

CRS Report for Congress

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Terrorist Screening and Brady Background Checks for Firearms

July 25, 2005

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Report Documentation Page

*Form Approved
OMB No. 0704-0188*

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1. REPORT DATE 25 JUL 2005	2. REPORT TYPE N/A	3. DATES COVERED -		
4. TITLE AND SUBTITLE Terrorist Screening and Brady Background Checks for Firearms		5a. CONTRACT NUMBER		
		5b. GRANT NUMBER		
		5c. PROGRAM ELEMENT NUMBER		
6. AUTHOR(S)		5d. PROJECT NUMBER		
		5e. TASK NUMBER		
		5f. WORK UNIT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Federation of American Scientists 1717 K St., NW Suite 209 Washington, DC 20036		8. PERFORMING ORGANIZATION REPORT NUMBER		
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)		10. SPONSOR/MONITOR'S ACRONYM(S)		
		11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release, distribution unlimited				
13. SUPPLEMENTARY NOTES				
14. ABSTRACT				
15. SUBJECT TERMS				
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified	SAR	18. NUMBER OF PAGES 11
				19a. NAME OF RESPONSIBLE PERSON

Terrorist Screening and Brady Background Checks for Firearms

Summary

Historically, terrorist watch list checks were not part of the firearms background check process implemented pursuant to the Brady Handgun Violence Prevention Act. Such watch lists were not checked, because being a known or suspected terrorist is not a disqualifying factor for firearm transfer/possession eligibility under current federal or state law. Nevertheless, if a person is a known or suspected terrorist, it suggests that there may be an underlying factor (e.g., illegal immigration or fugitive status) that could bar him from legal firearms possession. For a time, moreover, all Brady background check records for approved firearm transfers were destroyed almost immediately, precluding the opportunity to use the background check system to screen for known and suspected terrorists.

Consequently, three issues emerged regarding Brady background checks following the 9/11 attacks. First, should approved firearm transfer records be maintained on a temporary basis to determine whether persons of interest in counterterrorism investigations had previously obtained firearms improperly? Second, should terrorist watch list checks be incorporated statutorily into the Brady background check process? Third, should persons watch-listed as known or suspected terrorists be prohibited statutorily from possessing firearms?

In February 2004, the FBI reportedly modified its National Instant Criminal Background Check System (NICS) operating procedures to retain NICS records temporarily for approved transfers that result in terrorist watch list hits, and to pass that information on to FBI investigators on the Joint Terrorism Task Forces. In addition, Attorney General Alberto Gonzales has directed the DOJ Office of Legal Policy to form a working group to review federal gun laws — particularly in regard to Brady background checks — to determine whether additional authority should be sought to prevent firearms transfers to known and suspected terrorists.

In the 109th Congress, several related pieces of legislation have been introduced that are related to NICS procedures and terrorist watch lists. The Terrorist Apprehension and Record Retention Act of 2005 (S. 578/H.R. 1225), introduced by Senator Frank Lautenberg and Representative John Conyers, would authorize the retention of all related records for at least 10 years, among other things. In addition, Representative Peter King introduced H.R. 1168, a bill that would require the Attorney General to promulgate regulations to preserve records of terrorist- and gang-related record hits during such background checks until they were provided to the FBI. Representative Carolyn McCarthy introduced H.R. 1195, a bill that would make it unlawful for anyone to transfer a firearm to a person who was on the “No Fly” lists maintained by the Transportation Security Administration.

Amendments addressing the issue of terrorist watch lists and firearms background checks may be offered during Senate consideration of the Protection of Lawful Commerce in Arms Act (S. 397). This report will be updated as needed.

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Terrorist Screening and Brady Background Checks for Firearms

Introduction

This report analyzes the issues underlying the Terrorist Apprehension and Record Retention Act of 2005 (S. 578/H.R. 1225). Related proposals include H.R. 1168 and H.R. 1195. These bills address terrorist screening and Brady background checks for firearms transfer and possession eligibility.

Historically, terrorist watch list checks were not part of the firearms background check process implemented pursuant to the Brady Handgun Violence Prevention Act (hereafter, the Brady Act).¹ Such watch lists were not checked, because being a known or suspected terrorist is not a disqualifying factor for firearm transfer/possession eligibility under current federal or state law. Nevertheless, if a person is a known or suspected terrorist, it suggests that there may be an underlying factor (e.g., illegal immigration or fugitive status) that could bar him from legal firearms possession. For a time, moreover, Brady background check records for approved firearm transfers were destroyed almost immediately, precluding the opportunity to use the background check system to screen for known and suspected terrorists.

Consequently, three issues emerged regarding Brady background checks following the 9/11 attacks. First, should approved firearm transfer records be maintained on a temporary basis to determine whether persons of interest in counterterrorism investigations had previously obtained firearms improperly? Second, should terrorist watch list checks be incorporated into the Brady background check process? Third, should persons watch-listed as known or suspected terrorists be prohibited statutorily from possessing firearms? Amendments addressing the issue of terrorist watch lists and firearms background checks may be offered during Senate consideration of the Protection of Lawful Commerce in Arms Act (S. 397).²

Background

On November 30, 1998, the permanent provisions of the Brady Act became effective, and the FBI implemented the National Instant Criminal Background Check System (NICS). Through NICS, background checks are conducted on applicants for

¹ P.L. 103-159, 107 Stat. 1536.

² For further information, see CRS Report RS22074, *Limiting Tort Liability of Gun Manufacturers and Gun Sellers: Legal Analysis of 109th Congress Legislation*, by Henry Cohen.

both handgun and long gun transfers between Federal Firearms Licensees (FFLs — licensed sellers of firearms) and the general public. While the FBI handles background checks entirely for some states, other states serve as full or partial points of contact (POCs) for background check purposes. In POC states, FFLs contact a state agency, and the state agency contacts the FBI for such checks.³

Under current law, there are nine classes of persons prohibited from possessing firearms: (1) persons convicted in any court of a crime punishable by imprisonment for a term exceeding one year; (2) fugitives from justice; (3) drug users or addicts; (4) persons adjudicated as “mental defectives” or committed to mental institutions; (5) unauthorized immigrants and most nonimmigrant visitors; (6) persons dishonorably discharged from the Armed Forces; (7) U.S. citizenship renunciates; (8) persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner; and (9) persons convicted of misdemeanor domestic violence.⁴

As is the case today, NICS queries three databases to determine firearms transfer/possession eligibility. They include the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS index. The NICS index includes six categories of disqualifying records for persons who (1) have been dishonorably discharged from the U.S. Armed Forces, (2) have been adjudicated mental defectives or committed to mental institutions, (3) are known to be controlled substance abusers, (4) have renounced their U.S. citizenship to a State Department consular officer, (5) are known to be in an illegal immigration status, or (6) have been previously denied firearm transfers. The III includes criminal history records for persons arrested and convicted of felonies and misdemeanors. The NCIC includes law enforcement “hot files” on information that is of immediate importance and applicability to law enforcement officials. Some of these “hot files” include information on (1) wanted persons (fugitives), (2) persons subject to domestic abuse restraining orders, (3) deported felons, (4) persons in the U.S. Secret Service protective file, and (5) foreign fugitives, among others.

In addition, NCIC includes a “hot file” known as the Violent Gang and Terrorist Organization File (VGTOF). Prior to the 9/11 attacks, this file included *limited* information (about 10,000 records) on known or suspected terrorists and gang members, who were subjects of ongoing counterterrorism and criminal investigations. Initially, NICS did not flag VGTOF hits for NICS examiners, as such information was not considered legally required to determine firearms

³ In 14 states, state agencies serve as full POCs and conduct background checks for both handgun and long gun transfers. In four states, state agencies serve as partial POCs for handgun permits, while in another four states, state agencies serve as partial POCs for handgun transfers only. In these eight partial POC states, checks for long gun transfers are conducted entirely through the FBI. In the 28 non-POC states, the District of Columbia, and four territories (Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands), FFLs contact the FBI directly to conduct background checks through NICS for both handgun and long gun checks.

⁴ 18 U.S.C. §922(g) and (n).

transfer/possession eligibility. As described below, however, NICS procedures have been modified to screen terrorist watch lists.

NICS 90-Day Audit Log and Record Retention

Following the 9/11 attacks, FBI officials reportedly searched approved firearm transaction records in the then NICS 90-day audit log for 186 illegal alien detainees. Two were found to have been improperly cleared to be transferred firearms.⁵ Upon learning of this, then Attorney General John Ashcroft barred the FBI from searching the NICS audit log, maintaining that the Brady Handgun Violence Prevention Act prohibited the use of NICS as an electronic registry of firearms, dispositions, or owners.⁶ In a hearing before the Senate Committee on the Judiciary on December 6, 2001, Senator Charles Schumer questioned Attorney General Ashcroft as to why the FBI was barred from reviewing these records.⁷ The Attorney General responded that the Brady Act strictly limited the use of such information. Although the Attorney General did not acknowledge the need for legislation to authorize searching these records, he said the Department would be happy to consider any related legislative proposals presented by Congress.

Even prior to the 9/11 attacks, the use of approved firearms transfer records was controversial. During the Clinton Administration, the Department of Justice (DOJ) issued a final rule that would allow such records to be maintained for up to six months.⁸ The National Rifle Association (NRA) challenged this rule in federal court, arguing that retaining the *approved* records was tantamount to a temporary registry and in violation of the Brady Act. On July 11, 2000, however, the U.S. Court of Appeals for the District of Columbia, in the case of *NRA v. Reno* (No. 99-5270, 216 F. 3d 122; 2000 U.S. App. Lexis 15906), found that nothing in the Brady Act prohibited the temporary retention of information about lawful firearm transfers for certain audit purposes. Previously, on March 9, 1999, DOJ published a proposed rule to allow such records to be maintained for up to 90 days for audit purposes.⁹ On January 21, 2001, under then Attorney General Janet Reno, DOJ finalized this rule.¹⁰

Also, under Attorney General Reno, the NICS audit log was often searched at the request of federal, state, and local law enforcement officials to determine whether persons who were subsequently known to be prohibited had obtained a firearm in the previous 90 days. While the propriety of these types of searches was not presented in *NRA v. Reno*, incoming Attorney General Ashcroft and gun control opponents

⁵ Fox Butterfield, "Justice Dept. Bars Use of Gun Checks in Terror Inquiry: FBI Wants to See Files," *New York Times*, Dec. 6, 2001, p. A1.

⁶ Subparagraph 103(i) of P.L. 103-159, 107 Stat. 1542.

⁷ FDCH Political Transcripts, Senate Committee on the Judiciary, Hearing on Anti-Terrorism Policy, Dec. 6, 2001, Nexis, p. 37.

⁸ 63 *Federal Register* 58303, Oct. 30, 1998.

⁹ 64 *Federal Register* 10263, Mar. 9, 1999.

¹⁰ 66 *Federal Register* 6470, Jan. 22, 2001, codified at 28 C.F.R. Part 16.

viewed such searches as illegal and an abuse of the system.¹¹ Just months before the 9/11 attacks, DOJ had proposed regulations requiring the “next-day” destruction of the approved firearm transaction records,¹² a measure that would essentially prevent such searches.¹³

While further action on the proposed “next day” regulation was delayed, gun rights advocates amended the FY2004 Consolidated Appropriations Act with language that was modified in conference committee to require the destruction of these records within 24 hours.¹⁴ A final rule requiring record destruction within 24 hours was published on July 23, 2004.¹⁵ Nevertheless, similar language was included in the FY2005 Consolidated Appropriations Act.¹⁶ In addition, both versions of the FY2006 Science-State-Justice-Commerce appropriations bill (H.R. 2862), House-passed and Senate-reported, include a provision that would require the destruction of NICS records for approved transfers within 24 hours (§614 and §515, respectively). Advocates of greater gun control, on the other hand, oppose the destruction of NICS records within 24 hours, and argue further that law enforcement and counterterrorism officials ought to have access to NICS records to advance ongoing terrorist and criminal investigations.

Brady Background Checks and Terrorist Watch Lists

Historically, terrorist watch list checks were not part of Brady background checks. Indeed, prior to the 9/11 attacks, watch lists were maintained primarily to prevent foreign terrorists and other “undesirable” aliens from entering the United States. As stated in Homeland Security Presidential Directive 6 (HSPD-6), however, the use of watch lists has been expanded to better screen such persons at consular

¹¹ Assistant Attorney General for Legal Policy, Viet Dinh, was reportedly a leading opponent of using the NICS 90-day audit log to screen subsequently for improper firearm transfers. See Fox Butterfield, “Justice Dept. Bars Use of Gun Checks in Terror Inquiry: FBI Wants to See Files,” *New York Times*, Dec. 6, 2001, p. B7.

¹² 66 *Federal Register* 35567, July 6, 2001, to have been codified at 28 C.F.R. §25.9(b).

¹³ In July 2002, GAO reported that under Attorney General Reno the FBI had conducted “nonroutine” searches of the NICS audit log for law enforcement agencies to determine whether a person, whose subsequent information showed was a prohibited person, had been transferred a firearm within the previous 90 days. The FBI informed GAO that such searches were routinely conducted, but were a “secondary benefit” given that the audit log was maintained primarily to check for system “accuracy, privacy, and performance.” The next day destruction of NICS records would essentially prevent “nonroutine” searches. In addition, GAO reported that the next-day destruction of records would “adversely affect” other NICS operations, including firearm-retrieval actions, NICS audit log checks for previous background checks, verifications of NICS determinations for FFLs, and ATF inspections of FFL record keeping. For further information on these issues, see GAO, *Gun Control: Potential Effects of Next-Day Destruction of NICS Background Check Records*, GAO-02-653, July 2002.

¹⁴ Section 617 of P.L. 108-199, 118 Stat. 95.

¹⁵ 69 *Federal Register* 43892, July 23, 2004, codified at 28 C.F.R. §25.9(b).

¹⁶ Section 616 of P.L. 108-447, 118 Stat. 2915.

offices and international ports of entry, and to better track them both abroad and, if they manage to enter the United States, at home.¹⁷ In September 2003, the FBI-administered Terrorist Screening Center (TSC) was established, and work was begun to improve and merge several watch lists maintained by the U.S. government into a consolidated Terrorist Screening Database (TSDB).

One of these “watch lists” was VGTOF. As part of these efforts, TSDB “lookout” records from other agency watch lists were downloaded into VGTOF, expanding that file from 10,000 to over 140,000 records.¹⁸ With this improvement, state and local law enforcement officers now have limited access to terrorist watch lists through NCIC. With monitoring from the TSC, these officers are now able to screen for terrorists during routine traffic stops and similar encounters (subject to constitutional and other legal limitations).

While it is clearly within the U.S. government’s mandate to identify and track persons who are intent on inciting or engaging in terrorist activities, the determination of who may be a member or supporter of a terrorist organization and, therefore, should be subjected to police scrutiny and surveillance is ultimately a subjective consideration made by intelligence analysts and special agents based on the best information available. Under the terms of HSPD-6, the National Counterterrorism Center (NCTC) Director,¹⁹ the TSC Director, and the heads of federal departments and agencies nominate persons for inclusion in the TSDB. The TSC Director is responsible for establishing procedures to review these records for continued inclusion in the TSDB.

The NCTC is providing international terrorism data and the FBI is providing domestic terrorism data for inclusion in the TSDB. Both sets of data are merged in the consolidated TSDB maintained by the TSC. According to the FBI, international terrorists include those persons who carry out terrorist activities *under foreign direction*. For this purpose, they may include citizens or noncitizens, under the rationale that citizens could be recruited by foreign terrorist groups. Or, noncitizens (aliens) could immigrate to the United States and naturalize (become citizens), having been unidentified terrorists before entry, or having been recruited as terrorists sometime after their entry into the United States.

By comparison, domestic terrorists *are not under foreign direction*, and operate entirely within the United States. According to the Administration, both sets of data

¹⁷ The White House, *Homeland Security Presidential Directive/HSPD-6, Subject: Integration and Use of Screening Information* (Washington, Sept. 16, 2003). Available at [<http://www.whitehouse.gov/news/releases/2003/09/20030916-5.html>].

¹⁸ For further information, see CRS Report RL32366, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, by William J. Krouse.

¹⁹ The NCTC, previously the Terrorist Threat Integration Center (TTIC), is a “multi-agency joint venture,” the mission of which is to form the most comprehensive threat picture possible by serving as a central hub for the fusion and analysis of all-source information collected from foreign and domestic sources on international terrorist threats. In so doing, the NCTC also provides lookout records on international terrorists to the TSC for inclusion in the TSDB.

(on international and domestic terrorists) will include, when appropriate, information on “United States persons.”²⁰ Criteria for the inclusion of U.S. persons in the database will be developed by an interagency working group. The term “United States persons” includes U.S. citizens and legal permanent residents (immigrants).

Prior to HSPD-6, DOJ initiated, in February 2002, a NICS transaction audit to determine whether prohibited aliens (noncitizens) were being improperly transferred firearms.²¹ As part of this audit, NICS procedures were changed, so that NICS examiners were informed of VGTOF hits. Effective February 2004, the FBI reportedly changed its NICS operating procedures to inform NICS examiners of VGTOF hits for known and suspected terrorists.²² In non-Point of Contact (non-POC) states, NICS staff validate terrorism-related VGTOF hits by contacting TSC staff. The latter have greater access to identifiers in terrorist files, with which known and suspected terrorists can be more positively identified. In full and partial POC states, the law enforcement officials who conduct firearms-related background checks under the Brady Act contact TSC staff directly. In the case of valid hits, NICS staff delay the transactions for up to three business days and contact the FBI Counterterrorism Division to allow field agents to check for prohibiting factors.

If no prohibiting factors are uncovered within this three-day period, NICS staff *anonymize* the transaction record by deleting the subject’s identifying information. The firearms dealers may proceed with the transaction at their discretion, but FBI counterterrorism officials continue to work the case for up to 90 days. If they learn of a prohibiting factor within that 90-day period, they are able to contact the NICS unit and *de-anonymize* the transaction record by filling in the subject’s identifying fields. At the end of 90 days, if no prohibiting factor has been found, all records related to the NICS transaction are destroyed.

Government Accountability Office (GAO) Report

Senators Joseph Biden and Frank Lautenberg requested that GAO report on these new NICS operating procedures.²³ In January 2005, GAO reported that in a five-month period — February 3, 2004 through June 30, 2004 — NICS checks resulted in an estimated 650 terrorist-related record hits in VGTOF. Of these, 44

²⁰ The definition of “United States person” is found at 50 U.S.C. §1801(i): a citizen of the United States, an alien lawfully admitted for permanent residence (as defined §1101(a)(2) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation that is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

²¹ It is notable that unauthorized immigrants and most nonimmigrants are prohibited from possessing firearms in the United States.

²² Dan Eggen, “FBI Gets More Time on Gun Buys,” *Washington Post*, Nov. 22, 2003, p. A05.

²³ For further information, see GAO report, *Gun Control and Terrorism: FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, GAO-05-127, Jan. 2005, 38 pp.

were found to be valid. As noted above, however, being identified as a known or suspected terrorist is not grounds to prohibit a person from being transferred a firearm under current law. As a consequence, 35 of these transactions were allowed to proceed, 6 were denied, 1 was unresolved, and 2 were of an unknown status.²⁴ GAO recommended that the Attorney General (1) clarify what information generated by the Brady background check process could be shared with counterterrorism officials; and (2) either more frequently monitor background checks conducted by full and partial POC States that result in terrorism-related VGTOF hits, or allow the FBI to handle such cases.²⁵

DOJ Review of Brady Background Check Policy

While watch-listed persons may be the subject of ongoing foreign intelligence and criminal investigations, they may not be persons prohibited from possessing firearms under current federal law. Hence, DOJ has concluded that it is limited under current law in its authority to use terrorist watch lists as part of the Brady background check process to deny firearms transfers to known and suspected terrorists. In hearings before the House Committee on the Judiciary, Attorney General Alberto Gonzales was questioned several times by Members of Congress about NICS procedures and terrorist watch list hits.

Representative Chris Van Hollen asked the Attorney General, “Does it make sense to you that we stop a person from boarding the airline in order to protect the public safety, [but] that an individual can turn around, get in their car, go to the local gun shop and buy 20 semiautomatic assault weapons?”

Attorney General Gonzales responded, “I think we should be doing everything we can to ensure that people [who] are in fact terrorists shouldn’t have weapons in this country, the truth of the matter is. But unless they are disabled [disqualified] from having a weapon under the statute there’s not much that we can do other than maybe try and get them out of the country or, by the way, to see if there’s any disability under the statute that would allow us to deny them a firearm.”²⁶

Meanwhile, Attorney General Gonzales has directed the DOJ Office of Legal Policy to form a working group to review federal gun laws — particularly in regard to Brady background checks — to examine whether additional authority should be sought to prevent firearms transfers to known and suspected terrorists.²⁷

²⁴ Ibid., p. 9.

²⁵ Ibid., p. 26.

²⁶ Congressional Quarterly, Inc., FDCH Political Transcripts, House Committee on the Judiciary, Hearing on PATRIOT Act Reauthorization, Apr. 6, 2006, Nexis, p. 43.

²⁷ Letter to Senator Frank Lautenberg from FBI Director Robert Mueller under the auspices of the DOJ Office of Legal Policy, Mar. 23, 2005.

Related Legislation in the 109th Congress

In the 109th Congress, several pieces of legislation have been introduced that are related to Brady background checks and terrorist watch lists. The Terrorist Apprehension and Record Retention Act of 2005 (S. 578/H.R. 1225), introduced by Senator Frank Lautenberg and Representative John Conyers, would (1) require that the Federal Bureau of Investigation (FBI), along with appropriate federal and state counterterrorism officials, be notified immediately when Brady background checks indicate that a person seeking to obtain a firearm is a known or suspected terrorist; (2) require that the FBI coordinate the response to such occurrences; and (3) authorize the retention of all related records for at least 10 years.

In addition, Representative Peter King introduced H.R. 1168, a bill that would require the Attorney General to promulgate regulations to preserve records of terrorist- and gang-related matches during such background checks until they have been provided to the FBI. Representative Carolyn McCarthy introduced H.R. 1195, a bill that would make it unlawful for anyone to transfer a firearm to a person who was on the “No Fly” lists maintained by the Transportation Security Administration.²⁸

In summation, two of these bills (S. 578/H.R. 1225 and H.R. 1168) address the retention of approved firearm background check records that are related to valid terrorist watch list hits. The other bill (H.R. 1195) addresses the issue of whether a known or suspected terrorist on one government watch list in particular should be barred from possessing firearms. None of these bills, however, addresses the other underlying issue of how long the total number of approved firearm transfer records should be retained and, if retained, whether they should be searched to determine whether known or suspected terrorists have previously obtained firearms?

²⁸ For further information about the “No Fly” lists, see CRS Report RL32802, *Homeland Security: Air Passenger Prescreening and Counterterrorism*, by Bart Elias, William Krouse, and Ed Rappaport.