

Gun-banners want people whose names appear on secret government

no-fly lists to be denied their constitutional Right to Keep and Bear Arms.

# NO FLY! NO BUY!

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**"The NRA wants terrorists to have guns."**

This malicious charge has been a constant refrain of the gun prohibition lobbies for the past two decades.

In the 1980s, they claimed that the Glock pistol was a "terrorist special," and that the government should ban all guns with polymer frames. Then the prohibitionists claimed that so-called "assault weapons"—which they defined to include self-loading air rifles and rimfire guns—were the "weapon of choice" of terrorists. More recently, the prohibition lobbies announced that what terrorists really like are "sniper rifles"—an amorphous category including lots of intermediate-power centerfire rifles often used in hunting and target shooting. Terrorism has also been the pretext for proposals to require federal government permission in order to hold a gun show.

Since last March, the prohibition lobbies and their media allies have been using terrorism rhetoric to push for a bill—H.R. 1195 by Rep. Carolyn McCarthy, D-N.Y.—which would allow a person's Second Amendment rights to be taken away in secret, without notice or any other due process.

To understand what Rep. McCarthy is really up to, let's take a step back and look at how the National Instant Check System (NICS) works.

Guns are the most heavily regulated consumer product in the United States. The only consumer product for which a person needs FBI permission to purchase, for every single transaction, is a firearm. Since the sunset of the Brady waiting

period, all retail firearms transactions in the United States must be approved by the National Instant Check System (NICS). When a person goes to a gun store, the dealer takes his or her identifying information and calls the FBI. The FBI checks its records, and if the buyer passes the background check, he or she can buy a gun. If that person comes back to the store the next day to buy another gun, he or she must pass another background check.

In many states, the background checks are run by a state or local police agency, which accesses the FBI records.

To operate NICS, the FBI compiles "prohibited persons" lists for persons who are prohibited by federal law from possessing a gun. Categories on the list include felony convictions (any conviction, no matter how long ago), misdemeanor domestic violence convictions or dishonorable discharge from the military. Other prohibited categories include being the subject of a domestic violence restraining order or being under indictment for a felony.

What these lists have in common is that they are based on public records, and before a person can be put in one of the disqualifying categories, he must have due process.

Another prohibited category is that the person "is an unlawful user or addicted to any controlled substance." It would obviously be improper for the FBI to put someone's name on the prohibited persons list merely because an FBI agent or other government official suspected that

the person might be a drug user.

Among the FBI's many activities, in addition to operating the NICS, is anti-gang work. To assist law enforcement, the FBI has created a list called the "Violent Gang and Terrorist Organization File" (VGTOF). Some of the people on this list are suspected of crimes, while other persons on the list are merely someone that the FBI wants to talk to because the person may know someone else of interest.

Because the FBI's VGTOF list is based only on suspicion, not convictions or arrests, it was not used for NICS checks under the Clinton administration or most of the Bush administration. But in February 2004, the FBI revised the NICS procedures, so that any NICS inquiry would access the VGTOF list.

Another suspicion-based federal list is the Transportation Security Agency's "No-Fly" list of people who are not allowed to board a commercial airplane. In 2004, Sen. Edward Kennedy, D-Mass., complained very publicly that he had been denied boarding of a plane because he was on the No-Fly list.

Sen. Kennedy took his problem personally to TSA Secretary Tom Ridge, and the removal process still took three weeks. Imagine how difficult it is for an ordinary, innocent citizen to get removed from a government list such as the No-Fly list.

The No-Fly list, the VGTOF and 10 other federal lists are being consolidated by the federal Terrorism Screening Center (TSC). A name that is on one of the federal lists (such as the No-Fly list) will automatically show up when a gun background check is performed. According to the CBS Radio "Osgood File" (March 9), there are 50,000 names on the FBI's "terrorist watch list."

FBI spokesman Carl Schlaff told the *Rocky Mountain News* on March 9 that there's no cause to deny

someone a gun just because he or she is on the watch list. According to Schlaff, some people are on the list simply because the FBI wants to interview them about someone else who may have a connection to terrorism.

"You're innocent until proven guilty," Schlaff said.

Once a particular person (say, Sen. Kennedy) is placed on the No-Fly list, or any similar federal list, the National Instant Check System will automatically create a "hit" if the person attempts to buy a gun.

If there is a match between the would-be gun buyer and a name on the list, the gun purchase is automatically put on hold for 72 hours to give the FBI time to check its records more thoroughly.

person and a similar name of an innocent person.

Of the 44 genuine matches, nine resulted in denial of the firearms purchase because of a criminal conviction or other disqualifying category. The 35 other transactions were eventually allowed to proceed.

In some of those 35 cases, state officials conducting the background checks attempted to obtain additional information from FBI agents, but the agents were non-responsive.

In one state, the state laws gave officials the discretion to delay purchases indefinitely, and two purchases were indefinitely delayed. One of the purchases was allowed to go forward 10 months later, after the person's name was removed from the VGTOF list.

as it legally can; in response, the Department of Justice has created revised, more detailed guidelines on the sharing of information between state and federal authorities, in cases of a VGTOF hit.

The GAO also suggested that the FBI consider, and the FBI agreed, that the FBI examine the feasibility of the FBI taking over all background checks that generate a VGTOF hit. Once the hit occurred, the FBI, not state law enforcement, would complete the NICS investigation.

The GAO study got a lot of media attention last March, as media around the country followed the lead of *The New York Times* in claiming that terrorists were being allowed to buy guns.

Rep. McCarthy took advantage

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Earlier this year, the Government Accountability Office (GAO) released a study of the relationship between NICS background checks and the VGTOF list. (*Gun Control and Terrorism: FBI Could Better Manage Firearm-Related Background Check Involving Terrorist Watch List Records*, GAO-05-127, www.gao.gov/new.items/do5127.pdf.)

Initial data for the first half of 2004 suggested there were 650 matches between gun buyers and VGTOF names; but further inquiry revealed only 44 genuine matches. One of the weaknesses of NICS is false matches between the name of a prohibited

The GAO report made two recommendations. First, the FBI should conduct annual audits of how states that conduct the NICS checks handle possible matches with the VGTOF list.

For NICS checks, the FBI collects from the gun dealer the information that is necessary to run the background check (such as name and date of birth), but does not collect extraneous information (such as whether the person is buying a handgun or a long gun). The GAO recommended that for possible VGTOF matches, the FBI should receive as much information

of the media frenzy to announce her proposal to prohibit anyone on the No-Fly list from possessing a firearm. Never mind that the GAO report had not involved the No-Fly list, and the GAO had not suggested turning the VGTOF, the No-Fly list or anything else into a new category of persons forbidden to exercise Second Amendment rights.

Under the McCarthy proposal, a prosecutor could send a gun owner to federal prison without needing to show that the person had ever committed a crime, or had taken any steps preparatory to committing a

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### No-Fly Lists

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crime. The prosecutor merely would have to show that the person's name was on the No-Fly list, and that the person had owned, held or tried to buy a gun. The federal law (18 U.S. Code § 922) that prohibits certain types of people from buying guns also makes it a felony for such persons even to hold a gun in their hands for even a moment.

How exactly would persons on the No-Fly list be informed that they will commit a federal crime if they attempt to buy or use a gun, or if they retain ownership of a gun they already possess? It would obviously be detrimental to law enforcement for the government to be forced to provide notice to everyone on one of the No-Fly lists. True terrorists would be notified that the federal government is watching them, and they would immediately shut down their contacts with other members of their network.

It would be a due process nightmare to send a person to prison for attempting an illegal gun purchase when the government had never informed the person that he or she was on the list. But if gun rights can be taken away without due process, perhaps people can also be punished for a gun possession crime without due process.

We already know that the No-Fly list isn't always reliable, because, like many similar lists, it can be based on sometimes unreliable sources, such as information supplied by foreign governments, rumors or allegations of people trying to impress a law enforcement official. After all, Sen. Edward Kennedy does not seem likely to hijack an airplane.

The cases of FBI and other officials compiling dossiers on innocent people, and putting them on various lists, are far too numerous. For example, in the 1980s the FBI investigation of CISPES—the Committee in Solidarity with the People of El Salvador—created secret

files about a great many people who, notwithstanding their mistaken views on foreign policy, were guilty of no wrong-doing. The same is true of the FBI's prior investigation of the Socialist Workers Party.

If Congress takes away the Second Amendment rights of persons just because their name is placed on a secret government list, why not include the many people suspected of being involved in drugs? For that matter, why not include all criminal suspects (suspected bank robbers, suspected domestic violence perpetrators, suspected tax cheaters) on the federal prohibited list?

Once the principle has been established that constitutional rights can be taken away based on suspicion, and without due process, the principle cannot be contained merely to the Second Amendment. Why not take away the right of Americans on the No-Fly list to own a computer or use the Internet (a key source of terrorist communications)? If the courts uphold stripping a person's Second Amendment rights based on suspicion, there is no principled reason for a court to reject the stripping of any other constitutional rights.

Our nation has overcome many dangers in the past: revolution against the world's most powerful empire in order to win our independence; British invasion of our homeland and destruction of our capital city in the War of 1812; a terrible civil war; and the twin terrors of Fascism and Communism. As we overcame each of these dangers, never did Congress enact a law stating that a person's Second Amendment rights could be destroyed in secret, without a hearing or due process.

To create such a lawless rule would disgrace the memory of the many patriots who fought and died to preserve our civil liberties, including the Second Amendment right to arms and the Fifth Amendment right to due process. 