

## Gun Control to Major Tom: An Analysis of Failed Gun Regulations and the Terrorist Watchlist

Paolo G. Corso

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### Recommended Citation

Corso, Paolo G. () "Gun Control to Major Tom: An Analysis of Failed Gun Regulations and the Terrorist Watchlist," *University of Massachusetts Law Review*: Vol. 12 : Iss. 2 , Article 3.

Available at: <http://scholarship.law.umassd.edu/umlr/vol12/iss2/3>

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# **Gun Control to Major Tom: An Analysis of Failed Gun Regulations and the Terrorist Watchlist**

Paolo G. Corso

12 U. MASS. L. REV. 376

## **ABSTRACT**

As a division of the Federal Bureau of Investigation's National Security Branch, the Terrorist Screening Center maintains the Terrorist Watchlist, a central database for identifying individuals known or suspected to engage in terrorism or terrorist activities. Subsumed under the Terrorist Watchlist is the No Fly List, which prohibits individuals from boarding commercial aircrafts in and out of the United States. Placement on either list presumes named individuals as a potential threat to U.S. national security, yet there is no restriction preventing them from legally purchasing firearms. Following a mass shooting at an Orlando nightclub in June of 2016, which was perpetrated by an individual recently removed from the Terrorist Watchlist, the Senate proposed two gun control measures specifically aimed at preventing individuals on the Terrorist Watchlist from purchasing firearms. Both proposals were rejected. This article explores the constitutional and procedural concerns that led the Senate's rejection of both proposals, and concludes by introducing gun control regulation tailored to address those concerns.

## **AUTHOR NOTE**

Paolo G. Corso is a J.D. candidate at the University of Massachusetts School of Law-Dartmouth, class of 2018. The author would like to thank his thesis advisor, Dwight Duncan, and his article advisor, Jeremiah Ho, for their guidance. The author particularly wants to thank his wife, Catherine, and his parents, Frank and Max, for their unwavering support. Last, but not least, the author thanks the UMass Law Review for reviewing and editing this Article.

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## INTRODUCTION

*HILLARY CLINTON: We need comprehensive background checks, and we need to keep guns out of the hands of those who will do harm. And we finally need to pass a prohibition on anyone who's on the terrorist watch list from being able to buy a gun in our country. If you're too dangerous to fly, you are too dangerous to buy a gun. So there are things we can do, and we ought to do it in a bipartisan way.*

\*                     \*                     \*                     \*

*DONALD TRUMP: First of all, I agree . . . [w]hen a person is on a watch list or a no-fly list, and I have the endorsement of the NRA, which I'm very proud of. These are very, very good people, and they're protecting the Second Amendment. But I think we have to look very strongly at no-fly lists and watch lists.<sup>1</sup>*

In February of 2004, the Federal Bureau of Investigation's ("FBI") National Instant Criminal Background Check System ("NICS") began conducting background checks against Terrorist Watchlist records.<sup>2</sup> Since then, the data shows that individuals on the Terrorist Watchlist were involved in 2,477 background checks involving the sale of firearms or explosives.<sup>3</sup> Of that number, 91 percent of the transactions were allowed to proceed.<sup>4</sup> In 2015 alone, 223 out of 244 transactions were completed.<sup>5</sup>

<sup>1</sup> *Transcript of the First Debate*, N.Y. TIMES (Sept. 27, 2016), [http://www.nytimes.com/2016/09/27/us/politics/transcript-debate.html?\\_r=1](http://www.nytimes.com/2016/09/27/us/politics/transcript-debate.html?_r=1) [<https://perma.cc/NR94-6QNL>].

<sup>2</sup> Letter from Diana C. Maurer, Dir., Homeland Sec. and Justice Issues, to Dianne Feinstein, Sen., U.S. Senate (Mar. 7, 2016) (on file with author), *available at* [https://www.feinstein.senate.gov/public/index.cfm/files/serve?File\\_id=F53C4195-430D-4D8D-ACDE1EC53E97D0FA&SK=EF4E6FF4158FFA49E570234A3D E8E438](https://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=F53C4195-430D-4D8D-ACDE1EC53E97D0FA&SK=EF4E6FF4158FFA49E570234A3D E8E438) [<https://perma.cc/S4EF-GUGU>].

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (21 individuals were prohibited from completing the transaction due to reasons unrelated to the Terrorist Watchlist, e.g., prior felony convictions, adjudicated mental health, under indictment, etc.).

As a division of the FBI's National Security Branch, the Terrorist Screening Center ("TSC") maintains the Terrorist Watchlist ("TWL"), a database containing information on individuals who are known or reasonably suspected of being involved in terrorist activity.<sup>6</sup> Being on the No Fly List, which is a subset of the TWL, prohibits individuals from boarding commercial aircrafts in and out of the United States.<sup>7</sup> As it stands, these individuals have been deemed too great a threat to fly and yet there is no restriction preventing them from legally purchasing firearms. In June 2016, Congress proposed two gun control measures to prevent known or suspected terrorists from purchasing firearms.<sup>8</sup> The proposals were introduced following a mass shooting in an Orlando nightclub—perpetrated by an individual recently removed from the TWL—that left 49 patrons dead.<sup>9</sup> Both proposals were rejected.<sup>10</sup> Such a result is unacceptable.

Congress needs to pass gun regulations which disallow known or suspected terrorists on, or recently removed from, the FBI's Terrorist Watchlist, and its subsets, from legally purchasing firearms in the United States. If the government has deemed certain individuals to be such a threat to our national security, so much as to prevent them from flying on commercial aircrafts, common sense dictates these individuals be prevented from being able to legally purchase firearms, as well.

Part I of this Article will lay the groundwork for which gun regulation proposals can firmly stand on. This platform requires an understanding of the current interpretation of the Second Amendment of the U.S. Constitution and the operation of the FBI's TSC. With respect to both, an exploration into their reach and limitations is

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<sup>6</sup> *About the Terrorist Screening Center*, U.S. FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc> (last visited Oct. 13, 2016) [<https://perma.cc/Y3R6-6JBB>].

<sup>7</sup> U.S. FED. BUREAU OF INVESTIGATION, *The No Fly List and Selectee Lists*, <https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center-1> (last visited Oct. 13, 2016) [<https://perma.cc/9T93-XFVG>].

<sup>8</sup> Donovan Slack, *Senate Blocks Gun Measures Offered in Wake of Orlando Shooting*, USA TODAY (June 20, 2016, 9:27 PM), <http://www.usatoday.com/story/news/politics/2016/06/20/senate-gun-vote-after-orlando-shooting/86143418/> [<https://perma.cc/D8DP-AGBQ>].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

necessary. Additionally, a look into the FBI's NICS and how it relates to individuals on the TWL is warranted. Lastly, this foundation will highlight a correlation between known or suspected terrorists on the TWL and mass shootings in the United States.

Part II of this Article will begin to build on the footing set by reviewing two out of four gun control measures proposed by Congress in June of 2016.<sup>11</sup> The proposals are competing measures introduced for the purpose of providing a uniform procedure on how to handle the transfer of a firearm when the transferee is an individual on, or recently removed from, the TWL. Each regulation, and its reason for rejection, will be analyzed. Part III of this Article introduces a gun control measure designed to regulate the purchase and sale of firearms for individuals on the TWL, while also addressing the constitutional and procedural concerns which led to the rejection of the two June proposals.

## I. BACKGROUND

### A. The Second Amendment

The Second Amendment of the U.S. Constitution reads: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."<sup>12</sup>

In 2008, in a 5-4 decision, the Supreme Court, for the first time, enforced the Second Amendment as an individual right.<sup>13</sup> Prior to the Court's decision, the meaning of the Second Amendment was highly debated; did it protect an individual right to possess a firearm, or was the right to possess a firearm connected with service in the militia?<sup>14</sup>

In *District of Columbia v. Heller*, the respondent brought forth an action to enjoin the District of Columbia from enforcing a bar on registering handguns.<sup>15</sup> The District Court dismissed the complaint and respondent appealed the decision to the Circuit Court of Appeals for

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<sup>11</sup> *Id.* The two gun control measures not being discussed are beyond the scope of this Article, as they do not specifically address controlling the purchase of firearms by individuals on the TWL.

<sup>12</sup> U.S. CONST. amend. II.

<sup>13</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>14</sup> *Id.* at 577.

<sup>15</sup> *Id.* at 575-76.

the District of Columbia.<sup>16</sup> The Court of Appeals held that the Second Amendment provided an individual right to possess firearms and that the District of Columbia's total ban on handguns violated that right.<sup>17</sup> The Supreme Court granted certiorari to address this matter.<sup>18</sup>

Justice Antonin Scalia wrote the opinion for the majority and pointed to the history and text of the Second Amendment to ascertain its meaning.<sup>19</sup> In analyzing the text he stated that there are two parts to the Second Amendment: its prefatory clause, which states "a well-regulated Militia, being necessary to the security of a free state," and its operative clause, "the right of the people to keep and bear arms, shall not be infringed."<sup>20</sup> Following his analysis of the text, Scalia concluded that the operative clause "guarantee[s] [an] individual the right to possess and carry weapons in case of confrontation,"<sup>21</sup> which is not limited by the prefatory clause, but rather announces a purpose.<sup>22</sup>

Scalia made it blatantly clear that the Second Amendment protects an individual right to possess firearms, but that that right is not unlimited:

*There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.*<sup>23</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 577-80.

<sup>21</sup> *Id.* at 592.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 595.

Later in his opinion, Scalia expanded on his statement regarding limitations:

*Like most rights, the right secured by the Second Amendment is not unlimited. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on long standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.*<sup>24</sup>

This passage is significant as it paves a path for Congress to lay down legislation and restrictions on the purchase and sale of firearms.

Two years after *Heller*, the Supreme Court, in *McDonald v. City of Chicago*,<sup>25</sup> rendered the Second Amendment applicable to state governments via the Fourteenth Amendment.<sup>26</sup> As *Heller* was decided in the District of Columbia, the majority did not address the issue of state applicability in its opinion.

In *McDonald*, residents sued the city of Chicago for its handgun ban as a violation of their Second Amendment right to possess firearms.<sup>27</sup> Chicago argued that its laws were constitutional because the Second Amendment did not apply to the States.<sup>28</sup> The Supreme Court heard the case to decide whether the Second Amendment is applicable to the States under the Due Process Clause of the Fourteenth Amendment.<sup>29</sup>

Deciding this issue in the affirmative, Justice Samuel Alito, who wrote for the majority, supported his reasoning by looking to *Heller*.<sup>30</sup> As stated in *Heller*, “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day . . . [and that

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<sup>24</sup> *Id.* at 626-27.

<sup>25</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>26</sup> *Id.* at 750.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

basic right] is ‘the *central* component’ of the Second Amendment right.”<sup>31</sup> Alito states:

*Heller* makes it clear that this right is deeply rooted in this Nation’s history and tradition. *Heller* explored the right’s origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was one of the fundamental rights of Englishmen.<sup>32</sup>

Reflecting on the history highlighted in *Heller*, Alito pronounces, “It is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”<sup>33</sup> Accordingly, the Court held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to possess firearms.<sup>34</sup>

Thus, the current understanding of the Second Amendment is that it protects an individual right to possess firearms, and that that right is applicable to the States under the Due Process Clause of the Fourteenth Amendment. However, this protected right is not unlimited.

## **B. The FBI’s Terrorist Screening Center**

The FBI’s TSC was established in 2003 in the wake of the 9/11 terrorist attacks.<sup>35</sup> The TSC maintains the TWL, a consolidated database of information identifying individuals known or suspected to be engaged in terrorism or terrorist activities.<sup>36</sup> The TWL serves as a bridge between multiple government agencies, i.e., Homeland Security, Law Enforcement, the Intelligence Community, and international partners.<sup>37</sup>

Before adding a name to the TWL, there is a vetting process by numerous U.S. governmental agencies.<sup>38</sup> Once vetting is complete, the

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<sup>31</sup> *Id.* at 767.

<sup>32</sup> *Id.* at 768.

<sup>33</sup> *Id.* at 778.

<sup>34</sup> *Id.*

<sup>35</sup> *About the Terrorist Screening Center*, *supra* note 6.

<sup>36</sup> *Terrorist Screening Center – FAQs*, U.S. FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/file-repository/terrorist-screening-center-frequently-asked-questions.pdf/view> (last visited Oct. 13, 2016) [<https://perma.cc/WH2Q-LAH3>].

<sup>37</sup> *About the Terrorist Screening Center*, *supra* note 6.

<sup>38</sup> *Id.*

agencies will submit recommendations to the National Counterterrorism Center (“NCTC”),<sup>39</sup> who then reviews the information provided to determine whether there is a factual basis to suspect the person is a known or suspected terrorist.<sup>40</sup> If the information is sufficient, the person is entered into the Terrorist Identities Datamart Environment (“TIDE”).<sup>41</sup> That information is then circulated to the FBI to include the individual on the TWL.<sup>42</sup> Upon receiving this information, the FBI will conduct another review to verify the person meets the standard set for inclusion on the TWL.<sup>43</sup>

The standard set for including an individual on the TWL is reasonable suspicion that the person in question is a known or suspected terrorist.<sup>44</sup> To meet this standard, agencies submitting recommendations must rely upon:

*articulable intelligence or information which, taken together with rational inference from those facts, reasonably warrants a determination that an individual is known or suspected to be or have been knowingly engaged in conduct constituting, in preparation for, in aid of, or related to terrorism or terrorist activities. Based on the totality of the circumstances, a nominating agency must provide an objective factual*

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<sup>39</sup> *Terrorist Screening Center – FAQs*, *supra* note 36 (recommendations based solely on race, ethnicity, national origin, religious affiliation, or First Amendment-protected activities are not accepted).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* As of June 2016, TIDE contained roughly 1.5 million people, including approximately 15,000 U.S. persons.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (The FBI defines a “known terrorist” as “an individual whom the U.S. Government knows is engaged, has been engaged, or who intends to engage in terrorism and/or terrorist activity, including an individual (a) who has been charged, arrested, indicted, or convicted for a crime related to terrorism by U.S. Government or foreign government authorities; or (b) identified as a terrorist or member of a designated foreign terrorist organization pursuant to statute, Executive Order or international legal obligation pursuant to a United Nations Security Council Resolution.” The FBI defines a “suspected terrorist” as “an individual who is reasonably suspected to be, or has been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and/or terrorist activities based on an articulable and reasonable suspicion.”).

*basis to believe an individual is a known or suspected terrorist.*<sup>45</sup>

After reviewing the information to ensure the recommended individual meets the standard set forth, the individual will be added to the TWL.<sup>46</sup>

The FBI also monitors the No Fly List, a subset of the TWL.<sup>47</sup> The No Fly List prohibits individuals who may present a threat to “civil aviation” or “national security” from boarding commercial aircrafts flying into, out of, over, or within U.S. airspace; this includes international flights operated by U.S. carriers.<sup>48</sup> For an individual to be included on the No Fly List, there must be credible information demonstrating that such person poses a threat of “committing a violent act of terrorism with respect to civil aviation, the homeland, United States interests located abroad, or is operationally capable of doing so.”<sup>49</sup>

The FBI monitors both the TWL and the No Fly List to ensure their accuracy.<sup>50</sup> However, in a 2005 audit of the TSC by the U.S. Department of Justice Office of the Inspector General (“OIG”), it was reported that the TSC was riddled with inaccurate and inconsistent information.<sup>51</sup> Concerned with its findings, the OIG made recommendations for mitigating the faults of the system and a new audit was scheduled for 2007.<sup>52</sup> During its follow-up audit, the OIG reported progress by the FBI in its effort to ensure the quality of the data on the TWL, but found lingering errors.<sup>53</sup> Such errors included inappropriately watchlisting individuals, failing to adequately identify known or suspected terrorists, failing to undertake watchlist redress, failing to discard duplicate records, and inconsistencies in the FBI’s

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> U.S. DEPT. OF JUSTICE OFFICE OF THE INSPECTOR GEN. AUDIT DIV., *Follow-Up Audit of the Terrorist Screening Center*, <https://oig.justice.gov/reports/FBI/a0741/final.pdf> (last visited Oct. 17, 2016) [<https://perma.cc/QU3Y-RKQZ>].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

procedure for processing watchlist data.<sup>54</sup> At the end of its report, the OIG provided another set of recommendations for closing the gaps found in the TSC.<sup>55</sup>

The FBI is aware of the faults present within the TSC and TWL, and has undertaken a range of measures to ensure the information provided is accurate and timely.<sup>56</sup> Such measures include: regular reviews, periodic audits, and post-encounter reviews.<sup>57</sup> The FBI and nominating agencies perform these tasks to ensure the information continues to satisfy the standards set for inclusion.<sup>58</sup> It goes without saying that it is imperative that this information be as accurate and consistent as humanly possible. As the OIG stated in its audit report, “a single omission of a terrorist identity or an inaccuracy in the identifying information contained in a watchlist record can have enormous consequences.”<sup>59</sup>

### C. The FBI’s National Instant Criminal Background Check System

In 1993, the Brady Handgun Violence Prevention Act (“Brady Act”)<sup>60</sup> was enacted to provide for a waiting period before firearms were purchased, and for establishing a national criminal background check system.<sup>61</sup> Authorized by the Brady Act, the FBI’s NICS was established for Federal Firearms Licensees (“FFLs”) to contact the FBI for the purpose of acquiring information on intended transferees in order to determine whether a transfer would violate 18 U.S.C., § 922 (g) or (n).<sup>62</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Terrorist Screening Center – FAQs*, *supra* note 36.

<sup>57</sup> *Id.* An encounter is where an individual is identified during a screening process as a potential match for someone identified on the TWL. This can occur during an individual’s attempt to board an aircraft, apply for a passport or visa, or has an interaction with law enforcement.

<sup>58</sup> *Id.*

<sup>59</sup> *Follow-up Audit of the Terrorist Screening Center*, *supra* note 51.

<sup>60</sup> Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

<sup>61</sup> *About NICS*, U.S. FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/nics/about-nics> (last visited Oct. 18, 2016) [<https://perma.cc/NT8P-9GLP>].

<sup>62</sup> *Id.*

The NICS is a national system which searches available records on potential transferees in order to determine whether an individual is disqualified from procuring a firearm.<sup>63</sup> The prohibitive criteria for disqualifying individuals is outlined in 18 U.S.C., § 922 (g) & (n).<sup>64</sup> If an intended transferee matches one of the categories delineated, the transaction is prohibited from completing. Under 18 U.S.C., § 922 (g) & (n), it is unlawful for persons who: are fugitives; have been adjudicated as a mental defective; are aliens and illegally or unlawfully in the United States; or have been convicted for using or possessing a controlled substance within a certain time period to possess or receive any firearm.<sup>65</sup> The preceding list is not exhaustive; rather it is a mere glimpse into the prohibitive measures taken to prevent persons from possessing or receiving a firearm.<sup>66</sup> If an intended transferee is denied the transfer of a firearm, (s)he can seek remedial action under section 103(g) of the Brady Act and pursue a remedy for erroneous deprivation under 18 U.S.C. § 925A.<sup>67</sup>

In order to qualify or disqualify individuals from purchasing firearms, the NICS cross-checks available records with descriptive information provided to them by FFLs.<sup>68</sup> This procedure, and the NICS system, was developed by the FBI, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), and local and state enforcement agencies.<sup>69</sup> The system itself is computerized and is designed to provide results instantaneously on background check inquiries.

In Calendar Year 2015, the NICS Contacted Call Centers handled calls an average of 141 seconds. After transferring the calls to the NICS Section,<sup>70</sup> the wait and processing time averaged 446.3 seconds.

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 18 U.S.C. § 922(g), (n).

<sup>66</sup> *Id.* (see 18 U.S.C. § 922(g) and (n) for full list of prohibitive criteria.).

<sup>67</sup> Brady Handgun Violence Prevention Act § 103(g); 18 U.S.C. § 925A.

<sup>68</sup> *About NICS, supra* note 61 (FFLs gather this information from intended transferees during the purchase process as required by the ATF).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (NICS Section processes background checks for FFLs when a state declines to serve as the point of contact for the NICS).

When firearm background checks were conducted via the NICS E-check,<sup>71</sup> the wait and processing time averaged 107.5 seconds.<sup>72</sup>

Once results are received, and so long as there are no matching records returned by any of the databases warranting delay, FFLs may proceed with the transfer.<sup>73</sup>

When the NICS returns a match between an intended transferee's descriptive information with available records located in the databases, the transaction will be briefly delayed.<sup>74</sup> When this occurs, FFLs will be transferred to NICS Section, where the information will be reviewed and evaluated by a NICS Legal Instruments Examiner.<sup>75</sup> A NICS Legal Examiner has access to protected information and will review the information provided on the intended transferee to determine if prohibitive criteria exists to deny the purchase.<sup>76</sup> If a NICS Legal Examiner does not find the existence of prohibitive criteria, FFLs may proceed with the transfer.<sup>77</sup>

If a NICS Legal Examiner does find prohibitive criteria, there exists two possible outcomes: denial, or delay.<sup>78</sup> When a NICS Legal Examiner finds the existence of criteria for prohibiting the transfer of a firearm, FFLs will be instructed to deny the transfer. However, if "potentially"<sup>79</sup> prohibitive criteria exists, and more information is required to make a determination, FFLs will be advised that the firearm transaction will be delayed.<sup>80</sup> A delay only lasts for three business days, and after that, if a final determination has not been

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<sup>71</sup> *Id.* (NICS E-check allows FFLs to initiate an unassisted NICS background check via the internet).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* While it is impressive that a computerized system checks for *available* records within two minutes so that a transfer can be made, it is equally alarming that within two minutes time a computerized system is relied on to decide whether a firearm transfer should proceed.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *About NICS, supra* note 61 (potentially prohibitive information exists when the NICS indicates the subject of the background check has matched similar descriptive features in the system, i.e., name, sex, race, etc.).

<sup>80</sup> *Id.*

rendered by the NICS, it is within a FFLs discretion whether to proceed with the firearm transfer, subject to state law.<sup>81</sup>

#### D. NICS and the Terrorist Watchlist

In November 2003, the Department of Justice (“DOJ”) directed the FBI to reform the NICS’ procedures to include measures to screen prospective firearm transferees against the TWL.<sup>82</sup> Less than four months later, the FBI began cross-checking background checks for firearms against the TWL.<sup>83</sup> When a TWL match occurs, the NICS delays the transfer for the requisite three business days.<sup>84</sup> During the interim, NICS contacts the FBI’s Counterterrorism Division to research for any unknown prohibiting factors.<sup>85</sup> If the FBI fails to uncover any prohibiting factors after the allotted time, FFLs may proceed with the transfer at their discretion.<sup>86</sup> Following the conclusion of the requisite delay period, the FBI continues working on the case for up to 90 days in case information arises which authorizes a final determination.<sup>87</sup>

So, while there is a system in place to prevent known or suspected terrorists from purchasing firearms, it appears weak. Individuals are placed on the TWL because the FBI has been provided with specific and articulable intelligence warranting their inclusion.<sup>88</sup> Yet, the FBI’s Counterterrorism Division is only given three business days to prohibit the transfer of a firearm to an individual on the TWL.<sup>89</sup> It seems illogical that the procedures set forth for individuals believed likely to engage in terrorist activities be held to the same nominal standard for intended transferees under no investigation.<sup>90</sup> Furthermore, there does

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<sup>81</sup> *Id.*

<sup>82</sup> William J. Krouse, *Terrorist Watch List Screening and Background Checks for Firearms*, CONG. RESEARCH SERV. (May 1, 2013), <http://fpc.state.gov/documents/organization/209937.pdf> [<https://perma.cc/WC72-3GAF>].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See supra* note 36 and accompanying text.

<sup>89</sup> Krouse, *supra* note 82, at 13.

<sup>90</sup> *See supra* notes 61 & 82 and accompanying text.

not seem to be any procedures in place for prohibiting the transfer of a firearm to persons recently removed from the TWL or its subset, the No Fly List. Congress should enact legislation which heightens the standard for transferring firearms to known or suspected terrorists on, or recently removed from, the TWL.

### E. Current Events

The United States is no stranger to mass shootings; in 2016 alone, there were 384.<sup>91</sup> Mass shootings, and the events proceeding them, have become almost routine: shooting occurs, people die, families mourn, debate commences on gun regulation, Congress fails to act, and repeat. Recent mass shootings have generated discussion on enacting gun regulation to prevent individuals on the TWL and its subset, the No Fly List, from purchasing firearms.

The first of two events to spark this conversation was a mass shooting which occurred in San Bernardino, California. On December 2, 2015, a married couple, Syed Rizwan Farook and Tashfeen Malik, opened fire on a holiday work party resulting in the death of fourteen people.<sup>92</sup> The attack was carried out with assault rifles and semi-automatic handguns.<sup>93</sup> During a subsequent investigation, the FBI revealed that all of the couple's guns were bought legally. Farook had purchased two 9-millimeter handguns used in the attack, but it was unclear how Farook and Malik obtained the assault rifles as a non-participant in the attack originally purchased them.<sup>94</sup> While these individuals were not on any watchlist, the investigation uncovered that the perpetrators declared allegiance to the Islamic State prior to the attack.<sup>95</sup>

Following the investigation, Senate proposed and rejected two gun control measures focused on preventing individuals on the TWL from

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<sup>91</sup> *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, <http://www.gunviolencearchive.org/past-tolls> (last visited Apr. 27, 2017) [<https://perma.cc/BGJ8-3M34>].

<sup>92</sup> Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N. Y. TIMES (Dec. 4, 2015), <http://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html> [<https://perma.cc/69MH-AUG2>].

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

purchasing firearms.<sup>96</sup> Democratic Senator, Dianne Feinstein proposed one measure which was rejected on a 54-45 vote, while Republican Senator, John Cornyn's competing measure was rejected on a 55-45 vote.<sup>97</sup> As this issue was left unresolved, the doors remained open for another attack to take place.

Not even seven months removed from San Bernardino, forty-nine people were killed in the largest modern day mass shooting when Omar Mateen opened fire at the Pulse Nightclub ("Pulse") in Orlando, Florida.<sup>98</sup> The attack occurred in the earlier hours of June 12, 2016, when Mateen entered Pulse with two weapons he had legally purchased just one-week prior.<sup>99</sup> Records reveal that Mateen possessed a valid firearm license and had done so since September 2011.<sup>100</sup>

During the course of the shooting, Mateen phoned 911 to identify himself and pledge allegiance to the Islamic State, prompting an investigation by the FBI.<sup>101</sup> As a result of the investigation, FBI Director, James B. Comey, released information regarding Mateen's placement on the TWL in 2013 and 2014.<sup>102</sup> In 2013, the FBI investigated Mateen after he claimed to have ties to two terrorist groups, al-Qaida and Hezbollah.<sup>103</sup> Mateen was on the TWL for ten months before being removed.<sup>104</sup> Approximately one-year later, the FBI placed Mateen back on the TWL while investigating persons with

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<sup>96</sup> Kelsey Snell & Karoun Demirjian, *Senate Rejects Gun Control Amendments Offered following San Bernardino Shooting*, WASH. POST (Dec. 3, 2015), [https://www.washingtonpost.com/news/powerpost/wp/2015/12/03/senate-democrats-to-force-gun-control-votes-in-the-wake-of-the-san-bernardinoshooting/?utm\\_term=.e3f35d4103ba](https://www.washingtonpost.com/news/powerpost/wp/2015/12/03/senate-democrats-to-force-gun-control-votes-in-the-wake-of-the-san-bernardinoshooting/?utm_term=.e3f35d4103ba) [https://perma.cc/ZCL3-TVNL].

<sup>97</sup> *Id.*

<sup>98</sup> Ariel Zambelich & Alyson Hurt, *3 Hours in Orlando: Piecing Together An Attack and Its Aftermath*, NPR (June 26, 2016, 5:09 PM), <http://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update> [https://perma.cc/KBX8-8ZJQ].

<sup>99</sup> *Id.* (The two weapons used in the attack were a Sig Sauer MCX assault-style rifle and a handgun.).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

possible ties to a U.S. citizen who blew himself up in a suicide attack in Syria.<sup>105</sup> Finding no connection, the FBI once again removed Mateen from the TWL.<sup>106</sup>

The announcement of Mateen's placement and subsequent removal from the TWL, coupled with his ability to legally purchase firearms sparked outrage. It had been just seven months since the San Bernardino shooting, and the nation found itself in the midst of another mass shooting revolution. Would this be the event that broke the cycle? Congress answers that question in the negative.

## II. FAILED GUN REGULATIONS AND THE TERRORIST WATCHLIST

### A. Analysis

On June 13, 2016, the morning after the Orlando mass shooting, newspaper headlines across the country were of no surprise: "An Act of Terror and Act of Hate"; "A Night of Terror in Orlando"; "Deadliest Day"; "Massacre in the Night."<sup>107</sup> Sadly, neither were the headlines on June 20, 2016: "Senate Votes Down Gun Control Proposals in Wake of Orlando Shootings"; "Senate Rejects Series of Gun Measures"; "Senate Rejects 4 Gun Proposals Inspired by Orlando Attack"; "Senate Rejects 4 Measures to Control Gun Sales."<sup>108</sup> Why is this of no surprise? Because Congress repeatedly fails to pass

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Monday, June 13, 2016*, NEWSEUM, [http://www.newseum.org/todaysfrontpages/?tfp\\_display=archive-date&tfp\\_archive\\_id=061316](http://www.newseum.org/todaysfrontpages/?tfp_display=archive-date&tfp_archive_id=061316) (last visited Dec. 27, 2016) [<https://perma.cc/M798-N5AY>].

<sup>108</sup> See Karoun Demirjian, *Senate Votes Down Gun Control Proposals in Wake of Orlando Shootings*, WASH. POST (June 20, 2016), [https://www.washingtonpost.com/news/powerpost/wp/2016/06/20/senate-heads-for-gun-control-showdown-likely-to-go-nowhere/?utm\\_term=.3532f789a546](https://www.washingtonpost.com/news/powerpost/wp/2016/06/20/senate-heads-for-gun-control-showdown-likely-to-go-nowhere/?utm_term=.3532f789a546) [<https://perma.cc/99NJ-TGEC>]; Richard Gonzales et al., *Senate Rejects 4 Gun Proposals Inspired by Orlando Attack*, NPR POLITICS (June 20, 2016), <http://www.npr.org/2016/06/20/482783071/here-are-the-4-gun-proposals-the-senate-is-voting-on-monday-again> [<https://perma.cc/U7P6-948N>]; Tom LoBianco et al., *Senate Rejects Series of Gun Measures*, CNN POLITICS (June 20, 2016), <http://www.cnn.com/2016/06/20/politics/senate-gun-votes-congress/> [<https://perma.cc/Z6US-AV28>]; Jennifer Steinhauer, *Senate Rejects 4 Measures to Control Gun Sales*, N.Y. TIMES (June 20, 2016), [https://www.nytimes.com/2016/06/21/us/politics/gun-vote-senate.html?\\_r=1](https://www.nytimes.com/2016/06/21/us/politics/gun-vote-senate.html?_r=1) [<https://perma.cc/AB7W-HQQE>].

legislation aimed to regulate the purchase and sales of firearms. “Over just the past five years, lawmakers have introduced more than 100 gun control proposals in Congress, since Gabrielle Gifford and 18 other people were shot in Tucson, Arizona in January 2011.”<sup>109</sup> “Not one of them has been passed into law, and very few of the proposals even made it to the House or Senate Floor.”<sup>110</sup>

After the Orlando shooting, four gun-control proposals made it to the Senate floor, but not without protest. Democratic Senator, Christopher S. Murphy led a 15-hour filibuster<sup>111</sup> in order to get a commitment from majority leaders to hold votes on two gun control amendments favored by the Democrats.<sup>112</sup> Eventually, a few days later, on June 20, 2016, the Senate voted on all four gun control proposals, two brought forth by Democrats and two by Republicans.<sup>113</sup> All four were rejected.<sup>114</sup> Two of the amendments proposed focused on expanding background checks and are outside the scope of this Article.<sup>115</sup> The other two amendments, which are discussed below, focus on prohibiting individuals on the TWL from purchasing firearms.<sup>116</sup>

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<sup>109</sup> Gifford, an Arizona Democrat, and 17 others were attacked on January 8, 2011 by Jared Lee Loughner. While Gifford, the intended target, sustained serious injuries, 6 of the 17 other victims’ wounds were fatal. See Marc Lacey & David M. Herszenhorn, *In Attack’s Wake, Political Repercussions*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/us/politics/09giffords.html> [https://perma.cc/77S4-PPUE].

<sup>110</sup> Rebecca Shabad, *Why More than 100 Gun Control Proposals in Congress Since 2011 Have Failed*, CBS NEWS (June 20, 2016), <http://www.cbsnews.com/news/how-many-gun-control-proposals-have-been-offered-since-2011/> [https://perma.cc/R529-8MLN].

<sup>111</sup> BLACK’S LAW DICTIONARY (10th ed. 2014) (“A dilatory tactic, esp. prolonged and often irrelevant speechmaking, employed in an attempt to obstruct legislative action.”).

<sup>112</sup> David M. Herszenhorn, *Senator’s 15-Hour Filibuster Gains ‘Path Forward’ on Gun Control Measures*, N.Y. TIMES (June 16, 2016), <http://www.nytimes.com/2016/06/17/us/politics/senate-filibuster-gun-control.html> [https://perma.cc/W7GA-9QLL].

<sup>113</sup> Kristina Peterson & Siobhan Hughes, *Senate Rejects Four Gun-Control Proposals*, WALL ST. J. (June 20, 2016, 8:38 PM), <http://www.wsj.com/articles/congress-latest-gun-law-effort-faces-another-likely-impasse-1466458575> [https://perma.cc/AW7V-DHQV].

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

The first proposal comes from Democratic Senator, Dianne Feinstein. Her amendment echoes her rejected measure from December of 2015.<sup>117</sup> The second proposal comes from Republican Senator, John Cornyn, who also renewed his competing measure from December 2015.<sup>118</sup>

### **B. Feinstein's Proposal – S. Amdt. 4720**

The first amendment heard by the Senate came from Democratic Senator, Dianne Feinstein. The purpose of her proposed amendment was to grant the Attorney General authority to deny requests to transfer firearms to known or suspected terrorists.<sup>119</sup> In pertinent part, her amendment states:

*The Attorney General may deny the transfer of a firearm if the Attorney General determines, based on the totality of the circumstances, that the transferee represents a threat to public safety based on a reasonable suspicion that the transferee is engaged, or has been engaged, in conduct constituting, in preparation for, in aid of, or related to terrorism, or providing material support or resources therefor.*<sup>120</sup>

If a denial does take place, the transferee may pursue a remedy<sup>121</sup> for erroneous denial.<sup>122</sup> The latter part of Feinstein's amendment proposes that procedures should be established so that the Attorney General, or a designee of the Attorney General, shall be notified of an attempted purchase if an individual who is, or within the last five years

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> S.amdt.4720, H.R. 2578, 114th Cong. (2016), <https://www.congress.gov/amendment/114th-congress/senate-amendment/4720> (last visited Dec. 28, 2016) [<https://perma.cc/LG59-V4L9>].

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* Remedial procedures are set forth in §103(g) of the Brady Handgun Violence Prevention Act and transferees may pursue a remedy for erroneous denial under 18 U.S.C. § 925A. Transferees may bring an action against the political subdivision responsible for the transfer to order erroneous information to be corrected or the transfer approved.

<sup>122</sup> *Id.*

has been, under investigation for conduct related to a Federal Crime of Terrorism, as defined in 18 U.S.C. § 2332b(g)(5).<sup>123</sup>

In order to clear procedural hurdles, Feinstein's proposal needed a three-fifths majority vote to carry on.<sup>124</sup> She fell short of this feat as her proposal only received 47 votes for and 53 against.<sup>125</sup> Following its failure to proceed, a voice vote was held and the amendment was tabled.<sup>126</sup>

Out of the 53 votes casted against the amendment, 52 came from Republican Senators.<sup>127</sup> The main argument Republicans offered for rejecting the bill was that it paints with too broad of a brush and takes away persons' constitutional rights for procedural due process; that is, it first bans them from purchasing firearms, then allows them to challenge the denial in court.<sup>128</sup> In conjunction, Republicans also had a lingering concern over whether the process for appeal would be satisfactory to assist those erroneously affected.<sup>129</sup>

Republicans' rejection of Feinstein's proposal suggests that a person's procedural due process rights will be violated if a denial of transfer takes place before they are properly adjudicated.<sup>130</sup> While the Republicans present a valid point, such a concern is not so clear-cut.<sup>131</sup>

The Due Process Clause of the Fifth Amendment provides that "No person shall be . . . deprived life, liberty or property, without due

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<sup>123</sup> See Acts of Terrorism Transcending National Boundaries, 18 U.S.C. § 2332b(g)(5) (2015).

<sup>124</sup> Peterson & Hughes, *supra* note 113 (out of the 100 votes casted, the proposal would have needed at least 60 to survive.).

<sup>125</sup> "Motion to Invoke Cloture on Amdt. No. 4720: Roll Vote No. 106." 162 CONG. REC. S4351-52 (daily ed. June 20, 2016), available at <https://www.congress.gov/congressional-record/2016/06/20> (last visited Apr. 24, 2017).

<sup>126</sup> S.amdt.4720, H.R. 2578.

<sup>127</sup> "Motion to Invoke Cloture on Amdt. No. 4720: Roll Vote No. 106." 162 CONG. REC. S4351-52.

<sup>128</sup> Amber Phillips, *The Senate Voted on 4 Popular Gun Control Proposals Monday. Here's Why None of them Passed*, WASH. POST (June 20, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/06/20/the-senate-will-vote-on-4-gun-control-proposals-monday-heres-everything-you-need-to-know/?utm\\_term=.0fceb7495a60](https://www.washingtonpost.com/news/the-fix/wp/2016/06/20/the-senate-will-vote-on-4-gun-control-proposals-monday-heres-everything-you-need-to-know/?utm_term=.0fceb7495a60) [<https://perma.cc/B8KL-DE58>].

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

process of law.”<sup>132</sup> When speaking about the application of the Due Process Clause the Supreme Court stated, “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>133</sup> These remarks both limit and broaden the scope of the Fifth Amendment’s procedural protections based on the circumstances at hand. The application is not rigid, but rather, it is malleable. Thus, it is less convincing for Republicans to slap a due process label on Feinstein’s amendment and reject it without a proper evaluation of the particular situation.

In *Mathew v. Eldridge*, the Supreme Court introduced a three-factor balancing test to analyze procedural due process claims to assist in resolving whether procedures provided for are constitutionally sufficient.<sup>134</sup> The three-factor balancing test requires the following analysis:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>135</sup>

In 2011, this balancing test was applied in *Kuck v. Danaher*, which sought to determine whether the Connecticut Department of Public Safety’s (“DPS”) procedure for renewing permits to carry firearms violated applicants’ procedural due process.<sup>136</sup> In *Kuck*, the appellant centered his argument on the denial of his firearm permit, and the excessive delay in obtaining an appeal hearing.<sup>137</sup> In applying *Mathews*’ balancing test, the court specifically focused on the second factor: the overall risk of erroneous deprivation of an applicant’s

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<sup>132</sup> U.S. CONST. amend. V.

<sup>133</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 335.

<sup>136</sup> *Kuck v. Danaher*, 600 F.3d 159, 160 (2d Cir. 2010).

<sup>137</sup> *Id.*

property interest and the time-period required to correct such deprivation.<sup>138</sup> In discussing the second factor the court stated,

Broadly speaking, a delay amounts to a due process violation only where it renders the prescribed procedures meaningless in relation to the private interests at stake. The mere assertion that state remedies are lengthy will not render state remedies inadequate under the Due Process Clause unless they are inadequate to the point that they are meaningless or nonexistent.<sup>139</sup>

Unable to account for a waiting period of a year and a half for an appeal hearing, the court found the DPS' procedure to be in violation of the appellant's due process.<sup>140</sup>

Comparatively, the DPS' procedure for permit renewals differs from Feinstein's proposed procedure for denying a suspected terrorist's purchase of firearms. However, the two can be likened by the complaints brought forward. In *Kuck*, the allegations of due process violations were two-fold: (1) the denial of a permit to carry a firearm, and (2) a prolonged subsequent remedial measure.<sup>141</sup> Similarly, under Feinstein's proposal, an anticipated procedural due process claim, hinted to by Republicans, would be the same: (1) denial to purchase a firearm, and (2) a subsequent remedial measure. A procedural due process analysis as prescribed in *Mathews* is necessary.<sup>142</sup>

The first step in *Mathews*' balancing test looks at the effects that official actions will have on the private interest. Here, hypothetically speaking, it is the transferee's property interest which is at stake. The property interest is the transferee's right to bear arms: a fundamental right under the Second Amendment as applied to the States by the Fourteenth Amendment.<sup>143</sup> There can be no doubt that such an interest exists and is affected by Feinstein's proposal.

The second step requires an analysis of the erroneous deprivation of a transferee's property interest through the procedures provided for, and the probable value of, alternative procedures.<sup>144</sup> As stated above,

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 163.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 162.

<sup>142</sup> *Mathews*, 424 U.S. at 334.

<sup>143</sup> *McDonald*, 561 U.S. at 750.

<sup>144</sup> *Kuck*, 600 F.3d at 165.

the procedures in Feinstein's proposal allows the DOJ to deny the purchase of a firearm if the Attorney General determines, based on the totality of the circumstances, that the transferee represents a threat to public safety based on a reasonable suspicion that the transferee is or has been engaged in conduct constituting the preparation or aiding of activity related to terrorism.<sup>145</sup> The deprivation becomes erroneous when an intended transferee is incorrectly denied when attempting to purchase a firearm.<sup>146</sup>

As discussed above, the TWL is not perfect, making it likely that such a deprivation will occur.<sup>147</sup> However, just because an erroneous deprivation takes place prior to adjudication, does not necessarily mean it is unconstitutional. The Supreme Court has held that "the Constitution requires some kind of a hearing before the State deprives a person of liberty or property."<sup>148</sup> However, in some circumstances, "the Court has held that a statutory provision for a post deprivation hearing . . . for erroneous deprivation, satisfies due process."<sup>149</sup>

Such was the case in *Hightower v. City of Boston*, where a former member of the Boston Police Department ("BPD") brought forth a procedural due process claim alleging that a statutory scheme revoking her license to carry a Class A firearm prior to adjudication was inadequate.<sup>150</sup> The Court upheld the statutory scheme as procedurally sufficient since the statute provided a post-deprivation process, which allowed aggrieved parties to file a petition to obtain judicial review in the district court within 90 days after notice of the revocation.<sup>151</sup>

Likewise, Feinstein's proposal provides a scheme for a post-deprivation hearing for transferees erroneously affected.<sup>152</sup> The available remedial procedures are laid out in § 103(g) of Public Law 103-159, and the intended transferee can pursue a remedy for erroneous denial under 18 U.S.C. § 925A.<sup>153</sup> The remedial procedure calls for the transferee to submit information to correct the erroneous

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<sup>145</sup> S.amdt.4720, H.R. 2578.

<sup>146</sup> *Kuck*, 600 F.3d at 165.

<sup>147</sup> *Terrorist Screening Center – FAQs*, *supra* note 36.

<sup>148</sup> *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

<sup>149</sup> *Id.* at 128.

<sup>150</sup> *Hightower v. City of Boston*, 693 F.3d 61, 63 (1st Cir. 2012).

<sup>151</sup> *Id.*

<sup>152</sup> S.amdt.4720, H.R. 2578.

<sup>153</sup> *Id.*

information preventing the purchase from being approved.<sup>154</sup> Upon receiving that information, “the Attorney General *shall immediately* consider the information, investigate the matter further, and correct all erroneous federal records relating to the prospective transferee and give notice of the error to any federal department or agency or any state that was the source of such erroneous records.”<sup>155</sup> Furthermore, a transferee may take action against the DOJ in order to direct them to correct the information and approve the transfer.<sup>156</sup>

The final factor in *Mathews*’ balancing test requires an examination of the governmental interest in Feinstein’s proposal. Here, the government’s interest is public safety. More specifically, its interest concerns stopping suspected terrorists from legally purchasing firearms that are likely to be used to inflict harm on society. Such an interest is strong, compelling, and necessary. But, is it justified?

There can be no doubt that the procedures set forth in Feinstein’s proposal may erroneously deprive intended transferees of their property interest in purchasing firearms. However, the deprivation is minimal in comparison to the governmental interest, especially considering the immediacy in which a post deprivation hearing would occur. When balancing the erroneous deprivation with the governmental interest at hand, it is likely that the remedial measures proposed comports with the circumstances in which a post deprivation hearing would be constitutionally sufficient under the Due Process Clause.

Stepping away from the legal analysis and into prospective application, would there be a chance that some individuals would be erroneously affected? Absolutely; but, there would also be a chance that the precautionary measures proposed could help stop another terrorist attack, and if that is the case, requiring a balancing test seems unnecessary.

### C. Cornyn’s Proposal – S. Amdt. 4749

Republican Senator, John Cornyn introduced a competing measure after Feinstein’s amendment was tabled.<sup>157</sup> The overall purpose of his

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<sup>154</sup> See Brady Handgun Violence Prevention Act § 103(g).

<sup>155</sup> *Id.* Emphasis added.

<sup>156</sup> See 18 U.S.C. § 925A.

<sup>157</sup> S.amdt.4749, H.R. 2578, 114th Cong. (2016), <https://www.congress.gov/amendment/114th-congress/senate->

amendment aimed to secure the United States from terrorists by enhancing law enforcement detection.<sup>158</sup>

Cornyn's proposal calls on the Attorney General to establish a process in which "the Attorney General and Federal, State, and local law enforcement are immediately notified, as appropriate, of any request to transfer a firearm or explosive to a person who is, or within the previous 5 years was, investigated as a known or suspected terrorist."<sup>159</sup> Unlike Feinstein's proposal, the intended transferee would not be denied a firearm upfront, but instead allows the Attorney General to delay the transfer of the firearm for a period not exceeding three business days.<sup>160</sup> Within that time, the Attorney General may file an emergency petition to prevent the transfer of the firearm from being completed.<sup>161</sup> With regard to the hearing, Cornyn's proposal states that the petition and subsequent hearing will receive the highest possible priority on the docket of the court rendering the decision.<sup>162</sup> The proposal goes on to state that the transferee will receive actual notice of the hearing, and will have the opportunity to participate with counsel, thus satisfying due process requirements.<sup>163</sup>

The final portion of Cornyn's amendment speaks to the burden of proof the government would have to satisfy in order to prevent a transfer from being completed. The amendment states that "the emergency petition shall be granted if the court finds that there is probable cause to believe that the transferee has committed, conspired to commit, attempted to commit, or will commit an act of terrorism."<sup>164</sup>

Like Feinstein's amendment, Cornyn's proposal failed to meet the requisite majority vote needed to clear procedural hurdles. Cornyn received 53 votes in favor of his proposal, and 47 against.<sup>165</sup> Forty-two

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amendment/4749/text (last visited Dec. 28, 2016) [<https://perma.cc/BZ3B-F5QF>].

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> "Motion to Invoke Cloture on Amdt. No. 4749: Roll Vote No. 105." 162 CONG. REC. S4351-52 (daily ed. June 20, 2016), *available at*

of the votes rejecting Cornyn's proposal came from Democrats.<sup>166</sup> Admittedly, it is surprising that Cornyn's proposal failed to meet 60 votes, especially considering his amendment secured the endorsement of the National Rifle Association.<sup>167</sup> Nevertheless, the majority of Democratic senators felt that the amendment placed too high of a burden on the Attorney General to prevent a firearm transfer within such a short period of time.<sup>168</sup>

As stated above, Cornyn's amendment, if it had been enacted, would have allowed a court to grant the emergency petition denying an intended transferee's purchase of a firearm if it found probable cause to believe the transferee had engaged in, or would engage in an act of terrorism.<sup>169</sup> Probable cause exists where "the facts and circumstances within the [Attorney General's] knowledge and of which [there] is reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."<sup>170</sup> In evaluating whether the Attorney General has met this burden a court looks at the totality of the circumstances.<sup>171</sup> A totality of the circumstances analysis calls for an assessment which balances the "relative weights of all the various indicia of reliability" stemming from the DOJ.<sup>172</sup>

The existence of probable cause is perfectly demonstrated in *Draper v. United States*.<sup>173</sup> In *Draper*, an informant had provided information to a federal narcotics agent, Marsh, about an individual suspected of peddling narcotics from Chicago to Denver by train.<sup>174</sup> The information provided to Marsh was very specific.<sup>175</sup> The

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<https://www.congress.gov/congressional-record/2016/06/20> (last visited Apr. 24, 2017).

<sup>166</sup> *Id.*

<sup>167</sup> Gary Fields & Siobhan Hughes, *Lawmakers Set For New Showdown On Gun Control*, WALL ST. J. (June 20, 2016, 5:38 PM), <http://www.wsj.com/articles/nra-backs-proposal-to-delay-gun-sales-to-those-on-terror-watch-list-1466354619> [<https://perma.cc/W24M-U8DY>].

<sup>168</sup> *Id.*

<sup>169</sup> S.amdt.4749, H.R. 2578.

<sup>170</sup> *Draper v. United States*, 358 U.S. 307, 313 (1959).

<sup>171</sup> *Illinois v. Gates*, 462 U.S. 213, 234 (1983).

<sup>172</sup> *Id.*

<sup>173</sup> *Draper*, 358 U.S. at 307.

<sup>174</sup> *Id.* at 309.

<sup>175</sup> *Id.*

informant was able to provide Marsh with the suspect's expected arrival day into Denver, the clothing he would be wearing, the bag he would be carrying, and the quickness in which he would be moving through the train station.<sup>176</sup> Acting on the informant's tip, Marsh went to the train station on both days provided to him.<sup>177</sup> On the second day, Marsh saw an individual matching the description provided to him by the informant.<sup>178</sup> The individual had the same physical attributes and same clothing, and was moving hurriedly through the train station after exiting a track in which the incoming train was from Chicago.<sup>179</sup> Marsh approached the suspect, uncovered several envelopes containing heroin, and arrested him on the spot.<sup>180</sup> The arrestee claimed that Marsh lacked probable cause because the information he had was insufficient to prove that he had violated or was violating the narcotic laws.<sup>181</sup> In response, the Court stated, "In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act."<sup>182</sup> Thus, looking at the facts and circumstances as a whole, including the relative weight of all the various indicia of reliability, the Court determined that probable cause existed.<sup>183</sup>

*Draper* illustrates the facts and circumstances expected to be present in order for a court to find the existence of probable cause.<sup>184</sup> One can imagine the difficulty the DOJ would have in putting together such a case on an individual in just three business days. Regardless of the flexibility of the probable cause application, such a task will be too tall to overcome. Due to this obvious roadblock, Democrats denied Cornyn's proposal.<sup>185</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 309-10.

<sup>180</sup> *Id.* at 310.

<sup>181</sup> *Id.* at 311.

<sup>182</sup> *Id.* at 313 (citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

<sup>183</sup> *Id.* at 314.

<sup>184</sup> *See generally id.*

<sup>185</sup> Phillips, *supra* note 128.

Given only three business days, it is understandable how such a time restraint can decrease the likelihood of a successful case being built. It is not as though the Attorney General is actively building a case on every individual on the TWL. It is only when the transfer of a firearm is attempted would the DOJ receive notice and initiate its investigation to prevent the transfer. Needless to say, Democrats' issue with Cornyn's proposed burden of proof is reasonable; yet, offering a probable cause standard was logical.

The current standard for placing individuals on the TWL is reasonable suspicion.<sup>186</sup> First pronounced in *Terry v. Ohio*,<sup>187</sup> the standard requires that an officer have articulable and specific facts which give rise to reasonable suspicion that a crime is being committed in order to justify a brief detention of an individual.<sup>188</sup> The Supreme Court recognized reasonable suspicion to be a less demanding standard than probable cause.<sup>189</sup> The FBI has adopted this standard for purposes of including individuals on the TWL.<sup>190</sup> This shines a light on why Cornyn may have chosen probable cause to be the standard in his proposal. It does not make sense to use the same standard for placing an individual on the TWL and for preventing one of these individuals from purchasing a firearm. In theory, everyone on the TWL would be prevented from purchasing a firearm just because they meet the status quo. There can be no doubt that a burden higher than reasonable suspicion is required to prevent the transfer of a firearm. Perhaps the establishment of an intermediate standard applicable to individuals on the TWL is warranted.

Use of an intermediate standard between probable cause and reasonable suspicion is not a new concept. In *Griffin v. Wisconsin*,<sup>191</sup> the Supreme Court recognized the State of Wisconsin's use of a "reasonable grounds" standard within its probationary system—as a replacement for probable cause—to justify a search of a probationer's home.<sup>192</sup> In *Griffin*, the State's operation of its probationary system subjects probationers to conditions set by the court and rules and

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<sup>186</sup> See *supra* note 36 and accompanying text.

<sup>187</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>188</sup> *Id.* at 21.

<sup>189</sup> *Id.* at 30.

<sup>190</sup> See *supra* note 36 and accompanying text.

<sup>191</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 868 (1987).

<sup>192</sup> *Id.*

regulations established by the State Department of Health and Social Services.<sup>193</sup> One regulation permits probation officers to search a probationer's home without a warrant so long as his supervisor approves and as long as there are "reasonable grounds" to believe there is presence of contraband.<sup>194</sup> In upholding Wisconsin's "reasonable grounds" standard, the Court stated that they find it unnecessary to embrace a new principle of law, but that it has permitted exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."<sup>195</sup> The Court defines the "special needs" in *Griffin* to be the supervision of probationers to ensure the protection of the public from harm.<sup>196</sup>

The "special needs" discussed in *Griffin* is analogous to the circumstances surrounding known or suspected terrorists on the TWL.<sup>197</sup> The FBI supervises individuals they have deemed a potential threat in order to protect the public from harm. To ensure this protection, it is imperative to regulate the transfer of firearms to anyone on the TWL. Cornyn's proposal attempts to balance these needs, while also protecting the Second Amendment rights of anyone erroneously placed on the TWL. Conceivably, introducing a unique standard could help achieve this goal.

Similar to *Griffin*, the Supreme Court in *New Jersey v. T.L.O.*<sup>198</sup> allowed a showing of less than probable cause to justify searching students on school grounds who were likely to have engaged in conduct detrimental to the school's policies and procedures.<sup>199</sup> The Court stated that the legality of such a search should "depend simply on the reasonableness, under all the circumstances, of the search."<sup>200</sup> Furthering the standard announced, the Court held "where a careful balancing of governmental and private interests suggests that the public interest is best served by a . . . standard of reasonableness that

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<sup>193</sup> *Id.* at 870.

<sup>194</sup> *Id.* at 870-71.

<sup>195</sup> *Id.* at 872-73.

<sup>196</sup> *Id.* at 868.

<sup>197</sup> *See id.*

<sup>198</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>199</sup> *Id.* at 341.

<sup>200</sup> *Id.*

stops short of probable cause, we have not hesitated to adopt such a standard.”<sup>201</sup>

Given the decisions in both *Griffin* and *T.L.O.*, it is apparent that the Supreme Court has recognized and accepted an intermediate standard between probable cause and reasonable suspicion when warranted. This intermediate ground is one of reasonableness. Without clearly delineating a rule, the Supreme Court has carved out this exception when it has been for the greater good of the public’s interest. This standard speaks to permitting a governmental or regulatory action when a court or an administration find it reasonable, under all of the circumstances, that some negative event, or act, has or is likely to occur.

In the case of an emergency petition being sought after in order to prevent the transfer of a firearm to an individual on the TWL, it should fall upon the deciding court whether it is reasonable to conclude that the intended transferee is likely to commit an act of terror. Such a standard would provide the DOJ the ability to build an effective case in order to prevent the transfer. In aiming to protect the public from another tragic attack by individuals investigated for terrorism, a standard focusing on reasonableness, rather than probable cause, seems justifiable.

### III. PROPOSING COMMON SENSE GUN CONTROL REGULATION

Democrats seem to find reason to continuously reject gun control measures sponsored by Republicans, and vice versa. Repeatedly, the two parties fail to act as a bipartisanship and as a result the country suffers. To outsiders looking in, the two parties are more focused on disapproving one another’s agenda, rather than acting cohesively to push for sensible gun control regulation. The two proposed amendments above exemplify this behavior. Republicans raised due process concerns they found in Feinstein’s proposal, while Democrats took issue with the burden of proof set in Cornyn’s proposal.<sup>202</sup> Based on the concerns and considerations above, and in conjunction with the rejected measures, the following gun control regulation is proposed:

1. The Attorney General and the Federal, State, and local law enforcement shall be promptly notified of any request to

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<sup>201</sup> *Id.*

<sup>202</sup> Phillips, *supra* note 128.

transfer a firearm or explosive to a person who is, or within the previous five (5) years was, investigated as a known or suspected terrorist.

2. Upon receiving notification, the Attorney General may delay the transfer of the firearm or explosive for a period not to exceed thirty (30) days. If there is no cause for delay, the transfer may proceed at the Federal Firearm Licensee's discretion.
3. At any point within or up to the thirty (30) days provided for delay, the Attorney General may file a petition to prevent the transfer of the firearm within a court of competent jurisdiction. The petition and the subsequent hearing shall receive the highest possible priority on the docket; which shall not exceed sixty (60) days from the initial attempted firearm purchase and transfer.
4. The intended transferee will receive actual notice of the hearing and will be provided an opportunity to participate with legal counsel.
5. The court shall grant the petition if it determines that there is reasonable cause to believe, given the totality of the circumstances, that the intended transferee represents a threat to public safety, or has committed, has attempted and/or conspired to commit, or will commit an act of terrorism.
6. Denial by the court pursuant to this provision will equate to a determination that a transfer of a firearm or explosive would violate 18 U.S.C., 922 § (g) or (n).

Section one of the proposal sets the parameters of who the amendment will affect. The goal is to prevent known or suspected terrorists from purchasing firearms. Both of the rejected measures above call for the Attorney General to be notified if someone currently on the TWL, or recently removed within the previous five years, attempts to purchase a firearm. This is a sound policy. The Orlando shooting illustrates the reasoning for such latitude. Mateen was twice removed from the TWL.<sup>203</sup> One year following his second removal, Mateen legally purchased multiple firearms that he used during his

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<sup>203</sup> Zambelich & Hurt, *supra* note 98.

attack.<sup>204</sup> If this policy was in place in June of 2016, not only would the Attorney General have received notification, but it is also likely that the NICS would have had proper grounds to delay, or even deny, the transaction. For that reason, it is necessary the regulation encompasses individuals on or recently removed from the TWL.

Sections two through six outline the procedures for delaying the transfer, and subsequent steps to prevent the transfer completely. Section two of the proposal focuses on implementing a thirty-day delay for anyone on or recently removed from the TWL. Both of the rejected proposals pursued different effects: one called for a denial and the other a delay.<sup>205</sup> Seemingly, an initial delay, rather than denial, is the better of the two options. NICS' current procedure and Cornyn's rejected measure, called for a three-business day delay.<sup>206</sup> This is inadequate. The DOJ should be given thirty days to build its case. The Supreme Court has found post deprivation hearings to be constitutionally sufficient under certain circumstances.<sup>207</sup> A thirty-day delay is not likely to amount to a violation of a transferee's due process. Addressing this issue in *Fed. Deposit Ins. Corp. v. Mallen*, the Supreme Court stated:

*[E]ven though there is a point at which an unjustified delay in completing a post-deprivation proceeding would become a constitutional violation, the significance of such a delay cannot be evaluated in a vacuum. In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken.*<sup>208</sup>

Here, the private interest is the individual's right to possess a firearm. The government's interest is public safety. So long as an

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<sup>204</sup> *Id.*

<sup>205</sup> See S.amdt.4720, H.R. 2578; S.amdt.4749, H.R. 2578.

<sup>206</sup> See Krouse, *supra* note 82; See also S.amdt.4749, H.R. 2578, *supra* note 157.

<sup>207</sup> *Zinermon*, 494 U.S. at 128.

<sup>208</sup> *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988).

intended transferee's livelihood is not substantially affected by the brief deprivation prior to the hearing, a thirty-day delay should suffice. And while there can be no doubt that individuals will be erroneously deprived during this delay, their interest is arguably outweighed by the government's interest in protecting the public. On the other hand, should the DOJ find no reason to delay the transfer of a firearm, the transaction may proceed at the discretion of the FFL.

Section three discusses the procedure for the Attorney General should (s)he petition a firearm transfer. At any point during, or before the conclusion of, the thirty-day delay the Attorney General may file a petition within a court of competent jurisdiction to prevent the transfer. The petition and the subsequent hearing shall receive the highest possible priority on the docket so that the hearing will be held no more than 60 days from an intended transferee's initial attempt to purchase a firearm. Section four discusses the procedural due process afforded to an intended transferee. Aligned with the standards of due process, a transferee will receive actual notice of the hearing and will be provided an opportunity to participate with legal counsel.

Section five of the proposal sets forth the standard for denying a firearm transfer. Here, the court shall grant the petition, denying the transfer, if it determines that there is reasonable cause to believe, under all of the circumstances, that the intended transferee is a threat to public safety, or has or will commit an act of terrorism. Feinstein's proposal offered a reasonable suspicion standard, and Cornyn's probable cause. As Congress failed to agree on these competing standards, this proposal offers a reasonable cause standard which finds resolution somewhere in the middle. As discussed *supra*, the Supreme Court found a "reasonable grounds" standard to be acceptable for a probationary scheme where "special needs" made probable cause impractical.<sup>209</sup> Furthermore, the Court held a "reasonableness" standard to be acceptable where the balancing of governmental and private interests would be better served.<sup>210</sup> Introducing a unique standard applicable to individuals on the TWL comports with the Supreme Court's decisions in *Griffin* and *T.L.O.*, and is justified to safeguard the public from harm.

The final section of the amendment, section six, equates the denial of a firearm transfer to violations under 18 U.S.C., § 922 (g) or (n). As

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<sup>209</sup> *Griffin*, 483 U.S. at 872.

<sup>210</sup> *T.L.O.*, 469 U.S. at 340.

indicated *supra*, prior to FFLs transferring a firearm to a transferee, the NICS will be contacted to see whether the transfer will violate 18 U.S.C., § 922 (g) or (n), which makes it unlawful to transfer a firearm to an individual for a wide range of reasons.<sup>211</sup> Such reasons include transferring a firearm to persons who are fugitives; persons who have been adjudicated as a mental defective; persons who are aliens and illegally or unlawfully in the United States; or persons convicted for using or possessing a controlled substance within a certain time period to possess or receive any firearm.<sup>212</sup> However, nowhere among the prohibitive conditions does it state that it is unlawful to transfer a firearm to a known or suspected terrorist. So, under this proposal, a court finding it reasonable to believe that an individual is likely to engage in act of terrorism will be equivalent to those violations enumerated under U.S.C., § 922 (g) or (n).

This proposal, while not perfect, demonstrates that there is room for compromise. Congress can and should enact legislation which calls for a stricter procedure for when individuals on, or recently removed from, the TWL attempt to purchase firearms. Nevertheless, Congress fails to work as a bipartisanship. Perhaps the lack of successful regulations stem from Congress being influenced by special interest groups and gun lobbyists. Whatever the reason may be, Congress's failure to act is unsupportable. As Scalia stated in *Heller*, an individual's right to possess firearms secured under the Second Amendment is not limitless.<sup>213</sup> Specifically, Scalia declared: "nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms."<sup>214</sup> Such language provides the basis for Congress to construct conditions and qualifications pertaining to the transfer of firearms to individuals on, or recently removed from, the TWL. Accordingly, it is time for Congress to go to work.

## CONCLUSION

Congress' failure to work in unison to pass common sense gun regulation is unacceptable. Rather than working constructively to

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<sup>211</sup> *About NICS, supra* note 61.

<sup>212</sup> 18 U.S.C. § 922(g), (n).

<sup>213</sup> *Heller*, 554 U.S. at 595.

<sup>214</sup> *Id.* at 626-27.

produce a supportable proposal, Democrats and Republicans appear more interested in criticizing one another. Such behavior is exemplified in Congress' inability to approve one of the four amendments proposed between December 2015 and June 2016. As a result of Congress' failure in passing legislation to prevent known or suspected terrorists from legally purchasing firearms, the doors remain open for such individuals to commit more attacks.

Working in a bipartisan manner, Congress needs to construct, support, and approve gun regulations that disallow known or suspected terrorists on, or recently removed from, the TWL from legally purchasing firearms in the United States. Sitting in the position to do so, and equipped with the necessary legislative tools, the time for Congress to act is now. The country has waited long enough.