



# Issue Backgrounder

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## The New McCarthyism: *Depriving Constitutional Rights Based on Mere Suspicion*

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The civil libertarians who warned about a New McCarthyism in the United States turned out to be right. As in the early 1950s, politicians—abetted by an uncritical press—are using national security as a pretext to take away constitutional rights. Like the Old McCarthyism, the New McCarthyism wants constitutional rights eliminated without due process, based on mere suspicion. Like the Old McCarthyism, the New McCarthyism’s leading

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advocate happens to be a Congressperson named McCarthy.

Rep. Carolyn McCarthy (D-N.Y.) has introduced legislation, H.R. 1195 to ban persons on the “No Fly List” from buying firearms. The McCarthy bill was announced shortly after the release of a Government Accountability Office (GAO) report which detailed some deficiencies involving federal background checks on gun buyers.<sup>1</sup> (*Gun Control and Terrorism: FBI Could Better Manage Firearm-Related Background Check Involving Terrorist Watch List Records*, GAO-05-127, Jan. 2005). The GAO report also proposed some specific solutions, although the McCarthyite gun ban proposal was not among them.

The GAO report had been produced at the request of Senators Frank Lautenberg (D-N.J.) and Joseph Biden (D-Del.), who have announced plans to introduce a narrower bill of their own.<sup>2</sup>

To understand the issue it is necessary to understand some technical details about the operation of federal background checks for gun buyers.

### **The National Instant Check System**

The only consumer product which a person needs FBI permission to purchase, for every single transaction, is a firearm. Ever since the 1998 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 woman goes to a gun store, the dealer takes her identifying information, and calls the FBI. The FBI checks its records, and if she passes the background check, she can buy a gun. If she comes back to the store the next day to buy another gun, she must pass another background check.

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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 including 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 these disqualifying categories, there must be at least some due process. In the discussion below of federal “lists,” I do not include the prohibited persons list, which is based on formal adjudications with 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 law enforcement suspects that the person might be a drug user.

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The Violent Gang and Terrorist Organization File Of course the FBI has many duties besides operating NICS, and two of those duties are fighting gangs and terrorism.

Pursuant to those duties, the FBI maintains a “Violent Gang and Terrorist Organization File” (VGTOF).

Almost all the media echoed the assertion of Sen. Lautenberg that everyone on the VGTOF list is a suspected terrorist. But the *Rocky Mountain News* (Mar. 9), actually asked the FBI. According to the *News*, FBI spokesman Carl Schlaff

said there’s no cause to deny someone a gun just because he or she is on the watch list. 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,” he said.

## The No-Fly List

As the FBI acknowledges, being placed on a government list is not the same as being a criminal. For example, in 2004, Senator Edward Kennedy complained very publicly about being placed on another government list: the Transportation Security Administration’s No-fly List. Kennedy has had numerous contacts over the years with suspected Irish Republican Army terrorists, but it seems very unlikely that Kennedy himself would hijack a plane in order to help the IRA.

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Kennedy had to complain 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 the government list of terrorist suspects.

As *USA Today* acknowledged in a March 14, 2005, editorial, the No-fly List is “unquestionably flawed. Members of Congress, senior citizens and others who shouldn’t be on it have been stopped at airport gates and, in some cases, blocked from getting on their flights because of name mix-ups or other bad information in the file.”<sup>3</sup>

Nevertheless, the “Million” Mom March incorrectly claimed in a March 14 press release that all the people on one of the federal lists who purchased a gun in 2004 were “terrorists.”<sup>4</sup> Although Senator Kennedy’s office participated in the MMM press conference, the office apparently did not inform the MMM beforehand that some people on the federal lists are not criminals.

In addition to the TSA’s No-Fly List and the FBI’s VGTOF, there are 10 other federal lists. Beginning in late 2003, the federal Terrorism Screening Center (TSC) began consolidating the federal lists. As a result, 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”

(Mar. 9), there are 50,000 names on the FBI’s “terrorist watch list.”

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.

In other words, if a particular person (say, Senator Kennedy) is placed on the No-Fly list, or any other 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 VGTOF list, the gun purchase is automatically put on hold for 72 hours, to give the FBI time to check its records more thoroughly.

### Findings of the GAO Study

According to the GAO study, most matches turn out to be mistakes. 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 person and a similar name of an innocent person.

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Had Senator Kennedy attempted to purchase a firearm (perhaps as a gift for one of his bodyguards), the “match” would have been a true match, not a false match, since Senator Kennedy really was on the No-Fly List.

The GAO studied 11 states for the period of February through June 2004. The states were not selected at random, but were chosen because they were the only ones known to have produced a true VGTOF “hit” during a NICS check.

GAO found 44 cases in which persons on the list had attempted to purchase a gun. Of those, 35 trans-

actions were allowed to proceed. (The nine denied transactions were based on a criminal conviction or other disqualifying category.)

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 ten months later, after the person’s name was removed from the VGTOF list.

Long delays in FBI action—while not necessarily the norm—are doubly inappropriate. If the person really is a terrorist, then the FBI ought to be assigning an agent to conduct additional investigation, once it is discovered that the person has attempted to purchase a gun. If the person is not really a terrorist (like Senator Kennedy, and like the person who got removed from the VGTOF list after ten months), then an innocent person’s rights are denied for a very long time.

If the innocent person happens to be a gun collector, then perhaps the harm from a ten-month wait is not intolerable. On the other hand, if the person needs the gun for self-defense against a particular threat, such as a stalker, then the wrongful denial of rights could be fatal.

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### GAO Recommendations

The GAO Report made two sensible recommendations. Currently, the FBI plans to conduct audits every three years of how states which conduct the NICS checks handle possible matches with the VGTOF list. The GAO recommended that audits be conducted annually, and the FBI agreed to consider the issue.

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

The FBI has already begun fixing a third problem identified in the GAO report: that some VGTOF hits are “not adequately visible to system users” and could be missed by state personnel. FBI computer changes will remedy this problem in June.

### **The New McCarthyism**

Nowhere in the GAO report is there a recommendation for a New McCarthyism. The subtitle of the report of “FBI could Better Manage Firearm-Related

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Background Checks Involving Terrorist Watch List Records.” Yet Rep. McCarthy cites the GAO report about better FBI procedures as proof of the need for her bill to criminalize gun possession by people on no-fly list. Senator Lautenberg, more cautiously, has written to Attorney General Alberto Gonzales to ask him to evaluate the feasibility of the New McCarthyism. (In criticizing the “Old McCarthyism,” this

Issue Backgrounder refers to excesses of the early 1950s, and not to legitimate efforts to prosecute actual Communist spies, such as Alger Hiss and the Rosenbergs, according to the rules of due process.)

Under the New McCarthyism, 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 crime, but merely that the person’s name was on list compiled by a federal agent and the person had owned, used, or tried to buy a gun. By federal law, anyone on the prohibited persons list for guns is barred not only from buying a gun, but even from holding a gun for a moment.

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A name can also be placed on the no-fly list based solely on information supplied by a foreign government—information which may often be reliable, but sometimes may not be.

How exactly would persons on the 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 federal 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 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.

While supporting the New McCarthyism, *USA Today*, unlike the vast majority of the media, admitted that the federal lists had problems which needed to be fixed before they became a gun prohibition list. But the problem with *USA Today’s* solution is that it fails to recognize how the lists are compiled; they were never intended to include only suspected criminals, because they also include innocent persons who may know information about a terrorist suspect.

Moreover, to the extent that the lists include genuine suspects, law enforcement does not—nor should it—follow due process procedures merely to list someone as a suspect. Such listing may be based on hearsay, on potentially unreliable informants, or on fourth-hand rumors. Good investigators often follow

a trial that begins with weak evidence; sometimes the investigator finds that person has done nothing wrong, and sometimes the prosecutor finds solid evidence which can be used in a court of law.

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## Dangers to Other Constitutional Rights

*USA Today* may be over-optimistic that any government list of criminal suspects will not include innocent people. FBI investigation of CISPES—the Committee in Solidarity with the People of El Salvador—ended up compiling dossiers a great many people who, notwithstanding their mistaken views on foreign policy, were guilty of no wrongdoing. The same is true of the FBI's prior investigation of the Socialist Workers Party.

If the New McCarthyism had been the law in the 1970s and 1980s, then innocent Socialists and anti-war activists would have been stripped of their constitutional rights—without any due process or proof of wrongdoing.

If Congress takes away the Second Amendment rights of persons on a federal suspect list, why not include the many people on the federal and state lists of persons suspected of being involved in drugs? Although terrorism is today's gun control pretext, the drug war was the gun control pretext of the late 1980s and early 1990s. The next public panic over drugs would be a good opportunity to expand the prohibited suspect list to include drug suspects.

For that matter, why not include all criminal suspects (suspected bank robbers, suspected domestic violence perpetrators, suspected tax cheaters) on the federal prohibited list? If the New McCarthyism establishes the legitimacy of erasing the constitutional rights of many thousands of suspects, it would be hard to resist the calls for removing the rights of more and more suspects.

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 federal lists to own a computer or use the Internet (a key source of terrorist communications)? The Internet prohibition might be futile, because there are so many public Internet access points, but the same objection applies to the gun ban, because the black market in firearms is certainly plentiful enough for a determined buyer.

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. The fact the New York Times editorial page values the First Amendment and despises the Second Amendment is not going to stop a federal court from ruling that the principles for deprivation of one part of the Bill of Rights can also be employed for deprivation of other parts.

## Senator Lautenberg's Plan

Although Senator Lautenberg is working to set the stage for the New McCarthyism, his own bill is much more limited. Since 1986, federal law has forbidden federal gun registration. Nevertheless, the Clinton administration announced that it would retain NICS records for ten years—thereby compiling a list of the large majority of American gun owners.<sup>5</sup> (Since most gun owners buy at least one gun a decade.) In early 2004, the Tiahart Amendment put an end to that

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practice, requiring that FBI records of approved gun purchases be destroyed within 24 hours.<sup>6</sup> The FBI may retain indefinitely the information about transactions which were denied; retailers must still retain their own transaction records, including information about the purchaser, for 20 years.

The Lautenberg bill would allow the FBI to retain approval records for persons on the VGTOF list for ten years. But if it makes sense to retain records for people on the VGTOF, which includes suspected gangsters, why not retain the records of anyone on any gang suspect list compiled by a federal, state, or local law enforcement agency? Why not retain records of anyone on any suspect list, for any suspected crime?

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As the last sentence of Senator Lautenberg's March 8 press release stated, "Lautenberg is also seeking Gonzales' opinion on whether the Tiahart Amendment, calling for 24-hour destruction of records of gun purchases, should be repealed." Thus, the current Lautenberg bill is mainly an attempt to push the Second Amendment down the slippery slope, the opening round of a campaign to undo the Tiahart Amendment and thereby pervert the National Instant *Check* System into a national gun registration system.

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ADDITIONAL RESOURCES on this subject can be found at: <http://www.IndependenceInstitute.org> and at <http://www.davekopel.com/2dAmendment.htm>

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## Endnotes

<sup>1</sup> *Gun Control and Terrorism: FBI Could Better Manage Firearm-Related Background Check Involving Terrorist Watch List Records*, GAO-05-127, Jan. 2005, <http://www.gao.gov/new.items/d05127.pdf>.

<sup>2</sup> The draft bill can be found at: [http://lautenberg.senate.gov/images/GAO%20Terrorists%20with%20Guns/TARR\\_Act.pdf](http://lautenberg.senate.gov/images/GAO%20Terrorists%20with%20Guns/TARR_Act.pdf).

<sup>3</sup> "Terror suspects are buying guns — and it's perfectly legal," *USA Today*, Mar. 14, 2005, [http://www.usatoday.com/news/opinion/2005-03-14-terrorists-guns\\_x.htm](http://www.usatoday.com/news/opinion/2005-03-14-terrorists-guns_x.htm).

<sup>4</sup> "Legislators, Law Enforcement, Activists Warn of Immediate Threat: 'Cop Killer' Handguns and Sniper Rifles on Sale Now to Terrorists," *U.S. Newswire*, Mar. 14, 2005, <http://releases.usnewswire.com/GetRelease.asp?id=44322>. For information on the size of the group, see David B. Kopel, "Not Quite a Million Moms," *National Review Online*, <http://www.nationalreview.com/kopel/kopel051501.shtml>.

<sup>5</sup> David B. Kopel, Paul Gallant & Joanne Eisen, "Instant Check, Permanent Record," *National Review Online*, Aug. 10, 2000, <http://www.nationalreview.com/comment/comment081000a.shtml>.

<sup>6</sup> David B. Kopel, "Erasing a Clinton Gun Legacy," *National Review Online*, Jan. 27, 2004, <http://www.nationalreview.com/kopel/kopel200401270928.asp>.

<sup>7</sup> "In Wake of GAO Report That Terror Suspects are Buying Guns, Lautenberg Introduces Measure to Block Administration from Destroying Records," Mar. 8, 2005, <http://lautenberg.senate.gov/~lautenberg/press/2003/01/2005308622.html>.