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Beware the "Terror Gap": Closing the Loophole between the U.S. Terrorist Watchlist System and the Right to Bear Arms

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NOTE

BEWARE THE “TERROR GAP”: CLOSING THE LOOPHOLE BETWEEN THE U.S. TERRORIST WATCHLIST SYSTEM AND THE RIGHT TO BEAR ARMS

Elizabeth M. Sullivan†

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INTRODUCTION

In July 2014, the Federal Bureau of Investigation (FBI) interviewed a man named Omar Mateen about his connection to a Florida native named Moner Mohammad Abusalha.¹ Abusalha had killed himself two months earlier during a suicide attack in Syria, during which he drove a truck full of explosives into a restaurant.² The group formerly known as Jabhat al-Nusra claimed responsibility for the suicide attack and credited Abusalha as the first U.S. citizen to carry out a “martyrdom operation” on Syrian soil.³

The local Islamic community in Abusalha’s hometown of Port St. Lucie, Florida struggled to reconcile how a “jovial and easygoing” young man had become radicalized.⁴ Abusalha’s initial radicalization had occurred in the United States prior to his first trip to Syria in 2013, and there was a concern among the community that its youth could be susceptible to the same extremist tendencies—especially given that Abusalha had made an apparent recruiting trip back to the United States after his training in Syria.⁵ Mohammed Malik, a Pakistani-

¹ *Moner Mohammad Abusalha*, COUNTER EXTREMISM PROJECT: TERRORISTS AND EXTREMISTS DATABASE, <http://www.counterextremism.com/extremists/moner-mohammad-abusalha> [<https://perma.cc/K9RD-H9FA>]; see James B. Comey, Former Dir., Fed. Bureau of Investigation, Remarks at Press Briefing on Orlando Mass Shooting, FBI Headquarters: Update on Orlando Terrorism Investigation (June 13, 2016), <https://www.fbi.gov/news/speeches/update-on-orlando-terror-ism-investigation> [<https://perma.cc/JUJ4-YFCR>].

² Frances Robles & Emma G. Fitzsimmons, *Before Syrian Suicide Blast, a Quiet Life in the Suburbs*, N.Y. TIMES (May 31, 2014), <http://www.nytimes.com/2014/06/01/us/Moner-Mohammad-Abusalha-Vero-Beach-Florida-Syria.html> [<https://perma.cc/GRE8-6JQZ>].

³ *Moner Mohammad Abusalha*, *supra* note 1. In July 2016, Jabhat al-Nusra formally split from al-Qaeda and renamed itself Jabhat Fateh al-Sham (“Front for the Conquest of Syria”). Shaul Shay & Ely Karmon, *Jabhat Fateh al-Sham—Did Jabhat al-Nusra Split from Al-Qaeda?*, INT’L INST. FOR COUNTER-TERRORISM (Aug. 4, 2016), <https://www.ict.org.il/Article/1751/jabhat-fateh-al-sham-did-jabhat-al-nusra-split-from-al-qaeda> [<https://perma.cc/7MBK-JMPN>].

⁴ Mohammed A. Malik, *I Reported Omar Mateen to the FBI. Trump is Wrong that Muslims Don’t Do Our Part.*, WASH. POST: POSTEVERYTHING (June 20, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/06/20/i-reported-omar-mateen-to-the-fbi-trump-is-wrong-that-muslims-dont-do-our-part/> [<https://perma.cc/M6EA-49U7>].

⁵ See Adam Goldman & Greg Miller, *American Suicide Bomber’s Travels in the U.S., Middle East Went Unmonitored*, WASH. POST: NAT’L SECURITY (Oct. 11, 2014), <https://www.washingtonpost.com/world/national-security/american-suicide-bombers-travels-in-us-middle-east-went-unmonitored/2014/10/11/38a32>

American living in Port St. Lucie and a member of the local Islamic community, took it upon himself to speak with the FBI and other concerned community members in an effort to understand the motive behind Abusalha’s radicalization.⁶ One such conversation occurred between Malik and Mateen, both of whom had attended mosque at the Islamic Center of Fort Pierce with Abusalha.⁷ During this conversation, Mateen told Malik that, like Abusalha, he too had been watching videos depicting the American-born-turned-al-Qaeda digital propagandist, Anwar al-Awlaki. Mateen told Malik that he found the videos “very powerful,” a response that Malik found disturbing enough to again contact the FBI. The FBI, having already looked into Mateen based on a tip received in 2013, investigated him for a second time and once again deemed him not to be a threat.⁸

Less than two years later, Mateen opened fire on a nightclub in Orlando, killing forty-nine people and injuring fifty-three in the “deadliest terror attack on American soil since 9/11.”⁹ In the attack, Mateen used a Sig Sauer MCX assault rifle

28e-4fe8-11e4-aa5e-7153e466a02d_story.html [https://perma.cc/36SE-QESJ]. Although Abusalha was subject to additional screening and questioning at the U.S. border, Abusalha entered the United States essentially unnoticed. *See generally* PETER BERGEN, COURTNEY SCHUSTER & DAVID STERMAN, *NEW AM., ISIS IN THE WEST: THE NEW FACES OF EXTREMISM* 12 (2015), <https://static.newamerica.org/attachments/11813-isis-in-the-west-2/ISP-Isis-In-The-West-v2.b4f2e9e3a7c94b9e9bd2a293bae2e759.pdf> [https://perma.cc/48UP-QR82] (arguing that Abusalha’s travel to the U.S. after training in Syria raises a “real concern regarding existing security measures”).

⁶ *See* Malik, *supra* note 4; *Morning Edition: A Muslim Reported Omar Mateen to the FBI Well Before Orlando Shooting*, NAT’L PUB. RADIO (June 22, 2016), <http://www.npr.org/2016/06/22/483046567/a-muslim-reported-omar-mateen-to-the-fbi-well-before-the-orlando-shooting> [https://perma.cc/QKA5-B6ZF].

⁷ *See* Malik, *supra* note 4.

⁸ The FBI first investigated Mateen in 2013 over a ten-month period in response to coworkers reporting that he had told them he had connections to al-Qaeda, was a member of Hezbollah, and wanted to be a martyr. *Comey, supra* note 1.

⁹ *Omar Mateen*, COUNTER EXTREMISM PROJECT: TERRORISTS AND EXTREMISTS DATABASE, <http://www.counterextremism.com/extremists/omar-mateen> [https://perma.cc/C7BP-69YJ]. After this Note was submitted for publication, a shooting occurred in Las Vegas where the number of casualties surpassed that of the Orlando shooting, with early reports estimating 58 dead and over 500 injured. Within a day of the shooting, ISIL claimed responsibility but the FBI announced that their initial investigation of the incident suggested “no connection with an international terrorist group.” While the forthcoming investigation will clarify the circumstances surrounding this shooting, this incident serves as another stark reminder of the complexity of the relationship between gun rights and national security law. Bill Chappell, *Las Vegas Shooting Update: At Least 58 People Are Dead After Gunman Attacks Concert*, NAT’L PUB. RADIO (Oct. 2, 2017, 3:15 AM), <http://www.npr.org/sections/thetwo-way/2017/10/02/554976369/section-of-las-vegas-strip-is-closed-after-music-festival-shooting> [https://perma.cc/KDC8-XS9A]; *see infra* note 33.

and a Glock semiautomatic pistol—both of which he had legally purchased about a week prior to the attack.¹⁰ A prime example of “homegrown extremism,” Mateen had been operating in American society as a detected-yet-dismissed terrorist.¹¹ After the FBI interviewed him in 2013 and again in 2014, he had been placed in the Terrorist Screening Database (TSDB) but was removed after the FBI conducted its investigation.¹² Yet Mateen had a record of professing empathy toward the jihadist cause. He watched extremist videos, spoke to colleagues about his support for terrorist organizations, ran searches on Facebook about past terrorist attacks, and was influenced, either directly or indirectly, by the actions of Abusalha.¹³ So how did an individual who had been, in retrospect, so inextricably entwined with terrorism fall through the cracks?

There are undoubtedly holes in national security law. In fact, terrorism would not be such a considerable threat if there were not gaps and vulnerabilities that terrorists could discover and exploit. This is simply the nature of the current “cat and mouse” game.¹⁴ For national security officials, the goal is to recognize and isolate the gaps, constrict them to create a temporary solution, and then close them permanently.

One such gap is the loophole in U.S. law that allows individuals appearing in the TSDB to legally purchase firearms—

¹⁰ VIOLENCE POLICY CTR., UNDERSTANDING THE SIG SAUER MCX ASSAULT RIFLE USED IN THE ORLANDO MASS SHOOTING 1 (2016), <http://www.vpc.org/studies/Sig%20Sauer%20Backgrounder.pdf> [<https://perma.cc/7R2A-2MUZ>]; Bureau of Alcohol, Tobacco, Firearms and Explosives (@ATFHQ), TWITTER (June 12, 2016, 12:24 PM), <https://twitter.com/ATFHQ/status/742075110161588224> [<https://perma.cc/2Y9G-GF92>].

¹¹ President Barack Obama, Remarks by the President After Briefing on the Attack in Orlando, Florida (June 13, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/13/remarks-president-after-briefing-at-tack-orlando-florida> [<https://perma.cc/95AD-WYV7>].

¹² Russell Berman, *Could Congress Have Stopped Omar Mateen From Getting His Guns?*, ATLANTIC (June 14, 2016), <http://www.theatlantic.com/politics/archive/2016/06/closing-the-terror-gun-loophole-might-not-have-stopped-the-orlando-massacre/486863/> [<https://perma.cc/7GRC-3NRA>]; see *Comey*, *supra* note 1.

¹³ See *Comey*, *supra* note 1; *Facebook Asked to Provide Details of Gunman's Postings*, N.Y. TIMES (June 16, 2016), <http://www.nytimes.com/interactive/2016/06/16/us/document-JohnsonFacebookletter-2.html> [<https://perma.cc/4J89-X4CC>]; *Omar Mateen*, *supra* note 9.

¹⁴ See generally Bonnie Kristian, *As ISIS Spreads, the U.S. Must Not Play Cat and Mouse*, HUFFINGTON POST (Aug. 12, 2016, 10:23 AM), http://www.huffingtonpost.com/entry/as-isis-spreads-the-us-must-not-play-cat-and-mouse_us_57addbc4e4b03d06fe8494b3 [<https://perma.cc/JN53-336B>] (arguing that the United States, as the cat, should instead adopt a strategy of defense against ISIL, the mouse).

this is the “terror gap.”¹⁵ Certainly this gap has been recognized and isolated: with the increasing threat of terrorism on U.S. soil,¹⁶ as exemplified by the Orlando and San Bernardino tragedies, Congress can agree that guns are too easily getting into the hands of terrorists.¹⁷ Although there have been legislative attempts to close the “terror gap,” no statutory remedy has emerged that would successfully marry U.S. firearms regulations with the terrorist watchlist system.¹⁸ Yet the lack of coordination between the current gun background check system and the terrorist watchlist system is allowing individuals, like Omar Mateen, to slip through the system. The United States must find a permanent solution to fill the gap, one that reduces the threat of gun-driven terrorism, adheres to the Second Amendment guarantee for an individual’s right to bear arms, and avoids the constitutional pitfalls all too common when there is a tightening of national security laws.

In this Note, I will argue that closing the “terror gap” requires a reexamination and modernization of the interaction between the watchlist system and firearms regulations. I will suggest that direct statutory reform will fail, and I will offer a solution to indirectly close the loophole that combines construction of a modernized, refined watchlist system based on a tier structure with a system of “sticks and carrots” on the state and local level. In Part I, I will provide the relevant background information related to current terrorism statutes and definitions, the watchlist system, and firearms regulations. In Part II, I will examine past and recent attempts at closing the loophole, including Former President George W. Bush’s attempt after 9/11, Senator Diane Feinstein’s (D-CA) amendment, Senator John Cornyn’s (R-TX) amendment, and Senator Susan Collins’s (R-ME) bi-partisan approach. I will explain why these initiatives have not been successful. Part III offers a new approach. I will conclude by suggesting that whatever mechanism is used to close the loophole should not be considered a compromised or “second-best” solution.

¹⁵ *Closing the Terror Gap*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (June 17, 2016), <https://everytownresearch.org/documents/2015/12/closing-terror-gap.pdf> [<https://perma.cc/2HEQ-B7SY>]; see Berman, *supra* note 12.

¹⁶ See, e.g., Lilly Chapa, *Domestic Terrorism Is on the Rise*, ASIS INT’L: SECURITY MGMT. (Dec. 4, 2015), <https://sm.asisonline.org/Pages/Uprooting-Home-grown-Terror.aspx> [<https://perma.cc/U73D-MXDR>] (arguing that individuals who have no connection to terrorist groups are increasingly carrying out acts of domestic terrorism).

¹⁷ For a discussion of what constitutes “terrorism,” see *infra* note 33.

¹⁸ See *infra* Part II.

I

BACKGROUND: PUTTING THE “TERROR GAP” IN CONTEXT

A. Terrorism: Acts, Statutes, and Current Trends

The attacks of September 11, 2001, required the U.S. government to fundamentally reexamine the nature of terrorism and the scope of national security law.¹⁹ Whereas the pre-9/11 U.S. national security doctrine defined the majority of threats as originating along geographic lines, the main threat to the United States after 9/11 emerged along transnational societal factions built around community cornerstones such as religion, ethnicity, race, politics, and general ideology.²⁰ Sixteen years after 9/11, terrorism continues to evolve. The current terrorist threat is “broader, wider, and deeper,” with groups like the Islamic State of Iraq and the Levant (ISIL)²¹ using a harrowing variety of tactics to target and successfully execute attacks around the world.²² The breadth and scope of ISIL and its associated groups is markedly different from the days of Osama Bin Laden and core al-Qaeda,²³ and there are “more threats originating in more places and involving more individuals than . . . at any time in the past 15 years.”²⁴ Today, home-grown violent extremists (HVEs) pose a particularly unique challenge to counterterrorism efforts as they are, by nature, difficult to identify. In many ways, the legislative counterterrorism initiatives adopted and modified since 9/11 have failed to keep pace with the unpredictable nature of the threat landscape. In this Section, I will discuss the evolving history of terrorism legislation, introduce the applicable terrorism prosecution statutes, and examine the current trends of HVE development.

¹⁹ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 361 (2004) [hereinafter 9/11 COMMISSION REPORT].

²⁰ See *id.* at 361–62.

²¹ ISIL is also known as the Islamic State, ISIS, IS, or Daesh. For consistency, I will refer to the group as ISIL in this Note.

²² See *Fifteen Years After 9/11: Threats to the Homeland: Hearing Before the S. Homeland Sec. Governmental Affairs Comm.*, 114th Cong. (2016) (statement of Nicholas J. Rasmussen, Director, National Counterterrorism Center).

²³ See *Comparing Al Qaeda and ISIS: Different Goals, Different Targets: Prepared Testimony Before the Subcomm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Sec.*, 114th Cong. (2015) (prepared testimony of Daniel L. Byman, Senior Fellow, Center for Middle East Policy, Brookings Institution).

²⁴ Rasmussen, *supra* note 22.

1. *History of Terrorism Legislation Post-9/11: The USA PATRIOT Act*²⁵

Prior to 9/11, Congress had done little to reorganize its national security initiatives from a post-Cold War focus, and there was no integrated approach to counterterrorism legislation or policy.²⁶ As a result, Congress rushed to compose counterterrorism legislation that conformed to many of the recommendations posed by the Executive Branch under the leadership of President George W. Bush.²⁷ Only six weeks after 9/11, Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001” (better known as the “USA PATRIOT Act” or “PATRIOT Act”).²⁸ The PATRIOT Act provided broad authority to the Executive Branch in an effort to overcompensate for the dearth of intra- and interagency coordination prior to 9/11.²⁹

The PATRIOT Act had immense and immediate practical effects, two of which included redefining the scope of “terrorism” and expanding the government’s power of collection and surveillance.³⁰ In section 802 of the Act, Congress amended the definition of “terrorism” falling under 18 U.S.C. § 2331 to include “domestic terrorism.”³¹ This created a bright-line delineation between what constitutes “international terrorism” and “domestic terrorism,” with the primary difference being whether the “acts dangerous to human life” occur outside or

²⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S.C.).

²⁶ See, e.g., 9/11 COMMISSION REPORT, *supra* note 19, at 105 (noting that the House of Representatives had “at least 14 different committees” with some degree of jurisdiction over terrorism-related issues).

²⁷ See DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 195–96 (New Press 2006) (1999).

²⁸ *Id.* at 195; see generally *Highlights of the USA PATRIOT Act*, U.S. DEP’T JUST.: PRESERVING LIFE AND LIBERTY, <https://www.justice.gov/archive/ll/highlights.htm> [<https://perma.cc/7TPA-VMB7>].

²⁹ See generally COLE & DEMPSEY, *supra* note 27, at 196–97 (noting that the post-9/11 intelligence community worked within an internal “cloak of secrecy”).

³⁰ See, e.g., *Highlights of the USA PATRIOT Act*, *supra* note 28 (suggesting four ways in which the PATRIOT Act protects the general public from the threat of terrorism while preserving their life and liberty interests).

³¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56, § 802 115 Stat. 272, 376 (2001) (codified as amended in scattered sections of the U.S.C.).

within the “territorial jurisdiction of the United States.”³² Substantial criticism followed over the scope of these definitions,³³ and organizations like the American Civil Liberties Union argued that the government could deem any group with a position contrary to government policy as participating in terrorism.³⁴

This concern was compounded by criticisms over the scope of power that the PATRIOT Act granted to the government, particularly the Intelligence Community (IC), for collection and surveillance. Section 505 of the PATRIOT Act expanded the power of the IC under 18 U.S.C. § 2709 to collect data from

³² 18 U.S.C. § 2331 (2012). The statute defines “domestic terrorism” as activities that:

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.

The statute defines “international terrorism” as activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum

³³ An important clarification is that 18 U.S.C. § 2331 “does not create a new crime of domestic terrorism.” *How the USA PATRIOT Act Redefines “Domestic Terrorism,”* AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> [<https://perma.cc/N9ZB-GAKH>]. In other words, § 2331 expands the scope of what constitutes “terrorism” by including a definition of “domestic terrorism.” *See id.* While the breadth of “terrorism” is critical to understanding current U.S. counterterrorism policy, it is beyond the scope of this Note to discuss whether the United States should create a separate crime of “domestic terrorism.”

³⁴ *See, e.g., id.* (arguing that the new definition under the PATRIOT Act would even “encompass the activities of several prominent activist campaigns and organizations [such as] Greenpeace, Operation Rescue, Vieques Island and WTO protesters and the Environmental Liberation Front”). *But see Dispelling the Myths*, U.S. DEP’T JUST.: PRESERVING LIFE AND LIBERTY, https://www.justice.gov/archive/ll/subs/u_myths.htm [<https://perma.cc/2FSY-YYLV>] (“The Patriot Act limits domestic terrorism to conduct that breaks criminal laws, endangering human life. ‘Peaceful groups that dissent from government policy’ without breaking laws cannot be targeted. Peaceful political discourse and dissent is one of America’s most cherished freedoms, and is not subject to investigation as domestic terrorism.”).

U.S. citizens using "national security letters," or NSLs, which are demands from the IC that mandate the disclosure of large amounts of data without requiring judicial approval.³⁵ Additionally, section 215 of the Act created 50 U.S.C. § 1861, allowing the FBI to seize "any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities."³⁶ Although section 215 specifically did not mention "domestic terrorism," there was widespread criticism that the Act created an incentive for the FBI to collect information on individuals, including U.S. citizens, without establishing a "factual basis" or a "particular nexus between the records sought and a suspected agent."³⁷ Critics voiced concerns that this nearly unlimited IC discretion could lead to racial and ethnic profiling.³⁸ In fact, while U.S. officials and counterparts openly disclaimed racial and ethnic profiling, concrete examples emerged after 9/11, documenting intelligence surveillance and collection efforts concentrated on Arab and Muslim individuals purely because of their background.³⁹

Despite these concerns (and realized consequences), supporters of the PATRIOT Act saw loopholes in the pre-9/11 terrorism statutes that posed an immediate threat to homeland security and needed to be amended. As then-Senator Joe Biden (D-DE) said during a Senate debate on the PATRIOT Act, "[I]t simply did not make sense that many of our law enforcement tools were not available for terrorism cases. . . . [T]he FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists."⁴⁰

³⁵ COLE & DEMPSEY, *supra* note 27, at 214.

³⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001) (codified as amended in scattered sections of the U.S.C.); 50 U.S.C. § 1861 (2012).

³⁷ COLE & DEMPSEY, *supra* note 27, at 215; *see also* RONALD J. SIEVERT, DEFENSE, LIBERTY, AND THE CONSTITUTION 75 (2005) (documenting the public's "frenzy" over the PATRIOT Act, based mostly on misconceptions).

³⁸ COLE & DEMPSEY, *supra* note 27, at 221.

³⁹ *See, e.g.*, THE MUSLIM AM. CIVIL LIBERTIES COAL. ET AL., MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 7–11 (2013) (detailing the New York Police Department's (NYPD) use of ethnic profiling in its operations, despite an officer in the NYPD's Intelligence Division saying, "I never made a lead from the rhetoric that came from a Demographics report . . .").

⁴⁰ 147 CONG. REC. S11,048 (daily ed. Oct. 25, 2001) (statement of Sen. Biden). For other examples of responses from Congressional members regarding the PATRIOT Act, *see Congress Speaks*, U.S. DEP'T JUST.: PRESERVING LIFE AND LIBERTY, https://www.justice.gov/archive/ll/subs/q_support.htm [<https://perma.cc/4XKU-Z3Z8>].

Several sections of the PATRIOT Act were subject to expiring sunset provisions in 2015.⁴¹ In June 2015, Congress passed the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 (“USA FREEDOM Act” or “FREEDOM Act”) that reinstated the core features of the PATRIOT Act but in a post-Edward Snowden and Wikileaks framework.⁴² Among other changes, the FREEDOM Act mandated new government reporting requirements, prohibited bulk data collection and instated a “two hop” structure for collection under section 215, and reauthorized the “lone wolf” provision under section 6001(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) that was subject to the PATRIOT Act’s sunset provision.⁴³ Ultimately, the PATRIOT Act’s legacy continues to provide broad, discretionary power to the IC in the realm of data collection and surveillance, providing a legislative backdrop to the terrorist watchlist system.⁴⁴

2. *Prosecution Under the Terrorism Statutes: 18 U.S.C. §§ 2339A and 2339B*⁴⁵

Following 9/11, the U.S. government revitalized the use of 18 U.S.C. §§ 2339A and 2339B for the prosecution of terrorists

⁴¹ See Conor Friedersdorf, *Don't Underestimate the National-Security State*, ATLANTIC (June 1, 2015), <http://www.theatlantic.com/politics/archive/2015/06/dont-underestimate-the-national-security-state/394571> [<https://perma.cc/D92K-2Q2J>] (“[S]unset is wholly inadequate as a substantive reform to surveillance policy . . .”).

⁴² Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act (USA FREEDOM Act) of 2015, Pub. L. No. 114–23, 129 Stat. 268 (2015) (codified as amended in scattered sections of the U.S.C.); see also Raf Sanchez, *Congress Passes First Major NSA Reforms since Edward Snowden Leaks*, TELEGRAPH (June 2, 2015, 10:52 PM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11647583/Congress-passes-first-major-NSA-reforms-since-Edward-Snowden-leaks.html> [<https://perma.cc/U3LU-MUF8>] (“All sides agreed that the [USA FREEDOM Act’s] passage was a milestone in the debate over security and liberty that began with Snowden’s release of thousands of classified NSA documents.”).

⁴³ *USA Freedom Act: What’s In, What’s Out*, WASH. POST (June 2, 2015), <https://www.washingtonpost.com/graphics/politics/usa-freedom-act> [<https://perma.cc/TGD4-HQ3R>]; Jodie Liu, *So What Does the USA Freedom Act Do Anyway?*, LAWFARE (June 3, 2015, 5:29 PM), <https://www.lawfareblog.com/so-what-does-usa-freedom-act-do-anyway> [<https://perma.cc/YUV5-75WD>]. The “lone wolf” provision allowed tracking of persons with terrorist ties although they might have no connection to a foreign government. See Michael J. Woods & Suzanne E. Spaulding, *Lone Wolf*, PATRIOT DEBATES: A SOURCEBLOG FOR THE USA PATRIOT DEBATE, <https://apps.americanbar.org/natsecurity/patriotdebates/lone-wolf> [<https://perma.cc/X6VB-G34R>].

⁴⁴ See *infra* subpart I.B.

⁴⁵ 18 U.S.C. §§ 2339A, 2339B (2012).

and sympathizers.⁴⁶ Although these two “material support” statutes are often considered offshoots of the PATRIOT Act, they were originally adopted in the mid-1990s but had been rarely used by federal prosecutors. Congress originally enacted § 2339A as part of the Violent Crime Control and Law Enforcement Act of 1994,⁴⁷ an “omnibus crime bill” advocated by President Bill Clinton that critics claimed provided “money and perverse incentives for law enforcement” to adopt “abusive” practices.⁴⁸ In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, a “controversial” act better known for its substantial impact on habeas corpus law than for its granting of power to the Department of State to target foreign terrorist organizations (FTOs) who pose a threat to U.S. security and interests.⁴⁹ This Act amended § 2339A to create a larger list of terrorism-related offenses that would trigger “material support” prosecution under the statute, and it disposed of “unworkable investigative restrictions” that were preventing federal prosecutors from using the statute.⁵⁰ The Act also created § 2339B, which explicitly connected “material support” to FTOs.

Both § 2339A and § 2339B have gone through several iterations, with a general broadening of the scope of “material support” resulting in litigation in federal courts.⁵¹ After the PATRIOT Act added “expert advice or assistance” to the definition of “material support,”⁵² the Humanitarian Law Project filed suit in federal court.⁵³ The Humanitarian Law Project, on be-

⁴⁶ Alan F. Williams, *Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What’s Broken*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 365, 373 (2008).

⁴⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022-23 (codified as amended in scattered sections of the U.S.C.); Williams, *supra* note 46, at 373.

⁴⁸ 13TH (Kandoo Films 2016).

⁴⁹ See Lincoln Caplan, *The Destruction of Defendants’ Rights*, NEW YORKER (June 21, 2015), <http://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights> [<https://perma.cc/F9BC-8B3J>]; see also U.S. Attorneys’ Manual, *Criminal Resource Manual Section 16: Providing Material Support to Designated Terrorist Organizations (Fundraising) (18 U.S.C. 2339B)*, U.S. DEP’T JUST., <https://www.justice.gov/usam/criminal-resource-manual-16-providing-material-support-designated-terrorist-organizations> [<https://perma.cc/969S-GEU8>].

⁵⁰ U.S. Attorneys’ Manual, *Criminal Resource Manual Section 15: Providing Material Support to Terrorists (18 U.S.C. § 2339A)*, U.S. DEP’T JUST., <http://www.justice.gov/usam/criminal-resource-manual-15-providing-material-support-terrorists-18-usc-2339a> [<https://perma.cc/8JRQ-LUPQ>].

⁵¹ CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18. U.S.C. §2339A AND §2339B, at 1 (2016).

⁵² See *id.* at 5.

⁵³ Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185,1187 (C.D. Cal. 2004). The Humanitarian Law Project had originally filed suit after the origi-

half of organizations and individuals who supported designated FTOs by providing medical and humanitarian aid, argued that the “material support” provision was void for vagueness.⁵⁴ The Humanitarian Law Project also contended that the statute violated the First and Fifth Amendments because it is unconstitutional to criminalize a group that has a protected right of association with a FTO when the “material support” provided is for the FTO’s nonviolent and charitable endeavors.⁵⁵ After a California district court concluded that a person of “ordinary intelligence” could not “reasonably” decipher the meaning of “expert advice or assistance,” “training,” or “personnel,” Congress amended § 2339B under IRTPA in 2004.⁵⁶ The amendment clarified the constitutionally vague terms but also added “services,” which Congress failed to define, under the prohibited actions of “material support.”⁵⁷

In 2009, the Supreme Court agreed to review the Ninth Circuit’s decision that “training,” “expert advice and assistance,” and “services” remained unconstitutionally vague despite the amendments.⁵⁸ The Supreme Court reversed the Ninth Circuit’s decision, holding that § 2339B was not void for vagueness as to the plaintiffs’ proposed conduct because a person of ordinary intelligence would reasonably understand their activities to fall within the statute’s definitions.⁵⁹ Likewise, the Court found that § 2339B did not violate the plaintiffs’ freedom of speech because “the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”⁶⁰ The Court also rejected the plain-

nal inception of § 2339B and before the modifications. *See generally* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1132–33 (9th Cir. 2000) (holding, in part, that §§ 2339A and 2339B remain constitutional in light of the First Amendment challenge).

⁵⁴ *Ashcroft*, 309 F. Supp. 2d at 1199–1200.

⁵⁵ *See* COLE & DEMPSEY, *supra* note 27, at 164–65.

⁵⁶ *See Ashcroft*, 309 F. Supp. 2d at 1199–1200; DOYLE, *supra* note 51, at 15–17; *see also* *Federal Court Strikes Down Part of the “USA PATRIOT Act,”* FREE EXPRESSION POLY PROJ., <http://www.fepproject.org/news/humanlawproj.html> [<https://perma.cc/JV4V-U6RC>] (“The most recent decision . . . is a good reminder of the importance of the courts in setting some limits on government action at a time when the public’s justified fear of terrorism has been used to compromise civil liberties in ways that often do not really improve our security or safety.”).

⁵⁷ COLE & DEMPSEY, *supra* note 27, at 165.

⁵⁸ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 14 (2010); *cf.* DOYLE, *supra* note 51, at 15–17 (“Congress adjusted some of the definitions in the wake of First Amendment overbreadth and due process vagueness challenges that the Supreme Court ultimately addressed in *Holder v. Humanitarian Law Project*.”).

⁵⁹ *Holder*, 561 U.S. at 20–25.

⁶⁰ *Id.* at 26.

tiffs’ argument that § 2339B violated their First Amendment right to freedom of association, distinguishing “mere association” from association that includes the provision of “material support.”⁶¹

Both § 2339A and § 2339B have become choice provisions for federal prosecutors to use in charging alleged terrorists or sympathizers. The language of “material support” in many ways serves as an alternate definition of terrorist—namely, you qualify as a terrorist when you provide “material support” to another terrorist or FTO. Congress and the Supreme Court have made it clear that once an individual crosses this statutory line, federal law enforcement can arrest and prosecute under § 2339A or § 2339B.⁶² But prosecutors still have wide discretion on how to interpret “material support.”⁶³ There is no requirement that prosecutors show that the individual “engaged in terrorism, aided or abetted terrorism, or conspired to commit terrorism.”⁶⁴ Thus, a tension emerges between “material support” prosecution and civil liberties, an issue that will only continue to escalate as the nature of terrorism shifts to homegrown violent extremism and U.S.-based radicalization.

3. *Current Terrorism Trends: Homegrown Violent Extremists*

Described by the FBI as “looking for needles in a nationwide haystack . . . figur[ing] out which pieces of hay might someday become needles,” counterterrorism efforts targeting HVEs in the United States have posed significant challenges to the IC.⁶⁵ The Department of Justice has defined HVEs as:

[T]hose who encourage, endorse, condone, justify, or support the commission of a violent criminal act to achieve political, ideological, religious, social, or economic goals by a citizen or

⁶¹ *Id.* at 39–40.

⁶² For example, federal authorities arrested a transit police officer for providing material support to ISIL. See Rachel Weiner, *Police Officer for D.C. Subway System Accused of Trying to Help ISIS*, WASH. POST (Aug. 3, 2016), https://www.washingtonpost.com/local/public-safety/metro-police-officer-arrested-on-terrorism-charges/2016/08/03/6b7541de-5981-11e6-9aee-8075993d73a2_story.html [<https://perma.cc/4UPY-6JKU>].

⁶³ See COLE & DEMPSEY, *supra* note 27, at 165; Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L. & POL’Y 5, 7 (2005). The government is also using these offenses as a basis for early intervention, a kind of criminal early-warning and preventive enforcement device designed to minimize the risk of terrorist activity. See *id.* at 7, 21–30 (discussing the mens rea requirement for crimes of “material support”).

⁶⁴ COLE & DEMPSEY, *supra* note 27, at 165.

⁶⁵ Comey, *supra* note 1; see Rasmussen, *supra* note 22.

long-term resident of a Western country who has rejected Western cultural values, beliefs, and norms. [HVEs] are a diverse group of individuals that can include U.S.-born citizens, naturalized citizens, green card holders or other long-term residents, foreign students, or illegal immigrants. Regardless of their citizenship status, these individuals intend to commit terrorist acts inside Western countries or against Western interests abroad.⁶⁶

An HVE is closely related to a lone offender, also known as a lone wolf, for which the U.S. government has no universal definition. In 2015, Georgetown University's National Security Critical Issue Task Force suggested defining lone wolf terrorism as "[t]he deliberate creation and exploitation of fear through violence or threat of violence committed by a single actor who pursues political change linked to a formulated ideology, whether his own or that of a larger organization, and who does not receive orders, direction, or material support from outside sources."⁶⁷ A significant difference between the lexicon for HVEs and lone offenders is that the former does not necessarily operate in isolation—the two are not mutually exclusive. For example, a lone offender can be an HVE if the lone offender was radicalized primarily within the United States.⁶⁸ Likewise,

⁶⁶ U.S. DEP'T OF JUSTICE, CMTY. ORIENTED POLICING SERVS., AWARENESS BRIEF: HOMEGROWN VIOLENT EXTREMISM 1 & 4 n.1 (2014) (footnote omitted) (citing IACP COMMITTEE ON TERRORISM, COUNTERING VIOLENT EXTREMISM (CVE) WORKING GROUP, A COMMON LEXICON 1 (2012), theiacp.org/portals/0/pdfs/IACP-COT_CommonLexicon_Eng_FINALAug12.pdf [<https://perma.cc/UHK2-UT5B>]), <http://www.iacp.org/Portals/0/documents/HomegrownViolentExtremismAwarenessBrief.pdf> [<https://perma.cc/NXX2-HL8D>]) (creating a definition for "homegrown violent extremist" from IACP's definitions for "violent extremist" and "homegrown violent extremist").

⁶⁷ See LYDIA ALFARO-GONZALEZ ET AL., NAT'L SECURITY CRITICAL ISSUE TASK FORCE, GEO. UNIV., REPORT: LONE WOLF TERRORISM 9 (2015) (emphasis omitted).

⁶⁸ In 2016, a Department of Homeland Security (DHS) report from the Homeland Security Advisory Committee adopted a definition of radicalization from John Horgan and Kurt Braddock's article entitled *Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-Radicalization Programs*, which defines radicalization as "[t]he social and psychological process of incrementally experienced commitment to extremist political or religious ideology. Radicalization may not necessary [sic] lead to violence but it is one of the several risk factors required for this." COUNTERING VIOLENT EXTREMISM (CVE) SUBCOMM., HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., INTERIM REPORT AND RECOMMENDATIONS 33 (2016) (citing John Horgan & Kurt Braddock, *Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-Radicalization Programs*, 22 TERRORISM & POL. VIOLENCE 267, 279 (2010)), <https://www.dhs.gov/sites/default/files/publications/HSAC/HSAC%20CVE%20Final%20Interim%20Report%20June%209%202016%20508%20compliant.pdf> [<https://perma.cc/P43S-YKWA>]. According to Faiza Patel, DHS has in the past defined radicalization "as the process of adopting an extremist belief system, including the willingness to use, support, or facilitate violence, as a method to effect societal change." FAIZA PATEL,

HVE is not synonymous with domestic terrorist.⁶⁹

An HVE operating as a lone offender poses a particularly challenging issue for counterterrorism efforts, as these operators are essentially invisible and hard to predict. The growth of the Internet and its increased accessibility has "accelerat[ed]" radicalization.⁷⁰ FTOs, like al-Qaeda and ISIL, have capitalized on this means of radicalization and have found success in using forums, publications, and social media to radicalize individuals around the world essentially anonymously. Immediately after the Orlando attack, al-Qaeda released an online supplement to its propaganda magazine, *Inspire*, which was specifically aimed at providing guidance for the "Lone Mujahid."⁷¹ In addition to praising Mateen's tactical decisions and offering suggestions on how HVEs and lone offenders can make attacks more deadly, the online pamphlet emphasized that al-Qaeda supports individuals acting in the name of jihad even if they do not claim allegiance to al-Qaeda: "Lone Jihad is not monopolized by al-Qaida (sic) or any other group, therefore we call upon all active Jihadi groups, to adopt and build upon the idea of Lone Jihad and call towards it."⁷² Similarly, the most recent issue of ISIL's propaganda magazine, *Dabiq*, specifically focused its message on the conversion to Islam of non-Muslims.⁷³ Whereas in the past *Dabiq* had concentrated its message for audiences in Muslim-majority countries, this issue calls for "breaking the cross" and a reversion from Christianity. The result of this targeted rhetoric is that individuals can utilize the instructions and directions of major FTOs without ever

BRENNAN CTR. FOR JUSTICE, RETHINKING RADICALIZATION 42 n.84 (2011) (quoting *The Threat of Islamic Radicalization to the Homeland: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 1 (2007) (written testimony of Michael Chertoff, Sec'y, Dep't of Homeland Sec.)).

⁶⁹ See JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42536, THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS 8–9 (2013); *supra* notes 17, 31–34 and accompanying text.

⁷⁰ Gordon Lederman, *Insider Threats: Homegrown Terrorism in the 21st Century*, in PATRIOTS DEBATE: CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW 16, 16 (Harvey Rishikof, Stewart Baker & Bernard Horowitz eds., 2012).

⁷¹ See Oren Segal, *New AQAP Publication Encourages Additional Attacks Following Orlando*, ANTI-DEFAMATION LEAGUE BLOG (June 27, 2016), <https://www.adl.org/blog/new-aqap-publication-encourages-additional-attacks-following-orlando> [<https://perma.cc/4ZVL-UK4T>].

⁷² See *id.* ((sic) in original) (quoting *Inspire Guide: Orlando Operation*, LONE JIHAD GUIDE TEAM, AL QAEDA IN THE ARAB PENINSULA (June 17, 2016), https://azelin.files.wordpress.com/2016/06/al-qacc84_idah-in-the-arabian-peninsula-22inspire-guide-orlando-operation22.pdf [<https://perma.cc/KT99-7A5E>]).

⁷³ *Break the Cross*, DABIQ, July 2016, at 46, <http://www.clarionproject.org/factsheets-files/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf> [<https://perma.cc/DW93-D98J>].

needing to be on their radar, let alone making themselves vulnerable to discovery and prosecution by the U.S. authorities through activities like an official claim of allegiance, travel to a country known to have terrorist safe-harbors, or the provision of “material support.” This added layer of anonymity encourages a more diverse array of people to become radicalized, although patterns suggest that HVEs are most likely to be male and under thirty years old.⁷⁴

The idea of “crowd-sourced” terrorism has fed into fears within the United States,⁷⁵ with 86% of Americans either “very concerned or somewhat concerned” about HVEs operating as lone offenders.⁷⁶ And these fears are well founded. For example, there were at least seventy-five terrorist plots linked to ISIL against Western countries from early 2014 to early 2016, with twenty-seven plots targeting U.S. interests at home or overseas.⁷⁷ Of those plots, 42.67% were successfully executed, 66.67% were “inspired” by ISIL (in contrast to being “directed” by ISIL), and 54% involved a lone offender.⁷⁸

Although the IC has shifted its strategies in response to this new threat environment,⁷⁹ agencies continue to rely on various watchlist screening systems developed in response to the PATRIOT Act and other legislation passed in response to 9/11. But the nature of terrorism has changed since the immediate aftermath of 9/11: this is a “new era in which centralized leadership of a terrorist organization matters less; group identity is more fluid; and violent extremist narratives focus on a wider range of alleged grievances and enemies.”⁸⁰ The story

⁷⁴ See Lederman, *supra* note 70, at 21 (citing DAVID SCHANZER, CHARLES KURZMAN & EBRAHIM MOOSA, *ANTI-TERROR LESSONS OF MUSLIM-AMERICANS* 10 (2010)). Research indicates that 90% of suspects involved in ISIS-linked terrorist plots were men, and 94% were under the age of thirty-four. HOMELAND SEC. COMM., U.S. HOUSE OF REPRESENTATIVES, #TERROR GONE VIRAL: OVERVIEW OF THE 75 ISIS-LINKED PLOTS AGAINST THE WEST: 2014–2016, at 4, 7 (2016), <https://homeland.house.gov/wp-content/uploads/2016/03/Report-Terror-Gone-Viral-1.pdf> [<https://perma.cc/HYW5-VFYF>].

⁷⁵ See HOMELAND SEC. COMM., *supra* note 74, at 5.

⁷⁶ Taylor R. Applegate, *Reassessing the Threat of Homegrown Violent Extremism in the United States: Overstated or Underestimated?*, SMALL WARS J. (Oct. 1, 2016, 8:55 AM), <http://smallwarsjournal.com/jrnl/art/reassessing-the-threat-of-homegrown-violent-extremism-in-the-united-states-overstated-or-un> [<https://perma.cc/3GEW-U68P>].

⁷⁷ See HOMELAND SEC. COMM., *supra* note 74, at 5.

⁷⁸ *Id.* at 4–5.

⁷⁹ See *Current Terrorist Threat to the United States: Hearing Before the S. Select Comm. on Intelligence*, 114th Cong. (2015) (prepared statement of Nicholas J. Rasmussen, Director, National Counterterrorism Center).

⁸⁰ BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, *COUNTRY REPORTS ON TERRORISM* 2014, at 8 (2015).

of Omar Mateen illustrates that the current watchlist system is failing to keep up with the threat of HVEs and lone offenders. Even if the system is working as a whole, it is displaying vulnerabilities that will only become more obvious, and evidence suggests that attacks conducted by HVEs and lone offenders will only continue to increase. As former National Security Advisor Condoleezza Rice testified, “[T]hose charged with protecting [the United States] from attack have to succeed 100 percent of the time. . . . [T]he terrorists only have to succeed once, and we know they are trying every day.”⁸¹

B. U.S. Terrorist Watchlist System: The Terrorist Screening Center⁸²

In September 2003, President George W. Bush signed Homeland Security Presidential Directive 6 (HSPD-6), which called for the creation of an integrated screening and information system.⁸³ Less than three months later, the Terrorist Screening Center (TSC) was established as the governing body responsible for maintaining a central repository for intelligence gathered on known or suspected terrorists.⁸⁴ Although the FBI is the mandated administrator of the TSC, the entire IC contributes to the staffing and function of its 24/7 operational requirements.⁸⁵ This coordinated system improves the communication problems between the IC and law enforcement bodies as evident in the immediate aftermath of 9/11 through the

⁸¹ *Opening Remarks: Hearing Before the Nat’l Comm’n. on Terrorist Attacks upon the U.S.*, 108th Cong. (2004) (prepared statement of Dr. Condoleezza Rice, National Security Advisor).

⁸² This Note relies on an open-source analysis of the watchlist system, as many of the operational and intelligence-related intricacies of the system remain classified. See, e.g., OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REPORT 07-41, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER xviii (2007), <https://oig.justice.gov/reports/FBI/a0741/final.pdf> [<https://perma.cc/L388-8WFH>] [hereinafter DOJ AUDIT OF THE TERRORIST SCREENING CENTER] (discussing TSC’s “nondisclosure policy [that] protects U.S. counterterrorism operations and intelligence objectives and safeguards the personnel involved in these sensitive activities”). For a comprehensive, probability-based understanding of the watchlist system, see MARC SAGEMAN, MISUNDERSTANDING TERRORISM 55–87 (2017).

⁸³ Press Release, President George W. Bush, Homeland Security Presidential Directive/HSPD-6: Integration and Use of Screening Information (Sept. 16, 2003), <https://fas.org/irp/offdocs/nspd/hspd-6.html> [<https://perma.cc/UJY9-JUJZ>].

⁸⁴ JEROME P. BJELOPERA, BART ELIAS & ALISON SISKIN, CONG. RESEARCH SERV., R44678, THE TERRORIST SCREENING DATABASE AND PREVENTING TERRORIST TRAVEL 1–4 (2016).

⁸⁵ See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *supra* note 82, at iv; *Five Years After the Intelligence Reform and Terrorism Prevention Act: Stopping Terrorist Travel: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 1–2 (2009) (prepared statement of Timothy J. Healy, Director, Terrorist Screening Center, Federal Bureau of Investigation).

passage of the PATRIOT Act and the release of the 9/11 Commission Report.⁸⁶

1. *The Terrorist Screening Database*

The TSC maintains the Terrorist Screening Database. The TSDB is a sensitive database consisting of unclassified “identity information of those who are known to be or reasonably suspected of being involved in terrorist activities.”⁸⁷ According to a 2016 congressional report, the TSC consists of three main processes: nomination, verification, and screening.⁸⁸

During the nomination process to include an individual in TSDB, IC analysts “nominat[e]” individuals for inclusion in TSDB based on “raw” intelligence.⁸⁹ For individuals already being investigated by the FBI, the nomination process starts when the “nominating official” sends an email to the Terrorist Review and Examination Unit (TREX) at FBI headquarters.⁹⁰ This email contains the following attachments: an opening Electronic Communication, a Notice of Initiation, and a completed electronic form FD-930 requesting the subject be entered in the National Criminal Information Center’s (NCIC) “Known or Suspected Terrorist File” (KST File)—a database that emerged from the Violent Gang and Terrorist Organization File (VGTOF), which had been implemented in 1994 to track criminal and terrorist organizations and which, in 2009, the government split into the “Gang File” and KST File.⁹¹ After

⁸⁶ See *supra* section I.A.1.

⁸⁷ FED. BUREAU OF INVESTIGATION, TERRORIST SCREENING CENTER - FAQs 1 (2017), <https://www.fbi.gov/file-repository/terrorist-screening-center-frequently-asked-questions.pdf/view> [<https://perma.cc/32JY-R7MJ>] [hereinafter FBI FAQs].

⁸⁸ See BJELOPERA, ELIAS & SISKIN, *supra* note 84, at 3.

⁸⁹ *Id.* at 4.

⁹⁰ See FED. BUREAU OF INVESTIGATIONS, Section 19-06 (U) TERRORISM SCREENING PROCEDURES (WATCHLISTING) (2011), https://epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11_Screening_Procedures.pdf [<https://perma.cc/9RPF-7AUF>] [hereinafter FBI WATCHLISTING].

⁹¹ *Id.*; COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, SF-115-109, REQUEST FOR RECORDS DISPOSITION AUTHORITY (2008), https://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0065/n1-065-08-011_sf115.pdf [<https://perma.cc/SL8R-DGHA>]. The VGTOF was originally created as a hybrid terrorism and criminal database. See *Statement Before the S. Subcomm. on Immigration, Border Security, and Washington DC*, 108th Cong. 1 (2003) (prepared statement of Michael D. Kirkpatrick, Assistant Director in Charge, Federal Bureau of Investigation); AM. CIVIL LIBERTIES UNION, TRAPPED IN A BLACK BOX: GROWING TERRORISM WATCHLISTING IN EVERYDAY POLICING 5 n.11 (2016) [hereinafter TRAPPED IN A BLACK BOX]. Within the KST File, each entry is assigned a handling code that serves as guidance for law enforcement officials who may encounter the individual. See COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, COUNTERTERRORISM PROGRAM GUIDANCE, WATCHLISTING, ADMINISTRATIVE AND OPERATIONAL GUIDANCE 5–8 (2010), <https://epic.org/privacy/airtravel/>

review, TREX forwards the attachments to the National Counterterrorism Center (NCTC) for those known or suspected terrorists designated as “international terrorists.”⁹²

During the verification process, NCTC primarily decides whether nominated individuals meet the criteria to be included in TSDB as known or suspected terrorists.⁹³ In order for a nominated individual to be verified for inclusion in TSDB, NCTC must satisfy two requirements. First, all nominations must satisfy the “reasonable suspicion watchlisting standard.”⁹⁴ This standard requires that NCTC demonstrate to TSC that the nominating official selected the individual for TSDB based on an “objective factual basis.”⁹⁵ Using a totality of the circumstances test, NCTC must show that the IC analysts relied upon “‘articulable’ intelligence or information which . . . reasonably warrants a determination that the subject is known or suspected to be (or has been) knowingly engaged in conduct constituting, in preparation for, in aid of, or related to terrorism or terrorist activities.”⁹⁶ For example, NCTC evaluates Terrorist Identities Datamart Environment (TIDE)—an NCTC system containing primarily classified information on known or suspected terrorists—to verify intelligence gathered on nominees.⁹⁷ Second, even if the TSC concludes that NCTC met the “reasonable suspicion watchlisting standard,” NCTC must provide a minimum amount of identifying information for

EPIC_DOJ_FOIA_NoFlyList_09_13_11_CT_Guidance.pdf [https://perma.cc/878T-VTVL] [hereinafter FBI MEMO ON COUNTERTERRORISM PROGRAM].

⁹² See 18 U.S.C. § 2331 (2012); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REPORT 08-16, AUDIT OF THE U.S. DEPARTMENT OF JUSTICE TERRORIST WATCHLIST NOMINATION PROCESSES 6 (2008), <https://oig.justice.gov/reports/plus/a0816/final.pdf> [https://perma.cc/8FDD-A56G]. TSC directly handles all “domestic terrorists.”

⁹³ The FBI’s TREX processes its own TSDB nominations, except for nominations that are “purely international suspects.” See BJELOPERA, ELIAS & SISKIN, *supra* note 84, at 4–5. Before 2009, TREX entered all nominations sent to NCTC into VGTOF, regardless of what NCTC ultimately did with the information. Thus, as a matter of presumed efficiency, no automatic link existed between TSDB and these VGTOF submissions, and any modifications or changes made by TSC on TSDB, which would traditionally move “downstream” into VGTOF, failed to do so for these NCTC and TSC “bypassing” submissions. This “cumbersome” process was a highlight of a 2007 DOJ audit of the watchlisting system and emphasizes the historic inefficiencies that the modern watchlist system is built upon. See DOJ AUDIT OF THE TERRORIST SCREENING CENTER, *supra* note 82, at viii–x.

⁹⁴ See BJELOPERA, ELIAS & SISKIN, *supra* note 84, at 5.

⁹⁵ See FBI MEMO ON COUNTERTERRORISM PROGRAM, *supra* note 91, at 3.

⁹⁶ *Id.*; FBI FAQs, *supra* note 87, at 2.

⁹⁷ TIDE supplies “downstream” intelligence to TSDB. See NAT’L COUNTERTERRORISM CTR., TERRORIST IDENTITIES DATAMART ENVIRONMENT (TIDE) (2017), https://www.dni.gov/files/NCTC/documents/features_documents/TIDEfactsheet10FEB2017.pdf [https://perma.cc/J64Q-92Q8].

a nomination to qualify for TSDB.⁹⁸ To qualify for inclusion in TSDB, the nominating official must include the nominee's "last name 'and at least one additional piece of identifying information'" such as date of birth, place of birth, social security number, physical identifiers, and known locations.⁹⁹

During the third phase, the screening process, federal agencies inside and outside of the IC can "export" the records included in TSDB and incorporate them into their own database systems.¹⁰⁰ This creates a "downstream" of information flowing from TSDB as the centralized system to other agencies and law enforcement organizations. Agencies such as the Department of Homeland Security (including the Customs and Border Patrol (CBP)), the Department of State, and other travel-related agencies use TSDB's "downstream" model to facilitate their missions and accentuate their own screening databases.¹⁰¹ For example, CBP maintains its own screening system called the TECS System (TECS), in addition to an Automated Targeting System (ATS) that allows for "risk-based targeting scenarios and assessments"—both systems rely heavily on TSDB information.¹⁰² When a CBP officer encounters an individual at a border crossing, the individual's information is run against TECS and ATS, and it is then sent to the TSC. If there is a positive hit, TSC forwards the information to the FBI for review, and the FBI will then alert law enforcement if further action is required.¹⁰³

⁹⁸ BJELOPERA, ELIAS & SISKIN, *supra* note 84, at 5–6; *see also* FBI WATCHLISTING, *supra* note 90, at 4 (providing a full list of the identifier requirements).

⁹⁹ BJELOPERA, ELIAS & SISKIN, *supra* note 84, at 6 (quoting OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT 14-16 AUDIT OF THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION 3 (2014), <https://oig.justice.gov/reports/2014/a1416.pdf> [<https://perma.cc/3B8Q-YTBT>]); FBI MEMO ON COUNTERTERRORISM PROGRAM, *supra* note 91, at 20.

¹⁰⁰ *See* DOJ AUDIT OF THE TERRORIST SCREENING CENTER, *supra* note 82, at iii–viii.

¹⁰¹ *See* BJELOPERA, ELIAS & SISKIN, *supra* note 84, at 7–9.

¹⁰² *Id.* at 3, 8 (quoting U.S. DEP'T OF HOMELAND SEC., DHS/CBP/PIA-006(d), PRIVACY IMPACT ASSESSMENT UPDATE FOR THE AUTOMATED TARGETING SYSTEM – TSA/CBP COMMON OPERATING PICTURE PHASE II, at 1 (2014), https://www.dhs.gov/sites/default/files/publications/privacy_pia_cbp_tsacop_09162014.pdf [<https://perma.cc/R9FP-XYJC>]).

¹⁰³ For a detailed summary of a hypothetical encounter, *see* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT 05-27 REVIEW OF THE TERRORIST SCREENING CENTER 37–39 (2005), <https://oig.justice.gov/reports/FBI/a0527/final.pdf> [<https://perma.cc/56JJ-HBSL>]; DOJ AUDIT OF THE TERRORIST SCREENING CENTER *supra* note 82, at iv–vi.

2. *The No Fly List*

The Transportation Security Administration also queries data from TSDB but primarily draws information from TSDB’s subdatabases including the No Fly List.¹⁰⁴ The No Fly List is a narrow offshoot of the TSDB, specifically tailored to prevent “an individual who may present a threat to civil aviation or national security from boarding a commercial aircraft that traverses U.S. airspace.”¹⁰⁵ As of June 17, 2016, the No Fly List contained around 81,000 records with 1% of those records consisting of “U.S. persons”; in contrast, TSDB includes around 1 million records with 0.5% of those records consisting of “U.S. persons.”¹⁰⁶

The No Fly List is more selective than TSDB and has unique “minimum substantive derogatory criteria requirements.”¹⁰⁷ Most of the requirements remain classified; however, the process seems to involve the same general pattern as that modeled from TSDB selection.

One such requirement, declassified in 2011 as part of a Freedom of Information Act, or FOIA, request, indicates that the minimum identifying information required to include someone on the No Fly List is a first name, last name, and date of birth.¹⁰⁸ There is also an “expedited nomination” process for nominations to the No Fly List that bypasses some of the normal review and oversight processes required of a routine TSDB

¹⁰⁴ See *Ensuring America’s Safety: Cleaning Up the Nation’s Watchlists: Hearing Before the Subcomm. on Transp. Sec. and Infrastructure Prot. of the H. Comm. on Homeland Sec.*, 110th Cong. 15–17 (2008) (prepared statement of Richard S. Kopel, Principal Deputy Director, Terrorist Screening Center, Federal Bureau of Investigation). Other TSDB subdatabases with higher selectivity criteria include the Selectee List and Expanded Selectee List. See OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., IMPLEMENTATION AND COORDINATION OF TSA’S SECURE FLIGHT PROGRAM (REDACTED) 11 (2012), https://www.oig.dhs.gov/assets/Mgmt/2012/OIGr_12-94_Jul12.pdf [<https://perma.cc/3Q92-8GT2>]; OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION (REDACTED) 10 (2009), https://www.oig.dhs.gov/assets/Mgmt/OIGr_09-64_Jul09.pdf [<https://perma.cc/PZA7-N9GF>] [hereinafter INSPECTOR GEN., ROLE OF THE NO FLY].

¹⁰⁵ See FBI FAQs, *supra* note 87, at 2.

¹⁰⁶ OFFICE OF SENATOR DIANNE FEINSTEIN, FINDINGS FROM JOINT RESPONSE FROM THE NATIONAL COUNTERTERRORISM CENTER (NCTC) AND THE FEDERAL BUREAU OF INVESTIGATION (FBI) TO CONGRESSIONAL QUESTIONS REGARDING THE TERRORIST IDENTITIES DATAMART ENVIRONMENT (TIDE) AND THE TERRORIST SCREENING DATABASE (TSDB) (2016), http://www.feinstein.senate.gov/public/_cache/files/f/b/fb745343-1dbb-4802-a866-cfdfa300a5ad/BCD664419E5B375C638A0F250B37DCB2.nctc-tsc-numbers-to-congress-06172016-nctc-tsc-final.pdf [<https://perma.cc/ER63-W7WT>].

¹⁰⁷ INSPECTOR GEN., ROLE OF THE NO FLY, *supra* note 104, at 9, 54.

¹⁰⁸ See FBI MEMO ON COUNTERTERRORISM PROGRAM, *supra* note 91, at 12.

nomination.¹⁰⁹ TSC directly makes a decision on the nomination, but they are required to initially meet the normal TSDB inclusion requirements of the “reasonable suspicion watchlisting standard” and the production of identifying information threshold.¹¹⁰ Once included on the No Fly List, the record is then sent to NCTC for post-hoc review and inclusion in TIDE (or to TREX Unit for domestic terrorists records). Within seventy-two hours of the expedited nomination, if the nominating official does not complete the normal TSDB nomination process along with meeting the more stringent standards to be included on the No Fly List, then the individual’s record is removed from the No Fly List and TSDB.¹¹¹

Overall, the lack of transparency for nominations to the No Fly List remains a challenge to its constitutional legitimacy. TSC has an obligation to constantly update and remove records from TSDB and its subdatabases, but the process is not well-defined in the public record.¹¹² For example, TSC’s Nominations and Data Integrity Unit periodically reviews the records during a process called Quality Assurance Special Projects; however, it is unknown how frequently this review is conducted.¹¹³ Additionally, there is a redress system in place for individuals who challenge their inclusion on the list and a sifting system, called the Terrorist Encounter Review Process, that “automatically” reviews the database to ensure there is no redundancy or improper inclusion.¹¹⁴ Despite these processes in place, the general “secrecy” of the system has opened the door for litigation over the erroneous inclusions of individuals on the No Fly List.¹¹⁵ There is a public concern that any inaccuracy stemming from the shadows of TSDB or the No Fly List will allow for an unchecked system of racial and ethnic profiling, will infringe upon due process rights, and will pose a challenge to other constitutionally protected fundamental rights.¹¹⁶

¹⁰⁹ See DOJ AUDIT OF THE TERRORIST SCREENING CENTER, *supra* note 82, at 41–43; FBI WATCHLISTING, *supra* note 90.

¹¹⁰ BJELOPERA, ELIAS & SISKIN, *supra* note 84, at 5; FBI MEMO ON COUNTERTERRORISM PROGRAM, *supra* note 91, at 3; see FBI WATCHLISTING, *supra* note 90.

¹¹¹ FBI WATCHLISTING, *supra* note 90.

¹¹² See *id.*

¹¹³ See INSPECTOR GEN., ROLE OF THE NO FLY, *supra* note 104, at 13.

¹¹⁴ See Kopel, *supra* note 104.

¹¹⁵ Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1319 (2016); see also Shirin Sinnar, *Towards a Fairer Terrorist Watchlist*, 40 ADMIN. & REG. L. NEWS 4, 4–5 (2015) (questioning the “opaque” watchlisting process).

¹¹⁶ See, e.g., JARED P. COLE, CONG. RESEARCH SERV., R43730, TERRORIST DATABASES AND THE NO FLY LIST: PROCEDURAL DUE PROCESS AND HURDLES TO LITIGATION 9–19 (2015) (arguing that the No Fly List could potentially violate a person’s

C. Current U.S. Gun Regulations and the “Terror Gap”

Concurrent with the establishment of the United States, gun ownership and the right to bear arms has been an intricate, yet controversial, part of American history. In 1791, Congress adopted the Second Amendment to ensure that: “[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.”¹¹⁷ Yet while Federalists and Anti-Federalists argued the merits of the Bill of Rights in light of federalism, there was disagreement in Congress and among the general public over the role of the militia and the possession of arms in the post-Revolution society.¹¹⁸ In 1788, Alexander Hamilton wrote in *Federalist* No. 29 that:

There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity or with raillery; . . . [w]here in the name of COMMON-SENSE, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits and interests?¹¹⁹

Hamilton’s plea for “common-sense” failed to reverberate. Even James Madison, the author of the Second Amendment, argued in his 1789 speech to Congress in favor of the Bill of Rights that, “the greatest danger lies . . . in the body of the people, operating by the majority against the minority.”¹²⁰ Neverthe-

constitutionally protected interest in, for example, international travel and freedom from reputational harm or stigma).

¹¹⁷ U.S. CONST. amend. II.

¹¹⁸ The debate over the Second Amendment extends past mere counterterrorism concerns. See, e.g., MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* 215–18 (2000) (detailing the history of gun culture in the United States); SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 62–65 (2006) (evaluating Congressional and public opinion toward the Second Amendment at the time of its adoption).

¹¹⁹ THE FEDERALIST NO. 29, at 144 (Alexander Hamilton) (Ian Shapiro ed., 2009) (emphasis added); see also David W. Brown, *How Hamilton Solved America’s Gun Problem — 228 Years Ago*, WEEK (June 15, 2016), <http://theweek.com/articles/629815/how-alexander-hamilton-solved-americas-gun-problem—228-years-ago> [<https://perma.cc/V5FN-LASD>] (arguing that Hamilton might have resolved the gun debate in 1788 during discussions over the language of the Second Amendment).

¹²⁰ James Madison, Speech in Defense of the Bill of Rights (June 8, 1789) (transcript available at https://www.wwnorton.com/college/history/archive/reader/trial/directory/1783_1790/ch08_madison_speech.htm) [<https://perma.cc/Z656-9XUA>].

less, the Second Amendment passed as a provision wrought with disagreement and varying interpretations.¹²¹ An essential part of understanding modern gun regulations and policy is acknowledging that there was not and has never been a consensus as to the Second Amendment's scope and meaning.

In 2008, the Supreme Court in *District of Columbia v. Heller* held in a 5–4 decision that private citizens have a right to gun ownership independent from serving in a militia.¹²² Writing for the majority, Justice Antonin Scalia dissected the language of the Second Amendment to conclude that the District of Columbia's handgun ban and the trigger-lock requirement violated the constitutional guarantee of an individual's right to bear arms.¹²³ Yet Justice Scalia explicitly acknowledged that the private right to bear arms is not without limitations and stated that the Court “do[es] not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation.”¹²⁴ Justice Scalia further noted that “nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms.”¹²⁵ Given this interpretation, there is not a universal, unlimited right to gun ownership in the United States. Therefore, legislation and programs that regulate the purchase of guns, such as the Brady Handgun Violence Prevention Act (Brady Act) and the National Instant Criminal Background Check System (NICS), remain constitutional following *Heller*.¹²⁶

Congress passed the Brady Act in 1993, which in part mandated the creation of a national background check system that screens buyers prior to any firearm purchase.¹²⁷ Launched in 1998, NICS requires Federal Firearms Licensees (FFLs)—licensed gun sellers—to run a background check on all prospective buyers via a FBI-based system maintained in coor-

¹²¹ See CORNELL, *supra* note 118, at 64–65.

¹²² *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (5–4 decision) (Stevens, J., dissenting); see also *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (“[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

¹²³ See *Heller*, 554 U.S. at 595; DAVID DEGRAZIA & LESTER H. HUNT, *DEBATING GUN CONTROL: HOW MUCH REGULATION DO WE NEED?* 134 (2016).

¹²⁴ *Heller*, 554 U.S. at 595 (alteration in original).

¹²⁵ *Id.* at 626–27.

¹²⁶ In the dissent, Justice John Paul Stevens takes Scalia's concession a step further by questioning whether the majority provided any support for the proposition that the Second Amendment can “limit the power of Congress to regulate civilian uses of weapons.” *Id.* at 639 (Stevens, J., dissenting).

¹²⁷ Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2012)).

dination with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) as well as state and local law enforcement entities.¹²⁸ A NICS query is considered "instantaneous"; in 2015, the total processing time averaged 446.3 seconds for phone queries and 107.5 seconds for e-checks. Once a prospective buyer completes the ATF Form 447, the FFL contacts the FBI's Criminal Justice Information Services Division's NICS Section either through telephone to the NICS Contracted Call Centers or through an e-check method. NICS runs queries on the information provided using three databases: Interstate Identification Index, National Crime Information Center, and the NICS Index.¹²⁹ If there are no automatic hits, the transaction is approved. If there is an automatic hit, the transaction is "delayed" while the background check gets transferred to a NICS Legal Instruments Examiner (NICS Examiner).¹³⁰

The NICS Examiner, unlike those at the NICS Contracted Call Centers, has access to the sensitive information raised during the query and makes the determination as to the existence of "prohibitive criteria" based on either 18 U.S.C. § 922 or state law.¹³¹ If the NICS Examiner finds the existence of "potentially prohibitive criteria," then the transaction is again "delayed" and the NICS Examiner has three business days to research the individual. After three business days, the application will be approved, denied, or remain pending without a "final determination" status. If the latter, the FFL has discretion to either approve or deny the transaction; however, the FFL is bound by state law as well as ATF Form 4473 line 21d, which requires the FFL to record all instances where a firearm was transferred under the no "final determination" status. Even if NICS fails to provide a final determination, NICS Examiners can continue investigating the case for ninety days.¹³² Any individuals denied the purchase of a gun are able to appeal the decision through the NICS Section.

Not all U.S. states satisfy the background check requirements under the Brady Act using NICS Section directly. While

¹²⁸ See *About NICS*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/services/cjis/nics/about-nics> [<https://perma.cc/WV8N-77Q9>].

¹²⁹ *The NICS Improvement Amendments Act of 2007*, BUREAU JUST. STAT. (last updated Sept. 22, 2017), <https://www.bjs.gov/index.cfm?ty=TP&tid=49> [<https://perma.cc/CC7A-Y3VY>].

¹³⁰ See *About NICS*, *supra* note 128.

¹³¹ *Id.*

¹³² Press Release, Sen. Dianne Feinstein, GAO: 91 Percent on Terrorist Watch List Pass Firearm Background Checks (June 15, 2016), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=504741EF-A600-4FA4-BE0C-71CDD80F97CC> [<https://perma.cc/T4BA-5TFW>].

thirty-six U.S. states and territories have adopted NICS in its entirety, thirteen states are Full Point-of-Contact (Full POC) states that administer their own form of NICS in compliance with the Brady Act.¹³³ And seven states are Partial Point-of-Contact (Partial POC) states that use NICS for long gun¹³⁴ purchases but maintain a Brady-compliant state agency for running background checks on handgun purchases. Nevertheless, all U.S. states and territories, regardless of NICS status, rely to some degree on the federal databases associated with NICS.

Yet despite the overwhelming reliance on federal databases (specifically FBI-administered databases) for Brady-mandated background checks, there is a considerable lack of overlap between NICS and TSDB. Only since 2004 have NICS queries included a search of NCIC's VGTOF records, specifically known since 2009 as the KST File.¹³⁵ Although TSC technically maintains the KST File as part of the watchlist nomination process, the KST File falls under NCIC as one of its twenty-one files that functions under a "shared management concept" between FBI and other federal, state, or local law enforcement agencies.¹³⁶ Essentially, the KST File is a "downstream" version of TSDB.¹³⁷ And as a "downstream" database, the validity of NICS using the KST File as its main counterterrorism tool is questionable.

When "downstream" watchlist databases "export" the information from TSDB, there is a copy-paste transfer of information. Thus, in using the KST File, NICS relies on a watered-down version of TSDB that was originally created as a pre-9/11 hybrid criminal database (i.e. VGTOF) and that contains "hundreds of thousands of entries" while "lack[ing] adequate substantive oversight for existing entries and utiliz[ing] a low 'reasonable suspicion' evidentiary standard that is subject to

¹³³ See *About NICS*, *supra* note 128.

¹³⁴ BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, U.S. DEP'T OF JUSTICE, ATF E-FORM 4473 (5300.9), FIREARMS TRANSACTION RECORD (2016), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> [<http://perma.cc/H48Z-27W3>].

¹³⁵ WILLIAM J. KROUSE, CONG. RESEARCH SERV., R42336, TERRORIST WATCH LIST SCREENING AND BACKGROUND CHECKS FOR FIREARMS 12-13 (2013); TRAPPED IN A BLACK BOX, *supra* note 91, at 1; see *supra* subpart I.B.

¹³⁶ See *National Crime Information Center (NCIC)*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/ncic> [<https://perma.cc/9WA4-KL9Q>].

¹³⁷ *Statement Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. (2010) (prepared statement of Daniel D. Roberts, Former Assistant Director, Criminal Justice Information Services, Federal Bureau of Investigation); KROUSE, *supra* note 135; TRAPPED IN A BLACK BOX, *supra* note 91, at 16; see *supra* subpart I.B.

numerous exceptions.”¹³⁸ Analysts transferring names to the KST File do not have to meet a higher “minimum substantive derogatory criteria” threshold, as they would in TSDB sub-databases such as the No Fly List where a higher selectivity requirement from that of TSDB must be met prior to inclusion.¹³⁹ This means that there is a danger for an over-inclusion of individuals in the KST File—scholars have criticized the KST File for widespread “erroneous inclusion” and promotion of “silent hits.”¹⁴⁰

Similarly, there is a danger that the KST File fosters inaccuracies and under-inclusion. Statistics show that a high number of NICS searches that result in positive KST File hits eventually receive approval. According to data from the FBI, 91% of NICS checks in 2015 that included a positive hit on the KST File were eventually approved, with only 21 buyers out of 244 denied.¹⁴¹ This means that either the KST File is so over-inclusive that it fails to properly function at all (which is unlikely), or that there is a systemic disconnect between the standard to qualify for the KST File and the standard for getting NICS approval. If the latter, it could mean that the KST File is “very rarely . . . result[ing] in arrests or detention,” either by failing to include people in the KST File who should be there or letting people slip through the cracks due to duplicate files or other inaccuracies as a result of the “downstream” flow of information.¹⁴² But it could also mean that valid known or suspected terrorists, individuals who should rightly be included in the KST File, are legally acquiring guns. Taking it a step further, it is unknown how many of those 223 buyers who had positive KST File hits also appeared on the No Fly List.¹⁴³ As noted, the No Fly List has a higher selectivity requirement, but this information remains classified, and critics for many years have questioned the legitimacy of the standard. How many of these individuals on the No Fly List were able to pass NICS and purchase a gun? While the “prohibitive criteria” disqualifying buyers under 18 U.S.C. § 922 does not prohibit an individual appearing on the TSDB—including the KST File or even the No

¹³⁸ TRAPPED IN A BLACK BOX, *supra* note 91, at 1–2.

¹³⁹ INSPECTOR GEN., ROLE OF THE NO FLY, *supra* note 104, at 9.

¹⁴⁰ TRAPPED IN A BLACK BOX, *supra* note 91, at 2–3, 32.

¹⁴¹ See Feinstein, *supra* note 132.

¹⁴² TRAPPED IN A BLACK BOX, *supra* note 91, at 22–23.

¹⁴³ See, e.g., David A. Graham, *How Obama’s Gun-Control Push Inverted the Politics of the No-Fly List*, ATLANTIC (Dec. 7, 2015), <http://www.theatlantic.com/politics/archive/2015/12/no-fly-list-inverted-politics/419172> [<https://perma.cc/KQ44-VQM7>] (“GAO found that ‘several’ people on the no-fly list were allowed to buy guns.”).

Fly List—from purchasing a weapon,¹⁴⁴ there is a “common sense” argument that a person who cannot be trusted on an airplane should also not be trusted to buy a gun. This is the “terror gap.”

II

PAST AND CURRENT ATTEMPTS TO CLOSE THE “TERROR GAP”: WHY A STATUTORY FIX IS NOT FEASIBLE

Closing the “terror gap” directly via statutory modification appears, at first glance, to be an easy and logical fix. For example, Congress could amend 18 U.S.C. § 922 to include language prohibiting known or suspected terrorists from owning a weapon. However, such a fix raises both constitutional and policy issues that further splinter an already staunchly divided political environment, making it very unlikely that Congress will ever find a solution that satisfies both sides of the aisle. Despite the contention, there have been several legislative pushes to close the “terror gap” from Democrat-led, Republican-led, and bipartisan initiatives. Yet each of these initiatives has floundered. In this Part, I will argue there are three main reasons why a direct statutory fix to close the “terror gap” will fail.

First, the current political environment shuns compromise. According to the Pew Research Center, “[p]olitical polarization is the defining feature of early 21st century American politics, both among the public and elected officials.”¹⁴⁵ Regardless of the issue at hand, Congressional members (and the public) are increasingly voting in line with their party’s platform.¹⁴⁶ When translating this divide into gun control initiatives, the Republican position has become synonymous with a broad interpretation of the Second Amendment that promotes “gun rights over gun control.”¹⁴⁷ In 2015, a poll of the general public indicated that 71% of Republicans favor legislation pro-

¹⁴⁴ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2012)).

¹⁴⁵ Carroll Doherty, *7 Things to Know About Polarization in America*, PEW RES. CTR. (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america> [<https://perma.cc/HJ5A-4J3Y>].

¹⁴⁶ See, e.g., Christopher Ingraham, *A Stunning Visualization of Our Divided Congress*, WASH. POST: WONKBLOG (Apr. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/23/a-stunning-visualization-of-our-divided-congress/?utm_term=.021a86f6568d [<https://perma.cc/9LRP-G3WT>] (describing a “political mitosis” in voting patterns between Republicans and Democrats within the House of Representatives).

¹⁴⁷ Amber Phillips, *The NRA-ification of the Republican Party*, WASH. POST: THE FIX (Aug. 14, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/>

protecting gun rights, while 73% of Democrats favor legislation focusing on gun control.¹⁴⁸ Additionally, lobbying groups such as the National Rifle Association (NRA) remain exceptionally powerful forces behind the Republican congressional caucus’ general reluctance to compromise on Democrat and bipartisan initiatives to close the “terror gap.” With constituent votes and campaign donations on the line, Republican congressional members feel pressure from the NRA to focus on legislation promoting gun rights and to oppose gun control measures, such as modifying 18 U.S.C. § 922.¹⁴⁹

Second, 18 U.S.C. §§ 2339A and 2339B are relatively inflexible in relation to the Second Amendment and are not a statutorily viable mechanism for closing the “terror gap.” There is precedent for when prosecutors can use “material support,” but these cases widely deal with First Amendment issues such as freedom of speech and freedom of association.¹⁵⁰ In contrast, there has been very little precedent for the overlap between “material support” and gun ownership, and there is none between the “material support” provisions, NICS, and TSDB. Prosecutors are unlikely to argue that an individual who appears in TSDB but who passes NICS and buys a gun could be liable for “material support”—a hit on TSDB is not strong enough, or reliable enough, to stand on its own as a means of triggering a “material support” charge. And with concerns surrounding accuracy, over-inclusion, and under-inclusion on TSDB, this disinclination is warranted.¹⁵¹ The individual would have to buy the gun and then either provide some other means of “material support,” such as sending money to the terrorist group, or commit an attack before prosecutors would be able to charge the individual.¹⁵² A counterterrorism policy that is always a step behind is ineffective; in the age of HVEs, it

08/14/the-nra-ification-of-the-republican-party/?utm_term=.94686324267e [https://perma.cc/J2B4-47TG].

¹⁴⁸ PEW RESEARCH CTR., CONTINUED BIPARTISAN SUPPORT FOR EXPANDED BACKGROUND CHECKS ON GUN SALES: MORE POLARIZED VIEWS OF THE NRA’S INFLUENCE 6 (2015).

¹⁴⁹ Nevertheless, while the NRA opposes background checks, the public generally supports them. See *id.* at 2, 4; *Background Checks: NICS*, NAT’L RIFLE ASS’N.-INST. FOR LEG. ACTION (Aug. 8, 2016), <https://www.nraila.org/issues/background-checks-nics> [https://perma.cc/BJ34-WZ84].

¹⁵⁰ See *supra* section I.A.2; see, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39–40 (2010) (rejecting that § 2339B violated plaintiff’s First Amendment right by distinguishing “mere association” from association that includes the provision of “material support”).

¹⁵¹ See TRAPPED IN A BLACK BOX, *supra* note 91, at 2–3.

¹⁵² See *supra* section I.A.2. See generally NAT’L COUNTERTERRORISM CTR., *supra* note 97 (listing the types of conduct that would warrant inclusion in TIDE, includ-

is dangerous and counterproductive. Therefore, any legislative attempt to close the “terror gap” by modifying the language of §§ 2339A and 2339B would pose potentially enormous constitutional repercussions, including fears over infringement of an individual’s guaranteed right to bear arms. Unless the watchlist system itself is completely overhauled, modifying §§ 2339A and 2339B to close the “terror gap” is impractical.

Third, past statutory proposals have focused on closing the “terror gap” through bills primarily packaged as gun control legislation instead of national security legislation. Ironically, the NRA-endorsed¹⁵³ George W. Bush administration was the first to attack the apparent discontinuity between the watchlist system and regulations surrounding gun ownership. In a Government Accountability Office (GAO) report in 2005, the government acknowledged that, even after the NICS started to query the TSDB in 2004, there was still a statutory hole that did not make it illegal for a member of a terrorist organization to purchase a gun, as long as the person successfully passed NICS.¹⁵⁴ The GAO recommended to Congress that the Department of Justice reexamine the watchlist system, strengthen the list, and reinforce FBI oversight of the system in order to prevent terrorists from buying guns.¹⁵⁵ Yet there was a decisive flip flop of position in 2009 when President Barack Obama assumed office. Where Democrats had once opposed the strengthening of TSDB, they now pursued a more aggressive watchlisting policy centered around gun control; in contrast, Republicans argued in favor of relaxing the watchlist system in order to promote gun rights. Both parties used the watchlist system as a “tactical tool” to promote their own gun control policy.¹⁵⁶ No compromise was made.

Most recently, Senator Dianne Feinstein’s (D-CA) Denying Firearms and Explosives to Dangerous Terrorists Act of 2015, Senator John Cornyn’s (R-TX) Securing Our Homeland from Radical Islamists and Enhancing Law Enforcement Detection Act (SHIELD Act), and Senator Susan Collins’s (R-ME) Terrorist

ing committing an international terrorist attack, soliciting funds for a terrorist organization, and providing material support).

¹⁵³ NRA Endorses George W. Bush for President, NAT’L RIFLE ASS’N.-INST. FOR LEG. ACTION (Oct. 13, 2004), <https://www.nraila.org/articles/20041013/nra-endorses-george-w-bush-for-preside> [https://perma.cc/P9JA-W34J].

¹⁵⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-127, GUN CONTROL AND TERRORISM: FBI COULD BETTER MANAGE FIREARM-RELATED BACKGROUND CHECKS INVOLVING TERRORIST WATCH LIST RECORDS 4–5 (2005).

¹⁵⁵ See *id.* at 26.

¹⁵⁶ See Graham, *supra* note 143.

Firearms Prevention Act of 2016 succumbed to the same doomed fate. Senator Feinstein's amendment concentrated on updating the language of § 922 to provide the Attorney General with broad discretionary power to prohibit an FFL from transferring a firearm when the Attorney General determines that the buyer (1) is a known or suspected terrorist that has "engaged in conduct constituting . . . terrorism" or provided "material support" for terrorism in accordance with §§ 2339A and 2339B and (2) "has a reasonable belief that the prospective transferee may use a firearm in connection with terrorism."¹⁵⁷ The Senate voted along partisan lines to defeat the bill, with the exception of a single Democrat and Republican.¹⁵⁸ Despite the bill's attempt to maintain avenues for individuals to challenge their status in TSDB, Republicans focused on the gun rights argument and contended that the bill would unconstitutionally hamper the ability of individuals who are wrongly added to TSDB from being able to purchase a gun.¹⁵⁹ In response, Senator Cornyn introduced the SHIELD Act.¹⁶⁰ Backed by the NRA,¹⁶¹ the SHIELD Act would grant the Attorney General discretion to delay a gun transfer for a maximum of three days and would require federal prosecutors to make "a showing of probable cause" that the individual is engaged in terrorist activity prior to "permanently block[ing] the transfer."¹⁶² This bill

¹⁵⁷ Denying Firearms and Explosives to Dangerous Terrorists Act of 2015, S. 551, 114th Cong. (2015).

¹⁵⁸ See Alicia Parlapiano, *How Terrorism Suspects Buy Guns – and How They Still Could, Even with a Ban*, N.Y. TIMES (June 15, 2016), <https://www.nytimes.com/interactive/2016/06/14/us/gun-purchase-ban-for-suspected-terrorists.html> [<https://perma.cc/Y2J3-E8QM>].

¹⁵⁹ Press Release, Sen. Dianne Feinstein, Senators Introduce Bill to Stop Terrorists from Buying Firearms, Explosives (Feb. 24, 2015), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=185a6700-38a2-45e1-ac29-40b4b794f660> [<https://perma.cc/XQ9S-HD5Q>]; Burgess Everett & Seung Min Kim, *Gun Measures Fail in Senate*, POLITICO (Dec. 3, 2015), <http://www.politico.com/story/2015/12/gun-amendment-democrats-216389> [<https://perma.cc/7AST-NVGT>].

¹⁶⁰ Press Release, Sen. John Cornyn, Senate Democrats Block Cornyn Proposal to Prevent Suspected Terrorists from Purchasing Firearms (Dec. 7, 2015), <https://www.cornyn.senate.gov/content/senate-democrats-block-cornyn-proposal-prevent-suspected-terrorists-purchasing-firearms> [<https://perma.cc/G7MR-KZFX>].

¹⁶¹ NRA Statement on Terror Watchlists, NAT'L RIFLE ASS'N.-INST. FOR LEG. ACTION (June 15, 2016), <https://www.nra.org/articles/20160615/nra-statement-on-terror-watchlists> [<https://perma.cc/Q3MQ-8W98>].

¹⁶² Press Release, Sen. John Cornyn, Cornyn Introduces Legislation to Stop Terrorists from Buying Guns, Protect Second Amendment (June 16, 2016), <https://www.cornyn.senate.gov/content/cornyn-introduces-legislation-stop-terrorists-buying-guns-protect-second-amendment> [<https://perma.cc/3GF7-SUWS>].

also failed along partisan lines, in a 55–44 vote.¹⁶³

Senator Feinstein and Senator Cornyn reintroduced their respective “terror gap” legislation in June 2016 after the shooting at the Pulse nightclub in Orlando.¹⁶⁴ With several minor modifications, both bills remained essentially unchanged and again failed along partisan lines.¹⁶⁵ Looking for a bipartisan compromise, Senator Collins tried to introduce the Terrorist Firearms Prevention Act of 2016 that, in general, would give the Attorney General discretion “to deny firearms sales to individuals who appear on the No Fly List or the Selectee List.”¹⁶⁶ Despite focusing on the TSDB databases with higher “minimum substantive derogatory criteria requirements,”¹⁶⁷ it did not win support among Republicans who raised due process concerns with the bill’s failure to include a “probable cause” provision as in Senator Cornyn’s bill.¹⁶⁸ The bill stalled, again on partisan lines, with a vote of 52–46.¹⁶⁹

As these failed proposals illustrate, both Democrats and Republicans (even the NRA) agree that, as a matter of national security, terrorists should not own weapons. Yet framing the statutory fixes in terms of a gun rights versus gun control tug-of-war has stymied efforts to cross the aisle and find a compromise. Common sense suggests that if the United States cannot deem you safe enough to board a plane, then the United States should not deem you safe enough to buy a firearm. Senator Collins’s bipartisan approach of using a more selective sub-

¹⁶³ See Everett & Kim, *supra* note 159.

¹⁶⁴ See *id.*; 162 CONG. REC. S4289 (daily ed. June 16, 2016) (statement of Sen. McConnell).

¹⁶⁵ See Burgess Everett & Seung Min Kim, *Senate Strikes Deal to Vote on Doomed Gun Proposals*, POLITICO (June 16, 2016), <http://www.politico.com/story/2016/06/senate-vote-gun-restrictions-224426> [<https://perma.cc/Z3VE-T4H4>]; 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> [<https://perma.cc/8BC4-4TKU>].

¹⁶⁶ Office of Sen. Susan Collins, *Terrorist Firearms Prevention Act of 2016* (June 22, 2016), [https://www.collins.senate.gov/sites/default/files/Terrorist%20Firearms%20Prevention%20\(Updated%206.22.16\).pdf](https://www.collins.senate.gov/sites/default/files/Terrorist%20Firearms%20Prevention%20(Updated%206.22.16).pdf) [<https://perma.cc/K9T4-3XD8>] (emphasis omitted).

¹⁶⁷ INSPECTOR GEN., *ROLE OF THE NO FLY*, *supra* note 104, at 9; see *supra* subpart I.B.

¹⁶⁸ See David M. Herszenhorn, *Spurred by Orlando Shooting, G.O.P. Senator Offers a Gun Control Compromise*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/2016/06/18/us/politics/gun-control-mass-shootings-orlando-susan-collins.html> [<https://perma.cc/8LJX-Z9X9>]; David M. Herszenhorn, *Gun Control Effort in Congress Isn’t Dead, but Prospects Aren’t Good*, N.Y. TIMES (June 24, 2016), <https://www.nytimes.com/2016/06/25/us/politics/susan-collins-gun-control-sit-in.html> [<https://perma.cc/RH95-YHQV>].

¹⁶⁹ Herszenhorn, *Gun Control Effort in Congress Isn’t Dead, but Prospects Aren’t Good*, *supra* note 168.

database of TSDB logically makes sense and seems to be moving in the right direction for compromise. Nevertheless, the watchlist system unfolds so much in the shadows that Congress would be wary to find public support for a plan that would raise due process concerns and possibly restrict an individual’s Second Amendment rights. The “terror gap” is ultimately a question about terrorists getting guns—a national security issue. It is not a question about guns getting into the hands of terrorists—a gun control versus gun rights issue. Until Congress understands and addresses the difference, a statutory fix to the “terror gap” is impossible.

III

NEW PROPOSAL: CLOSING THE “TERROR GAP” USING A MODERNIZED WATCHLIST SYSTEM AND A “STICKS AND CARROTS” APPROACH TO COUNTERTERRORISM ON THE STATE AND LOCAL LEVEL

The nature of the terrorist threat against the United States has drastically changed since September 11, 2001, and the immediate years after the passing of the PATRIOT Act.¹⁷⁰ The danger of HVEs operating within the United States as lone offenders poses an enormous strain on counterterrorism efforts, and FTOs such as al-Qaeda and ISIL show no signs of slowing down in their efforts to radicalize Westerners. Despite the changing terrorist threat environment, the terrorist watchlist system and its surrounding policies have remained remarkably unchanged.¹⁷¹ How many Omar Mateens is it going to take for public outrage to break the partisan divide in Congress? Apparently quite a few. Within the first week of 2017 alone, alleged ISIL supporter Esteban Santiago killed five people at the Fort Lauderdale–Hollywood International Airport with his own firearm, despite having gone to the FBI several months before claiming that he had been forced to watch jihadist propaganda.¹⁷² With a direct statutory fix to the “terror gap” out of the question, this Note proposes indirectly closing the “terror gap” through a modernization of the watchlist system and a reliance on state and local authorities to create a system of incentives to prevent legitimate known or suspected terrorists from acquiring firearms.

¹⁷⁰ See *supra* section I.A.3.

¹⁷¹ See *supra* Part II.

¹⁷² Paula McMahon, *Airport Shooter Esteban Santiago Said He Visited ‘Jihadi Chat Rooms’ Online, Prosecutors Say*, SUN SENTINEL (Jan. 17, 2017, 5:14 PM), <http://www.sun-sentinel.com/news/fort-lauderdale-hollywood-airport-shooting/fl-court-tuesday-esteban-santiago-airport-20170117-story.html> [https://perma.cc/78YZ-TL8U].

A. Modernization of the U.S. Terrorist Watchlist System
Considering the Growing Threat from HVEs in the
United States

The purpose of this Note is not to suggest overhauling the entire watchlist system but for the U.S. government to reevaluate the interaction between TSDB and NICS in order to modernize TSC. The KST File should not be the primary terrorism database used to run NICS.¹⁷³ The KST File, originally VGTOF, was created as a hybrid crime database and not a terrorist database. Although information is technically fed to the KST File downstream from TSDB, TSDB and the KST File are essentially the same database. To qualify for entry on TSDB, all nominations must satisfy the “reasonable suspicion watchlisting standard” that determines whether an individual is to be considered a known or suspected terrorist for inclusion in the KST File; a nomination is not going to survive entry into TSDB without entry into the KST File. Therefore, using the “downstream” KST File, which is more prone to inaccuracies and either over-inclusion or under-inclusion compared to TSDB, for NICS does not logically follow. The FBI is relying on what was originally a hybrid crime database, restructured as a terrorist subdatabase, that is a watered-down version of a main terrorist database in order to conduct its primary counterterrorism checks in the realm of gun purchasing. The government must reevaluate the subdatabases within TSDB to create a system that is specifically designed for NICS.

Running NICS against a consolidated system of subdatabases with a higher standard of review would provide compatibility with NICS while easing the tensions within TSDB associated with overlapping subdatabases. I suggest consolidating the No Fly List, Selectee List, and Extended Selectee List into a single subdatabase with a single standard of review resting on the No Fly List’s “minimum substantive derogatory criteria requirements.”¹⁷⁴ Different from the proposed congressional amendments in 2016, this system would avoid the issue of Attorney General discretion and instead use the existing standard of review from the watchlist system as the trigger for a positive NICS hit and a more thorough investigation prior to firearm transfer.¹⁷⁵ If an individual meets this higher standard of review for inclusion in the consolidated subdatabase, then the individual should meet a higher standard of

¹⁷³ See *supra* subpart I.B.

¹⁷⁴ See *supra* section I.B.2.

¹⁷⁵ See *supra* Part II.

review to purchase a weapon—a principle on which both Republicans and Democrats should agree. Yet this would require a well-maintained and regulated consolidated subdatabase system, one that is more transparent and less secretive than how the government currently administers the No Fly List (and TSDB in general). Congress would also have to agree on what an appropriate elevated NICS investigation would entail, but the current system of a three-day review period seems to remain acceptable given that a positive NICS hit would theoretically increase the statistics on NICS denials to include less “approvals” for individuals who are added accidentally or whose status cannot be determined and more “denials” for actual known and suspected terrorists.¹⁷⁶

Additionally, if an individual who appears on the consolidated subdatabase is ultimately cleared to purchase a weapon, then there should be a mandatory flagging of the record for a definite period of time. Many of the problems with HVEs arise from their ability to travel from shop to shop and pick up a considerable number of weapons over a short period without arousing suspicion.¹⁷⁷ Creating a flagging system in the consolidated subdatabase would specifically target counterterrorism efforts against HVEs who might be approved for a weapon following an incomplete determination after NICS but still could pose a threat to national security. Although the flagging could raise due process concerns related to creating a list of individuals, the flagging would be eliminated after a definite period,¹⁷⁸ and the standard of review would be transparent. Additionally, flagging records would also help U.S. officials eliminate improperly added records. Allowing a flagged person to purchase a weapon does not always mean that they were incorrectly added to the database to begin with, it just means that they have surpassed the standard of review necessary to acquire the firearm. During the investigation following a positive NICS hit, U.S. officials would be able to acquire additional intelligence and make the decision whether the individual was

¹⁷⁶ See *supra* subpart I.C.

¹⁷⁷ See, e.g., John Cassidy, *Gun Laws and Terrorism: An American Nightmare*, NEW YORKER (June 13, 2016), <http://www.newyorker.com/news/john-cassidy/gun-laws-and-terrorism-an-american-nightmare> [<https://perma.cc/363H-X843>] (“[T]hey had stockpiled a small armory They had purchased the handguns themselves . . . at a gun store”).

¹⁷⁸ A definite period of ninety days would conform with current state law and NICS requirements under ATF Form 4473 regarding applicants without a “final determination,” including FFL records compliance and the NICS investigation window. See *supra* subpart I.C.

improperly added or whether they should remain on the list with the flagged status.

B. Creating a System of “Sticks and Carrots” on the State and Local Level

In order to target HVEs wishing to purchase a weapon who either appear within TSDB but do not meet the standard of review to be on the consolidated subdatabase or who do not meet the standard of review for even TSDB, utilizing a “sticks and carrots” approach on the state and local level would provide the necessary incentives and disincentives to make the “terror gap” obsolete. State and local governments can use their own homeland security and gun regulations to construct an incentive and deterrent system. For example, Massachusetts began Operation Ceasefire in Boston during the 1990s, which created a “sticks and carrots” system to combat intercity gun violence amongst youths.¹⁷⁹ Relatively successful, I believe that a counterterrorism “sticks and carrots” approach targeting HVEs wishing to purchase firearms could follow a similar model.¹⁸⁰ Incentives, or “carrots,” should include promoting education and employment, providing mentorship programs within at-risk communities, creating awareness in communities of the warning signs associated with radicalization, and reassuring FFLs that alerting the FBI to suspicious customers will be taken seriously. Potential deterrents, or “sticks,” should include creating stronger penalties for families who do not report children or relatives who are affiliated with an FTO or have clear signs of radicalization, raising awareness of the potential implications of providing “material support” to disincentivize individuals from buying guns for others who are planning a terrorist attack, and operating under a zero-tolerance policy for the abuse or misuse of NICS.

CONCLUSION

Finding a solution to close the “terror gap” cannot be a temporary or “second-best” fix—it must seal shut the loophole. Although a statutory fix will seal the gap directly, this solution

¹⁷⁹ NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT'S OPERATION CEASEFIRE 1 (2001). Operation Ceasefire's incentive program is particularly useful given its target audience was juveniles and young adults, which generally corresponds to the age range most vulnerable to radicalization. See HOMELAND SEC. COMM., *supra* note 74, at 4; *supra* section I.A.3.

¹⁸⁰ Giampaolo Garzarelli, Book Review, 19 REV. AUSTRIAN ECON. 337, 337–40 (2006) (reviewing BRUNO S. FREY, DEALING WITH TERRORISM—STICK OR CARROT? (Edward Elgar ed., 2004)).

is futile in light of the current political situation, the nature of the Second Amendment, and the lack of interaction between current firearms regulations and national security law. Instead, indirectly closing the gap through a modernization of the watchlist system along with a deterrent and incentive system on the state level would provide a solution to the theoretical question posed by the "terror gap": it would prevent those dangerous enough to not fly on a plane from being legally able to purchase a firearm. It would also allow for a more regulated and modernized counterterrorism approach against HVEs and lone offenders, while not impeding due process rights. Under this system, individuals like Omar Mateen, who fall through the cracks of the watchlist system, would perhaps be caught prior to killing innocent people. Although terrorists will inevitably find another loophole in which to operate, closing the "terror gap" is a positive step toward reducing the threat of terrorism in the United States while preserving an individual's right to bear arms.