⁷

Every time a law enforcement officer encounters someone on the terrorist watch list (as determined by a check of the National Crime Information Center (NCIC) database) they contact the TSC. So in essence Virginia law enforcement is reporting that there are more than 400 al Qaeda terrorists in Virginia in a given year. This is difficult to believe.¹⁸ In reality most, if not all, of these stops are false positives, mistakes regarding individuals who should not be on the list. These false positives can only distract law enforcement from real dangers.

Due Process and Redress: Still No Fairness after Eight Years

The ability of individuals to receive fair treatment when caught up in this system is still lacking after eight years. Due to the secrecy obscuring the watch listing process, innocent victims cannot discover if they are victims of inaccuracies that riddle government and private databases, if they were falsely accused of wrongdoing, or if they are being discriminated against because of their religion, race, ethnic origin, or political beliefs.

The task facing security agencies is challenging indeed, and we do not object to the goal of trying to identify genuine terrorists. But in actual practice, the government's list appears to be so large and bloated that it inevitably sweeps in many innocent people. Adequate protections must be built in to deal with the problems that will result and to protect the rights and the reputations of those who have done nothing wrong.

Dr. Rahinah Ibrahim, a Malaysian mother of four with no previous criminal record, has been suing for the right to challenge her placement on the no-fly list ever since she was arrested at the San Francisco airport in 2005 while she was a student at Stanford University. She was quickly released and allowed to fly home to Malaysia, but has been prohibited from flying since. U.S. District Court Judge William Alsup suggested that Dr. Ibrahim's inclusion on the list may have been the result of "a monumental mistake," and he dismissed the government's continuing claims that the five-year old information that put her on the list must remain secret for national security reasons as "baloney," yet the U.S. continues to deny her a visa and won't tell her why she remains prohibited from flying.¹⁹

¹⁷ VIRGINIA FUSION CENTER, 2009 VIRGINIA TERRORISM THREAT ASSESSMENT, March 2009, pg 27.

¹⁸ The report does not state that any of these individuals were arrested.

¹⁹ Mike McIntire, *Ensnared by Error on Growing U.S. Watchlist*, New York Times, (Apr. 6, 2010) at: <http://www.nytimes.com/2010/04/07/us/07watch.html?pagewanted=all>; see also, Order for Production of Items

In a democratic society, the act of maintaining a secret list of people who are considered suspect and therefore denied freedoms others enjoy must be scrutinized closely. The power to impose denial of access to common-carrier services such as airlines (which are integral to the free and normal conduct of life for many in today's society) or deny them a firearm when they are otherwise eligible to possess one must not be wielded in an arbitrary manner. Reliance on unreliable tools like the watch lists results in inherently arbitrary decisions and makes it imperative that checks and balances be instituted to limit the use of such lists.

Erich Scherfen, a commercial airline pilot and Gulf War veteran, was threatened with termination from his job as a pilot because his name appeared on a government watch list, which prevented him from entering the cockpit.²⁰ Scherfen is not the only innocent person placed on a terror watch list. Others individuals who are either on a list or mistaken for those on the list include former Assistant Attorney General Jim Robinson, many individuals with the name Robert Johnson, the late Senator Edward Kennedy and even Nelson Mandela.²¹

One recent case is that of Mikey Hicks, an 8 year old boy who has been on the selectee list seemingly since birth. According to Hicks' family, their travel tribulations began when Mikey was an infant and could not get a seat assignment at an airport kiosk. When he was 2 years old, the child started being patted down by airport security. He's now, by all accounts, an unassuming bespectacled Boy Scout, yet he is stopped and scrutinized by security officials every time he flies with his family.²²

Internal processes for addressing these problems are woefully inadequate or completely non-existent. In some cases – like that of Mikey Hicks – the problem seems to be one of mistaken identification. However after more than 5 years – the first law aimed at remedying misidentifications was passed in 2004 – the problems persist.²³

A 2009 report by the Inspector General of DHS detailed extensive problems with the appeal process.²⁴ Specifically the report reveals that DHS is promising travelers that their watch list problems are solved, while privately admitting that airlines don't use the so-called 'clear' lists that would allow innocent travelers onto their flights. DHS officials frequently write to tell travelers their underlying data problems have been solved without being able to ensure that is true. Further because of outmoded information technology systems, the method for clearing the

Despite the Assertion of Various Privileges, United States District Court for the Northern District of California, Case No. C 06-99545 WHA, (Dec. 17, 2009) available at: <http://www.courthousenews.com/2009/12/21/Ibrahim.pdf>

²⁰ Jeanne Meserve, *Name on government watch list threatens pilot's career*, CNN.com, August 22, 2008, <http://www.cnn.com/2008/US/08/22/pilot.watch.list/index.html?ref=newssearch>

²¹ For details on these individuals and many other please see: <http://www.aclu.org/technology-and-liberty/unlikely-suspects>

²² Lizette Alvarez, *Meet Mikey, 8: U.S. Has Him on Watch List*, New York Times, January 13, 2010.

²³ Intelligence Reform and Terrorism Prevention Act of 2004, Section 4017.

²⁴ DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM OIG-00-103 (September 2009)

names of people who pose no threat to national security from watch lists is plagued by delays, and DHS can't even monitor how many cases it resolves.

Perhaps worse than the inadequacies of the process for resolving mistaken identifications is that fact that there is no administrative process for an individual to actually be removed from the list. No statute or regulation creates a process whereby any of the more than 400,000 individuals currently on the terror watch list can be removed. Individuals are left to rely on the arbitrary discretion of the federal agencies and airlines involved in the process, none of whom are motivated to ensure the removal of names from the lists.

The TSC, which does not accept redress requests directly from the public, processed only about 500 redress requests from government agencies between February 2007 and March 2010, removing people from the list in only 25 percent of the cases, according to the New York Times (citing Congressional Research Service data).²⁵ Meanwhile, the TSC adds more than 350 people to the watch list every day.²⁶

It is inconceivable that a democratic nation can allow the creation of a vast infrastructure for denying individuals their full freedoms, without tight checks and balances on that machinery. Those checks and balances are well established in other areas where individuals are subject to what amounts to punishment, such as the criminal justice system:

- **Meaningful due process.** Individuals must have the opportunity for a meaningful, participatory process by which they can challenge their inclusion on a watch list in an adversarial proceeding before a neutral arbiter.
- **Access to and a right to challenge the data on which inclusion on a list is based.** Before any individuals lose the rights and privileges that other members of society enjoy (for example, to travel by air or to own a gun), then they must have the same rights to confront their accusers and be told of the charges being leveled against them that other individuals are entitled to in criminal proceedings. In some limited circumstances - genuinely justified by true national security imperatives - some data may be reviewed in camera by a neutral arbiter, but such circumstances must be narrowly drawn.
- **Tight criteria for adding identities to watch lists.** Security officials must be tightly constrained in their ability to add names to watch lists, and the natural incentive to add a name to a list ("better safe than sorry") must be institutionally counterbalanced.
- **Rigorous procedures for removing names from watch lists.** When the government begins keeping lists of individuals for the purposes of lessening their freedom, it assumes the responsibility to keep that list up to date by regularly reviewing and reassessing each person's inclusion on that list.

²⁵ *How Names Enter the Terrorist Watch List*, New York Times, (Apr. 7, 2010) at: <http://www.nytimes.com/imagepages/2010/04/07/us/07watch-graphic.html?ref=us>; see also, *Federal Bureau of Investigation Terrorist Screening Center Redress Procedures*, at: <http://www.fbi.gov/terrorinfo/counterrorism/redress.htm>

²⁶ *Flight 253: Learning Lessons from an Averted Tragedy*, Hearing of the S. Comm. On Homeland Security and Governmental Affairs, 111th Cong. (2010) Statement of Michael Leiter, Director National Counterterrorism Center available at: http://www.dni.gov/testimonies/20100127_testimony.pdf

Without such controls, the inevitable result will be a capricious and unpredictable security bureaucracy that will trample on the rights and freedoms individuals, leaving them no recourse and offering no accountability.

Conclusion

No American should be denied a firearm – or any other benefit or right – based on their placement on a terror watch list in their current form. Years of government and media reports and countless examples of harm to ordinary Americans demonstrate that these lists, and the processes for creating and maintaining them, are fatally flawed. Before bills such as S. 1317 and S. 2820, as well-intentioned as they may be, or any similar measures go forward, the watch lists must be scrapped and replaced with a narrow, tightly circumscribed process focused on identifying those who are real threats to security, with effective due process measures to ensure the minimization of errors and abuses leading to inclusion of innocent persons.

**Post-Hearing Questions for the Record
Submitted to the Honorable Michael R. Bloomberg
From Senator Tom Coburn**

**“Terrorists and Guns: The Nature of the Threat and Proposed Reforms”
May 5, 2010**

1. In June 2008, the Supreme Court ruled that 2nd Amendment protects an individual right to bear arms. What is your definition of the 2nd Amendment? What type of firearm ownership by regular non-law-enforcement citizens do you support? What is the role of an armed citizenry under the 2nd Amendment?

Response:

I have always supported the rights of Americans to own guns, and I continue to do so in keeping with the Second Amendment right identified by the U.S. Supreme Court in *McDonald v. City of Chicago* and its 2008 predecessor, *District of Columbia v. Heller*. Pursuing policies to keep guns out of the hands of criminals, terrorists and other dangerous people is fully consistent with the Supreme Court’s interpretation of the Second Amendment.

2. Based on what information where [sic] you able to conclude that legislation such as S. 1317 would have prevented the Fort Hood attacks? What other factors enabled the Fort Hood attacks in your opinion?

Response:

The review of the Fort Hood tragedy by the military and the federal government continues, so I will leave it to them to make their determinations of the various factors that made Hasan’s attack possible.

I have not concluded that any single factor would have prevented the Fort Hood attacks. However, Major Nidal Hasan was already under investigation by the FBI prior to the attacks, yet he was able to pass a FBI background check to buy a gun, and the FBI was unable to connect the dots between his gun purchase and their previous investigations of his activities. This seems to be a serious enforcement gap.

Furthermore, the Government Accountability Office (GAO) released a report in May 2010 indicating that individuals on the terrorist watch list succeeded in purchasing guns and explosives from licensed dealers 1,119 times between 2004 and 2010.

I believe that this high frequency of purchases by individuals on the terror watch list, the large number of terrorism plots foiled by the FBI, and the tragedy at Fort Hood point to the urgent need to pass S.1317.

3. Would you recommend enabling law enforcement or the Attorney General to arrest Americans for being on the consolidated watch list?

Response:

No. I believe the FBI should be able to block individual gun and explosives sales to persons on the terrorism watch list if they have a reasonable belief the purchasers will use the guns or explosives in connection with terrorism. S.1317 should be part of a comprehensive strategy to reduce the threat of terror attacks in the United States.

4. Under S. 1317, would law-abiding citizens who are on the terror list be considered felons if they are found to possess a firearm they purchased previously or are using (for instance at a gun range)? If so, how would a person be able to know they are prohibited in the first place, since they are not prohibited under the Gun Control Act?

Response:

No.

5. What do you believe the phrases “reasonable belief that the prospective transferee may use a firearm in connection with terrorism” or “appropriately suspected” in S. 1317 mean? How reasonable is it to base the criteria for the Attorney General’s determination on 18 USC 2339A since the very same definitions are being challenged as “vague” as they appear in 18 USC 2339B? (*Holder v. Humanitarian Law Project*, 08-1498).

Response:

The purpose of S.1317, and, I believe, the reason it has been endorsed by both the Bush and Obama Administrations, is to give investigators the tools they need to fight terrorism by giving the Attorney General the discretion to block particular gun sales to terrorism suspects. The Department of Justice should respond about how they make these determinations. The U.S. Supreme Court did not find 18 U.S.C. 2339(B) to be unconstitutionally vague in *Holder v. Humanitarian Law Project*.

6. Generally Congress doesn’t prohibit a person from exercising a right unless they have committed an offense or have been deemed incompetent. Why is it appropriate for Congress to remove a constitutionally protected right without due process and either criminal activity or a finding of incompetence?

Response:

The Supreme Court made clear in both the *Heller* and *McDonald* decisions that reasonable regulations, including non-criminal restrictions on access to guns by minors or carrying guns in government buildings or in schools, are consistent with protecting Second Amendment rights. The fact that the Justice Department has no discretion to block sales of guns and explosives to terror suspects is a serious threat to our national security. That's why Thomas Kean, former New Jersey Governor and chairman of the September 11 Commission has endorsed S.1317.

S. 1317 gives the Attorney General the discretion to block individual gun and explosives sales to individuals on the terrorism watch list whom he has a reasonable belief may use a gun or explosives in connection with terrorism. It does not permanently or irrevocably remove anyone's right. Furthermore, there is an appeals process built into the legislation.

7. Regarding efforts to further regulate and restrict firearm purchases at gun shows, what is the percentage of firearms used by terrorists in the U.S. that were purchased at gun shows? What is the percentage of firearms used by criminals that were purchased at gun shows? Why would terrorists and criminals go to gun shows where there is often a considerable law enforcement presence to purchase their firearms? Would you agree that the vast majority of firearms used by criminals and terrorists are procured by theft or on the black market? If the background check act were to pass, would non-dealers be able to sell their firearms without background checks outside of gun shows?

Response:

Because private sellers at gun shows are not required to conduct background checks or keep paperwork, there is no accurate information available, even to the FBI and ATF, about the percentages of crime guns or guns used in terrorism plots that may have come from a gun show source. Criminals and terrorists can go to gun shows to avoid background checks. These same individuals would currently undergo a background check if they purchase a gun at a licensed firearms dealer's store or from a licensed dealer at a gun show.

An ATF study found that 30 percent of federal illegal gun trafficking investigations are connected to gun shows. Federal investigators have also linked gun shows to trafficking across the U.S.-Mexico border. As the Government Accountability Office reported in "GAO-09-709 Firearms

Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges”:

“In addition to these firearms that are successfully traced back to a retail dealer, some ATF officials told us, based on information from their operations and investigations, many seized guns also come from private sales at gun shows, though it is impossible to know this exact number due to the lack of records kept for such purchases.”

Finally, New York City has documented illegal sales taking place at gun shows, and videos from the investigation are available at www.gunshowundercover.org.

The current bill under consideration in Congress, S. 1317, would apply only to private sales at gun shows.

8. Do you have any suggestions for improving law enforcement efforts to prevent and prosecute criminal firearm use/possession without increasing gun control measures that affect law-abiding citizens more than criminals? Why not focus on increasing prosecution of criminals who are already breaking the law (for instance by purchasing or selling firearms at a gun show illicitly) instead of using considerable time, finances, and other resources to increase gun control efforts that also affect law-abiding citizens?

Response:

I strongly support better enforcement of existing gun laws. The Mayors Against Illegal Guns coalition, which I co-chair along with Mayor Thomas Menino, submitted a “Blueprint for Federal Action on Illegal Guns” to the Obama Administration in August 2009. The Blueprint contains 40 recommendations to better enforce existing gun laws. We specifically recommend, among other measures, that ATF increase its enforcement efforts at gun shows, leverage data to pinpoint which licensed dealers are fueling illegal gun trafficking, and prosecute people who commit a felony by making false statements on their background check Form 4473. I am glad you agree that these recommendations would be effective and should be a priority for the current administration. A copy of the Blueprint is enclosed and available here: http://mayorsagainstillegalsguns.org/downloads/pdf/blueprint_federal_action.pdf



THE POLICE COMMISSIONER
CITY OF NEW YORK

June 28, 2010

Honorable Joseph I. Lieberman
Chairman, Committee on Homeland Security and Governmental Affairs
United States Senate
Washington D.C. 20510-6250

Dear Chairman Lieberman:

I am writing in response to your correspondence regarding post-hearing questions submitted subsequent to the hearing held on May 5, 2010 titled "Terrorists and Guns: The Nature of the Threat and Proposed Reforms."

The following are comments regarding each of the questions submitted by Senator Coburn:

Question:

- o *In June 2008, the Supreme Court ruled that the 2nd Amendment protects an individual right to bear arms. What is your definition of the 2nd Amendment? What type of firearm ownership by regular non-law enforcement citizens do you support? What is the role of an armed citizenry under the 2nd Amendment?*
- o *Generally, Congress doesn't prohibit a person from exercising a right unless they have committed an offense or have been deemed incompetent. Why is it appropriate for Congress to remove a constitutionally protected right without due process and either criminal activity or a finding of incompetence?*

Comment:

The case of McDonald v. Chicago, which was argued this term before the United States Supreme Court, involves a 2nd Amendment based challenge to state and local firearms laws which effectively ban the possession of firearms in certain localities. The Supreme Court's decision in this case will likely decide how and to what extent the 2nd Amendment applies to the states and should provide some guidance on the types of firearms restrictions that may be imposed if it is determined that the 2nd Amendment applies to state firearms licensing laws. It is our belief that New York State and New York City firearms possession and licensing laws are constitutional and will comport with the standard the Supreme Court announces in its decision in the McDonald case.

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Question:

- o *During the hearing you mentioned that a purchase of a gun by a person on the consolidated watch list "may" indicate imminent activity of the purchaser. How often have you seen such a purchase be followed imminently by terrorist activity?*

Comment:

The acquisition of guns or other weapons is often the final step in an operational cycle leading to terrorist activity. The following examples cite circumstances when weapons were acquired in the time period immediately preceding the act:

1. Shooting at CIA headquarters (Langley, Virginia; January 25, 1993): Mir Aimal Kasi had exchanged another gun for the AK-47 used in the attack three days prior to the shootings.
2. Shooting at the Empire State Building (New York, New York; February 24, 1997): Ali Abu Kamal purchased the .38 caliber handgun in Florida at the end of January 1997.
3. Plot to attack Chicago-area shopping mall (Rockford, Illinois; FBI effected arrest on December 6, 2006): Derrick Shareef attempted to trade a set of stereo speakers for four hand grenades and two handguns on December 6, 2006. Shareef planned to make his attack during the Christmas shopping season.
4. Fort Dix plot (Fort Dix, New Jersey; FBI made arrests on May 7, 2007): Six men were arrested while attempting to purchase AK-47s, M-16s, M-60s, RPGs, rockets, semi-automatic Sig Sauer 9mms, Smith & Wesson 9mms, C-4 plastic explosives and nitroglycerin. The perpetrators planned to attack Fort Dix and kill as many people as possible.
5. Man in possession of AK-47 for unknown purposes (Dearborn, Michigan; arrest made on September 12, 2007): Hossein Zorkot was arrested after walking around with a concealed AK-47, which he had purchased the night before, and dressed in black clothing with camouflage paint on his face. Zorkot had a Hizballah-praising website with a post entitled "The Start of My Personal Jihad (in the U.S.)."

Question:

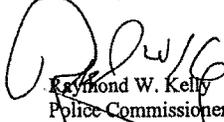
- o *Would you recommend enabling law enforcement or the Attorney General to arrest Americans for being on the consolidated watch list?*

Comment:

In order to make an arrest, there must be probable cause to believe that a person has committed an offense. A person's presence on the consolidated watch list may or may not be a sufficient basis to establish probable cause that the person has engaged in activity for which an arrest can be made.

Thank you for providing me with the opportunity to offer my comments regarding this very important subject matter. I appreciate your continued support of the New York City Police Department.

Sincerely,



Raymond W. Kelly
Police Commissioner

**Daniel Roberts, Assistant Director,
Criminal Justice Information Systems
Responses of the Federal Bureau of Investigation
to Questions for the Record
Arising from the May 5, 2010, Hearing Before the
Senate Committee on Homeland Security and Governmental Affairs
Regarding Terrorists and Guns:
The Nature of the Threat and Proposed Reforms**

Question Posed by Chairman Lieberman

1. The Government Accountability Office testified before the Committee that individuals on the terrorist watch list were involved in firearm or explosives background check 1,228 times and that 1,119 of these transactions were allowed to proceed. Three of the transactions that were allowed to proceed were connected to explosives permits. In addition, GAO reported that the 1,228 attempted transactions involved 650 unique individuals, of which about 450 were involved in multiple transactions and 6 were involved in 10 or more transactions.

Of the 1,119 transactions that were allowed to proceed, how many involved people who were:

- subsequently charged with any crime;
- subsequently prosecuted for felonies;
- subsequently prosecuted for crimes involving terrorism;
- subsequently prosecuted for crimes involving firearms and/or explosives;
- were not subsequently charged with any crime but were subsequently deported, removed, and/or barred from returning to the United States;
- subsequently convicted of any crime;
- on the No Fly List at the time of the NICS check.

Response:

Because the FBI does not maintain a registry of the identities of firearm purchasers and owners, there are no data readily available and accessible with which to answer the questions regarding the subsequent activities of those whose purchases were approved.

Although the Terrorist Screening Center (TSC) has not historically collected information regarding those on the No Fly List at the time of a NICS check, this information has been collected since January 2008. The TSC's Encounter

Management Application records indicate that from January 2008 to February 2010 512 NICS checks resulted in positive matches to the Terrorist Screening Database (TSDB). Of those 512 matches, seven individuals were on the No Fly list at the time of the NICS check.

Questions Posed by Senator Levin

2. What percentage of the FBI Terrorist Screening Center's (TSC) consolidated Terrorist Screening Database (TSDB) is in the Violent Gang and Terrorist Offender File (VGTOF)?

Response:

The Violent Gang and Terrorist Organization File was renamed the Known or Appropriately Suspected Terrorist (KST) file in August 2009. As of May 5, 2010, the TSC had exported approximately 54% of the individuals in the TSDB to the KST file, which resides in the FBI's National Crime Information Center (NCIC) database.

3. Are there any records in the TSDB that are excluded from the VGTOF for reasons other than incomplete biographic information (e.g. because of their classified nature)?

Response:

The information responsive to this inquiry is exempt from disclosure to the public because it could cause harm to, impede, impair, or hinder the FBI's investigative interests or could impede or impair the effectiveness of FBI investigative techniques, methods, or procedures. For this reason, this information is provided separately.

4. In your experience, are there any problems with intelligence agencies sharing terrorist records with the FBI's Terrorist Screening Center for inclusion in the TSDB? In other words, is the Terrorist Screening Center getting all the data from the intelligence community that it needs?

Response:

By law (the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) (Pub. L. 108-458, 118 Stat. 3638 (12/17/04)), regulation, and established process, all terrorism information obtained by members of the Intelligence Community is forwarded to the National Counterterrorism Center (NCTC) Terrorist Identities Datamart Environment (TIDE) database. This information includes KST watchlist nominations. These nominations are reviewed by NCTC, and then forwarded to the TSC for final adjudication and inclusion on the watchlist. The TSDB records, which are maintained by the TSC, are updated regularly with new information provided to TIDE through this process. The FBI is confident this process works

effectively and that the TSDB contains thorough, accurate, and current information on watchlisted KSTs.

5. After an intelligence agency nominates an individual for inclusion in the TSDB, the Terrorist Screening Center evaluates the nomination. Can you please explain the process used by the Terrorist Screening Center for evaluating these nominations? What criteria does the Terrorist Screening Center use to accept or reject these nominations?

Response:

There are three key steps in the watchlisting process. The process begins when Federal agencies and other entities collect terrorism information and submit nominations of known or suspected international terrorists to the NCTC for inclusion in the NCTC's TIDE database. TIDE is the U.S. Government's central holding database of all information pertaining to international terrorism. NCTC reviews these nominations and then forwards them to the TSC for final adjudication and inclusion in the TSDB, also known as the Terrorist Watchlist, when established criteria for inclusion in the TSDB are met, as discussed below. The FBI uses a similar process to provide TSC with nominations of domestic terrorists.

When TSC receives a nomination, analysts in the TSC's Nominations and Data Integrity Unit (NDIU) process the terrorist nomination to ensure it meets the minimum standards for inclusion in the TSDB. TSC accepts a nomination into the TSDB when it satisfies two requirements. First, the biographic information associated with a nomination must include sufficient identifying data so that a person being screened can be matched to, or disassociated from, a watchlisted terrorist. Second, the facts and circumstances pertaining to the nomination must satisfy minimum substantive derogatory criteria for inclusion in the TSDB and meet the "reasonable suspicion" standard of review established by Presidential Directive. Reasonable suspicion requires "articulable" facts that, taken together with rational inferences, reasonably warrant a determination that an individual is known or suspected to be, or to have been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities based on the totality of the circumstances. Due weight must be given to the reasonable inferences that a person can draw from the facts.

In addition to determining whether nominations meet the requirements for inclusion in the TSDB, NDIU analysts review nominations to determine whether they meet the criteria for inclusion in the four major U.S. Government systems supported by the TSDB: the Department of State Consular Lookout and Support Systems for passport and visa screening; the DHS TECS system for border and port-of-entry screening; the No Fly and Selectee lists used by the Transportation Security Administration for air passenger screening; and the FBI's NCIC KST file for domestic law enforcement screening. The criteria for inclusion in each of these systems are tailored to the mission, legal authorities, and information technology

requirements of the department or agency that maintains the system. Accordingly, each of these systems contains a different subset of TSDB data.

6. FBI guidelines state that international terrorist suspects are automatically added to the terrorist watch list whether the FBI investigation is preliminary or full. However, domestic terrorist suspects are automatically added only if the investigation is considered full. In the event of a preliminary FBI investigation of a domestic terrorist suspect, the FBI case agent has the discretion to add the suspect to the TSDB. What are the established FBI guidelines for the case agent's use of discretion?

Response:

On December 7, 2009, the FBI disseminated a revised watchlisting policy that eliminated the ability of case agents to exercise discretion in nominating the subjects of domestic terrorism preliminary investigations to the TSDB. The revised policy now requires that case agents submit nominating forms for all terrorism subjects. This does not mean, though, that all such subjects will be added to the TSDB. Instead, trained subject matter experts in both the FBI's Counterterrorism Division and the TSC analyze all incoming nominations to ensure the watchlisting criteria approved by the National Security Council/Homeland Security Council Deputies Committee have been met.

Questions Posed by Senator Coburn

7. In June 2008, the Supreme Court ruled that 2nd Amendment protects an individual right to bear arms. What is your definition of the 2nd Amendment? What type of firearm ownership by regular non-law-enforcement citizens do you support? What is the role of an armed citizenry under the 2nd Amendment?

Response:

The Department of Justice (DOJ) is familiar with the Supreme Court's 2008 decision in *District of Columbia v. Heller*, which recognized an individual right to keep and bear arms under the Second Amendment to the U.S. Constitution. The Heller decision made no attempt to fully describe the scope of this right, but did acknowledge that -- like many other constitutional rights -- it is not unlimited. The full extent of the right to keep and bear arms protected by the Second Amendment will be resolved by the Supreme Court over time. In the meantime, the implications of Heller necessarily will be part of the Department's calculus whenever initiatives involving firearms are proposed or under consideration.

8. Under what law does the FBI claim permission to track gun purchasers on the consolidated watch list?

Response:

The FBI does not "track" gun purchasers on the consolidated watchlist. The National Instant Criminal Background Check System (NICS) conducts a check of a limited number of databases to check for the presence of information that would disqualify the individual from the receipt and possession of a firearm under the Brady Handgun Violence Prevention Act of 1993. Included in that check is the NCIC KST file. If the check matches a name in the KST file, NICS conducts further research, as permitted by law, to determine whether the FBI's investigative records on that KST contain any Brady Act disqualifiers.

9. Do you have any evidence that those on the consolidated watch list during the purchase have used the purchased firearm in a terrorist attack?

Response:

The FBI possesses no evidence that a firearm purchased by someone on the consolidated terrorist watchlist has ever been used in a terrorist attack. Attempted firearms purchases by a watchlisted KST will trigger notification by NICS to the TSC and, in turn, the FBI's Counterterrorism Division and the FBI case agent assigned to the investigation involving the KST. In this situation, the transfer of the firearm is delayed up to three business days (as permitted by law), during which the FBI checks the investigative case file and other available databases for the presence of any Brady Act disqualifiers, as listed in 18 U.S.C. § 922(g) and (n). At the end of the three days, the transfer may proceed if no Brady Act disqualifying information is found. The transfer of the firearm is documented in the KST's FBI investigative file pursuant to statutory and regulatory authority to detect and prevent acts of terrorism in the U.S. and, in support of that mission, to collect terrorism information pursuant to the IRTPA. No separate registry of this transfer or any other transfer or purchase, however, is maintained in NICS, in the TSC's consolidated watchlist, or in the FBI's data holdings.

10. a. How many people are on the consolidated watch list? Could you break down your answers by different watch list? Of these, how many of them are American citizens permitted to purchase firearms?

Response:

The information responsive to this inquiry is exempt from disclosure to the public because it could cause harm to, impede, impair, or hinder the FBI's investigative interests or could impede or impair the effectiveness of FBI investigative techniques, methods, or procedures. For this reason, this information is provided separately.

b. What triggers are used to place someone on the various lists that make up the consolidated watch list? For instance could someone be added to this list because he is acquainted with someone suspected of connections to terrorism, even though he is not suspected himself?

Response:

Under the current watchlisting guidance, an individual who is associated with a known or suspected terrorist can be nominated to the TSDB when the context of the relationship gives rise to a reasonable suspicion that the individual is engaging in, or has engaged in, conduct constituting, in preparation for, in aid of, or related to terrorism or terrorist activities.

For additional information responsive to this inquiry, please see the responses to Questions 3 and 5.

11. Under S. 1317, would law-abiding citizens who are on the terror list be considered felons if they are found to possess a firearm they purchased previously or are using (for instance at a gun range)? If so, how would a person be able to know they are prohibited in the first place, since they are not prohibited under the Gun Control Act?

Response:

It is DOJ's position that S. 1317 would not make it automatically illegal for someone listed in the Terrorist Screening Database to possess, own, or use a firearm if that person is not otherwise so prohibited under Federal or state law. Instead, S. 1317 would authorize the Attorney General to deny the transfer of a firearm by a Federal firearm licensee to someone known or reasonably suspected of being involved with terrorism as part of the National Instant Criminal Background Check process. If such a denial is authorized by the Attorney General, and the person so denied receives actual notice of the denial, the person would thereafter be prohibited from shipping, transporting, receiving, or possessing a firearm in or affecting commerce. If 18 U.S.C. § 922(g)(10) were amended by S. 1317, § 2(d), it would read as follows: "It shall be unlawful for any person . . . who has received actual notice of the Attorney General's determination made under section 922A, 922B, 923(d)(3) or 923(e) of this title . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

12. What do you believe the phrases "reasonable belief that the prospective transferee may use a firearm in connection with terrorism" or "appropriately suspected" in S. 1317 mean? How reasonable is it to base the criteria for the Attorney General's determination on 18 USC

2339A since the very same definitions are being challenged as “vague” as they appear in 18 USC 2339B? (Holder v. Humanitarian Law Project, 08-1498).

Response:

It is DOJ's position that the criteria that S. 1317 imposes upon the exercise of the Attorney General's discretion to deny a firearms transfer are similar to those employed in other law enforcement contexts in which crimes are being detected, investigated, or prosecuted. The Supreme Court decision in *Holder v. Humanitarian Law Project* rejected a vagueness challenge to certain terms contained in the definition of “material support or resources,” as used in 18 U.S.C. §§ 2339A and 2339B. As a result, the Department does not anticipate that the case will have a substantial impact on the Attorney General's ability to exercise his discretion under S. 1317 if it becomes law in its current form.

13. How expensive do you think it would be keep NICS records on approved firearm transactions for up to 180 days and other records as mandated by S. 2820?

Response:

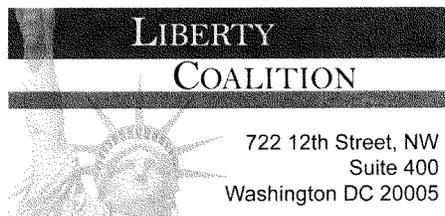
The FBI has not assessed the costs of retaining records as would be required by S. 2820. The longer retention periods required by that bill would require additional computer storage capacity, and software and hardware enhancements would be needed both to maintain current transaction speeds and to accommodate the increased volume involved in system backups and report generation.

**Post-Hearing Questions for the Record
Submitted to Sandy Jo MacArthur
From Senator Tom Coburn**

**“Terrorists and Guns: The Nature of the Threat and Proposed Reforms”
May 5, 2010**

1. In June 2008, the Supreme Court ruled that 2nd Amendment protects an individual right to bear arms.
 - a. What is your definition of the 2nd Amendment?
 - b. What type of firearm ownership by regular non-law-enforcement citizens do you support?
 - c. What is the role of an armed citizenry under the 2nd Amendment?
2. Can suspected terrorists be law-abiding citizens?
 - a. What would you say to someone who had their 2nd Amendment rights revoked under S. 1317, but later was determined to have never been a threat to U.S. national security?
3. Generally Congress doesn't prohibit a person from exercising a right unless they have committed an offense or have been deemed incompetent. Why is it appropriate for Congress to remove a constitutionally protected right without due process and either criminal activity or a finding of incompetence?
4. Would you recommend enabling law enforcement or the Attorney General to arrest Americans for being on the consolidated watch list?

Responses to these Questions for the Record were not received by time of printing.



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Response to Senator Tom Coburn's QFR

Aaron Titus

**Privacy Director, Liberty Coalition
Attorney, J.C. Neu & Associates**

Senator Coburn,

Thank you for the opportunity to respond to your questions regarding S.1317, or "The Gun Owners Are Probably Terrorists Act," and S.2820, or "The National Firearm Registry Act."

The Liberty Coalition (<http://www.libertycoalition.net>) works to organize, support, and coordinate bipartisan public policy activities related to civil liberties and basic rights. We work in conjunction with more than 80 partner organizations from across the political spectrum that are interested in preserving the Bill of Rights, personal autonomy and individual privacy. The Liberty Coalition works with, but does not speak on behalf of our partners.

Response to Question 1

"In June 2008, the Supreme Court ruled that 2nd Amendment protects an individual Right to Keep and Bear Arms. What is your definition of the 2nd Amendment? What type of firearm ownership by regular non-law-enforcement citizens do you support? What is the role of an armed citizenry under the 2nd Amendment?"

We are saddened, alarmed, and angered by gun violence and terrorist acts. We can all agree that the world would be better if we each beat our proverbial swords into plow-shares and spears into pruning-hooks. But that day has not yet arrived. Guns and other weapons do exist, and managing them is a matter of public concern. Reasonable minds may and do come to differing conclusions about gun control, gun safety, and whether gun ownership makes people safer.¹ The Liberty Coalition takes no official position on "gun control" *per se*. However, we are very alarmed at legislative attempts, though well-intentioned, which strip away individual Constitutional protections.

¹ This point is demonstrated no better than references to a wealth of reputable research cited in the *District of Columbia v. Heller* dissent.

The Liberty Coalition adopts the definition of the Second Amendment as expounded by the most recent Second Amendment Supreme Court jurisprudence: *District of Columbia v. Heller*. As with all individual, enumerated Constitutional rights, the government may only regulate or revoke the right after due process of law.

Response to Question 2

“Could you predict the most likely outcomes of implementing S. 1317 for law-abiding Americans on the consolidated watch list? What due process rights would these American citizens have? What would such an American have to do to get their 2nd Amendment rights back?”

Likely Outcome for Law-Abiding Citizens

Under current law, a citizen has the right to know exactly why he was denied the purchase of a firearm. With this information, the person can correct the record or appeal the decision.

If S.1317 becomes law, a law-abiding American citizen on the consolidated watch list may be denied a firearm purchase at the discretion of the Attorney General. Under S.1317, the person will only receive "actual notice of the Attorney General's determination," if the Attorney General determines that such notice would not likely "compromise national security."^{2, 3} Due to the secret nature of the watch lists, the Attorney General may determine that simply tipping off the person that they are on a watch list may compromise national security, thus rendering the notice clause illusory. In that case, the person would receive a "Denied" signal from NICS, with no further information about the reason for the denial.

The citizen may ask why he or she was denied,⁴ but the Attorney General is not required to answer, nor correct erroneous information within the watch list system.⁵ Further, even if the Attorney General explains the reason for the denial, the citizen will lose his right to appeal expires after 60 days.⁶

Assuming that the citizen appeals the decision in court, things only get harder and more confusing. First, the citizen must rely on summaries or a redacted version of the documents upon which the Attorney General made his decision.⁷ Neither the citizen nor his attorney has a

² S. 1317 p. 13, lines 6-10.

³ "any information upon which the Attorney General relied for this determination may be withheld from the petitioner, if the Attorney General determines that disclosure of the information would likely compromise national security."

⁴ S. 1317, p. 13, lines 1-5.

⁵ S. 1317, p. 13, lines 6-9.

⁶ "The petition shall be filed not later than 60 days after the petitioner has received actual notice of the Attorney General's determination under section 922A or 922B of this title." S.1317, p. 11 lines 7-8.

⁷ "To make this showing, the United States may submit, and the court may rely upon, summaries or redacted versions of documents containing information of the disclosure of which the Attorney General has determined would likely compromise national security. Upon request of the petitioner or the court's own motion, the court

right to see or rebut the evidence presented against him. Not even the court may consider the unredacted documents to determine whether the Attorney General acted reasonably in denying the firearms permit.⁸ These procedures are frighteningly similar to those applied to enemy combatants in Guantanamo Bay.

If a law-abiding citizen is able to appeal the decision in court, he will lose if the Attorney General can prove, by a preponderance of the evidence,⁹ not that the individual poses a risk, or that the person is a terrorist, or even that the person is under investigation; rather, the Attorney General must only demonstrate that the citizen has been placed on a watch list.

Once that has been proven, the appeal is over and the citizen loses his Second Amendment Right to Keep and Bear Arms. The citizen will not have a chance to introduce evidence of innocence, abuse of Executive discretion or mount any other meaningful defense. **Under S.1317, innocence of terrorism is irrelevant.**

In other words, S.1317 allows the Attorney General to unilaterally revoke a person's Second Amendment Right to Keep and Bear Arms by a bald assertion of terrorist inclinations, founded on "suspicion"¹⁰ and "reasonable belief," thus rendering the notion of a citizen's right to appeal illusory and impotent.

Citizens' Recourse

Under S.1317, law-abiding citizens on the consolidated watch list who are denied a firearms purchase, have no meaningful way to regain their Second Amendment rights. Without direct legal recourse, citizens would have no choice except to challenge the facial constitutionality of the law itself. While the Liberty Coalition believes that S.1317 is unconstitutional on its face, we also believe that an ounce of effort preventing this bill from becoming law is worth a pound of cure in the courts.

Terror Watch lists, by their nature, are designed to be over-broad.¹¹ A name on a terror watch list is evidence of a government interest in an individual or an investigation, not proof of

may review the full, undisclosed documents ex parte and in camera. The court shall determine whether the summaries or redacted versions, as the case may be, are fair and accurate representations of the underlying documents. The court shall not consider the full, undisclosed documents in deciding whether the Attorney General's determination satisfies the requirements of section 922A or 922B." S.1317, p. 11. See also S.1317, p. 9 line 1; p. 9, lines 15-24.

⁸ Ibid.

⁹ "The court shall sustain the Attorney General's determination upon a showing by the United States by a preponderance of evidence that the Attorney General's determination satisfied the requirements of section 922A or 922B, as the case may be." S. 1317, p. 11, line 7.

¹⁰ Note that S.1317 generally uses the term "appropriately suspected." "Appropriately suspected" has no definition in the Act, nor in federal statute, nor in case law. It is the opinion of the Liberty Coalition that "appropriately suspected" is legally indistinguishable from "suspected," and is probably a euphemism for appearance on a terror watch list.

¹¹ "In general, individuals who are 'reasonably suspected' of having possible links to terrorism—in addition to individuals with known links—are to be nominated for inclusion on the consolidated watch list by the FBI and other members of the intelligence community." GAO, *NICS and Terrorist Watch List Records*, GAO-09-125R (Washington, D.C.: May 21, 2009), 24.

terrorism. The bald allegation of a suspicion of terrorist sympathies is insufficient evidence to overcome an individual's interest in their Right to Keep and Bear Arms. Such a showing would not come close to overcoming even the most basic level of judicial scrutiny.

The nature of criminal and terrorist investigations necessitates that certain information be kept confidential. The Liberty Coalition does not oppose confidential criminal and terrorist investigations, or even targeted, focused lists of individuals of interest. But what S.1317 misunderstands is that "investigation" is not "guilt," and "suspicion" is not "conviction."

The existing lists upon which NICS draws are fundamentally different from terror watch lists. The NICS system already checks the background of gun purchasers against lists of "felons, fugitives, unlawful drug users, and aliens illegally or unlawfully in the United States."¹² What makes these lists effective is that they are based on appropriate and transparent legal standards of due process. In theory, denying a firearm to a person who appears on a list of "convicted terrorists" would not violate due process. However, revoking Second Amendment rights based solely on a list of "suspected terrorists" certainly does violate due process.¹³

No constitutional right is absolute, but **when a secret enemy list constitutes sufficient proof to take away life, liberty or property without due process of law, then the greater danger to democracy comes not from the enemy, but from the list itself.** Whether the list contains Confirmed Communists or Suspected Terrorists, it must be subject to the Constitution and Due Process of law.

While the bill implements a key GAO recommendation that the Attorney General issue guidelines for exercising this new authority,¹⁴ S.1317 contains so many flaws that any guidelines would be like giving swimming lessons in a rip tide.

The discretionary power to revoke the Second Amendment requires checks, balances, due process, and a meaningful opportunity for redress. S.1317 and S.2820 lack such due process. In order to satisfy constitutional Due Process protections, any bill which limits the Second Amendment must, at a minimum provide: an adversarial proceeding before a neutral arbiter, through which a person may challenge the Attorney General's determination to deny a firearm sale, as well as their inclusion on a watch list; access to and a right to challenge the information on which the decision is based, where the arbiter is unrestricted in the evidence which he or she may consider; and a meaningful administrative procedure for removal from watch lists.

Slippery Slope

If S.1317 becomes law, then the logical conclusion is that other Constitutionally enumerated rights could be annulled by a simple assertion of terrorist activities. If S.1317 is constitutional, then there is no reason why Congress could not authorize the Attorney General discretion to prevent anyone on a terror watch list from making inappropriate public speeches,

¹² GAO, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127 (Washington, D.C.: Jan. 19, 2005), 1.

¹³ As vividly illustrated by the film, *Minority Report*.

¹⁴ S. 1317 p. 17, line 21.

participating in dangerous religious activities or unauthorized demonstrations. In addition to disarming people on terror watch lists, the Attorney General would have discretion to deny the right against self incrimination, the right to counsel, the right to confront witnesses against them, and the right against double jeopardy.

Collectively these bills strip citizens of their enumerated Constitutional Right to Keep and Bear Arms without any meaningful due process, and create a national firearms registry. The same Constitutional Due Process provided by the 5th and 14th Amendments that prevents Congress from incarcerating a citizen based on mere suspicion also prevents Congress from revoking a citizen's Second Amendment Right to Keep and Bear Arms. For that and other reasons, the Liberty Coalition opposes these bills.

