PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

H.R. 800

MARCH 15, 2005

Serial No. 109–21

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

20–015 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

TUESDAY, MARCH 15, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:10 a.m., in Room 2141, Rayburn House Office Building, Hon. Chris Cannon (Chair of the Subcommittee) presiding.

Mr. CANNON. Good morning, ladies and gentlemen. This hearing of the Subcommittee on Commercial and Administrative Law will now come to order to consider today H.R. 800, the "Protection of Lawful Commerce in Arms Act," which was introduced on February 15 by our colleague from Florida, Mr. Stearns. It currently has 157 cosponsors, including me.

H.R. 800 addresses abusive lawsuits aimed at the firearms industry. It provides that a qualified civil liability action cannot be brought in any State or Federal court. Qualified civil liability action is defined as a civil action or proceeding brought by any person against a manufacturer or seller of firearms or ammunition for damages resulting from the criminal or unlawful misuse of such products.

There are exceptions, however. The bill does not prohibit an action against a person who transfers a firearm or ammunition knowing that it will be used to commit a crime of violence or a drug trafficking crime or to commit an identical or a comparable State felony offense. It also does not prohibit an action brought against a seller for negligent entrustment or negligence per se.

The bill also includes several additional exceptions, including one for actions in which a manufacturer or seller of a qualified product knowingly and willfully violates a State or Federal statute applicable to sales or marketing when such violation was a proximate cause of the harm for which relief is sought. Other exceptions under the bill include one for actions for breach of contract or warranty in connection with the purchase of a firearm or ammunition and an exception for actions for damages resulting directly from a defect in design or manufacture of a firearm or ammunition when used as intended. The bill also makes clear that only licensed manufacturers and sellers are covered by the bill.

Tort law rests on a foundation of personal responsibility. A product may not be defined as defective unless there is something wrong with the product rather than with the product's use. How-

ever, in the last several years, some lawsuits filed against the firearms industry would hold it liable for actions of those who use their products in a criminal or unlawful manner. Such lawsuits threaten the historic connection between tort law and personal responsibility and have forced firearms manufacturers into bankruptcy, severely curtailing the recovery available for those asserting traditional claims of product manufacturing defects.

While some of these lawsuits have been dismissed and some States have acted to limit them in one way or another, they continue to be aggressively pursued. In January, the Supreme Court refused to overturn a decision by the Ninth Circuit Court of Appeals permitting such frivolous lawsuit against a gun manufacturer for a crime committed by a third party. The strategy behind these lawsuits is no secret. One of the personal injury lawyers suing the firearms industry, John Cole, told the Washington Post, quote, "The legal fees alone are enough to bankrupt the industry." Professor David Capel also stated that the cities suing the firearms industry, quote, "don't even have to win. All they have to do is keep suing. They'll kill the industry with the cost of defending all the lawsuits."

Lawsuits seeking to hold the firearms industry responsible for criminal and unlawful use of its products by others are attempts to accomplish through litigation what has not been achieved by legislation and the democratic process. As explained by one Federal judge, quote, "The plaintiffs' attorneys simply want to eliminate handguns." Taking advantage of our currently unregulated court system, the personal injury lawyers are misusing the courts to limit the sale and distribution of firearms well beyond jurisdictional boundaries. A lawsuit in a single county of a State could destroy a national industry, denying citizens everywhere the right to keep and bear arms, a right guaranteed by the Constitution.

Insofar as these lawsuits have the practical effect of burdening interstate commerce in firearms, Congress has the authority to act under the Commerce Clause of the Constitution as well as the Second Amendment. Such lawsuits also directly implicate core federalism principles articulated by the Supreme Court, which has made clear that, quote, "one State's power to impose burdens on the interstate market is not only subordinate to the Federal power over interstate commerce, but it is also constrained by the need to respect the interests of the other States."

The direction of this slippery slope is obvious. If the judicial system is allowed to eliminate the firearms industry based on legal theories holding manufacturers liable for the misuse by others of its products, surely those theories will be applied to other industries whose products are capable of being misused. Knives, for example, are intended and used for non-violent purposes. They are virtually indispensable for eating. Yet hundreds of thousands of violent crimes every year are perpetrated with knives.

We have already seen multi-million-dollar lawsuits against the makers of hamburgers and steaks for causes—or for damages caused when people abuse those products and overeat. Surely the manufacturers of steak knives will be sued next when such knives are used for criminal purposes.

Congress must begin to stem the slide down the slippery slope. It can do that by fulfilling its constitutional duty and exercising its authority under the Commerce Clause to prevent a few State courts from bankrupting the national firearms industry and denying all Americans their fundamental right to bear arms. We need to preserve the benefit of American-made weapons for our soldiers overseas who are so ably defending us all from terrorism. Let's not allow the American firearms industry to be bankrupted so we're left to rely on foreign countries to provide weapons for our own soldiers.

I now yield to Mr. Watt, the Ranking Member of the Subcommittee, for an opening statement. Mr. Watt?

Mr. WATT. Thank you, Mr. Chairman. I apologize to you and other Members of the Subcommittee for being a minute or two late. I actually was trying to get back on my schedule this morning and run for a change and that threw everything off, trying to get back on schedule.

I guess I find it interesting that the first hearing that we are having this year allows me to quote a famous Republican former President. "Here we go again." Here you go.

Another year of trying to close the courthouse doors to innocent victims of preventable violence of any kind. Another year of radically altering and undermining our system of States' rights, which so many on this Committee have given so much and so much energy to saying that they support. Another year of trying to confer sweeping immunity to a single industry, the gun industry, in this case. Here we go again. Here we go again.

I'd have to say, Mr. Chairman, that last year's debate on this bill didn't reveal to me any reason why individuals harmed by guns that were recklessly placed in the stream of commerce should not be allowed to seek a remedy from those responsible, including those whose negligent conduct—negligent conduct—resulted in dangerous weapons landing in the hands of criminals. Nor was I convinced that there exists a national crisis that requires Federal intervention in this matter. States are and have been perfectly capable, through both their courts and legislatures, of developing tort principles and addressing gun policy at a local level.

Finally, I didn't find anything in last year's testimony or any of the things that I have found out about this bill that would suggest to me why it would be necessary to single out for unprecedented protection the entire gun industry, even as the number of deaths and injuries from gun violence and accidental shootings has escalated. Under this bill, on one within the gun industry bears any responsibility, no duty of care for the misuse of dangerous weapons.

When the industry acts responsibly, there should be no liability. I agree with that wholeheartedly. But when elements within the industry act without regard to the safety of our citizens, those harmed by such indifference or recklessness should be afforded a remedy.

I don't know what happened to the concept of personal responsibility, corporate responsibility, our whole theory of negligence in this country. Our whole theory of tort law in this country is based on negligence, and I have no idea why one industry should be exempt from those theories that we have developed for so long. They

are all about personal responsibility. That's what our whole negligence system is about.

If any of our witnesses can today address these very basic and fundamental concerns about this bill, I'm still looking for enlightenment about it. But I believe that unless and until these three core issues are adequately addressed and substantiated, the Federal court, the Federal Government, has no jurisdiction for barring State courts from providing appropriate relief to victims of negligent conduct.

We are off and running again. Here we go again, Mr. Chairman. I yield back.

Can I just add one thing, Mr. Chairman? I want to put in the record some information here that is just astonishing to me. This is from the Smith and Wesson SEC filing,[1] and I'm quoting this. "In the 9-month period ended January 31, 2005, we incurred $4,535 in defense costs net of amounts receivable from insurance carriers relative to product liability and municipal litigation. For the 9 months ended January 31, 2005, we spent $4,150,000 on advertising." Put that into this calculus. Thank you, Mr. Chairman.

Mr. CANNON. Without objection, that'll be included in the record.

Would the gentleman yield to a question? How much did they spend on their insurance premiums, do you know? Does the filing reveal that?

Mr. WATT. I have no idea, but probably no more than any other inherently dangerous product maker would be spending on their insurance. There are some risks of business. You have insurance on your automobile, probably a lot more than most people sitting around because people think that you are more vulnerable, you drive more, you expose yourself to more risks, you're more valuable, you're more important, and I suspect your insurance premiums are higher than most of the people sitting in this audience.

Mr. CANNON. I drive very carefully, so I keep my premiums down. I don't think these guys control who sues them.

We'd like to welcome Adam Smith from Washington, Steve Chabot from Ohio, Mr. Van Hollen from Maryland, and Mr. Coble from North Carolina. Does anyone other than Mr. Smith want to make an opening statement? Oh, and we've got the gentleman, Mr. Franks, from Arizona. Would anyone like to make an opening statement of any sort?

Mr. CHABOT. Mr. Chairman, if I could, just very briefly.

Mr. CANNON. Let me, if you don't mind, I'm going to ask Mr. Smith to go first and then we'll come back to you.

Mr. CHABOT. Sure.

Mr. CANNON. Would anyone else like to make a—Mr. Coble? Okay.

Mr. SMITH. It's more of a question just for the witnesses so that as they're testifying, they can hopefully address it, and we've sort of gotten this from the two opening statements.

The big question for me is exactly what liability is left. I mean, the basic notion that if you sell a gun in a perfectly legal way and basically have no negligence in how you go through that process, then you should not then be liable if someone misuses it is some-

[1] The information referred to was not available to include in this hearing.

thing that I support. I think it is different, frankly, than what went on with the tobacco industry when they sold a product and misled the public for a good many years about the dangers. There's no misleading about the dangers of a firearm. As Mr. Watt himself said, it's fairly apparent how dangerous it is, so the person who's buying it knows that.

But in the debate over this issue, I have heard so much conflicting information on what liability remains, you know, what negligence can be demonstrated by the person. Certainly, if they sell to someone who shouldn't have bought a firearm, someone who is disqualified through the law because they are a felon, mentally incompetent, or below the age of 18 or the normal categories, they should be liable.

But there's one specific case that arose not far from my district, the sniper case out here. The gun that was used in those crimes was actually purchased in my district, or actually, I should say, actually came from a store in my district. It is still unclear how that got to be in the person's possession because the gun shop has no records. They have records that they had the guns and then, oops, they're gone. They have no records of how it actually got to be in somebody else's hands or even out of their store, for that matter.

To my mind, that is at least enough of a case of negligence that you go to court. I mean, you'd have to hear from the jury and so forth. I do not want to exclude that company from liability when they had some number of guns that just went unaccountably missing. That is negligence, to my mind, depending on the facts. It's at least a case for the jury, let's put it that way.

And if I could just get some kind of correct answer—I suspect that I'll get about five different contradictory answers—as to whether or not this bill would exempt people like that from liability when there was some clear evidence of negligence, and you can imagine a variety of other different negligent circumstances where it at least should be a question for the jury whether or not this negligence rose to the level of liability.

I certainly agree with the Chairman's sentiment that if you sell a legal product without negligence, even if it's dangerous, it's like an automobile is a good analogy, if you use it poorly and get in the accident, it shouldn't be the liability of the manufacturer unless there was some negligence. But I'm just trying to figure out what the limits are. So if you could address that issue as you testify, that would be very helpful to me.

Mr. CANNON. Thank you. The gentleman yields back.

Mr. Chabot, you are recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. I won't take the 5 minutes. I'll be very brief. I just want to first of all commend you for holding this important hearing today and to reiterate my support for this really much-needed piece of liability reform legislation. I want to commend Mr. Stearns for offering it.

It's really critical for a number of reasons. It'll protect really people's Second Amendment rights. You know, we give lip service to it all the time, but this is one thing, I think, when we can really stand up for the citizens' Second Amendment rights, and the firearms industry, I think, has been targeted. And even if you ultimately prevail in the lawsuit, the resources that you have to use

up and the time, the attorneys' fees, court costs, all the rest, can be quite sigsnificant and it can drag on really interminably.

And we also have—I think it's an example of some of the activist courts, too, in these cases. We have a judiciary which too often is rewriting the law and legislating from the bench, and I think this is an example where the activist courts have gotten too involved. As I mentioned before, even if you win as a defendant in one of these cases, you can lose.

And you'll have a city which is essentially using what they might consider to be unlimited resources, but when you consider many of the cities right now which are in real financial straits, they'll get involved in one of these lawsuits and it just drags on and on and on, so you're utilizing the resources which could much better be used to fill potholes and do other things which the cities really ought to be about. Instead, they're suing an industry which I think has really been under assault for a number of years now.

If citizens are going to be able to actually exercise their Second Amendment rights, they're going to have to be able to purchase these weapons and purchase firearms. When you have the assault that's been on a number of these companies for some time now, it really does infringe upon those Second Amendment rights.

So I want to commend you for having this hearing, and again, strongly urge my colleagues to support this much-needed legislation. I yield back.

Mr. CANNON. Thank you. Mr. Van Hollen, did you want to take 5 minutes?

Mr. VAN HOLLEN. Thank you.

Mr. CANNON. The gentleman is recognized for 5 minutes.

Mr. VAN HOLLEN. I thank you, Mr. Chairman, and I won't take the whole 5 minutes. I will be brief.

It's a coincidence that the two new Members, at least on the Democratic side of the Committee here, are two Members who were involved, by coincidence, in the sniper shooting, because while the guns that were used in the sniper shooting may have been sold in Mr. Smith's district, they were used and with the result that many people were killed in the district I represent.

I have attended over the last couple of years a number of memorial services for the victims. A number of memorials have been placed in public places in my Congressional district and other places around the Washington area in memory of the victims of those shootings.

And I really have many of the same issues Mr. Smith asked about, although as I read the legislation, it's pretty clear that that case would not have been able to go forward, a case that was settled, a case where there was some payment of damages, I believe in the range of $2 million by the owners of the store and some monies paid by the manufacturer.

If you look back in the record of this debate in the Senate, there was an effort in the Senate after the House passed the bill to attach an amendment that would have made it clear that under the circumstances of the sales of the guns used in the Sniper shooting that it could have gone forward. I think that those of us who have looked at the facts of that case believe that it was a situation

where there was clearly reckless negligence, negligence on behalf of the gun store.

And I, in reading this and having read the legal opinions of a number of law firms in town, I think it's quite clear that if this legislation passes in its current form, those victims would not have an opportunity to obtain justice and redress through the courts in this country and they would have had the courthouse door shut on them.

It's ironic that this piece of legislation was actually being debated by the House of Representatives about the time the sniper shootings occurred and it was withdrawn at that time because people understood that the public wouldn't stand for a Congress passing a piece of legislation that took away the rights of the victims. And here we are a couple of years later when people think memories have faded and there is again, regrettably, in my view, a piece of legislation which I think is quite clear would shut the doors of justice to those victims.

Thank you, Mr. Chairman.

Mr. CANNON. Thank you, and Mr. Coble, did you want to—the gentleman is recognized for 5 minutes.

Mr. COBLE. Mr. Chairman, I will not take the 5 minutes. I thank you for recognizing me. But not unlike my friend from North Carolina, the Ranking Member, I want to apologize for my arrival and to furthermore, Mr. Chairman, apologize for my abrupt departure because I have an aviation hearing going on as we speak here.

I just want to state for the record, Mr. Chairman, that if a manufacturer—strike that. It is my belief that if a manufacturer develops a lawful product and lawfully markets it absence negligence, I think that manufacturer should be held harmless. If, on the other hand, there is negligent conduct involved, then I think that manufacturer should have to answer to it.

I don't mean to overly simplify it, but that's my position, Mr. Chairman, and I yield back.

Mr. CANNON. I thank the gentleman for yielding back. This may be a moment in history. We've had four people speak and not go over the time. In fact, all of them were significantly under the time.

Mr. WATT. Except the Chairman, of course. [Laughter.]

Mr. CANNON. Oh, I didn't keep track. [Laughter.]

The way I read the clock, it was okay. [Laughter.]

But I only said four. I think you were under, too, which would make it five.

Mr. WATT. I was under.

Mr. COBLE. Mr. Chairman, would you yield to me just a second?

Mr. CANNON. I would certainly yield.

Mr. COBLE. I think you and the Ranking Member probably have wider latitude than the rest of us on your opening statements.

Mr. CANNON. I thank the gentleman.

The Committee is pleased to have the Ranking Member of the full Committee, Mr. Conyers of Michigan, with us. Did you want to make a statement, Mr. Conyers?

Mr. CONYERS. If I could, and I thank you very much——

Mr. CANNON. The gentleman is recognized for 5 minutes.

Mr. CONYERS. —Mr. Chairman. Last week, the GAO issued a report which concluded that the FBI could better manage its gun buying records when matching them against lists of suspected terrorists. In particular, the GAO determined that information sharing procedures needed to be considerably improved in order to help Federal counterterrorism officials better track suspected terrorists who attempt to purchase firearms.

Nor are we here to discuss the two assault weapons used in unrelated multiple shootings in February. One shooting involved a Tyler, Texas person and the other took place in Los Angeles, with assault rifles in both cases. The fact that both shootings occurred on the same day made the two stories even more newsworthy, but obviously, not deserving, unfortunately, of a Congressional response.

Neither have we seen fit to respond to the requests from law enforcement officials to take appropriate Congressional action in response to recent introduction of the Five-Seven handgun, dubbed by some as the "copkiller" gun because it is easily concealable and can penetrate bulletproof vests of law enforcement officers. The Director of the International Brotherhood of Police Officers described this new weapon as an assault weapon that fits your pocket.

And so in the minds of any, any one of the aforementioned public policy problems should take precedent over the one before us today because they pose grave risk to human life. And so the bill that purports to protect our court system, even though it's not—if or when a frivolous lawsuit is brought before——

Well, I'll return my time, Mr. Chairman. But I think this is an incredibly important issue that is before your Subcommittee and I thank you for the opportunity to discuss it with you.

Mr. CANNON. I thank the gentleman, and I'm now astounded that we've had, with possibly the exception of me, although I didn't look at the clock, everyone spoke for less than 5 minutes and that will allow us to get on—we are joined by the gentleman from Texas, Mr. Gohmert. Did you want to speak, Mr. Gohmert?

Mr. GOHMERT. If I might.

Mr. CANNON. The gentleman is recognized for 5 minutes——

Mr. GOHMERT. Thank you.

Mr. CANNON. —recognizing the trend that we have in place, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. I very much appreciate that and I appreciate the individuals here and their testimony.

It was mentioned about the shooting in Tyler, Texas. That happened right outside the courthouse where I worked for a decade and knew and loved so many of the people there. The weapon used by the individual regarding a domestic situation was used outside the courthouse and it was a semi-automatic weapon. It was not an automatic weapon. It should be noted that when we toss around the term "assault weapon" that any weapon could be an assault weapon, just like any knife, whether steak knife or 11-inch butcher knife, could be an assault knife. Every weapon, no matter what it is, could be an assault weapon.

Congress did respond, at least this one did, immediately, within a day or two went to the floor of the House and gave a very mov-

ing, heartfelt, at least, tribute to Mark Wilson, who was the man that had the concealed carry permit who immediately put himself in danger by drawing a weapon he was lawfully allowed to have and firing at the individual, the murderer, and at least drawing his attention away from the others, and, I believe, saving the life of many other people there.

And because Texas has a concealed carry permit and the actions of Mark Wilson and the prompt response by law enforcement after Mark, we did not have another Luby's like we had years before where nobody had a weapon when a crazy nut came in and started shooting wildly. Here, we had somebody and we had a citizenry and a law enforcement that were armed. They protected the public to minimize the damage that occurred there, and I thank God for Mark Wilson and law enforcement and for the laws that made that possible. Thank you.

Mr. CANNON. That was only about two-and-a-half minutes, Mr. Gohmert. I am pleased. There has got to be some kind of record for this. I mean, this is an amazing thing. I would remind the Committee that, generally speaking, we want to get to witnesses more early, and so as we read our statements, we work with, the Ranking Member and me, to get issues in and we are going to try in future hearings to avoid these kinds of—or opening statements.

But, of course, as the panel and others will recognize, these are very important issues. They are held very dearly by everyone here and so we recognize that it may be a slightly different case.

We now turn to our panel of witnesses. Our first witness is Rodd Walton. Mr. Walton is the Secretary and General Counsel of Sigarms, Inc. He's also a major in the United States Army Reserve, Judge Advocate General Corps. Mr. Walton joined the military right out of high school in 1984 and he has been in the military for 21 years—hard to believe at your age. He recently came off a one-and-a-half-year tour of duty in the war on terror. In the American Bar Association, Mr. Walton serves as Chair of the Business and Commercial Law Committee—good. In the National Bar Association, Mr. Walton serves as Secretary of the Small Business Law Section.

Our second witness is Dennis Henigan, the Legal Director of the Brady Center to Prevent Gun Violence in Washington, D.C., and the Director of its Legal Action Project. The Legal Action Project is a national public interest law program which provides pro bono legal representation to victims of gun violence and lawsuits against the gun industry. In addition to representing individual victims of violence, the Legal Action Project also has represented over two dozen municipalities in lawsuits seeking to recover the public costs of gun violence.

Our third witness is Bradley T. Beckman of Beckman and Associates in Philadelphia. For roughly a dozen years, Mr. Beckman has been National Counsel for North American Arms in lawsuits brought by various municipalities. North American Arms is a Utah-based manufacturer of high-quality personal protection firearms that has been in business for over 30 years. Welcome from Utah.

Our fourth and final witness is Lawrence G. Keane. Mr. Keane is the Senior Vice President and General Counsel of the National

Shooting Sports Foundation, Inc., the firearm industry's trade association. He's responsible for all of NSSF's legal, Government relations, and risk management functions. Mr. Keane also served on the Board of Directors of the Firearms Safety Education Foundation, Inc., a nonprofit 501(c)(3) charitable organization dedicated to educating the public about firearms safety issues.

Without objection, all Members will have 5 days within which to submit additional material for the record.

Now, it is the practice of the Committee to swear in all witnesses appearing before it. If you would please stand and raise your right hand.

Do you swear that the testimony that you are about to give, that you will tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. WALTON. I do.

Mr. HENIGAN. I do.

Mr. BECKMAN. I do.

Mr. KEANE. I do.

Mr. CANNON. The record will note that the witnesses all answered in the affirmative. Please be seated.

Now, Mr. Walton, we would like to hear from you for 5 minutes. I don't want to interrupt. We don't want to stop anybody's train of thought, but I'll tap my pencil on the podium here when you get at 5 minutes just so you're aware. There's a little timer in front of you that it's green for 4 minutes, turns yellow for 1 minute, and then turns red at the end of the 5 minutes. You don't have to stop at that red light, but just be aware that we'd like to wind down, and then we'll have plenty of time for questions. Thank you.

Mr. Walton?

TESTIMONY OF RODD C. WALTON, SECRETARY AND GENERAL COUNSEL, SIGARMS, INC.

Mr. WALTON. Mr. Chair, thank you for having me here, and keeping with your time limit and the spirit of the meeting and being timely, I'll do my best.

Chairman Cannon, Members of the Committee, my name is Rodd Walton. I'm Secretary and General Counsel of Sigarms and its affiliates and subsidiaries in the United States. I am here today to ask you to support H.R. 800.

Since 1853, Sigarms and related companies, together with our predecessors, have been manufacturing small arms for military, law enforcement, and commercial use. Switzerland's Federal Ministry of Defense challenged a Swiss wagon factory to make a rifle for the Swiss army. Accepting the challenge, and after receiving the contract, the wagon company changed its name to Swiss Industrial Company—I'm not going to try to speak it in German, but it's currently world known as Sigarms. SIG brought our firearms industry to Virginia in 1985 and then moved to New Hampshire, where we call home today.

The foundation and thrust of Sigarms' business has been and will continue to be support of military and law enforcement customers worldwide. The list of Sigarms' customers in the United States reads like a Who's Who of law enforcement. Sigarms pistols are carried by the Department of Homeland Security, the U.S.

Coast Guard, the Federal Air Marshals, the U.S. Secret Service, State police agencies from Delaware, Massachusetts, Michigan, New Jersey, Virginia, as well as the Texas Department of Safety and the Texas Rangers, just to name a few. And, SIG Sauer pistols are carried by many in combat, most notably the U.S. Navy Seals. Today, about 65 percent of the output of the New Hampshire-based manufacturing facility is devoted to supplying firearms and training to military and law enforcement.

Since 1988—excuse me, '98, we at Sigarms have been defending ourselves against a multitude of lawsuits brought by Government entities and organizations and individuals seeking to blame the firearms industry, including SIG, for criminal and wrongful misuse of firearms in the United States. To blame Sigarms for the criminal misuse of firearms that are lawfully manufactured and sold is unjust. It is also threatening to our very existence. We have been fighting for our very survival against these lawsuits, diverting time, money, and other of our limited resources to defend ourselves.

As I walk through the plant, employees stop to ask me, "How's the war going?" The war that the employees are asking about is not the Iraqi war. It's the war we are fighting against plaintiffs filing junk and frivolous lawsuits against the firearms industry, spurred on by plaintiffs' trial attorneys.

Sigarms and many others in the industry have been fighting for 10 years now, beginning with *Hamilton v. Accu-Tek,* in which the plaintiffs claimed that we manufacturers negligently distributed firearms. While the jury found the case—some of the manufacturers to be liable, the verdicts were properly reversed on appeal. The same plaintiffs' lawyers decided to bring a similar case before the same trial judge. They brought the NAACP case based on similar theories that had already been rejected by the U.S. Court of Appeals. While we are resolved not to wear down, there is a cost to this war.

Beyond these lawsuits draining our already fragile national economy and littering our already overburdened court system, this war is hindering companies like Sigarms from engaging in legitimate business, making lawful products. The existence of these lawsuits thwarts our ability to raise new capital, borrow money, establish credit, obtain insurance, attract new employees, and retain valued employees in the same manner that companies of other industries are able to do without these attacks.

These lawsuits are dangerous, and not only to us as manufacturers of lawful products in other industries. Where will this end? Should General Motors be liable for an aggressive driver who crashes into another car? If the theory of these cases are widely applied, it could result in the bankruptcy of countless companies and the displacement of innumerable amount of American workers.

I come here today to ask you to support H.R. 800. This bill would protect legitimate businesses, such as Sigarms, that provide hundreds of thousands of jobs for our citizens—assemblers, polishers, tool and die makers, cafeteria workers, and people who fill our snack vending machines.

If enacted into law, this Act would preempt State and local government entities and other parties from bringing aggregate law-

suits against the firearms industry as a way to circumvent our legislatures. It would promote interstate and foreign commerce of small arms. A majority of the States—in fact, over 30—have passed legislation of some type that insulate the firearms industry from these types of lawsuits. However, we need and are seeking passage of Federal law that would afford protection to the industry on a national level.

I think my time is about up, so I will yield to the chair. Thank you, sir.

Mr. CANNON. Thank you very much.

[The prepared statement of Mr. Walton follows:]

PREPARED STATEMENT OF RODD C. WALTON

Chairman Cannon, Members of the Committee, my name is Rodd Walton. I am Secretary and General Counsel of SIGARMS, Inc. and its affiliates and subsidiaries in the United States. I am here today to ask you to support H.R. 800.

Since 1853, SIGARMS related companies, together with our predecessors, have been manufacturing small arms for military, law enforcement and commercial use. Switzerland's Federal Ministry of Defense challenged a Swiss wagon factory to make a rifle for the Swiss Army. Accepting the challenge and after receiving the contract the wagon company changed its name to the Swiss Industrial Company—Schweizerische Industrie-Gesellschaft known worldwide as SIG. SIG brought our firearms business to Virginia in 1985 and then moved it to New Hampshire, where we call our home today.

The foundation and thrust of SIGARMS business has been and will continue to be support military and law enforcement customers worldwide. The list of SIGARMS customers in the United States reads like a Who's Who of law enforcement. SIG SAUER pistols are carried by the Department of Homeland Security, The U.S. Coast Guard, The Federal Air Marshalls, The U.S. Secret Service, state police agencies from Delaware, Massachusetts, Michigan, New Jersey, Virginia as well as the Texas Department of Public Safety and the Texas Rangers just to name a few. And SIG SAUER pistols are carried by many in combat and most notably by the U.S. Navy SEALs.

Today, approximately 65% of the output at the New Hampshire-based manufacturing facility is devoted to supplying firearms and training to military and law enforcement.

Since 1998, we at SIGARMS have been defending ourselves against a multitude of lawsuits brought by government entities, organizations and individuals seeking to blame the firearms industry, including SIGARMS, for the criminal and wrongful misuse of firearms in the United States. To blame SIGARMS for the criminal misuse of firearms that are lawfully manufactured and sold is unjust. It also is threatening to our very existence. We have been fighting for our very survival against these lawsuits, diverting time, money and other of our limited resources to defend ourselves.

As I walk through our plant, employees stop to ask me how the war is going. The war that our employees are asking about is not the Iraqi War; it is the war we are fighting against plaintiffs filing junk and frivolous lawsuits against the firearms industry, spurred on by plaintiffs' trial lawyers.

SIGARMS and many others in the industry have been fighting for ten years now, beginning with the *Hamilton v. Accu-Tek* case, in which the plaintiffs claimed that we manufacturers negligently distributed our firearms. While the jury in that case found some of the manufacturers liable, the verdicts were properly reversed on appeal. The same plaintiff's lawyer decided to bring a similar case before that same trial judge. They brought the *NAACP v. A.A. Arms, Inc.* case based on similar theories that had already been rejected by the U.S. Court of Appeals. While we are resolved not to wear down, there is a cost to this war.

Beyond these lawsuits draining our already fragile national economy and littering our already over-burdened court system, this war is hindering companies like SIGARMS from engaging in a legitimate business, making a lawful product. The existence of these lawsuits thwarts our ability to raise new capital, borrow money, establish credit, obtain insurance, attract new employees, and retain valued employees in the same manner that companies in other industries are able to do without these attacks against their industry.

These lawsuits are dangerous not only to us but also to manufacturers of lawful products in other industries. Where will it end? Should General Motors be liable for an aggressive driver who crashes into another car? If the theory of these cases is widely applied, it could result in the bankruptcies of countless companies and the displacement of innumerable amount of American workers.

I come here today to ask you to support H.R. 800. This Bill would protect legitimate businesses, such as SIGARMS, that provide hundreds of thousands of jobs for our citizens, assemblers, polishers, tool and die makers, cafeteria workers and the people who fill our snack vending machines.

If enacted into law, this Act would preempt state and local government entities and other parties from bringing aggregate liability lawsuits against the firearms industry as a way to circumvent our legislatures. It also would promote interstate and foreign commerce of small arms. A majority of the states—in fact, over 30 states—have passed legislation of some type that insulate the firearms industry from these types of suits. However, we need and are seeking passage of Federal law that would afford protection to the industry on a national level.

Let me emphasize that this legislation would not provide the sweeping immunity that many of its opponents suggest. This Bill would not protect gun manufacturers from liability claims. Instead, it would stop lawsuits against our industry that are based on the criminal misuse of lawfully distributed products and premised on theories such as public nuisance and market share liability.

If passed, this Bill would help to set a much needed precedent that frivolous and junk suits like these should be stopped. If passed, it would prevent the usurpation of power by the judicial branch from the legislative branch. For it is the legislature that makes laws on how we should manufacture, design, and sell firearms, not the courts. If not stopped, these lawsuits clearly will threaten other legitimate and vital industries in America.

This Bill if enacted would restore the rule of law and protect manufacturers and sellers in the firearms and ammunition industry who act legally from being harassed by frivolous and junk lawsuits. However, the Bill ensures that if a seller provides a firearm and the seller knows or should have known that the firearm would be used negligently, that seller would be liable.

We are dutifully helping to defend our country when attacked and in times of war. I ask that each of you help us in our time of war so that we can focus on making the best firearms available for our men and women in uniform and law enforcement.

In conclusion, it makes no difference that SIGARMS or other firearm manufacturers make high quality firearms that enjoy excellent records of safety. It makes no difference that we and our industry are committed to continuing our efforts, individually and together with others, to increase awareness of the issues related to the safe handling and storage of firearms and the criminal acquisition of firearms. In makes no difference that the firearms industry is one of the most patriotic and staunchly pro-law and order industries in the corporate landscape. These frivolous and junk lawsuits are being brought to exert undue pressure on our industry to settle or cave under the massive weight of litigation. Without this Federal legislation, the survival of SIGARMS, our firearms and ammunition industries, and all of the jobs, taxes, and commerce that we contribute to the U.S. economy are threatened.

Mr. CANNON. Mr. Henigan, you are recognized for 5 minutes.

TESTIMONY OF DENNIS A. HENIGAN, DIRECTOR, LEGAL ACTION PROJECT, BRADY CENTER TO PREVENT GUN VIOLENCE

Mr. HENIGAN. Thank you, Mr. Chairman, and thank you to the entire Subcommittee for this opportunity to appear today.

Let me state my position on this bill in the must unequivocal terms. This bill is nothing but a special interest giveaway to the gun lobby and a shameful attack on the legal rights of gun violence victims.

As an attorney at the Brady Center, I have had the honor to represent on a pro bono basis gun violence victims whose rights would be trampled by this legislation, and I have a difficult time explaining to those clients why we are here today. As Ranking Member Conyers noted, just recently we have heard that suspected terrorists repeatedly have been able to buy guns over the counter in our

country. The Department of Homeland Security recently issued an alert about that Belgian gun manufacturer that is selling a handgun in this country that shoots bullets that can penetrate police body armor.

And what is the response of the U.S. Congress to these recent threats to our national safety and security? Is it to move quickly to prevent terrorists from buying guns over the counter? Is it to ban copkiller handguns? No. It is to hold hearings on a bill to give special legal protection to the most reckless gun sellers in America.

Mr. Chairman, this Congressional response defies rational explanation. I regret to say the only explanation is the overarching power of the gun lobby.

Now, the proponents of this bill say it affects only frivolous lawsuits brought to bankrupt the gun industry. This assertion is insulting to the victims who have sought to assert their legal rights against this industry and it also grossly misrepresents what this bill does.

Consider first the lawsuit brought by Brady Center attorneys for New Jersey Police Officers David Lemongello and Ken McGuire. These two officers were seriously wounded in a shoot-out with an armed robbery suspect, and the Ruger pistol used by the shooter was sold by a West Virginia pawn shop called Will's Jewelry and Loan. It was one of 12 handguns sold by Will's in a single transaction 6 months before the shooting to a gun trafficking team. A woman named Tammi Lea Songer acted as a straw buyer for a gun trafficker, James Gray. Gray pointed out the guns he wanted. Songer paid the clerk $4,000 in cash. It was perfectly obvious those guns were headed to the illegal market.

So the officers brought a civil damages suit against Will's and a West Virginia judge determined that the suit stated legally valid claims. If this legislation had passed last year, the judge's decision would have been nullified and the police officers' suit would have been dismissed. But fortunately, the bill failed. The suit went forward. And in June of last year, Will's settled the suit with a payment of $1 million in damages to those two brave police officers. And as a result of this suit, that gun shop no longer engages in large-volume sales of handguns.

So because this bill failed last Congress, two brave police officers received a measure of justice, the pawn shop was held accountable for this reckless sale, and the pawn shop now operates more responsibly than it did before, and I might add, no one went bankrupt.

But consider also the case brought by Brady Center lawyers for the victims of the D.C. area sniper shootings against Bull's Eye Shooter Supply, the gun shop in Tacoma, Washington, that Mr. Smith referred to, where the gun that was used in that shooting mysteriously disappeared from that gun shop. And it turned out that in the previous 3 years, some 238 other guns had mysteriously walked away from that gun shop.

So eight D.C. sniper victims and their victims brought a lawsuit with our help seeking damages against Bull's Eye, and we also sued Bushmaster, the manufacturer of the assault rifle, because it sold military-style assault rifles to the general public while doing

absolutely nothing to ensure that the retailers it chose to do business with were responsible corporate citizens.

Well, in June of 2003, a Washington State trial judge ruled the victims' claims were legally valid against both of those defendants, but if this immunity bill had passed, Mr. Chairman, it would have required dismissal of that lawsuit, even though a Washington State court had already held it consistent with accepted principles of law. And in the last Congress, we had letters from former White House Counsel Lloyd Cutler as well as noted attorney David Boies analyzing exactly the question Mr. Smith raised and concluding that, in fact, this would bar that lawsuit.

Mr. SMITH. Mr. Chairman, I'm sorry to break the flow here, but could I ask a question on that?

Mr. CHABOT. [Presiding.] Yes, if you will make it quick.

Mr. SMITH. In reading the bill, it says that the immunity shall apply but shall not include an action brought against a seller for negligent entrustment or negligence per se. I guess given that exception, you're telling me you couldn't make a case for negligence in that situation?

Mr. HENIGAN. That's right, Mr. Smith. Neither of those exceptions would have applied, and let me explain why. First of all, negligence per se would have required a showing that the gun shop violated a law leading to the shooting that occurred. That's what negligence per se requires, as opposed to ordinary negligence, Mr. Smith, which simply requires a violation of the common law duty of ordinary care.

In every State that adopts negligence per se, you have to show a violation of a law and then you have to show the causal link between the shooting and the violation. Here, what we had was a situation in which——

Mr. SMITH. You could go on, but that answers the question.

Mr. CHABOT. Okay, and if you wouldn't mind wrapping up your testimony, Mr. Henigan.

Mr. HENIGAN. Okay.

Mr. CHABOT. Your 5 minutes are up.

Mr. HENIGAN. I'd be happy to do that. These cases, Mr. Chairman, show how the proponents of this bill have misrepresented what the bill does, because these are two cases that were not frivolous. They were two cases not about trying to hold gun sellers responsible simply because a criminal uses the gun to shoot somebody, but to hold them responsible for their own conduct.

I would suggest, Mr. Chairman, that if we are going to be in the business of immunizing from civil liability the most reckless gun sellers among us, that is not only going to deprive gun violence of their legal rights, it's going to make us all more unsafe. It's going to mean more guns on the streets, and for those reasons, we urge that this bill be defeated. Thank you.

Mr. CHABOT. Thank you, Mr. Henigan.

[The prepared statement of Mr. Henigan follows:]

PREPARED STATEMENT OF DENNIS A. HENIGAN

Chairman Cannon, Ranking Member Watt, Members of the Subcommittee, I appreciate this opportunity to appear before you today. On behalf of Jim and Sarah Brady, and their organizations, let me state my position on H.R. 800 in the most direct and unequivocal terms: *this bill is nothing but a special interest giveaway to*

the gun lobby and a shameful attack on the legal rights of innocent victims of gun violence.

As Director of the Legal Action Project at the Brady Center to Prevent Gun Violence,[1] I have the honor to represent, on a pro bono basis, innocent victims of gun violence whose rights would be trampled by this legislation. I have a difficult time explaining to these clients, who have personally faced the horror of gun violence, why the response of the United States Congress to their personal tragedies, and to the continuing national tragedy of gun deaths and injuries, is to give special legal protection to the most reckless members of the gun industry.

Just last week, the GAO reported that suspected terrorists, who are not permitted to board airplanes or cruise ships, repeatedly have been allowed to purchase guns over-the-counter.

The Department of Homeland Security recently issued an alert to all its law enforcement personnel about a Belgian gun maker selling a handgun in America that shoots bullets that penetrate police body armor.

Another gun maker is selling .50 caliber sniper rifles with such extraordinary range and power that they can bring down airplanes.

And gun deaths in America, after a seven-year decline, have started to rise again and are now over 30,000 a year. In the last two weeks, our Nation has learned, once again, that no one is truly safe from gun violence: a judge's family slain in Chicago, a judge and two others murdered in an Atlanta courtroom and, on Saturday, seven worshippers shot and killed while attending church services in Milwaukee.

What is the response of the United States Congress to these clear and present threats to our national safety and security? Is it to move quickly to strengthen the Brady background check system to stop terrorist suspects from buying guns? Is it to ban cop-killer guns and terrorist sniper rifles? No. It is to hold hearings on a bill that would protect from legal accountability the most reckless gun sellers in America.

Mr. Chairman, this Congressional response is beyond rational explanation. I suggest the only explanation is the power of the gun lobby.

GUN INDUSTRY IMMUNITY LEGISLATION IS A SHAMEFUL ATTACK ON THE LEGAL RIGHTS OF GUN VIOLENCE VICTIMS

The proponents of this legislation claim it would block only "frivolous" lawsuits against gun sellers brought only to bankrupt the gun industry. Not only is this assertion a gross misrepresentation of the bill, it also is an insult to gun violence victims who have sought justice in the courts - justice that would be denied if this bill became law.

This legislation would provide legal immunity in many cases to grossly irresponsible gun dealers who supply the criminal gun market, as well as to manufacturers of defectively designed firearms. It would throw out of court innocent victims of gun violence, even where courts have found their cases justified by general and established principles of law. Never before has a class of persons harmed by the dangerous conduct of others been so wholly deprived of the right to legal recourse. As Senator Mike DeWine (R-Ohio) stated so eloquently in opposing this legislation of the Floor of the United States Senate a year ago: "I oppose this bill because...it singles out one particular group of victims and treats them differently than all other victims in this country...It denies them their access to court."

When this bill was debated in the last Congress, two lawsuits, then pending in the courts, were at the center of the debate. Lawyers at the Brady Center represented the victims in both cases. Had this legislation been passed into law last year, these lawsuits would have been blocked.

Gun Industry Immunity Legislation Would Have Deprived Two New Jersey Police Officers of their Legal Rights Against a Reckless West Virginia Pawnshop

The first suit had been filed by two brave New Jersey police officers, David Lemongello and Ken McGuire. Almost two years ago, Officer Lemongello testified before this Subcommittee and told their story. In January of 2001, Dave Lemongello was on a stakeout of a gas station in Orange, New Jersey that had been the target of several armed robberies. He spotted an individual walking near the station who matched the description of a suspect in the robberies. When the officer approached, the individual, career criminal Shuntez Everett, opened fire with a Ruger pistol. Lemongello was hit three times, fell to the ground, and radioed for help. Officer McGuire responded, chased Everett into a nearby backyard, and the two exchanged

[1] The Brady Center, and its affiliate, the Brady Campaign to Prevent Gun Violence united with the Million Mom March, are the largest organizations dedicated to creating an America free from gun violence.

fire. McGuire also was seriously wounded, but was able to return fire. Everett died from his wounds. The shootings ended the police careers of the two officers.

How was a convicted felon like Shuntez Everett able to obtain a handgun? It turned out that the gun used in the shooting was one of twelve handguns purchased from a West Virginia pawnshop six months before by a gun trafficking team. Tammi Lea Songer, acting as a straw purchaser for gun trafficker James Gray, paid $4,000 in cash for the guns, after Gray pointed out which guns he wanted. The pawnshop, Will Jewelry and Loan in Charleston, West Virginia, completed the sale, even though it was obvious that the handguns were headed directly into the illegal market. Indeed, the sale was so suspicious that Will reported it to ATF the next day, long after the shop had pocketed the profits and the guns were headed to New Jersey. Ironically, another one of the twelve guns was taken by Ken McGuire from a criminal suspect months before the gas station shooting. Because of the recklessness of a West Virginia gun dealer, Orange, New Jersey became a more dangerous place and the careers of two police officers were ended.

We represented Officers McGuire and Lemongello in a civil damages lawsuit against Will's pawnshop. The suit charged the pawnshop with negligence, and contributing to a public nuisance, in the sale of guns, creating a foreseeable risk that the guns would be used in criminal activity. In March of 2003, Judge Irene Berger of the Kanawha County Circuit Court denied Will's motion to dismiss our case, finding that the officers had stated a legally valid claim under general principles of West Virginia law. If the last Congress had enacted the predecessor of H.R. 800, Judge Berger's ruling would have been superceded and Officers McGuire and Lemongello would have been denied their day in court.

Because gun industry immunity legislation was defeated in the Senate a year ago, the case against Will's pawnshop went forward. In June of last year, Will's settled the case by paying $1 million in damages to the two officers. As a result of the suit, the pawnshop changed its policies and now no longer engages in large-volume gun sales. Two other gun dealers in the Charleston area have adopted similar policies.

I ask the Subcommittee to consider the outcome of this lawsuit. For these two brave police officers, justice was done. Will's pawnshop was properly held accountable for its reckless sale to a gun trafficking team and it now operates more responsibly. And no one declared bankruptcy. This outcome was possible only because this special interest immunity legislation did not become law.

Gun Industry Immunity Legislation Would Have Deprived the DC-area Sniper Victims of Their Legal Rights Against a Reckless Washington State Gun Dealer and the Assault Weapon Manufacturer that Supplied It

A second lawsuit that would have been blocked by this legislation is the civil damages action brought by the victims of the DC-area sniper shootings. Certainly no one on this Subcommittee will ever forget the paralyzing fear inflicted on this community by the snipers John Lee Muhammad and Lee Boyd Malvo in the Fall of 2002. For some families, that fear became tragedy, as 10 people were killed and four more injured by the snipers. When the snipers were arrested, they were found with the Bushmaster XM-15 assault rifle that had been used in the shootings. The gun was traced back to Bull's Eye Shooter Supply, a Tacoma, Washington gun shop. Incredibly, though, Bull's Eye had no record of what happened to the gun. The shop had no record of sale, no record of a background check, and had not reported the gun lost or missing. The gun had mysteriously disappeared. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) audits showed that Bull's Eye had mysteriously "lost" 238 other guns in a three-year period, an average of more than one gun missing every week. Bull's Eye was one of the most irresponsible gun dealers in the Nation. It ranked in the top .27% of gun dealers nationwide in number of missing guns and in the top 1% in the number of guns traced to crime.

Neither Malvo nor Muhammad could legally have purchased a gun. Malvo was a juvenile; Muhammad had a disqualifying domestic violence restraining order on his record. Only through the gross negligence of Bull's Eye could they have obtained the Bushmaster assault rifle. The Brady Center represented eight of the sniper victims and their families in a lawsuit against Bull's Eye, charging that the shop's negligence put a deadly assault rifle in the hands of the killers. We also sued Bushmaster, the manufacturer of the gun, on the ground that companies that make high-firepower assault weapons have a special duty to ensure that their retailers are responsible corporate citizens. Bushmaster did not even require its retail dealers to report to it the results of ATF audits, which would have revealed Bull's Eye's chronic problem of "missing" guns. Indeed, even after the press reported the gun shop's record, Bushmaster stated that it still considered Bull's Eye a "good customer".

In June of 2003, a Washington State trial judge denied motions to dismiss by both Bull's Eye and Bushmaster, deciding that the victims' claims were legally valid

under general principles of Washington State law. The Washington State Court of Appeals denied Bushmaster's appeal of this ruling.

As former White House Counsel Lloyd Cutler concluded, after conducting his own independent analysis, the immunity bill that reached the Floor of the Senate in the last Congress would have superceded the judge's ruling and required the sniper case to be dismissed. Because the legislation was defeated, however, the lawsuit brought by the sniper victims went forward. In September of last year, the parties reached a settlement, resulting in the payment, by both Bull's Eye and Bushmaster, of a combined total of $2.56 million in damages to the victims. Bushmaster also agreed in the settlement to make its dealers aware of programs to encourage safe sales practices by gun retailers - something the company had never done before.

Again, consider the outcome of this lawsuit. The sniper victims received justice. Bull's Eye and Bushmaster were made accountable for their shoddy business practices. And, again, no one declared bankruptcy.

No one can seriously argue that these were "frivolous" lawsuits, and yet they would have been blocked by the immunity legislation. It is hardly surprising that in February of last year, Henry Cohen, a 28-year veteran of the Congressional Research Service and the author of a report on gun industry immunity legislation, stated "it does not appear the bill would be limited to frivolous lawsuits. That's my neutral assessment."[2]

Gun Industry Immunity Legislation Would Protect a Careless Gun Manufacturer that Hired Criminals and Allowed Them to Walk Away with Guns

H.R. 800 would also affect currently pending cases brought by gun violence victims. An example is the lawsuit brought by the family of a young man named Danny Guzman, an innocent bystander who was shot on the street in Worcester, Massachusetts on Christmas Eve in 1999. After the shooting, the loaded gun used in the shooting was found behind an apartment building by a four-year-old child. The gun had no serial number.

Police investigators determined that the gun was one of several stolen from Kahr Arms, a Worcester gun manufacturer, by Kahr's own employees who were hired despite their long criminal records. One of the thieves, Mark Cronin, had been hired by Kahr to work in its plant despite his history of crack addiction, theft to support that addiction, alcohol abuse and violence, including several assault and battery charges. Cronin had been able to walk out of the factory with stolen guns, even before they had been stamped with serial numbers. Cronin told an associate that he takes guns from Kahr "all the time" and that he "can just walk out with them." Cronin later pled guilty to the thefts. The investigation also led to the arrest of another Kahr employee, Scott Anderson, who also had a criminal history and who pled guilty to stealing guns from Kahr. At least fifty Kahr firearms disappeared from its manufacturing plant in a five-year period. Worcester Police Captain Paul Campbell classified the record keeping at the Kahr facility as so "shoddy" that it was possible to remove weapons without detection.

Brady Center attorneys represent Danny Guzman's family in a wrongful death suit against Kahr arms, charging Kahr with negligence in completely failing to screen its employees for criminal history and in maintaining a security system so inadequate that employees repeatedly were able to walk out of the plant with unserialized guns. In April, 2003, a Massachusetts trial judge denied Kahr's motion to dismiss the suit, finding it supported by general principles of Massachusetts law. It is now in pretrial discovery. Had immunity legislation been passed, the ruling of the Massachusetts court would have been nullified and Danny Guzman's family would be denied the right to justice against a gun maker that allowed drug criminals to "help themselves" to free lethal weaponry.

GUN INDUSTRY IMMUNITY LEGISLATION WOULD BE A "BREATHTAKINGLY RADICAL" REVISION OF LIABILITY LAW FOR THE BENEFIT OF A SINGLE INDUSTRY

Far from affecting only "frivolous" lawsuits, H.R. 800 would exempt the gun industry from the oldest principle of our civil liability law: that persons, or companies, who act negligently should be accountable to the foreseeable victims of their negligence. Indeed, in the last Congress, over sixty law professors, from across the country, joined a letter calling the legislation "breathtakingly radical" because it "affords to a handpicked few - those who make, distribute, and sell guns - special protection against the most commonplace, long-established form of tort liability: accountability to the standard of care required by principles of negligence." The professors called the immunity bill "one of the most radical statutory revisions of the com-

[2] Steve Volk, *Specter Shoots Blanks,* Philadelphia Weekly, February 18, 2004.

mon law of torts that any legislature - federal or state - has ever considered, let along passed."

Proponents of this legislation try to obfuscate its radicalism through arguments that simply misstate the law.

First, they assert that it is unfair to hold the seller of a product responsible for the conduct of a criminal. However, the cases brought by Officers McGuire and Lemongello and the sniper victims did not seek to hold the defendant gun sellers liable simply because guns they sold were used by criminals. Rather, these victims sought to hold the gun sellers liable for their *own* irresponsible conduct that enabled criminals to be armed and to commit violent crimes. The courts in West Virginia and Washington State based their rulings on the longstanding legal doctrine that a defendant can be liable when his own negligent conduct creates a foreseeable risk that a third party will commit a criminal act. Courts, for example, have applied this doctrine to hold landlords liable when their failure to secure their buildings allows criminals to victimize their tenants. It has been applied to drivers who leave their keys in the ignition in high-crime areas, allowing thieves access to a car that is then used to inflict injury on others. Courts in these cases are holding the landlords and the drivers liable for their *own* negligence that enabled someone else to commit a criminal act.

Second, proponents of the bill argue that it is unfair to hold a gun company liable if its product, and its conduct, are entirely legal. This argument confuses criminal liability, which requires a showing of illegal conduct, with civil liability, which does not. The issue in a civil negligence case is whether the defendant has acted with reasonable care, not whether the defendant has violated a statute. For example, when a doctor leaves forceps in a surgical patient, he can be liable for his failure to use reasonable care. There is no requirement that his conduct violate a statute. It is particularly telling that the exception from immunity in H.R. 800 for illegal conduct applies only where a gun manufacturer "*knowingly* violated" a State or Federal gun statute. In other words, under this bill, a gun company is immunized from liability *even if it has violated the law,* as long as the company can demonstrate its ignorance of the law. It is also telling that the proponents of gun industry immunity opposed, and defeated, an amendment offered last year by Senator Levin (D-Mich.) that would have permitted lawsuits where a gun injury or death was caused by "grossly negligent or reckless" conduct by a gun company. Can there be any doubt that the purpose of this legislation is to protect gun manufacturers and dealers from civil liability, *even if their conduct has been grossly negligent, reckless or even illegal?*

Third, the legislation's supporters assert that they are merely asking the Congress to do what over 30 states have already done. It is flatly untrue that over 30 states have enacted radical legislation of this kind. The vast majority of state immunity statutes apply only to suits brought by local governments and have no effect on the legal rights of individual gun violence victims. In fact, *only five states have enacted legislation that limits the legal rights of individual gun violence victims to the extent of H.R. 800.* For those in Congress who regard themselves as guardians of state prerogatives against federal encroachment, it is fair to ask: Why should Congress override the decisions of 45 states not to strip away the legal rights of gun violence victims?

In virtually all states, victim claims against gun sellers are judged by the courts according to age-old principles of law that apply to everyone else. H.R. 800 is an effort by the United States Congress to impose a special set of legal rules on state courts that apply only to suits against gun companies. This bill is the worst form of special interest legislation. Its passage would be a tribute to the power of the gun lobby and an embarrassment to the country.

GUN INDUSTRY IMMUNITY LEGISLATION WOULD ENDANGER COMMUNITIES BY DESTROYING A STRONG INCENTIVE FOR GUN SELLERS TO BEHAVE RESPONSIBLY

Mr. Chairman, irresponsible conduct by gun sellers has tragic real-world consequences. As the Brady Center lawsuits dramatically show, reckless gun sellers put guns into the hands of criminals and endanger innocent lives. ATF has found from its own gun trafficking investigations that licensed gun dealers are the largest single source of guns trafficked into the underground market.[3] Because of irrational statutory limitations on its enforcement powers, and limited resources, ATF is hampered in its efforts to ensure that gun dealers obey the law. The Office of the Inspector General of the Justice Department recently estimated that, at ATF's current rate of inspections, it will take the Bureau *twenty-two years* to inspect all of the ap-

[3] *Following the Gun: Enforcing Federal Firearms Laws Against Firearms Traffickers,* Bureau of Alcohol, Tobacco and Firearms (June 2000), at 13.

proximately 100,000 current federal firearms licensees.[4] When ATF does inspect dealers, violations of the law often are found, but severe statutory constraints on ATF's license revocation powers make it difficult for the Bureau to take meaningful action. According to the Inspector General, in FY 2003, ATF found that 1,812 of its inspections had revealed violations, *with an average of over 80 violations for each inspection.* However, ATF had issued only 54 notices of license revocation.[5]

The National Rifle Association has worked for years to weaken ATF's enforcement of federal gun laws. It has been tragically successful in this endeavor, by limiting ATF's legal authority and its resources. As a result, it is all the more important to maintain a strong civil liability system to give gun sellers a powerful incentive to behave responsibly. One of the recognized purposes of civil liability is to encourage individuals and companies to use reasonable care to prevent injury to others by ensuring that wrongful and dangerous conduct will result in damages liability. Having weakened ATF's enforcement powers, now the gun lobby seeks to remove the only remaining incentive for gun sellers to consider public safety in their business practices. The importance of civil liability was noted by former gun industry insider Robert Ricker, who wrote in a sworn declaration that "until faced with a serious threat of civil liability for past conduct, leaders in the industry have consistently resisted taking constructive voluntary action to prevent firearms from ending up in the illegal gun market."[6]

Far from pursuing legislation to strengthen ATF, proponents of immunity in Congress would rather reassure reckless gun sellers that they need no longer worry about the prospect that courts will hold them accountable to the victims of their conduct. If H.R. 800 passes, it will mean more gun sellers acting with utter contempt for public safety, with disastrous consequences for communities throughout the Nation. This is why, Mr. Chairman, there is substantial opposition to this legislation in the law enforcement community, including the Major Cities Chiefs Association, the International Brotherhood of Police Officers, the Police Foundation, the National Black Police Association, the Hispanic Police Command Officers Association and several state associations of police chiefs.[7] In addition to recognizing that police officers like David Lemongello and Ken McGuire may be among the gun victims whose rights are infringed by this bill, these organizations also understand that H.R. 800 will only mean more illegal guns on the streets. It only takes a few "bad apple" gun dealers to funnel thousands of guns to criminals. ATF has found that only one percent of licensed gun dealers account for 57% of the guns traced to crime.[8] These law enforcement organizations agree with us that *good gun dealers don't need legal immunity; bad gun dealers don't deserve it.*

GUN INDUSTRY IMMUNITY LEGISLATION IS FAR MORE RADICAL THAN TORT REFORM

Finally, it is important to distinguish H.R. 800 from other legislation this Congress has considered, and will consider, to reform our civil justice system. This bill is far more radical than any other proposal the Congress will address. Unlike class action reform, H.R. 800 does not simply change the legal forum in which gun liability cases are considered; it protects reckless gun sellers from liability in any forum. Unlike medical malpractice reform, H.R. 800 does not simply limit the amount and kind of damages that can be recovered by gun violence victims against reckless gun sellers; it deprives victims of any recovery. Unlike the asbestos litigation reform proposals, H.R. 800 sets up no alternative to the court system for victims to be compensated; it denies all avenues for compensation. In short, *H.R. 800 gives the gun industry special legal privileges that other industries can only dream about. And it makes the victims of reckless gun sellers into "second-class" citizens, who lack the basic civil liberties of other Americans who have been injured by the wrongful conduct of others.*

For these reasons, on behalf of the Brady Center to Prevent Gun Violence, and the brave gun violence victims we represent in court, I urge you to oppose this legislation. Thank you again for the opportunity to share my views.

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[4] *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives,* Report No. I-2004-005, U.S. Dept. of Justice Office of the Inspector General (July 2004), at iii.

[5] *Id.* at vi.

[6] Mr. Ricker is a former NRA lawyer and former Executive Director of the American Shootings Sports Council, an industry trade association. His revelations about the gun industry are discussed in greater depth in the attached Brady Center special report, *Smoking Guns: Exposing the Gun Industry's Complicity in the Illegal Gun Market,* which details much of evidence against the gun industry uncovered in litigation.

[7] A letter opposing H.R. 800 from these organizations, and other members of the law enforcement community, is attached.

[8] Commerce in Firearms in the United States, Bureau of Alcohol, Tobacco and Firearms (February 2000), at 2.

ATTACHMENT

March 14, 2005

U.S. Congress
U.S. House of Representatives
Washington, D.C. 20510

Dear Representative:

As active and retired law enforcement officers, we are writing to urge your strong opposition to any legislation granting the gun industry special legal immunity. H.R. 800 would strip away the legal rights of gun violence victims, including law enforcement officers and their families, to seek redress against irresponsible gun dealers and manufacturers.

The impact of this bill on the law enforcement community is well illustrated by the lawsuit brought by former Orange, New Jersey police officers Ken McGuire and David Lemongello. On January 12, 2001, McGuire and Lemongello were shot in the line of duty with a trafficked gun negligently sold by a West Virginia dealer. The dealer had sold the gun, along with 11 other handguns, in a cash sale to a straw buyer for a gun trafficker. In June 2004, the officers obtained a $1 million settlement from the dealer. The dealer, as well as two other area pawnshops, also have implemented safer practices to prevent sales to traffickers, including a new policy of ending large-volume sales of handguns. These reforms go beyond the requirements of current law and are not imposed by any manufacturers or distributors.

If immunity for the gun industry had been enacted, the officers' case would have been thrown out of court and justice would have been denied. Police officers like Ken McGuire and Dave Lemongello put their lives on the line every day to protect the public. Instead of honoring them for their service, legislation granting immunity to the gun industry would deprive them of their basic rights as American citizens to prove their case in a court of law. We stand with officers McGuire and Lemongello in urging you to oppose such legislation.

Sincerely,

International Brotherhood of Police Officers (AFL-CIO Police union)

Major Cities Chiefs Association (Represents our nation's largest police departments)

National Black Police Association (Nationwide organization with more than 35,000 members)

Hispanic American Police Command Officers Association (Serving command level staff and federal agents)

The Police Foundation (A private, nonprofit research institution)

Michigan Association of Chiefs of Police

Rhode Island State Association of Chiefs of Police

Maine Chiefs of Police Association

Departments listed for identification purposes only:

Chief Jon J. Arcaro
Conneat Police Dept. (OH)

Sheriff Thomas Altiere
Trumbull County Sheriff's Office (OH)

Sheriff Dennis Balaam
Washoe County Sheriff's Office (NV)

Sheriff Kevin A. Beck
Bryan Sheriff's Office (OH)

Chief William Bratton
Los Angeles Police Dept. (CA)

Special Agent (Ret) Ronald J. Brogan
Drug Enforcement Agency
D.A.R.E. America (NY)

Detective Sean Burke
Lawrence Police Dept. (MA)

Chief (Ret) John H. Cease
Wilmington Police Dept (NC)

Chief Michael Chitwood
Portland Police Department (ME)

Chief Kenneth V. Collins
Maplewood Police Dept. (MN)

Asst. Director Jim Deal
US Dept. Homeland Security
Transportation Security Administration
Reno/Lake Tahoe Airport (NV)

Chief Dean Esserman
Providence Police Dept. (RI)

Chief Charles Glorioso
Trinidad Police Department (CO)

Chief Jack F. Harris
Phoenix Police Dept. (AZ)

Sheriff Gene A. Hill
Humbolt County Sheriff's Office (NV)

Terry G. Hillard, Retired Superintendent
Chicago Police Dept. (IL)

Undersheriff Brian Jonas
Humbolt County Sheriff's Office (NV)

Chief Gil Kerlikowske
Seattle Police Dept. (WA)

Detective John Kotnour
Overland Park Police Dept. (KS)

Detective Curt Lavarello
Sarasota County Sheriffs Office (FL)

Chief Michael T. Lazor
Willowick Police Dept. (OH)

Sheriff Simon L Leis, JR.
Hamilton County Sheriffs Department (OH)

Sheriff Ralph Lopez
Bexar County Sheriff (San Antonio, TX)

Chief Michael T. Matulavich
Akron Police Dept (OH)

Chief Randall C. McCoy
Ravenna Police Department (OH)

Sgt. Michael McGuire
Essex County Sheriffs Dept. (NJ)

Chief Roy Meisner
Berkley Police Dept. (CA)

Chief Mark S. Paresi
North Las Vegas Police Dept. (NV)

Chief Edward Reines
Yauapai-Prescott Tribal Police Dept (AZ)

Chief Cel Rivera
Lorain Police Department (OH)

Chief Ronald C. Sloan
Arvada Police Dept. (CO)

Chief William Taylor
Rice University Police Dept (TX)

Sheriff Ron Unger
Lander County Sheriff's Office (NV)

Chief (Ret) Joseph J. Vince Jr.
Crime Gun Analysis Branch, ATF (VA)

Chief Garnett F. Watson Jr.
Gary Police Dept. (IN)

Sheriff Steve Waugh
Yavapai County Sheriff (AR)

Hubert Williams, President
The Police Foundation (DC)

Sheriff Bill Young
Las Vegas Metropolitan Police Dept. (NV)

Mr. CHABOT. Mr. Beckman, you are recognized for 5 minutes.

TESTIMONY OF BRADLEY T. BECKMAN, BECKMAN AND ASSOCIATES, COUNSEL TO NORTH AMERICAN ARMS

Mr. BECKMAN. Good morning, Mr. Chairman and Members of the Subcommittee. My name is Bradley Beckman and I'm National Counsel for North American Arms, which is in Mr. Cannon's district.

The legal assault that has been brought against North American Arms and the other manufacturers by Mr. Henigan's organization and various municipalities are nothing short of legal terrorism. This has been an assault that has been ongoing for many years.

North American Arms is a small manufacturer, relatively modest-sized, been in business for 30-odd years. It employs a number of people and it has a number of suppliers that are employed and it goes on down the line. The burden that is put upon a small company like North American Arms and many that are similarly situated is extraordinary.

I listened to Mr. Henigan's comments about what this bill has to do with, and respectfully, I suggest that this bill has nothing to do with terrorism, 50-caliber ammunition, armor-piercing bullets, copkiller handguns, but it has everything to do with prevention of legal terrorism.

Companies like North American Arms have been essentially held for ransom because they've been told if they don't, they're going to continue to be assaulted with litigation of this sort.

I listened with interest to the comments about the Bull's Eye case because I was involved in that case. I was engaged as trial counsel. The acts of those criminals were just that. That was a firearm that was stolen. Bushmaster sold a lawful product in a non-defective condition which was openly stolen from the retailer. This legislation, I submit, under my understanding of the way it is written, would not prevent litigation such as that against a wrongful seller, somebody who has violated the law by allowing that firearm to escape their clutches.

With regard to the Lemongello case in West Virginia, we're talking about, again, tragedies where we've seen law enforcement officers killed. Ruger sold another product in a non-defective condition in compliance with a host of laws. It did nothing wrong. To suggest that this legislation will prevent somebody from getting into the courthouse door, I think is simply a misstatement of what this bill is designed to prevent.

Mr. Henigan was involved since the mid-1990's with approximately 30 lawsuits brought by municipalities throughout the country—Cincinnati, several in California, Detroit. Each and every one of them has been unsuccessful. However, the cost has been staggering. That is what this legislation is about.

If the courthouses in America were designed to address that, then I would submit that we wouldn't have a legislature. We would have just a judicial branch. But this is up to the legislative body to make the laws. If our legislature should determine that firearms are illegal in some form or another, that's a matter for another day. This is to prevent the proverbial gun in the ribs to the manufactur-

ers, the distributors, and the lawful sellers who comply with a very large host of law and regulation.

If somebody could explain—I listened to Mr. Smith ask what liability is left. Well, we have retailers who are complying with law, distributors, and manufacturers. As we go through the chain, as we find somebody who violates the laws that presently exist, that's not going to be covered by this legislation. What is covered is the—truly a perversion of the tort system to try to use the tort law of public nuisance, which has been one of the prime sticks that the plaintiffs have tried to use against this industry, to essentially bankrupt them, and while there may have been some companies larger than others, better able to withstand some of the legal assault, I can tell you from the perspective of a modest-sized manufacturer like North American Arms, it cannot withstand that assault and there are a number of other similarly situated companies.

I see that my time is expiring, and I thank you.

Mr. CHABOT. I can assure you you'll have an opportunity to respond to questions and speak some more.

[The prepared statement of Mr. Beckman follows:]

PREPARED STATEMENT OF BRADLEY BECKMAN

Mr. Chairman, my name is Bradley Beckman and I am here representing a modest-sized firearms manufacturer with which I am sure you are familiar, North American Arms. North American Arms is based in your district. I want to begin by thanking you for holding this hearing. The legal assault on the firearms industry by opportunistic lawyers and anti-gun politicians threatens to bankrupt an entire industry that scrupulously follows all federal, state and local laws in the manufacture of our products and their sale to federally licensed firearms distributors.

North American Arms employs approximately 40 people and specializes in the manufacture of small-sized, personal protection firearms. Many individuals who choose to carry our high-quality products are members of the law enforcement community who use them as a second or "backup" firearm to their standard sidearm. North American Arms has been named in several of the state and municipal suits against the firearms industry.

The lawsuits brought against gun manufacturers are nothing short of outrageous. Holding gun makers liable for the criminal misuse of our products—one of the central accusations in these suits—is akin to holding Ford, Chevy or Honda responsible for the illegal actions of a drunk driver or holding Kodak responsible for the use of their film in the vile world of child pornography. It is an accusation that defies common sense. While these lawsuits barely pass the straight face test, the consequences of these suits are no laughing matter.

North American Arms is literally being crushed under the weight of legal expenses. Money that could be used for developing new markets, hiring workers, improving firearms design and safety is instead channeled to fund the huge costs associated with the legal defense of the company.

These lawsuits are nothing short of legal backmail-lawyers, politicians and anti-gun groups want to achieve in the courtroom draconian changes in gun laws that have been rejected by Congress and state legislatures. Their message is simple: "settle with us or we will bankrupt you with lawsuits." This legal extortion must be stopped.

North American Arms is a responsible firearms manufacturer that adheres strictly to all laws governing the manufacture and sale of our products to distributors. We have an excellent relationship with law enforcement. We have done nothing wrong, yet if a judge and jury in, for example, New York, decide against our industry it holds the potential of bankrupting not just North American Arms, but the entire U.S. firearms industry. It is doubtful that North American Arms or other manufacturers could post the necessary bond to appeal a verdict. If these suits are successful, they will be a wrecking ball on our national economy. Any member of Congress from Michigan should be ready for a similar assault on the auto industry. We already see suits against purveyors of fast food. The list of targeted industries could go on and on.

I want to close with two quotes. The first from a recent decision by California Judge James Marchiano, writing for a unanimous state Court of Appeals decision in favor of the firearms industry just last month. Judge Marchiano wrote:

> *"The only business practice the defendants in this case have engaged in is marketing their products in a lawful manner to federally licensed dealers . . ."*
>
> *"In this case, there is no causal connection between any conduct of the defendants and any incident of illegal acquisition of firearms or criminal acts or accidental injury by a firearm. Defendants manufacture guns according to federal law and guidelines."*

In March 2002, the City of Boston dismissed with prejudice its lawsuit against firearms manufacturers. The city, facing mounting legal bills and recognizing that it would lose its case, stated in its dismissal that:

> *". . . members of the Industry and firearms trade associations are genuinely concerned with and are committed to, the safe, legal and responsible sale and use of their products . . . The Industry and the City believe that through cooperation and communication they can continue to reduce the number of firearm related accidents, can increase awareness of the issues related to the safe handling of storage of firearms, and can reduce the criminal acquisition of firearms."*

Mr. Chairman, passage of H.R. 800 is common-sense judicial reform. This bill will protect jobs, prevent the misuse of the courts to circumvent elected officials and prevent abuse of the judicial system.

Thank You.

Mr. CHABOT. Mr. Keane?

TESTIMONY OF LAWRENCE G. KEANE, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL SHOOTING SPORTS FOUNDATION, INC.

Mr. KEANE. Chairman Cannon, distinguished Members of the Subcommittee, my name is Lawrence Keane and I'm the Senior Vice President and General Counsel for the National Shooting Sports Foundation, the trade association for the firearms industry. We strongly support this bill because it's an important common sense legal reform that will help restore integrity and fairness to our nation's judicial system by preventing lawsuit abuse.

This vital, bipartisan legislation is critical to protecting America's firearms industry from destruction and bankruptcy at the hands of opportunistic trial lawyers, seriously misguided politicians, and radical anti-gun interest groups who seek to destroy and bankrupt our industry through massive damage awards and/or bleeding us dry through ever-mounting legal fees. These "regulation-through-litigation" lawsuits misuse our judicial system in an attempt to dictate to all Americans public policy choices that are rightfully the purview of Congress and the elected State legislators. Under our Constitution, those policy choices are for Congress, not judges.

The threat posed by "regulation-through-litigation" is why the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Association of Wholesalers, and others support this bill. As the National Association of Manufacturers has said, "It is a certainty that other businesses will be the next target if these groups succeed in misusing the courts against the firearms industry." This legislation is also supported by organized labor. The United Mine Workers, representing about 1,000 Remington factory workers, said the bill will, "help prevent lawsuits by various parties that are intended to shut down the legitimate and legal fire-

arms industry in the United States because of the improper use of firearms by individuals." These lawsuits seek to blame federally-licensed firearms manufacturers for the actions of criminals.

Despite some industry success in the courts, this well-funded, highly-coordinated onslaught of abusive lawsuits against Members of our industry continues unabated. A single $100 million verdict will bankrupt virtually all the defendants.

Members of our industry are being sued today, right here in the District of Columbia, under a law that imposes absolute liability upon manufacturers for criminal shootings occurring in the District because they lawfully sold a gun that was then later illegally brought into the District and used in a crime. Bushmaster is being sued under this same statute with respect to the firearm misused in the sniper case.

But the poster child for this bill is a case called *Ileto v. Glock,* where a manufacturer is being sued in Federal court in California for selling a firearm to a police department in Washington State that was later used in a criminal shooting. A distributor is being sued in that case, even though it never owned, possessed, or sold the firearm in question. Winning on the merits is not necessary in order for these politician and anti-gun activists, like Mr. Henigan, to impose through litigation or financially extorted or coerced settlements, a gun control agenda repeatedly rejected by Congress and State legislature.

These anti-gun plaintiffs can implement their gun control policies through the entire nation if the coercive effect resulting from the staggering cost to defend these cases forces manufacturers into a Hobson's choice of capitulation or bankruptcy.

The industry-wide cost to defend these cases is staggering. It exceeds $200 million, which is a huge sum for a small industry like ours that taken together doesn't equal a simple Fortune 500 company. These lawsuits threaten the very existence of the manufacturers, such as Sigarms, that produce the tools for law enforcement and military agencies that they use to protect America's freedoms here and abroad every day. These lawsuits have national defense and homeland security implications.

The legislation you are considering today is as important for what it does not do. It does not, as Mr. Henigan tries to allege, close the courthouse door to those who have been injured by firearms that have been, for example, illegally sold or have been negligently entrusted or are defectively designed. The bill expressly provides that injured parties will be able to assert well-established tort law claims against the manufacturers themselves of firearms.

The Wall Street Journal in an editorial got it right when it said, "This isn't immunity, as some critics claim. The gun makers and distributors would still have to abide by product liability laws and still face civil suits for violating regulations on the sale and distribution. But just as Sony is not responsible for someone who uses a camcorder to film child pornography, no longer could Beretta be held responsible for someone using its legally purchased product to rob a liquor store." It's that judicial abuse that this legislation is carefully drafted to stop, and nothing more.

There are several refinements to the bill that was passed by the House in the 108th Congress. We support those changes because they enhance and clarify the bill's purpose and intent.

We agree with President Bush, who said, "Recently our nation depends on a fair legal system that protects people who have been harmed without encouraging junk lawsuits that undermine the confidence in our courts while hurting our economy, costing jobs, and threatening small business." Over 30 States have already enacted similar laws designed to stop junk lawsuits that are intended to destroy our industry and to achieve gun control regulation through litigation.

The time has come for Congress to enact common sense legal reform to prevent an unconstitutional attempt to circumvent Congress and State legislatures, to restore integrity and fairness to our judicial system, to protect one of America's oldest and most important industries, and to prevent the loss of thousands of American jobs vital to the health of our economy, and to protect a critical component of our national security industrial base.

Today, it's guns. We are already seeing similar legal assaults on the fast food industry. Are cars, alcohol, and distilled spirits next in line at the courthouse door? We've already seen it start with alcohol.

The National Shooting Sports Foundation urges you to vote in favor of the Protection of Lawful Commerce in Arms Act. Thank you, Mr. Chairman, for permitting the National Shooting Sports Foundation the opportunity to address the Subcommittee and for the Subcommittee's time and attention.

Mr. CANNON. [Presiding.] Thank you, Mr. Keane.

[The prepared statement of Mr. Keane follows:]

PREPARED STATEMENT OF LAWRENCE G. KEANE

Chairman Cannon and distinguished members of the Subcommittee, my name is Lawrence G. Keane. I am the senior vice president and general counsel of the National Shooting Sports Foundation, Inc. (NSSF). The National Shooting Sports Foundation appreciates the opportunity to appear before the Subcommittee this morning to offer testimony in support of the *Protection of Lawful Commerce in Arms Act* (H.R. 800).

Formed in 1961, the National Shooting Sports Foundation, with approximately 2,500 members, is the trade association for the firearm, hunting and recreational shooting sports industry. NSSF is proud of our industry's cooperative relationship with law enforcement, as exemplified by the NSSF—Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) partnership program called *Don't' Lie for the Other Guy* that ATF Director Carl Truscott described as "vital in educating Federal firearms licensees (FFL's) and their employees how to recognize and deter the illegal purchase of firearms through straw purchases." He called the program "an important tool for ATF as we pursue our missions of preventing terrorism, reducing violent crime, and protecting the public through Project Safe Neighborhoods and other initiatives." NSSF's commitment to promoting the safe and responsible use of firearms is typified by our *Project ChildSafe* program. Operating under a grant from the U.S. Department of Justice, NSSF, in partnership with state and local governments throughout the United States, has distributed to the public over 25 million firearm safety kits, which includes a free firearm lock. We are very proud that *Don't Lie* and *Project ChildSafe* are both components of the Justice Department's *Project Safe Neighborhoods* program.

We strongly support the *Protection of Lawful Commerce in Arms Act* (H.R. 800) because it is an important common sense legal reform that will help restore integrity and fairness to our nation's judicial system by preventing lawsuit abuse. This vital bipartisan legislation is critical to protecting America's firearm industry from destruction and bankruptcy at the hands of opportunistic trial lawyers, seriously misguided politicians and radical antigun interest groups who seek to destroy and

bankrupt our industry through massive damage awards and/or bleed us dry through ever mounting legal fees. These predatory lawsuits misuse and abuse our nation's judicial system in an attempt to dictate to all Americans public policy choices that are rightfully the purview of Congress and elected state legislators. In dismissing one such suit, a Florida appellate judge astutely observed that

> [Miami-Dade County's] request that the trial court use its injunctive powers to mandate redesign of firearms and declare that the [firearms manufacturers'] business methods create a public nuisance, is an attempt to regulate firearms and ammunition through the medium of the judiciary. . . . The County's frustration cannot be alleviated through litigation as the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government but to the legislative branch.

This misuse of lawsuits by interest groups to force public policy changes, so-called "regulation through litigation," when under our Constitution those policy choices are for Congress and state legislatures to make, represents a direct threat to the entire business community and the nation's economy. This is why the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Association of Wholesalers, the American Tort Reform Association, and many others support H.R. 800. As National Association of Manufacturers executive vice president Michael Baroody has said, *"It is a certainty that other businesses will be the next target if these groups succeed in misusing the courts against the firearms industry."*

This legislation is supported by organized labor as well. Cecil Roberts, president of the United Mine Workers of America, which represents nearly a thousand workers at the Remington Arms Company's plant in New York, said this bill "will help prevent lawsuits by various parties that are intended to shut down the legitimate and legal firearms industry in the United States because of improper use of firearms by individuals." He cautioned, "The United States is losing our industrial base and since January 2001 we have lost 2.5 million industrial jobs in the U.S. . . . We need to take steps to protect and encourage growth of our industrial base, including our firearms manufacturers."

Beginning in 1998, a group of approximately forty urban politicians, aligned with contingency-fee trial lawyers and anti-gun activists, have flooded our nation's courts with lawsuits filed against law-abiding, federally licensed firearm manufacturers, wholesale distributors and retailers. These suits blame federally licensed firearm manufacturers for the actions of criminals. The plaintiffs in these cases allege that the sale of a legal product in full compliance with the vast and extensive array of federal, state and local laws and regulations somehow causes criminal violence to occur. They allege that members of the industry are subverting the law by knowingly and willingly selling guns to criminals and are funneling firearms to the so-called "criminal market." These despicable allegations are both patently false and highly offensive and defamatory to the tens of thousands of men and women who work in our industry.

Despite some success in the courts, this well-funded, highly coordinated onslaught of abusive lawsuits against members of our industry continues unabated. Several cases are currently pending at the trial court level with several more cases at various stages of appeal that could be returned to trial courts for costly and time-consuming discovery and trial. A single hundred million dollar verdict will bankrupt virtually all of the defendants. In fact, the companies would almost certainly be unable to post the bond required to enable them to appeal such an award. Recently, the City of New York enacted into law the *Gun Industry Responsibility Act* that imposes absolute liability on law abiding, federally licensed firearm manufacturers and dealers for criminal shootings that occur in New York City. Members of our industry are being sued today right here in the District of Columbia under a similar law that imposed absolute liability upon manufacturers and dealers for criminal shootings occurring in the District because they lawfully sold a firearm that was then illegally brought into the District and used in the commission of a crime. A manufacturer is being sued in federal court in California for selling firearms to a police department in Washington State that was later used in a criminal shooting. In that same case, a distributor is being sued even though it never owned, possessed or sold the firearm in question. This case, *Ileto v. Glock,* is the poster child for the *Protection of Lawful Commerce in Arms Act.*

Winning on the merits is not necessary in order for these politicians and antigun activists to impose through litigation, or financially extorted and coerced settlements, a radical gun control agenda repeatedly rejected by Congress and state legislatures, and not supported by the American public. At the time he filed his suit, Chicago Mayor Richard Dailey said, "We're going to hit them where it hurts—in

their bank accounts. . .” Andrew Cuomo, then Housing and Urban Development Secretary, threatened firearm manufacturers with “death by a thousand cuts.” NAACP president Kweisi Mfume said its lawsuit was “an effort to break the backs” of industry members. These antigun plaintiffs can implement their gun control policies throughout the entire nation if the coercive effect resulting from the staggering financial cost to defend these baseless suits forces industry members into a Hobson’s choice of either capitulation or bankruptcy. Companies have gone bankrupt, and thousands of people thrown out of work, vindicating themselves against baseless lawsuits; just ask Dow Corning.

The collective, industry-wide cost to defend these ill-conceived, politically motivated, predatory lawsuits has been truly staggering. Exact figures are unavailable because the defendants are competitors, and each considers its defense costs to be confidential business information. However, based on discussions with insurance industry executives, manufacturers’ corporate counsel, reading cost estimates in various publications and NSSF’s own experience as a defendant in these cases, I believe a conservative estimate for the total, industry-wide cost of defending ourselves to date now exceeds $200 million dollars. This is a huge sum of money for a small industry like ours. The firearm industry taken together would not equal a Fortune 500 company.

The cost of litigation is borne almost exclusively by the companies themselves. With few exceptions, insurance carriers have denied coverage. These antigun plaintiffs have carefully drafted their complaints to take them outside of liability insurance coverage in order to apply maximum financial pressure on the defendant manufacturers. Because of these lawsuits, firearm industry members now confront skyrocketing premium increases when renewing their insurance policies. In addition, insurance policies now universally exclude coverage for these types of suits. This has resulted in large, across-the-board price increases for consumers. In addition, in these trying economic times, taxpayers of the cities that have chosen to pursue the utterly discredited notion that manufacturers are responsible for the acts of criminals are forced to shoulder their city’s cost of pursuing such a lawsuit, money that would be better spent hiring more police officers, procuring new equipment or funding critical social services.

These lawsuits threaten the very existence of the manufacturers that produce the tools our military and law enforcement agencies use every day to protect America and our freedoms both here at home and abroad. If these companies are driven out of business, from whom will our military and law enforcement purchase firearms? Make no mistake about it; these lawsuits have national defense and homeland security implications.

The legislation you are considering today is perhaps more important for what it does not do. It does not, as antigun interest groups have falsely alleged, “close the courthouse doors” to those who have been injured by firearms that have been illegally sold, supplied to a person likely to use the firearm in a manner involving an unreasonable risk of injury to himself or another, or prevent a suit due to a defectively designed or manufactured product. The bill expressly provides that injured parties will be able to assert well-recognized tort law claims against the manufacturers and sellers of firearms. The Wall Street Journal clearly stated in an editorial that, *“This isn’t immunity, as some critics claim. Gun makers and distributors would still have to abide by product liability laws and still face civil suits for violating regulations on sales or distribution. But just as Sony is not responsible for someone who uses a camcorder to film child pornography, no longer could Beretta be held responsible for someone using its legally purchased product to rob a liquor store.”* (*Wall Street Journal,* April 17, 2003.) It is that abuse of our judicial system that this legislation is carefully drafted to stop, nothing more and nothing less.

The loudest voices arrayed in opposition to this legislation are the same antigun interest groups that are orchestrating and financing the litigation assault to regulate the firearm industry in ways Congress and state legislatures have roundly rejected and hold no support with the American public.

There are several refinements between the bill passed by the House in the 108th Congress (H.R. 1036) and this legislation. One change better clarifies that suits can proceed where there is a defective product, but that when a criminal volitionally pulls the trigger causing injury, the manufacturer cannot be sued. As revised, for instance, a juvenile who while target shooting without written permission from his parents (a violation of 18 U.S.C. § 922(y)) is injured by defective ammunition could still be able to bring a suit against the ammunition manufacturer. H.R. 800 defines a “trade association” based on Internal Revenue Code and regulations. This new definition avoids specious arguments that the former definition was intended to protect the National Rifle Association. There was never any such intention in the previous bill, and this language makes that clear. H.R. 800 provides that manufacturers or

sellers can be sued if they "knowingly" violate laws applicable to the sale or marketing of the product, and the violation is a proximate cause of harm to the plaintiff. By comparison, H.R. 1036 said "knowingly and willfully." We support these refinements because they enhance and further clarify the bill's purpose and intent.

Over thirty states have already enacted similar laws to stop "junk" lawsuits designed to destroy this industry and to achieve gun control regulation through litigation. We agree with President Bush who recently said, *"Our country depends on a fair legal system that protects people who have been harmed without encouraging junk lawsuits that undermine confidence in our courts while hurting our economy, costing jobs and threatening small businesses."* The time has come for Congress to enact a common sense legal reform to restore integrity and fairness to our judicial system, protect American jobs and industry and to prevent an unconstitutional attempt to circumvent Congress and state legislatures. We call upon Congress to prevent lawsuit abuse. The future of one of America's oldest, most important industries and the loss of thousands of American jobs vital to the health of our economy is at stake, as is a critical component of our national security industrial base.

The shuttering of the firearm industry will hit states—especially rural states—especially hard. Each year hunters and shooters spend $21 billion generating 366,344 jobs that pay more than $8,896,623,900 in salaries and wages and provide $1,223,049,215 in state tax revenue.

In closing, if these lawsuits are not stopped, then it is open season on any industry. It is guns today, and we are already seeing similar legal assaults on the fast food industry—cars, alcohol and distilled spirits could be next in line at the courthouse door. In some way, these lawsuits will impact job creation in your districts and states and not for the better.

The National Shootings Sports Foundation urges you to vote in favor of the *Protection of Lawful Commerce in Arms Act* (H.R. 800). I thank you Mr. Chairman for permitting the NSSF to address the Subcommittee and for the Subcommittee's attention this morning.

ATTACHMENT

American Insurance Association

1130 Connecticut Ave. NW
Suite 1000
Washington, DC 20036
202-828-7100
Fax 202-293-1219
www.aiadc.org

October 30, 2003

The Honorable Larry Craig
United States Senate
Washington, DC 20510

Dear Senator Craig:

The American Insurance Association is pleased to endorse your legislation, S. 659, the Protection of Lawful Commerce in Arms Act. The American Insurance Association is a trade association representing more than 400 insurance companies that provide all lines of property/casualty insurance. AIA companies write more than $118 billion in premiums annually.

In recent years there has been an increase in speculative lawsuits designed to achieve policy objectives through the judicial process. Many of these suits are based on theories without a foundation in U.S. common law and jurisprudence and do not represent a bona fide expansion of the common law. They cost time and money to defend.

Your legislation is a balanced approach that will prevent such lawsuits against the firearms industry for criminal or unlawful misuse of their products by making clear that a cause of action does not exist for such suits. It does not prohibit legitimate suits against wrongdoers for defective products or for certain illegal acts.

We thank you for your leadership on this important issue, and we urge Senate consideration of S. 659.

Sincerely,

Leigh Ann Pusey
Senior Vice President – Federal Affairs

JAY S. FISHMAN, Chairman
JOHN J. AMORE, Chairman Elect
DOUGLAS G. ELLIOT, Vice Chairman
Vice Chairman
ROBERT E. VAGLEY, President

DAVID M. FARMER
Senior Vice President – Federal Affairs
dfarmer@allianceai.org

The Honorable Larry Craig
United States Senate
Washington, D.C. 20510

October 30, 2003

Dear Senator Craig:

The Alliance of American Insurers is a national property and casualty insurance trade association representing more than 340 insurers. Our membership includes national, regional, and niche insurance companies that provide a variety of property and casualty insurance products to our insureds. Litigation reform is a matter that our membership has long supported and as a result we offer our support for S 659, the Protection and Lawful Commerce in Arms Act, which you introduced earlier this year.

As you know, our tort litigation system has evolved into a system that fosters frivolous lawsuits, forum shopping, and regulation through litigation. Traditional tort concepts have been discarded for theories that have made the system into one of "jack pot" justice. The cost to the American economy has been estimated to exceed $230 billion in 2002 and these costs are growing at a rapid rate.

Traditional tort law holds that a manufacturer or seller of a product is generally not liable for the criminal or tortuous misuse of that product unless the product is defective or negligence in the manufacture or sale of the product is present. This is a common sense rule that has been applied to all products, from automobiles to "widgets" to even firearms. Recent history has shown that this traditional tort concept has been replaced by theories that have resulted in lawsuits seeking to hold those in the firearms industry responsible for the criminal, wrongful, or negligent misuse of firearms. The industry has been overwhelmed by the cost of defending against these lawsuits. These are tactics that seek to regulate the firearms industry through litigation in order to achieve a result far beyond what federal and state legislatures have permitted. In our view, this sets a dangerous precedent for our litigation system and the economy if traditional tort concepts continue to be abandoned.

These lawsuits are also an assault on the concept of individual responsibility. Criminals must bear responsibility for their act, not the manufacturer of the baseball bat, car, wrench, or firearm that became a tool of the criminal. In the wrong hands, anything can become a criminal tool. That's why you legislation is important to the business community. To allow such actions to continue moves our nation down a litigation road that can have only adverse effects on the entire economy.

S 659 represents a well crafted but modest approach that is designed to prevent abuse of the legal system while at the same time preserving the rights of individuals that have legitimate cases to pursue them. We support your efforts on this legislation well as other meaningful, though more general, litigation reform initiatives that are currently before the Senate. Your legislation is but one example of what must be done to preserve the integrity of out tort system.

Sincerely,

David M. Farmer
Senior Vice President, Federal Affairs

1211 Connecticut Avenue, NW, Suite 400 • Washington, D.C. 20036
tel 202.822.8811 • *fax* 202.872.1865 • www.allianceai.org

ATRA American Tort Reform Association
1101 Connecticut Avenue, NW • Suite 400 • Washington, DC 20036
(202) 682-1163 • Fax (202) 682-1022 • www.atra.org

October 29, 2003

The Honorable Larry E. Craig
United States Senate
Washington, D.C. 20510

Dear Senator Craig:

I am writing on behalf of the American Tort Reform Association (ATRA) to express our support for S. 659, the Protection of Lawful Commerce in Arms Act. ATRA, founded in 1986, is a broad-based bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

ATRA is concerned about the increasing trend of "regulation through litigation." This trend, which began with the state Medicaid recovery lawsuits against the tobacco industry, and has now spread to other industries, including the firearms industry, undermines the separation of powers and represents an end-run around the democratic process. ATRA believes that the decision to regulate or tax entire product lines should be left to the elected representatives of the people. The courts should not make such decisions.

Lawsuits filed by municipal governments and other entities against the firearms industry seek to hold the industry liable for the criminal misuse of lawful products by end-users that are beyond the industry's control. The cases are not supported by either fundamental tort law rules or sound public policy.

The Protection of Lawful Commerce in Arms Act does not interfere with traditional tort law principles. Manufacturers of defective firearms will remain responsible for harms caused by such defects. The legislation does surgically address claims based on the premise that a lawfully sold non-defective product should not lead to liability on the part of the product's manufacturer. We agree with that result.

ATRA urges Members to vote in favor of S. 659 when the bill is considered by the full Senate.

Sincerely,

Sherman Joyce
President

United Mine Workers of America

CECIL E. ROBERTS
INTERNATIONAL PRESIDENT

TELEPHONE
(703) 208-7220
FAX (703) 208-7132

September 23, *2003*

Dear Senator:

On behalf of the United Mine Workers .of America, in particular members of UMW A Local Union 717 at Remington Arms in Ilion, NY, I ask that you co-sponsor and strongly support the Protection of Lawful Commerce in Arms Act, S. 659. Similar legislation, H.R. 1036, passed the House of Representatives in April.

The Protection *of* Lawful Commerce in Arms Act will help prevent lawsuits by various parties that are intended to shut dawn the legitimate and legal firearms industry in the United States because of improper use of firearms by individuals.

An issue that is often overlooked in this emotionally charged debate is the economic impact the closing of our firearms industry will have on workers and their communities. In mast cases these plants are located in rural areas and are the largest employers in the community. Nearly *1000* UMWA members work for Remington Arms in Ilion, one *of* the largest employers in Herkimer County in upstate New York.

The United States is losing our industrial base and since January *2001* we have lost 2.5 million industrial jobs in the U.S. In the state of New York, where our members work for Remington Arms, 179,400 industrial jobs have been last since January *2001*. We need to take steps to protect and encourage growth of our industrial base, including our firearms manufacturers. You can do that by co-sponsoring and supporting S.659.

I strongly encourage you to co-sponsor the Protection of Lawful Commerce in Arms Act in its consideration by the full Senate.

Sincerely,

Cecil E. Roberts

N·A·W

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS
1725 K STREET, N.W., SUITE 300
WASHINGTON, DC 20006
TEL: 202-872-0885 • FAX: 202-296-5940
WWW.NAW.ORG

FAX TRANSMISSION July 2, 2003

TO: ***All Members of the United States Senate***

On behalf of the National Association of Wholesaler-Distributors (NAW), we are writing to ask for your support for S. 659, the "Protection of Lawful Commerce in Arms Act."

NAW is comprised of direct member firms and a federation of over 100 national, regional, state and local line-of-trade associations which collectively total more than 40,000 companies.

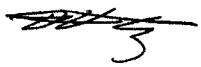
We believe that it is a true miscarriage of justice for the manufacturers, wholesaler-distributors and/or retailers of products to be held liable for the misuse of those products by end-users over whose conduct they have no control.

S. 659 is a modest and thoughtful response to the need for serious civil justice reform. A bi-partisan majority of the members of the U.S. Senate have co-sponsored this legislation, and a companion bill has already passed the U.S. House of Representatives by a wide -- and also bi-partisan -- margin.

The Congress has the opportunity now to pass and send to the President for his expected signature, a measure that takes a small step toward returning common sense to our civil justice system.

We urge you not to let this opportunity pass, and to vote for S. 659.

Sincerely,



Dirk Van Dongen
President

James A. Anderson, Jr.
Vice President-Government Relations

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

February 25, 2004

TO MEMBERS OF THE UNITED STATES SENATE:

I am writing on behalf of the U.S. Chamber of Commerce, the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, to express our support for S. 1805, the "Protection of Lawful Commerce in Arms Act" and to urge you to support this important piece of legislation when the Senate considers it this week.

The U.S. Chamber is greatly concerned about the growing trend of litigation being filed against entire legal industries with the goal of either raising government revenue or achieving policy goals outside the constraints of the political process. This dangerous trend began in the state lawsuits against the tobacco industry to recover Medicaid funds and, as the Chamber predicted, has now spread to other industries – including the firearm industry.

The Protection of Lawful Commerce in Arms Act would help curtail this abusive situation. This narrowly tailored legislation is designed to limit speculative litigation against the firearms industry for legally selling their product. The legislation simply makes clear that, in most circumstances, a cause of action does not exist against the manufacturer or seller of qualified firearms or a trade association for the criminal or unlawful misuse of the product by the plaintiff or third party. It is also important to highlight the fact that S. 1805 does not provide blanket immunity to the firearm industry. The bill specifically preserves the ability of injured parties to pursue litigation if they are injured by a defective product or as a result of certain specified illegal acts.

S. 1805 would help stop speculative litigation against entire industries and I urge you to support and vote in favor of the Protection of Lawful Commerce in Arms Act when the Senate considers it this week.

Sincerely,

R. Bruce Josten

SUPPORT FOR S. 659

August 27, 2003

The Honorable Larry Craig
520 Senate Hart Building
Washington, D.C. 20510

The Honorable Max Baucus
511 Senate Hart Building
Washington, D.C. 20510

Dear Senator Craig and Senator Baucus:

The wildlife conservation organizations listed below represent millions of dedicated sportsmen and women. We commend your efforts to protect the future of the American firearms industry and we support S. 659.

The "Protection of Lawful Commerce in Arms Act" will prevent lawsuits against firearm manufacturers attempting to hold them liable for the criminal acts of third parties. The legislation you have sponsored is needed in order to shield lawful firearm manufacturers from lawsuits filed with the intent of driving the industry out of business.

S. 659 only protects legitimate businesses that comply with federal, state and local firearm laws. It has no effect on true liability cases for defective products, breach of contract or warranty, negligent entrustment or other causes that are not related to third-party criminal misuse of firearms. Firearm manufacturers ought not to be held to a standard of liability that reaches to situations beyond their control, any more than any other product manufacturers are held to such a standard.

Also of significance to our members is the potentially serious impact that irresponsible lawsuits could have upon the budgets of state fish and wildlife agencies. Excise taxes are imposed on firearms under the Federal Aid in Wildlife Restoration Act (commonly known as the Pittman-Robertson Act). The revenue generated is apportioned to state fish and wildlife agencies for wildlife restoration projects and hunter safety training and represents a critical source of funding.

Our members gladly pay these taxes because they understand the connection between these funds and the ability of the states to maintain healthy wildlife populations and recreational hunting and shooting opportunities. But all people who value wildlife should be concerned about the possible loss of funding that could result if the viability of American firearms manufacturers were placed in jeopardy.

Thirty-two states have enacted statutes similar to S. 659 and we encourage the Congress to follow their lead. We trust that our support of this legislation will help to spur its passage in the U.S. Senate.

Respectfully,

BASS/ESPN Outdoors
Boone and Crockett Club
Buckmasters American Deer Foundation
Campfire Club of America
Congressional Sportsmen's Foundation
Council for Wildlife Management and Education
Dallas Safari Club
Foundation for North American Wild Sheep
Hunting and Shooting Sports Heritage Foundation
International Association of Fish and Wildlife Agencies
International Hunter Education Association
Izaak Walton League of America
Mule Deer Foundation
National Rifle Association
National Shooting Sports Foundation
National Trappers Association
National Wild Turkey Federation
Pheasants Forever
Pope and Young Club
Quail Unlimited
Rocky Mountain Elk Foundation
Ruffed Grouse Society
Safari Club International
Shikar-Safari Club
Texas Wildlife Association
The Wildlife Society
U.S. Sportsmen's Alliance
Whitetails Unlimited
Wildlife Forever
Wildlife Management Institute

National Shooting Sports Foundation, Inc.
FLINTLOCK RIDGE OFFICE CENTER · 11 MILE HILL ROAD · NEWTOWN, CT 06470-2359
(203) 426-1320 · FAX (203) 426-1087 · WEB SITE www.nssf.org · EMAIL lkeane@nssf.org

LAWRENCE G. KEANE
SENIOR VICE PRESIDENT AND
GENERAL COUNSEL

March 3, 2005

The Honorable William Frist
Senate Majority Leader
Washington, D.C. 20510

The Honorable Harry Reid
Senate Minority Leader
Washington, D.C. 20510

Re: *Protection of Lawful Commerce in Arms Act* (S.397)

Dear Senators Frist and Reid:

We, the undersigned executives of America's leading firearms and ammunition manufacturers, write to urge the swift passage of the *Protection of Lawful Commerce in Arms Act* (S.397) which was recently introduced in the Senate by Sen. Larry Craig. This vital bipartisan legislation is critical to protect America's firearms industry from bankruptcy at the hands of opportunistic trial lawyers, seriously misguided politicians and radical antigun interest groups who are abusing our nation's judicial system to impose through litigation gun-control measures repeatedly rejected by Congress and state legislatures and not supported by the overwhelming majority of Americans. Your prompt action on this important legal reform legislation will save tens of thousands of good paying jobs connected to our lawful and highly regulated industry. While over thirty states have already enacted similar legislation, only a federal law will provide comprehensive protection against predatory lawsuits that threaten to destroy and bankrupt our industry by blaming manufacturers for the actions of criminals. When this legislation is taken up by the Senate, we ask that you use your good offices to press for passage of a "clean" bill without amendment.

The firearms industry has been targeted by greedy trial lawyers, misguided city officials and antigun activist who are eager to misuse and abuse our nation's judicial system to dictate to all Americans public policy choices that are rightfully the purview of Congress and elected state legislators. In dismissing one such suit a Florida appellate judge astutely observed that

> [Miami-Dade's] request that the trial court use its injunctive powers to mandate redesign of firearms and declare that the [firearms manufacturers'] business methods create a public

> nuisance, is an attempt to regulate firearms and ammunition through the medium of the judiciary.... The County's frustration cannot be alleviated through litigation as the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government but to the legislative branch.

It is important for all Senators to understand that S.397 does not, as its opponents falsely assert, provide our industry with "blanket immunity," nor does the bill close the courthouse door to injured victims. Under this carefully drafted bill, no one with a legitimate claim will be barred from seeking redress of their injuries through the judicial system. Any company or dealer that breaks the law can be sued. A company can be sued for designing and selling a defective product. A retailer can be sued for negligently entrusting a firearm to someone, for example by selling a firearm to an obviously drunk person who misuses the firearm injuring himself or someone else.

Members of our industry have been forced to spend collectively well over $200 million dollars to defend themselves against this onslaught of "junk" lawsuits, with no end in sight. While we have been fortunate to experience some limited success in the courts, the cold hard reality is that we remain just one multi-hundred million dollar jury award away from the bankruptcy of an entire legal, heavily regulated and responsible industry. In fact, the companies would almost certainly be unable to post the bond required to enable them to appeal such an award.

The shuttering of the firearms industry will result in the loss of hundreds of thousands of good paying jobs, hitting rural states with rich hunting traditions especially hard. Each year hunters and shooters spend $21 billion generating 366,344 jobs that pay more than $8,896,623,900 in salaries and wages and provide $1,223,049,215 in state tax revenue. The national security implications of destroying America's "arsenal for democracy" cannot be ignored. Our military and law enforcement agencies will be forced to rely upon foreign manufacturers. Those foreign governments might impose export bans if they dislike U.S. foreign policy positions.

The misuse of lawsuits by interest groups to force public policy changes, so-called regulation through litigation, when under our Constitution those policy choices are for Congress and state legislatures to make, represents a very real threat to the entire business community. This is why the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Association of Wholesalers and many others support S.397. As National Association of Manufacturers executive vice president Michael Baroody has said, *"It is a certainty that other businesses will be the next target if these groups succeed in misusing the courts against the firearms industry."* Your bipartisan leadership will help protect American jobs, protect Congress' exclusive authority under the Constitution to regulate interstate commerce and ensure that the Separation of Powers doctrine and the constitutional principles of federalism and comity

are respected. And you will have helped to safeguard the ability of citizens to exercise their cherished Second Amendment rights.

We respectfully urge that you move quickly to pass the *Protection of Lawful Commerce in Arms Act*. We thank you for your efforts last year in attempting to move this legislation through the Senate.

Sincerely,

Stephen L. Sanetti
President & COO
Sturm, Ruger & Co., Inc.

Michael F. Golden, President & CEO
Smith & Wesson Corp.

Robert W. Behn, President
Marlin Firearms Company

Carlton S. Chen, Vice President,
General Counsel & Secretary
Colt's Manufacturing Company, LLC

Charles G. Guevremont, President
Browning Firearms and U.S. Repeating
Arms, Co. d/b/a Winchester

Tommy Millner, President and CEO
Remington Arms Company

A. Iver Mossberg, Jr., CEO
O.F. Mossberg & Sons, Inc.

Richard M. Hammett, President
Winchester Ammunition

Jeffrey K. Reh, Vice General Manager
Beretta U.S.A. Corp.

Robert Glock, President
Glock, Inc.

Robert Morrison, Executive Vice
President & COO
Taurus International Firearms

Mark W. DeYoung, President & CEO
Federal Cartridge

Ronald Coburn, Chairman & CEO
Savage Arms, Inc.

Stephen Hornady, President
Hornady Manufacturing Co.

Matthew C.C. Christoni III
President & CEO
North American Arms, Inc.

James L. Smith, President & CEO
A-Square Company

cc: The Honorable Larry Craig
The Honorable Max Baucus

NAM National Association of Manufacturers

John Engler
President and CEO

March 8, 2005

The Honorable Neil Abercrombie
U.S. House of Representatives
1502 Longworth House Office Building
Washington, DC 20515

Dear Representative Abercrombie:

On behalf of the National Association of Manufacturers, I urge you to support H.R. 800, the Protection of Lawful Commerce in Arms Act, sponsored by Representatives Cliff Stearns and Rick Boucher.

H.R. 800 would help to rein in lawsuits against the firearms industry for the purposes of "regulation through litigation." That is, lawsuits brought to force a settlement or court order for the purpose of changing industry behavior or practices. Even if the intent of the lawsuit is a laudatory goal, the proper branches of government for dealing with it are the legislative and executive. By using the courts, however, litigants are able to short-circuit public debate and balancing the interests of society as a whole.

Another practice that H.R. 800 would stem is "taxation through litigation." This occurs when a government entity takes a company or industry to court for the purpose of extracting a monetary settlement rather than for a true harm committed. Again, the proper forum for imposing what is, in essence, a special assessment or "tax" is the legislative process.

Perhaps most importantly, the Protection of Lawful Commerce in Arms Act allows cases to go forward if they are based on negligence, product defect or other true harm.

The NAM does not routinely take a position on industry-specific legislation. We would prefer to see a bill that deals with the problems of regulation and taxation through litigation in a general manner because the same tactics could be used against other industries. However, with the firearms industry under judicial assault from activists and some state and local governments wishing to avoid the transparency of legislating or rulemaking, the NAM encourages Congress to enact the Protection of Lawful Commerce in Arms Act.

Sincerely,

John Engler

JE/laf

Manufacturing Makes America Strong
1331 Pennsylvania Avenue, NW • Washington, DC 20004-1790 • (202) 637-3106 • Fax (202) 637-3460 • www.nam.org

John Engler
President and CEO

March 8, 2005

The Honorable Daniel K. Akaka
United States Senate
141 Hart Senate Office Building
Washington, DC 20510

Dear Senator Akaka:

On behalf of the National Association of Manufacturers, I urge you to support S. 397, the Protection of Lawful Commerce in Arms Act, sponsored by Senators Larry Craig and Max Baucus.

S. 397 would help to rein in lawsuits against the firearms industry for the purposes of "regulation through litigation." That is, lawsuits brought to force a settlement or court order for the purpose of changing industry behavior or practices. Even if the intent of the lawsuit is a laudatory goal, the proper branches of government for dealing with it are the legislative and executive. By using the courts, however, litigants are able to short-circuit public debate and balancing the interests of society as a whole.

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Sincerely,

John Engler

JE/laf

Manufacturing Makes America Strong
1331 Pennsylvania Avenue, NW • Washington, DC 20004-1790 • (202) 637-3106 • Fax (202) 637-3460 • www.nam.org

Mr. CANNON. We'd like to welcome Mr. Delahunt from Massachusetts, who's joined us.

We have a vote coming up, and I'd hate to hold the panel through that vote and it would be hard for Members to come back, so I'd ask unanimous consent to limit questioning by the Members to 3 minutes. No objection, so ordered.

Mr. Watt, would you like to begin?

Mr. WATT. Thank you, Mr. Chairman. I think in light of our time constraints, I think I will not ask any questions. We've been through this several times now in this Committee, and here we go again. I mean, I made that point in my opening statement.

I would just say that this whole notion that Mr. Beckman and Mr. Walton have—obviously, it's some public relations thing that you've undertaken to compare this war to the war in Iraq or call this legal terrorism and make it in some kind of way comparable to terrorism in general, I think is insulting to your argument, and I'll just leave that alone and tell you that's my opinion. That's a constructive suggestion. For you all to compare these things like that, I think is a bad, bad public relations move.

I yield back, Mr. Chairman.

Mr. CANNON. The gentleman yields back.

Mr. Gohmert, would you like to question the witnesses?

Mr. GOHMERT. Yes, I would.

Mr. CANNON. The gentleman is recognized for 3 minutes.

Mr. GOHMERT. Thank you. Mr. Henigan, let me ask, what do you take the term negligent entrustment to mean?

Mr. HENIGAN. Congressman, negligent entrustment is actually defined in this bill, so it has a very special definition that is not necessarily the same as the common law definition. According to this bill, the suits that would be allowed under that doctrine are suits in which a seller transfers a gun to an obviously dangerous person and then that person misuses the gun against someone. So it would be, for example, a situation where a seller sells a gun to someone who is intoxicated and then goes out and shoots someone. That is a very rare kind of case.

The much more frequent kind of case is the kind of thing that happened in that gun shop in West Virginia, where the sale of the gun is to a gun trafficking team and the person who pulled the trigger was nowhere near the gun shop, but nevertheless, the sale was incredibly suspicious. It had all the earmarks of a sale to people who were going to take those guns and sell them directly into the illegal market.

So the doctrine of negligent entrustment as it is defined in this bill would not have preserved that case at all.

Mr. GOHMERT. Well, it does seem, though, that the Second Amendment, when it says—talks about not infringing the right to keep and bear arms, doesn't mean what one constable back in Texas thought it meant, that he had the right to wear short sleeves. But until such time as that is amended, it seems like we should be affording people the right to act within the purview of that amendment.

I yield back the remainder of my time. Thank you, Mr. Chairman.

Mr. CANNON. Thank you, Mr. Gohmert.

Mr. Van Hollen?

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

Whenever the case of the sniper victims comes up, the proponents of the bill say, oh, no, no, no, we're not talking about trying to bar people like the sniper victims and their families from court. It's other people in the world. In fact, as I understood your testimony, Mr. Beckman, you said your understanding of the bill was it would not bar that case. Is that what your testimony was?

Mr. BECKMAN. Insofar as the claims against the manufacturer of that firearm——

Mr. VAN HOLLEN. Let—go ahead.

Mr. BECKMAN. Insofar as the claims against the manufacturer of that firearm, I believe that this legislation would prevent that. But respectfully, I suggest that Bushmaster sold its lawful product in a non-defective condition, which the Congress of the United States as well as every State said was a lawful product.

Mr. VAN HOLLEN. If I could, let me focus on the gun store, the gun store that sold the weapons. Is it your testimony that a lawsuit against the gun store on the facts of the sniper case would still be allowed to go forward under this bill?

Mr. BECKMAN. Well, it——

Mr. VAN HOLLEN. And if so, if you could point to the specific provisions—specific provisions of this bill, because, as you know, when you go in front of a court of law and you sit before a judge, you've got to make an argument based on the language in this bill. If you could tell me, based on the facts, what provisions would allow that case would go forward, I'd appreciate it.

Mr. BECKMAN. Okay. That firearm was not sold by Bull's Eye. It was stolen by Bull's Eye. Strike that, stolen from Bull's Eye. The qualified civil liability action would not include, in my opinion, the failure of Bull's Eye to have maintained control over whatever it—its inventory, because we already have plenty of Federal law that dictates the inventory control that the firearms manufacturers—the firearms retailers should have, and it is the unlawfulness use that is—it would not be precluded. And it would deal with, perhaps—you're asking me to interpret this draft statute as I sit here, and I believe——

Mr. VAN HOLLEN. Right. I'm not—you made a statement in your testimony that I interpreted to mean that you thought that this would allow this to go forward, so I thought that you looked at the provisions. That's all.

Mr. BECKMAN. Yes, sir, I have, and I believe that the claim against the retailer would have not been foreclosed under the language of the statute. I believe that it would have foreclosed the——

Mr. VAN HOLLEN. And all I was asking you, Mr. Beckman, based on your reading of the statute, what provisions in the statute, based on your understanding of the facts, would allow it to go forward, because the fact of the matter is, although over 250 weapons were missing from this store, under the requirements in this bill, you have to show a direct connection between the particular gun that was stolen and used in the shootings and a proximate cause between the disappearance of that gun and the shootings.

And I just—the way I read this bill, and the way many lawyers who have looked at the bill and written opinions and submitted

opinions to the Congress, it's quite clear, I believe, that those claims would be barred against the store.

Mr. BECKMAN. Well, but again, I respectfully disagree, sir, because I believe that it is a violation of Federal law, existing Federal law, for the retailer to have not reported the theft.

Mr. VAN HOLLEN. If I could ask you, the requirement is if you know of a theft, right?

Mr. BECKMAN. Well——

Mr. VAN HOLLEN. In this case—Mr. Chairman, I don't mean to belabor this point, but I'd just like to just wrap up, because in this case, the testimony was that about 230 weapons had been missing from the store. Their testimony was, and it was unrefuted, that they were not aware of the theft of the Bushmaster rifles used in the sniper killings until after the killings took place, and therefore, there would be no legal obligation on them to report something that they did not know about under the statutes.

Even though the record is clear that this is a gun store that did not keep control over its weapons—that's why 230 were missing and they couldn't account for them. But the way this is written, because their testimony is they didn't know about it, therefore, they didn't have a legal obligation to report it. Even though they were totally negligent in keeping control of their arsenal, of the guns they were selling, they couldn't—the claim would not be brought.

I would ask if you could, in a written statement, show us how that is not the case. Thank you, Mr. Chairman.

Mr. BECKMAN. I'd be pleased——

Mr. CANNON. You're welcome to answer that question, if you'd like.

Mr. BECKMAN. I believe that I've given my view as to why the statute would not have precluded that case against the retailer. It's still a violation of Federal law. It is just akin go what Mr. Henigan explained in the West Virginia case, where it was a knowing violation of the straw purchase. That has been and will remain a violation of Federal law. Where we have somebody who violates the law, that's not within the purview of this statute. What is within the purview of this statute is the 30-odd lawsuits that were brought by municipalities around this country, all of which had no effect whatsoever on this industry other than to cost them staggering sums of money. And indeed, the lawsuits themselves were abject failures. That's what this legislation is designed to address.

Mr. VAN HOLLEN. Mr. Chairman, at some point, if you could maybe later supply for the record the particular provision in this bill that you say would still allow that lawsuit to go forward, because what this bill does is provide general liability and creates certain exceptions. If you could, please, pinpoint what in the bill allows the lawsuit against the seller of the weapons used in the sniper suit to go forward, I would appreciate it.

Mr. CANNON. And if you could get that within 5 days, we would appreciate that, so that we can include it in the record.

Mr. BECKMAN. I'd be pleased to do so.

Mr. CANNON. Thank you, Mr. Beckman.

The gentleman from Arizona, Mr. Franks, is recognized for 3 minutes.

Mr. FRANKS. Mr. Chairman, I know this isn't the appropriate venue to kind of dissect this legislation, but it occurs to me that in section 5, article III, 1, 2, the *Malvo* case is made very clear. Neither of these individuals involved in the sniper case could have legally purchased a gun in the first place, and so I think it's a red herring.

But the ultimate situation is that in the final analysis here, this is going to a deeper question in our country, and that is simply the right of people to own and bear arms and defend themselves and the right of manufacturers to manufacture weapons that can accomplish that. Ultimately, even those that are opponents of this bill would suggest that the police officers of this nation should have the ability to defend other people.

So with that statement made, it lays out very clearly that it's not the weapons, it's whose hands they are in. If we don't refocus our attentions as a nation into making sure that the people who misuse the weapons are our focus rather than the weapons, then we merely disarm the innocent and merely prevent people from being able to defend themselves, and I can suggest to you that criminals have always preferred unarmed victims, and that is at the core bases of this discussion.

Thank you, Mr. Chairman.

Mr. CANNON. Thank you.

The bell has not yet run. Mr. Delahunt, would you like to ask questions?

Mr. DELAHUNT. If the chair doesn't object.

Mr. CANNON. How could I object? I wish you were on our side, but what the heck. We'll do with the information we get, whatever——

Mr. DELAHUNT. I just want to pick up on something that the gentleman just talked about, a basic right and the Second Amendment. I want to assure you, I support the Second Amendment. But I also support what I consider as a basic right of a citizen who, if he or she feels that there has been an injury because of negligence or because of the actions of someone else, a basic right to the justice system, to the civil justice system. That is probably the core, most fundamental right that we enjoy as Americans, access to a justice system.

You know, the gentleman speaks of staggering sums. How much has been spent?

Mr. BECKMAN. Are you——

Mr. DELAHUNT. I'm speaking to the gentleman with the nice white hair. [Laughter.]

Mr. BECKMAN. Are you talking about for North American Arms specifically, or——

Mr. DELAHUNT. No. In other words, I'll tell you, I'm having real difficulty finding out what the problem is. You know, all I see is in the findings, I don't read anything about empirical data supporting a premise that the industry is going to go under.

Mr. BECKMAN. Well, respectfully, Congressman, we have other laws that preclude us from sharing all of our information among the manufacturers and distributors. So I can only speak to the company, or companies, that I have first-hand knowledge of.

Mr. DELAHUNT. Okay.

Mr. BECKMAN. And I can tell you that my client has spent hundreds and hundreds of thousands of dollars——

Mr. DELAHUNT. Defending lawsuits.

Mr. BECKMAN. Well, I'm talking about the municipal litigation. I'm not talking about——

Mr. DELAHUNT. All right. Now, you've won those suits, correct?

Mr. BECKMAN. Well, thus far, and where I have the problem with it, why I think that this legislation——

Mr. DELAHUNT. Could I ask you—let me just interrupt, okay? You represent a manufacturer.

Mr. BECKMAN. Yes, sir.

Mr. DELAHUNT. Would you have problems if manufacturers enjoyed this particular—the benefit of this legislation, because, you know, I dare say that the most obvious party in terms of responsibility and negligence would be the seller, the immediate seller. Now, if legislation were redrafted which would continue the common law as it applies to the distributor, the immediate seller, would you have a problem with that?

Mr. BECKMAN. I have a problem with holding—trying to hold somebody liable for damages that is very remote, because it is the same thing. We all know about the problems with drunk driving in this country, and if we start holding the auto manufacturers liable——

Mr. DELAHUNT. No, no, but you're not answering my question. I'm saying, let's use your analogy. What about the bartender, okay, that gives that customer who's obviously inebriated that extra drink, as opposed to the maker of the scotch that was consumed? Do you see a distinction there?

Mr. BECKMAN. Well, I do, and we have the Dram Shop Acts that——

Mr. DELAHUNT. I'm not asking about the Dram Shop Acts. I'm asking about the analogy between the producer of the whiskey and the bartender who sells it in terms of responsibility. Do you see a distinction there?

Mr. BECKMAN. I do. I do. I think that if you hold the manufacturer of the whiskey responsible, that's not——

Mr. DELAHUNT. But what about the bartender?

Mr. BECKMAN. If the bartender is serving somebody who's clearly inebriated, I think that's wrong.

Mr. DELAHUNT. Okay, and should be held liable?

Mr. BECKMAN. Indeed. If somebody is then injured by that drunk person, yes, I have no problem with——

Mr. DELAHUNT. Well, I guess that's what I'm suggesting in terms of the difference between the manufacturer and the seller in that gun store to that individual who comes in.

Mr. BECKMAN. Well, unless we have a vertically integrated industry where——

Mr. DELAHUNT. I'm not asking about vertical integration. I'm asking about the individual who sells the gun at the gun store, not—if you guys want to have a caucus, I'll be quiet here and you two can work out the answer. Can I just please ask the question without the gentleman whispering in your ear for just a moment, okay? I'm sure he's more than capable of giving me an answer.

Mr. CANNON. Do you want an answer to the question, or do you want to embarrass the witness, Bill?

Mr. DELAHUNT. Maybe both, but at least an attempt——

Mr. BECKMAN. Fortunately, I don't embarrass very easily.

Mr. DELAHUNT. No. At least an attempt at giving me an answer. There's a distinction between the manufacturer and the gun store.

Mr. BECKMAN. I think there's a great distinction between the manufacturer and the gun store, because you have somebody who is the proverbial—18 inches away——

Mr. DELAHUNT. I'm not——

Mr. CANNON. The gentleman's time has expired and we have a vote called——

Mr. DELAHUNT. Okay.

Mr. CANNON. —so if you don't mind, I'm going to give the gentleman a chance to answer the question and you can clarify a little bit if you want, but we probably do need to come to a close.

Mr. DELAHUNT. I'll do the clarification at a later time.

Mr. BECKMAN. To answer your question, the person who is 18 inches away in a retail store, they have an obligation to comply with the law, and if they're selling through straw purchasers or if they're selling to somebody who is an unqualified buyer, that is a violation of the law and that is not something that is going to be barred under this statute.

Mr. CANNON. The gentleman's time having expired, Mr. Watt?

Mr. WATT. Mr. Chairman, Mr. Conyers has asked me to put some things in the record, so I ask unanimous consent to insert in the record a copy of the GAO report entitled, "FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records."

Mr. CANNON. Without objection—oh, go ahead.

Mr. WATT. A copy of the bill that Mr. Conyers and Representative Chris Shays introduced in response to the GAO report; some information taken from a website which describes the Five-Seven as a 20-round pistol that fires a 5.7 millimeter bullet that will, quote, "defeat most body armor in military service around the world today;" a copy of the bill Representative Eliot Engel introduced which limits the use of the Five-Seven firearm; and some articles which highlight nearly a dozen or so assault weapons-related shootings which all occurred in the past 9 months, many of the shootings involving law enforcement officers.

Mr. CANNON. Without objection, so ordered.

[The material referred to is inserted in the Appendix.]

Mr. CANNON. I want to thank the panel for being here today. The language which you said has helped us frame the language of the debate that I think we're going to have. Actually, I think it was more interesting year than it was last cycle, so perhaps we can get to a vote in the House and also in the Senate and make this thing move forward.

I just want to, not having taken my 5 minutes, let me just make one point. That is, the hundreds of thousands of dollars that your company, Mr. Beckman, spent on defense of these lawsuits means the jeopardy of jobs in my district, and I would prefer that we keep liability the way it historically has been in America. That is personal, with personal responsibility, and I think this bill does that.

Thank you very much, gentlemen. This hearing is adjourned.
[Whereupon, at 11:27 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Good morning ladies and gentlemen; this hearing of the Subcommittee on Commercial and Administrative Law will now come to order. We consider today H.R. 800, the "Protection of Lawful Commerce in Arms Act," which was introduced on February 15 by Representative Stearns. It currently has 157 co-sponsors, including myself.

H.R. 800 provides that a "qualified civil liability action" cannot be brought in any State or Federal court. "Qualified civil liability action" is defined as a civil action or proceeding brought by any person against a manufacturer or seller of firearms or ammunition for damages resulting from the criminal or unlawful misuse of such products. However, such term does not include an action against a person who transfers a firearm or ammunition knowing that it will be used to commit a crime of violence or a drug trafficking crime, or a comparable or identical State felony law. It also does not include an action brought against a seller for negligent entrustment or negligence per se. The bill also includes several additional exceptions, including an exception for actions in which a manufacturer or seller of a qualified product knowingly and willfully violates a State or Federal statute applicable to sales or marketing when such violation was a proximate cause of the harm for which relief is sought. Other exceptions include actions for breach of contract or warranty in connection with the purchase of a firearm or ammunition; and an exception for actions for damages resulting directly from a defect in design or manufacture of a firearm or ammunition, when used as intended. The bill also makes clear that only licensed manufacturers and sellers are covered by the bill.

Tort law rests upon a foundation of personal responsibility in which a product may not be defined as defective unless there is something "wrong" with *the product,* rather than with the product's user. However, in the last several years, lawsuits have been filed against the firearms industry on theories of liability that would hold it liable for the actions of others who use their products in a *criminal* or *unlawful* manner. Such lawsuits threaten to separate tort law from its basis in *personal responsibility,* and to force firearms manufacturers into bankruptcy, leaving potential plaintiffs asserting traditional claims of product manufacturing defects unable to recover more than pennies on the dollar, if that, in federal bankruptcy court. While some of these lawsuits have been dismissed, and some states have acted to limit them in one way or another, the fact remains that these lawsuits continue to be aggressively pursued. In January, the Supreme Court refused to overturn a decision by the notorious Ninth Circuit Court of Appeals that allowed a frivolous lawsuit brought against gun manufacturers for a crime committed by a third party to go forward. One of the personal injury lawyers suing the firearms industry—John Coale—told *The Washington Post*—quote—"The legal fees alone are enough to bankrupt the industry." Professor David Kopel (Ko-PELL) has also stated that the cities suing the firearms industry—quote—"don't even have to win . . . All they have to do is keep suing . . . They'll kill [the industry] with the cost of defending all the lawsuits."

Lawsuits seeking to hold the firearms industry responsible for the criminal and unlawful use of its products by others are attempts to accomplish through litigation what has not been achieved by legislation and the democratic process. As explained by one federal judge—quote—"the plaintiff's attorneys simply want to eliminate handguns."

Under the currently unregulated tort system, personal injury lawyers are seeking to obtain through the courts stringent limits on the sale and distribution of firearms

beyond the court's jurisdictional boundaries. Such a state lawsuit in a single county could destroy a national industry and deny citizens everywhere the right to keep and bear arms guaranteed by the Constitution. Insofar as these lawsuits have the practical effect of burdening interstate commerce in firearms, Congress has the authority to act under the Commerce Clause of the Constitution, as well as the Second Amendment.

Such lawsuits also directly implicate core federalism principles articulated by the Supreme Court, which has made clear that—quote—"one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States . . ."

If the judicial system is allowed to eliminate the firearms industry based on legal theories holding manufacturers liable for the misuse of their products, it is also likely that similar liability will be applied to an infinitely long list of other industries whose products are statistically associated with misuse. Where will it end? Knives are mostly used for nonviolent purposes, such as cooking, but hundreds of thousands of violent crimes every year are perpetrated with knives. We've already seen multimillion dollar lawsuits against the makers of hamburgers and steaks for damages caused when other people abuse those products and overeat. Surely the manufacturers of steak knives will be sued next when such knives are used for criminal purposes.

Congress must begin to stem the slide down this slippery slope. It can do that by fulfilling its constitutional duty and exercising its authority under the Commerce Clause to prevent a few state courts from bankrupting the national firearms industry and denying all Americans their fundamental right to bear arms. We need to preserve the benefit of American-made weapons for our soldiers overseas who are so ably defending all of us from terrorism. Let's not allow the American firearms industry to be bankrupted so we're left to rely on foreign countries to provide weapons for our own soldiers.

I now yield to Mr. Watt, the Ranking Member of the Subcommittee, for an opening statement.

PREPARED STATEMENT OF THE HONORABLE CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Statement of Congressman Cliff Stearns
Legislative Hearing on H.R. 800, the "Protection of Lawful Commerce in Arms Act"
Subcommittee on Administrative and Commercial Law
March 15, 2005

Mr. Chairman, I am honored to have introduced the "Protection of Lawful Commerce in Arms Act" the past three sessions of Congress, and to work on this important legislation with my colleague from Virginia, Rick Boucher, along with many more of my colleagues and this Committee.

I would like to thank you, Chairman Cannon, for your prompt action on H.R. 800, and also Chairman Sensenbrenner for giving the "Protection of Lawful Commerce Act" the high priority that it deserves.

My work on this issue over the last few years has taught me just how much of a target the firearms industry is for junk lawsuits. In fact, gun manufacturers have been targeted for dozens of lawsuits by cities, municipalities and individuals. Unfortunately, the vast majority of these lawsuits are often based on the legal fiction that gun manufacturers should be held liable for the actions of others who use their products in a criminal or unlawful manner.

I am of the belief, however, that any manufacturer of a lawful product should not be held liable for damages caused by someone who criminally or negligently misuses this perfectly legal product. I also believe that a law-abiding manufacturer has the constitutional right to engage in interstate commerce without the fear of frivolous lawsuits.

I am pleased to note that many of these cases have been dismissed in various city, State, and Federal courts. However, there are still several lawsuits pending which threaten to devastate the industry.

In addition, in New York City, the City Council recently enacted legislation allows victims of crime to sue the dealers and gunmakers.

We also must consider that with just the mere threat of these suits, taking the first couple of legal steps to defend these suits can be enough on their own to force some of the smaller companies out of business.

This abuse of the legal and democratic process demands strong and immediate Congressional action, and H.R. 800 is exactly that. But our bill does not just propose to end this reckless and unfounded litigation. It is narrowly-tailored so that cases involving defective firearms, breaches of contract, criminal behavior by a gunmaker or seller, or the negligent entrustment of a firearm to an irresponsible person are allowed to go forward.

Mr. Chairman, H.R. 800 is a responsible and measured response to the growing problem of frivolous lawsuits against gun manufacturers. I look forward to hearing the testimony of the witnesses here today, and I thank the committee once again for holding hearings on this bill.

H.R. 1225, THE "TERRORIST APPREHENSION AND RECORD RETENTION (TARR) ACT OF 2005"

I

109TH CONGRESS
1ST SESSION

H. R. 1225

To better manage the national instant criminal background check system and terrorism matches.

IN THE HOUSE OF REPRESENTATIVES

MARCH 10, 2005

MR. CONYERS (for himself and MR. SHAYS) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To better manage the national instant criminal background check system and terrorism matches.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Terrorist Apprehension and Record Retention Act of 2005" or the "TARR Act of 2005".

SEC. 2. IDENTIFICATION OF TERRORISTS.

(a) IN GENERAL.—Section 922(t) of title 18, United States Code, is amended by inserting after paragraph (6) the following:

"(7) If the national criminal background check system indicates that a person attempting to purchase a firearm or applying for a State permit to possess, acquire, or carry a firearm is identified as a known or suspected member of a terrorist organization in records maintained by the Department of Justice or the Department of Homeland Security, including the Violent Gang and Terrorist Organization File—

"(A) all information related to the prospective transaction shall automatically and immediately be transmitted to the appropriate Federal and State counterterrorism officials, including the Federal Bureau of Investigation;

"(B) the Federal Bureau of Investigation shall coordinate the response to such an event; and

"(C) all records generated in the course of the check of the national criminal background check system, including the ATF Form 4473, that are obtained by Federal and State officials shall be retained for a minimum of 10 years.".

(b) CONFORMING AMENDMENTS.—

(1) TITLE 18.—Section 922(t)(2)(C) of title 18, United States Code, is amended by inserting after

1 "transfer" the following: ", except as provided in
2 paragraph (7)".
3 (2) OTHER LAW.—Section 617(a)(2) of the De-
4 partments of Commerce, Justice, and State, the Ju-
5 diciary, and Related Agencies Appropriations Act,
6 2004 (118 Stat. 95) is amended by inserting after
7 "or State Law" the following: ", except for informa-
8 tion required to be maintained by section 922(t)(7)
9 of title 18, United States Code".

○

GAO REPORT ENTITLED "GUN CONTROL AND TERRORISM: FBI COULD BETTER MANAGE FIREARM-RELATED BACKGROUND CHECKS INVOLVING TERRORIST WATCH LIST RECORDS

United States Government Accountability Office

GAO

Report to Congressional Requesters

January 2005

GUN CONTROL AND TERRORISM

FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records

GAO
Accountability * Integrity * Reliability

GAO-05-127

GAO
Accountability•Integrity•Reliability
Highlights

Highlights of GAO-05-127, a report to congressional requesters

Why GAO Did This Study

Membership in a terrorist organization does not prohibit a person from owning a gun under current law. Thus, during presale screening of prospective firearms purchasers, the National Instant Criminal Background Check System historically did not utilize terrorist watch list records. However, for homeland security and other purposes, the Federal Bureau of Investigation (FBI) and applicable state agencies began receiving notices (effective February 3, 2004) when such screening involved watch lists records. GAO determined (1) how many checks have resulted in valid matches with terrorist watch list records, (2) procedures for providing federal counterterrorism officials relevant information from valid-match background checks, and (3) the extent to which the FBI monitors or audits the states' handling of such checks.

What GAO Recommends

Proper management of firearm-related background checks involving valid matches with terrorist watch list records is important. GAO recommends that the Attorney General (1) clarify procedures to ensure that the maximum amount of allowable information from these background checks is consistently shared with counterterrorism officials and (2) either strengthen the FBI's oversight of state agencies or have the FBI centrally manage all valid-match background checks. The Department of Justice agreed.

www.gao.gov/cgi-bin/getrpt?GAO-05-127.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Laurie Ekstrand at (202) 512-8777 or ekstrandl@gao.gov.

January 2005

GUN CONTROL AND TERRORISM

FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records

What GAO Found

During the period GAO reviewed—February 3 through June 30, 2004—a total of 44 firearm-related background checks handled by the FBI and applicable state agencies resulted in valid matches with terrorist watch list records. Of this total, 35 transactions were allowed to proceed because the background checks found no prohibiting information, such as felony convictions, illegal immigrant status, or other disqualifying factors.

Firearm-Related Background Checks with Valid Matches to Terrorist Watch List Records, February 3 through June 30, 2004

		Results of background checks		
Agency	**Valid matches**	**Allowed to proceed**	**Denied**	**Results pending or records not available**
FBI	21	19	2	0
State agencies	23	16	4	3
Total	**44**	**35**	**6**	**3**

Source: GAO analysis of FBI data and interviews with state agency officials.

Federal and state procedures—developed and disseminated under the Department of Justice's direction—do not address the specific types of information from valid-match background checks that can or should be provided to federal counterterrorism officials or the sources from which such information can be obtained. Justice officials told GAO that information from the background check system is not to be used for general law enforcement purposes but can be shared with law enforcement agents or other government agencies in the legitimate pursuit of establishing a match between the prospective gun buyer and a terrorist watch list record and in the search for information that could prohibit the firearm transfer. Most state agency personnel GAO contacted were not aware of any restrictions or limitations on providing valid-match information to counterterrorism officials. FBI counterterrorism officials told GAO that routinely receiving all available personal identifying information and other details from valid-match background checks could be useful in conducting investigations.

As part of routine audits the FBI conducts every 3 years, the Bureau plans to assess the states' handling of firearm-related background checks involving terrorist watch list records. However, given that these background checks involve known or suspected terrorists who could pose homeland security risks, more frequent FBI oversight or centralized management would help ensure that suspected terrorists who have disqualifying factors do not obtain firearms in violation of the law. The Attorney General and the FBI ultimately are responsible for managing the background check system, although they have yet to assess the states' compliance with applicable procedures for handling terrorism-related checks. Also, more frequent FBI oversight or centralized management would help address other types of issues GAO identified—such as several states' delays in implementing procedures and one state's mishandling of a terrorism-related background check.

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Abbreviations

ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
FBI	Federal Bureau of Investigation
Justice	Department of Justice
NICS	National Instant Criminal Background Check System
TSC	Terrorist Screening Center
VGTOF	Violent Gang and Terrorist Organization File

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United States Government Accountability Office
Washington, DC 20548

January 19, 2005

The Honorable Joseph R. Biden, Jr.
Committee on the Judiciary
U.S. Senate

The Honorable Frank R. Lautenberg
Committee on Homeland Security and
Governmental Affairs
U.S. Senate

Terrorist and criminal watch lists—sometimes referred to as watchout, lookout, target, or tip-off lists—are important tools for law enforcement and homeland security purposes. This report responds to your request for information on how the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS) handles checks of prospective firearms purchasers that hit on and are confirmed to match terrorist watch list records.

As you know, under the Brady Handgun Violence Prevention Act and implementing regulations, the FBI and designated state and local criminal justice agencies use NICS to conduct background checks on individuals seeking to purchase firearms or obtain permits to possess, acquire, or carry firearms.[1] During the NICS check, descriptive data provided by an individual—such as name and date of birth—are used to search databases containing criminal history and other relevant records to determine whether or not the person is disqualified by law from receiving or possessing firearms. For instance, persons prohibited by federal law from receiving firearms include convicted felons, fugitives, unlawful drug users, and aliens illegally or unlawfully in the United States.

According to the Department of Justice (Justice), under federal and state law, neither suspected nor actual membership in a terrorist organization is a stand-alone factor that would prohibit a person from receiving or possessing a firearm. Thus, FBI and state personnel processing NICS transactions historically did not receive notice when NICS searches hit on terrorist watch list records. In such cases, if there were no other records in

[1]Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536 (1993).

the databases checked by NICS showing the person to be prohibited, the transaction received an immediate "proceed" response. However, in November 2003, Justice directed the FBI to revise its procedures to better ensure that suspected members of terrorist organizations who have disqualifying factors do not receive firearms in violation of the law. Under revised procedures effective February 3, 2004, all NICS transactions with potential or valid matches to terrorist watch list records are automatically delayed to give NICS personnel the chance to further research the transaction for prohibiting information before a response (e.g., proceed or denied) is given to the initiator of the background check. If no prohibiting information is found, the transaction may proceed and a known or suspected terrorist can legally purchase firearms.

This report addresses the following questions regarding NICS and terrorist watch lists:

- What terrorist watch lists are searched during NICS background checks?
- How many NICS transactions have resulted in valid matches with terrorist watch list records?
- For valid matches, what are federal and state procedures for sharing NICS-related information with federal counterterrorism officials?
- To what extent does the FBI monitor the states' handling of NICS transactions with valid matches to terrorist watch list records? What issues, if any, have state agencies encountered in handling such transactions?

Also, appendix II of this report presents summary information on federal and state requirements for retaining information related to NICS transactions with valid matches to terrorist watch list records.

In performing our work, we interviewed officials from the Department of Justice, the FBI, and the Terrorist Screening Center—a multiagency center responsible for consolidating federal terrorist watch lists—and reviewed documentation they provided us. We obtained data on NICS transactions that resulted in valid matches with terrorist watch list records during the period February 3, 2004 (when the revised NICS procedures took effect), through June 30, 2004. We also contacted 11 states (California, Colorado, Florida, Hawaii, Illinois, Massachusetts, North Carolina, Pennsylvania, Tennessee, Texas, and Virginia) that FBI data indicated—and the states subsequently confirmed—had processed NICS checks (during the period February 3 through June 30, 2004) that resulted in one or more valid matches with terrorist watch list records. The results of our interviews

with state officials may not be representative of the views and opinions of others nationwide. We were unable to fully assess the reliability or accuracy of the data provided to us because of ongoing terrorism investigations. However, we did discuss the sources of data with FBI and state officials and determined that the data were sufficiently reliable for the purposes of this review. Further, we reviewed applicable laws, procedures, and other documents related to handling NICS transactions that hit on terrorist watch list records or the retention of NICS information.

We performed our work from April through December 2004 in accordance with generally accepted government auditing standards. Appendix I presents more details about our objectives, scope, and methodology.

Results in Brief

During presale screening of prospective firearms purchasers, NICS searches terrorist watch list records generated by numerous federal agencies, including components of the Departments of Justice, State, and Homeland Security. Applicable records are consolidated by the Terrorist Screening Center, which then makes them available for certain uses or purposes, such as inclusion in an FBI database that is searched during NICS checks of prospective firearms purchasers.

During the period February 3 through June 30, 2004, a total of 44 NICS transactions (involving 36 different individuals) resulted in valid matches with terrorist watch list records, according to FBI data and our interviews with state agency officials. Of the 44 transactions with valid matches, 35 were allowed to proceed because the background checks found no prohibiting information, such as felony convictions or illegal immigrant status; 6 were denied based on prohibiting information; and 3 were either pending a final resolution or the final resolution was not available. We could not determine whether the individuals who had more than one valid match had actually attempted to purchase firearms or acquire firearms permits on separate occasions, or if the multiple transactions were run for other purposes (e.g., rechecks), in part because information related to applicable NICS records was not available due to legal requirements for destroying information on transactions that are allowed to proceed.[2]

[2]In December 2004, FBI officials told us that—during the period July 1 through October 31, 2004—the FBI handled an additional 14 NICS transactions with valid matches to terrorist watch list records, of which 12 were allowed to proceed and 2 were denied. It was beyond the scope of our work to assess the reliability or accuracy of the additional data.

For valid matches, federal and state procedures—developed and disseminated under the Department of Justice's direction—do not address the specific types of information from NICS transactions that can or should be provided to federal counterterrorism officials or the sources from which such information can be obtained. Justice's position is that the types of information that can be routinely provided generally are limited to the information contained within the NICS database, such as certain biographical data collected from a gun dealer for purposes of running a NICS check (e.g., name and date of birth). Justice noted, however, that NICS personnel can request additional information from a gun dealer or from a law enforcement agency processing a firearms permit application, if that information is requested by a counterterrorism official in the legitimate pursuit of establishing a match between the prospective gun buyer and a terrorist watch list record. Justice told us that in cases in which a match is established and law enforcement agents want additional information about the firearm transaction—such as the residence address of the prospective firearm purchaser or the make and model of the firearm(s) to be transferred—law enforcement officers could coordinate with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to have ATF request such information from the gun dealer's records without a warrant. Most state agency personnel we contacted were not aware of any restrictions or limitations on sharing information with counterterrorism officials. Most state personnel told us that—at the request of counterterrorism officials—the state would contact the gun dealer or refer to the state permit application to obtain and provide all available information related to a NICS transaction. FBI counterterrorism officials told us that receiving all available personal identifying information and other details from terrorism-related NICS transactions could be useful in conducting investigations.

Although the Attorney General and the FBI ultimately are responsible for managing NICS, the FBI has not routinely monitored the states' handling of NICS transactions with valid matches to terrorist watch list records. For example, while the FBI has notified state agencies about the procedures for handling NICS transactions with valid matches to terrorist watch list records, it has not routinely assessed the extent to which the states have implemented and followed procedures. According to the FBI, routine monitoring of the states has not been performed because of the difficulty in obtaining reliable state data. The FBI's plans call for auditing the states' compliance with the procedures every 3 years. However, given that valid-match background checks involve known or suspected terrorists who could pose homeland security risks, more timely or more frequent monitoring would help ensure that terrorists who have disqualifying

factors do not obtain firearms in violation of the law. Also, under the FBI's planned 3-year audit cycle, relevant information from valid-match checks may have been destroyed pursuant to federal or state laws and therefore not available for review. Our work revealed several issues state agencies have encountered in handling terrorism-related NICS transactions, including delays in implementing procedures and a mishandled transaction.

This report provides recommendations for the Attorney General to (1) clarify procedures to ensure that the maximum amount of allowable information from terrorism-related NICS transactions is consistently shared with counterterrorism officials and (2) either implement more frequent monitoring by the FBI of applicable state agencies or have the FBI centrally manage all terrorism-related background checks. The Department of Justice agreed with our recommendations.

Background

The permanent provisions of the Brady Handgun Violence Prevention Act took effect on November 30, 1998. Under the Brady Act, before a federally licensed firearms dealer can transfer a firearm to an unlicensed individual, the dealer must request a background check through NICS to determine whether the prospective firearm transfer would violate federal or state law.[3] The Brady Act's implementing regulations also provide for conducting NICS checks on individuals seeking to obtain permits to possess, acquire, or carry firearms. According to the Department of Justice, under current law, inclusion on a terrorist watch list is not a stand-alone factor that would prohibit a person from receiving or possessing a firearm. Thus, if no other federal or state prohibitors exist, a known or suspected terrorist can legally purchase firearms.

Approximately 8.5 million background checks are run through NICS each year, of which about one-half are processed by the FBI's NICS Section and one-half by designated state and local criminal justice agencies. Under

[3]Under federal law, persons are prohibited from receiving a firearm if they (1) have been convicted of, or are under indictment for, a felony; (2) are a fugitive from justice; (3) are unlawful drug users or are addicted to a controlled substance; (4) have been involuntarily committed to a mental institution or judged to be mentally defective; (5) are aliens illegally or unlawfully in the United States, or certain other aliens admitted under a nonimmigrant visa; (6) have been dishonorably discharged from the military; (7) have renounced their U.S. citizenship; (8) are under a qualifying domestic violence restraining order; or (9) have been convicted of a misdemeanor crime of domestic violence. See 18 U.S.C. § 922(g) and § 922(n).

federal and state requirements, prospective firearms purchasers must provide information that is needed to initiate a NICS background check. For example, in order to receive a firearm from a licensed dealer, federal regulations require an individual to complete a Firearms Transaction Record (ATF Form 4473). Among other things, this form requires prospective purchasers to provide the following descriptive data: name, residence address, place of birth, height and weight, sex, date of birth, race, state of residence, country of citizenship, and alien registration number (for non-U.S. citizens). A Social Security number is optional. Firearms dealers use the Form 4473 to record information about the firearms transaction, including the type of firearm(s) to be transferred (e.g., handgun or long gun); the response provided by the FBI's NICS Section or state agency (e.g., proceed or denied); and information specifically identifying each firearm to be transferred (e.g., manufacturer, model, and serial number), which shows whether the transaction involves the purchase of multiple firearms. Individuals applying for state permits to possess, acquire, or carry firearms also are required to provide personal descriptive data on a state permit application. State laws vary in regard to the types of information required from permit applicants.

The purpose of the NICS background check is to search for the existence of a prohibitor that would disqualify a potential buyer from purchasing a firearm pursuant to federal or state law. During the NICS check, descriptive data provided by an individual—such as name and date of birth—are used to search databases containing criminal history and other records supplied by federal, state, and local agencies.[1] One of the databases searched by NICS is the FBI's National Crime Information Center database, which contains criminal justice information (e.g., names of persons who have outstanding warrants) and also includes records on persons identified as known or suspected members of terrorist organizations. The terrorist-related records are maintained in the National Crime Information Center's Violent Gang and Terrorist Organization File (VGTOF), which was designed to provide law enforcement personnel with

[1]In earlier reports, we provided a detailed overview of NICS operations. See GAO, *Gun Control: Implementation of the National Instant Criminal Background Check System*, GAO/GGD/AIMD-00-64 (Washington, D.C.: Feb. 29, 2000); GAO, *Gun Control: Options for Improving the National Instant Criminal Background Check System*, GAO/GGD-00-56 (Washington, D.C.: Apr. 12, 2000); and GAO, *Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System*, GAO-02-720 (Washington, D.C.: July 12, 2002).

the means to exchange information on members of violent gangs and terrorist organizations.

Although NICS checks have included searches of terrorist records in VGTOF, NICS personnel at the FBI and state agencies historically did not receive notice when there were hits on these records. The FBI blocked the VGTOF responses (i.e., the responses were not provided to NICS personnel) under the reasoning that VGTOF records contain no information that would legally prohibit the transfer of a firearm under federal or state law. However, in November 2002, the FBI began an audit of NICS transactions where information indicated the individual was an alien, including transactions involving VGTOF records. In one instance involving a VGTOF record, the audit revealed that an FBI field agent had knowledge of prohibiting information not yet entered into the automated databases checked by NICS. As a result, in November 2003, the Department of Justice—citing Brady Act authorities—directed the FBI to revise NICS procedures to better ensure that subjects of VGTOF records who have disqualifying factors do not receive firearms in violation of applicable federal or state law. Specifically, the Brady Act authority cited allows the FBI up to 3 business days to check for information demonstrating that a prospective buyer is prohibited by law from possessing or receiving a firearm.[5]

Under revised procedures effective February 3, 2004, FBI and state personnel who handle NICS transactions began receiving notice of transactions that hit on VGTOF records. Also, under the revised procedures, all NICS transactions with potential or valid matches to VGTOF records are automatically delayed to give NICS personnel the chance to further research the transaction before a response (e.g., proceed or denied) is given to the initiator of the background check. For all potential or valid matches with terrorist records in VGTOF, NICS personnel are to begin their research by contacting the Terrorist Screening Center (TSC) to verify that the subject of the NICS transaction matches the subject of the VGTOF record, based on the name and other descriptors.[6] For confirmed matches, NICS personnel are to determine whether federal counterterrorism officials (e.g., FBI field agents) are

[5]18 U.S.C. § 922(t)(1)(B)(ii).

[6]Pursuant to Homeland Security Presidential Directive 6, TSC was established on September 16, 2003, to consolidate the government's approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in screening processes.

aware of any information that would prohibit the individual by law from receiving or possessing a firearm. For example, FBI field agents could have information not yet posted to databases checked by NICS showing the person is an alien illegally or unlawfully in the United States. If counterterrorism officials do not provide any prohibiting information, and there are no other records in the databases checked by NICS showing the individual to be prohibited, NICS personnel are to advise the initiator of the background check that the transaction may proceed. If the NICS background check is not completed within 3 business days, the gun dealer may transfer the firearm (unless state law provides otherwise).

Designated state and local criminal justice agencies are responsible for conducting background checks in accordance with NICS policies and procedures. However, the Attorney General and the FBI ultimately are responsible for managing the overall NICS program. Thus, the FBI's Criminal Justice Information Services Division conducts audits of the states' compliance with federally established NICS regulations and guidelines. Also, the FBI is a lead U.S. law enforcement agency responsible for investigating terrorism-related matters.

NICS Searches Terrorist Watch List Records Generated by Numerous Federal Agencies

During presale screening of prospective firearms purchasers, NICS searches terrorist watch list records generated by numerous federal agencies, including components of the Departments of Justice, State, and Homeland Security. Applicable records are consolidated by TSC, which then makes them available for certain uses or purposes, such as inclusion in VGTOF—a database routinely searched during NICS background checks.

Numerous Federal Agencies Maintain Terrorist Watch Lists

Terrorist watch lists are maintained by numerous federal agencies. These lists contain varying types of data, from biographical data—such as a person's name and date of birth—to biometric data—such as fingerprints. Our April 2003 report identified 12 terrorist or criminal watch lists that were maintained by nine federal agencies.[7] Table 1 shows the 12 watch lists and the current agencies that maintain them.

[7] See GAO, *Information Technology: Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO-03-322 (Washington, D.C.: Apr. 15, 2003).

Table 1: Watch Lists Maintained by Federal Agencies

Department	Agency	Watch list
State	Bureau of Consular Affairs	Consular Lookout and Support System
	Bureau of Intelligence and Research	TIPOFF[a]
Homeland Security	U.S. Customs and Border Protection	Interagency Border Inspection System
	Transportation Security Administration	No-Fly List
		Selectee List
	U.S. Immigration and Customs Enforcement	National Automated Immigration Lookout System
		Automated Biometric (fingerprint) Identification System
Justice	U.S. Marshals Service	Warrant Information Network
	FBI	Violent Gang and Terrorist Organization File
		Integrated Automated Fingerprint Identification System[b]
	U.S. National Central Bureau of Interpol	Interpol Terrorism Watch List
Defense	Air Force (Office of Special Investigations)	Top 10 Fugitive List

Source: GAO.

[a]In November 2003, the Terrorist Threat Integration Center assumed responsibility for the functions of the Department of State's TIPOFF counterterrorism program. The Terrorist Threat Integration Center was created in January 2003 to merge and analyze terrorist-related information collected domestically and abroad in order to form the most comprehensive possible threat picture.

[b]The Integrated Automated Fingerprint Identification System is the FBI system for searching the fingerprint-supported criminal history records maintained by the FBI. The fingerprints and corresponding criminal history information are submitted by federal, state, and local law enforcement agencies.

At the time we issued our April 2003 report, federal agencies did not have a consistent and uniform approach to sharing terrorist watch list information.

TSC Was Established to Consolidate Terrorist Watch Lists

TSC was established in September 2003 to consolidate the government's approach to terrorism screening and provide for the appropriate and lawful use of terrorism information. In addition to consolidating terrorist watch list records, TSC serves as a single point of contact for law enforcement authorities requesting assistance in the identification of

subjects with possible ties to terrorism. TSC has access to supporting information behind terrorist records and can help resolve issues regarding identification. TSC also coordinates with the FBI's Counterterrorism Division to help ensure appropriate follow-up actions are taken.

TSC receives the vast majority of its information about known or suspected terrorists from the Terrorist Threat Integration Center, which assembles and analyzes information from a wide range of sources. In addition, the FBI provides TSC with information about purely domestic terrorism (i.e., activities having no connection to international terrorism). According to TSC officials, from December 1, 2003—the day TSC achieved an initial operating capability—to March 12, 2004, TSC consolidated information from 10 of the 12 watch lists shown in table 1 into a terrorist-screening database. The officials noted that the database has routinely been updated to add new information. Further, TSC officials told us that information from the remaining 2 watch lists—the U.S. Immigration and Customs Enforcement's Automated Biometric Identification System and the FBI's Integrated Automated Fingerprint Identification System—will be added to the consolidated database at a future date not yet determined.

A provision in the Intelligence Authorization Act for Fiscal Year 2004 required the President to submit a report to Congress by September 16, 2004, on the operations of TSC.[8] Among other things, this report was to include

- a determination of whether the data from all the watch lists enumerated in our April 2003 report have been incorporated into the consolidated terrorist-screening database;
- a determination of whether there remain any relevant databases not yet part of the consolidated database; and
- a schedule setting out the dates by which identified databases—not yet part of the consolidated database—would be integrated.

As of November 2004, the report on TSC operations had not been submitted to Congress.

TSC, through the participation of the Departments of Homeland Security, Justice, and State and intelligence community representatives, determines

[8]Public Law 108-177, 117 Stat. 2599, 2623, 2624 (2003).

what information in the terrorist-screening database will be made available for which types of screening purposes.

Eligible TSC Records Are Added to VGTOF and Searched by NICS

In November 2003, the Department of Justice directed the FBI's NICS Section to develop appropriate procedures for NICS searches of TSC records when the center and its consolidated watch list database were established and operational. In accordance with this directive, the FBI and TSC have implemented procedures that allow all eligible records in the center's consolidated terrorist-screening database to be added to VGTOF and searched during NICS background checks. According to FBI and TSC officials, since December 2003, eligible records from the terrorist-screening database have been added to VGTOF and searched during NICS background checks.

NICS Transactions Resulted in 44 Valid Matches with Terrorist Records in VGTOF

For the period February 3 through June 30, 2004, FBI data and our interviews with state agency officials indicated that 44 NICS transactions resulted in valid matches with terrorist records in VGTOF. Of this total, 35 transactions were allowed to proceed because the background checks found no prohibiting information, such as felony convictions or illegal immigrant status, as shown in table 2.

Table 2: NICS Transactions with Valid Matches to Terrorist Records in VGTOF, February 3 through June 30, 2004

Agency handling transactions	Valid matches	Results of valid matches			
		Transactions allowed to proceed	Transactions denied	Transactions unresolved[a]	Unknown status[b]
FBI	21	19	2	0	0
State agencies	23[c]	16	4	1	2
Total	**44[d]**	**35**	**6**	**1**	**2**

Source: GAO analysis of data provided by the FBI's NICS Section and interviews with state agency officials.

[a]Transactions unresolved refers to open transactions pending a final proceed or denied determination.

[b]Unknown status consists of closed transactions for which the final proceed or denied determination was not available.

[c]The 23 valid matches handled by state agencies occurred in 11 states that process NICS transactions (Calif., Colo., Fla., Hawaii, Ill., Mass., N.C., Pa., Tenn., Tex., and Va.).

[d]Of the 44 total valid matches, 30 were related to prospective gun purchases and 14 involved applications for permits to possess, carry, or acquire firearms.

According to FBI data and our interviews with state agency officials, the 44 total valid matches shown in table 2 involved 36 different individuals (31 individuals had one match and 5 individuals had more than one match). We could not determine whether the 5 individuals with more than one match had actually attempted to purchase firearms or acquire firearms permits on separate occasions, in part because information related to applicable NICS records was not available due to legal requirements for destroying information on transactions that are allowed to proceed.[6] Our work indicated that the multiple transactions could have, for example, been run for administrative purposes (e.g., rechecks).

The FBI's revised procedures for handling NICS transactions with valid matches to terrorist watch list records—i.e., to delay the transactions to give NICS personnel the chance to further research for prohibitors—have successfully resulted in the denial of firearms transactions involving known or suspected terrorists who have disqualifying factors. Specifically, two of the six denied transactions shown in table 2 were based on prohibiting information provided by FBI field agents that had not yet been

[6]Additional information on federal and state requirements for retaining records related to NICS transactions is presented in appendix II.

entered in automated databases checked by NICS. According to agency officials in the two states that handled the transactions, FBI field agents provided information showing that one of the individuals was judged to be mentally defective and the other individual was an alien illegally or unlawfully in the United States. Based on this information, both firearm transfers were denied.

The vast majority of NICS transactions that generated initial hits on terrorist records in VGTOF did not result in valid matches. Specifically, during the period in which the 44 valid matches were identified—February 3 through June 30, 2004—officials from the FBI's NICS Section estimated that approximately 650 NICS transactions generated initial hits on terrorist records in VGTOF.[10] The high rate of potential matches returned—i.e., VGTOF records returned as potential matches based upon the data provided by the prospective purchaser—is due to the expanded search parameters used to compare the subject of a background check with a VGTOF record. An FBI NICS Section official told us that by comparing data from the NICS transaction (e.g., name, date of birth, and Social Security number) with data from the VGTOF record, it generally is easy to determine if there is a potential or valid match. The official told us that NICS personnel drop the false hits from further consideration and follow up only on transactions considered to be potential or valid matches. A false hit, for example, could occur when the subject of a NICS transaction and the subject of a VGTOF record have the same or a similar name but a different date of birth and Social Security number.

As table 2 shows, the 44 NICS transactions with valid matches to terrorist records in VGTOF were processed by the FBI's NICS Section and 11 states during the period February 3 through June 30, 2004. In December 2004, FBI officials told us that during the 4 months following June 2004—that is, during July through October 2004—the FBI's NICS Section handled an additional 14 transactions with valid matches to terrorist records in VGTOF. Of the 14 transactions with valid matches, FBI officials told us that 12 were allowed to proceed because the background checks found no prohibiting information, and 2 were denied based on prohibiting

[10]The FBI did not have data on the specific number of NICS transactions that hit on terrorist records in VGTOF. However, for the period February 3 through June 30, 2004, FBI data showed that a total of 1,660 NICS transactions hit on either terrorist or violent gang records in VGTOF. FBI officials estimated that approximately 40 percent (about 650) of the 1,660 hits were on terrorist records.

information. It was beyond the scope of our work to assess the reliability or accuracy of the additional data.

NICS Procedures Contain General Guidelines for Sharing Information with Counterterrorism Officials

Federal and state procedures—developed and disseminated under the Department of Justice's direction—contain general guidelines that allow FBI and state personnel to share information from NICS transactions with federal counterterrorism officials, in the pursuit of potentially prohibiting information about a prospective gun buyer. However, the procedures do not address the specific types of information that can or should be provided or the sources from which such information can be obtained. Justice's position is that the types of information that can be routinely provided generally are limited to the information contained within the NICS database. Justice noted, however, that NICS personnel can request additional information from a gun dealer or from a law enforcement agency processing a firearms permit application, if that information is requested by a counterterrorism official in the legitimate pursuit of establishing a match between the prospective gun buyer and a VGTOF record. Most state personnel told us that—at the request of counterterrorism officials—the state would contact the gun dealer or refer to the state permit application to obtain and provide all available information related to a NICS transaction. FBI counterterrorism officials told us that receiving all available personal identifying information and other details from terrorism-related NICS transactions could be useful in conducting investigations.

FBI NICS Section Procedures and Guidance for Sharing NICS-Related Information

As mentioned previously, for all potential or valid matches with terrorist records in VGTOF, NICS personnel are to begin their research by contacting TSC to verify the match. According to the procedures used by the FBI's NICS Section, during the screening process, TSC will ask NICS staff to provide "all information available in the transaction," including the location of the firearms dealer, in the pursuit of identifying a valid match. If a coordinated effort by TSC and FBI NICS Section staff determines that the subject of the NICS transaction appears to match a terrorist record in VGTOF—based on the name and other descriptors—TSC is to refer the NICS Section staff to the FBI's Counterterrorism Division for follow-up. Further, the procedures note that there will be instances when NICS Section staff are contacted directly by a case agent, who will ask the NICS Section staff to share "additional information from the transaction or provide necessary information to complete the transaction."

Justice's Position on Sharing NICS-Related Information

The Department of Justice's position is that information from the NICS database is not to be used for general law enforcement purposes.[11] Justice noted, however, that information about a NICS transaction can be shared with law enforcement agents or other government agencies in the legitimate pursuit of establishing a match between the prospective gun buyer and a VGTOF record and in the search for information that could prohibit the firearm transfer. Justice explained that the purpose of NICS is to determine the lawfulness of proposed gun transactions, not to provide law enforcement agents with intelligence about lawful gun purchases by persons of investigative interest. Thus, Justice told us that as set forth in NICS procedures, all information about a transaction hitting on a VGTOF record can be shared with field personnel in the pursuit of establishing whether the person seeking to buy the gun is the same person with the terrorist record in VGTOF. Justice added that this is done during the search for prohibiting information about the person whose name hit on the VGTOF record. Further, Justice noted that information about NICS transactions also can be and routinely is shared by NICS with law enforcement agencies when the information indicates a violation, or suspected violation, of law or regulation.[12]

According to Justice, the types of information that can be routinely shared under NICS procedures generally are limited to the information collected by or contained within the NICS database. Specifically, Justice noted that—in verifying a match and determining whether prohibiting information exists—the following information can be routinely shared with TSC and counterterrorism officials:

- certain biographical data from the ATF Form 4473 collected from a gun dealer for purposes of running a NICS check (e.g., name, date of birth, race, sex, and state of residence);
- the specific date and time of the transaction;
- the name, street address, and phone number of the gun dealer; and
- the type of firearm (e.g., handgun or long gun), if relevant to helping confirm identity.

[11] As a basis for its position related to proceeded gun transactions, Justice noted that the Brady Act restricts the use of identifying information in NICS by prohibiting the use of such information to establish a national registry of firearm owners and requiring destruction of the information to protect the privacy of lawful gun purchasers. In addition, Justice noted that recent appropriations act provisions require such identifying information in NICS be destroyed within 24 hours of advising a gun dealer that a transaction may proceed.

[12] See NICS Privacy Act Notice, Routine Use C, 63 Fed. Reg. 65,223, 65,224 (1998).

Justice told us that additional information contained in the ATF Form 4473, such as residence address or the number and make and model of guns being sold, is not required or necessary to run a NICS check. Justice noted, however, that there are times when NICS personnel will contact a gun dealer and request a residence address on a person who is determined to be prohibited from purchasing firearms—such as when there is a hit on a prohibiting arrest warrant record—so that the information can be supplied to a law enforcement agency to enforce the warrant. Similarly, Justice told us that NICS procedures do not prohibit NICS personnel from requesting a residence address from a gun dealer—or from a law enforcement agency issuing a firearms permit in the case of a permit check—if that information is requested by a counterterrorism official in the pursuit of establishing a match between the gun buyer and the VGTOF record. Justice noted that gun dealers are not legally obligated under either NICS or ATF regulations to provide this information to NICS personnel but frequently do cooperate and provide the residence information when specifically requested by NICS personnel.

Further, Justice told us that in cases in which a match is established and the field does not have the residence address or wants the address or other additional information on the Form 4473 regarding a "proceeded" transaction, FBI personnel can then coordinate with ATF to request the information from the gun dealer's records without a warrant. Specifically, Justice cited provisions in the Gun Control Act of 1968, as amended, that give the Attorney General the authority to inspect or examine the records of a gun dealer without a warrant "in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the [federal firearms] licensee."[18] Justice explained that unless the person is prohibited or there is an indication of a violation or potential violation of law, FBI NICS personnel do not perform this investigative function for the field. FBI field personnel can, however, get the investigative information from gun dealers through coordination with ATF.

We recognize that current procedures allow NICS personnel to share "all information available in the transaction" with TSC or counterterrorism officials, in the pursuit of identifying a true match and the discovery of

[18]See 18 U.S.C. § 923(g)(1)(B)(i). In general, the Attorney General has delegated to the Bureau of Alcohol, Tobacco, Firearms and Explosives—subject to his and the Deputy Attorney General's direction—the authority to investigate, administer, and enforce the laws relating to firearms, including exercising the function and powers of the Attorney General under various federal firearms laws (see 28 C.F.R. § 0.130).

information that is prohibiting. However, given Justice's interpretation, we believe that clarifying the procedures would help ensure that the maximum amount of allowable information from terrorism-related NICS transactions is consistently shared with counterterrorism officials. For example, under current procedures, it is not clear if the types of information that can or should be routinely shared are limited to the information contained within the NICS database or if additional information can be requested from the gun dealer or from the law enforcement agency processing a permit application.

Types of Information Shared by the FBI's NICS Section

The FBI's NICS Section did not maintain data on the types of information it shared with TSC or counterterrorism officials to (1) verify matches between NICS transactions and VGTOF records or (2) pursue the existence of firearm possession prohibitors. According to the NICS Section, such data are not maintained because NICS procedures provide for the sharing of all information available from the transaction, including the location of the gun dealer, in the pursuit of identifying a true match. The NICS Section told us that data required to initiate a NICS check—such as name, date of birth, sex, race, state of residence, citizenship, and purpose code (e.g., firearm check or permit check)—are captured in the NICS database and shared on every NICS transaction. A NICS Section official told us that the specific or approximate date and time of each transaction also is consistently shared with TSC.

TSC did maintain data on the types of information shared by the NICS Section. Specifically, in verifying matches, TSC data showed that NICS Section staff shared basic identifying information about the prospective purchasers (e.g., name, date of birth, and Social Security number). However, TSC data showed that NICS Section staff did not consistently share the specific location or phone number of the gun dealer. According to the procedures used by the FBI's NICS Section, in the pursuit of identifying a valid match, TSC will ask NICS staff to provide the location of the gun dealer. The NICS Section told us that this includes the specific location and phone number of the gun dealer.

According to TSC officials, once the FBI's NICS Section has shared information on an identity match and TSC verifies the match, the information provided by the NICS Section is forwarded to the FBI's Counterterrorism Division. The Counterterrorism Division is to then contact the NICS Section to follow up on the match. If the NICS Section does not receive a response from the Counterterrorism Division, the NICS Section is to aggressively pursue contacting the division to resolve the transaction. Counterterrorism Division officials told us the information

provided by the NICS Section is routinely shared with field agents familiar with the terrorist records in VGTOF.

NICS Section officials also told us that for each transaction with a valid match to a VGTOF record, NICS Section staff talked directly to a field agent to pursue prohibiting information.[14] The NICS Section did not maintain data on what, if any, additional information from the NICS transactions was shared during these discussions. However, NICS Section officials told us that in no cases did NICS staff contact the gun dealer to obtain—and provide to counterterrorism officials—additional information about the firearm transaction (e.g., information such as the prospective purchaser's residence address) that was not submitted as part of the initial NICS check or already contained within NICS. The NICS Section was aware of one instance in which NICS staff was asked by a counterterrorism official to obtain address information to assist in determining whether a VGTOF hit was a valid match. In that case—involving a firearm permit check—the NICS staff was able to get residence address information from the law enforcement agency processing the permit application and provide it to the counterterrorism official.

State Agency Procedures and Guidance for Sharing NICS-Related Information

According to the FBI-disseminated procedures used by state agencies, in the process of contacting TSC, state staff are to share "all information available in the transaction," including the location of the firearms dealer, in the pursuit of identifying a true match and determining the existence of prohibiting information. If TSC and state staff make an identity match, TSC is to refer the state staff to the FBI's Counterterrorism Division for follow-up. Unlike the procedures used by the FBI's NICS Section, the state agency procedures do not address whether there will be instances when state staff are to be contacted directly by a case agent, or what additional information from the NICS transaction could be shared during such contacts.

Most state agency officials we contacted told us they interpreted the procedures as allowing them to share all available information related to a NICS transaction requested by counterterrorism officials, including any information contained on the forms used to purchase firearms or apply for

[14] We did not interview FBI field agents because the NICS transactions and related VGTOF records involved ongoing terrorism investigations. Instead, we interviewed officials from the FBI's Counterterrorism Division who were responsible for coordinating with field agents to determine whether or not they were aware of prohibiting information.

firearms permits. Also, most state agency officials told us they were not aware of any restrictions or specific FBI guidance on the types of information that could or could not be shared with counterterrorism officials. According to the FBI's NICS Section, the procedures used by state agencies note that in the process of contacting TSC, state staff will share all information available in the transaction in the pursuit of identifying a true match and the discovery of information that is prohibiting. As mentioned previously, we believe that clarifying the procedures would help ensure that the maximum amount of allowable information from terrorism-related NICS transactions is consistently shared with counterterrorism officials.

The state agencies we contacted did not maintain data on the types of information they shared with TSC or counterterrorism officials to verify matches between NICS transactions and VGTOF records or pursue prohibiting information. However, in verifying matches, TSC data showed that state agency staff shared basic identifying information about the prospective purchasers (e.g., name, date of birth, and Social Security number). TSC data also showed that state agency staff did not consistently share the specific location or phone number of the gun dealer. TSC officials told us they basically can identify the date and time of a firearm transaction because TSC records the date and time NICS staff call TSC, which occurs very shortly after the gun dealer initiates the NICS check. TSC and FBI Counterterrorism Division officials told us they handle state agency referrals the same way as they handle referrals from the FBI's NICS Section.

Most of the state agency officials we contacted told us that if requested by counterterrorism officials (e.g., FBI field agents), state agency staff would either call the gun dealer or refer to the state permit application to obtain and provide all available information related to a NICS transaction. This information could include the prospective purchaser's residence address and the type and number of firearms involved in the transaction. Officials in three states told us that state staff had shared the prospective purchaser's residence address with FBI field agents. In one of the three cases, the field agent was interested in the residence address because the individual was in the country illegally and was wanted for deportation.

In its written comments on a draft of this report, Justice noted that in the case of the individual who was in the country illegally, because the individual was a prohibited person, there was no restriction on obtaining and providing the additional information about the denied transaction to a law enforcement agency after the identity was already established. Justice

also noted that regarding the sharing of information from state firearm permit applications, there is no Brady Act limitation on the state supplying transaction information to field agents for investigative purposes after identity is established, as the use and dissemination of state firearm permit information is governed by state law.

NICS-Related Information Could Be Useful to Counterterrorism Officials

According to officials from the FBI's Counterterrorism Division, personal identifying information and other details about NICS transactions with valid matches to terrorist records in VGTOF could be useful to FBI field agents in conducting terrorism investigations. Specifically, the officials noted the potential usefulness of locator information, such as the prospective purchaser's residence address, the date and time of the transaction, and the specific location of the gun dealer at which the transaction took place. The officials also told us that information on the type of firearm(s) involved in the transaction and whether the transaction involved the purchase of multiple firearms could also be useful to field agents. According to one official, in general, agents would want as much information as possible that could assist investigations. The FBI's NICS Section noted, however, that NICS procedures provide for sharing information only when it is relevant to determining a true match between a NICS transaction and a terrorist record in VGTOF.

The FBI Has Not Routinely Monitored the States' Handling of Terrorism-Related NICS Transactions; States Have Encountered Issues

Although the Attorney General and the FBI ultimately are responsible for managing NICS, the FBI has not routinely monitored the states' handling of terrorism-related background checks. For example, the FBI does not know the number and results of terrorism-related NICS transactions handled by state agencies since June 30, 2004. Also, the FBI has not routinely assessed the extent to which applicable state agencies have implemented and followed procedures for handling NICS transactions involving terrorist records in VGTOF. The FBI's plans call for conducting audits of the states' compliance with the procedures every 3 years. Our work revealed several issues state agencies have encountered in handling NICS transactions involving terrorist records in VGTOF, including delays in implementing procedures and a mishandled transaction.

FBI Has Not Routinely Monitored the States' Handling of NICS Transactions Involving VGTOF Records

The FBI has not routinely monitored the states' handling of NICS transactions involving terrorist records in VGTOF. For example, in response to our request for information—covering February 3 through June 30, 2004—the FBI's NICS Section reviewed all state NICS transactions that hit on VGTOF records during this period to identify potential matches. We used this information to follow up with state agencies and create table 2 in this report. However, since June 30, 2004, the FBI's NICS Section has not tracked or otherwise attempted to collect information on the number of NICS transactions handled by state agencies that have resulted in valid matches with terrorist records in VGTOF or whether such transactions were approved or denied. NICS Section officials told us that while the NICS Section does not have aggregate data, FBI officials at TSC and the FBI's Counterterrorism Division are aware of valid-match transactions that state agencies handle. Given the significance of valid matches, we believe it would be useful for the FBI's NICS Section to have aggregate data on the number and results of terrorism-related NICS transactions handled by state agencies, particularly if the data indicate that known or suspected terrorists may be receiving firearms. In response to our inquiries, in October 2004, Justice and FBI NICS Section officials told us they plan to study the need for information on state NICS transactions with valid matches to terrorist records in VGTOF and the means by which such information could be obtained.

Also, while the FBI has taken steps to notify state agencies about the revised procedures for handling NICS transactions involving VGTOF records—including periodic teleconferences and presentations at a May 2004 NICS User Conference[15]—the FBI has not routinely assessed the extent to which states have implemented and followed the procedures. According to the FBI, the NICS Section performed an assessment of all NICS transactions involving VGTOF records from February 3, 2004 (the day the block on VGTOF records was removed) to March 22, 2004, in order to assess the extent to which the states implemented and followed procedures. For example, a NICS Section official told us that NICS personnel called state agencies to make sure they contacted TSC to verify matches and also contacted counterterrorism officials to pursue prohibiting information. However, according to the NICS Section, the assessment concluded on March 23, 2004, because NICS Section personnel

[15]Each year, the FBI's NICS Section sponsors a national conference for designated state and local agencies that conduct background checks, during which various issues related to the NICS program are addressed.

could not fully assess the reliability or accuracy of the information provided by the states. Officials from two states told us that additional FBI oversight could help ensure that applicable procedures are followed. One of the state officials told us that such FBI oversight could be particularly important since NICS transactions with valid matches to VGTOF records are rare and there could be turnover of state personnel who process the transactions.

As part of routine state audits the FBI conducts every 3 years, the FBI plans to assess the states' handling of terrorism-related NICS transactions. Specifically, every 3 years, the FBI plans to audit whether designated state and local criminal justice agencies are utilizing the written procedures for processing NICS transactions involving VGTOF records. Moreover, for states with a decentralized structure for processing NICS transactions—i.e., states with multiple local law enforcement entities that conduct background checks (rather than one central agency)—the goal of the audit is to determine if local law enforcement agencies conducting the checks have in fact received the written procedures, and if so, whether the procedures are being followed.[16] However, given that the relevant NICS transactions involve known or suspected terrorists who could pose homeland security risks, we believe that a 3-year audit cycle is not sufficient. Also, under a 3-year audit cycle, information from NICS transactions with valid matches to terrorist records in VGTOF may have been destroyed pursuant to federal or state requirements and therefore may not be available for review.[17] Further, a 3-year audit cycle may not be sufficient help ensure the timely identification and resolution of issues state agencies may encounter in handling terrorism-related NICS transactions.

States' Issues in Handling Terrorism-Related NICS Transactions

State agencies have encountered several issues in handling NICS transactions involving terrorist records in VGTOF. Specifically, of the 11 states we contacted, 9 states experienced one or more of the following issues:

[16] According to the Department of Justice's Bureau of Justice Statistics, over 3,000 state and local agencies conduct background checks related to firearm transfers.

[17] As mentioned previously, appendix II presents information on federal and state requirements for retaining information related to NICS transactions with valid matches to terrorist watch list records.

- 4 states had delays in implementing procedures,
- 3 states questioned whether state task forces were notified,
- 2 states had problems receiving responses from FBI field agents,
- 1 state mishandled a transaction, and
- 3 states raised concerns about notifications.

Four States Had Delays in Implementing Procedures

Four of the 11 states we contacted had delays of 3 months or more in implementing NICS procedures for processing transactions that hit on VGTOF records—procedures that were to have been effective on February 3, 2004. Each of the 4 states processed one NICS transaction with a valid match to terrorist records in VGTOF before becoming aware of and implementing the new procedures. In processing the transactions, our work indicated that at least 3 of the 4 states did not contact TSC, as required by the procedures. The fourth state did not have information on how the transaction was processed. Although our work indicated that the FBI provided the new procedures to state agencies in January 2004, 1 of the 4 states did not implement the procedures until after a state official attended the May 2004 NICS User Conference. Officials in the other 3 states were not aware of the new procedures at the time we made our initial contacts with them in June 2004 (2 states) and August 2004 (1 state). Subsequent discussions with officials in 2 of the 3 states indicated the new procedures have been implemented. In November 2004, an official in the third state told us the procedures had not yet been implemented.

Three States Questioned whether State Task Forces Were Notified

Officials in 3 of the 11 states told us they believed their respective state's homeland security or terrorism task forces should be notified when a suspected terrorist attempts to purchase a firearm in their state, but the officials said they did not know if TSC or the FBI provided such notices. Officials from the FBI's Counterterrorism Division did not know the extent to which FBI field agents notified state and local task forces about terrorism-related NICS transactions, but the officials told us that such notifications likely are made on a need-to-know basis.[18] Justice and FBI officials acknowledged that this issue warrants further consideration.

Two States Had Problems Receiving Responses from FBI Field Agents

Officials in 2 of the 11 states told us that in the pursuit of prohibiting information, their respective states had problems receiving responses from FBI field agents. These problems led to delays in each state's ability to resolve one NICS transaction with a valid match to a terrorist record in

[18]As mentioned previously, we did not contact FBI field agents because the transactions involved ongoing terrorism investigations.

VGTOF. According to state officials, under the respective state's laws, the two transactions were not allowed to proceed during the delays, even though prohibiting information had not been identified. The two transactions were resolved as follows:

- In response to our inquiries, in November 2004, an analyst in one of the states contacted an FBI field agent, who told the analyst that the subject of the background check had been removed from VGTOF. A state official told us the NICS transaction was in a delay status for nearly 10 months.
- Regarding the other state, the NICS transaction was in an unresolved status for a period of time specified by state law, after which it was automatically denied. According to state officials, a state analyst made initial contact with an FBI field agent, who said he would call the analyst back. The state officials told us that the analyst made several follow-up calls to the agent without receiving a response.

As of November 2004, the FBI had not responded to our request for information regarding the issues or circumstances as to why the FBI field agents had not contacted the two states' analysts.

One State Mishandled a Transaction

One of the 11 states mishandled a NICS transaction with a valid match to a terrorist record in VGTOF. Specifically, although the state received notification of the VGTOF hit, the information was not relayed to state staff responsible for processing NICS transactions. Consequently, the transaction was approved without contacting TSC or FBI counterterrorism officials. We informed the state that the FBI's NICS Section had identified the transaction as matching a VGTOF record. Subsequently, state personnel contacted TSC and an FBI field agent, who determined that prohibiting information did not exist. State officials told us that to help prevent future oversights, the state has revised its internal procedures for handling NICS transactions that hit on VGTOF records.

Three States Raised Concerns about Notifications

Officials in 3 of the 11 states told us that the automatic (computer-generated) notification of NICS transactions that hit on a certain (sensitive) category of terrorist records in VGTOF is not adequately visible to system users and could be missed by state personnel processing NICS transactions. The FBI has taken steps to address this issue and plans to implement computer system enhancements in June 2005.

Conclusions

Under revised procedures effective February 3, 2004, all NICS transactions with potential or valid matches to terrorist watch list records in VGTOF are automatically delayed to give NICS personnel at the FBI and applicable state agencies an opportunity to further research the transactions for prohibiting information. The primary purpose of the revised procedures is to better ensure that known or suspected members of terrorist organizations who have disqualifying factors do not receive firearms in violation of federal or state law. An additional benefit has been to support the nation's war against terrorism. Thus, it is important that the maximum amount of allowable information from these background checks be consistently shared with counterterrorism officials. However, our work revealed that federal and state procedures for handling terrorism-related NICS transactions do not clearly address the specific types of information that can or should be routinely provided to counterterrorism officials or the sources from which such information can be obtained. For example, under current procedures, it is not clear if certain types of potentially useful information, such as the residence address of the prospective purchaser, can or should be routinely shared. Also, under current procedures, it is not clear if FBI and state personnel can routinely call a gun dealer or a law enforcement agency processing a permit application to obtain and provide counterterrorism officials with information not submitted as part of the initial NICS check. Further, some types of information—such as the specific location of the dealer from which the prospective purchaser attempted to obtain the firearm—have not consistently been shared with counterterrorism officials. Consistently sharing the maximum amount of allowable information could provide counterterrorism officials with valuable new information about individuals on terrorist watch lists.

The FBI has plans that call for conducting audits every 3 years of the states' handling of terrorism-related NICS transactions. However, given that these NICS background checks involve known or suspected terrorists who could pose homeland security risks, more frequent FBI oversight or centralized management is needed. The Attorney General and the FBI ultimately are responsible for managing NICS, and the FBI is a lead law enforcement agency responsible for combating terrorism. However, the FBI does not have aggregate data on the number of NICS transactions involving known or suspected members of terrorist organizations that have been approved or denied by state agencies to date. Also, the FBI has not assessed the extent to which the states have implemented and followed applicable procedures for handling terrorism-related NICS transactions. Moreover, under a 3-year audit cycle, relevant information from the background checks may have been destroyed pursuant to federal

or state laws and therefore may not be available for review. Further, more frequent FBI oversight or centralized management would help address other types of issues we identified—such as several states' delays in implementing procedures and one state's mishandling of a terrorism-related NICS transaction.

Recommendations for Executive Action

Proper management of NICS transactions with valid matches to terrorist watch list records is important. Thus, we recommend that the Attorney General (1) clarify procedures to ensure that the maximum amount of allowable information from these background checks is consistently shared with counterterrorism officials and (2) either implement more frequent monitoring by the FBI of applicable state agencies or have the FBI centrally manage all terrorism-related NICS background checks.

Agency Comments and Our Evaluation

We requested comments on a draft of this report from the Department of Justice. Also, we provided a draft of sections of this report for comment to applicable agencies in the 11 states we contacted.

On January 7, 2005, Justice provided us written comments, which were signed by the Acting Assistant Director of the FBI's Criminal Justice Information Services Division. According to Justice and FBI officials, the draft report was provided for review to Justice's Office of Legal Policy, the FBI's NICS Section (within the Criminal Justice Information Services Division), the FBI's Counterterrorism Division, and the Terrorist Screening Center.

Justice agreed with our two recommendations. Specifically, regarding our recommendation to clarify NICS procedures for sharing information from NICS transactions with counterterrorism officials, Justice stated that (1) the written procedures used by the FBI's NICS Section will be revised and (2) additional written guidance should be provided to applicable state agencies. Regarding our recommendation for more frequent FBI oversight or centralized management of terrorism-related NICS background checks, Justice has requested that the FBI report to the department by the end of January 2005 on the feasibility of having the FBI's NICS Section process all NICS transactions involving VGTOF records.

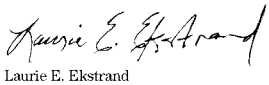
In its written comments, Justice also provided (1) a detailed discussion of the Brady Act's provisions relating to the retention and use of NICS information and (2) clarifications on the states' handling of terrorism-related NICS transactions. These comments have been incorporated in

this report where appropriate. The full text of Justice's written comments is reprinted in appendix III.

Officials from 7 of the 11 states we contacted told us they did not have any comments. Officials from the remaining 4 states did not respond to our request for comments.

As arranged with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after its issue date. At that time, we will send copies of this report to interested congressional committees and subcommittees. We will also make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at http://www.gao.gov.

If you or your staff have any questions about this report or wish to discuss the matter further, please contact me at (202) 512-8777 or ekstrandl@gao.gov, or my Assistant Director, Danny R. Burton, at (214) 777-5600 or burtond@gao.gov. Other key contributors to this report were Eric Erdman, Lindy Coe-Juell, David Alexander, Katherine Davis, and Geoffrey Hamilton.



Laurie E. Ekstrand
Director, Homeland Security and Justice Issues

Appendix I: Objectives, Scope, and Methodology

Objectives

Our overall objective was to review how the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS) handles checks of prospective firearms purchasers that hit on and are confirmed to match terrorist watch list records. The FBI and designated state and local criminal justice agencies use NICS to determine whether or not individuals seeking to purchase firearms or apply for firearms permits are prohibited by law from receiving or possessing firearms. Specifically, we addressed the following questions:

- What terrorist watch lists are searched during NICS background checks?
- How many NICS transactions have resulted in valid matches with terrorist watch list records?
- For valid matches, what are federal and state procedures for sharing NICS-related information with federal counterterrorism officials?
- To what extent does the FBI monitor the states' handling of NICS transactions with valid matches to terrorist watch list records? What issues, if any, have state agencies encountered in handling such transactions?

Also, we obtained summary information on federal and state requirements for retaining information related to NICS transactions with valid matches to terrorist watch list records (see app. II).

Scope and Methodology

In performing our work, we reviewed applicable federal laws and regulations, FBI policies and procedures, and relevant statistics. We interviewed federal officials at and reviewed documentation obtained from the Department of Justice's Office of Legal Policy; the FBI's Counterterrorism Division; the FBI's NICS Section and Criminal Justice Information Services Division at Clarksburg, West Virginia; and the Terrorist Screening Center (TSC), which is the multiagency center responsible for consolidating federal terrorist watch lists. Generally, our analyses focused on background checks processed by the FBI's NICS Section and 11 states during the period February 3, 2004 (when the FBI's procedures for handling terrorism-related NICS transactions became effective), through June 30, 2004. The 11 states we contacted (California, Colorado, Florida, Hawaii, Illinois, Massachusetts, North Carolina, Pennsylvania, Tennessee, Texas, and Virginia) were those that FBI data indicated—and the states subsequently confirmed—had processed NICS checks (during the period February 3 through June 30, 2004) that resulted in one or more valid matches with terrorist watch list records.

Terrorist Watch List Records Searched during NICS Background Checks

To determine what terrorist watch list records are searched during NICS background checks, we interviewed officials from the FBI's NICS Section and the Criminal Justice Information Services Division—the FBI division responsible for maintaining the Violent Gang and Terrorist Organization File (VGTOF)—and obtained relevant documentation. Also, we interviewed TSC officials and obtained documentation and other relevant information on TSC's efforts to consolidate federal terrorist watch list records into a single database. Eligible records from TSC's consolidated database are shared with VGTOF and searched during NICS background checks.

Number of NICS Transactions with Valid Matches to Terrorist Watch List Records

To determine the number of NICS transactions that resulted in valid matches with terrorist records in VGTOF—during the period February 3 through June 30, 2004—we interviewed officials from the FBI's NICS Section and reviewed FBI data. The FBI did not have comprehensive or conclusive information on transactions handled by state agencies, but FBI data indicated that 12 states (California, Colorado, Florida, Georgia, Hawaii, Illinois, Massachusetts, North Carolina, Pennsylvania, Tennessee, Texas, and Virginia) likely had processed one or more NICS transactions with a valid match to terrorist records in VGTOF during this period. We interviewed agency officials in the 12 states to corroborate the FBI data and to obtain additional information about the related background checks (e.g., whether the transactions were allowed to proceed or were denied). We also worked with officials from the FBI's NICS Section and state agencies to resolve any inconsistencies. For example, our work revealed that 1 of the 12 states (Georgia) had not processed a terrorism-related NICS transaction during the period we reviewed. As such, our subsequent interviews and analysis focused on background checks processed by the FBI's NICS Section and the remaining 11 states.

Procedures for Sharing NICS-Related Information with Counterterrorism Officials

To determine federal and state procedures for sharing NICS-related information with federal counterterrorism officials, we reviewed applicable federal laws and regulations, including the Brady Handgun Violence Prevention Act[1] and NICS regulations. We also reviewed FBI and state procedures for handling NICS transactions involving terrorist records in VGTOF—procedures that were developed and disseminated under the Department of Justice's direction. We interviewed officials from

[1]Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536 (1993).

the Department of Justice's Office of Legal Policy, the FBI's NICS Section, and the 11 states to determine the scope and types of NICS-related information that could be shared with federal counterterrorism officials under applicable procedures. Further, for NICS transactions with valid matches to terrorist records in VGTOF—during the period February 3 through June 30, 2004—we interviewed officials from the FBI's NICS Section and Counterterrorism Division, TSC, and the 11 states to determine the types of NICS-related information that were shared with counterterrorism officials.

FBI Monitoring of the States' Handling of NICS Transactions and Issues Encountered by State Agencies

To determine the extent to which the FBI has monitored the states' handling of NICS transactions involving VGTOF records, we interviewed officials from the Department of Justice's Office of Legal Policy, the FBI's NICS Section, and state agencies. We reviewed documents the FBI used to notify state agencies about the procedures for handling terrorism-related NICS transactions. We also reviewed data and other information the FBI maintained on transactions handled by the states. Further, we obtained information on the FBI's plans to periodically audit whether designated state and local criminal justice agencies are utilizing the written procedures for processing NICS transactions involving VGTOF records. To identify issues state agencies have encountered in handling terrorism-related NICS transactions, we interviewed officials from the 11 states. For identified issues, we interviewed officials from the Department of Justice and the FBI's NICS Section and Counterterrorism Division to discuss the states' issues and obtain related information.

Federal and State Requirements for Retaining Information from Terrorism-Related NICS Transactions

To determine federal and state requirements for retaining information from terrorism-related NICS transactions, we interviewed officials from the FBI's NICS Section and state agencies and reviewed applicable federal laws and regulations. We also reviewed a Department of Justice report that addressed the length of time the FBI and applicable state agencies retain information related to firearm background checks.[5] Further, we interviewed officials from the FBI and reviewed relevant FBI documents to determine how the federal 24-hour destruction requirement for NICS records of allowed firearms transfers would affect the FBI's NICS Section and state policies and procedures.

[5]Department of Justice, Bureau of Justice Statistics, *Survey of State Procedures Related to Firearm Sales, Midyear 2003*, NCJ 203701 (Washington, D.C.: Aug. 2004).

Data Reliability

We performed our work from April through December 2004 in accordance with generally accepted government auditing standards. We were unable to fully assess the reliability or accuracy of the data regarding valid matches with terrorist records in VGTOF because the data related to ongoing terrorism investigations. However, we discussed the sources of data with FBI, TSC, and state agency officials and worked with them to resolve any inconsistencies. We determined that the data were sufficiently reliable for the purposes of this review. The results of our interviews with officials in the 11 states may not be representative of the views and opinions of others nationwide.

Appendix II: Federal and State Requirements for Retaining Information from Terrorism-Related NICS Transactions

Federal Records Retention Requirements: Next-Day Destruction

On July 21, 2004, the FBI's NICS Section implemented a provision in federal law that requires any personal identifying information in the NICS database related to allowed firearms transfers to be destroyed within 24 hours after the FBI advises the gun dealer that the transfer may proceed.[1] The law does not provide an exception for retaining information from NICS transactions with valid matches to terrorist records in VGTOF. Thus, information in the NICS database from such transactions also is subject to the federal 24-hour destruction provision. Before the 24-hour destruction provision took effect, federal regulations permitted the retention of all information related to allowed firearms transfers for up to 90 days.[2] The federal 24-hour retention statute does not specifically address whether identifying information in the NICS database related to permit checks—which do not involve gun dealers—is subject to 24-hour destruction. According to the FBI's NICS Section, the 24-hour destruction requirement does not apply to permit checks. Rather, information related to permit checks is maintained in the NICS database for up to 90 days after the background check is initiated.

In implementing the 24-hour destruction provision, the FBI's NICS Section revised its policies and procedures to allow for the retention of nonidentifying information related to each proceeded background check for up to 90 days (e.g., information about the gun dealer). According to the FBI, by retaining the nonidentifying information, the FBI's NICS Section can initiate firearm retrieval actions when new information reveals that an individual who was approved to purchase a firearm should not have been. The nonidentifying information is retained for all NICS transactions that are allowed to proceed, including transactions involving subjects of terrorist watch lists.

Also, in implementing the 24-hour destruction provision, the FBI's NICS Section created a new internal classification system for transactions that are "open." Specifically, if NICS staff cannot make a final determination (i.e., proceed or denied) on a transaction within 3 business days, the NICS Section is to automatically change the status to open. The NICS Section maintains personal identifying information and other details related to open transactions until either (1) a final determination on the transaction

[1]See section 617 of Public Law 108-199, 118 Stat. 3, 95 (2004).

[2]We previously reported on Justice's then-proposed next-day destruction policy. See GAO, *Gun Control: Potential Effects of Next-Day Destruction of NICS Background Check Records*, GAO-02-653 (Washington, D.C.: Jul. 10, 2002).

is reached or (2) the expiration of the retention period for open transactions, which is a period of no more than 90 days. Regarding terrorism-related NICS transactions, the open designation would be used, for example, if NICS Section staff did not receive responses from FBI field agents within 3 business days.

The 24-hour destruction provision did not affect federal policies for retaining NICS records related to denied firearms transactions. Under provisions in NICS regulations, personal identifying information and other details related to denied firearms transactions are retained indefinitely. Also, according to Justice and FBI officials, there are no limitations on the retention of NICS information by TSC or counterterrorism officials, who received the information to verify identities and determine whether firearm-possession prohibitors exist.

State Records Retention Requirements Vary

Among the states, requirements vary for retaining records of allowed transfers of firearms.[3] Some states purge a firearm transaction record almost immediately after the firearm sale is approved, while other states retain such records for longer periods of time. Under NICS regulations, state records are not subject to the federal 24-hour destruction requirement if the records are part of a system created and maintained pursuant to independent state law. Thus, states with their own state law provisions may retain records of allowed firearms transfers for longer than 24 hours. The retention of state records related to denied firearms transactions varies.

[3]See Department of Justice, Bureau of Justice Statistics, *Survey of State Procedures Related to Firearm Sales, Midyear 2003*, NCJ 203701 (Washington, D.C.: Aug. 2004).

Appendix III: Comments from the Department of Justice

U.S. Department of Justice

Federal Bureau of Investigation

Clarksburg, WV 26306

January 7, 2005

Ms. Laurie Ekstrand
Director, Homeland Security and Justice Issues
United States Government Accountability Office
Washington, DC 20548

Re: GAO-05-127

Dear. Ms. Ekstrand:

Thank you for the opportunity to review the Government Accountability Office (GAO) draft report entitled *"GUN CONTROL AND TERRORISM: FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records."* The draft report has been reviewed by various components of the Department of Justice (DOJ), including the FBI Criminal Justice Information Services (CJIS) Division, National Instant Criminal Background Check System (NICS) Section. This letter constitutes the formal Department of Justice comments to the draft report and it is requested that it be included in GAO's final report.

The report reviews the experience of the NICS in implementing new procedures under which the NICS delays checks on firearms transactions that hit on a terrorist watch list record in the National Crime Information Center's (NCIC) Violent Gang and Terrorist Organization File (VGTOF). The new procedures began in February 2004, pursuant to a November 2003 DOJ directive, and required the NICS to delay such transactions so that NICS personnel can coordinate with FBI field agents to determine whether the agents have prohibiting information about a prospective purchaser on the watch list that is not yet available in the automated databases checked by the NICS. Because persons placed on a terrorist watch list are not prohibited from possessing or receiving firearms[1], before the February 2004 change in procedures, such transactions had not been delayed unless the NICS check hit upon another prohibiting record. As the report notes, the new procedures have been successful in enabling the NICS to deny two gun transactions during the five-month period reviewed based on prohibiting information provided by the FBI field agents that had not yet been entered in the automated databases checked by NICS.

[1] As noted in your report, under federal law, persons are prohibited from receiving or possessing a firearm if they (1) have been convicted of, or are under indictment for, a felony; (2) are a fugitive from justice; (3) are unlawful drug users or are addicted to a controlled substance; (4) have been involuntarily committed to a mental institution or judged to be mentally defective; (5) are aliens illegally or unlawfully in the United States, or certain other aliens admitted under a nonimmigrant visa; (6) have been dishonorably discharged from the military; (7) have renounced their U.S. citizenship; (8) are under a qualifying domestic violence restraining order; or (9) have been convicted of a misdemeanor crime of domestic violence. See Title 18, United States Code, Sections 922(g) and (n).

Ms. Laurie Ekstrand

One of the main points made in the report is that the existing procedures are not clear enough as to what information can be shared with FBI field agents when processing a NICS checks hitting on an NCIC VGTOF record. In particular, the report suggests that the procedures be more explicit with respect to when a prospective purchaser's residence address can and should be obtained and shared by NICS with FBI field agents. The FBI's NICS VGTOF Standard Operating Procedures (SOP) explicitly provide that all information about a transaction that is obtained in the course of processing a NICS check, including the name and address of the gun dealer, will be shared by the NICS with law enforcement agents or other government agencies to establish whether the person seeking to buy the gun is the same person with the record in the NCIC VGTOF. This information sharing is done in legitimate pursuit of prohibiting information about the person whose name hit on the NCIC VGTOF record. In addition, although not explicitly stated in the FBI's NICS VGTOF SOP, it is understood by the NICS personnel that if requested by an FBI field agent for purposes of establishing the identity of the purchaser with the NCIC VGTOF record, the NICS will contact a gun dealer or a firearms licensing authority to request the residence address of the prospective purchaser, information that is not required for running a NICS check. We agree, however, that this procedure concerning a follow-up call to obtain a residence address at the request of an FBI field agent should be made a part of the written FBI's NICS VGTOF SOP, and the FBI will so revise its written procedures.

A discussion of the Brady Handgun Violence Prevention Act's (Brady Act) provisions relating to the retention and use of NICS information is helpful in understanding the information sharing provisions of FBI's NICS VGTOF procedures. The Brady Act restricts the use of identifying information in the NICS about "proceeded" gun transactions, prohibiting the use of such information to establish a national registry of firearm owners and requiring its destruction to protect the privacy of lawful gun purchasers. Congress has recently imposed a new legal requirement, set forth in the 2004 and 2005 Omnibus Appropriations bills, that such identifying information is destroyed by the NICS within 24 hours of advising a gun dealer that a transaction can proceed. Thus, since the establishment of the NICS in November 1998, the DOJ has taken the position that information from the NICS about lawful gun transactions is not to be used for general law enforcement purposes. However, because the purpose of the NICS is to determine the lawfulness of proposed gun transactions, identifying information about a transaction that has not been "proceeded" can be shared by the NICS with law enforcement agents or other government agencies in legitimate pursuit of potentially prohibiting information about a proposed firearm transferee. Thus, as set forth in the FBI's NICS VGTOF procedures, all NICS information about a transaction hitting on an NCIC VGTOF record can be shared with field personnel in pursuit of establishing whether the person seeking to buy the gun is the same as the person with the record in the NCIC VGTOF.

There is no similar limitation under the Brady Act on sharing NICS information with law enforcement agencies about persons determined to be prohibited from possessing or receiving a firearm, and NICS information on "denied" transactions can be and routinely is provided to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

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In addition, although NICS information about "proceeded" transactions cannot, because of these legal restrictions, be shared with law enforcement officials just to provide notice of lawful gun purchases by persons of investigative interest, information about NICS transactions, including transactions that are eventually "proceeded," can be and routinely is shared by the NICS with law enforcement agencies when the information indicates a violation, or suspected violation, of law or regulation. Thus, Routine Use C of the NICS Privacy Act Notice provides:

> If, during the course of any activity or operation of the system authorized by the regulations governing the system (28 CFR, part 25, subpart A), any record is found by the system which indicates, either on its face or in conjunction with other information, a violation or potential violation of law (whether criminal or civil) and/or regulation, the pertinent record may be disclosed to the appropriate agency/organization/task force (whether Federal, State, local, joint, or tribal) and/or to the appropriate foreign or international agency/organization charged with the responsibility of investigating, prosecuting, and/or enforcing such law or regulation . . .

63 FR 65226-27 (Nov. 25, 1998).

In general, the FBI NICS Section only collects certain biographical data on a prospective gun purchaser for purposes of running a NICS check (e.g., name, date of birth, sex, race, state of residence). Additional information contained in the ATF Form 4473 maintained by the gun dealer, such as a residence address or the number and make and model of guns being sold, is not required or necessary to run a NICS check. There are, however, times when the NICS will contact a gun dealer and request a residence address on a person that is determined to be prohibited, such as when there is a hit on a prohibiting arrest warrant record, so that the information can be supplied, pursuant to Routine Use C, to a law enforcement agency that can enforce the warrant. Gun dealers are not legally obligated under the NICS or the ATF regulations to provide this information to the NICS, but frequently do cooperate and provide the residence information when specifically requested by the NICS.

Similarly, when requested by a counterterrorism official for the purpose of establishing identity, additional information about the transaction can and is sought by the FBI NICS Section. The FBI's NICS VGTOF SOP states: "There will be instances when the VGTOF Examiners [NICS personnel specially assigned to handle transaction VGTOF hits] are contacted directly by the case agent. The case agent will ask the VGTOF Examiner to share additional information from the transaction or provide necessary information to determine true identity and complete the transaction." The VGTOF Examiners will provide any additional information available on the transaction requested by the counterterrorism officials in order to resolve the identity issue. The additional information can include the residence address of the prospective gun buyer or firearms permit applicant obtained through a special request to the gun dealer or firearms permitting authority that initiated the check. If the information is provided in response to the request, the NICS will share that information with the counterterrorism official for the

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purpose of establishing true identity of the prospective purchaser. In addition, FBI field personnel can obtain additional information on proceeded transactions from gun dealers for investigative purposes through coordination with ATF. Thus, if identity is already established and the person is a lawful purchaser, counterterrorism official, if they do not already know the subject's residence address or wish to see address or other additional information recorded on the ATF Form 4473, can coordinate with the ATF to obtain from the gun dealer additional information on the ATF Form 4473. If identity is established and the subject is a prohibited person, the NICS will attempt to obtain the residence address from the gun dealer if requested by the counterterrorism official. As noted above, the FBI plans to make these procedures an explicit part of the written FBI's NICS VGTOF SOP used by VGTOF Examiners.

A special request for additional information was made by the FBI NICS Section in one instance when a counterterrorism official requested the residence address of a subject while coordinating with FBI NICS personnel in the pursuit of determining a true match on a terrorism-related NCIC VGTOF record. That case involved a firearm permit application, and the FBI NICS Examiner was able to obtain the subject's residence address from the law enforcement agency processing the permit application and provide it to the counterterrorism official in pursuit of determining a true match. In the rest of the cases involving NCIC VGTOF hits processed by the FBI NICS Section to date, the FBI field personnel have been able to determine whether a match exists from the information the NICS received from the gun dealer when initiating a NICS check and without a special call to the gun dealer or firearm permitting authority requesting a residence address.

The report also makes the following observation about the practice of state personnel in seeking and providing additional information to FBI field personnel when processing transactions hitting on VGTOF records in Point-of-Contact (POC) states:

> Most of the state agency officials we contacted told us that if requested by counterterrorism officials (e.g., FBI field agents), state agency staff would either call the gun dealer or refer to the state permit application to obtain and provide all available information related to a NICS transaction. This information could include the prospective purchaser's residence address and the type and number of firearms involved in the transaction. Officials in three states told us that state staff had shared the prospective purchaser's residence address with FBI field agents. In one of the three cases, the field agent was interested in the residence address because the individual was in the country illegally and was wanted for deportation.

We note that, contrary to the report's implication, in the case involving the illegal alien, because the individual was a prohibited person, there was no restriction on obtaining and providing the additional information about the denied transaction to a law enforcement agency after identity was already established. In addition, in the case of information from state firearm permit applications, there is no Brady Act limitation on the state supplying transaction information to

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the FBI field agents for investigative purposes after identity is established, as the use and dissemination of state firearm permit information is governed by state law. It is not clear from the report whether in other instances the state sought the information from a gun dealer after identity was already established or was requested by the field as part of the effort to establish identity. Written guidance provided to the POC states makes it clear that all information concerning a transaction may be provided in pursuit of establishing a true match. We agree, however, that additional written guidance should be provided to the POC states clarifying when additional information may be sought from a gun dealer and shared with FBI field personnel.

Finally, in discussing how POC states are implementing the procedures for processing NICS checks that hit on NCIC VGTOF records, the report notes that: (1) there are inconsistencies in how state agency staff have implemented the procedures and how successful they have been in getting responses from FBI field agents; (2) despite an initial effort by the FBI to obtain information about NCIC VGTOF transactions processed by the POC states, the FBI has been unable to obtain complete aggregate information concerning the number of POC transactions with confirmed matches to the NCIC VGTOF (i.e., although the Terroist Screening Center and FBI field agents know when there is a confirmed match, the FBI NICS Section does not have aggregate match data for POC state NCIC VGTOF hits in the same way that it has that data for NCIC VGTOF hits that it processes); and (3) there is a need for more oversight of how the POC states are implementing the NCIC VGTOF hit procedures to ensure there is consistency in how the NICS checks for prohibiting information on these transactions.

We note that the since implementing these procedures in February 2004, it has become apparent that the volume of affected transactions is low enough that all of the NCIC VGTOF hits could be processed by the FBI NICS Section. Given that fact, together with the report's findings concerning inconsistencies in POC states' handling of the transactions, and the fact that the effort involved in ensuring consistency in POC implementation of the procedures would be greater than simply having the FBI NICS Section process POC transactions with NCIC VGTOF hits, the FBI has been requested to report to the DOJ by the end of January 2005 on the feasibility of having *all* NCIC VGTOF hits processed by the FBI NICS Section.

Thank you for the opportunity to comment on your report.

Sincerely yours,

Jerome M. Pender

Jerome M. Pender
Acting Assistant Director
Criminal Justice Information
Services Division

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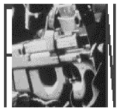

FN's Five-seveN® Pistol

The First of a New Generation

In 1935, the FN-made Browning Hi Power was revolutionary. The market quickly adopted this high-capacity 9mm pistol accordingly, and it has since been fielded by over 100 countries.

FN's newest contribution the handgun's evolution is named the Five-seveN®. This

20-round pistol fires a 5.7mm bullet that will defeat most body armor in military service around the world today. Essentially, the Five-seveN® represents a quantum leap forward in the handgun's suitablity for close engagements by delivering the type of performance that was previously confined to rifles or carbines. Elements of this performance include:

High magazine capacity: The Five-seveN® comes standard with 20-round magazine.

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High hit probability: The Five-seveN's® extremely low recoil impulse results in virtually no muzzle climb, thereby facilitating fast and controllable follow-up shots.

Yet, the Five-seveN® is:

Light and ergonomic: Weighing 30% less than most 9mm pistols, the smoothly-contoured Five-seveN® is comfortable to carry and quick to deploy.

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The Five-seveN® fires the SS190 5.7x28mm ball round. This projectile will

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perforate any individual protection on today's battlefield including the PASGT kevlar helmet, 48 layers of kevlar body armor and the CRISAT target (titanium and kevlar). The SS190's conventional design allows it to be manufactured on existing production lines, and its lead-free composition eliminates range contamination.

Five-seveN® Technical Specifications

Caliber	5.7x28mm
Operating principle	Delayed blowback
Trigger mechanism	Double action only
Magazine capacity	20 rounds
Overall length	208mm (8.2 in)
Barrel length	122.5mm (4.82 in)
Weight, unloaded	618g (1.36 lb)
Weight, loaded	744g (1.64 lb)

information courtesy of FN HERSTAL

I

109TH CONGRESS
1ST SESSION

H. R. 1136

To protect the Nation's law enforcement officers by banning the Five-seveN Pistol and 5.7 x 28mm SS190 and SS192 cartridges, testing handguns and ammunition for capability to penetrate body armor, and prohibiting the manufacture, importation, sale, or purchase of such handguns or ammunition by civilians.

IN THE HOUSE OF REPRESENTATIVES

MARCH 7, 2005

Mr. ENGEL (for himself and Mr. KENNEDY of Rhode Island) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To protect the Nation's law enforcement officers by banning the Five-seveN Pistol and 5.7 x 28mm SS190 and SS192 cartridges, testing handguns and ammunition for capability to penetrate body armor, and prohibiting the manufacture, importation, sale, or purchase of such handguns or ammunition by civilians.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Protect Law Enforce-
5 ment Armor Act" or the "PLEA Act".

1 **SEC. 2. FINDINGS AND PURPOSE.**

2 (a) FINDINGS.—Congress finds the following:

3 (1) Law enforcement is facing a new threat
4 from handguns and accompanying ammunition,
5 which are designed to penetrate police body armor,
6 being marketed and sold to civilians.

7 (2) A Five-seveN Pistol and accompanying am-
8 munition, manufactured by FN Herstal of Belgium
9 as the "5.7 x 28 mm System", has recently been re-
10 covered by law enforcement on the streets. The Five-
11 seveN Pistol and 5.7 x 28mm SS192 cartridges are
12 legally available for purchase by civilians under cur-
13 rent law.

14 (3) The Five-seveN Pistol and 5.7 x 28mm
15 SS192 cartridges are capable of penetrating level
16 IIA armor. The manufacturer advertises that ammu-
17 nition fired from the Five-seveN will perforate 48
18 layers of Kevlar up to 200 meters and that the am-
19 munition travels at 2100 feet per second.

20 (4) The Five-seveN Pistol, and similar hand-
21 guns designed to use ammunition capable of pene-
22 trating body armor, pose a devastating threat to law
23 enforcement.

24 (b) PURPOSE.—The purpose of this Act is to protect
25 the Nation's law enforcement officers by—

(1) testing handguns and ammunition for capability to penetrate body armor; and

(2) prohibiting the manufacture, importation, sale, or purchase by civilians of the Five-seveN Pistol, ammunition for such pistol, or any other handgun that uses ammunition found to be capable of penetrating body armor.

SEC. 3. ARMOR PIERCING AMMUNITION.

(a) EXPANSION OF DEFINITION OF ARMOR PIERCING AMMUNITION.—Section 921(a)(17)(B) of title 18, United States Code, is amended—

(1) in clause (i), by striking "or" at the end;

(2) in clause (ii), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(iii) a projectile that—

"(I) may be used in a handgun; and

"(II) the Attorney General determines, pursuant to section 926(d), to be capable of penetrating body armor.".

(b) DETERMINATION OF CAPABILITY OF PROJECTILES TO PENETRATE BODY ARMOR.—Section 926 of title 18, United States Code, is amended by adding at the end the following:

"(d)(1) Not later than 1 year after the date of enactment of this subsection, the Attorney General shall promulgate standards for the uniform testing of projectiles against Body Armor Exemplar.

"(2) The standards promulgated pursuant to paragraph (1) shall take into account, among other factors, variations in performance that are related to the type of handgun used, the length of the barrel of the handgun, the amount and kind of powder used to propel the projectile, and the design of the projectile.

"(3) As used in paragraph (1), the term 'Body Armor Exemplar' means body armor that the Attorney General determines meets minimum standards for the protection of law enforcement officers.".

SEC. 4. ARMOR PIERCING HANDGUNS AND AMMUNITION.

(a) IN GENERAL.—Section 922 of title 18, United States Code, is amended by adding after subsection (y):

"(z) FIVE-SEVEN PISTOL.—

"(1) IN GENERAL.—It shall be unlawful for any person to manufacture, import, market, sell, ship, deliver, possess, transfer, or receive—

"(A) the Fabrique Nationale Herstal Five-SeveN Pistol;

"(B) 5.7 x 28mm SS190 and SS192 cartridges; or

"(C) any other handgun that uses armor piercing ammunition.

"(2) EXCEPTIONS.—This subsection shall not apply to—

"(A) any firearm or armor piercing ammunition manufactured for, and sold exclusively to, military, law enforcement, or intelligence agencies of the United States; and

"(B) the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm or armor piercing ammunition by a licensed manufacturer, or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm or ammunition to determine whether paragraph (1) applies to such firearm.".

(b) PENALTIES.—Section 924(a)(1)(B) of title 18, United States Code, is amended by striking "or (q)" and inserting "(q), or (z)".

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NEWS ARTICLES FOR THE RECORD OFFERED BY THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

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Star Tribune (Minneapolis, MN)

November 28, 2004, Sunday, Metro Edition

SECTION: NEWS; Pg. 1A

LENGTH: 2144 words

HEADLINE: WISCONSIN **SHOOTINGS;**
TRACING TWO PATHS TO TRAGEDY;
A shared passion for hunting wasn't enough common ground in the Wisconsin woods.

BYLINE: Rene Sanchez; Bob von Sternberg; Staff Writers

DATELINE: Birchwood, Wis.

BODY:
The day broke cold and bright over Deer Lake. In the bare branches of maple trees and across brown beds of fallen leaves, there was quiet.

The hunt was on.

Late November in the northern wilds of Wisconsin is defined by the short season the state sets for shooting deer: old buddies, fathers and sons, even daughters - they all pile into muddy pickups and come rollicking down curving county roads, passing signs that hawk discount beer or wish them good luck bagging a buck.

"It's like Super Bowl week for us," said Jay Koenig, a manager at Bear Paw Sporting Goods in nearby Rice Lake, Wis.

Last Sunday, Robert Crotteau's cabin in those woods was filled with family and friends. Bobby was that kind of guy: the more, the merrier.

Chai Soua Vang was in the woods, too.

He had come all the way from St. Paul because he loved hunting deer, just as his Hmong ancestors have done for ages in Laos.

Two cultures, two traditions, at peace in the outdoors.

Until they met.

Hours before the stilled woods erupted in deadly violence, Tim Jubie's phone rang in Rice Lake. That figured.

He was not surprised to hear Lauren Hesebeck and Denny Drew, his co-workers and friends, calling from the cabin and urging him to change his Sunday plans and join their hunting party. They were giddy.

"We were teasing him a little bit," Hesebeck said later.

Jubie said he was too tired to come.

The rest of the gang, about a dozen hunters in all, was already there. Some of them had driven up the night before from Rice Lake, about 35 miles away. Others had arrived before dawn. The trip had become an annual ritual ever since Crotteau and his friend Terry Willers got what hunters in these parts want most and tend to describe in two words: some land.

It was near the lake, a good ways from any road, and there was plenty of room to hunt. A nice spread.

"It's really the middle of nowhere," said Ryan Stovern, who knew the group.

Crotteau, 42, brought his son Joe, 20. Willers, 47, a contractor who did business with Crotteau's construction company, came with his newly engaged daughter Jessica, 27.

Hesebeck, 48, and Drew, 55, who were brothers-in-law and best friends, took along a co-worker from the Rice Lake car dealership where they worked, Mark Roidt, 28. Allan Laski, 43, the manager of a lumberyard that some of the guys frequented, also came.

"The hunting camps here are like a fraternity," said Gary Fleischauer, who owns GJ's Bar near Weyerhaeuser, Wis.

The outing at Crotteau's camp had been in the works for months, timed for the opening weekend of Wisconsin's nine-day deer season. The group had the whole day free for the hunt. The Green Bay Packers, their other shared passion, were playing a rare Sunday night game.

The weather looked good, too. Not even freezing. And a few showers the day before had hushed the woods. A hunter's steps on wet leaves are harder for deer to hear.

"You couldn't keep those guys from a deer hunt on a day like that," said Mark Miller, the owner of Fat Man's, a tavern in Rice Lake where Crotteau often stopped for lunch.

By noon, most of the party had come back to the cabin after a morning searching for deer and visiting a neighboring camp.

But Terry Willers was still out on a trail, a quarter-mile from the cabin, walking toward a wooden deer stand hammered high in a gap between two trees.

He looked up and noticed a stranger: a solitary hunter - trespassing.

The other hunter

The drive from St. Paul to Deer Lake took Chai Soua Vang two hours. It wasn't his first trip to the Wisconsin woods.

He had lived on the city's East Side for about three years, raising six children in a pale yellow house with a few chickens and cornstalks in the yard. He worked as a truck driver.

Not that many people in his neighborhood knew the 36-year-old Vang, but folks on his block knew that he liked to hunt.

He was among thousands of Hmong who register to hunt every year in Wisconsin. Their growing population in St. Paul and around Eau Claire, Wis., has created friction with some white hunters who once had the woods all to themselves.

Some of the Hmong, they say, cannot read "No Trespassing" signs, or do not understand the concept of private hunting land. Hmong leaders complain of getting harassed in the woods for no reason.

Vang was no newly arrived immigrant.

He had come to the United States in 1980, settling first near Sacramento, Calif., before moving to the Twin Cities. He spoke English well.

He was also no slouch with a gun. As a member of the California National Guard a decade ago, Vang earned a Sharpshooter Qualification Badge, The midrange ranking meant he had proved that he could hit at least 30 of 40 targets from a distance of 50 to 300 meters.

Vang came to the woods carrying a SKS semiautomatic rifle, an unusual but legal weapon for shooting deer. It was cheap, just $189 retail at one Twin Cities gun shop, and had little recoil when fired. But some hunters consider it more dangerous than more traditional hunting rifles.

Koenig, the manager at Bear Paw Sporting Goods, said it is the kind of gun that allows a hunter "to shoot anything and everything in sight."

During his stint in the National Guard, where he served as a medical clerk, Vang earned accolades for good conduct. And he had been hunting in the Wisconsin woods for four years without incident.

But he had a temper. In 2001, Minneapolis police arrested him on suspicion of threatening to kill his wife with a gun. She declined to press charges. Twice in recent years, St. Paul police had been called to his home for reports of a domestic disturbance.

Late Sunday morning, Vang's deer hunt led him to the land owned by Willers and Crotteau. Wearing a blaze-orange vest, he climbed up eight wooden planks to an empty deer stand.

He was violating a sacred creed of the woods: Do not tread on another person's land.

Hunters, said Fleischauer, the local bar owner, are very protective of their turf. "This is their domain," he said.

Vang saw someone approaching: an irritated hunter.

Willers was steamed. He looked up at Vang and made two demands. Get out of my stand. And get off my land.

Willers toggled on his walkie-talkie, calling back to the cabin to give the other members of his hunting party a heads-up about the trespasser.

He waited as Vang climbed down the stand.

What happened next is a mystery. Hesebeck and Vang later gave investigators accounts with only a few consistent details.

Vang said he was lost at the time and thought he had been hunting on public land. He said he tried to tell Willers that.

Hesebeck and six other members of the party jumped on their ATVs, hurrying to reach Willers.

When they arrived at the stand, one of the hunters - no one's sure who - noticed Vang's Wisconsin hunting license pinned to his back and scrawled the number, 0685505, on the dirty fender of one of the ATVs.

Another told Vang he was calling police.

Vang turned and started to walk away. More words may have been exchanged. Then Vang stopped and removed the spotting scope from his rifle, which had a 20-round clip. He was at least 20 yards away from Willers.

Vang told police that several hunters began cursing him, with one calling him a "gook" and a "chink."

"Why were you in my son's stand?" he said one of the men demanded.

Then someone - either Willers or Vang - opened fire.

Vang said one of the men pointed his rifle at him, then fired a single shot that hit the ground more than 40 feet behind him.

But the surviving hunters said Vang pivoted in a crouch and opened fire first, without saying a word and without provocation.

Vang fired, twice. A bullet tore into Willers' neck, coming out through his left shoulder.

By Willers' account, only then did he return fire.

The other hunters scattered, running toward the ATVs and the cabin.

"Help me! Help me!" Vang said one of them shouted. Vang shot him twice, in the back.

"Vang walked up to the man and heard the man groan and then Vang walked away," an investigator said later.

In quick succession, Vang then shot Drew and Roidt.

Hesebeck scrambled behind one of the ATVs, but Vang stalked him and shot him in the left shoulder.

Then Vang ran after the Crotteaus. Hesebeck reached the cabin with his walkie-talkie and said he had been shot. After he heard Vang return and shout, "One of you [expletive] is still alive?" Hesebeck fired back at him at least once but missed.

Vang spotted three more members of the hunting party approach on an ATV. He reversed his blaze-orange coat to its camouflage side and reloaded. Vang said he didn't fire at the men because they were carrying rifles.

Those hunters left, taking at least one of the wounded.

Laski and Jessica Willers pulled up on an ATV; Laski had a rifle in his hand, but Vang fired three or four more times, hitting both.

The Crotteaus, Laski, Jessica Willers and Roidt were dead. Terry Willers, Drew and Hesebeck were rushed to area hospitals. Drew died the next night.

"They were sitting ducks," a shaken Sawyer County Sheriff James Meier said later.

'He was very polite'

Theresa Hesebeck, Lauren's wife and Drew's sister, was on her way home from church, where she had prayed for a safe hunt. It was one of her annual hunting season rituals, to ease her worries about some kind of accident or even a heart attack.

When she got home, she heard the news.

Left alone amid the dead, Vang later told police that he did not want to shoot anybody else and that he tossed the ammunition that he had left.

About an hour later, he heard a low-flying plane overhead. He figured the authorities were looking for him.

The shootings had stirred a frenzy.

Sheriff's deputies were driving up and down roads and using loudspeakers to order hunters out of the woods. Emergency vehicles roared northward out of Rice Lake on Hwy. 48, heading for the scene.

Members of the hunting party were on the road, too. They were carrying the wounded and frantically dialing 911, unable to get a signal in a region where cell phone traffic is barely reliable. Eventually, they reached an emergency dispatcher in another county and met an ambulance.

Reports of what happened swept through the woods toward the resort town of Hayward and toward Rice Lake. At first, people heard that several hunters had been wounded. Then they got the stunning news of dead bodies in the forest.

A mile south of the shooting scene, Vang came across hunter Wally Cieslak climbing down from his tree stand.

"I scared you," Vang said. "I'm sorry."

At Cieslak's camp, Aaron Wordon had just come back from an unsettling encounter in the woods: Eight armed SWAT team members, in full camouflage, creeping through the trees, hunting for Vang and for two other men they believe may have been with him on the hunting trip.

Cieslak gave Vang a lift back to his camp, where Wisconsin Department of Natural Resources game warden Jeremy Peery recognized Vang from descriptions.

"Hold it right there," Peery snapped, training his rifle at Vang. Peery inched forward, handcuffed Vang and forced him to kneel in a ditch.

Peery turned Vang's jacket back to its blaze-orange side and saw the same hunting license number that had been scrawled on the side of the ATV at the shooting scene.

Vang didn't say a word.

Peery put Vang in the passenger seat of his pickup and drove him to the Sawyer County jail in Hayward. It was 5:17 p.m., a few minutes after the sun had set.

Staff writers Dennis Anderson, Chuck Haga and Jill Burcum contributed to this report. The writers are at vonste@startribune.com and rsanchez@startribune.com.

DENNY DREW - Hesebeck's brother-in-law, he died from his wounds a day after the shootings.

ROBERT CROTTEAU - The hunting outing at his camp had been in the works for months.

ALLAN LASKI - He managed a lumberyard that some of the others frequented.

JESSICA WILLERS - She rode up on an ATV after the shooting started. Her father, Terry Willers, was wounded.

LAUREN HESEBECK - After the shooting began and he was wounded in the shoulder, he radioed back to the cabin for help.

JOE CROTTEAU - The 20-year-old ran a construction company with his father.

MARK ROIDT - An employee of a car dealership, he joined two of his co-workers on the hunting trip.

GRAPHIC: PHOTO

LOAD-DATE: November 30, 2004

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The Indianapolis Star

August 29, 2004 Sunday Final Edition

SECTION: CITY STATE; RUTH HOLLADAY; Pg. 1B

LENGTH: 592 words

HEADLINE: IPD officer's death puts spotlight on cops' lack of weaponry

BYLINE: RUTH HOLLADAY

BODY:
Thursday was the last day for Indianapolis Police Department officers to wear black armbands and fly black flags on patrol cars, in memory of slain Officer Timothy "Jake" Laird.

But even before they officially stopped showing their sorrow on their sleeves, grief had given way to growling among some officers -- emotions directed not at the shooter but at city brass. The charge is that Public Safety Director Robert Turner, Mayor Bart Peterson and, to a lesser extent, Police Chief Jerry Barker have been slow in providing IPD's 1,200 officers with critical training on assault weapons, which are increasingly what cops face on this city's streets and across the nation.

This may not be on the average reader's radar scope.

It should be.

This is an unpleasant subject that we all need to get up to speed on. File it under reality-testing -- it's not about what ought to be, but what is. And the need to deal with it.

Laird was killed by Kenneth Anderson with an assault rifle. Anderson had purchased his SKS weapon -- a military-style semiautomatic -- June 23, 2003, at Albro Guns on the Eastside. It was a legal transaction. The weapon Anderson bought did not have the requisite gewgaws to technically include it in a federal assault-weapon ban, which has more exceptions than a nervous lawyer.

Anderson killed his mother and Laird. He also shot four officers who responded to the middle-of-the-night rampage. As the police say, the threat Anderson posed was removed by SWAT member Peter Koe -- using an assault weapon similar to Anderson's and a pistol. Yet Public Safety Director Turner, after the shooting, said, "This is not about who has the bigger gun."

It would not have mattered, Turner added, if responding police themselves were armed with assault weapons. Police, he said, cannot shoot in a neighborhood where residents are sleeping.

Respectfully, Sgt. Joe Humkey of the West District disagrees. Like many other IPD officers, he is pretty peeved that IPD a year ago received 218 military- style weapons -- but has yet to train officers on them. "This incident was exactly about who had the bigger gun -- Anderson was able to kill Laird and beat four of our guys because he had a bigger gun," Humkey said.

Vince Huber of the Fraternal Order of Police points out that most major cities already have trained police on assault weapons -- as have smaller Hoosier communities, such as Speedway, Beech Grove and Hendricks County.

Turner defended his timetable. Assault weapons, he said, are complicated and possess such a long firepower range that they require specific areas for training. Eagle Creek, where IPD trains, was deemed not workable in the past.

Lt. Andy Anderson of the Indiana Law Enforcement Academy in Plainfield respectfully disagrees. Eagle Creek could work, he said, and other ranges are available.

As for the danger of police shooting up a neighborhood, no IPD officer fired except Koe -- they couldn't see the shooter, and their training kicked in. Anderson stresses that swift, careful action is vital. "When the bad guys are shooting up a neighborhood, not only the police are in danger, but so is every citizen. The sooner you eliminate that problem, the safer it is for everyone."

Draw your own conclusions, but IPD training on assault weapons is now set to begin in November -- a decision announced Thursday, the same day IPD stopped wearing its armbands.

Ruth Holladay's column appears Sunday, Tuesday and Thursday. You can reach her at (317) 444-6405 or via e-mail at ruth.holladay@indystar.com

LOAD-DATE: September 3, 2004

Copyright 2004 The Birmingham News, All Rights Reserved
Birmingham News (Alabama)

June 18, 2004 Friday

SECTION: NEWS

LENGTH: 963 words

HEADLINE: 3 POLICE OFFICERS KILLED BY GUNFIRE POLICE SAY SHOOTER AMONG 3 ARRESTED

BYLINE: CAROL ROBINSON News staff writer

BODY:
Three Birmingham police officers were slain and a fourth narrowly escaped death in Ensley Thursday after a confrontation at what neighbors and police called a drug house.

What should have been a routine arrest on a misdemeanor assault warrant turned deadly at 1:18 p.m. when someone inside the apartment house sprayed officers with an SKS assault rifle.

Two officers died in the apartment, just inside the back door in a small kitchen. A third officer died just outside the front door, able only to make a final radio call for help for his fellow officers before a bullet struck him in the head.

Police officials believe it is the first time more than one Birmingham police officer has been killed in a single incident. The last police officer killed in Birmingham was officer Jerome Daniels, slain during a robbery in November 2002.

Those killed Thursday were Carlos "Curly" Owen, 58; Charles Bennett, 33; and Harley Chisholm III, 40. All worked the day shift at the West Precinct, just blocks from where they were gunned down. Owen, whose decorated career on the force spanned nearly three decades, was nearing retirement.

Kerry Marquise Spencer, 24, and Nathaniel Woods, 27, were booked into the Birmingham City Jail at 10:30 p.m. on suspicion of capital murder. Formal charges could come as early as today.

Their arrests followed a twohour manhunt involving dozens of officers that spanned only two blocks.

Arrests were made at 1736 18th St. in Ensley, where authorities captured one man on the front porch. Police later took a tracking dog up a ladder and broke through an attic vent to take a second man in custody. Arresting officers said they Officers, Page 8A 1A screamed at the second man to give up and found him "cowering" in the attic.

Police recovered the assault rifle in the bushes outside the apartment where the officers died. It was unclear whether more than one gun was used in the shootings and whether any police officers were able to return fire. Authorities said the crime scene was full of guns and bullet holes.

"This is something that seems unimaginable," said Birmingham Police Chief Annetta Nunn.

Ensley residents at the scene openly grieved the loss of their beat officer, Owen: One woman said he brought her coffee once; a man standing nearby sobbed and said Owen came to visit him when he was shot. Chisholm joined the department in 1998; Bennett in 2001.

"Carlos loved catching crooks. After all these years, he was still dedicated, still wanted to put the bad guys away," said narcotics Officer Jim Hickey, a former West Precinct officer. "Chisholm and Bennett were cut from the same cloth."

Rifle-toting police officers and federal agents from a dozen agencies in the Jefferson County area swarmed to the Tuxedo neighborhood, an older, low- to moderate-income community in search of the gunman or gunmen.

Police worked throughout the night trying sort out several versions of events.

Sorting things out

Friends of the officers gave this account: One officer had a verbal run-in with Woods midday Thursday while he was on routine patrol. The officer checked police records and found Woods was wanted on a third-degree assault charge from February.

Once they had the warrant in hand, Owen, Chisholm, Bennett and Mike Collins went to the one-story house that contained several apartments. Owen and Chisholm entered the apartment through the back door to arrest Woods. He broke away from them and ran toward the front of the house, where Bennett was about to come through the front door.

That's when shots were fired. All three officers, shot multiple times, were dead on the scene.

Collins was on his way toward Bennett in the front when bullets whizzed at him. A bullet struck his holster and tore a hole through his back pocket.

Police said he was shaken, but not wounded.

The shootings, the search and the fallout paralyzed that corner of Ensley for much of the afternoon. Knots of people clustered at every corner, some praying it was not an officer they knew.

Police cars and SUVs, ambulances, firetrucks, SWAT vehicles and a police command unit congregated in front of a nearby church. Officers in uniform and plainclothes scurried about, talking over radios and gazing through binoculars.

Police told area business owners to lock their doors while they hunted for the assailants. They

searched the area street by street, checking houses, car trunks and trash bins.

A few blocks over, a West Precinct police officer rolled down his patrol car window and sobbed. After wiping his eyes, he glanced up and said, "Those are my friends."

A neighborhood in shock

Neighbors appeared to be in shock. Some talked frantically over cell phones, others embraced. Little children looked lost.

"I live six blocks from where it happened," said James Davenport. "I have lived here all my life, and I've never been afraid. Lord, this is devastating to me."

Joseph Black, president of the Central Pratt Neighborhood, said he was disgusted by the killings.

"They ought to just have an execution tomorrow morning," Black said.

The Rev. Dean Pesnell, a chaplain at Birmingham police headquarters, said Thursday was "absolutely, without doubt" the toughest assignment he's faced.

It fell to Pesnell and other chaplains to notify the officers' families.

"They are doing as well as can be expected under the circumstances," Pesnell said. "They are very upset. We are all upset. I was an officer myself. The only way I can get through this is knowing that God is with me. We ask for prayers, prayers, prayers."

News staff writers Kim Bryan, Val Walton, Anne Ruisi, Chanda Temple, Vivi Abrams, Bill Plott, Victoria L. Coman, Michelle Q. Guffey and Robert Gordon contributed to this report.

GRAPHIC: Figure, A locator Newsmap and a map titled 'Scene of the crime' accompanied this article.

LOAD-DATE: June 24, 2004

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CBS News Transcripts

SHOW: CBS Morning News 6:30 AM EST CBS

February 25, 2005 Friday

LENGTH: 310 words

HEADLINE: Texas gunman kills two in shootout

ANCHORS: SUSAN McGINNIS

REPORTERS: LEE COWAN

BODY:

SUSAN McGINNIS, anchor:

A domestic dispute turned into a deadly Texas shootout. A gunman opened fire in front of the Tyler, Texas, Courthouse. He was armed with an assault rifle and wearing a bulletproof vest, and when it was over, three people were dead. Lee Cowan reports.

LEE COWAN reporting:

The shooting ripped through the historic town square like something out of the old West. Court had just resumed after the lunch hour and then this.

(Footage from courtroom with sound of gunfire)

COWAN: Officers with guns drawn were preparing for the worst. Many in the courtroom took refuge behind the judge's bench. Others ran for their lives.

Ms. HOLLY MEYER (Witness): I was so scared, my life flashed before my eyes. I saw my little girl's life flash before my eyes. And it sounded like the gunshot was right on the other side of the wall.

COWAN: Outside, the suspect had gunned down his ex-wife and was in the process of shooting his own son when a stranger named Mark Wilson, with a concealed weapons permit, began firing back. Wilson was shot and killed.

Sheriff J.B. SMITH (Smith County, Texas): One of the deputies on the scene said if it hadn't

been for Mr. Wilson that he thinks that the son would be dead at this time.

COWAN: The shooter, David Arroyo, was apparently upset over legal action taken by his ex-wife involving unpaid child support. He came prepared--body armor over his chest, an AK-47 at the ready.

Chief GARY SWINDLE (Tyler, Texas, Police Department): We do know that there was multiple rounds that were shot into the flack jacket and into the bulletproof vest. Obviously, that did keep him going for some time afterwards.

COWAN: Some seven minutes, say witnesses, before police finally chased him down and killed him, but only after dozens of rounds had been fired in a Texas square at the height of the afternoon rush.

Lee Cowan, CBS News, Dallas.

LOAD-DATE: February 27, 2005

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Los Angeles Times

February 25, 2005 Friday
Home Edition

SECTION: CALIFORNIA; Metro; Metro Desk; Part B; Pg. 1

LENGTH: 420 words

HEADLINE: CALIFORNIA;
2 Are Shot to Death at Maintenance Yard;
L.A. city employee allegedly killed his boss, coworker after being reprimanded.

BYLINE: Natasha Lee, Times Staff Writer

BODY:

A Los Angeles city street worker who reportedly had been reprimanded for being late to work opened fire with an assault rifle on his boss and another coworker Thursday evening at a downtown maintenance yard, killing both, police said.

The suspect drove himself to the nearby Hollenbeck police station and turned himself in a short time later, Police Chief William J. Bratton said. Police found an AK-47 rifle in his car.

Sources said the suspect had been chastised in the morning for arriving late, and the dispute escalated throughout the day. Police believe the second victim might have been killed simply because he was there when the killer opened fire.

Both victims had worked for the Bureau of Street Services for more than 20 years, police said. The suspect also was a longtime worker. None of the men's names were released.

The shooting occurred about 5 p.m. at a maintenance and asphalt-producing yard in the 2400 block of East Olympic Boulevard. Both men died at the scene.

There appeared to have been no witnesses; a crew returning to the maintenance yard office at the end of a shift discovered the bodies shortly before 6 p.m.

Authorities released no other details Thursday night.

Mayor James K. Hahn noted that city street services workers have been working 12-hour days, from 6 a.m. to 6 p.m., since storms began pounding Southern California. A city engineer died

earlier this week when he fell into a widening sinkhole in Sun Valley.

"It's been a very tough week, a very emotional week," Hahn said at the shooting site. "It doesn't seem like any issue that arises in the workplace should result in violence. It's totally unexpected."

Hahn said that earlier this week, he saw the supervisor who was killed Thursday working in Glassell Park at the scene of a mudslide.

"The crew was out and they were in great spirits. It just makes it all the harder."

Workers based at the facility perform a range of street-maintenance services, including curb reconstruction and pothole filling. They also manufacture asphalt there, officials said.

Volunteer members of the city's crisis response team went to the scene to counsel any workers or family members who had seen or heard news reports of the shootings and gone to the maintenance yard.

Team manager Jeffrey Zimerman said the group planned to remain at the yard until about midnight. He said the city also planned to send a psychologist to the site today to help employees cope with the loss of their co-workers.

Times staff writer Andrew Blankstein contributed to this report.

GRAPHIC: PHOTO: INVESTIGATION: Both shooting victims had worked for the Bureau of Street Services for more than 20 years, police said. PHOTOGRAPHER: Francine Orr Los Angeles Times PHOTO: WORKPLACE VIOLENCE: Police investigate the crime scene beneath the bridge in the 2400 block of East Olympic Boulevard in downtown Los Angeles. The suspect drove himself to the Hollenbeck police station and turned himself in. PHOTOGRAPHER: Photographs by Francine Orr Los Angeles Times

LOAD-DATE: February 25, 2005

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The Advertiser

February 15, 2005 Tuesday

SECTION: FOREIGN; Pg. 29

LENGTH: 238 words

HEADLINE: Gunman opens fire in mall

BYLINE: By MICHAEL HILL in Kingston, New York

BODY:
A 24-YEAR-OLD man has been arraigned on assault charges after he allegedly opened fire in a crowded shopping mall, wounding two people and sending shoppers scrambling for safety.

Robert Bonelli apppeared in Ulster Town Court on first- and second-degree assault and reckless endangerment charges, said Brian Woltman, a dispatcher for the Town of Ulster Police Department.

Bonelli, of nearby Saugerties, was being held in Ulster County Jail without bail pending a court appearance on Wednesday, Mr Woltman said.

Police say Bonelli opened fire with an assault-type rifle on Sunday afternoon inside the Best Buy store in the Hudson Valley Mall, about 90kms south of Albany.

After firing several shots, he made is way into the mall corridor and continued shooting until running out of ammunition near the centre court, witnesses said. He then laid down the weapon and was tackled by two mall workers, police said.

State police Captain Wayne Olson said investigators did not know the exact number of shots fired but he said it was a "significant number of rounds".

"It's shocking that it happened," Ulster Town Supervisor Fred Wadnola said. "But I guess that's the way our society is going today."

The wounded included a National Guard recruiter who was in a recruiting booth inside the mall when he was shot. Olson said the 20-year-old recruiter might lose his leg. Hospital officials did not release any information.

LOAD-DATE: February 16, 2005

Copyright 2005 Los Angeles Times
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Los Angeles Times

January 11, 2005 Tuesday
Home Edition

SECTION: CALIFORNIA; Metro; Metro Desk; Part B; Pg. 9

LENGTH: 270 words

HEADLINE: CALIFORNIA;
Marine Is Fatally Shot by Police;
The 19-year-old killed one officer and injured another, say authorities, who suspect the motive may have been tied to upcoming tour in Iraq.

BYLINE: Zeke Minaya, Times Staff Writer

BODY:

A 19-year-old Marine from Modesto, who was scheduled for a second tour of duty in Iraq, shot two police officers -- one fatally -- before being gunned down hours later as he rushed at police, authorities said Monday.

Andres Raya had told his family that after a seven-month stint in Iraq he didn't want to go back, authorities said.

"There are many possibilities in this case," said Jason Woodman, spokesman for the Stanislaus County Sheriff's Department.

"We haven't narrowed it down to one motive," Woodman added. "But he did mention to his family members that he did not want to return to Iraq."

Raya was on leave, visiting his family in Modesto.

He returned to Camp Pendleton on Saturday, but told a friend he was leaving the barracks to get something to eat and didn't return, Woodman said.

About 8 p.m. Sunday, Raya appeared in the parking lot of a liquor store in Ceres, a city next to Modesto, and fired a shot from an assault rifle, Woodman said.

Then Raya went into the store and asked that police be called, Woodman said.

Ceres Police Officer Sam Ryno, who arrived first, was shot several times in the lower body and was critically wounded, authorities said.

Sgt. Howard Stevenson was shot in the torso and died at the scene, authorities said.

Raya ran to a nearby neighborhood, which authorities surrounded, drawing the Marine out from behind a home three hours later, Woodman said.

Raya charged officers, reaching into his clothes as if for a gun when he was fatally shot by officers, Woodman said.

Stevenson was the first Ceres police officer killed in the line of duty.

"This is a big shock to the community," Woodman said.

GRAPHIC: PHOTO: Andres Raya fired on two officers in Ceres, police said.

LOAD-DATE: January 11, 2005

Copyright 2005 The Deseret News Publishing Co.
Deseret Morning News (Salt Lake City)

February 26, 2005 Saturday

LENGTH: 105 words

HEADLINE: Texan kills 2 people before police kill him

BODY:

TYLER, Texas (AP) -- A man angry about being sued for unpaid child support opened fire with an AK-47 assault rifle outside a courthouse, killing his ex-wife and a bystander who intervened to protect the couple's 23-year-old son.

The gunman, 43-year-old David Hernandez Arroyo Sr., was killed Thursday in a gun battle with officers after fleeing the scene of the shooting, in which his son and three law enforcement officers were wounded.

Police estimated that Arroyo, who had a history of spousal abuse and weapons violations, shot 50 rounds in the historic town square. He was wearing a military flak jacket and a bulletproof vest.

LOAD-DATE: February 26, 2005

RESPONSE TO POST-HEARING QUESTIONS FROM A MINORITY MEMBER TO BRADLEY T. BECKMAN, COUNSEL, BECKMAN AND ASSOCIATES, COUNSEL TO NORTH AMERICAN ARMS

RESPONSE OF BRADLEY T. BECKMAN
TO QUESTIONS BY A MINORITY MEMBER OF
THE HOUSE SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW DURING THE SUBCOMMITTEE HEARING
HELD MARCH 15, 2005

1. **In 2002 John Muhammad and Lee Malvo used a firearm to shoot and kill several individuals in the Washington, D.C. area. The firearm had been sold, legally, by the federally licensed firearm manufacturer to a Tacoma, Washington federally licensed dealer, Bull's Eye Shooters' Supply. When contacted by law enforcement, the dealer, Bull's Eye Shooters' Supply, was not able to account for the transfer of the subject firearm in its Acquisition & Distribution records nor was it able to produce a Firearms Transaction Record (ATF Form 4473). Victims of the criminal shootings perpetrated by Muhammad and Malvo filed civil lawsuits against the manufacturer and dealer alleging negligence. Would H.R. 800 permit a suit against this dealer?**

Response: Yes, under H.R. 800 a civil action could be pursued against this dealer.

Pursuant to Section 5(A)(iii), H.R. 800 does not prevent a suit against a dealer who "knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm]" including "(I) any case in which the … [dealer] knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the [firearm], or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of the [firearm]" or "(II) any case in which the [dealer] aided, abetted, or conspired with any other person to sell or otherwise dispose of the qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the [firearm] was prohibited from possessing or receiving [the firearm]…" *See* H.R.800, Sec. 5(A)(iii)(I) and (II). In addition, a suit may be maintained against the dealer for "negligent entrustment" by "supplying … [the firearm] …for use by another person when the [dealer] knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others"[1] or "negligence per se". H.R. 800, Sec. 5(A)(iv).

[1] Negligent entrustment is a well-established common law doctrine in the State of Washington. *Christen v. Lee*, 113 Wn.2d 479, 499, 780 P.2d 1307 (1989).

A plaintiff would be permitted to conduct discovery to establish the facts and circumstances surrounding what happened to the firearm while in the possession, custody and control of Bull's Eye Shooters' Supply and how it came into the possession of the criminal shooters. A plaintiff would be permitted to his or her day in court to try to establish whether the dealer knowingly violated or made any false entry in, or failed to make appropriate entry in, his records, which he is required to keep pursuant to Federal law and regulation, or whether the dealer aided, abetted, or conspired with Muhammad or Malvo, or any co-conspirators, in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or disposition of the firearm, or aided, abetted, or conspired with Muhammad or Malvo, or any other co-conspirator, to sell or otherwise dispose of the firearm knowing, or having reasonable cause to believe, that Muhammad and Malvo were prohibited from possessing or receiving the firearm.

In addition, in a civil action the standard of proof the plaintiff would have to establish to prevail is a mere "preponderance of the evidence," not the more stringent "beyond a reasonable doubt" standard applied in criminal cases. As the subcommittee knows, the dealer in the Bull's Eye lawsuit settled the case without any admission of liability.

What is beyond question is the fact that both Muhammad and Malvo were prohibited under federal law from purchasing a firearm and that records required to be maintained, if the firearm was transferred, were not kept. It has been reported that Muhammad and Malvo confessed to law enforcement that they stole from the dealer the firearm they used to commit the criminal shootings. Federal law requires a dealer to timely report to the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) the theft or loss of a firearm from inventory. 18 U.S.C. § 923(g)(6); 27 CFR § 478.39a. It is beyond question that the dealer did not report the theft of the firearm until after being contacted by law enforcement.

The common law, however, does not impose civil liability on a retailer for the criminal misuse of a product that has been stolen from the store without the shopkeeper's knowledge. *See e.g. Louria v. Brummett*, 916 S.W.2d 929 (Tenn. Ct. App. 1995) (K-Mart not liable for subsequent criminal acts of individuals who stole gun from store); *Valentine v. On Target, Inc.*, 727 A.2d 947 (Md. 1999) (Gun retailer from whom gun used in murder was stolen owed no duty to murder victim to prevent theft of gun and unknown assailant's use of that gun in murder.). Normally the intervening criminal act breaks the chain of causation between any acts or omissions by the retailer and the harm to the plaintiff caused by the actions of the criminal. *See Louria*, 916 S.W.2d at 930 (which expressly rejected the holding in the *Kimbler* case, discussed *infra)*. As noted by the *Louria* court, I am aware of only one reported case that would potentially impose liability upon a retailer for subsequent crimes committed with a stolen firearm. *Kimbler v. Stillwell,* 734 P.2d 1344 (Or. 1987) (Defendant's motion to dismiss for failure to state a claim was denied). However, the *Kimbler* case was later overruled by the

Oregon Supreme Court in *Buchler v. Oregon Corrections Div.*, 853 P.2d 798, 805 (Or. 1993), which criticized the *Kimbler decision* as standing for an erroneous legal proposition that anyone who "facilitates" a criminal act may be held liable. *See id.* at 804-06. The *Buchler* court said,

> [I]n our society it is foreseeable that crimes may occur and that the criminals perpetrating them may cause harm. Thus, in a general sense, it is foreseeable that anyone whose conduct may in any way facilitate the criminal in committing the crime has played some part in the resulting harm. But mere "facilitation" of an unintended adverse result, where intervening intentional criminality of another person is the harm-producing force, does not cause the harm so as to support liability for it.

Id. at 805.

2. **Former New Jersey police officer, David Lemongello, was injured when he was shot by a career felon who was on parole with a firearm that had been purchased earlier from Will's Jewelry & Loan Pawnshop, a federally licensed firearm dealer, following a federally mandated National Instant Check (NICS). In a civil lawsuit officer Lemongello alleged the firearm used to shoot him was purchased as part of an illegal straw purchase. Would H.R. 800 permit a suit against this dealer?**

Response: Yes, under H.R. 800 a civil action could be pursued against this dealer.

H.R. 800 does not prevent a suit against a dealer who knowingly sells a firearm to a straw purchaser or violates any law in transferring a firearm. *See* H.R. 800, § 5(A)(i) and (iii). The facts and circumstances surrounding a given transaction establish whether the dealer knowingly transferred a firearm to an illegal straw purchaser or in violation of the law. A plaintiff would be permitted to conduct discovery to establish whether the sale was in violation of the law, i.e. a knowingly illegal straw purchase. It is important to note that under H.R.800 a civil action could proceed even in the absence of a criminal prosecution against the dealer. In addition, in a civil action the standard of proof the plaintiff would have to establish to prevail is a "preponderance of the evidence," not the more stringent "beyond a reasonable doubt" standard applied in criminal cases.

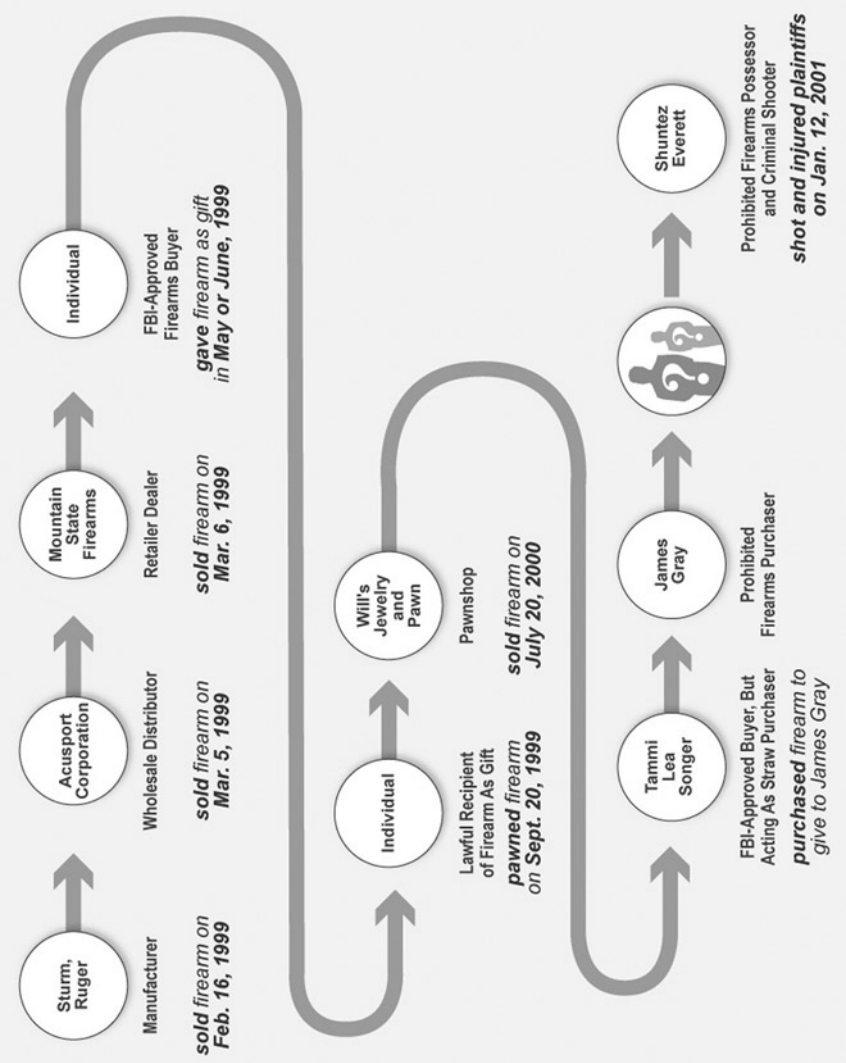
As ATF itself acknowledges on the video component of the "Don't Lie for the Other Guy" dealer kit, it is not always easy for a dealer to determine or know whether a transaction is a legitimate purchase or whether it is an illegal straw purchase. The mere fact that a sale turns out after the fact to have been a straw purchase should not give rise to liability against the dealer, nor the manufacturer or distributor.

The facts and circumstances surrounding the transfer of the firearm involved in former police officer Lemongello's case are more involved than the subcommittee may be aware. Upon information and belief, the straw purchaser used by the multiple-convicted felon to illegally purchase the firearm in question was a known customer of the store. Before making the sale, a store employee did inquire of the straw purchaser as to the reason for the purchase. Later that day the store's management voluntarily alerted ATF of the transaction. The dealer subsequently voluntarily cooperated with ATF in an undercover sting operation that resulted in the successful apprehension of the convicted felon who was illegally trafficking firearms into New Jersey. The dealer permitted ATF to install surveillance equipment in the store and permitted an undercover ATF agent to pose as a store employee. The "straw purchaser" also cooperated with law enforcement in exchange for leniency in the subsequent criminal prosecution against her. The convicted felon pled guilty in federal court and was sentenced to 15 years in prison. As part of his plea agreement, the defendant signed a cooperation agreement with the United States requiring him to disclose any information he had concerning the involvement of others. The dealer was not prosecuted by the government. At the time of the incident, the shooter, Shuntez Everett, was wanted on charges of attempting to murder his girlfriend, was in violation of probation for one crime and free on bail for another.

It is worth noting that Dennis Henigan, Director, Legal Action Project, Brady Center to Prevent Gun Violence, on behalf of former officer Lemongello, also sued Sturm, Ruger and Co., Inc., the manufacturer of the firearm used, even though Mr. Henigan knew the firearm transferred by Will's Pawn Shop was a used firearm originally sold at retail by a different dealer, following a proper NICS check, to an ordained Baptist minister. See attached chart. Mr. Henigan, even after learning the transactional history of the firearm, sought to amend the complaint to sue the distributor that originally sold the firearm. The circuit court judge, in dismissing the suit against Sturm, Ruger failed to find "any conduct on the part of Sturm, Ruger constituted a breach of its duty to exercise reasonable care, in its distribution of firearms, a duty that takes into consideration the nature of the product it distributes. The Court also finds that given the undisputed facts and the evidence of intervening criminal conduct, there does not exist a genuine issue of material fact that any conduct on the part of Sturm, Ruger proximately caused the plaintiffs' injuries." (Judgment Order, filed November 8, 2004 at p. 2.)[2]

If the Subcommittee members would like any additional information, I would be pleased to respond. Thank you for your consideration of this supplemental information.

[2] Will's Jewelry & Loan Pawnshop had already settled the suit without any admission of liability.


Sturm, Ruger
Manufacturer
sold firearm on Feb. 16, 1999
Acusport Corporation
Wholesale Distributor
sold firearm on Mar. 5, 1999
Mountain State Firearms
Retailer Dealer
sold firearm on Mar. 6, 1999
Individual
FBI-Approved Firearms Buyer
gave firearm as gift in May or June, 1999
Individual
Lawful Recipient of Firearm As Gift
pawned firearm on Sept. 20, 1999
Will's Jewelry and Pawn
Pawnshop
sold firearm on July 20, 2000
Tammi Lea Songer
FBI-Approved Buyer, But Acting As Straw Purchaser
purchased firearm to give to James Gray
James Gray
Prohibited Firearms Purchaser
Shuntez Everett
Prohibited Firearms Possessor and Criminal Shooter
shot and injured plaintiffs on Jan. 12, 2001

ARTICLE SUBMITTED BY LAWRENCE G. KEANE, COUNSEL, BECKMAN AND ASSOCIATES, COUNSEL TO NORTH AMERICAN ARMS

Protection by Prohibition

Legislative Solutions to Regulation-by-Litigation

by Lawrence G. Keane and Christopher P. Johnson

Since 1998, the firearms industry—one of the most highly regulated industries in the nation, see, *e.g.*, 18 U.S.C. §922—has been under a coordinated, politically motivated attack in the courts. Unsatisfied with statutes enacted by democratically elected representatives at the state and federal level, municipal officials that year began suing members of the firearms industry in an effort to regulate the industry through litigation. Since then, virtually identical lawsuits have been filed by over 30 municipalities and one state attorney general, all of which seek to hold the industry liable for the criminal misuse of their lawfully sold, non-defective products. These suits, which will be collectively referred to here as the "Firearms Industry Litigation," seek to have judges and/or juries impose gun control measures the plaintiffs believe will reduce gun violence, but which the United States Congress and state legislatures have chosen not to enact.

Some of these frivolous lawsuits have been dismissed. See, *e.g.*, *People v. Sturm, Ruger & Co.*, 2003 Westlaw 21456297, 2003 N.Y.App. Div.LEXIS 7304 (June 23, 2003); *In re Firearms Cases,* J.C.C.P. No. 4095 (Cal.Super.Ct., San Diego County, April 10, 2003); *NAACP v. Acusport, Inc.*, Nos. 99 CIV 3999, 99 CIV 7037, 2003 U.S.Dist.LEXIS 12421 (E.D.N.Y. July 21, 2003); *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001). Many others, however, remain pending. It has cost the firearms industry an estimated $100 million to defend these cases, a staggering sum for an industry with aggregate sales less than that of a single Fortune 500 company. See Testimony of Lawrence G. Keane before House Subcommittee on Commercial and Administrative Law regarding H.R. 1036 (April 2, 2003); Kopel, "Ban Lawsuits That Hurt Legal Gun Industry," *The Philadelphia Inquirer*, May 19, 2003.

Lawrence G. Keane is Vice President and General Counsel for the National Shooting Sports Foundation, Inc., the firearm industry's major trade association. Formerly, he was a partner in the White Plains, New York law firm of Pino & Associates. Christopher P. Johnson is a partner in the New York City law firm of Kasowitz, Benson, Torres & Friedman, LLP. A member of DRI, he has a trial and appellate practice focusing on products liability, constitutional, antitrust, and general commercial litigation.

Kim Conroy, an associate at Kasowitz Benson, and Erin Murray, a summer associate at the firm, assisted in the preparation of the article.

The views expressed herein are those of the authors and not necessarily those of the organizations with which they are affiliated.

Based in large part upon the significant and unfair burden these lawsuits have imposed upon interstate commerce, Congress is on the verge of prohibiting lawsuits, like the Firearms Industry Litigation, that seek to blame manufacturers and product sellers for the criminal misuse of their lawfully sold, non-defective products. On April 9, 2003, the House of Representatives passed the Protection of Lawful Commerce in Arms Act (H.R. 1036) by a wide bipartisan margin (285–140). The companion legislation in the Senate (S. 659) currently has 54 co-sponsors. The stated purposes of the Protection of Lawful Commerce in Arms Act include:

1. To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunitions products by others when the product functioned as designed and intended; [and]

...

4. To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

S. 659, 108th Cong. (2003). The White House has indicated that it supports the bill. See "Statement of Administrative Policy, H.R. 1036—Protection of Lawful Commerce in Arms Act" (Apr. 9, 2003), at http://www.hsshf.org/legal.

In this article, the authors discuss the circumstances that make a legislative resolution to litigation both appropriate and politically feasible. First, we examine various statutes in which Congress has previously granted an industry or profession protection from litigation in whole or in part. This includes a discussion of bills before Congress that appear ready to resolve—at long last—the decades-long asbestos litigation. Second, we examine why a bipartisan majority of Congress is sponsoring the Protection of Lawful Commerce in Arms Act. Finally, we discuss factors that practitioners in other industries should consider in determining whether a legislative resolution to litigation is an attainable objective.

Congressional Efforts to Protect Industries from Litigation

During the House debate over the Protection of Lawful Commerce in Arms Act, opponents of the bill falsely asserted that it was an unprecedented blanket or special immunity for an entire industry. 149 Cong. Rec. H2968, 2969 (April 9, 2003) (Statement of Rep. Watt). Rep-

resentative Cliff Stearns (R-Florida), the lead sponsor in the House, responded to this charge by noting that Congress had enacted numerous other federal statutes to "protect... specific industries... where these industries... have found themselves uniquely threatened by bizarre or novel legal situations.... [There are] major pieces of legislation, very similar, very like this bill that have been passed by Congress to protect and to enforce protection against nuisance lawsuits." 149 Cong. Rec. H2968, 2970–71 (Apr. 9, 2003).

Representative Stearns was, of course, completely correct. As the following examples show, the United States Code contains numerous statutes in which Congress has sought to protect different industries from the onslaught of litigation.

National Childhood Vaccine Injury Act of 1986

While asbestos may have been the first true mass tort, the first mass tort to which Congress responded was the vaccine litigation crisis of the early 1980s. Vaccine manufacturers faced a flood of lawsuits alleging adverse reactions to childhood immunizations, such as allegations of neurological impairments resulting from immunization with the diphtheria-tetanus-pertussis vaccine. See, *e.g.*, *Jones v. Lederle Laboratories*, 982 F.2d 63 (2d Cir. 1992). Concerned that the cost of this litigation had resulted in an enormous increase in the prices of vaccines and a consequent reduction in the number of manufacturers willing to sell childhood vaccines (see H.R. Rep. No. 908, 99th Cong., 2d Sess. 4–5 (1986)), in 1986 Congress enacted the National Childhood Vaccine Injury Act, Pub.L. 99-660, 42 U.S.C. §300aa-1, *et seq.*

In passing the Vaccine Act, Congress noted that, while most children greatly benefit from immunizations, there was a small number who foreseeably and unavoidably sustain injuries associated with the vaccines. Congress sought to remove the twin economic disincentives of litigation costs and verdict uncertainty that were driving vaccine suppliers from the market, while ensuring that those who were truly injured had a legal remedy. Accordingly, Congress significantly limited the common law remedies available to those injured, such as by requiring them to exhaust remedies under a federally sponsored compensation program before commencing a civil action and limiting the availability of punitive damages. As courts have noted, the Vaccine Act "'ensure[s] that all children who are injured by vaccines have access to sufficient compensation for their injuries,' and 'free[s] manufacturers from the specter of large, uncertain tort liability, and thereby... keep[s] manufacturers in the market.'" *Strauss v. American Home Products Corp.*, 208 F.Supp.2d 711, 713 (S.D.Tex. 2002), quoting *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 4 (1st Cir. 1994).

Biomaterials Access Assurance Act of 1998

Roughly ten years ago, the mass tort *du jour* was the silicone breast implant litigation. Women around the nation sued Dow Corning and others, alleging that silicone leaking from the implants caused various systemic diseases. See, *e.g.*, *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98 (1998). In 1998, a National Science Panel created by United States District Judge Sam Pointer concluded that silicone did not cause such diseases, thereby essentially sounding the death knell for that mass tort. See *In re Silicone Litigation*, 2000 Westlaw 33180471, at *23 (Dec. 29, 2000). By then, however, much of the damage had already been done. Dow Corning was driven into bankruptcy by the litigation, and other defendants spent untold millions to defend claims that were eventually shown to have no factual basis. Dow Corning is proof positive that a company can win frivolous litigation but go bankrupt in the process—a very real concern in the Firearms Industry Litigation.

Congress is on the verge of prohibiting lawsuits that seek to blame manufacturers and product sellers for the criminal misuse of their lawfully sold, non-defective products.

As in the vaccine litigation, one of the risks of mass tort litigation—the twin market disincentives of legal defense costs and verdict uncertainty—reared its ugly head in the silicone breast implant litigation. Specifically, the breast implant litigation convinced many companies that supply raw materials to medical device manufacturers that the risks of selling to that market—and possibly getting swept into the device manufacturers' litigation—outweighed the benefits of selling to that market. The result was that, probably unbeknownst to the public at large, the United States faced a serious biomaterials shortage in the 1990s, all because of litigation that *eventually* proved to be scientifically unfounded.

In response to this medical crisis, Congress passed the Biomaterials Access Assurance Act of 1998, Pub.L. 105-230, 21 U.S.C. §1601, *et seq.* The purpose of the Biomaterials Act is to protect suppliers of raw material and component parts that are used in medical devices and to ensure the availability of those medical devices. The Act "supersedes State law to create an exclusion from liability for manufacturers of raw materials or components of medical implants." See 149 Cong.Rec. H2968, 2970–71 (Apr. 9, 2003).

The General Aviation Revitalization Act

Manufacturers of small aircraft faced similar market disincentives. Whereas aircraft purchased by commercial airlines are routinely upgraded, maintained, and replaced at the end of their useful life, small aircraft purchased by individuals and small businesses may not always receive the maintenance required to keep them in good working order. When lawsuits by individuals and small businesses threatened the viability of small aircraft manufacturers, Congress responded with the General Aviation Revitalization Act of 1994, Pub.L. 103-298, 49 U.S.C. §40101 (GARA).

GARA is an amendment to the Federal Aviation Act of 1958 that "establish[ed] time limitations on certain civil actions against aircraft manufacturers." "'[Congress] believed that manufacturers were being driven to the wall because, among other things, of the long tail of liability attached to those aircraft, which could be used for decades after they were first manufactured and sold.'" *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002). Given the structure and remedies established by tort law, Congress grew deeply concerned about the costs imposed upon general aviation aircraft manufacturers. See H.R. Rep. No. 103-525, pt. I, at 1–4 (1994). Determining "that the economic health of the general aviation aircraft manufacturing industry depended on lifting the requirement that manufacturers abide the possibility of litigation for the indefinite future when they sell an airplane," *Lyon*, 252 F.3d at 1089, Congress enacted GARA, "which generally protects manufacturers of

small planes more than 18 years old against personal injury lawsuits in both Federal and State courts." 149 Cong.Rec. H2968, 2970–71 (Apr. 9, 2003).

Y2K Act of 1999

Economic disincentives related to litigation also motivated the Y2K Act. See Pub.L. 106-37, 15 U.S.C. §6601 *et seq.* Congress was concerned that "the potential for liability—in particular, concern about the substantial litigation expenses associated with defending against even the most insubstantial lawsuits—[wa]s prompting many persons and businesses with technical expertise to avoid projects aimed at curing year 2000 computer date-change problems." 15 U.S.C. §6601(a)(B)(6), (b)(4). Accordingly, Congress enacted the Y2K Act "[t]o establish certain procedures for civil actions brought for damages relating to the failure of any device or system to process or otherwise deal with the transaction from the year 1999 to the year 2000, and for other reasons." It "limits punitive damages and establishes special procedures for liability in Y2K cases." 149 Cong.Rec. H2968, 2970–71 (Apr. 9, 2003).

The Proposed Asbestos Trust

As of July 2003, the prospects for a Congressional resolution to the decades-long asbestos litigation crisis looked promising. Asbestos lawsuits have already driven at least 67 companies to bankruptcy and another 8,400 companies into court. See "Asbestos Takes the Senate," *Wall Street Journal*, July 1, 2003. The United States Supreme Court, meanwhile, has implored Congress to act. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

Congress appears finally to be responding to these pressures. The pending "Fairness in Asbestos Injury Resolution Act of 2003" would establish an asbestos "trust fund"—which is expected to be well over $100 billion—financed by contributions from current asbestos defendants and insurers. In return, the remaining asbestos defendants and insurers are expected to finally get some protection from a tort system that has not served either plaintiffs or defendants well. As of July 2003, the Senate Judiciary Committee had approved the asbestos trust bill. See *New York Times*, July 11, 2003.

Firearms Industry Litigation

Like some of the immunity statutes referenced above, the proposed Protection of Lawful Commerce in Arms Act is motivated in part by Congressional concern about the adverse effect of litigation costs on interstate commerce. The Act, however, is different from the referenced immunity statutes in that it is directed at the Firearms Industry Litigation—a new and troubling type of litigation that seeks to circumvent the democratic legislative process by using litigation to regulate a legal industry.

The Firearms Industry Litigation cases generally assert state law public nuisance claims and/or so-called "negligent marketing" claims. Seeking to hold the industry liable for the criminal acts of others, the gravamen of these public nuisance and negligent marketing claims is that the defendant manufacturers, distributors, and retailers bear responsibility for allegedly "supplying" or "feeding" an "illegal gun market" from which criminals obtain firearms they subsequently use in crime. The plaintiffs, principally municipalities but also including the Attorney General of the State of New York and the National Association for the Advancement of Colored People, allege that *the existence* of this illegal gun market constitutes a public nuisance under the common law of a particular state. The plaintiffs typically seek a mandatory injunction requiring the defendants to "abate" the nuisance and/or to pay hundreds of millions in damages (which would effectively bankrupt the industry).

The injunctive relief sought in these cases, however, is not limited to the boundaries of the state under whose law the claims are brought. Rather, the plaintiffs seek injunctive relief that is geographically unlimited in scope. Indeed, the entire goal of the Firearms Industry Litigation is to use a particular state's common law of public nuisance to alter the defendants' distribution practices *in other states*. In essence, the plaintiffs seek to regulate the distribution of firearms nationwide through the use of a state's common law of public nuisance.

A clear example of the regulatory objective of the Firearms Industry Litigation can be found in the complaint filed in *NAACP v. A.A. Arms, Inc.*, No. 99 CIV 3999 (JBW) (E.D.N.Y.). See 2003 U.S.Dist.LEXIS 3377, 2003 U.S.Dist. LEXIS 3531. The NAACP seeks to have a federal court judge sitting in diversity and applying New York law enter a geographically limitless (*i.e.*, nationwide) injunction directing that each defendant "maintain a contract and/or franchise agreement with its distributors and/or retailers to establish, implement and enforce the following mandatory requirements of its distributors and/or retailers." The requested injunction then listed retailers to whom distributors would not be permitted to sell: "non-stocking" dealers; "non-storefront" dealers; and retailers who do not maintain adequate liability insurance or an inventory worth at least $250,000. Furthermore, distributors and retailers would not be permitted to sell more than one handgun to the same person in a 30-day period. The injunction would have required that each defendant "not market, distribute and sell handguns to other defendants, distributors and retailers who sell handguns at handgun shows." Manufacturers would have been required to conduct quarterly inspections of all distributors and retailers. They would also have to "institute an industry-wide program of warranty revocation upon individual resale of handguns, unless the firearm is resold only through a bona fide stocking handgun retailer so that secondary sales are subject to background checks under the Brady Handgun Violence Prevention Act."

The sweeping regulatory injunction sought by the NAACP is typical of that sought in other Firearms Industry Litigation complaints and is patently unconstitutional. As set forth below, the Constitution's Commerce Clause and its underlying principles of federalism and separation of powers prohibit a court from using a state's law to regulate commerce occurring *outside* that state. Because the Firearms Industry Litigation is designed to, and will, alter drastically the relationships between states and the federal government and between and among sister states, Congress is not only well within its constitutional power to halt the Firearms Industry Litigation, but must do so to preserve and protect the Constitution's carefully balanced allocation of power.

Commerce Clause's Effect on State Regulation

The Constitution's Commerce Clause empowers only Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. 1 §8, cl. 3. The Supreme Court has long held that the Commerce Clause limits the power of state and local governments to take actions affecting foreign and interstate commerce. See *Healy v. The Beer Institute*, 491 U.S. 324, 326 n.1 (1989). This implied limitation on state and local powers is commonly referred to as the "dormant Commerce Clause." In applying the dormant Commerce Clause, courts analyze whether a state law "directly

regulates or discriminates against interstate commerce" (*Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); see also, *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994)), or whether the state law simply has an incidental effect. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "When a state statute directly regulates or discriminates against interstate commerce,... [courts] have generally struck down the statute without further inquiry." *Brown-Forman Distillers*, 476 U.S. at 579; accord, *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) ("The Commerce Clause... permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited."); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925) (holding that a "state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted").

In particular, the dormant Commerce Clause prohibits state governments from directly controlling commerce that occurs wholly outside of their jurisdictions and that could result in inconsistent legislation. *Healy*, 491 U.S. at 336, 337 n.14. The Supreme Court in *Healy* summarized the Commerce Clause's prohibition on such extraterritorial action as follows:

> First, the Commerce Clause... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.... Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.... Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

491 U.S. at 336–37. The Supreme Court has repeatedly condemned such extraterritorial action as *per se* unconstitutional. See, *e.g.*, *Edgar v. MITE*, 457 U.S. at 626–27, 643–46 (striking as *per se* invalid Illinois law allowing Illinois official to evaluate tender offer for shares of an Illinois company, regardless of the existence of Illinois shareholders); *Brown-Forman v. New York*, 476 U.S. at 582–83 (striking as *per se* invalid a price affirmation statute requiring New York liquor sellers to charge prices no higher than those charged to customers outside New York; "[w]hile New York may regulate the sale of liquor within its borders,... it may not... 'regulate the price to be paid' for liquor in those states"). Stated otherwise, while state law that directly regulates interstate commerce is subjected to a strict scrutiny that it rarely survives, an extraterritorial law is a form of direct regulation that never survives. See *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995).

The United States Code contains numerous statutes in which Congress has sought to protect different industries from the onslaught of litigation.

The type of injunctive relief sought in the Firearms Industry Litigation would result in the direct regulation of extraterritorial commerce, would violate the *Healy* principles, and is *per se* unconstitutional. The NAACP's proposed injunction (again as an example of this sort of litigation), purports to permit a court applying New York law to regulate the marketing, distribution, and sale of firearms sold *everywhere*, and thus well beyond the borders of New York. The extraterritorial reach of that proposed injunction is undeniable, and it is identical in all material respects to the provisions found *per se* invalid in *Edgar* and *Brown-Forman*.

That the Firearms Industry Litigation plaintiffs seek to regulate interstate commerce through a court order—as opposed to state legislation—does not protect the regulation from constitutional scrutiny. The United States Supreme Court has made abundantly clear for decades that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of North America v. Gore*, 517 U.S. 559, 573 (1996). Accord, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("It matters not that that law has been applied in a civil action and that it is common law only.... The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246–47 (1959) ("Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief.") *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of a racially restrictive covenant would constitute state action and violate the Fourteenth Amendment). Accordingly, the Constitution prohibits a court applying one state's common law from enjoining or regulating commerce occurring outside that state's borders.

Violating Principles of Federalism, Comity, and State Sovereignty

In addition to the restrictions of the Commerce Clause, the federal system established by the Constitution prohibits a single state from projecting its policy choices onto sovereign sister states. In our federal system, each state is sovereign within its territorial borders, subject only to the supreme authority of the federal government. As the Supreme Court held in *Healy v. The Beer Institute*, the Constitution has a special concern for "the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce" and "the autonomy of the individual states within their respective spheres." 491 U.S. at 335–36. These principles of state sovereignty have long provided the bedrock of our federal system. See, *e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

The United States Supreme Court emphasized these core principles in *BMW v. Gore*, *supra*. There, an Alabama state court awarded plaintiff $2,000,000 in punitive damages from defendant BMW—along with $4,000 in com-

pensatory damages. In determining whether the punitive damage award was "grossly excessive" in violation of the Due Process Clause, the Supreme Court considered the scope of Alabama's legitimate state interests—specifically including whether Alabama could punish based upon out-of-state conduct that was lawful in those other states.

The Supreme Court held in *Gore* that "one State's power to impose burdens on the interstate market... is not only subordinate to the federal power over interstate commerce,... but is also constrained by the need to respect the interests of other States." *Gore*, 517 U.S. at 571. According to the Court, "it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572. Because any attempt by Alabama "to alter BMW's nationwide policy... would... infring[e] on the policy choices of other States," Alabama was prohibited from considering lawful out-of-state conduct in rendering a punitive damage award. *Id.* Thus, the Court held that neither Alabama nor any other state could constitutionally "impose sanctions... to deter conduct that is lawful in other jurisdictions." *Id.* at 573. While Congress has "ample authority to enact... a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States." *Id.* at 571.

The Supreme Court recently re-affirmed *BMW v. Gore*'s state sovereignty analysis in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S.Ct. 1513 (2003). Like *Gore*, *Campbell* involved a punitive damage award from a state court that was based in part on out-of-state conduct. According to the Supreme Court, "[t]his case... was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells." *Id.* at 1521. As in *Gore*, however, the Supreme Court held that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Id.* at 1522. Indeed, going even further than *Gore*, the *Campbell* court held that, even with respect to acts that are unlawful outside of the state's jurisdiction, the state's power is limited: "[a]ny proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction." *Id.* Accordingly, the Supreme Court struck down Utah's punitive damages award.

The relief sought in the Firearms Industry Litigation—and the "regulation through litigation" that it embodies—does violence to the principles of federalism and state sovereignty that lie at the heart of *Gore*, *Campbell*, and the Constitution. If the NAACP, for example, had obtained against even one defendant the geographically unlimited injunction it sought, that injunction would necessarily have required the court to regulate and govern, under New York law, the marketing, distribution, and sales of firearms in the other 49 states. Non-defendant, federally licensed dealers in each of those states would have their commercial activities governed not just by the federal government and their own state government, but also by regulations imposed through a court order based upon New York common law. This drastic—and unprecedented—remedy would have the "practical effect" of exporting New York law and permit the Empire State to regulate commercial activity that is otherwise lawful in other jurisdictions. It would infringe upon the autonomy and sovereignty of any state that has rejected, would reject, or might reject the regulations by which the NAACP thinks a legal, non-defective product should be sold nationally. See *Healy*, 491 U.S. at 336 n.13; *Gore*, 517 U.S. at 571–72.

Consider, for example, the proposed injunction's prohibition against distributors selling to retailers who sell more than one handgun to the same person within a 30-day period. That is an issue on which several states have legislated. Compare, *e.g.*, Va. Code §18.2-308.2:2(Q) (permitting sales of more than one handgun per month under certain circumstances), with S.C. Code §23-31-140(C) (generally prohibiting sales of more than one handgun per month). To the extent the NAACP's proposed injunction would conflict with legislation in a particular state, the injunction would purport to supplant and override that state's public policy choice with New York's policy choices. To the extent a state has not legislated on this issue, the injunction would still impose upon such a state New York's preferences on that issue. Either way, the autonomy of the citizens of 49 states would be infringed by the injunction. Every restriction in the injunction—*e.g.*, those on non-stocking dealers, non-storefront dealers, inadequately insured dealers, dealers with smaller inventory, dealers with two trace requests, and distributors and dealers who sell at gun shows—Involves the same exportation of policy choices, and is constitutionally barred. *Edgar v. MITE, supra*, 457 U.S. at 640 ("direct regulation is prohibited."); *Shafer v. Farmers Grain Co., supra*.

The Firearms Industry Litigation (and any similar attempt to regulate through litigation), however, suffers from an even greater constitutional defect. These cases do not involve the interpretation of a state statute, but instead involve the judge-made common law of public nuisance. As a result, a court cannot even be guided by a state legislature's policy choices on the issues at stake. In reality, the injunctive relief sought in the Firearms Industry Litigation seeks to supplant the firearms distribution policy choices of 49 other states with the policy choices of a particular plaintiff and court. As the Supreme Court held in *State Farm v. Campbell*, "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." 123 S.Ct. at 1523. The Firearms Industry Litigation flouts every notion of federalism and the representative democracy upon which this nation is built.

Violating the Separation of Powers

Finally, the Firearms Industry Litigation is designed to, and would, violate the separation of powers doctrine as well. Article I of the Constitution vests in Congress all legislative powers, including the power to regulate commerce with foreign nations and among the states. Article III, meanwhile, vests in the judicial branch the task of reviewing and interpreting the laws. See, *e.g.*, O'Connor & Sabato, *American Government: Roots and Reform*, at 41 (1994). "The judges can exercise no... legislative function." *The Federalist*, No. 47 (James Madison). Stated otherwise, it is for the legislature to enact and for the courts to react.

As the NAACP's proposed injunction makes clear, the goal of the Firearms Industry Litigation is to have state courts "enact" a national firearms distribution law. The injunctive relief sought, which would establish policies pursuant to which manufacturers and distributors would be required to distribute and sell firearms nationwide, constitutes improper and unconstitutional judicial legislation. See *Penelas v. Arms Technology, Inc.*, 778 So.2d 1042,

1045 (Fla.App. 2001) ("The County's request that the trial court use its injunctive powers to mandate redesign of firearms and declare that the appellees' business methods create a public nuisance is an attempt to regulate firearms and ammunition through the medium of the judiciary.... The County's frustration cannot be alleviated through litigation as the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government but to the legislative branch."). As a New York appellate court recently held in affirming the dismissal of the state's complaint against firearms manufacturers and distributors, "the plain fact [is] that courts are the least suited, least equipped, and thus the least appropriate branch of government to regulate and micro-manage the manufacturing, marketing, distribution and sale of handguns." *People v. Sturm, Ruger, supra.* Amending the interstate firearms laws is a function for the legislative branch—specifically and exclusively the United States Congress—not for the judicial branch.

The Protection of Lawful Commerce in Arms Act

While the elements of congressional immunity statutes vary widely, certain general principles can be distilled. First, all such statutes seem to recognize that, regardless of whether litigation is justified or frivolous, the twin economic disincentives of legal defense costs and verdict uncertainty often have undesirable market consequences that Congress seeks to cure. If an industry or profession can convince Congress that it is a critical component of the nation's economy, and that these disincentives have a real potential to damage a segment of the economy, that likely increases the odds for obtaining immunity. Second, where a product proximately causes the injuries being alleged, then, as with the Vaccine Act and the Fairness in Asbestos Injury Resolution Act, Congress may link immunity to a federally administered compensation program. Where causation is remote or unproven, however, such as with the silicone breast implant litigation and the Municipal Firearms Litigation, Congress will not link immunity to a compensation vehicle.

The Protection of Lawful Commerce in Arms Act fits these general principles. The Firearms Industry Litigation has generated the twin economic disincentives that one sees in virtually every instance in which Congress grants immunity. Moreover, firearms are an important part of the economy, serving the military, law enforcement, the tens of millions of outdoor sports enthusiasts and hunters, and those interested in self-defense. Our nation's wildlife management is heavily dependent upon federal excise tax revenue collected from the sale of firearm and ammunition products. Indeed, because of the significant role firearms played when this nation was founded, firearms are the only product that has explicit constitutional protection—in the Second Amendment. Finally, because the injuries that the Firearms Industry Litigation seeks to redress are—by definition—those caused by criminal violence, it would be ludicrous to link immunity here to a compensation fund.

The Constitution prohibits a single state from projecting its policy choices onto sovereign sister states.

The Protection of Lawful Commerce in Arms Act, however, suggests a new element that may greatly enhance the likelihood of congressional immunity: when an industry is threatened with regulation through litigation. As the foregoing discussion makes clear, the Firearms Industry Litigation arose from a vocal minority's dissatisfaction with the myriad of existing federal and state regulations of the interstate distribution of firearms. See, *e.g.*, *Penelas v. Arms Technology, Inc., supra.* Unable to achieve stricter regulation through the democratic process, this minority decided to impose its will upon others through state "public nuisance" litigation that is designed to impose interstate regulation. Because this regulation through litigation poses an unfounded but serious challenge to the balance of powers between and among the federal and state governments, Congress has had little choice but to reassert its exclusive authority.

Thus, while the Protection of Lawful Commerce in Arms Act would prohibit certain specific causes of action directed at the firearms industry, the overwhelming bipartisan support it enjoys in Congress is attributable to something more fundamental: Congress's desire to preserve and protect core constitutional principles regarding interstate commerce, federal versus state rights, and sister state comity. Because the proposed Act prohibits state law from encroaching upon Congress's exclusive power to regulate interstate commerce and reinforces both federalism and the separation of powers, it can serve as an important model for other industries threatened with attempts to regulate through litigation their lawful commercial activity.

The Future of Regulation-by-Litigation

It is not difficult to envision other situations in which Congress would need to stop unconstitutional regulation through litigation. One possibility already on the horizon is the spate of complaints recently filed against the "fast food" industry. See "Salivating Over Fast-Food Torts," *Wall Street Journal*, June 30, 2003. Participants at a recent "fast food litigation" conference have argued that obesity is the result of America's food supply being too plentiful and too cheap, and that "deliberate federal policies make this so." *Id.* Another possible target is the alcoholic beverages industry.

To the extent state law claims are asserted in an effort to regulate interstate commerce in food or alcoholic beverages, one should not be surprised to see Congress grant some form of litigation immunity. Indeed, fast on the heels of this "fast food litigation," Congressman Ric Keller (R-Florida) has introduced a bill for the Personal Responsibility in Food Consumption Act, which would immunize a "manufacturer, distributor, or seller of a food or non-alcoholic beverage product intended for human consumption" from "civil liability, in Federal or State court, whether stated in terms of negligence, strict liability, absolute liability, breach of warranty, or State statutory cause of action, relating to consumption of food or non-alcoholic beverage products unless the plaintiff proves that, at the time of sale, the product was not in compliance with applicable statutory and regulatory requirements." H.R. 339, 108th Cong. (2003). On July 17, 2003, Senator Mitch McConnell (R-Kentucky) introduced a companion bill.

As the Firearms Industry Litigation and the "fast food litigation" indicate, plaintiffs' lawyers will go to great lengths to ignite industry-wide litigation. Regulation through litigation is one of the plaintiffs' bar's latest efforts, but the constitutional issues that this effort raises make it uniquely susceptible to congressional preemption such as that contained in the Protection of Lawful Commerce in Arms Act. FD

OP-ED ARTICLE FROM *New York Daily News,* Sunday, January 9, 2005, submitted by Lawrence G. Keane, Counsel, Beckman and Associates, Counsel to North American Arms

Suits Against Gun Makers Won't Stop Crime

BY LAWRENCE G. KEANE

The City Council's Gun Industry Responsibility Act is an unconstitutional attempt to regulate interstate commerce, is premised on the false assumption gun makers act irresponsibly and will not reduce gun crime in the city.

Recently, Boston, as it voluntarily dropped its lawsuit to blame gunmakers for gun crimes there, acknowledged in court that the industry was "committed to the safe, legal and responsible sale and use of their products." Our industry works cooperatively with law enforcement through programs like "Don't Lie for the Other Guy," which assists the Bureau of Alcohol, Tobacco and Firearms in training gun dealers to prevent illegal purchases of firearms.

More important, this bill will not reduce gun crime in New York. The bill's "code of conduct" seeks to impose the sorts of gun control measures that, according to independent studies by the Center for Disease Control and the National Academy of Sciences, can not be shown to reduce gun violence. Lawsuits under the bill will simply bankrupt law-abiding businesses by blaming them for the actions of criminals.

A report by the Clinton-era Department of Justice showed that only a small number of prison inmates — approximately 8% — obtained their crime gun from a gun store and fewer than 1% got them from gun shows. It is perfectly legal for a dealer to sell at a gun show. And, despite gun controllers' rhetoric, there is no gun show loophole. When a licensed dealer sells a gun anywhere — in his store or at a gun show — he must perform a criminal background check.

There already is a code of conduct for the firearm industry: the federal Gun Control Act. The city's bill is an unconstitutional attempt to use the threat of lawsuits and crushing liability jury awards to impose nationwide its views on how guns should be sold.

Only Congress has the power to regulate interstate commerce. New York City does not have the right to make public policy choices for businesses and citizens of other states. This unconstitutional and ill-considered bill serves only as further ammunition for Congress to pass the Protection of Lawful Commerce in Arms Act, a common-sense legal reform to stop junk lawsuits like those the city's bill would spawn.

Keane is senior vice president and general counsel for the National Shooting Sports Foundation, the nonprofit trade association for the firearms industry.

Appeared in New York Daily News, Sunday, January 9, 2005.

LETTER FROM WALTER OLSON, SENIOR FELLOW, MANHATTAN INSTITUTE FOR POLICY RESEARCH TO THE HONORABLE CHRIS CANNON

875 King St.
Chappaqua, NY 10514
wo@walterolson.com

March 22, 2005

Rep. Chris Cannon, Chairman
Subcommittee on Commercial and Administrative Law
House Judiciary Committee
U.S. House of Representatives
Washington, DC 20515

Dear Rep. Cannon:

I write in support of H.R. 800, the Protection of Lawful Commerce in Arms Act, on which the Subcommittee earlier this month held a hearing. As you may recall, I was a witness at the April 2, 2003 hearing on the predecessor bill, then styled H.R. 1036. (A copy of my testimony then is available at http://judiciary.house.gov/media/pdfs/olson040203.pdf). This brief note is just to emphasize that the passage of time has made the case for this measure even stronger.

In the intervening two years, the courts have continued their record of overwhelmingly rejecting requests to invent new law so as to hold gun manufacturers and lawful gun sellers liable for later criminal misuse of guns. Unfortunately, it has always been the strategy of some anti-gun litigators 1) to count on getting lucky somewhere, most likely in a court predisposed by local political climate against the majority view; 2) to use the expense and distraction of litigation itself as a club with which to demand settlement. And unfortunately, there is reason to believe that both of these strategies remain a material danger to the business of lawful gunmaking and -selling.

In recent years, anti-gun forces have pushed a third line of attack, namely trying to persuade jurisdictions sympathetic to their case (typically cities) to enact punitive new liability rules of interstate application. An especially egregious example of this trend is New York City's enactment of what it calls the Gun Industry Responsibility Act, which purports to impose liability on gunmakers and sellers for entirely lawful sales in other states. So extreme and ill-considered is GIRA that it has drawn pointed criticism even from legal scholars otherwise well disposed toward firearms litigation (see, e.g., http://writ.news.findlaw.com/commentary/20050307_lytton.html). As I point out in a

recent opinion piece for the New York Times (attached, or at http://www.manhattan-institute.org/html/_nyt-wrong_target.htm), GIRA and similar legislation elsewhere make it clear that some anti-gun enclaves intend to impose their desired gun-selling laws on the rest of the country. H.R. 800 is an appropriate -- perhaps the only appropriate -- response.

Yours sincerely,

Walter Olson
Senior Fellow
Manhattan Institute for Policy Research
Author, "The Rule of Lawyers" (St. Martin's, 2003)

APPENDIX

The Wrong Target
New York Times

By Walter Olson

February 6, 2005

IN January, Mayor Michael R. Bloomberg signed a bill passed by the City Council making gun makers and dealers liable for crimes perpetrated with their pr(they adopt a "code of conduct" that, among other things, would limit the ı handguns they can sell to one person and require background checks on p buyers at gun shows. The strange thing about this new law is that it applies not only to sales within New York City, but also to sales in other states and cities.

This new law is too clever by half and it's also shortsighted. It insults the right to democratic self-governance of the 273 million Americans who don't live in New York City. Moreover, it may have a consequence that Mayor Bloomberg and other gun-control advocates have not foreseen: it could be further impetus for a bill in Congress, nearly enacted last year, which would pre-empt local efforts at gun-control through litigation.

It's hardly a secret that New York City is out of step with the rest of the country on issues involving firearms. But there's no need to reargue the gun control controversy to appreciate a few basic points.

First, whatever the merits of the city's gun permit process, which makes it nearly impossible for ordinary residents to own guns lawfully, it's an act of aggression against citizens of other states to try to control gun sales nationwide, as the new ordinance would do. The residents of Georgia, Idaho, Indiana and Vermont happen to prefer a different balance on gun liberty, and New Yorkers have no more right to pass a law overriding their chosen policy than, say, social conservatives in Salt Lake City or Cincinnati have a right to pass a law about the sale of alcohol or indecent literature in New York - no matter how annoyed they may be that some of those products make their way into their states.

And second, again leaving aside the merits of gun control as a policy in itself, it is wrong to try to smuggle such controls in through the back door by punishing dealers for gun sales that were lawful at the time. Yet under the new ordinance, distant gun manufacturers and dealers could be made to pay damages for a shooting in New York City even if the presence of the gun here did not result from any bad acts of theirs. For example, under the new law, if a gun had been stolen in a burglary from a lawful Florida owner, the manufacturer and dealer could be legally responsible for death or injury to a person in Queens. Their only defense would be to show that they had adopted the city's stringent new guidelines, which go well beyond current federal law.

Last year, Congress nearly passed a law that would have forbidden most lawsuits by crime victims against gun makers and dealers. Indeed, the bill was defeated only by opponents attaching an amendment that would have renewed the assault-weapons ban, a step intended as a poison pill to get gun-rights groups to withdraw their support for the bill, which they did.

When the issue returns in this year's (more pro-gun) Congress, Mr. Bloomberg's new law is likely to serve as a prime exhibit of the case for federal pre-emption on the issue of gun liability. The new city law makes it absolutely clear that anti-gun enclaves intend to inflict their will on other states. Lawmakers from the rest of the country will then, appropriately, move to defend their states' preference through federal legislation.

The mayor and City Council of New York seem to think they can make laws that bind the rest of the country. That's an arrogant stance - and when the rest of the country is heard from, it's apt to be a losing stance as well.

Walter Olson, a senior fellow at the Manhattan Institute, is the author, most recently, of "The Rule of Lawyers."

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http://www.manhattan-institute.org/html/_nyt-wrong_target.htm

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