LETHAL LOOPHOLES; DEFICIENCIES IN STATE AND FEDERAL GUN PURCHASE LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON DOMESTIC POLICY

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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LETHAL LOOPHOLES; DEFICIENCIES IN STATE AND FEDERAL GUN PURCHASE LAWS

THURSDAY, MAY 10, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DOMESTIC POLICY,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m. in room 2154, Rayburn House Office Building, Hon. Dennis Kucinich (chairman of the subcommittee) presiding.

Present: Representatives Kucinich, Davis of Virginia, Burton, Issa, and Bilbray.

Staff present: Jaron R. Bourke, staff director; Charles Honig, counsel; Jean Gosa, clerk; Nidia Salazar, staff assistant; Auke Mahar-Piersma, legislative director; Natalie Laber, press secretary, Office of Congressman Dennis J. Kucinich; Erin Holloway, legislative assistant, Office of Congressman Dennis J. Kucinich; Leneal Scott, information systems manager; Jacy Dardine, full committee intern; Ann Marie Turner, minority counsel; Allison Blandford, minority professional staff member; and Benjamin Chance, minority clerk.

Mr. KUCINICH. The subcommittee will come to order.

This is a hearing of the Domestic Policy Subcommittee of the Oversight and Government Reform Committee. Today's hearing will cover Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws.

We have three panels today. I will be introducing the first panel in a moment.

Without objection, the Chair and ranking minority member will have 5 minutes to make opening statements, followed by opening statements not to exceed 3 minutes by any other Member who seeks recognition. Without objection, Members and witnesses may have 5 legislative days to submit a written statement or extraneous materials for the record.

Good afternoon and welcome. The Domestic Policy Subcommittee of the Oversight and Government Reform Committee has come to order. I want to recognize the significant contributions of the ranking member of the full committee. This hearing is bipartisan in its conception and in its development. I want to thank the gentleman for his cooperation.

Today in America, people who shouldn't get guns get guns. It is that simple, everybody knows that. How they get guns and how to prevent them from getting guns, that is not so simple. That is why we are here today. This hearing will focus on lethal loopholes and

deficiencies in laws designed to prevent high risk individuals from buying firearms. There are other important reasons why America has such a high rate of gun violence, gang activity, inadequate provision of health services and cultural attitudes toward violence.

But those issues are for another day. There are many Federal and State laws that have been on the books, some for decades, aimed at preventing certain categories of people from purchasing guns. The problem is that they do not function properly or are not properly enforced.

In 1968, when Congress passed the Gun Control Act, it made a judgment that certain categories of individuals termed "prohibited persons" should not be allowed to purchase or possess handguns or long guns because of the high risk that they would later use these firearms to commit crimes. Prohibited persons include convicted felons, illegal aliens and individuals with serious mental health issues. The problem was that it was difficult to determine which individuals fell into these categories when they walked into a gun dealer to buy a gun.

In 1993, Congress passed the Brady Act with the goal of instantly checking a prospective handgun purchaser against a nationwide data base that would contain all information necessary to determine if the purchase was a prohibited person. To the extent the data is in the system, the background check works fairly well. Between 1994 and the end of 2005, Federal and State law enforcement performed about 70 million background checks and identified 1,360,000 purchasers in the prohibited categories, a rejection rate of 1.9 percent and over 90 percent of prospective purchasers got an instant response.

But this is only part of the story, because that system is only as smart as the information we put into it. And a lot of those people the system lets through we all know should not be allowed to own guns, people like the disturbed young man who took the lives of 33 innocent people last month at Virginia Tech.

We will hear testimony from the Government that the information in the data base, actually three data bases, collectively called NICS, is woefully incomplete. For some prohibited persons categories, there is much less than half of the data that should be there. And about half of the States don't provide the FBI with any mental health data.

Much of the information about prohibited persons originates in the States and localities and they often fail to collect this information. If they do collect it, they don't send it in a usable form to the Federal Government. Why? Well, after all, that only hurts the States, which rely on the data where illegal gun purchases and gun violence occur.

Part of it is that the current law does not obligate the States to report this vital information and it is difficult and expensive to do so. Some States have other policies that get in the way.

The result is that 40 years later, 40 years after the passage of the Gun Control Act, individuals who are prone to use guns illegally are still getting guns legally. There is legislation currently being considered by the House Judiciary Committee, H.R. 297, the NICS Improvement Act of 2007, which is designed to remedy the States' reporting failures through a combination of direct funding

for improving States' reporting systems, fiscal incentives for States' compliance and penalties for non-compliance. We will hear testimony that passage of this law would help reduce illegal firearm purchases, but that the law alone won't be enough.

Even if this reporting improves, there remains the gun show loophole. The Brady Act's instant background check only applies to Federal-licensed firearm dealers and not to private sales, including sales by unlicensed dealers at gun shows. These private sales are largely unregulated and many guns involved in firearm violence have been traced to gun show sales. Instant background checks are not the only avenue to enforce gun control and the Brady Act.

Federal Government enforcement is primarily the responsibility of the Bureau of Alcohol, Firearms, Tobacco and Explosives, the ATF. The ATF can investigate, inspect and monitor sales of licensed and unlicensed firearm dealers, revoke licenses or refer for prosecution dealers and purchasers who break the law and work with State and local law enforcement to prevent illegal sales.

But there is reason to believe, including Government studies, that the ATF does not do its enforcement job well. This hearing will investigate where lax enforcement is a product of the AFT's lack of resources and authority and where the Bureau simply does not use its authority well. We will also hear how Federal law makes it difficult, if not impossible for State and local law enforcement to get data necessary to trace guns used in crimes back to the gun dealers that illegally sold them.

In spite of these limitations, we will learn the unbelievable story of the efforts of New York City to fill the Federal enforcement void by suing out of State gun dealers who are the source of guns involving crimes afflicting New York City. In setting the suit, the federally licensed gun dealers located in Pennsylvania, South Carolina and as far away as Georgia agreed to a 3-year inspection and monitoring regime administered by New York City. I guess necessity really is the mother of invention. It fell upon a city to enforce Federal law because the ATF is AWOL. Kudos to New York City, which has sent its top official in this area to be a witness today.

Our third panel will focus on the States. We will hear testimony on how some States do a better job than others. First, we will learn about how some States have enacted laws and developed internal systems designed to improve their data collection and reporting. Second, many States have moved into the vacuum of Federal regulation and have passed laws regulating non-federally licensed dealers and effectively closed the gun show loophole.

Finally, we are going to hear about States that have passed purchase prohibitions beyond those required by Federal law, aimed at categories of individuals who have shown propensity for violence, including juvenile offenders and certain misdemeanor and domestic violence offenders. We will also hear from an advocate for mental health patients who cautions that proposals to broaden the prohibited categories for people undergoing mental health treatment should be grounded not on prejudice, but on sound science, and that these individuals actually pose a risk of violence.

Moreover, we will hear concerns that these laws will not be crafted to serve as a disincentive to people seeking mental health treatment. It is possible that the States' approaches can reveal some

best set of practices that would be adopted by other States or percolate up and become the Federal standard.

But as with Federal purchase restrictions, enforcement of State restrictions depends on other States reporting crucial information. We will hear about the lack of uniformity and problems of coordination across the States. In Ohio law, for example, prohibiting a certain category of high risk individuals from buying handguns will not stop individuals who commit disqualifying offenses in other States if those States do not share their information.

Finally, we can expect more from the States in the way of reporting, respect their sovereignty and learn from them. However, because the market for guns is national and State borders are porous for both guns and people, in the end this is a national problem. It is my hope that this hearing can show the way for the Federal and State governments, through the implementation of new policy or the passage of new laws, to close these loopholes and ultimately to reduce firearm violence.

At this time, the Chair is pleased to recognize Mr. Davis.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

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COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM

COMMITTEE ON EDUCATION AND LABOR

Opening Statement
Congressman Dennis Kucinich, Chairman
Domestic Policy Subcommittee
Oversight and Government Reform Committee

"Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws"
Thursday, May 10, 2007 – 2:00 P.M.
2154 Rayburn HOB

Good afternoon and welcome. The Domestic Policy Subcommittee of the Oversight and Government Reform Committee will come to order.

I want to recognize the significant contributions of the Ranking Minority member of the Full Committee. This hearing is bipartisan, in its conception and in its development. I want to thank the gentleman for his cooperation.

Today in America, people who shouldn't get guns, get guns. That's simple. Everybody knows that. How they get guns, and how to prevent them from getting guns, that's not so simple. That's why we are here today.

This hearing will focus on lethal loopholes and deficiencies in laws designed to prevent high-risk individuals from buying firearms. There are other important reasons why America has such a high rate of gun violence—gang activity, inadequate provision of mental health services, and cultural attitudes toward violence. But those are issues for another day.

There are many federal and state laws that have been on the books—some for decades—aimed at preventing certain categories of people from purchasing guns. The problem is that they do not function properly or are not properly enforced.

In 1968, when Congress passed the Gun Control Act, it made a judgment that certain categories of individuals – termed "prohibited persons" – should not be allowed to purchase or possess handguns or long guns because of the high risk that they would later use these firearms to commit crimes. Prohibited persons included convicted felons, illegal aliens, and individuals with serious mental health issues. The problem was that it

was difficult to determine which individuals fell into these categories when they walked into a gun dealer to buy a gun.

In 1993, Congress passed the Brady Act with the goal of instantly checking a prospective handgun purchaser against a nationwide database that would contain all information necessary to determine if the purchaser was a prohibited person. To the extent the data is in the system, the background check works fairly well. Between 1994 and the end of 2005, federal and state law enforcement performed about 70 million background checks and identified 1,360,000 purchasers in the prohibited categories, a rejection rate of 1.9 percent, and over 90% of prospective purchasers got an instant response.

But this is only part of the story, because that system is only as smart as the information we put into it. And a lot of those people the system lets through, we all know should not be allowed to own guns – people like the disturbed young man who took the lives of 32 innocent people last month at Virginia Tech. We will hear testimony from the government that the information in the database – actually three databases collectively called "NICS" – is woefully incomplete. For some prohibited persons categories, there is much less than half of the data that should be there, and about the half of the states don't provide the FBI with **any** mental health data. Much of the information about prohibited persons originates in the states and localities, and they often fail to collect this information. If they do collect it, they don't send it in a usable form to the federal government. Why? After all, that only hurts the states which rely on this data – where illegal gun purchases and gun violence occur. Part of it is that the current law does not obligate the states to report this vital information, and it's difficult and expensive to do so. Some states have other policies that get in the way.

The result is that forty years later after the passage of the Gun Control Act, individuals who are prone to use guns illegally are still getting guns legally.

There is legislation currently being considered by the House Judiciary Committee, H.R. 297, the NICS Improvement Act of 2007, which is designed to remedy the states' reporting failures through a combination of direct funding for improving state reporting systems, fiscal incentives for states' compliance, and penalties for noncompliance. We will hear testimony that passage of this law would help reduce illegal firearm purchases, but that the law alone will not be enough.

Even if this reporting improves, there remains the "gun show" loophole. The Brady Act's instant background check only applies to federal licensed firearm dealers, and not to private sales, including sales by unlicensed dealers at gun shows. These private sales are largely unregulated, and many guns involved in firearm violence have been traced to gun show sales.

Instant background checks are not the only avenue to enforce the Gun Control and Brady Acts. Federal government enforcement is primarily the responsibility of the Bureau of Alcohol, Firearms, Tobacco & Explosives – the ATF. The ATF can investigate, inspect, and monitor sales of licensed and unlicensed firearm dealers, revoke licenses or refer for

prosecution dealers and purchasers who break the law, and work with state and local law enforcement to prevent illegal sales. But there is reason to believe, including government studies, that the ATF does not do its enforcement job well. This hearing will investigate where lax enforcement is a product of the ATF's lack of resources and authority, and where the bureau simply does not use its authority well.

We will also hear how federal law makes it difficult if not impossible for state and local law enforcement to get data necessary to trace guns used in crimes back to the guns dealers that illegally sold them. In spite of these limitations, we will learn the unbelievable story of the efforts of New York City to fill the federal enforcement void by suing out-of-state gun dealers who were the source of the guns involved in crime afflicting New York. In settling the suit, the federally licensed gun dealers – located in Pennsylvania, South Carolina, and as far away as Georgia – agreed to a three-year inspection and monitoring regime administered by New York City.

I guess necessity really is the mother of invention. It fell upon a city to enforce federal law because the ATF is AWOL. Kudos to New York City, which has sent its top official in this area to be a witness today. Shame on the ATF.

Our third panel will focus on the states. We will hear testimony on how some states do a better job than others. First, we will learn about how some states have enacted laws and developed internal systems designed to improve their data collection and reporting. Second, many states have moved into the vacuum of federal regulation and have passed laws regulating non-federally licensed dealers and effectively closed the gun show loophole. Finally, we will hear about states that have passed purchase prohibitions beyond those required by federal law aimed at categories of individuals that have shown propensity for violence, including juvenile offenders and certain misdemeanor and domestic violence offenders.

We will also hear from an advocate for mental health patients who cautions that proposals to broaden the prohibited categories for people undergoing mental health treatment should be grounded not on prejudice but on sound science that these individuals actually pose a risk of violence. Moreover, we will hear concerns that these laws not be crafted to serve as a disincentive to people seeking mental health treatment.

It is possible that states' approaches can reveal some set of best practices that will be adopted by other states or percolate up and become the federal standard. But as with federal purchase restrictions, enforcement of state restrictions depends on other states reporting crucial information. We will hear about lack of uniformity and problems of coordination across the states. An Ohio law prohibiting a certain category of high-risk individuals from buying handguns will not stop individuals who commit disqualifying offenses in other states if those states do not share their information.

We can expect more from the states in the way of reporting, respect their sovereignty, and learn from them. However, because the market for guns is national and state borders are porous for both guns and people, in the end, this is a national problem, crying out for

federal solutions. It is my hope that this hearing can show the way for the federal and state governments, through the implementation of new policy or the passage of new laws, to close these loopholes and, ultimately, to reduce firearm violence.

Mr. DAVIS OF VIRGINIA. Thank you. I want to thank you, Chairman Kucinich, for holding this hearing on an issue of critical importance to the citizens of every State in this Nation. The most lethal episode of gun violence by an individual in our history, the shooting last month at Virginia Tech, prompted many to take a critical look at Federal and State prohibitions against gun ownership. As a result, Virginia Governor Tim Kaine closed a loophole in the way the Commonwealth processes information on those found to pose a danger to the community.

Before, only persons actually admitted to a hospital or residential treatment facility were deemed dangerous enough to be subject to the gun ownership ban. By Executive order, the Governor eliminated the inapt distinction in this context between inpatient and outpatient care to require prompt listing of all individuals undergoing involuntary mental health treatment in any setting. In issuing his order, the Governor correctly observed, "The key factor should be the danger finding, and not whether the judicially mandated treatment is performed in an institution or on an out-patient basis." That is what we are here today to discuss, how best to keep guns out of the hands of dangerous individuals.

The Gun Control Act of 1968 listed those who were prohibited from purchasing or possessing a firearm. The Brady Handgun Violence Prevention Act of 1993 requires that all federally licensed firearms dealers obtain a background check on potential purchasers through the National Instant Check System [NICS]. The NICS contains information from State and Federal agencies about individuals who should not be permitted to purchase a gun. In an ideal world, every time an individual prohibited under law attempts to buy a gun, a quick background check would prevent the purchase.

Unfortunately, we don't live in an ideal world. In truth, not every State compiles and maintains an accurate list of those who should not have a gun. If the State's lists are incomplete the NCIS data are also incomplete. And not all guns are sold by licensed dealers. Those gaps make it possible for dangerous people to obtain lethal weapons.

We hear a variety of reasons for reporting lapses and delays, from inadequate technology systems to privacy issues to costs. But we all know from sad experience, even minor oversights or loopholes can have major and tragic consequences. Some States are moving to expand and strengthen the exclusion criteria for gun purchases. We will discuss some of those proposed standards today, including juvenile offenses, serious misdemeanor convictions, imposition of restraining orders protecting other than spouses or children and a more expansive list of mental illness diagnoses.

We will hear from academics and others who have studied evidence of a predictive connection between these and other factors and subsequent violence. There is no denying this is a complicated issue. Are we willing to include in the mental illness prohibition individuals who voluntarily commit themselves to a mental health institution? Do we tell someone who struggled with mental illness in his or her 20's, received needed treatment and has gone on to live a productive life that he or she cannot buy a gun 20 years later?

Will including a broader range of mental health indicators discourage people from seeking treatment? Does the current list of prohibited acts, conditions and findings capture advances in psychiatric understanding and all known predilections to violence?

The process of crafting additional prohibitions and applying them to all gun sales is not easy and no one has a perfect solution. Hopefully, today's hearing will help us better understand the questions and get closer to workable answers. I would just add that this violence claimed four victims plus the shooter, all from northern Virginia, in my home county. This has affected the whole community, and I appreciate your looking into this. I appreciate our witnesses being here today.

[The prepared statement of Hon. Danny K. Davis follows:]

OPENING STATEMENT
CONGRESSMAN DANNY K. DAVIS
DOMESTIC POLICY SUBCOMMITTEE
OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
"LOOPHOLES AND DEFICIENCIES IN STATE AND FEDERAL GUN PURCHASE AND POSSESSION LAWS"
2154 RAYBURN HOB- 2:00 P.M.
THURSDAY, MAY 10, 2007

Thank you Chairman Kucinich and Ranking Member Issa for today's hearing in an attempt to bring to light deficient policies and procedures for the purchase and possession of firearms towards the attainment of promoting and protecting the health, safety and welfare. Public safety, and foremost firearms, affects everyone; it transcends race and socioeconomic backgrounds, as evident by widely televised firearm murders during the 20th Century.

Americans have witnessed—and the world for that matter—heinous massacres committed with firearms, specifically:

- **University of Texas Massacre (August 1, 1996)**, where from atop a 27 story Victorian-Gothic building—often called "The Tower"—13 people were killed and 31 were wounded by sniper with a M1 Carbine (formally the United States Carbine, Caliber .30, M1), a lightweight semi-automatic carbine.
- **Columbine High School Massacre (April 20, 1999)**, where in unincorporated Jefferson County, Colorado a shooting rampage resulted in the death of 12 students and a teacher and wounded 24 victims. Perpetrators used two 9 mm firearms and two 12-gauge shotguns whose barrels and butts were sawed off to make it easier to conceal them.
- **Virginia Tech Massacre (April 16, 2007):** just four days before the eighth anniversary of the Columbine shooting, 32 people were killed and many more were wounded. Two semi-automatic (also known as self-loading) pistols—a type

of handgun that can be fired in semi automatic mode—were the firearms used in the deadliest shooting in modern U.S. history.

It's important to point out that these atrocities transpired less than 3-to-8 years apart within a ten-year time period.

Significantly:

- They occurred within educational institutions, where our children go to learn- to acquire and develop memories and behaviors, including skills, knowledge, understanding, as well as wisdom.
- Perpetrators of the crimes ranged from ages 17-to-25, which falls in the highest ranking age group of persons arrested, according to the latest 2005 U.S. Department of Justice, Federal Bureau of Investigation criminal justice statistics.
- Each perpetrator illustrated dysfunctional and deviant behavior, as well as underwent some sort of mental health care and evaluation.
- Perpetrators purchased firearms from either federally-licensed firearms (University of Texas and Virginia Tech) or from a friend (Columbine).

The point of sharing this information with you is twofold: 1) to shine the light on loopholes in state and federal firearm restrictions; and foremost 2) to drive home the need for safer learning environments. Indeed, as a staunch advocate of education, it's vital that we give credence to the aforementioned trend of firearms in our schools and its affects on our children's learning environment and wellbeing.

To this end, I welcome today's panelist.

Mr. KUCINICH. I thank the gentleman from Virginia.

The gentleman from Indiana, Mr. Burton.

Mr. BURTON. Thank you, Mr. Chairman.

We all want to keep guns out of the hands of people who would commit crimes of violence. There is no question about that. But we have to be very careful when we start messing around with the second amendment. And I know we are not going to be covering the second amendment today, but I think it is important that we talk about it anyhow.

In 1977, here in Washington, DC, they put into law a permanent ban on all handguns and all guns in a person's house. Since 1977, the crime rate and the murder rate in this city has gone up triple, over triple, because the criminals know they can come into your house and you can't protect yourself.

I had a young lady that was my secretary, she lived on the second floor of an apartment building about five blocks from the Capitol. A guy shinnied up the drain pipe and came in through a window she had open in the summer time and stabbed her four or five times. She finally got down the stairs, opened a door and she hit him with a pan. That is the only thing she could—she couldn't even have mace in her house. So we have to be very careful about taking away the rights of homeowners and individuals that would allow them to protect themselves from these violent criminals.

When I got off the plane, when I first got elected to Congress in 1983, the cab driver was driving me down to the Capitol. I said, tell me about Washington. He said, oh, it is a great city, but the crime rate is terrible. I said, well, I have a permit to carry a gun back in Indiana, maybe I should do it here. He said, oh, you can't get a gun permit. I said, what are you talking about? He said, they don't allow any guns here. The only people who get guns are the police and the crooks. And he reached under his seat and pulled a .38 out and held it up and said, but if you want one, I can get you one in about 15 minutes.

So that shows you that the criminals have access to these weapons, and they can kill people as well as the people who have these mental problems. I am for keeping guns out of the hands of people who are going to be a problem. But we have to be very, very careful how we do that.

I would like to point out one thing on Virginia Tech. That was a horrible, horrible crime. And we all want to make sure those tragedies don't happen. And we want to make sure that people who have mental problems or have a case history of violence don't get guns. And it is a very tough thing to do.

But I would like to add just one thing to that. If one of those students or one of the people at Virginia Tech had the right to carry a weapon, do you think they might have saved some of those people's lives, because they could have retaliated against this guy? As it was, nobody had a way to stop him. They shut doors and he shot through the doors.

So I would just like to say that obviously, we want to keep guns out of the hands of people who would pose a threat to society. But at the same time, we ought to realize that keeping law-abiding citizens from having weapons to protect themselves is a big, big mistake. With that, I yield back my time.

[The prepared statement of Hon. Dan Burton follows:]

Jaron R. Bourke
Staff Director,
Subcommittee on Domestic Policy
Committee on Oversight and Government Reform
B-349-B Rayburn House Office Building
Washington, DC 20515

Dear Mr. Bourke,

During the Domestic Policy Subcommittee hearing of Thursday May 10, 2007, entitled "Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws", Representative Burton submitted for the hearing record a document entitled "Carrying Concealed Firearms (CCW) Statistics". Page 6 of the document indicates that it was prepared by the NRA/ILA [Institute for Legislative Action] and down-loaded from the NRA's web site.

Because this document is now part of the hearing record, I feel compelled to point out that it contains several errors and misrepresentations. For example, page 5, item 2 begins with the following statement:

"Anti-gunners cite 'studies' they claim show that firearms kept at home are '43 times more likely' to be used to kill family members than to be used for self defense. (Other "studies" claim different ratios.)"

The passage goes on to characterize this research as a "fraud".

The concluding line of the same passage states, *"Unfortunately, some of these "studies" are funded with taxpayer dollars, through grants from the Centers for Disease and Prevention, a division of the U.S. Department of Health and Human Services."*

As the author of the widely cited "43:1" ratio, I offer the following clarifications:

- The "43:1" ratio is derived from a paper I published in the June 12, 1986 issue of the *New England Journal of Medicine*, arguably the most respected, peer-reviewed medical journal in the world.[1] In this study, my co-author and I reviewed all the gunshot deaths that occurred in King County, Washington (population at the time – 1,270,000) from 1978 to 1983. Information from medical examiner case files was supplemented by police records or interviews with investigating police officers or both, to obtain specific information about he circumstances, the scene of the incident, the type of firearm involved, and the relationship of the suspect to victim. A total of 743 fiream-related deaths occurred over this 6 year period, 398 of which (54%) occurred in the residence where the firearm involved was kept. Only 2 of these 398 deaths involved an intruder shot during attempted entry. Seven persons were killed in

self defense. For every case of self protection homicide involving a firearm kept in the home (N = 9 total), there were 1.3 accidental deaths, 4.6 criminal homicides and 37 suicides involving firearms. Adding these totals together produces the widely quoted (and frequently misquoted) "43:1" ratio. At no point in the study did we claim, as Congressman Burton's document suggests, that a gun in the home is 43 times more likely to be used to kill a family member than to be used in self defense [emphasis added].

- The "43:1" ratio was clearly derived from an analysis of fatal events, including homicides committed in self-defense. My co-author and I never claimed that it included all uses of guns in self-defense. In the discussion section of the paper, we explicitly acknowledged this fact with the following statements: "Mortality studies such as ours do not include cases in which burglars or intruders are wounded or frightened away by the use of display of a firearm. Cases in which would-be intruders may have purposefully avoided a house known to be armed are also not identified. We did not report the total number or extent of non-lethal firearm injuries involving guns kept in the home. A complete determination of firearm risks versus benefits would require that these figures be known".[1]
- The "43:1" study was not conducted in Shelby County (Memphis) as claimed.
- More than ten years after this paper was published, I revisited this issue with a follow-up study conducted in 3 cities – Seattle Washington, Memphis Tennessee, and Galveston, Texas. This time, my co-authors and I devised a method to identify non-fatal shootings as well as fatalities. A total of 626 fatal or non-fatal shootings occurred in or around a residence. This included 54 unintended shootings, 118 attempted or completed suicides, and 438 assaults or homicides. Thirteen (13) of the shootings were legally justifiable or an act of self defense, including 3 involving law enforcement officers acting in the line of duty. For every time a gun in the home was used in self-defense or a legally justifiable shooting, there were 4 unintentional shootings, seven criminal assaults or homicides, and 11 attempted or completed suicides – a ratio of 22:1. This study was published in the August 1998 issue of the *Journal of Trauma* – another peer-reviewed journal.[2] One should not be surprised that this ratio is different than the earlier one, as would be the ratio produced by any other follow up study. It's the magnitude of the difference that matters – not the precise number.
- Contrary to the assertions contained in Congressman Burton's document, the "43:1" study was not funded by the CDC. The subsequent "22:1" study was funded by a CDC grant awarded through a highly competitive, peer-reviewed process. So was a case-control study (also published in the *New England Journal of Medicine*) that analyzed violent deaths in 3 metro counties – Shelby County (Memphis), King County (Seattle) and Cuyahoga County (Cleveland).[3] This research determined that guns kept in the home do not provide appreciable protection from homicide, whether the gun is used to shoot an intruder or simply frighten him away. Rather, keeping one or more guns in a residence was associated with elevated risk of homicide in the home – mostly due to homicides involving a family member or an intimate acquaintance.
- There is disagreement about how often guns are used for self defense in the home. The most authoritative figures have been produced by the Bureau of Justice Statistics.

In a paper reporting the results of a pilot study of weapon involvement in home invasion crimes, I reviewed these contrasting claims. That work was published in 1995 in the *Journal of the American Medical Association*, one of the world's most highly regarded, peer-reviewed journals.[4]

- The statement that some of these studies "are" funded by the CDC is misleading, because it implies that CDC support for this work is ongoing. In 1996, responding to pressure from the NRA, Congress sharply restricted the CDC's ability to fund research on firearm-related injuries.[5]

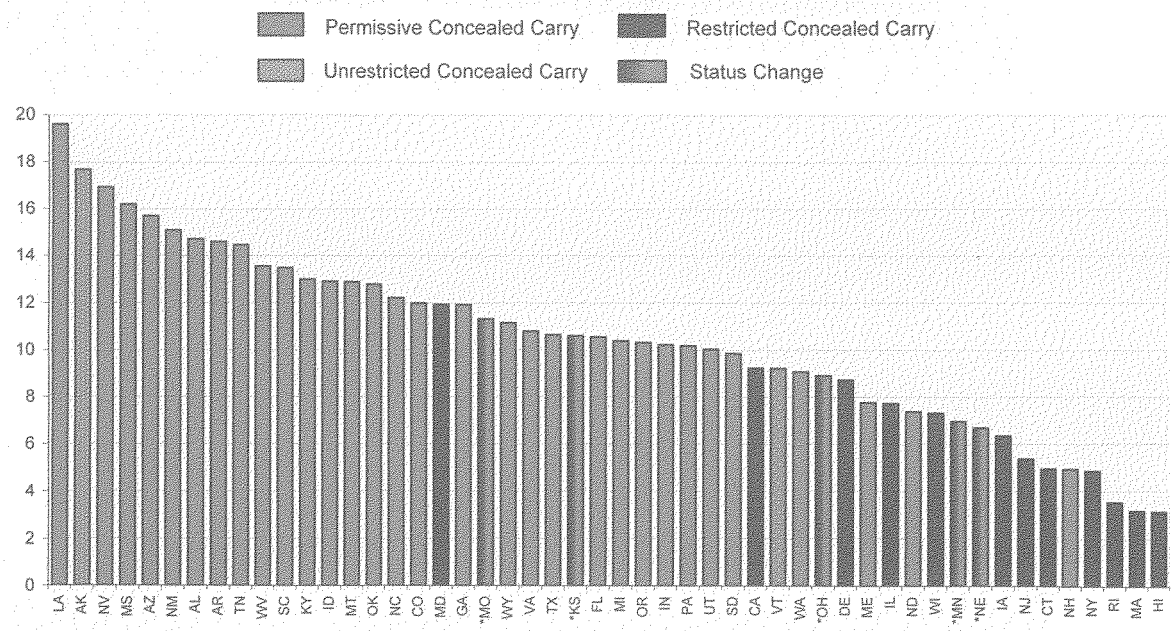
Inaccurate submissions to the record are too important to go uncontested. I suspect that Congressman Burton was not aware of these errors when he submitted the material. Future readers who study the proceedings of this hearing deserve the facts, so they can draw valid conclusions.

Sincerely,
s/
Arthur L. Kellermann, MD, MPH

References:

1. Kellermann AL, Reay D. (1986) Protection or Peril? An analysis of firearm related deaths in the home. The New England Journal of Medicine Vol. 314, 1557-60.
2. Kellermann AL, Somes G, Rivara FP, Lee RK, Banton J. (1998) Injuries and deaths due to firearms in the home. Journal of Trauma Vol. 45(2), 263-67.
3. Kellermann AL, Rivara FP, Rushforth NB, Banton JG, Reay DT, Francisco JT, Locci AB, Prodzinski J, Hackman BB, Somes G. (1993). Gun Ownership as a Risk factor homicide in the home. The New England Journal of Medicine Vol. 329, 1084-1091.
4. Kellermann AL, Westphal L, Fischer L, Harvard B. (1995) Weapon involvement in home invasion crimes. The Journal of the American Medical Association Vol. 273, 1759-1762.
5. Kellermann AL. (1997) Comment Gunsmoke - changing public attitudes towards smoking and firearms. American Journal of Public Health Vol. 87, 910-913.

Firearm Death Rates by CCW Status of State -- 2004



KS- Shall-Issue law took effect in 2006.
MO - Shall-Issue law took effect in 2004 for approx. 1/2 of population; extended to entire state in 2005.
MN - Shall-Issue took effect in 2003. Reverted to May Issue in 2004. Shall-Issue again passed in 2005
NE - Shall-Issue law took effect in 2006.
OH - Sahll-Issue law took effect in 2005.

Source: CDC, http://www.cdc.gov/ncipc/wisqars/, Accessed: 12/11/06

VIOLENT CRIME RATES AND RANKINGS
1986 and 2003

(Most changes in CCW laws occurred between 1987 and 2003)

1=Highest Violent Crime Rank, 50=Lowest Violent Crime Rank

State	Rank-1986	Rank-2003	Violent Crime Rate (per 100,000)-1986	Violent Crime Rate (per 100,000)-2003
Permissive CCW				
Florida	1	2	1036.5	730.2
Michigan	6	14	803.9	511.2
Louisiana	7	7	758.2	646.3
Nevada	9	8	718.9	614.2
South Carolina	10	1	674.6	793.5
Texas	11	12	658.9	552.5
Arizona	12	13	658.3	513.2
Georgia	13	21	587.6	453.9
Alaska	16	9	570.4	593.4
Alabama	17	22	558.0	429.5
Oregon	19	33	549.7	295.5
Tennessee	20	4	539.6	687.8
North Carolina	22	20	475.9	454.9
Washington	23	28	437.0	347.0
Oklahoma	24	15	436.4	505.7
Arkansas	28	19	394.8	456.1
Pennsylvania	30	23	358.6	398.0
Kentucky	32	41	334.4	261.7
Indiana	33	27	307.7	352.8
Virginia	34	36	306.0	275.8
Wyoming	35	40	293.1	262.1
Mississippi	37	31	274.1	325.5
Utah	38	43	266.7	248.6
Idaho	43	44	222.5	242.7
West Virginia	44	42	164.5	257.5
Montana	45	26	157.4	365.2
Vermont	46	48	149.2	110.2
Maine	47	49	147.0	108.9
New Hampshire	48	47	139.5	148.8
South Dakota	49	46	124.7	173.4
North Dakota	50	50	51.3	77.8
Restrictive CCW				
New York	2	18	985.9	465.2
California	3	10	920.5	579.3
Maryland	4	3	833.0	703.9
Illinois	5	11	808.9	556.8
New Mexico*	8	5	725.6	665.2
Missouri	14	16	578.6	472.8
New Jersey	15	25	572.5	365.8
Massachusetts	18	17	556.9	469.4
Colorado*	21	29	523.6	345.1
Delaware	25	6	427.0	658.0
Connecticut	26	32	425.8	308.2
Ohio	27	30	420.9	333.2
Kansas	29	24	368.8	395.5
Rhode Island	31	35	335.5	285.6
Minnesota*	36	39	284.6	262.6
Nebraska	39	34	262.6	289.0
Wisconsin	40	45	257.9	221.0
Hawaii	41	38	245.2	270.4
Iowa	42	37	235.1	272.4

*Status changed to Shall-Issue in 2003.

PERMISSIVE CCW
(Shall-Issue or No Permit)

Violent Crime Rank (from 1986 to 2003):
14 states (45%) worsened compared to other states
2 states (6%) stayed the same
15 states (48%) improved compared to other states

Violent Crime Rate (from 1986 to 2003):
14 states (45%) experienced an increase
17 states (55%) experienced a decrease

Overall Average Violent Crime Rate in These 31 States:
7% decrease

RESTRICTIVE CCW
(May-Issue or Prohibit)

Violent Crime Rank (from 1986 to 2003):
8 states (42%) worsened compared to other states
11 states (58%) improved compared to other states

Violent Crime Rate (from 1986 to 2003):
5 states (26%) experienced an increase
14 states (74%) experienced a decrease

Overall Average Violent Crime Rate in These 19 States:
19% decrease

WAVE Educational Fund

Source: UCR, www.ojp.usdoj.gov/bjs

United States Department of Justice
FAIR HOUSING

En Español

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Fair Lending Program

The Department of Justice has authority to investigate and file a fair lending lawsuit under the Fair Housing Act or the Equal Credit Opportunity Act. Read more about recent fair lending cases.

The Justice Department's fair lending enforcement authority is focused on pattern or practice discrimination cases. Individuals who believe they are the victims of unfair credit transactions should contact other federal agencies that investigate individual complaints.

The Equal Credit Opportunity Act

The Equal Credit Opportunity Act [ECOA], 15 U.S.C. 1691 et seq., prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, or because an applicant receives income from a public assistance program or exercises rights protected under the Consumer Credit Protection Act. The Board of Governors of the Federal Reserve System has issued regulations under ECOA. These regulations, known as Regulation B, provide the substantive and procedural framework for fair lending enforcement under ECOA.

Other federal agencies have general regulatory authority over certain types of lenders, and they monitor creditors for their compliance with ECOA. ECOA requires these agencies to refer matters to the Justice Department when there is reason to believe that a creditor is engaged in a pattern or practice of discrimination which violates ECOA. These agencies also may refer to the Justice Department matters involving an individual incident of discrimination. Each year, the Department files a report with Congress on its activities under the statute. Read Justice Department annual ECOA reports to Congress.

The Fair Housing Act

The Fair Housing Act, 42 USC 3601 et seq., prohibits discrimination in home mortgage loans, home improvement loans, and other residential credit transactions, on the basis of race, color, religion, national origin, sex, familial status or disability. The Department of Housing and Urban Development has issued regulations under the Fair Housing Act, including regulations addressing fair lending issues. 24 C.F.R. Part 100, Subpart C

Domestic Policy Subcommittee
2154 RHOB.
2:00 p.m.

Virginia Tech

05/10/07 Submitted by
M. Burton (Thailand)

CARRYING CONCEALED FIREARMS (CCW) STATISTICS

Violent crime rates are highest overall in states with laws severely limiting or prohibiting the carrying of concealed firearms for self-defense. (FBI Uniform Crime Reports, 1992) -

The total Violent Crime Rate is 26% higher in the restrictive states (798.3 per 100,000 pop.) than in the less restrictive states (631.6 per 100,000).

The Homicide Rate is 49% higher in the restrictive states (10.1 per 100,000) than in the states with less restrictive CCW laws (6.8 per 100,000).

The Robbery Rate is 58% higher in the restrictive states (289.7 per 100,000) than in the less restrictive states (183.1 per 100,000).

The Aggravated Assault Rate is 15% higher in the restrictive states (455.9 per 100,000) than in the less restrictive states (398.3 per 100,000). Using the most recent FBI data (1992), homicide trends in the 17 states with less restrictive CCW laws compare favorably against national trends, and almost all CCW permittees are law-abiding.

Since adopting CCW (1987), Florida's homicide rate has fallen 21% while the U.S. rate has risen 12%. From start-up 10/1/87 2/28/94 (over 6 yrs.) Florida issued 204,108 permits; only 17 (0.008%) were revoked because permittees later committed crimes (not necessarily violent) in which guns were present (not necessarily used).

Of 14,000 CCW licensees in Oregon, only 4 (0.03%) were convicted of the criminal (not necessarily violent) use or possession of a firearm. Americans use firearms for self-defense more than 2.1 million times annually.

By contrast, there are about 579,000 violent crimes committed annually with firearms of all types. Seventy percent of violent crimes are committed by 7% of criminals, including repeat offenders, many of whom the courts place on probation after conviction, and felons that are paroled before serving their full time behind bars.

Two-thirds of self-protective firearms uses are with handguns.

99.9% of self-defense firearms uses do not result in fatal shootings of criminals, an important factor ignored in certain "studies" that are used to claim that

guns are more often misused than used for self-protection. Of incarcerated felons surveyed by the Department of Justice, 34% have been driven away, wounded, or captured by armed citizens; 40% have decided against committing crimes for fear their would-be victims were armed.

OTHER CCW FACTS

With adoption of CCW by Arizona, Tennessee and Wyoming in early 1994, 19 states have CCW laws requiring the issuance of permits to carry concealed firearms for self-defense to citizens who meet fair and reasonable state standards. Vermont, which ranks near the bottom in violent crime rates year-in and year-out, allows firearms to be carried concealed without a permit.

In recent years NRA successfully fought for the adoption of favorable CCW laws now on the books in Florida (1987), Idaho (1990, amended 1991), Mississippi (1990), Montana (1991), and Oregon (1990). In recent legislative sessions, proposals for similar CCW laws have progressed in Alaska, Colorado, Missouri, Oklahoma and Texas.

Anti-gun forces oppose CCW with a variety of arguments, ranging from deliberate misrepresentations of commonly available crime data to "studies" pretending to show that private ownership of firearms leads to death and injury rather than providing protection to the owner.

1. Firearms ownership opponents claim that "violent crime" went up in Florida since that state enacted CCW legislation in 1987, a misleading statement for multiple reasons:

Florida's homicide rate has declined 21% since adopting CCW in1987.

No comparison of aggravated assault, robbery, and rape (99.3% of Florida violent crimes) beginning before 1988 is valid,according to the Florida Dept. of Law Enforcement. In 1988,Florida changed its method of compiling crime statistics.

In Florida, as in the U.S., more than 70% of violent crimes do not involve guns. Violent crime rates, therefore, don't necessarily reflect violent gun-related crime trends. According to the most recent FBI Uniform Crime Reports (1992), nationwide firearms were used in the four violent crimes that make up the total "Violent Crime" category, as follows:

Aggravated Assault (58% of violent crimes) -- firearms used in 25%; Robbery (35% of violent crimes) -- firearms used in 41%; Rapes (6% of violent crimes) -- firearms used in an estimated 5%-10% (survey data); and Homicides (1% of violent crimes) -- firearms used in 68%.

In Florida: Aggravated Assaults (64% of violent crimes) -- firearms used in 25%; Robberies (30% of violent crimes) -- firearms used in 37%; Rapes (4% of violent crimes) -- firearms used in an estimated 5%-10% (survey data); and Homicides (0.7% of violent crimes) -- firearms used in 61%.

2. Anti-gunners cite "studies" they claim show that firearms kept at home are "43 times more likely" to be used to kill family members than be used for self-defense. (Other "studies" claim different ratios.) The 43:1 claim, based upon a small-scale study of Kings County (Seattle) and Shelby County (Memphis), is a fraud, because it counts as self-defense gun uses only those cases in which criminals were killed in the defender's home. Approximately 99.9% of all defensive gun uses are not fatal shootings, however -- criminals are usually frightened off, held at bay, or non-fatally wounded. Also, many defensive firearms uses occur away from home. Further, suicides were counted as "family member killings" in the "study,"

elevating that number more than 500%. Unfortunately, some of these "studies" are funded with taxpayer dollars, through grants from the Centers for Disease Control and Prevention, a division of the U.S. Dept. of Health and Human Services.

This information is presented as a service to the Internet community by the NRA/ILA.

Many files are available via anonymous ftp from ftp.nra.org and via WWW at http://www.nra.org

Be sure to subscribe to rkba-alert by sending: subscribe rkba-alert Your Full Name as the body of a message to rkba-alert-request@NRA.org

Information can also be obtained by connecting to the NRA-ILA GUN-TALK BBS at (703) 934-2121.

by violent criminals,6 prohibiting guns inexpensive enough for them to afford for protection7 is not reasonable. It is also not reasonable to prohibit people who pass criminal records checks from buying two handguns in a given month8 or to prohibit them from carrying a gun for protection.9 And when computerized criminal records checks of gun buyers can be completed in only a matter of minutes, it is unreasonable to delay their firearm purchases with a week-long waiting period.10

The siren call to bow to the demand for "reasonable" gun control is not unique to the United States. In three nations that have much in common with the United States--Australia, Canada and Great Britain--gun owners did not unify to fight the incremental imposition of restrictive gun laws touted as "reasonable and necessary." As a result, firearms are severely restricted in Canada and Australia and almost entirely prohibited in Great Britain.

British gun owners failed to resist the passage of "reasonable" gun laws and have seen their rights almost completely disappear in the space of a few decades.11 England changed from a nation with almost no restrictions on gun ownership and no crime, to a nation where all but certain rifles and shotguns are banned and crime is rising.12 The clear lesson for American gun owners is simple: if you don't fight for your liberties, you lose them.

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FABLE IV: "Gun control" laws prevent crime.

So overwhelming is the evidence against this myth that it borders on the absurd for anti-gun groups to try to perpetuate it.

There are thousands of federal, state and local gun laws. The Gun Control Act of 1968 (Public Law 90-618, 18 U.S.C. Chapter 44) alone

prohibits persons convicted of, or under indictment for, crimes punishable by more than a year in prison, fugitives, illegal drug users, illegal aliens, mental incompetents and certain other classes of people from purchasing or possessing firearms. It prohibits mail order sales of firearms, prohibits sales of firearms between non-dealer residents of other states, prohibits retail sales of handguns to persons under age 21 and rifles and shotguns to persons under age 18 and prohibits the importation of firearms "not generally recognized as particularly suitable for or readily adaptable to sporting purposes." It also established the current firearms dealer licensing system. Consider the following gun control failures.

(Unless otherwise noted, crime data are from the FBI, Uniform Crime Reports.)

Washington, D.C.'s ban on handgun sales took effect in 1977 and by the 1990s the city's murder rate had tripled. During the years following the ban, most murders--and all firearm murders--in the city were committed with handguns.1

Chicago imposed handgun registration in 1968, and murders with handguns continued to rise. Its registration system in place, Chicago imposed a D.C.-style handgun ban in 1982, and over the next decade the annual number of handgun-related murders doubled.2

California increased its waiting period on retail and private sales of handguns from five to 15 days in 1975 (reduced to 10 days in 1996), outlawed "assault weapons" in 1989 and subjected rifles and shotguns to the waiting period in 1990. Yet since 1975, the state's annual murder rate has averaged 32% higher than the rate for the rest of the country.

Maryland has imposed a waiting period and a gun purchase limit, banned several small handguns, restricted "assault weapons," and regulated private transfers of firearms even between family members and friends,

yet for the last decade its murder rate has averaged 44% higher than the rate for the rest of the country, and its robbery rate has averaged highest among the states.

The overall murder rate in the jurisdictions that have the most severe restrictions on firearms purchase and ownership--California, Illinois, Maryland, Massachusetts, New Jersey, New York and Washington, D.C.--is 8% higher than the rate for the rest of the country.

New York has had a handgun licensing law since 1911, yet until the New York City Police Department began a massive crackdown on crime in the mid-1990s, New York City's violent crime rate was among the highest of U.S. cities.

The federal Gun Control Act of 1968 imposed unprecedented restrictions relating to firearms nationwide. Yet, compared to the five years before the law, the national murder rate averaged 50% higher during the five years after the law, 75% higher during the next five years, and 81% higher during the five years after that.

States where the Brady Act's waiting period was imposed had worse violent crime trends than other states. Other failures of the federal waiting period law are noted in the discussion of Fable V.

The record is clear: Gun control primarily impacts upon upstanding citizens, not criminals. Crime is reduced by holding criminals accountable for their actions.

Increasing incarceration rates -- Between 1980-1994, the 10 states with the greatest increases in prison population experienced an average decrease of 13% in violent crime, while the 10 states with the smallest increases in prison population experienced an average 55% increase in violent crime.3

Put violent criminals behind bars and keep them there -- In 1991, 162,000 criminals placed on probation instead of being imprisoned committed 44,000 violent crimes during their probation. In 1991, criminals released on parole committed 46,000 violent crimes while under supervision in the community for an average of 13 months.4 Nineteen percent of persons involved in the felonious killings of law enforcement officers during the last decade were on probation or parole at the time of the officers' killings.5

Enforce the law against criminals with guns -- The success of Richmond, Virginia's Project Exile, strongly supported by NRA, has grabbed the attention of the Administration, Members of Congress, big city mayors and criminologists. Project Exile is a federal, state and local effort led by the U.S. Attorney's Office in Richmond that sentences felons convicted of illegally possessing guns to a minimum of five years in prison. Following the implementation of Project Exile, the city's firearm murder rate was cut by nearly 40%.6 Recognizing the program's success, Congress in 1998 approved $2.3 million to implement Project Exile in Philadelphia, Pa., and Camden County, N.J. In 2002, the Bush Department of Justice took the Project Exile concept nationwide, targeting violent felons with guns under Project Safe Neighborhoods.

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FABLE V: It is because of the Brady Act's five-day waiting period and the "assault weapons" law that crime has decreased.

(Unless otherwise noted, crime data are from the FBI, Uniform Crime Reports.)

Anti-gun groups and the Clinton-Gore Administration tried to credit those two laws and, thus themselves, with the decrease. However, violent crime began declining nationally during 1991, while the Brady Act didn't

take effect until Feb. 28, 1994 and the "assault weapons" law not until Sept. 13, 1994.

Crime in America has declined for several other reasons. New York City, which accounted for one in 10 violent crimes in the U.S. a decade ago, cut violent crimes significantly with a widely-acclaimed crackdown on a broad range of crimes and implementation of new police strategies.1 The incarceration rate has doubled nationally.2 Additionally, during the 1990s the U.S. population aged and became less prone to violence--most notably the membership of drug gangs.3

The "assault weapon" law has been irrelevant to the decrease in crime. Not only did that law take effect well after the decrease began, "assault weapons" were and are used in only a very small percentage of violent crime.4 "Assault weapons" are still widely available on the commercial market because of increased production before the federal law ceased their manufacture. Furthermore, the law permits the manufacture of firearms that are identical to "assault weapons" except for one or more attachments.5

The Brady Act's waiting period was never imposed on many high-crime states and cities, but instead was imposed on mostly low-crime states. Eighteen states and the District of Columbia were always exempt from the waiting period6 because they already had more restrictive gun laws when the Brady Act took effect.7 Those areas accounted for the majority of murders and other violent crimes in the U.S. Furthermore, during the five years the waiting period was in effect, more than a dozen other states became "Brady-exempt" as well by adopting NRA-backed instant check laws or modifying pre-existing purchase regulations.

Even in states where waiting periods have been in effect, criminals have not been prevented from obtaining handguns. Only 7% of armed career criminals and 7% of "handgun predators" obtained firearms from licensed gun shops8 in the 1980s and 1990s, respectively, and four of

every five prison inmates get their guns from friends, family members and black market sources. 9 Eighty-five percent of police chiefs say the Brady Act's waiting period did not stop criminals from obtaining handguns.10 According to the Bureau of Justice Statistics (BJS), handgun purchase denial statistics often cited by gun prohibitionists, "do not indicate whether rejected purchasers later obtained a firearm through other means."11

Summarizing the waiting period's failure, New York University Professors James M. Jacobs and Kimberley A. Potter wrote: "It is hard to see the Brady law, heralded by many politicians, the media, and Handgun Control, Inc. as an important step toward keeping handguns out of the hands of dangerous and irresponsible persons, as anything more than a sop to the widespread fear of crime."12

Waiting periods and other laws delaying handgun purchases have never reduced crime. Historically, most states with such laws have had higher violent crime rates than other states and have been more likely to have violent crime and murder rates higher than national rates. Despite a 15-day waiting period (reduced to 10 days in 1996) and a ban on "assault weapons," California's violent crime and murder rates averaged 45% and 30% higher than the rest of the country during the 1990s. When Congress approved the Brady bill, eight of the 12 states that had violent crime rates higher than the national rate, and nine of the 16 states that had murder rates higher than the national rate, were states that delayed handgun purchases.

In Brady's first two years, the overall murder rate in states subject to its waiting period declined only 9%, compared to 17% in other states. Even anti-gun researcher David McDowell has written, "waiting periods have no influence on either gun homicides or gun suicides."13 Handgun Control's Sarah Brady admitted that a waiting period "is not a panacea. It's not going to stop crimes of passion or drug-related crimes."14

The Brady Act waiting period also led to fewer arrests of prohibited purchasers, compared to NRA-backed instant check systems. For example, between November 1989 and August 1998, Virginia's instant check system led to the arrests of 3,380 individuals, including 475 wanted persons.15 The General Accounting Office (GAO) found that during the Brady Act's first 17 months, only seven individuals were convicted of illegal attempts to buy handguns.16 The Dept. of Justice, citing statistics from the Executive Office of United States Attorneys, stated that during Fiscal Years 1994-1997 only 599 individuals were convicted of providing false information on either federal forms 4473 (used to document retail firearms purchases) or Brady handgun purchase application forms.17

The vast majority of persons who applied to buy handguns under the Brady Act's waiting period were law-abiding citizens. The GAO reported that during the Act's first year, 95.2% of handgun purchase applicants were approved without a hitch. Of the denials, nearly half were due to traffic tickets or administrative problems with application forms (including sending forms to the wrong law enforcement agency). Law-abiding citizens were often incorrectly denied as "criminals," because their names or other identifying information were similar to those of criminals and triggered "false hits" during records checks. GAO noted that denials reported by BATF in its one-year study of the Brady Act, "do not reflect the fact that some of the initially denied applications were subsequently approved following administrative or other appeal procedures."18

Due to NRA-backed amendments that were made to the Brady bill before its passage in 1993, the Brady Act's waiting period was replaced in November 1998 by the nationwide instant check system.19 However, in June 1998, President Clinton and the anti-gun lobby announced their desire for the waiting period to continue permanently along with the instant check. White House senior advisor Rahm Emanuel falsely

claimed on June 14, 1998, that "The five-day waiting period was established for a cooling off period for crimes of passion."20

As the inclusion of its instant check amendment made clear, however, the Brady Act was imposed not for a "cooling off period," but for a records check obstacle to firearm purchases by felons, fugitives and other prohibited persons. Furthermore, during congressional hearings on the Brady bill on Sept. 30, 1993, Assistant Attorney General Eleanor Acheson testified for the Department of Justice that there were no statistics to support claims that handguns were often used in crimes soon after being purchased.21

Emanuel also brazenly claimed that, "Based on police research, 20% of the guns purchased that are used in murder are purchased within the week of the murder." But this was a falsehood typical of anti-gun advocates: BATF reports that, on average, guns recovered in murder investigations were purchased 6.6 years before involvement in those crimes.22

The Clinton-Gore Administration and anti-gun groups wanted a waiting period because it complicates the process of buying a gun and therefore may dissuade some potential gun buyers. A waiting period also can prevent a person who needs a gun for protection from acquiring one quickly. The anti-gun lobby opposes the use of firearms for protection, claiming "the only reason for guns in civilian hands is for sporting purposes"23 and self-defense is "not a federally guaranteed constitutional right."24

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FABLE VI: Since firearm accidents are a large and growing problem, we need laws mandating how people store their firearms.

Mr. KUCINICH. I thank the gentleman.

I would like to start by introducing our first panel, if there are no additional opening statements.

Mr. BURTON. Mr. Chairman, can I submit for the record some statistical data I have, please?

Mr. KUCINICH. Without objection, the gentleman's submission is included in the record. I thank the gentleman.

We will introduce our first panel. I would like to introduce Robyn Thomas, who is the executive director of Legal Community Against Violence. LCAV is a public interest law center dedicated to preventing gun violence by providing legal assistance to State and local governments. Before joining LCAV last year, she was a practicing attorney in New York City.

Next we will hear from Paul Helmke, who has served in the last year as president of the Brady Campaign and Brady Center to Prevent Gun Violence, a non-partisan grassroots organization working to prevent gun violence. Mr. Helmke has served as mayor of Fort Wayne, IN, from 1988 through 2000. During his tenure as mayor, he worked to strengthen the police department and implement community policing. Mr. Helmke served as president of the U.S. Conference of Mayors in 1997 and 1998, and was a board member and chair of the Committee on Public Safety and Crime Prevention for the National League of Cities.

The final witness on the first panel will be John Feinblatt. Mr. Feinblatt was appointed New York City's criminal justice coordinator by Mayor Michael R. Bloomberg in January 2002. In this capacity, Mr. Feinblatt has served as the chief advisor on Mayor Bloomberg's Illegal Gun Strategy, which includes innovative enforcement strategies, new local legislation, and the formation of a new national coalition: Mayors Against Illegal Guns. Prior to his appointment, Mr. Feinblatt was the founding director of both the Center for Court Innovation, the country's leading think tank on problemsolving justice, and the Mid-town Community Court.

Welcome to all the witnesses. It is the policy of the Committee on Oversight and Government Reform to swear in all witnesses before they testify. I would ask the witnesses to please rise and raise your right hands.

[Witnesses sworn.]

Mr. KUCINICH. Thank you. Let the record reflect that the witnesses answered in the affirmative.

I ask that each of the witnesses now give a brief summary of your testimony, and keep the summary to 5 minutes in length. Bear in mind that your complete written statement will be included in the hearing record.

Ms. Thomas, you will be our first witness. You may begin.

STATEMENTS OF ROBYN THOMAS, EXECUTIVE DIRECTOR, LEGAL COMMUNITY AGAINST VIOLENCE; PAUL HELMKE, PRESIDENT, BRADY CAMPAIGN AND CENTER TO PREVENT GUN VIOLENCE; AND JOHN FEINBLATT, CRIMINAL JUSTICE COORDINATOR FOR THE CITY OF NEW YORK

STATEMENT OF ROBYN THOMAS

Ms. THOMAS. Thank you very much. Legal Community Against Violence sincerely appreciates the opportunity to speak to the committee about Lethal Loopholes: the Deficiency in State and Federal Gun Purchase Laws.

As you mentioned, LCAV is a public interest law center devoted to preventing gun violence. We were founded in 1993 after the assault weapon massacre at 101 California Street in San Francisco.

I am going to address three questions related to the deficiency in State and Federal gun purchase laws. First, how to State and Federal gun laws interact? As you mentioned, Federal law establishes the baseline regarding the types of purchasers who are ineligible to acquire firearms. Those categories of prohibited purchasers include felons, illegal aliens, those subject to domestic violence protective orders, and the mentally ill. Some States then expand the Federal law by applying broader standards to some or all of these categories. In addition, many States designate extra and additional classes of prohibited purchasers who are not found in the Federal law.

The second question I will address is what are the lethal loopholes in the Federal system and how are States addressing them? First, there are numerous gaps in the Federal law that prohibit certain individuals from purchasing firearms. Here I am going to touch on two basic issues, those with mental illness and domestic violence offenders.

With respect to mental illness, Federal law prohibits firearm purchases by those who have been involuntarily committed or adjudicated as mental defective. This does not reach individuals with a wide range of potentially dangerous mental illnesses. For example, a person who is voluntarily committed to a mental institution can still lawfully purchase a firearm under Federal law. Many States have broadened the category of mentally ill persons prohibited by including those who voluntarily or involuntarily are committed to a mental hospital.

In the case of domestic violence offenders, Federal law prohibits firearm purchases by those who have been convicted of a misdemeanor crime of domestic violence and those subject to certain domestic violence protection orders. The Federal prohibitions leave large gaps, also allowing violent offenders to acquire firearms.

For example, the protection order prohibition does not include those individuals who have not co-habitated with the person who is the subject of the restrictive order. So in other words, if you and I have not lived together and I am subject to a restraining order, I may still purchase a firearm under Federal law.

More than half of the individuals who are subject to domestic violence protection orders fall into this category. So it is a large loophole in the domestic violence prohibition. And many States have acted to close that loophole.

I also will address gaps in enforcement. As was mentioned, access to State records is a huge part of the issue with enforcement of the prohibited purchaser provisions. As the Virginia Tech incident illustrated, access to mental health and domestic violence records is seriously inadequate. Federal law does not and cannot require that States send relevant records to the FBI for inclusion in the NICS data base. According to the FBI, only 22 States voluntarily contribute mental health records to NICS.

We note the legitimate concern for privacy regarding mental health records. However, with laws that limit the use of such records, this concern can be adequately addressed. Lack of access to State records is also a significant obstacle with regard to perpetrators of domestic violence. A recent study showed that less than 50 percent of those believed to qualify, even under existing Federal law, would not be included in the system.

One way States can improve access to prohibited purchaser records is by becoming a point of contact or POC State. POC States can then conduct background checks through the State system and have access to records which include NICS information as well as independent State information, criminal history and other data bases.

The FBI has been encouraging more States to serve as POCs. At the present time, only 21 States serve as POCs either for handgun transfers or other gun transfers. In addition, several POC States already search mental health records automatically as part of the background check system. On top of that, some States have decided to require reporting to mental health data bases. This is an important point, because it has two parts to it. The first is that there has to be reporting of mental health records and then the second is that when a background check is done that those mental health records are actually reviewed. It's the same situation for domestic violence offenders. It is a twofold problem that has to be addressed.

Two other dangerous loopholes remain which I will touch on briefly. One is the so-called default proceeds provision. What this refers to is the instance when a background check is done and it is incomplete after 3 days. The gun automatically default proceeds to the requested purchaser.

Approximately 3,000 or 4,000 guns per year proceed this year and then later have to be reacquired, when it is found after the 3-day period has passed that the person should not have passed the background check. Many States have posed this loophole in a variety of different ways, from including the length of time to not allowing a transfer if the background check is not completed.

The final loophole that I will mention is something that has already been mentioned, the private sale loophole. Forty percent of the guns transferred in this country take place through private sales which are not subject to any background check at all. So until unlicensed sellers are also regulated by the background check system, this will continue to remain an avenue for a huge quantity of the guns that are sold in the marketplace.

I would just like to close by adding that H.R. 297 that the Congressman mentioned is a good step in the right direction, something that encourages States to report records to NICS and that begins to address the problem of the lack of information. It is a step

in the right direction, but there are many other issues that need to be addressed, and we hope that this hearing will be a beginning of addressing some of these.

Thank you very much.

[The prepared statement of Ms. Thomas follows:]

Domestic Policy Subcommittee

Oversight and Government Reform Committee

Robyn Thomas

Executive Director of LCAV

Thursday, May 10, 2007

2154 Rayburn HOB - 2:00 P. M.

Written Testimony of LCAV
May 10, 2007 Domestic Policy Subcommittee of the
Oversight and Government Reform Committee

Legal Community Against Violence ("LCAV") appreciates the opportunity to offer testimony to the Domestic Policy Subcommittee of the Oversight and Government Reform Committee on state compliance with the Gun Control Act of 1968, including states' obligations under the Brady Handgun Violence Prevention Act of 1993 (the "Brady Act") to report "prohibited purchasers" to the National Instant Check System. As requested by Subcommittee Chairman Dennis Kucinich in a letter dated May 1, 2007, LCAV will discuss state compliance with the Brady Act and more inclusive state law firearm restrictions in the following categories: individuals under mental health care or evaluation, individuals restrained by protective or restraining orders, and former juvenile offenders. In an effort to address these topics, LCAV's written testimony will address the following specific issues: 1) the interaction between federal and state law on prohibited firearms purchaser provisions and enforcement of such provisions; 2) loopholes in the federal prohibited purchaser provisions and background check system; and 3) state laws enacted to address the identified loopholes in the federal prohibited purchaser provisions and background check system.

LCAV is a national public interest law center dedicated to preventing gun violence. Founded in 1993 in the aftermath of the assault weapon massacre at 101 California Street in San Francisco, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV serves governmental entities and nonprofit organizations nationwide, focusing on policy reform at the state and local levels. We conduct legal research, analyze existing and emerging policy strategies, review proposed legislation, generate model regulations and develop legal and analytical materials to help governmental entities and nonprofit organizations achieve their policy goals. Our website, www.lcav.org, is the most comprehensive resource for information on U.S. firearms laws in either print or electronic form.

I. Overview of Interaction Between Federal and State Law

A. Prohibited Purchaser Provisions

Federal law establishes the baseline regarding the types of persons who are ineligible to purchase firearms. The federal Gun Control Act of 1968, codified at 18 U.S.C. § 922, prohibits the sale of firearms to certain individuals, including felons, illegal aliens, persons subject to domestic violence protective orders, and the mentally ill.[1] Some states

[1] The complete list of prohibited purchasers under 18 U.S.C. § 922(b)(1), (d) includes any person who is underage; has been convicted of, or is under indictment for, a crime punishable by imprisonment for more than one year; is a fugitive from justice; is an unlawful user of or addicted to a controlled substance; has been adjudicated as a mental defective or committed to a mental institution; is an illegal alien; has been dishonorably discharged from the military; has renounced his or her U.S. citizenship; is subject to a court order restraining him or her from harassing, stalking or threatening an intimate partner, his or her child or a child of a partner; or has been convicted of a misdemeanor offense of domestic violence.

expand on federal law by applying broader standards to some or all of the federally prohibited purchaser categories. In addition, many states designate additional classes of prohibited purchasers not found in federal law. Examples of how states have expanded on federal law prohibited purchaser provisions is provided in section III below.

B. Enforcement of Prohibited Purchaser Provisions Via Background Checks

The "Brady Act" requires federally licensed firearms dealers ("FFLs") to perform background checks on prospective firearm purchasers to ensure that the prospective purchaser is not prohibited from purchasing a firearm under federal, state or local law.[2] Since 1998, the Brady Act has been implemented through the National Instant Criminal Background Check System (NICS).[3] Licensed dealers initiate a NICS check (typically by telephone or computer) after the prospective purchaser has provided a government-issued photo I.D. and completed a federal Firearms Transaction Record (also known as Form 4473).[4]

As with federal law prohibited purchaser provisions, states can and do expand on federal law requiring background checks. For example, states have the option of serving as a state POC and conducting their own background checks instead of having those checks performed by the FBI.[5] A state POC search includes the state's independent criminal history database as well as the three federal databases accessed by the FBI during a NICS check.[6] According to the FBI, state POC background checks are more thorough than those performed by the FBI because of the access to independent state criminal history databases in addition to the databases maintained by NICS.[7] State databases typically include information that is unavailable to the FBI, including mental health records, outstanding felony warrants, domestic violence restraining orders and final disposition records (those showing whether an arrest resulted in an acquittal or a conviction).

In addition, some states have enacted licensing laws which require an individual to obtain a license or permit authorizing him or her to purchase and/or possess a firearm. Although licensing laws vary, they generally require that a license only be issued after the applicant passes a background check which, in some cases, is more thorough than the Brady

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[2] 18 U.S.C. § 922(s).

[3] As originally adopted, the Brady Act included interim as well as permanent provisions. The Act's interim provisions, implemented on February 28, 1994, applied to handgun sales only. On November 30, 1998, the permanent provisions of the Brady Act went into effect, establishing the NICS system and extending the Act's application to purchasers of long guns and persons who redeem a pawned firearm.

[4] 27 C.F.R. § 478.124.

[5] Bureau of Justice Statistics, U.S. Department of Justice, *Survey of State Procedures Related to Firearm Sales, 2005* 3-4 (Nov. 2006), *at* http://www.ojp.gov/bjs/pub/pdf/ssprfs05.pdf.

[6] *Id.* at 3-4. The three federal databases that comprise a NICS check are the National Crime Information Center (NCIC), which includes records regarding wanted persons (fugitives) and persons subject to protective/restraining orders; the Interstate Identification Index, which contains state criminal history records; and the NICS Index, which contains records of other persons prohibited under federal law from receiving or possessing firearms.

[7] Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Operations Report (November 30, 1998-December 31, 1999)* 5 (Mar. 2000), *at* http://www.fbi.gov/hq/cjisd/nics/nic1year.pdf.

background check required to purchase a firearm.[8] In addition, applicants may be required to provide proof of residency and fingerprints, and pass written and performance-based tests showing that the applicant knows how to safely load, fire and store a gun, and has knowledge of relevant firearms laws.

II. Loopholes in Federal Prohibited Purchaser Provisions and Background Check System

A. Prohibited Purchaser Provisions

There are numerous gaps in the federal laws that prohibit certain individuals from purchasing firearms. At the Subcommittee's request, LCAV's testimony will focus on loopholes with regard to prospective purchasers who have histories of mental illness, have perpetrated domestic violence, and who have been convicted of an offense in juvenile court.

1. Persons with a History of Mental Illness: Federal law prohibits any person from selling or otherwise transferring a firearm to any person who has been adjudicated as a mental defective or committed to a mental institution.[9] Federal regulations define "adjudication as a mental defective" to include a determination by a court, board, commission or other lawful authority that as a result of incompetency or a mental illness, condition or disease, a person is a danger to himself, herself or to others or lacks the ability to contract or manage his or her own affairs. It also includes a finding of insanity by a court in a criminal case, a finding of incompetence to stand trial, and a finding of not guilty by reason of lack of mental responsibility pursuant to the Uniform Code of Military Justice. "Commitment to a mental institution" is defined to include involuntary commitment to a mental institution.[10] These definitions do not reach individuals with a wide range of potentially dangerous mentally illnesses. For example, a person who is voluntarily committed to a mental institution can lawfully purchase a firearm under federal law.

2. Domestic Violence Offenders: Federal provisions prohibiting firearms purchases by domestic violence offenders are similarly limited. Persons who have been convicted in any court of a "misdemeanor crime of domestic violence" and/or who are subject to certain domestic violence protection orders may not purchase firearms.[11] "Misdemeanor crime of domestic violence" is defined as an offense that is a federal, state or tribal law misdemeanor and has the use or attempted use of physical force or threatened use of a deadly weapon as an element.[12] In addition, the offender must be a current or former spouse, parent, or guardian of the victim; share a child in common with

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[8] For example, New Jersey requires that firearms purchaser permit applicants be "of good character and good repute in the community" and that the names and addresses of two personal references be included on the permit application. N.J. Rev. Stat. § 2C:58-3(c), (e).
[9] 18 U.S.C. § 922(d)(4).
[10] 27 C.F.R. § 478.11 provides the federal definitions of the terms "adjudicated as a mental defective" and "committed to a mental institution."
[11] 18 U.S.C. §§ 922(g)(8), (9), 27 C.F.R. § 478.11.
[12] 18 U.S.C. § 921(a)(33).

the victim; be a current or former cohabitant with the victim as a spouse, parent or guardian; or be similarly situated to a spouse, parent or guardian of the victim.[13]

Domestic violence protection orders disqualify a prospective purchaser only if issued after a hearing of which the subject received actual notice.[14] In addition, the order must protect an "intimate partner" of the defendant. This includes a current or former spouse, a child of the defendant or of the victim, a parent of a child in common with the defendant, or an individual with whom the defendant does or has cohabitated.[15] The order must also contain a finding that the person presents a credible threat to the victim and must restrain him or her from certain specified conduct.[16]

Both of the prohibitions against domestic violence perpetrators leave large gaps allowing violent individuals to obtain guns. For example, the protection order prohibition does not apply to persons with a dating relationship who have never lived together. In one study of temporary domestic violence protection orders, researchers found that the most common relationship between the petitioner and defendant was a dating relationship. The same study found that applications for protection orders were more likely to mention firearms when the parties had *not* lived together.[17]

3. Juvenile Offenders: Federal law prohibits firearm purchases by persons convicted or under indictment for a crime punishable by imprisonment for more than one year.[18] However, individuals who were convicted of offenses, even violent offenses, in juvenile court, are permitted under federal law to purchase firearms.

4. Other Loopholes: Gaps exist in other prohibited purchaser categories as well. For example, while persons with felony convictions are prohibited from purchasing firearms, persons convicted of violent misdemeanors (other than domestic violence misdemeanors) face no federal restrictions on firearms purchases. In addition, a person addicted to a controlled substance may not purchase a gun, but an individual who abuses alcohol and/or has been convicted of an alcohol-related offense is permitted to purchase a firearm. Likewise, there is no prohibition against persons who are known or suspected of terrorist activity from purchasing firearms.[19]

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[13] *Id.* Also note that a conviction requires that the offender was represented by counsel or waived the right to counsel and was tried by a jury or waived the right to a jury, if the offense entitled the offender to a jury trial.
[14] 18 U.S.C. § 922(g)(8).
[15] 18 U.S.C. §§ 922(g)(8), 921(a)(32).
[16] 18 U.S.C. § 922(g)(8).
[17] Katherine A. Vittes & Susan B. Sorenson, *Are Temporary Restraining Orders More Likely to be Issued When Applications Mention Firearms?*, 30 Evaluation Review 266, 271, 275 (June 2006).
[18] 18 U.S.C. § 922(d)(1).
[19] A bill introduced by Senator Lautenberg, S. 1237, would, among other things, prohibit firearms purchase and possession by, and transfer to, persons the Attorney General determines to be known or suspected of engaging in terrorism if the Attorney General also has a reasonable belief that the prospective purchaser may use a firearm in connection with terrorism. A companion bill, H.R. 2074, has been introduced in the House of Representatives.

B. Enforcement of Prohibited Purchaser Provisions Via Background Checks

1. Private Sale Loophole: Perhaps the biggest loophole in enforcement of federal and state prohibited purchaser provisions is what is known as the "private sale loophole."[20] The private sale loophole refers to the imposition of various federal law duties on federally licensed firearms dealers that do not apply to unlicensed sellers. Firearms dealers must, among other things: (1) perform background checks on prospective firearm purchasers; (2) maintain records of all gun sales; (3) make those records available to law enforcement for inspection; (4) report multiple sales; and (5) report the theft or loss of a firearm from the licensee's inventory.[21]

The Gun Control Act of 1968 provides that persons "engaged in the business" of dealing in firearms must be licensed.[22] Although Congress did not originally define the term "engaged in the business," it did so in 1986 as part of the McClure-Volkmer Act (also known as the "Firearms Owners' Protection Act"). That Act defined the term "engaged in the business," as applied to a firearms dealer, as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms."[23]

Significantly, however, the term was defined to *exclude* a person who "makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms."[24]

Consequently, unlicensed sellers may sell firearms without conducting background checks or documenting the transaction in any way. As a result, convicted felons, persons with a history of mental illness, domestic violence offenders, and other prohibited purchasers can easily buy guns from unlicensed sellers. In addition, because federal law does not require private sellers to inspect a buyer's driver's license or any other identification, there is no obligation for such sellers to confirm that a buyer is of legal age to purchase a firearm.

According to a 1999 report issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the current definition of "engaged in the business" often frustrates the prosecution of "unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons."[25] A June 2000 ATF report found that unlicensed sellers were involved in about a fifth of the trafficking

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[20] Although the "private sale" loophole is frequently referred to as the "gun show" loophole (because of the particular problems associated with gun shows), it applies to all firearm sales by non-licensed sellers, regardless of where the sales occur.
[21] 18 U.S.C. §§ 922(t), 923(g).
[22] 18 U.S.C § 921(a)(21)(C).
[23] *Id.*
[24] *Id.*
[25] U.S. Department of Justice & Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Gun Shows: Brady Checks and Crime Gun Traces* 14 (Jan. 1999).

investigations and associated with nearly 23,000 diverted guns.[26] A national survey of firearm ownership conducted in 1994 determined that 60 percent of all firearm sales in the U.S. involved federally licensed dealers, while the remaining 40 percent of firearms were acquired from unlicensed sellers.[27]

2. *Lack of Access to State Records:* Lack of access to relevant state records also frustrates enforcement of prohibited purchaser provisions. Federal law does not and cannot require that states send relevant records to the FBI for inclusion in the NICS database.[28]

a. *Mental Health Records:* According to an FBI press release dated April 9, 2007, only 22 states voluntarily contribute some or all mental health records to NICS: Alabama, Arizona, Arkansas, California, Colorado, Florida, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, Virginia, Washington and Wyoming.

FBI data indicate that a small fraction of the number of Americans who have been involuntarily committed to mental institutions has been reported to NICS. As of November 30, 1999, the FBI had received from all states a total of only 41 records of mentally ill persons.[29] Although the number of mental health records provided to NICS has increased – in 2003 there were more than 143,000[30] – mental illness remains significantly underreported. As a result of the FBI's lack of information about mentally ill persons, it cannot be assured that an FBI background check will find that a person is ineligible to possess a firearm due to mental illness.

Tragically, the Virginia Tech shooting illustrates the impact of the lack of access to state records. Although the Virginia Tech shooter purchased firearms through a licensed dealer and passed two background checks, LCAV's analysis of the facts as they have been reported, and the applicable law, indicates that Mr. Cho was, in fact, prohibited from purchasing a firearm under federal law.

A Virginia special justice declared Mr. Cho to be "an imminent danger" to himself as a result of mental illness, and directed him to seek outpatient treatment. Under federal regulations defining "adjudication as a mental defective" to include a "determination by a

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[26] Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearm Traffickers* xi (June 2000).

[27] Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, U.S. Department of Justice, National Institute of Justice Research in Brief 6-7 (May 1997), *at* http://www.ncjrs.org/pdffiles/165476.pdf.

[28] State contribution to the NICS database is voluntary. *See* 28 C.F.R. 25.4. Note that *Printz v. U.S.*, 521 U.S. 898 (1997), stands for the proposition that the federal government may not mandate that state officials administer or enforce a federal regulatory program. Although this proposition has not been applied to a case directly involving the contribution of state records to NICS, it may limit the ability of the federal government to require that states do so.

[29] U.S. General Accounting Office, *Gun Control: Options for Improving the National Instant Criminal Background Check System* 8 (Apr. 2000), *at* http://www.gao.gov/archive/2000/gg00056.pdf.

[30] Bureau of Justice Statistics, U.S. Department of Justice, *Improving Criminal History Records for Background Checks* 2 (May 2003), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ichrbc.htm.

court, board, commission or other lawful authority" that as a result of incompetency or a mental illness, condition or disease, the person is a "danger to himself or to others,"[31] Mr. Cho should have been precluded from purchasing a firearm because he had been adjudicated as a mental defective.

Virginia law is similar to federal law in that it prohibits a person from purchasing a firearm if he or she has been involuntarily committed to a mental health facility due to mental illness.[32] However, unlike federal law, Virginia does not prohibit firearm purchases for those who have been deemed to be a danger to themselves or others. Rather, Virginia law prohibits purchase of firearms by any person adjudicated legally incompetent, mentally incapacitated, or incapacitated.[33] These terms generally apply to an individual who is incapable of managing his or her own health or property.[34] Mr. Cho did not fall into this category and therefore was not prohibited from purchasing a firearm under state law.

Federal law should have barred Mr. Cho from purchasing a firearm, but the background check conducted by the state (Virginia is a POC state) did not reveal his adjudication as a mental defective. Virginia law only requires mental health records that would disqualify a purchaser under *state* law be sent to the state criminal history database.[35] It appears that, for this reason, the record of the proceeding deeming Mr. Cho to be an imminent danger to himself was not forwarded to the state database (or to NICS) and his status as a prohibited purchaser under federal law was not revealed during either of the two background checks he passed.[36]

b. *Domestic Violence Records:* Lack of access to state records is also a significant obstacle with regard to perpetrators of domestic violence. As of June 2003, the National Crime Information Center registry of protective orders contained only 781,574 entries, estimated to be less than 50% of the orders believed to qualify for entry into the system.[37]

3. Default Proceeds: Another dangerous loophole in enforcement of the prohibited purchaser provisions results from the so-called "default proceed" provision of

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[31] 27 C.F.R. § 478.11.
[32] Va. Code Ann. § 18.2-308.1:3.
[33] Va. Code Ann. § 18.2-308.1:2.
[34] *Id.* See Va. Code Ann. § 37.2-1000 et seq.
[35] Va. Code Ann. § 37.2-1014 requires the clerk of the circuit court to certify and forward to Virginia's Central Criminal Records Exchange a copy of any order adjudicating a person incapacitated (as defined by state law) and section 37.2-819 requires the clerk to certify and forward a copy of any order for involuntary admission to a mental health facility. Mr. Cho was not deemed incapacitated as defined by state law and his treatment was outpatient in nature.
[36] Note that Virginia Governor Timothy Kaine issued Executive Order 50 on April 30, 2007 directing all executive branch employees to consider outpatient treatment as "involuntary admission to a mental health facility" for purposes of VA. Code Ann. § 37.2-1014. The Order further directs law enforcement to include records of involuntary outpatient as well as inpatient care in the state database and forward such records to federal law enforcement.
[37] Julissa Jose, *Disarming Domestic Violence Abusers: States Should Close Legislative Loopholes That Enable Domestic Abusers to Purchase and Possess Firearms* 3 (Sept. 2003).

the Brady Act. Under the Brady Act, if a dealer has not been notified within three business days that the sale would violate federal or state laws, the sale may proceed by default.[38] This default provision allowed 3,849 prohibited purchasers to buy guns during the first year of operation (November 30, 1998 through November 30, 1999) of NICS.[39] Moreover, between November 1998 and September 2001, ATF received 10,945 referrals from the FBI requesting retrieval of firearms that had been sold to ineligible persons by default.[40] As a result, the FBI has recommended extending the maximum time allowed for conducting background checks to allow more research time to complete background checks and to reduce the number of prohibited purchasers who are able to purchase firearms by default.[41]

4. Other Loopholes

a. Destruction of Records: Destruction of approved purchaser records creates another gap in enforcement of federal law. Until 2004, information on approved NICS background checks was retained by NICS for ninety days.[42] This information helped ATF deter fraud and detect dealers who might be providing false information about a prohibited person, by inspecting a dealer's records within the ninety-day period and verifying that the records matched the information earlier submitted to NICS.[43] If discrepancies were found, ATF could conduct a further investigation of the dealer to determine whether the dealer submitted false information to NICS.[44] In a recent review of trafficking investigations, ATF determined that corrupt dealers are a significant source of trafficked firearms.[45]

As of July 2004, approved purchaser information is no longer kept for ninety days but is instead destroyed within twenty-four hours of the official NICS response to the dealer.[46]

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[38] 18 U.S.C. § 922(t)(1). *See also Survey of State Procedures Related to Firearm Sales, supra* note 5 at 3.
[39] *NICS Operations Report, supra* note 7, at 11. In fact, the FBI has found that a purchaser whose NICS check takes longer than 24 hours to complete is 20 times more likely to be a prohibited purchaser than other applicants. *Id.* at 6.
[40] U.S. General Accounting Office, *Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System* 17 (July 2002), *at* http://www.gao.gov/new.items/d02720.pdf.
[41] U.S. General Accounting Office, *Gun Control: Implementation of the National Instant Criminal Background Check System* 13 (Feb. 2000), *at* http://www.gao.gov/archive/2000/g100064.pdf. FBI investigations of prohibited purchasers who were allowed to buy firearms by default typically take 25 days to complete. *Id.*
[42] Office of the Inspector General, U.S. Department of Justice, *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives, Evaluation & Inspection Report I-2004-005* x-xi (July 2004), *at* http://www.usdoj.gov/oig/reports/ATF/e0405/final.pdf [hereinafter *Evaluation & Inspection Report*].
[43] *Id.*
[44] *Id.*
[45] Violence Policy Center et al., *Comments On Regulations Proposed by the Federal Bureau of Investigation, Department of Justice Regarding Changes to Regulations Implementing the National Instant Criminal Background Check System* 10 (Sept. 4, 2001).
[46] The requirement that approved purchaser information be destroyed within twenty-four hours has been included in the appropriations bills funding the Department of Justice (which includes ATF and the FBI) every year since 2004. *See* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 617, 118 Stat. 3 (2004); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 615, 118 Stat. 2809, 2915

As a result, ATF inspectors are no longer able to compare the information on file with the dealer to the information the dealer submitted to NICS. The Department of Justice Inspector General noted that the shortened retention time makes it much easier for corrupt firearm dealers who are enabling prohibited persons to purchase firearms to avoid detection.[47] Federal law also specifically prohibits using NICS to create any system of registration of firearms or firearm owners.[48]

b. Firearms Permit Exception: Under the Brady Act, persons holding a state-issued permit to acquire or possess firearms (e.g., a concealed weapons permit) are permitted to purchase a firearm without undergoing a background check if the permit was issued: (1) within the previous five years in the state in which the transfer is to take place; and (2) after an authorized government official has conducted a background investigation to verify that possession of a firearm would not be unlawful.[49] This exemption could allow some prohibited persons to acquire firearms, in cases where a state permit holder falls into a prohibited category after issuance of the state permit. Under the federal exemption, no background check is required and the seller would have no way to learn that the prospective purchaser is prohibited from possessing firearms.

III. State Laws Addressing Loopholes in the Federal Prohibited Purchaser Provisions and Background Check System[50]

A. Prohibited Purchaser Provisions

The federal categories of prohibited purchasers are the prevailing minimum for all states. A number of states have enacted laws that exceed these minimum standards, to close gaps in federal prohibited purchaser provisions. The following are examples of state law approaches to address these gaps.

1. Persons with a History of Mental Illness: The majority of states have laws that prohibit the transfer of firearms to persons who are mentally ill. While most states use definitions of mental illness similar to the Brady Act and its implementing regulations, several states have broadened the category of mentally ill persons who are prohibited from purchasing or possessing firearms.

(2005); Science, State, Justice, Commerce, and Related Appropriations Act of 2006, Pub. L. No. 109-108, § 611, 119 Stat. 2290, 2336 (2005). Each of these acts contains additional provisions which restrict disclosure of data obtained by ATF via crime gun traces. The destruction of records and disclosure provisions are known as the "Tiahrt Amendment." LCAV submitted written testimony to the Subcommittee on Commerce, Justice, Science, and Related Agencies of the House Appropriations Committee on April 26, 2007, requesting that the disclosure of data provisions not be included in ATF's fiscal year 2008 appropriations legislation.

[47] *Inspection & Evaluation Report, supra* note 42, at x-xi; 51-54.

[48] 28 C.F.R. § 25.9(b)(3).

[49] 18 U.S.C. § 922(t)(3); 27 C.F.R. § 478.102(d). Permits issued after November 30, 1998 qualify as exempt only if the approval process included a NICS check. *Id.*

[50] Detailed information about state firearm laws is contained in LCAV's 2006 report, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws, available at* http://www.lcav.org/library/reports_analyses/regulating_guns.asp.

For example, under federal law persons who are voluntarily committed to a mental hospital are not prohibited from possessing firearms.[51] Delaware,[52] Illinois,[53] Massachusetts,[54] Minnesota,[55] North Carolina[56] and Utah[57] have closed this gap by prohibiting purchase or possession of some or all firearms by persons who have been voluntarily or involuntarily committed to a mental hospital.

Several other states define more broadly than federal law those persons who are disqualified from possessing firearms due to mental illness. California law includes an extensive list of disqualifying factors relating to mental illness that are stronger than federal law, including: communicating a serious threat of violence to a licensed psychotherapist and being under a court-ordered conservatorship because of a grave disability resulting from a mental disorder.[58]

Hawaii prohibits possession by any person who is or has been diagnosed as having a significant behavioral, emotional, or mental disorder.[59] Indiana includes a prohibition on persons with "documented evidence" of a "propensity for violent or emotionally unstable conduct."[60] Maryland law prohibits any person who is suffering from a mental disorder and has a history of violent behavior against others from possessing handguns or assault weapons.[61] In addition to prohibiting persons who have been patients of a mental institution within the past 5 years, Illinois also bars persons impaired by a mental condition "of such a nature that it poses a clear and present danger to the applicant, any other person or persons or the community," and persons who are mentally retarded, from obtaining a Firearm Owner's Identification (FOID) card.[62]

Mental health records are particularly sensitive to privacy issues and states can protect these records by including provisions that limit the use of such records to the determination of eligibility to purchase a firearm. For example, the California law

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[51] 27 C.F.R. § 478.11.
[52] Del. Code Ann., tit. 11, § 1448.
[53] 430 Ill. Comp. Stat. 65/8(e).
[54] Mass. Gen. Laws ch. 140, §§ 129B(1), 131(d).
[55] Minn. Stat. § 624.713, subd. 1(c), subd. 1(j)(4).
[56] N.C. Gen. Stat. § 14-404(c).
[57] Utah Code Ann. § 76-10-503(1)(b).
[58] Cal. Welf. & Inst. Code §§ 8100, 8105. A person who communicates to a licensed psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims is barred for six months from possessing a firearm. The prohibition applies only if the psychotherapist complies with a state law requiring him or her to notify local law enforcement of the threat. The person may, however, possess a firearm if a Superior Court finds that the person is likely to use a firearm in a safe and lawful manner. Cal. Welf. & Inst. Code § 8100(b).
[59] Haw. Rev. Stat. Ann. § 134-7.
[60] Ind. Code Ann. § 35-47-1-7.
[61] Md. Code Ann., Pub. Safety § 5-134(b).
[62] 430 Ill. Comp. Stat. 65/8(f), (g). In Illinois, no person may acquire or possess any firearm or ammunition without a valid FOID card. Upon request by the Illinois Department of State Police (DSP), applicants must sign a release waiving any right to confidentiality and requesting disclosure to the DSP of "limited mental health institution admission information" from another state, the District of Columbia or a foreign country. No mental health treatment records may be requested. The information must be destroyed within one year of receipt. 430 Ill. Comp. Stat. 65/4(a)(3).

requiring the state department of mental health to supply mental health records to the state department of justice provides that the records "shall not be furnished or made available to any person unless the [department of justice] determines that disclosure of any information in the records is necessary to carry out its duties with respect to applications for [firearms] permits...or to determine the eligibility of a person to acquire, carry, or possess a firearm."[63]

2. Domestic Violence Offenders: Most states that have enacted laws barring persons who are subject to a restraining order from purchasing or possessing firearms use language similar to federal law ("subject to a court order issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate, restraining him or her from harassing, stalking or threatening an intimate partner or child of a partner"), but some states apply this prohibition beyond orders involving intimate partners or children of partners and/or include *ex parte* restraining orders. For example, in addition to subjects of intimate partner protection orders, California law prohibits persons subject to harassment orders (which require no intimate relationship between the parties) from possessing or receiving firearms while an order is in effect. California also prohibits firearm possession and purchase while an *ex parte* harassment or domestic violence protection order is in effect.[64]

In addition, several states prohibit domestic violence misdemeanants from purchasing firearms and some expand the prohibition by defining the qualifying offense more broadly than federal law. Illinois[65], Indiana[66], Iowa[67] and Minnesota[68] are among the states that expand on federal law by prohibiting firearms purchase by certain domestic violence misdemeanants.[69] For example, Illinois prohibits acquisition and possession of firearms or ammunition by persons who have been convicted of "domestic battery" or a similar offense after January 1, 1998.[70] The Illinois definition of "domestic battery," knowingly or intentionally causing bodily harm to or making physical contact of an insulting or provoking nature with any family or household member,[71] appears broader than the federal standard for a disqualifying misdemeanor crime of domestic violence.

3. Juvenile Offenders: Federal law does not restrict purchases of firearms by persons with juvenile convictions. Twenty-seven states prohibit persons with certain juvenile convictions from purchasing firearms.[72]

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[63] Cal. Welfare and Institutions Code § 8104.
[64] Cal. Civ. Proc. Code §§ 527.6(k), 527.8(j), Cal. Fam. Code §§ 6218, 6389.
[65] 430 Ill. Comp. Stat. 65/8(l), (m), 720 Ill. Comp. Stat. 5/12-3.2.
[66] Ind. Code Ann. §§ 35-47-4-6, 35-42-2-1.3.
[67] Iowa Code §§ 724.15(1), 708.11. See Iowa Code Chapter 708.
[68] Minn. Stat. §§ 624.713(i), 609.2242, 609.221, 609.222, 609.223, 609.224, 609.2247, 609.749, subd. 8.
[69] LCAV identified these states in the course of a survey of domestic violence laws in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. We have not completed an exhaustive survey of state law on this topic.
[70] 430 Ill. Comp. Stat. 65/8(l), (m).
[71] 720 Ill. Comp. Stat. 5/12-3.2.
[72] States that prohibit persons with juvenile convictions from purchasing some or all firearms include: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma,

4. Other Categories of Prohibited Persons Under State Law: Among the other categories of prohibited persons under state laws are prohibitions on misdemeanor offenders and persons who abuse alcohol. Twenty-six states prohibit possession of firearms by persons convicted of certain designated misdemeanors.[73] Twenty states prohibit persons who are alcohol abusers and/or offenders from purchasing firearms.[74]

B. Enforcement of Prohibited Purchaser Provisions and Background Check System

Just as states have enacted laws to close loopholes in the prohibited purchaser provisions, states also have passed laws to close loopholes in the enforcement of these provisions via the background check system. Examples of state laws closing the private sale loophole, expanding access to state mental health records, and addressing default proceeds and other loopholes, are outlined below.

1. *Private Sale Loophole:* The most comprehensive approach to ensuring that sales are only made to eligible purchasers is through a requirement for universal background checks prior to all firearm transfers. Two states, California[75] and Rhode Island[76] require that, prior to any firearm transfer, a licensed dealer or law enforcement agency conduct a background check on every prospective firearm transferee. Maryland requires a background check on every prospective transferee of certain "regulated firearms" (defined as handguns and assault weapons),[77] and Connecticut[78] and Pennsylvania[79] require background checks on all prospective handgun purchasers. (In Pennsylvania, all handgun transfers must be processed through a licensed dealer.)

In Delaware, Nevada and Oregon, private sellers are not required to conduct background checks on purchasers (except, in Oregon, at gun shows), but they may request a background check of the purchaser. In Delaware, the seller may make a request to a licensed dealer, who must facilitate the transfer.[80] In Nevada[81] and Oregon[82], the seller may make a request to the relevant state agency, which must process the request.

Oregon, Pennsylvania, Utah, Virginia, Washington and Wisconsin. Bureau of Justice Statistics, U.S. Department of Justice, *Survey of State Procedures Related to Firearm Sales, supra* note 5, at 75.

[73] States that prohibit possession of some or all firearms by persons with certain misdemeanor convictions include: California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and West Virginia. *Id.*

[74] States that restrict access to firearms by alcohol abusers include: Alabama, Alaska, Delaware, Florida, Hawaii, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and West Virginia. *Id.*

[75] Cal. Penal Code §§ 12072(d), 12082.

[76] In Rhode Island, the background check requirement does not apply to persons licensed to carry a concealed handgun. R.I. Gen. Laws §§ 11-47-35, 11-47-35.2.

[77] Md. Code Ann., Pub. Safety §§ 5-124, 5-130(j).

[78] Conn. Gen. Stat. § 29-33(b), (c).

[79] 18 Pa. Cons. Stat. Ann. §§ 6111(c), 6111(f)(1), (2).

[80] Del. Code Ann. tit. 24, § 904A.

[81] Nev. Rev. Stat. § 202.254.

[82] Or. Rev. Stat. § 166.346.

Five states (Colorado, Connecticut, Illinois, New York and Oregon) require background checks on all transfers at gun shows. Colorado,[83] Connecticut,[84] New York[85] and Oregon[86] require that a licensed dealer or law enforcement agency perform a background check prior to any firearm transfer at a gun show. Illinois requires unlicensed sellers at gun shows to request the Department of State Police to conduct a background check on the prospective recipient of a firearm.[87]

2. *Limitations on Access to State Mental Health Records:* Although persons who have been adjudicated as mental defectives or involuntarily committed to mental institutions are prohibited by federal law from possessing firearms, the current status of the FBI databases makes it difficult to prevent such persons from obtaining firearms if they undergo only an FBI background check. As discussed above, that is because a great deal of information about mentally ill people is not reported to the FBI and the FBI does not currently have access to mental health records that are maintained by the states.

POC states can conduct more thorough background checks than those performed by the FBI because states can access their independent criminal history databases in addition to databases maintained by NICS.[88] Accordingly, the FBI is encouraging more states to serve as state POCs, and is also encouraging states that are unwilling to serve as POCs to provide more complete records to the NICS system.[89]

Currently, thirteen states serve as POC states for all firearm transfers.[90] Seven states (Iowa, Michigan, Nebraska, New Hampshire, North Carolina, Washington and Wisconsin) use a state or local POC for handgun background checks only, using the FBI for background checks on long gun transfers.[91] Maryland is a POC state for background checks on handgun and assault weapon purchases.[92] The remaining twenty-nine states and the District of Columbia process all background checks through the FBI.[93]

Several POC states search state mental health records as part of their background checks.[94] However, unless these states also require reporting of mental health

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[83] Colo. Rev. Stat. §§ 12-26.1-101 – 12-26.1-108.
[84] Conn. Gen. Stat. §§ 29-37g.
[85] N.Y.Gen. Bus. Law §§ 895 – 897; N.Y. Penal Law § 400.00.
[86] Or. Rev. Stat. §§ 166.432 – 166.441.
[87] 430 Ill. Comp. Stat. 65/3, 65/3.1.
[88] *NICS Operations Report, supra* note 7, *at* 5.
[89] *Id.*
[90] POC states for all firearm transfers are: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Nevada, New Jersey, Oregon, Pennsylvania, Tennessee, Utah and Virginia. Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice, *Permanent Brady State Lists* (July 28, 2005), *at* http://www.atf.gov/firearms/bradylaw/072805bradystatelist.pdf.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] POC states that search state mental health records as part of their background checks include California, Connecticut, Hawaii, Illinois, Michigan, Nebraska, New Jersey, Oregon, Pennsylvania, Utah, Virginia, Washington and Wisconsin. *Survey of State Procedures Related to Firearm Sales, supra* note 5, at 81, 84.

information, a search may not provide complete information. Federal law does not require that states send criminal and mental health records to the FBI for inclusion in the NICS database.[95] Some states have enacted laws requiring that all records relevant to the Brady Act be timely forwarded to the state POC database, if applicable, and to the NICS database.

States that require the reporting of mental health information to state and/or federal databases include Alabama, California, Colorado, Utah, and Virginia.

Alabama requires judges who enter final orders for involuntary commitment for inpatient treatment to the Department of Mental Health and Mental Retardation or a Veteran's Administration hospital, to forward such orders to the state's Criminal Justice Information Center. The Criminal Justice Information Center must enter the information into NICS.[96]

In California, courts must immediately report to the state Department of Justice when they adjudicate someone to be a danger to others as a result of a mental disorder or mental illness, a mentally disordered sex offender, not guilty of a crime by reason of insanity, or mentally incompetent to stand trial.[97] Mental health facilities must immediately report to the state Department of Justice whenever a person is taken into custody and determined to be a danger to him or herself or others or has been certified for intensive treatment.[98] Similarly, any court that places a person under a conservatorship because the person is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism must report this information to the state Department of Justice.[99] Licensed psychotherapists also are required to report to local law enforcement the identity of a person who communicates a serious threat of physical violence against a reasonably identifiable victim or victims.[100]

In Colorado, court clerks are required to report periodically to NICS the name of each person determined by the court to be: incapacitated; committed to the custody of the Division of Alcohol and Drug Abuse in the Department of Human Services; ordered for involuntary certification for short-term treatment of mental illness; ordered for extended certification for treatment of mental illness; or ordered for long-term care and treatment for mental illness.[101]

In addition, Ohio accesses information regarding involuntary commitments only for purposes of concealed handgun license applications. *Id.*

[95] According to an FBI press release dated April 9, 2007, the following 22 states voluntarily contribute mental health records to NICS: Alabama, Arizona, Arkansas, California, Colorado, Florida, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, Virginia, Washington and Wyoming. *See also* page 6 and note 28, *supra.*

[96] Alabama's requirement applies only to commitment orders based on evidence that the person has a history of the inappropriate use of firearms or poses a threat to use firearms inappropriately. Ala. Code § 22-52-10.8.

[97] Cal. Welf. & Inst. Code §§ 8103(a)(2), (b)(2), (c)(2), (d)(2).

[98] *Id.*, §§ 8103(f)(2), (g)(2).

[99] Id. § 8103(e)(2).

[100] Cal. Welf. & Inst. Code § 8100(b), § 8105(c).

[101] Colo. Rev. Stat. §§ 13-5-142, 13-9-123.

In Virginia, court clerks are required to certify and forward a copy of all court orders requiring involuntary commitment of an individual, or containing a finding that an individual is incapacitated, to the Department of State Police. The Department of State Police is then authorized (but not required) to forward this information to the FBI for inclusion in the NICS database.[102] However, Virginia law only requires mental health records that would disqualify a purchaser under *state* law be sent to the state criminal history database.[103] Therefore, as discussed previously, in the Virginia Tech incident, the record of the proceeding deeming Mr. Cho to be an imminent danger to himself was not forwarded to the state database (or to NICS) and his status as a prohibited purchaser under federal law was not revealed during either of the two background checks he passed.[104]

Utah requires magistrates and court clerks to report all orders of civil involuntary commitment and judgments of "guilty and mentally ill" and "not guilty by reason of insanity" to the state's Criminal Investigations and Technical Services Division of the Department of Public Safety, which maintains criminal records.[105]

3. Default Proceeds: The problem of default proceeds arises in cases where a background check cannot be completed within three business days due to incomplete information. Inadequate access to state records is one likely cause of an incomplete background check. The previous section discusses state law approaches to limitations on access to state records.

In addition to addressing the problem of default proceeds through improved access to state records, several states have taken measures to extend the time allowed for completion of a background check so that firearms cannot be transferred by default when a background check cannot be completed within three days. Examples of states that have taken action to prevent firearms from being transferred by default include: California, Colorado, Georgia, New Jersey, Washington and Wisconsin.

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[102] A 2002 Virginia Attorney General Opinion determined that the Department of State Police is authorized to provide mental health information to the FBI so long as the information is kept confidential and used only to determine a person's eligibility to possess, purchase or transfer a firearm. Op. Att'y Gen. Va. 01-062 (Apr. 4, 2002).

[103] Va. Code Ann. § 37.2-1014 requires the clerk of the circuit court to certify and forward to Virginia's Central Criminal Records Exchange a copy of any order adjudicating a person incapacitated (as defined by state law) and section 37.2-819 requires the clerk to certify and forward a copy of any order for involuntary admission to a mental health facility. Mr. Cho was not deemed incapacitated as defined by state law and his treatment was outpatient in nature.

[104] Note that Virginia Governor Timothy Kaine issued Executive Order 50 on April 30, 2007 directing all executive branch employees to consider outpatient treatment as "involuntary admission to a mental health facility" for purposes of VA. Code Ann. § 37.2-1014. The Order further directs law enforcement to include records of involuntary outpatient as well as inpatient care in the state database and forward such records to federal law enforcement.

[105] *Utah Code Ann. § 53-10-208.1.*

In California, all firearm transfers are subject to a 10-day waiting period.[106] If the background check information received is incomplete, preventing the background check from being approved or denied within the 10-day period, the California Department of Justice (DOJ) may notify the dealer of that fact.[107] The DOJ interprets this provision to allow (but not require) DOJ to notify the dealer to delay the transfer until the background check can be completed.

Colorado law permits the state to deny a prospective purchaser's application if the background check cannot be completed within the 3-day default period. Colorado provides that an application must be denied in cases in which there has been no final disposition or the final disposition is not noted in the NICS or state databases, where the applicant: (1) has been arrested for or charged with a crime that would prohibit him or her from purchasing, receiving, or possessing a firearm under state or federal law; or (2) is the subject of an indictment, an information, or a felony complaint alleging that the prospective transferee has committed a crime punishable by imprisonment for a term exceeding one year as defined in 18 U.S.C. § 921(a)(20).[108]

In Georgia, when a background check identifies the existence of a criminal record that is not immediately available to determine the eligibility of the applicant, the dealer may not transfer the firearm until he or she is advised by the state that the purchaser is not prohibited.[109]

In New Jersey, retail firearms dealers may not deliver a handgun to any person unless the person possesses a valid permit to purchase a handgun and at least seven days have elapsed since the date of application for the permit.[110] The time period to obtain the permit itself can be as long as 30 days (45 days for non-residents)[111] while the permit application is processed.[112]

Washington allows five days to complete a background check on prospective handgun purchasers. However, if records indicate that a prospective purchaser has an arrest for a potentially disqualifying offense, a hold may be placed on the transaction for up to 30 days, pending receipt of information on the disposition of the arrest. After 30 days, if the disposition still cannot be verified, the hold may be extended by a judicial order on a showing of good cause.[113]

In Wisconsin, if the background check indicates a felony charge without a recorded disposition, the state's 48-hour waiting period for handgun purchases is extended to the

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[106] Cal. Penal Code §§ 12071(b)(3)(A), 12072(c)(1), 12084(d)(7)(A).
[107] Cal. Penal Code § 12076(d)(4), (5).
[108] This provision has a sunset clause and will be automatically repealed July 1, 2010, unless renewed. Colo. Rev. Stat. § 24-33.5-424(3)(b).
[109] Ga. Comp. R. & Regs. 140-2-.17(2).
[110] N.J. Rev. Stat. § 2C:58-2a(5)(a).
[111] N.J. Rev. Stat. § 2C:58-3f. Note that federally licensed dealers may not sell handguns to out-of-state residents. See 18 U.S.C. § 922.
[112] N.J. Stat. Ann. §§ 2C:58-2a(5)(a), 2C:58-3i, 2C:58-3f.
[113] Wash. Rev. Code Ann. § 9.41.090(3), (4).

end of the third complete working day commencing after the day on which the finding is made. The Department of Justice must notify the firearms dealer of the extension as soon as practicable. During the extended period, the Department of Justice is required to make every reasonable effort to determine the disposition of the charge and notify the firearms dealer of the results as soon as practicable.[114]

4. Other Loopholes

a. Destruction of Background Check Records: Although most state laws are silent with respect to the retention of background check records,[115] ten states (Alabama, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania and Washington) require sellers to report firearm sales information identifying the purchaser and firearm purchased to law enforcement.

Connecticut[116] and Massachusetts[117] maintain records submitted by dealers of all firearm transactions. Massachusetts also retains sales records for all firearms reported by private sellers,[118] and Connecticut retains handgun sales records reported by private sellers.[119]

Alabama,[120] California,[121] Michigan,[122] New Jersey[123] and Washington[124] retain records of all handgun sales reported to state law enforcement by licensed dealers. In California, all firearm transfers must be conducted through licensed dealers, thereby ensuring that sales reporting requirements will include private sales. California retains reports of handgun sales.

Maryland retains records of transfers of "regulated firearms," which are defined as handguns and assault weapons.[125] In New York, every licensed firearms dealer must keep a record of handgun, short-barreled rifle and shotgun, and assault weapon sales, copies of which are delivered to and retained by the New York State Police.[126] Pennsylvania maintains records of handgun sales and sales of rifles and shotguns with

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[114] Wis. Stat. §§ 175.35(2)(d), 175.35(2g)(c)4.c.
[115] Note that nine states are required by state law to purge background check records after a short time period. These states are: Delaware, Florida, Nebraska, New Hampshire, Rhode Island, Tennessee, Utah, Virginia, and Wisconsin.
[116] Conn. Gen. Stat. §§ 29-33(e), 29-37a(b).
[117] Mass. Gen. Laws ch. 140, §§ 123, 128B.
[118] *Id.*
[119] Conn. Gen. Stat. § 29-33(e). In addition, Oregon statutes provide that the state *may* retain records of firearm transactions reported by dealers for up to five years. Or. Rev. Stat. §§ 166.412, 166.434.
[120] Ala. Code § 13A-11-79.
[121] Cal. Penal Code §§ 11105, 11106(c).
[122] In Michigan, sales that must be reported are those to concealed weapons license holders. Mich. Comp. Laws § 28.422a.
[123] N.J. Stat. § 2C:58-2e.
[124] Wash. Rev .Code Ann. § 9.41.110(9).
[125] Md. Code Ann., Pub. Safety §§ 5-101(p), 5-123(d), 5-124.
[126] N.Y. *Penal* Law §§ 265.00(3), 400.00(12).

specified dimensions.[127] Maryland and Pennsylvania also retain records of private transfers of the specified firearms.

These state statutes do not specify the length of time law enforcement must retain the records.

b. *Exemption for State Permit Holders:* ATF has identified 20 states that issue permits to acquire or possess firearms that qualify for the background check exemption provided at 18 U.S.C. § 922(t)(3).[128] Although some of the remaining states do not issue permits that qualify under federal law, others, such as California, have chosen not to request approval by ATF, even though permits issued by the state would qualify for an exemption.[129] In choosing not to seek this exemption, these states are ensuring that background checks will be conducted on all prospective purchasers as required under federal and state law.

C. Challenges to Enforcement of State Prohibited Purchaser Provisions and Background Check Procedures

As detailed above, states have taken a variety of steps to close loopholes in federal prohibited purchaser provisions, and to strengthen their background check procedures to reduce the risk that prohibited persons will obtain access to firearms. However, these states still face obstacles to full and effective enforcement of their laws because states are limited to the data that is available through their state databases (in the case of POC states) and NICS. Out-of-state information is available only through NICS. If states do not send complete records to NICS, then out-of-state records will be unavailable to a requesting state or dealer. If an individual changes his or her state of residence and then applies to purchase a firearm, any disqualifying information from the prior state of residence cannot be discovered unless all records are reported to NICS.

IV. NICS Improvement Act (H.R. 297)

A bill currently pending before the U.S. House of Representatives, the NICS Improvement Act (H.R. 297, McCarthy), would provide financial incentives for state officials to send all relevant records, including those pertaining to mental health, to the NICS system and to their own state databases, in a timely manner. The bill would also require federal agencies and departments regularly to submit relevant records to NICS, require the Attorney General to work with states to help improve their data systems, and require study and evaluation of the NICS system and reporting of best practices for record collection and transmittal.

If enacted into law, the provisions of H.R. 297 would fill some of the gaps identified above in enforcing federal and state prohibited purchaser provisions. It is likely that the

[127] 18 Pa. Cons. Stat. Ann. § 6111(b)(1).
[128] Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice, "Permanent Brady Permit" Chart (July 17, 2006), at http://www.atf.gov/firearms/bradylaw/permit_chart.htm.
[129] Telephone interview with California Department of Justice, Firearms Division, (May 7, 2007).

bill would significantly increase submission of state records to NICS and state databases. Unfortunately, even if the bill became law, submission of records would remain voluntary and, likely, incomplete. The bill may have marginal effect on the default proceeds problem, and would have no effect on the private sale, destruction of records or firearms permit exception loopholes described above.

Mr. KUCINICH. Thank you very much, Ms. Thomas.

STATEMENT OF PAUL HELMKE

Mr. HELMKE. Thank you, Chairman Kucinich, Ranking Member Issa, Congressman Davis and fellow Hoosier, Congressman Burton, Mr. Bilbray.

I come to you as the recipient of two NRA marksmanship awards from grade school, a lifelong Republican, born and raised in Indiana, where as you indicated, I was the mayor of Fort Wayne for three terms.

I am also here as the president of the Brady Campaign and Brady Center to Prevent Gun Violence, the Nation's largest organizations working for reasonable gun policies.

I don't see a contradiction. The proposals I recommend are common sense, simply common sense. They should appeal to most Americans across party and geographic lines and can help make our communities safer. I have submitted my written testimony, so I will just address a few points quickly here.

We have an epidemic of gun violence in this country. Every year in America, almost 30,000 people are killed by gunfire, 10 times the death toll of 9/11. About 32 people are murdered every day with guns. That is a Virginia Tech massacre every day in this country. And for every death, there is another two or three people that are seriously wounded.

In recent years, violent gun crime has spiked, increasing almost 50 percent from 2004 to 2005, the largest increase in 14 years. What are we going to do about it?

What we are doing now to prevent gun violence clearly is not working. We need to plug the lethal loopholes in our laws. There are many things we should do, but let me just touch on a few.

No. 1, we need to make sure that the Brady background system is effectively applied. The Virginia Tech killer was prohibited from buying guns under Federal law, since a court had found him to be a danger to himself or others as a result of mental illness. Unfortunately, Virginia did not provide such orders to their State police, so the killer passed a background check and bought his guns. Effective Brady background checks with access to all relevant records would have stopped those sales.

According to the FBI, in 28 States, no relevant mental health orders are made available for background checks, so many people can buy guns, even though they are prohibited by Federal law. We need to close that lethal loophole.

The NICS Improvement Act, introduced by Carolyn McCarthy as H.R. 297, is a necessary step. This legislation would provide grants and other incentives to encourage States to forward all relevant records on people prohibited from possessing firearms to the Federal National Instant Criminal Background Check System. Had it been law, the Virginia Tech shooting may have been averted.

Now, there has been a great deal of misinformation about the effect of gun laws on those being treated for mental illness. I would like to set the record straight. Under existing Federal law, you will not be denied a gun simply because you have sought treatment for or been diagnosed with a mental illness. Existing Federal law prohibits from buying guns only those mentally ill persons who have

been adjudicated by a "lawful authority," such as a court, to be a danger to themselves or others as a result of mental illness, who lack the mental capacity to manage their own affairs, as well as persons who have been involuntarily committed to a mental institution.

Further, no one accesses your medical records in a background check. The only records entered into the Federal or State data bases are relevant court or other orders indicating that you fall into a prohibited category. When anyone is denied a gun purchase because they fail a background check, the gun dealer simply gets back a "denied" message, with no information as to why the person is denied.

So Federal gun laws create no disincentive for people to seek mental health treatment or obtain a diagnosis. But the Virginia Tech massacre provides another reminder that those who are dangerous because of mental illness should not be allowed to buy guns.

Second point I want to address: we must be sure that no guns are sold without a background check. As Congressman Davis pointed out, incredibly, current Federal law allows people without a Federal license to sell guns without a background check, so long as the seller is not "engaged in the business" of selling guns and the buyer is from the same State. We need to close this loophole by passing the Gun Show Loophole Closing Act of 2007, introduced as H.R. 96 by Representative Castle from Delaware, co-sponsored by Representatives McCarthy and Shays.

No. 3, we must give law enforcement the tools and resources it needs to fight gun crimes, including illegal gun trafficking and corrupt gun dealers. Studies have shown, as you indicated, Mr. Chairman, that 1 percent of gun dealers sell almost 60 percent of crime guns. Yet we tie law enforcement's hands. We put blinders on them and we give special protections to corrupt gun dealers who supply these criminals.

Law enforcement must have all the information it needs. Congress must eliminate appropriation riders to ATF's budget, the so-called Tiahrt amendment, that shields important gun data and makes it uniquely exempt from the Freedom of Information Act. We need to eliminate other restrictions that make it harder for law enforcement to crack down on corrupt dealers. Law-abiding gun dealers do not need special protections, and corrupt dealers don't deserve them. There are a number of other loopholes that we hope will be addressed in the future: the fact that there is no limit on the amount of guns you can buy and the size of the arsenal you stock, the fact that the terrorists can be on the terrorist watch list and they are not prohibited from purchasing guns currently, the fact that weapons of war are often available for purchase.

But all the loopholes we have been talking about today are law and order proposals. They will not prevent law-abiding citizens from having guns in their home if they choose; they will not cost a single sportsman a day of hunting season. They are supported by law enforcement and by most Americans.

Too many of our neighbors are experiencing the same pain experienced by the Virginia Tech victims and their families every day. I ask Congress what we should all be asking: what are you going to do about it?

Thank you for having this hearing. Thank you for addressing the issue. You show that you are not silent on guns, and I appreciate that. Thank you.

[The prepared statement of Mr. Helmke follows:]

Paul Helmke
President, Brady Campaign & Center to Prevent Gun Violence

Domestic Policy Subcommittee
Oversight and Government Reform Committee,
Hearing On
"Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws"
2154 Rayburn HOB – 2:00 P. M.
May 10, 2007

Thank you, Chairman Kucinich, Ranking Member Issa, and other Members of the Subcommittee.

Let me introduce myself.

I come to you as the recipient of two NRA marksmanship awards, a lifelong Republican, born and raised in Indiana, where I was the Mayor of Fort Wayne for three terms.

And as President of the Brady Campaign and Brady Center to Prevent Gun Violence, the nation's largest organizations working for reasonable gun policies.

There is no contradiction here. The proposals I recommend are simply common sense. They appeal to solid majorities of Americans, across party and geographic lines, and can help make our communities safer.

We have a problem with gun violence in this country.

In fact, it's a crisis. If you talk to public health folks, they will tell you that the gun violence problem in America fits the definition of an epidemic.

The shootings at Virginia Tech have brought the issue of gun violence back to the nightly newscasts, just as the Amish schoolhouse shootings at Nickel Mines did six months ago, and Columbine did eight years ago and so many horrific shootings did before and in between. We need to learn from those horrible episodes to see how we can prevent them. But I urge you to also learn from the gun violence that occurs every day in America, that doesn't make the news. Let's work to prevent those tragedies as well.

Every year in America almost 30,000 people are killed by gunfire.[1] That's 10 times the death toll of 9-11, every year. That's 80 people killed every day. Some are homicides, some suicides, some unintentional shootings. About 32 are murdered every day with guns.[2] That's a

[1] Centers for Disease Control and Prevention, WISQARS Injury Mortality Reports, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sv.html (average annual gun deaths for the years 2000-2004 is 29,637).
[2] *Id* (average annual firearm homicides for the years 2000-2004 is 31.51).

Virginia Tech massacre every day on our streets and in our homes. Since the wars in Afghanistan and Iraq have begun, where about 3,700 American soldiers and Marines have died, over 162,000 American citizens have died here at home from gunfire. And for every death, another two or three are wounded.

In the decade from 1996 to 2005 there were almost 5 million violent crimes committed with guns in this country – about 136 violent gun crimes a day.[3] And in the last couple of years violent gun crime has spiked up again. From 2004 to 2005, violent gun crime increased almost 50%, the largest increase in 14 years.[4]

What are we going to do about it?

After the Virginia Tech shootings, the NRA's chief, Wayne La Pierre, said: "we just don't think it's really gun control to try to keep guns out of the hands of criminals and the mentally defective."[5] I guess it depends on what the meaning of "gun control" is, but it appears we are all in agreement that we should do more to keep guns out of the hands of dangerous people.

What we are doing now to prevent gun violence clearly isn't working. We can do better. We must. We need to plug the lethal loopholes in our laws.

There are many things we should do to prevent gun violence. Let me focus on just three things for purposes of this hearing:

Number One – We must make sure that the Brady background check system is effectively applied, so no one who is prohibited from buying guns can buy one.

The Virginia Tech killer was prohibited from buying guns under federal law, as a court had found him to be a danger to himself or others as a result of his mental illness. The 1968 Gun Control Act classifies such people as having been adjudicated as a "mental defective," and prohibits them from buying guns. The Act also prohibits from buying guns those committed to a mental institution. Virginia had a procedure which provided commitment orders to the state police for background checks, but dangerousness findings – that someone is "mentally defective" under the law – were not made available. As a result, the killer was able to pass a background check and buy his guns. Effective Brady background checks, with access to all relevant records that show whether purchasers are prohibited from buying, would have stopped the sale.

We need to close this lethal loophole. We must make sure that people who have been deemed too dangerous to buy guns cannot go into a gun store and walk out with a gun.

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[3] *See* U.S. Department of Justice ("DOJ"), Bureau of Justice Statistics, *Non-fatal firearm-related violent crimes, 1993-2005*; DOJ, Bureau of Justice Statistics, *Homicide Trends in the U.S.*

[4] *Id.*

[5] Michael Isikoff, *Taking Aim at Mental Health Records*, NEWSWEEK ONLINE, April 24, 2007, http://www.msnbc.msn.com/id/18298126/site/newsweek/.

In the wake of Virginia Tech, there has been a great deal of misinformation about who is prohibited from buying guns, and what records are accessed by background checks. I would like to set the record straight. I have heard some people express concern that if you seek treatment for mental illness you may be denied a gun, and your medical records may be accessed by police or gun dealers. That is simply incorrect. Existing federal law prohibits from buying guns those mentally ill persons who have been adjudicated, by a "lawful authority" such as a court, to be a danger to themselves or others as a result of mental illness, or to lack the mental capacity to contract or manage their own affairs, as well as persons who have been involuntarily committed to a mental institution. Under federal law, merely seeking treatment for a mental illness, or being diagnosed with a mental illness, or being voluntarily committed to a mental institution, does not disqualify a person from buying a gun.

Further, in a background check, no one gains access to your medical records. The only relevant records entered into the federal or state databases are court or other orders committing someone involuntarily to a mental institution, and orders finding someone dangerous because of mental illness, or mentally incapacitated. And when anyone is denied a gun purchase because they fail a background check, the gun dealer gets back just a "Denied" message, with no information as to why the person was denied. Federal gun laws create no disincentive for people to seek mental health treatment or obtain a diagnosis.

The NICS Improvement Act, introduced by Rep. Carolyn McCarthy (D-NY) as H.R. 297, is a necessary step in the right direction. This legislation would provide grants and other incentives to encourage states to forward all relevant records on people prohibited from possessing firearms to the federal National Instant Criminal Background Check System. It would provide incentives for states to make available to NICS mental health commitment orders, relevant adjudications of dangerousness, as well as domestic violence restraining orders and other criminal records that indicate that a person is legally prohibited from buying guns. Had it been the law, the Virginia Tech shooting may have been averted.

While the NICS Improvement Act is an important step toward preventing prohibited persons from obtaining guns, more is needed. The fact that Virginia provided one category of relevant mental health orders (commitment orders) to the state police, but did not provide the other category (dangerousness findings) suggests that Virginia officials may not have understood or appreciated that federal law prohibits *both* categories of mentally ill persons from buying guns. And Virginia is one of the *better* states in making mental health orders available for background checks; according to the FBI, in 28 states no relevant mental health orders are made available.[6] This means that people who have been committed or been found dangerous as a result of mental illness pass background checks, even though they are prohibited by federal law from buying guns.

The Department of Justice must work with the states to advise them about what classes of persons are prohibited from buying guns, and must stress the importance of making relevant records available for background checks. Since the Virginia Tech shootings, Governor Kaine has tried to address the problem through executive order, mandating that additional relevant

[6] *Response to Inquiries on the FBI's National Instant Criminal Background Check System*, FBI Press Release, April 19, 2007, http://www.fbi.gov/pressrel/pressrel07/nics041907.htm.

mental health orders be forwarded to the state police so they are available for Brady background checks. The federal government should assist other states to take similar actions.

Number Two – We must make sure that no guns are sold without a background check, so no one who is prohibited from buying guns can buy one.

While we need to make sure that licensed gun dealers do not sell guns to prohibited purchasers such as the Virginia Tech killer, we also must make sure that such dangerous people cannot obtain guns through other sources. The sad fact is, even if Virginia made all relevant mental health records available for the Brady background check, and the shooter has been denied a gun by licensed gun sellers, he could have gone to an unlicensed seller at a gun show or elsewhere and purchased guns without a background check. Unless we require Brady background checks for the sale of *all* guns, the improvements to the background check system may be undercut by "off the books," unlicensed sales.

The incredible fact is, under current federal law, we allow people to sell guns to criminals.

Let me explain. Under current federal law, there are two categories of gun sellers: licensed sellers, and unlicensed sellers. If you are "engaged in the business" of selling guns, you are required to have a federal firearms license, and you cannot sell a gun without a background check that determines if the purchaser is prohibited from buying guns.

But federal law allows people without a license to sell guns to others in their state without a background check, so long as the seller is not "engaged in the business." These unlicensed sellers are not required to check the background of the purchaser, and they are not required to keep any records.

Explain to me how that makes sense: Joe Helmke, licensed gun dealer, is not allowed to sell a gun unless the buyer undergoes a background check. But Paul Helmke, an unlicensed seller next door, can sell a gun to a criminal or an escaped mental patient, no questions asked, no background check, no paperwork.

This would be bad enough if people were allowed to make occasional sales of guns to criminals and other prohibited purchasers. But it's worse because there are "gun show cowboys" who turn up at gun shows month after month, selling guns without performing background checks on the purchasers, always claiming to be selling guns from their "private collection." Not that anyone is asking them. Criminals and other dangerous persons can flock to gun shows and other events, confident that there will be tables full of guns for sale by unlicensed sellers, without a background check. ATF doesn't have the resources or tools to investigate all of these sellers, and since the law allows unregulated, unlicensed "off the books" sales, gun show operators are not obligated by federal law to shut them down or monitor them.

Most gun owners are law-abiding people who already go through background checks when they buy guns and have no criminal record to hide. I think most would support a little red tape, if it helps to prevent some more yellow tape – at crime scenes. In fact, just last week I read

an op-ed in the Wilmington Delaware News-Journal by an NRA member, Bob Mitchell, who called for background checks on all gun sales.[7] As he said: "Since the sale can take place without background checks, an honest seller may not have this information about a buyer... and dishonest sellers can claim, after guns they sell are used in crimes, that they did not know the buyers were criminals."

Recall that the guns used by the killers at Columbine were bought from unlicensed sellers at gun shows. The teenaged girl who bought three of the killers' guns said she wouldn't have bought them if she had to undergo a background check.[8] Yet here we are, eight years later, and we have done nothing to stop these unregulated gun sales by unlicensed sellers.

Allowing unlicensed sellers to sell guns without a background check not only helps criminals, but it hurts legitimate gun dealers, who play by the rules, yet face competition from unregulated sellers.

We support the Gun Show Loophole Closing Act of 2007, introduced as H.R. 96 by Rep. Castle (R-DE), and cosponsored by Representatives McCarthy and Shays, who sits on this Subcommittee. This would require Brady background checks for guns sold at gun shows and similar events. This would plug one gaping loophole that enables criminals and other dangerous folks to get guns.

Number Three – We must give our police and federal law enforcement the tools and resources they need to fight gun crimes, including illegal gun trafficking and corrupt gun dealers.

We know how criminals get guns. But we don't give law enforcement the tools to stop them effectively.

Studies have shown that virtually every gun used in crime started out in the legal market. Criminals want new guns, and they get new guns, mostly from a small group of dealers. About 1 percent of gun dealers sell almost 60 percent of crime guns.[9] An ATF report issued in 2000 found that corrupt gun dealers, on average, trafficked over 350 guns each to the criminal

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[7] Bob Mitchell, *An NRA Member Willing To Compromise On Gun Control*, The News Journal (Wilmington, Delaware), April 30, 2007 at 7A, *available at* http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20070430/OPINION07/704300337/1108.

[8] Mike Soraghan, *Colorado After Columbine: The Gun Debate*, 6 State Legislatures 14, (2000), *available at* http://www.ncsl.org/programs/pubs/600gun.htm.

[9] Bureau of Alcohol, Tobacco and Firearms (ATF), *Commerce in Firearms in the United States* 2 (2000). *See also* Glenn L. Pierce, LeBaron Briggs & David A. Carlson, *The Identification of Patterns in Firearms Trafficking: Implications for Focused Enforcement Strategies, A Report to the United States Dep't of Treasury, Bureau of Alcohol, Tobacco and Firearms Office of Enforcement*, 12-13 (1995); Report of Sen. Charles E. Schumer, *A Few Bad Apples: Small Number of Gun Dealers the Source of Thousands of Crimes* (June 1999) (finding that 137 of the worst dealers accounted for 34,000 of crime guns over three years); Philip J. Cook and Anthony A. Braga, *Comprehensive Firearm Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277, 294 (2001).

market.[10] Among dealers inspected by ATF who had sold high numbers of guns traced to crime, 75% were found to have violated Federal firearms laws.[11]

We should be giving law enforcement all the tools it needs to crack down on corrupt dealers, to prevent them from continuing to supply dangerous people with guns. Instead, we tie law enforcement's hands, we put blinders on them, and we give special protections to corrupt gun dealers who supply criminals.

Current law does not allow the police to find out about the corrupt gun dealers who flood their cities' streets with guns. Trace data, showing what types of guns are used in crime and where they come from, used to be accessible to local law enforcement and the public. Localities were able to focus in on dealers who supplied local criminals; experts were able to analyze how and where criminals were getting guns, and whether ATF could do a better job. The data was covered by the Freedom of Information Act, like other government records. Under FOIA, information that needed to be kept confidential, because of a pending investigation, for example, was not disclosed.

We are not aware of a single investigation that was jeopardized or a single law enforcement officer whose safety was endangered by disclosure of this information. Nonetheless, Congress shielded this data from the public and law enforcement through appropriation riders to ATF's budget – the so-called "Tiahrt amendment" – making gun data uniquely exempt from FOIA and the general policy of openness in government. These restrictions should be eliminated.

Even corrupt dealers who violate gun laws are specially protected under the law. Instead of letting ATF operate as other law enforcement entities do, ATF is barred from conducting more than one unannounced investigation of any gun dealer each year. So after a dealer has been inspected once, he knows it's unlikely ATF will visit for another year. Further, current law prevents law enforcement from reviewing approved gun sales records, as most are destroyed within 24 hours. The U.S. Department of Justice, Office of the Inspector General, has found that "the shortened retention time will make it much easier for corrupt FFLs to avoid detection" and "will make it much more difficult for the ATF to prove that FFLs supplied false information."[12] The 24-hour destruction policy also makes it impossible for the FBI to review records to determine whether guns have been mistakenly sold to prohibited purchasers. Even FBI Director Mueller recently questioned whether gun records should be destroyed so quickly.[13]

It is also too difficult to stop corrupt gun dealers from continuing to sell guns, even after they have been found to violate gun laws. To revoke a gun dealer's license, ATF must meet an extraordinary burden of proof, higher than required even in most criminal cases. ATF must prove that a dealer "willfully" violated the law, requiring proof that the dealer not only broke the

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[10] ATF, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* x, 10-15 (June 2000).
[11] ATF, *ATF Regulatory Actions: Report to the Secretary on Firearms Initiatives* 20 (Nov. 2000).
[12] DOJ, *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives* 53 (July 2004).
[13] "Under Lautenberg Questioning, FBI Director Mueller Acknowledges Gun Data Should Be Retained For More Than 24 Hours," Press Release, April 26, 2007, http://lautenberg.senate.gov/newsroom/record.cfm?id=273190

law but also knew that his or her conduct was unlawful. Because of this standard, ATF generally requires repeated violations of the law over many years before it attempts to revoke a license. As a result, license revocations are exceedingly rare. In fiscal year 2003, ATF completed 1,812 inspections that uncovered regulatory violations, *with an average of over 80 violations per dealer*.[14] Despite this large number of dealers with multiple violations, ATF issued only 54 notices of license revocation that year.[15] Although revocations have recently increased, gun dealers have been able to violate the law and supply the criminal gun market for decades before finally losing their licenses.

Even after ATF has found that a gun dealer has violated the law and should have its license to sell guns revoked, that decision can be reviewed *de novo*, not giving the ATF's decision the customary administrative deference. And these corrupt gun dealers are allowed to continue to sell guns while their case is on appeal. In fact, gun dealers have been allowed to sell guns even after their licenses have been finally revoked.[16] We must stop allowing gun dealers who violate the law to continue to do so.

Law-abiding gun dealers do not need special protections that shield them from the law. And corrupt dealers don't deserve them.

Law enforcement should also be empowered with new technologies, such as microstamping and other ballistic identification systems, which might have allowed authorities to identify the Virginia Tech shooter earlier, before his second, most deadly, rampage.

We support the Anti-Gun Trafficking Penalties Enhancement Act, introduced on the Senate side by Senator Schumer as S. 77. This legislation would strengthen law enforcement by reinstating access to important crime gun trace data. It would also give ATF new tools to crack down on rogue gun dealers, and would require reporting of information on crime guns and stolen guns to ATF. It would also remove some of the artificial shackles now imposed on ATF by allowing inspection of gun dealers "at any time that the Attorney General may reasonably require." The bill also increases penalties for various gun crimes. It would be an important asset for law enforcement.

These are just some of the policies that we should implement to protect our families and communities from the scourge of gun violence.

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[14] DOJ, *Inspection of Firearms Dealers, supra note* 12, at 39.
[15] *Id.*
[16] *See, e.g.*, "Former Gun Dealer Faces Criminal Charges," WBAL-TV, (April 20, 2007), http://www.wbaltv.com/news/12638343/detail.html.

There are many more lethal loopholes in our gun laws, that we hope will be addressed in future hearings. These include the following:

- Current law enables gun traffickers and gangs to be supplied with arensals, placing no limit on the number of guns you can buy in a single purchase. Purchases of multiple guns, whether one hundred or one thousand or more, require only another form notifying ATF, but the guns are sold, and no additional questions are asked about why someone wants an arsenal. Not surprisingly, it is typically gun traffickers who want 10, 50, or 100 guns at a time, so they can stock their inventory to sell on the streets.

- Current law allows suspected terrorists, even if they are deemed too dangerous to fly on airplanes, to buy all the guns they want, as long as they have not been convicted of a felony or fall into another category of prohibited gun purchasers. We are pleased that Senator Lautenberg has recently introduced the Bush Administration's proposed legislation, S. 1237, to give the Attorney General discretion to deny such gun sales. This is an important start to closing this loophole.

- Current law allows weapons of war to be sold to the general public, making the means to commit massacres widely available. Uzis, AK-47s, fifty round magazines, and even fifty caliber sniper rifles that can shoot down airplanes and have a range of over a mile, are wholly legal for civilians to purchase under federal law.

These proposals should not be controversial.

The proposals I have discussed today are basic "law and order" policies. Most Americans across the country support them. Law enforcement supports them. They will not prevent law-abiding citizens from having a gun in their home, if they choose. They will not cost a single sportsman a day of hunting season. Plugging the lethal loopholes in our laws is simple common sense.

We have all heard from pundits who say that Congress is afraid to tackle the gun issue because guns are becoming a third rail of American politics. I reject that. As a lifelong politician, I think the most dangerous thing a political leader can do is ignore an issue that is important to the American people, or to do nothing when change is a necessity. After the Virginia Tech massacre especially, politicians ignore the gun crisis at their peril.

I began by mentioning my roots, a Republican from the heartland, from Fort Wayne, Indiana. I think that's important because sensible gun laws should not be supported by just one party, or one region, or just big cities, or whatever. Supporters of sensible gun laws have come from rural America, from the West, from the South, Republicans as well as Democrats. The common thread among them is they had the courage of their convictions, and the judgment to trust in the common sense of the American people.

What we are doing now about gun violence is not working. We can do better. Too many of our neighbors are suffering the same pain experienced by the Virginia Tech victims and families every day.

Thirty-two times a day.

I ask Congress what we should all be asking ourselves: What are you going to do about it?

Thank you very much.

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Mr. KUCINICH. Thank you, Mayor.
Mr. Feinblatt.

STATEMENT OF JOHN FEINBLATT

Mr. FEINBLATT. Good afternoon. Thank you, Mr. Chairman, Ranking Member Issa and distinguished members of the subcommittee.

I am here to talk about crime control, not gun control. As Mayor Michael Bloomberg's Criminal Justice Coordinator, I serve as the mayor's chief advisor on criminal justice policy. Controlling crime is my chief concern, and I can assure you that it is an absolute top priority for the mayor.

I am proud today to represent a city that has made enormous strides combatting crime. According to the FBI, New York City is the safest big city in America. In New York City, the crime rate has dropped 21 percent since Mayor Bloomberg took office. Already this year, homicides are down 23 percent compared to the same period last year, and shooting incidents are down 16 percent.

Unfortunately, the national crime story isn't so bright. After years of decline, crime rates are now on the rise across the country. A recently released study by the Police Executive Research Forum shows that homicides are up 20 percent while aggravated assault with a firearm has increased by 30 percent since 2004. This alarming trend is one of the reasons why mayors across the country are working together to combat the flow of illegal guns into their cities.

One year ago, in April 2006, Republican Mayor Michael Bloomberg and Democratic Mayor Tom Menino of Boston invited 13 mayors to join in a conversation about the scourge of illegal guns. That initial group of 15 mayors has grown into the Mayors Against Illegal Guns Coalition, comprised of more than 225 mayors from more than 40 States, representing over 50 million people. At the Federal level, this coalition has one priority and one priority only: to repeal the Tiahrt Amendment restrictions on crime gun trace data.

Let me be clear about what data we are talking about here, because this data is about only one thing, and that is guns recovered in crimes. It is not about any sort of wholesale access to the sale records of lawful gun owners.

Why do mayors oppose the Tiahrt Amendment? It is simple. Their police chiefs are telling them that the Tiahrt Amendment makes them do their jobs with a blindfold on. Despite the lessons we learned on the tragic days surrounding September 11th, the Tiahrt Amendment prevents police from connecting the dots.

There are four principal restrictions of the Tiahrt Amendment. One, it restricts access to aggregate crime gun data, which means cities can't look at trends and patterns. Two, it blocks access to data from other cities and States, which means the police can't get a regional picture of where the illegal guns are flowing from. Three, it prevents cities from using gun trace data to hold accountable the few dealers who break the law. And four, it stops the ATF from producing national reports, which prevent all of us from getting a full picture of how guns move into the illegal market. This makes no sense.

Every year, Congress has made the Tiahrt Amendment more and more restrictive. This year, the Justice Department and the White House seem determined to make these restrictions even worse. As Mayor Bloomberg wrote to Attorney General Gonzalez on May 3rd of this year, "Your Justice Department has submitted an appropriations request to Congress that not only largely retains the Tiahrt language, but makes it even worse, adding provisions that would require police officers to certify the reasons for their use of trace data, which could result in criminal prosecutions of police officers."

The gun lobby has put forward two main talking points in an attempt to support its defense of the Tiahrt Amendment. Neither stand up. First, they claim that the restrictions protect undercover law enforcement officers. But they have not documented a single case of an undercover officer being exposed by the release of trace data prior to the enactment of the Tiahrt Amendment.

Second, they argue it will subject gun dealers to undue harassment. But the truth is that 85 percent of dealers have no crime gun traces in a given year and as you have heard before, 1 percent of the dealers account for nearly 60 percent of the traces.

Our coalition of 225 mayors knows the gun lobby's claims are false, and so do the 10 national law enforcement organizations, the more than 20 State and regional law enforcement organizations and the more than 185 individual law enforcement executives who have written to Congress to oppose the Tiahrt Amendment. Some ask, why are the mayors taking the fight against illegal guns into their own hands? It is because the Federal Government has so clearly dropped the ball.

By their own admission, ATF is not up to the task. According to the Department of Justice Inspector General, in fiscal year 2002, ATF revoked or refused to renew just 2.8 percent of the licenses of dealers who were found to have violations, even though those dealers had an average of 70 violations each. And just 3 days ago, ATF's chief public affairs officer told Time Magazine that at the current rate of inspections, it would take 17 years to inspect all existing licensed firearm dealers.

It is the Federal Government's failure to enforce the laws on the books that has forced New York City and others to act. Ninety percent of guns recovered in crimes in New York City come from out of State. That is why New York City initiated lawsuits against 27 gun dealers from 5 States last year. In each of these 27 cases, we sent in undercovers and caught the dealers in the act of completing illegal "straw" purchases. I am pleased to report that 12 of the 27 dealers have now settled out of course, and agreed to unprecedented oversight of their firearms sales.

Having spoken to countless mayors, countless prosecutors and countless police, there is only one way to interpret what Congress did when it enacted the Tiahrt Amendment: it chose to protect the privacy of criminals over the lives of police officers. If this Congress is serious about getting tough on crime, then it will repeal the Tiahrt restrictions and help State and local enforcement combat illegal guns.

Thank you.

[The prepared statement of Mr. Feinblatt follows:]

Statement of John Feinblatt
Criminal Justice Coordinator for the City of New York
Before the United States House of Representatives
Domestic Policy Subcommittee
Oversight and Government Reform Committee,
2154Rayburn HOB – 2:00 P. M.
May 10, 2007

Thank you, Mr. Chairman, Ranking Member Issa, and distinguished Members of the Subcommittee for inviting me here to testify.

I am here to talk about crime control – not gun control. As Mayor Michael Bloomberg's Criminal Justice Coordinator, I serve as the Mayor's chief advisor on criminal justice policy and as a liaison to local, state, and federal law enforcement agencies. Controlling crime is my chief concern – and I can assure you it is also a top priority for Mayor Bloomberg.

CRIME TRENDS IN NEW YORK CITY AND NATIONWIDE

I am proud today to represent a city that has made enormous strides combating crime. According to the FBI, New York City is the safest big city in America. In New York City, the crime rate has dropped 21% since Mayor Bloomberg took office. Already this year, homicides are down 23% compared to the same period last year and shooting incidents are down 16%. We are committed to leaving no option off the table when it comes to keeping our police officers and our citizens safe.

Unfortunately, the national crime story is not so bright. After years of decline, crime rates are now on the rise across the country. A recently released study of a sample of cities by the Police Executive Research Forum shows homicides are up 20%, while aggravated assault with a firearm has increased by 30% since 2004.

One reason New York City has escaped that troubling national trend is the way we do our policing. It is data-driven, using a system called CompStat that compiles the latest information to pinpoint problems, allowing police to respond quickly and effectively. Results show that our aggressive, information-driven policing works.

Here are some of the ways we have been stepping up enforcement:

In New York City, gun arrests increased by 14% in 2006, and have increased an additional 5% so far this year, thanks in part to the hard work of the NYPD's specialized gun interdiction units.

We passed new laws in 2006 that added to the tools available to law enforcement. The Gun Offender Registration Act, which requires people who have been convicted of a felony gun offense to register with the NYPD after they are released from prison, is the first law of its kind in the country.

And, at the urging of Mayor Bloomberg, the State of New York recently passed the toughest-in-the-nation sentencing law that makes possession of a loaded illegal handgun punishable by a minimum of 3 ½ years in prison. Period. No exceptions.

MAYORS AGAINST ILLEGAL GUNS

The rise in crime is one of the reasons why mayors across the country are working together to combat the flow of illegal guns into their cities. Unlike other elected officials, mayors see the devastation of illegal guns up close. It is America's mayors who get the calls in the middle of the night when a police officer or a child is shot. It is America's mayors who too often must break the news that can break somebody's heart.

A year ago, in April 2006, Mayor Bloomberg and Boston's Mayor Tom Menino invited 13 mayors to join in a conversation about how to fight the scourge of illegal guns. That initial group of 15 mayors has grown into the Mayors Against Illegal Guns coalition—comprised of more than 225 mayors from more than 40 states, representing more than 50 million Americans. These mayors are Democrats, Republicans, and Independents from big cites to small towns. These mayors believe in the rights of responsible gun owners and they also believe it is their job to keep illegal guns off their streets.

At the federal level, the coalition has one priority: fight to repeal the Tiahrt Amendment restrictions on crime gun trace data.

THE TIAHRT AMENDMENT

The Tiahrt Amendment, named for its original sponsor Rep. Todd Tiahrt, is an appropriations rider first inserted in 2003 that restricts local and state law enforcement's access to and use of crime gun trace data.

Let me be clear about the data that is at issue here. It is about one thing and one thing only: guns recovered in crimes. It is not about any sort of wholesale access to the sales records of lawful gun owners. These traces are guns recovered in crimes by police – only a law enforcement agency can make a gun trace request and thereby create a trace record.

Why do mayors oppose the Tiahrt Amendment? It's simple. Police chiefs are telling mayors that the Tiahrt Amendment makes them do their jobs with a blindfold on – it prevents police from connecting the dots.

There are four principal restrictions in the Tiahrt Amendment:

1. It restricts access to aggregate crime gun data. The Tiahrt Amendment restricts local governments from accessing the ATF gun trace data they need in order to understand and address citywide gun crime trends.

2. It blocks access to data from other cities and states. The Tiahrt Amendment prevents local governments and police from accessing ATF gun trace data from areas outside its geographic jurisdiction, greatly undermining regional efforts to control gun crime.

3. It prevents cities from accessing and using gun trace data to hold accountable the few dealers who break the law. The Tiahrt Amendment blocks trace data from being used as evidence in any state or local civil action—even a state administrative proceeding to revoke or suspend a gun dealer license.

4. It stops the ATF from producing national reports. The Tiahrt Amendment stops ATF from publishing reports that use gun trace data to analyze nationwide gun trafficking patterns.

This makes no sense.

And this is not just a theoretical argument. The Tiahrt Amendment is causing actual harm and hampering law enforcement. For example,

- In 2005, the District Attorney of New York County and the NYPD uncovered a Manhattan resident as both a major methamphetamine dealer and a large-scale gun trafficker. The defendant sold undercover detectives 18 guns, including an Uzi and other assault weapons; over $18,500 worth of methamphetamine; half a kilo of cocaine; and other drugs. Trace data confirmed that the defendant had bought his guns from three dealers outside NYC, including one on Long Island. The Long Island dealer not only sold the defendant assault rifles, but also falsified federal records about the sales. To identify other potential traffickers who might be using this dealer, the District Attorney wanted ATF to supply trace data for all crime guns sold by this store and recovered throughout New York State. The Tiahrt Amendment, however, specifically blocks requests beyond the requesting agency's geographic jurisdiction, effectively ending the investigation.

- In January 2007, the corporation counsel of Jersey City, NJ formally requested from the ATF information about the sources of crime guns recovered in their own city from 2001–2006. ATF refused, saying "Unfortunately, we are unable to provide you with the requested data" due to restrictions on them under the Tiahrt Amendment.

- In April 2006, Sen. Frank R. Lautenberg wrote ATF asking for aggregate trace data for a specific type of handgun that, when fired with certain ammunition, can pierce police vests. In an October 6, 2006 reply letter, ATF said "the required information cannot be disclosed to you, pursuant to the requirements set forth in the Consolidated Appropriations Act of 2006."

- The much heralded and copied Boston Gun Project used trace data to dramatically reduce youth homicide; they could not have done so if the Tiahrt Amendment had existed at the time. In fact, the ATF described the importance of trace data in the Boston Gun Project as essential, saying it "not only maximiz[ed] the number of leads to illegal suppliers but also enabl[ed] law enforcement officials to determine an overall picture of the kind and sources of crime guns in their jurisdiction." The Gun Project's strategy was developed in 1995 and 1996 by a working group that included non-law enforcement members as well as law enforcement organizations. They analyzed aggregate trace data about Boston crime guns to figure out how they could disrupt the illegal gun market. For example:
    - They analyzed source states to determine where Boston's crime guns were coming from and, therefore, how big the trafficking organizations were;
    - They analyzed time-to-crime statistics to determine how much the criminals relied on gun trafficking channels that could be easily disrupted; and
    - They analyzed which models of gun were most commonly used in crime to help them detect traffickers, plan undercover work, and determine where to focus their efforts.

  The Tiahrt Amendment restrictions severely curtail the ability of cities and local law enforcement to perform these kinds of aggregate analyses, which are essential to developing effective gun violence reduction strategies.

Each year Congress has made the Tiahrt Amendment more and more restrictive. And, this year, the Justice Department and the White House seem determined to make these restrictions even worse. In its proposed Fiscal Year 2008 language, the Justice Department has created a new certification provision that threatens law enforcement officers with a 5-year prison sentence. As Mayor Bloomberg wrote to Attorney General Gonzalez on May 3, 2007:

> "[Y]our Justice Department has submitted an appropriations request to Congress that not only largely retains the Tiahrt language, but makes it even worse, adding provisions that would require police officers to certify the reasons for their use of trace data, which could result in criminal prosecutions of police officers.... Although the Tiahrt Amendment began in Congress, your Department has now become complicit in this disgrace."

Even the Justice Department openly acknowledges that its proposal could put police officers in jail for trying to enforce gun laws. As the New York Sun reported on May 9, 2007:

> The Department of Justice initially said yesterday that the measure it supports "says nothing about criminal prosecutions of police officers," but later in the day dropped that from its statement, noting that someone could technically be subject to prosecution if they lied on their certification."

The addition of the certification requirement is particularly striking given that this same Justice Department, in a letter to Congress one year ago, said that the threat of federal prison for the misuse of trace data will create a chilling effect. In a May 8, 2006 letter, from Assistant Attorney General William E. Moschella to Rep. Sensenbrenner, the Justice Department warned that the threat of criminal sanctions for using trace data for anything other than a particular criminal investigation "may have a chilling effect on the use by law enforcement of the trace service ATF provides, as well as on the sharing of data among state and local law enforcement agencies for bona fide law enforcement purposes. Such a chilling effect could have adverse consequences for law enforcement operations and officer safety."

It is astonishing that Congress and the Administration would even contemplate threatening police with prison for trying to keep Americans safe from gun criminals.

The gun lobby has put forward two main talking points in an attempt to support its defense of the Tiahrt Amendment. Neither stands up.

First, they claim that the restrictions protect undercover law enforcement officers. But they have not documented a single case of an undercover officer being exposed by the release of trace data prior to the enactment of the Tiahrt Amendment. As a panel of federal judges noted in City of Chicago v. United States Department of Treasury, BATF, "ATF's witnesses failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." In the same case, the panel also noted "in all its affidavits, documents, and testimony, ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information." Even Rep. Todd Tiahrt, the original sponsor of the Tiahrt Amendment, when asked by the Denver Post to point to one example in which a release of trace data endangered an officer's safety, was unable to do so.

The second argument some in the gun lobby make is that the release of trace data will subject gun dealers to undue harassment. But the truth is that, according to the ATF, 85% of dealers have no crime gun traces in a given year – and 1% of dealers account for 57% of traces.

Our coalition of 225 mayors knows these claims are false. And so do the 10 national law enforcement organizations, including the International Association of Chiefs of Police, the International Brotherhood of Police Officers and the Police Foundation, the more than

20 state law enforcement organizations and more than 185 individual law enforcement executives who have written to Congress to oppose the Tiahrt Amendment. In a group letter to Congress, these organizations and individual chiefs have said

> "The Tiahrt provision puts new and unjustified limits on ATF's disclosure of trace data to law enforcement agencies and organizations. Prior to the Tiahrt restrictions, law enforcement agencies could get access to crime gun trace data to assist in developing effective strategies against gun trafficking and illegal guns, without the requirement that the data be limited to crime guns pertaining to the requesting jurisdiction or that the request be for use in a specific criminal investigation or prosecution."

Additionally, the International Association of Police Chiefs has said

> "The IACP is opposed to the 'Tiahrt Amendment' [which] restricts the ATF's ability to share vital gun trace information with its state and local counterparts, which severely limits the ability of those agencies to conduct critical investigations designed to identify and apprehend corrupt firearms dealers and the traffickers they supply. The IACP strongly believes that these provisions, and others like them, put our citizens and our officers at risk."

And other police chiefs have stated how the Tiahrt Amendment hurts them locally. Police Chief Michael A. Billdt of San Bernardino, CA has said that "police need the ability to access trace data in their communities and surrounding communities – that data can help us find the sources and identify the illegal traffickers. It is crucial that Congress lift the Tiahrt Amendment's restrictions on that trace data." Police Chief Tim Dolan of Minneapolis, MN has said, "In order to target those who possess, use and traffic illegal guns, we need the freedom to access, analyze and share ATF gun trace data across jurisdictions." Police Chief Mike Bladel of Davenport, IA added, "If the ability to access regional ATF gun trace data helps me track down even one more criminal each year, it just might help save a life. That's what good police work is all about."

The lone law enforcement voice supporting the Tiahrt Amendment is the national leadership of the Fraternal Order of Police (FOP). But the local chapters are beginning to break ranks. The Illinois chapter, which comprises 10% of the FOP's national membership, recently wrote Senator Durbin, saying that the Tiahrt Amendment "has functioned to limit effective law enforcement action against corrupt gun dealers and the traffickers they supply."

Not only is law enforcement fighting the Tiahrt Amendment, so are some members of Congress. The bi-partisan Congressional Task Force on Illegal Guns, co-chaired by Rep. Charles Rangel (D-NY), Rep. John Conyers (D-MI), Rep. Peter King (R-NY), and Rep. Mark Kirk (R-IL) has made repealing the Tiahrt Amendment its top priority.

Furthermore, more than 15 editorial boards from across the country, from the *New York Times* and the *Washington Post* to the *Cincinnati Enquirer* and the *Wichita Eagle*—Rep.

Tiahrt's hometown paper—have already called for the Tiahrt Amendment's restrictions to be fixed.

Here is what a couple of the newspapers had to say:

The *Columbus Post-Dispatch* has said the Tiahrt Amendment "should be thrown out or drastically changed by Congress. Trafficking in illegal weapons is a national scourge, just as is trafficking in drugs. Wider use of the ATF data would assist jurisdictions' efforts to get illegally sold weapons off the streets."

And the *Baltimore Sun* noted that "as Baltimore focuses greater resources on ridding the streets of illegal guns, it may find its effort stymied by a federal law that restricts release of gun tracing data. The provision makes it difficult for cities to identify trends and gun dealers who serve criminals, and it should be revised."

FEDERAL ENFORCEMENT AND THE ATF

Some ask: why are mayors taking the fight against illegal guns intro their own hands? It's because the federal government has so clearly dropped the ball. By their own admission, ATF is not up to the job.

- According to the Department of Justice inspector general, in FY 2002, ATF revoked or refused to renew just 2.8% of the licenses of dealers who were found to have violations, even though those dealers had an average of *70 violations each*.

- And just three days ago, ATF's chief public affairs officer, Sheree Mixell, told Time Magazine that at current rates it would take 17 years to inspect all existing licensed firearms dealers.

- And, if these facts weren't bad enough, ATF efforts are hampered by restrictions imposed by Congress that prevent them from:

    - Inspecting any dealer more than once per year – ironically there are no such restrictions on tobacco and alcohol distributor inspections.
    - Requiring licensed dealers to physically check their inventory against their records.
    - Revoking the licenses of gun dealers charged with felonies until their criminal case is fully concluded. Because that includes appeals, a rogue dealer can remain in operation for years after his initial arrest.

It is the federal government's failure to enforce the laws on the books that has forced cities like New York City to act.

NEW YORK CITY INVESTIGATION OF IRRESPONSIBLE GUN DEALERS

In 2006, New York City initiated lawsuits against 27 gun dealers from 5 states. Ninety percent of guns recovered in crimes in New York City are brought into our city illegally from across state lines. The City relied in part on pre-Tiahrt Amendment trace data to identify these dealers. The 27 dealers were the sources of more than 800 guns used in crimes in New York City over an 8 ½ year period—more than 20 of those crimes were homicides or attempted homicides. In each of these 27 cases, New York City sent in undercovers and caught these dealers in the act completing illegal "straw sales," where one person fills out the background check paperwork for another person – usually a felon or a gun trafficker wanting to avoid scrutiny.

I am pleased to report that 12 of the 27 dealers have now settled out of court and agreed to unprecedented oversight of their firearms sales. Under the terms of the agreements, a Special Master has been appointed who will have access to the dealers' records and the power to impose escalating fines for any new violations of federal, state, or local gun laws.

CLOSING

Having spoken to countless mayors, countless prosecutors and countless police, there is only one way to interpret what Congress did when it enacted the Tiahrt Amendment: it chose to protect the privacy of criminals over the lives of police officers. If this Congress is serious about getting tough on crime, then it will repeal the Tiahrt restrictions and help state and local enforcement combat illegal guns.

Mr. KUCINICH. Thank you very much, Mr. Feinblatt.

I just want to indicate how we are going to proceed. There is a vote on, and the ranking member, Mr. Issa, has requested time at this moment. So I will yield to him, then after that, we are going to take a break for the votes. It could be about 45 to 50 minutes. I would ask the panel to remain for questions.

So at this time, the Chair will yield to Mr. Issa.

Mr. ISSA. Thank you, chairman.

I apologize for not having been here at the beginning to make my opening statement. We were unavoidably delayed in a piece of conference business, as we call it, a vote within the committee.

Mr. Chairman, I want to thank you for holding this hearing today. I have forwarded a letter that objects to some aspects of this committee hearing not being as full and complete as I would like it to be. However, it is very clear that at a minimum, we will receive a good cross-section of some of those legitimate loopholes that exist, particularly the mental illness fail to implement that has clearly, clearly played a part in the tragic deaths of 32 at Virginia Tech.

Moreover, it is very clear that Congress does have a continued role in working with the States to see that the full intent of Congress, not just under the Brady Bill, but under all our prior legislation, is implemented. I happen to come from California, a State that is known for tough gun laws. But even there, I want to commend, and this doesn't often happen these days, Attorney General Alberto Gonzalez for the fact that he repeatedly insisted that in California Federal gun laws be enforced even in a State with some of the toughest gun laws. That Federal U.S. Attorney arm is extremely important. If anything, although the President made it a top priority, it needs to be an even higher priority.

We cannot stand behind the second amendment, which I do very strongly, if in fact we will not ensure that those who legitimately should be denied the right to keep and bear arms are in fact denied that. I look forward to this hearing. I have a strong view that we should have at least one followup hearing in which some of the people who strongly support the second amendment and strongly support that we do not need additional laws are given an opportunity to make their case of how we can, in fact, with the existing laws, enforce sufficiently to make those who should not have guns not have guns.

I believe that the firearm laws need to be looked at carefully. But most importantly, I look forward to our witnesses giving us the insight into the lack of enforcement that has led to many tragedies around the United States.

With that, Mr. Chairman, I will put the rest of it in the record, with unanimous consent. Thank you. I yield back.

Mr. KUCINICH. Without objection, the gentleman's statement and letter is included in the record. I thank the gentleman very much for his presence and for his testimony.

At this time, the Chair is going to declare a recess until I would say about 50 minutes from now, we will come back. We will ask the witnesses if they will remain or be back here in 50 minutes, so that we can go to questions.

Thank you very much.

[Recess.]

Mr. KUCINICH. The Domestic Policy Subcommittee will resume.

Our hearing today is on Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws.

We are now at the point where we are going to ask the first panel to answer questions. I would like to begin by asking both Ms. Thomas and Mr. Helmke: Without closing the gun show loophole, is there anything else that can be done that helps prevent prohibited persons from getting guns, or does reform just divert individuals to unregulated private sales, individuals who are now in NICS?

Ms. THOMAS. I think as has already been discussed by members of the panel, there are so many areas in which you can begin. I think it can begin with closing some of the ways in which these categories are defined, whether it's mental health prohibition or domestic violence offender prohibitions. So at the State level that can be done, and certainly as well as at the Federal level. Both of those things wouldn't entail closing the private sale loophole, but would entail shoring up prohibitions that already exist.

Secondarily to actually impacting those provisions, there are other categories of purchasers who are not prohibited. For example, domestic violence juvenile offenders are not prohibited under Federal law from acquiring firearms. That is something that might need to be looked at, as to whether there is a way to implement that into this. Certainly many States already have created prohibitions around particular categories that aren't covered by the Federal law.

Then last, going back to the State recordkeeping and the way in which that is transferred to the Federal level. Right now you do have Sates that report very well up to the NICS system and the FBI. That is very helpful, especially as the chairman mentioned, with regard to our porous borders. If in California, we have very good recordkeeping for mental illness, and I am in the system, but I move to another State, say Nevada, and California doesn't report to the FBI or NICS, therefore in Nevada, they won't have access to that information.

So I think there are ways in which the data can be transferred that would be extremely helpful to shoring up some of these problems.

Mr. KUCINICH. Mr. Helmke.

Mr. HELMKE. The question usually comes to me in terms of, well, the bad guys don't follow the rules, so why should we make rules. And I think if we analyze this, the guns come from some place. And we don't want to make it easy for dangerous people to get guns. That is why we have the 1968 Gun Control Act. That is why we have the Brady Bill, to do a check to make sure that prohibited purchasers, we don't rely on the prohibited purchaser filling out the form. We check to see what the records are.

So again, the first thing we need to do is to make sure that we are strengthening the Brady Bill, that we get good information into the system from the States as to felons and other prohibited purchasers. That is the first crucial part. Then we need to make sure, I think, that the Brady background checks are applied to all sales,

that the so-called gun show loophole, the private seller exception that we talked about.

But then we have to focus on the thing that Mr. Feinblatt talked about, and that is that guns do get in, criminals do pick up guns illegally. But where do those guns come from? And when you talk to police chiefs around the country, when you talk to mayors around the country, most guns that are used in crimes, it has been a fairly short period of time that it has come from a legitimate gun dealer to the street. It is not old guns we are seeing used in crimes. Most guns that are used in crimes are 2 to 3 years old. They have come fairly quickly from the legitimate market to the criminal market. How does that happen?

That is one of the reasons that we focus on Tiahrt. We need to find out where the guns are coming from. Once you find where they are coming from, then you can develop strategies to make it harder, strengthening ATF, dealing with the bulk sales of guns.

Mr. KUCINICH. And this goes to the issue of the completeness of the data in the NICS. So the following, including all the Federal prohibited persons categories, what is the percentage of data that has been entered into the NICS data base in a form that can be used by the Brady background check, for example?

Mr. HELMKE. The States have done a very good job in terms of felony records. Where the States haven't done a very good job are with regard to the other categories. This deals with those who are a danger to themselves or others because of mental illness. It is a category that people put in the NICS index, is what they call it.

But for example, in terms of people who are considered a danger to themselves or others because of mental illness, the mental illness category of prohibited purchaser, there are only about 235,000 names entered into that record. I have seen some estimates that are at least 2.6 million people institutionalized involuntarily in this country. That means there is a disconnect between the mental health records that are getting in there and the number of people that would actually be a prohibitive purchaser.

Mr. KUCINICH. So if you had a complete NICS data base, that would include, let's say, 1,000 pieces of information or 1,000 pieces of data, and NICS had access to only about 500, what would you say? Could you give a quantification, that you just said 235,000 of 1.2 million?

Mr. HELMKE. And these are estimates, because we don't have complete records.

Mr. KUCINICH. Can you give me a rough estimate, percentage?

Mr. HELMKE. In terms of the mental health records, in terms of a disqualifying mental illness, findings that someone is dangerous to themselves or others, a prohibited purchaser, it is probably just 10 percent of the records. Virginia actually is one of the better States in terms of reporting records. They have reported about 80,000 instances.

Mr. KUCINICH. That is in mental health records?

Mr. HELMKE. That is criminal health records.

Mr. KUCINICH. What about criminal conviction data? Is it just as problematic?

Mr. HELMKE. Well, particularly when you look at misdemeanors, dealing with the domestic violence area that Ms. Thomas talked

about, again, the States do a pretty good job, because they have computerized most of their felony records. When you get into misdemeanors, when you get into restraining orders, when you get into the mental illness disqualifying records, it is basically hit or miss whether the State has given you anything at all.

Mr. KUCINICH. I am going to come back, to that line of questioning, but it is now time for Mr. Burton, if he so chooses, to ask questions. Mr. Burton.

Mr. BURTON. Thank you, Mr. Chairman.

I am concerned about, you are advocating, I guess, that the Federal Government demand of the States that they provide adequate records. That is essentially what you want to do, right?

Mr. HELMKE. In 1968, the Federal Government said that certain people were prohibited purchasers and declared as a policy that those people were dangerous people who should not be getting guns. So we are trying to figure out, how do we turn that statement of who is a prohibited purchaser into an effective enforcement tool.

Mr. BURTON. Are you advocating that there be Federal records kept, that the States are required to send these records to Washington, DC, and that make sure we keep track of them through the Federal Government?

Mr. HELMKE. Currently, States have a choice. They can be what is called a point of contact State, and I think there are 22 or so of those?

Ms. THOMAS. About 20.

Mr. HELMKE. About 20 of those now where they handle the records on their own. There are other States who decide they don't want to handle that, and they send it to the Federal Government. So right now the States have a choice.

Mr. BURTON. I understand, but if the States don't comply with the things they way you think they should, then you feel the Federal Government should force them to do that?

Mr. HELMKE. Well, actually, Carolyn McCarthy's bill, the NICS Improvement Act, wouldn't be forcing them to.

Mr. BURTON. What does it do? How do you enforce it if it doesn't force the States to comply?

Ms. THOMAS. If you don't mind, I don't think it is about enforcing. In fact, I think there are issues as to whether it could actually be enforced on the States. I don't believe that is an approach that would be appropriate under the way that our system operates under the tenth amendment. I do think that is he is talking about, there are ways to encourage and give incentives.

Mr. BURTON. So you are talking about encouraging the States. Well, I think the States right now, for the most part, really want to keep the guns out of people's hands that shouldn't have them. I don't know how this legislation is going to improve that. You are just suggesting, we want you to do better?

Ms. THOMAS. There are financial incentives included in the legislation that I believe would be——

Mr. BURTON. OK, I want to get to that. Financial incentives. So we are going to have the Federal Government in effect mandating through financial incentives to the States to do certain things?

Ms. THOMAS. Paul, you can correct me if I am wrong. My understanding is one of the things that the McCarthy Bill does is to provide the financing that some of the States might need in order to help them, to enable them to computerize records and to bring some of these records up to speed.

Mr. BURTON. OK. I think your goals are laudable. But let me just tell you, in Indiana there have been incentives to create more policemen. And the Federal Government has put money into the program to create more policemen to cut the crime rate.

Then the Federal Government, after they hire the policemen, a few years later, don't continue to comply and fund those mandates. So you have a situation there where you get into this thing, then you have the Federal Government who is supposed to pay for these things as an incentive, then they drop the ball. I want to tell you, that happens an awful lot. You being a mayor, you know about unfunded mandates.

I don't have a lot of time, so I want to go into some other questions. You said that there should be background checks, Mr. Feinblatt, on people that are selling guns person to person, right?

Mr. FEINBLATT. No, I did not.

Mr. BURTON. Explain that to me again.

Mr. FEINBLATT. I did not discuss background checks, Congressman.

Mr. BURTON. You said people selling a gun to another person.

Mr. FEINBLATT. I didn't discuss that. The only thing that I commented on today is the Tiahrt Amendment, which restricts law enforcement.

Mr. BURTON. I must have mis-understood.

Mr. HELMKE. I talked about that.

Mr. BURTON. I thought you said——

Mr. FEINBLATT. I think it was Mr. Helmke.

Mr. BURTON. Well, somebody, I thought it was you, said that there should be background checks on a person to person basis, is that right?

Mr. HELMKE. As I indicated, the Brady background check system isn't going to fully work if 40 percent of the sales of guns aren't covered by the Brady background check system. If the requirement was that private sales, if private sales were covered, that if you got the unlicensed seller exception out of the way, where people can go to a gun show, go to the desk that is set up, say, I am an unlicensed dealer and therefore I can sell you the guns without the background check, that would help our system work.

Mr. BURTON. The enforcement of that, I think, would be virtually impossible. Because you get so many people who have guns and so many people that sell them to other people or give them to other people. Now, there is a liability statute, as I understand it, that says if you give a gun or sell a gun to somebody else and they commit a crime, you have a responsibility and you can be sued. So I think we already have a deterrent.

I want to ask one more question. I have a friend, and I won't go into the details, he and his wife are getting divorced. She was running around with another guy and he was crushed. He has a couple of kids, and it is really a problem. As a result, he wanted to make sure that he did the right thing, so he went for counseling, went

to a mental health center for counseling. The counseling worked, he went to his church, that worked. He is now in good shape and he is not any threat to his wife or anybody else, because he has learned to cope with it.

But the mental health record of this man would be a deterrent for him getting a gun, would it not?

Mr. HELMKE. No.

Mr. BURTON. Why not? Because there will be a record of it, won't there?

Mr. HELMKE. No. As I indicated, it only deals, the Federal law and the implementation of who is defined as a prohibited purchaser only deals with someone who has been involuntarily committed or someone who has been adjudicated by a court as a danger to themselves or others because of mental illness. Going for marital counseling, getting that sort of voluntary treatment, therapy, medication, whatever, as long as you are not in front of a judge or someone who has that official capacity, then it doesn't show up in the records.

Mr. BURTON. Brian and I were talking a minute ago, and he may want to pursue this question further. Are the mental health agencies in favor of what you are trying to do?

Mr. HELMKE. They are represented here, I believe, with another panel. We have been talking to them. We don't want a stigma on mental health. We want people to go in for mental health question.

Mr. BURTON. That is not my question, Mr. Mayor. My question is, the mental health organizations, are they in favor of what you want?

Mr. HELMKE. I can't speak for them. But I believe based on our discussions that we can reach agreement here. They agree that individuals that are a danger to themselves or others because of mental illness should not be purchasing guns.

Mr. BURTON. Thank you, Mr. Chairman.

Mr. KUCINICH. I thank the gentleman.

The gentleman from California.

Mr. BILBRAY. Thank you very much.

Mayor, seeing that we are stringing you out right now, let's not interrupt the pace.

Mr. HELMKE. I am used to it. [Laughter.]

Mr. BILBRAY. I appreciate it. I was a mayor for 6 years. When I started off, I was 27 years old. It was rather an interesting situation to lead a city at that age that you had grown into. Half of the staff and police chief used to change my diapers before I was in there. [Laughter.]

But I would say, in fact, I remember, that was the day you were in Cleveland. There were three of us, the new politicos.

Mr. KUCINICH. We all have something in common here.

Mr. BILBRAY. Ancient history.

Let's talk about the gun show issue. Mayor, when is the last time you went to a gun show?

Mr. HELMKE. Four years ago, I guess.

Mr. BILBRAY. Now, you said 40 percent of the sales of guns are not regulated at this time?

Mr. HELMKE. It is estimated. Since we don't keep records on that, it is just an estimate.

Mr. BILBRAY. Is that 40 percent of what you are estimating, is 40 percent are being sold through gun shows?

Mr. HELMKE. It is not just gun shows. It is private sales. So it could be gun shows, it could be classified ads, it could be neighbor to neighbor.

Mr. BILBRAY. What percentage do you think is being sold through gun shows unregulated?

Mr. HELMKE. I don't have any hard data on that.

Mr. BILBRAY. What percentage of the gun shows sales do you think is unregulated?

Mr. HELMKE. The 40 percent figure, I am under oath here, so I am just guessing at this stage. I have seen the 40 percent figure. I have seen others who say that at gun shows maybe it is 25 percent of the total sales or something like that.

Mr. BILBRAY. Then, boy, it definitely is not the gun shows that I have seen around. The fact is, I would challenge anybody, and I have had the NRA attack me on positions, I have had Brady support me on issues, but I think what we need to keep grounded is, the overwhelming majority of people who are engaged in gun shows are professionals who are licensed. Very few, very few, and I guess in my mind I remember the son, the 12 year old son and the man selling the black powder rifle with spare barrels, and I remember, because I don't shoot modern firearms. I am exempt from all these rules. I can go buy my musket and my cap and ball and get anything I want over the counter.

But to imply that gun shows pose a major threat, when our big exposure here, our big source of unsupervised purchases I think doesn't reflect the fact that the overwhelming majority of people at gun shows are licensed dealers who are functioning under that vehicle.

Now, if we can just say, you guys want to take a shot at that, I have some real problems with you eliminating the deal that most of the people that are dealing, most firearms sold under the gun show process is under some kind of regulatory deal. Counter my argument if you want to.

Mr. HELMKE. First of all, California does require background checks at gun shows. So if you are going to gun shows in California, yes, they do background checks, because that is a State law and that has been effective in reducing the amount of guns that get into the illegal market in California.

Mr. BILBRAY. But the issue was not the background check. It was the person, the regulations that were imposed on the people that are actually selling the firearms.

Mr. HELMKE. Right. In California, if you are an unlicensed dealer, the way it works in California is, if you want to purchase from the collector, they then take the form to the licensed dealer who is in the booth next door, and for a $5 fee or whatever, they run the instant check and come back with a you are approved type of thing. So in effect, the so-called gun show loophole has been closed in California and they do do the background checks.

Mr. BILBRAY. The point I was making, though, and Ms. Thomas, if you want to go over it, you still are bound to this issue that the overwhelming majority of people engaged in the sale of firearms at gun shows are licensed dealers.

Mr. HELMKE. Most are. And actually, part of the point, though, even in the statistics, most of the licensed dealers do a good job. It is only 1 percent of the dealers that contribute 60 percent of the guns.

Mr. BILBRAY. My point was that the fact that the perception that this is an unregulated, no oversight, that it is a great majority of moms and pops giving the sales, and let me just say, you have been a mayor. I would really ask you the question: the ability of Government learning just not to over-reach, the ability of taking a theory and making a practical application, the ability for even a local government, let alone a Federal Government, to regulate one on one sales between individuals, and I give you an example. We don't do a very job at regulating those who are buying and selling cars under the law as a dealer, a car dealer. If we can't regulate the buying and selling of cars under that, what makes you think we can do it with firearms?

Mr. HELMKE. But we still have laws dealing with the sale of cars, and you still have the licenses and you still have the process that it goes through, the State Bureau of Motor Vehicles, whatever, to get the license transferred and collect the sales tax.

Mr. BILBRAY. Mr. Helmke, my point being, even with the laws on the books, we admit that those of us in Government—the crucial, huge problem to try to enforce the sale of automobiles, something you are registering, something you are putting on the street, something that is pretty big that you are not going to put in a box and take home, if you are talking about now something that can go into a box and be taken home, I just want to raise the issue of what a huge, huge leap in practical application we have to make here. That was just my point.

Mr. HELMKE. I think the whole point with this discussion of guns is what we are doing now is not working. We need to find things that just don't sound good in law but are actually going to be effective. That is what I am trying to say. We make it too easy for dangerous people to get the weapons.

Mr. BILBRAY. And I am just saying, the big thing is what is effective is more important than what sounds good.

Mr. BILBRAY. I agree totally. I yield back.

Ms. THOMAS. If I can just add one thing. As you mentioned, if you are talking about federally licensed firearms dealers, who are the ones at the gun shows, and if they are running background checks, and if you are a law-abiding gun owner, you know that the Federal instant background system is incredibly quick and efficient. It is not very burdensome. It is something that for people who know the rules and understand how the system works, it is not a big deal to have this instant check run before they get their guns. What it does is it takes the difference between someone who should have a gun and is law-abiding versus someone who shouldn't have a gun. We make sure that person who is at the gun show just gets that instant check run and we make sure they fill the category.

Mr. BILBRAY. You miss my point. My point was perception that this problem was a large portion of gun shows when in fact it is a very small part of the problem within the gun shows, because the

overwhelming majority are already plugged into the registration system.

Mr. HELMKE. I did just get a clarification here. According to an ATF report from 1999, they estimate that 25 to 50 percent of gun show sellers are private parties.

Mr. BILBRAY. I would totally disagree with that.

Mr. HELMKE. I am just saying that is what the 1999 ATF data is.

Mr. BILBRAY. I would also point out that it is estimated that 1 percent of criminal guns are acquired at gun shows.

Thank you, Mr. Chairman.

Mr. KUCINICH. I thank the gentleman. We are going to go to another round of questions here. Congressman Burton, can you wait 5 minutes?

Mr. BURTON. Sure.

Mr. KUCINICH. We are just going to go to one more round of questions. I would like to ask Mr. Helmke, if you have a fairly informed, quantitative assessment you can give us at this moment, fine. If you don't, I would like you to provide the information to the committee with respect to the completeness of this records on data related to prohibited persons with respect to criminal conviction data. Can you tell us what percent? And if you don't know, can you provide it?

Mr. HELMKE. It is my understanding, I will double check this and provide it. It is my understanding that in terms of felony conviction records that it is pretty close to complete.

Mr. KUCINICH. And mental health, you said 10 percent?

Mr. HELMKE. With all other disqualifiers, mental health, dishonorable discharges, restraining orders, outstanding warrants, that it is just hit or miss, and 10 percent to 20 percent at best.

Mr. KUCINICH. OK. I want to go to Mr. Feinblatt. Could you tell me, why did New York City feel that it was necessary to bring its lawsuit against the gun dealers, I think it was 27 gun dealers? Couldn't it just call up and request that the ATF do something about the flow of illegal guns into your city?

Mr. FEINBLATT. I think the problem is that the ATF is not keeping up their end of the bargain. As you know, I think that the Department of Justice in fact did a report that was issued, I think in 2002, which said that the ATF inspected about 4½ percent of the firearm licensees nationwide. So that is about 4,500, 4,600 of the 104,000 FFLs. They found in those inspections that in fact 42 percent of the inspected licensees had violations. And we're not just talking about one violation. What they found was on average, the licensees had 70 violations each.

Nonetheless, in the face of data like that, the ATF revoked or refused to renew only 2.8 percent of the licenses of dealers with violations.

Mr. KUCINICH. Well, wait a minute. Why didn't the ATF do what you did, before bringing this suit, and that is, conduct aggressive investigations to make sure that federally licensed gun dealers are not breaking the law and allowing straw purchases?

Mr. FEINBLATT. Why does the ATF not do it? Because the ATF is not committed to this as part of their mission. And there are several reasons why.

Let me give you some disturbing evidence, which is even more disturbing than the numbers. In this same report, investigators interviewed ATF inspectors. What they found was that 78 percent of the inspectors that were interviewed said that when doing an inspection, they did not look for signs of straw purchases whatsoever. Another 67 percent of the inspectors said that they rarely referred information gathered during an inspection for criminal investigation by the ATF, because they actually didn't believe that the ATF would followup.

So what we have now is a culture within the ATF that isn't taking their mission seriously.

Now, let me tell you, it is not just the ATF. Congress hasn't made it any easier. As you know, Congress has in some ways tied the hands of the ATF. It has restricted inspections of dealers to once per year. It has required licensed dealers, it has prevented ATF from requiring licensed dealers to physically check their inventory against their records. It has prevented ATF from revoking a license until all legal means are exhausted, which can take years, even if they find that a dealer has been convicted of a felony.

So I think that what we have is a culture of lax enforcement within the ATF, and I think that Congress has abetted that and aided that.

Mr. KUCINICH. And you are saying that with respect to the Tiahrt Amendment, for example, is that right?

Mr. FEINBLATT. I am saying that in effect to the restrictions that we placed on ATF, and the fact that the restrictions that we placed on local law enforcement getting information about crime gun trace data is just one more example of trying to shield the gun industry.

Mr. KUCINICH. With the Tiahrt Amendment in effect, could you now obtain the type of trace data that you have used from the ATF and use it in a civil suit?

Mr. FEINBLATT. Absolutely not. Don't even think about a civil suit. At least 20 States in the country have State licensing regulations, trace data is not admissible in those State regulatory hearings. So what you have is the Federal Government basically stopping the dam of information.

Mr. KUCINICH. Let's go then to the consent decree that New York worked out about the monitoring that went on, that the dealers settled with New York about. You had a consent decree, the dealers said, look, we are going to settle up with you, New York. What happened with that?

Mr. FEINBLATT. What we did was, we sued 27 dealers from five States. Already 12 of them, nearly half, have settled with the city of New York. We haven't looked to put anybody behind bars. That isn't our goal. We haven't looked to put anybody out of business. That certainly is not our goal.

What the settlements require is that a special master be appointed to oversee the business with the cooperation of the FFL for a period of 3 years. If there are continued violations of Federal, State or local laws, the special master has the right to impose a penalty and if there are violations, the 3-year clock resets.

Mr. KUCINICH. Just one final question before we go back to Mr. Burton, and that is from a policy standpoint, would you tell this

committee what benefits New York City was able to achieve in entering into this consent decree?

Mr. FEINBLATT. The basics of law enforcement are trying to define who the bad guys are. Most dealers are good, honest businesspeople. ATF tells us that only about 1 percent of the dealers are responsible for 50 percent of the crime guns.

But what trace data does is it actually pinpoints who are the people who are breaking the law. What New York has tried to do is use that trace data to actually pinpoint in a very precise way who is breaking the law and then come to some agreement with them. That is what our goal is. Our goal isn't to interfere with legal dealers. Our goal isn't to question the right of people to have guns. Our goal is plain and simple, it is to enforce the law.

Mr. KUCINICH. So the Federal Government kind of responded to this investigation and lawsuit and consent decree in a favorable way? Did ATF say, hey, New York, we have something to learn from you?

Mr. FEINBLATT. Absolutely not. What the Federal Government did was threaten New York City, just like——

Mr. KUCINICH. What do you mean, threaten?

Mr. FEINBLATT. Basically wrote a letter to the city of New York saying that, under certain circumstances, if you continue enforcing the law, mind you, you could be subject to criminal penalties.

But what is so telling here is that we have a pattern. The White House, the FOP and Department of Justice has now recently taken the Tiahrt Amendment one step further. What they are now suggesting is that every single police officer, every rank and file police officer who wants to trace a gun, the basic thing that you want to do if you are trying to catch criminals and put them away, or try to catch traffickers, is to get data. What they have said is that every police officer needs to certify the purposes for seeking the trace data and if those purposes are broader than the investigation of one gun at a time, that somebody is liable to go to prison for 5 years.

The real question is, who does that help and who does that hurt. That only helps one people, criminals. Who does it hurt? It hurts law enforcement. There is a basic choice here. Who do you want to protect? Do you want to protect cops or do you want to protect criminals? The city of New York wants to protect cops. It seems that the White House, the Justice Department and the ATF, by making the rank and file police officer certify the purposes for the request of data and threatening them with jail, wants to really hurt cops and help criminals.

What is so striking about this amendment is just 1 year ago, the Department of Justice itself, when considering the idea of having police officers face criminal penalties for doing their job, wrote to Congress that this would have a chilling effect, it would be deleterious to law enforcement, it would chill police officers from doing their job by requesting key data and by sharing key data.

Mr. KUCINICH. I thank the gentleman. Whatever you have that you would like to submit for the record on that, I would appreciate it. This has gone on about, more than 9 minutes, so I just want to say to Mr. Burton and Mr. Bilbray, if each of you would like to consume 9 minutes, you are entitled to that each.

Mr. BURTON. First of all, let me just say that people who don't agree with you do support law enforcement and policemen. The implication of some of your remarks were that the people who don't agree with you aren't caring enough about the police. I don't think that is true. A lot of police officers around this country don't agree with the position you have taken. I don't know the percentage, but I am sure there are a lot of them.

How many guns are there in America? Do you know?

Mr. FEINBLATT. I do not know. Mr. Helmke probably has that figure on the tip of his tongue.

Mr. HELMKE. There are estimates of around 200 million.

Mr. BURTON. Two hundred million.

Ms. THOMAS. More than that.

Mr. BURTON. You are going to keep track of 200 million guns? What you are talking about, Mayor Helmke, is that if there is a sale from one individual from another individual, there ought to be a background check. Two hundred million guns. You have to be joking.

Mr. HELMKE. We are awash with guns in this country. That is part of the problem.

Mr. BURTON. And to start creating a bureaucracy and making law-abiding citizens criminals if they sell a gun to some other law-abiding citizen, it doesn't make any sense to me.

Mr. HELMKE. How do they know they are a law-abiding citizen if they don't do a background check before they sell it. That is the problem. Most of the people aren't selling their guns. A lot are collections, a lot are handed down from their family, a lot they use. Many people who own have a lot of guns. While there are that many guns out there, there are also estimates that only 25 percent of the households have a gun, too, I think is the figure. So those guns are basically——

Mr. BURTON. You said 25 percent of the households. Where did you get that figure?

Mr. HELMKE. I think that is——

Ms. THOMAS. I think some of that is through the Department of Justice, they come out with reports. I think it might be cited in our testimony if you take a look.

Mr. BURTON. But it is an estimate?

Ms. THOMAS. Yes, it is an estimate. Because there is no system of registration of guns in this country right now. So all of this data is generally collected through estimates in the numbers that we do have.

Mr. BURTON. Let me ask you a question. You just said there is no registration in this country right now. Are you advocating registration of guns?

Ms. THOMAS. I certainly think there are ways to go about it that are feasible. I think that some kind of registration system, like we have for cars in this country, would certainly be helpful in knowing how many we have, knowing where they are and being able to understand a little better what the issue is.

Mr. BURTON. Let me just tell you, there are an awful lot of people, there are 200 million guns out there, there are an awful lot of people that are concerned about the second amendment and their constitutional rights. They are afraid if you register all guns,

at some point in the future there may be a tyrannical government that uses the registration of those guns to disarm everybody in this country in violation of the second amendment. I see you shaking your head back there. It is a fact. People are concerned about that.

Ms. THOMAS. I absolutely hear what you are saying, and certainly a discussion of the second amendment is a very interesting legal argument. I would hold that the Supreme Court of this country, in the 200 cases that have come since Miller in 1939, have held that the second amendment is not a bar to sensible, sane, commonsense gun regulation, that those laws, things like background checks, have been upheld hundreds of times by the courts of this country.

So the second amendment, with all respect, is not a prohibition on common sense gun regulations that would save lives.

Mr. BURTON. In the sense of gun regulations, I agree with you. But you are talking about registration, and that is a different subject. I am certainly not for that.

Mr. Chairman, I don't think you need to ask any more questions.

Mr. FEINBLATT. Congressman, may I just respond to the comment you made? This is not an issue of whether you disagree with one position or don't agree with another, whether you are for cops or against cops. This is really an issue of whether you are going to threaten cops with imprisonment for doing their job. That is actually what the Justice Department, the White House and the ATF are now calling for by requiring police officers to certify. Everybody in the law enforcement world just about sees this issue for what it is. That is why 10 national law enforcement organizations oppose the Tiahrt Amendment. It is why over 20 State and regional law enforcement organizations oppose the Tiahrt Amendment. It is why over 175 police chiefs from around the country oppose the Tiahrt Amendment. And it is why 225 mayors, Republicans, Democrats and Independents, oppose the Tiahrt Amendment. They want cops to do their job.

Mr. BURTON. How many police chiefs are there in America?

Mr. FEINBLATT. There are obviously many——

Mr. BURTON. Well, how many?

Mr. FEINBLATT. I don't have the number.

Mr. BURTON. You said 175 police chiefs. I would just like to know what percentage of the——

Mr. FEINBLATT. I don't have the percent, but I would be delighted to give that to you.

Mr. BURTON. I was just given a note from my staff here. It says, both the BATFE and the Fraternal Order of Police oppose release of trace data.

Mr. FEINBLATT. It is true. The FOP——

Mr. BURTON. But you didn't say that, though. You just cited a bunch of people that oppose you and a bunch of groups that oppose you. Don't you think it is important also to say how many support the other side?

Mr. FEINBLATT. There is one police organization in this country that supports the Tiahrt Amendment. A single police organization. Stack that against 10 national police organizations, 22 State and regional organizations, 175—it is a lone voice.

Mr. BURTON. What is that lone voice, the Fraternal Order of Police?

Mr. FEINBLATT. It is the Fraternal Order of Police. But——

Mr. BURTON. The Fraternal Order of Police, the majority of the policemen in this country are members of the Fraternal Order of Police.

Mr. FEINBLATT. Yes, except that——

Mr. BURTON. You're saying one organization. But that is the majority of the policemen in this country. And the BATFE also opposes it.

Mr. FEINBLATT. The Fraternal Order of Police doesn't speak with one voice. I would refer you to this letter from the Illinois, for instance, Fraternal Order of Police, which constitutes 10 percent of the entire membership of the Fraternal Order of Police.

Mr. KUCINICH. Without objection, we will enter that into the record.

[The information referred to follows:]

FRATERNAL ORDER OF POLICE
ILLINOIS STATE LODGE

4341 Acer Grove • Suite B • Springfield, IL 62711
Phone: 217-726-8880 • Fax: 217-726-8881 • www.ilfop.org

VIA TELEFAX: ORIGINAL VIA U.S.MAIL

Richard J. Durbin, U.S. Senator
332 Dirksen Senate Office Building
Washington, D.C. 20510

REF: LAW ENFORCEMENT OPPOSITION TO APPROPRIATIONS RIDER LIMITING DISCLOSURE OF CRIME GUN TRACE DATA

Dear Senator Durbin:

I write to express our opposition to a provision in recent appropriations legislation funding the Justice Department that significantly restricts the disclosure of crime gun trace data by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). This provision, the original sponsor of which was Rep. Todd Tiahrt (R-Ka), has appeared in appropriations legislation in various forms dating back to fiscal year 2004. It is our position that this language has functioned to protect corrupt gun dealers at the expense of effective law enforcement. We urge that it not be included in the appropriations bill for fiscal year 2008.

The Tiahrt rider bars the use of appropriated funds "to disclose part or all of the contents of the Firearms Trace System database" maintained by ATF, with certain limited exceptions. One of the exceptions is disclosure to "a Federal, State, or local law enforcement agency or prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure." The Tiahrt language also bars disclosure of trace data for use in "any civil action or proceeding" (including those brought by law enforcement officials or agencies) other than enforcement actions filed by ATF itself.

The Tiahrt provision puts new and unjustified limits on ATF's disclosure of trace data to law enforcement

agencies and organizations. Prior to the Tiahrt restrictions, law enforcement agencies could get access to crime gun trace data to assist in developing effective strategi s against gun trafficking and ill gal guns, without the requirement that the data be limited to crime guns pertaining to the requesting jurisdiction or that the request be for use in a specific criminal investigation or prosecution. For example, if a local law enforcement agency wanted trace data to identify which gun dealers in its community exhibit "trafficking indicators" as defined by ATF(such as multiple crime gun traces, short "time to crime" for traced guns, or frequent multiple sales), ATF now cannot share that information because it would not relate to a specific criminal investigation or prosecution. Law enforcement officials also are unable to obtain trace data to inform their evaluation of the effectiveness of various strategies against illegal guns. The Tiahrt rider thereby has functioned to limit effective law enforcement action against corrupt gun dealers and the traffickers they supply.

The Tiahrt language also has prevented ATF itself from publishing reports that use trace data to inform law enforcement and the public about the sources of illegal guns and the impact of various law enforcement strategies. For example, it has curtailed ATF's regular issuance of crime gun trace reports under the Youth Crime Gun Interdiction Initiative. These reports had been invaluable in educating law enforcement, and the public, about the diversion of guns from licensed dealers into the illegal market. As ATF itself recognized, its public dissemination of crime gun trace data provided "crime gun information to the Federal, State, and local law enforcement agencies that submit trace requests, boosting their information resources for arresting gun criminals, responding to gun violence, and establishing a benchmark for crime gun measurements." ATF, *YCGII, Crime Gun Trace Reports National Report (2000)*, (July 2002) at 1 (emphasis in original).

It has been argued that the Tiahrt restrictions on trace data disclosure are needed to protect the identities of undercover agents and the integrity of ongoing investigations. For many years, however, ATF has disclosed crime gun trace data to the public, while withholding any specific information it felt could compromise law enforcement investigations or threaten the safety of law enforcement personnel. We know of no evidence that past

ATF disclosures of trace data have had an adverse impact on l w nforcement. The Tiahrt language, however, places new restrictions on ATF disclosure that do n thing to prot ct law enforcement investigations and, instead, hamper critical law enforcement functions.

For these reasons, we urge you to stand, with your law enforcement constituents and oppose the Tiahrt rider that unjustifiably has limited ATF's disclosure of crime gun trace data to law enforcement and the public.

Sincerely,

Ted Street
State President

Mr. BURTON. That is fine. What about the other 90 percent?

Mr. FEINBLATT. They are on record absolutely opposing it.

Mr. BURTON. What about the other 90 percent?

Mr. FEINBLATT. They are not alone, and I think that you will see many——

Mr. BURTON. What about the other 90 percent? You just said 10 percent. What about the other 90 percent?

Mr. FEINBLATT. With all due respect, one organization, the Fraternal Order of Police, which has basically taken the position that the reason why the Tiahrt Amendment is a good thing is this. They have said that it does two things. It protects dealers from harassment. While 85 percent of dealers in this country have absolutely no traces, 1 percent of the dealers account for nearly 60 percent of the traces.

Every police organization that represents chiefs, who look at crime on a macro level, not on a one at a time level, opposes it. So what is the other reason that the FOP says that we shouldn't release trace data? They say, well, it could expose undercover operations.

However, when the ATF and the FOP have been asked, under oath, whether they can give one single example in Federal court of an instance where an undercover operation was compromised, they were unable to do it. When Todd Tiahrt was asked whether he can give one single example of an undercover operation that has been compromised, he has been able to do it.

In fact, the real reason that we have the Tiahrt Amendment, I think we can find by looking at the Washington Post from July 21, 2003, when Todd Tiahrt was asked why he put in the Tiahrt Amendment——

Mr. BURTON. I am not asking you about Todd Tiahrt. I am not asking that question.

Mr. FEINBLATT. Sir, the FOP supports Todd Tiahrt. We are talking about the FOP.

Mr. BURTON. No, no, no, no. Just the——

Mr. FEINBLATT. The reason that they are supporting the Tiahrt Amendments is because "I wanted to make sure I was fulfilling the needs of my friends who are firearms dealers, and the NRA officials said they were helpful in making sure I had my bases covered." What we have here is another example of Congress bending over backward——

Mr. BURTON. All right. You just go on and on and on.

Mr. FEINBLATT [continuing]. To protect the gun industry.

Mr. BURTON. You have made your point. Let me just say this to you, or ask you this question. How many people are in the FOP around the country?

Mr. FEINBLATT. Several hundred thousand, about 300,000, I think.

Mr. BURTON. And how many oppose the Tiahrt Amendment and take your position?

Mr. FEINBLATT. There are many States, there are States that are fractured——

Mr. BURTON. How many?

Mr. FEINBLATT. I don't have that answer.

Mr. BURTON. You should.

Mr. FEINBLATT. Why should I? I can tell you this.

Mr. BURTON. Because you are making categorical statements that can't be verified.

Mr. FEINBLATT. I am not making a categorical statement. One police organization opposes it, and 10 nationals, 1 police organization supports it, 10 nationals oppose it, 22 State and regionals oppose it, 175 police chiefs. I do addition that way.

Mr. BURTON. The FOP represents more than all of those you named. Combined. That is it. I have no more questions.

Mr. KUCINICH. I want to thank the gentleman from Indiana. I want to ask the witness if you could provide this committee with the qualification and the quantification of the various groups that have taken positions on this that you offer to this committee as proof of the position that you hold.

Mr. FEINBLATT. Absolutely.

Mr. KUCINICH. We would appreciate it very much.

[The information referred to follows:]

For the Record Submitted by 05/10/07
John Feinblatt
Domestic Policy Subcommittee
2154 RHOB - 2:00 p.m.

The United States Congress
The Capitol
Washington, D.C.

LAW ENFORCEMENT OPPOSITION TO APPROPRIATIONS RIDER LIMITING DISCLOSURE OF CRIME GUN TRACE DATA

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The Tiahrt provision puts new and unjustified limits on ATF's disclosure of trace data to law enforcement agencies and organizations. Prior to the Tiahrt restrictions, law enforcement agencies could get access to crime gun trace data to assist in developing effective strategies against gun trafficking and illegal guns, without the requirement that the data be limited to crime guns pertaining to the requesting jurisdiction or that the request be for use in a specific criminal investigation or prosecution. For example, if a local law enforcement agency wanted trace data to identify which gun dealers in its community exhibit "trafficking indicators" as defined by ATF (such as multiple crime gun traces, short "time to crime" for traced guns, or frequent multiple sales), ATF now cannot share that information because it would not relate to a specific criminal investigation or prosecution. Law enforcement officials also are unable to obtain trace data to inform their evaluation of the effectiveness of various strategies against illegal guns. The Tiahrt rider thereby has functioned to limit effective law enforcement action against corrupt gun dealers and the traffickers they supply.

The Tiahrt language also has prevented ATF itself from publishing reports that use trace data to inform law enforcement and the public about the sources of illegal guns and the impact of various law enforcement strategies. For example, it has curtailed ATF's regular issuance of crime gun trace reports under the Youth Crime Gun Interdiction Initiative. These reports had been invaluable in educating law enforcement, and the public, about the diversion of guns from licensed dealers into the illegal market. As ATF itself recognized, its public dissemination of crime gun trace data provided "crime gun information to the *Federal, State, and local law enforcement agencies* that submit trace requests, boosting their information resources for

arresting gun criminals, responding to gun violence, and establishing a benchmark for crime gun measurements." ATF, *YCGII, Crime Gun Trace Reports National Report (2000),* (July 2002) at 1 (emphasis in original).

It has been argued that the Tiahrt restrictions on trace data disclosure are needed to protect the identities of undercover agents and the integrity of ongoing investigations. For many years, however, ATF has disclosed crime gun trace data to the public, while withholding any specific information it felt could compromise law enforcement investigations or threaten the safety of law enforcement personnel. We know of no evidence that past ATF disclosures of trace data have had an adverse impact on law enforcement. The Tiahrt language, however, places new restrictions on ATF disclosure that do nothing to protect law enforcement investigations and, instead, hamper critical law enforcement functions.

For these reasons, we urge you to stand with your law enforcement constituents and oppose the Tiahrt rider that unjustifiably has limited ATF's disclosure of crime gun trace data to law enforcement and the public.

Sincerely,

National Law Enforcement Associations:

International Association of Chiefs of Police

International Brotherhood of Police Officers

Major Cities Chiefs Association

Police Executive Research Foundation

Police Foundation

Hispanic American Police Command Officers Association (HAPCOA)

National Black Police Association

National Latino Peace Officers Association

National Organization of Black Law Enforcement Executives

School Safety Advocacy Council

State Law Enforcement Associations:

California Association of Chiefs of Police

Colorado Association of Chiefs of Police

Connecticut Association of Chiefs of Police

Delaware Police Chiefs Council

Illinois Association of Chiefs of Police

Kentucky Association of Chiefs of Police

Maine Association of Chiefs of Police

Maryland Association of Chiefs of Police

Maryland Municipal Law Enforcement Executives Association

Massachusetts Assoc. of Chiefs of Police

Michigan Association of Chiefs of Police

Minnesota Association of Chiefs of Police

State Law Enforcement Associations:

New England Assoc. of Chiefs of Police

Representing: Maine
Connecticut
Rhode Island
New Hampshire
Vermont
Massachusetts

New Mexico Association of Chiefs of Police

New York Association of Chiefs of Police

Oregon Association of Chiefs of Police

Rhode Island Police Chiefs Association

Texas Association of Chiefs of Police

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Washington Association of Sheriffs and Police Chiefs (Washington State)

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Racine Police Department
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Mr. KUCINICH. Also without objection, the Washington Post article that you mentioned, if it could be included in the record, and the letter from the Illinois FOP, if it could be included in the record. Without objection.

[The information referred to follows:]

For the Record - Submitted by:
John Feinblatt
Domestic Policy Subcommittee
2154 Rayburn HOB - 2:00 p.m.

05/10/07

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HEADLINE: Firearms Measure Surprises Some in GOP

BYLINE: Juliet Eilperin, Washington Post Staff Writer

BODY:

Rep. Todd Tiahrt (Kan.) surprised many of his fellow Republicans last week when he offered a lengthy amendment, blessed by the National Rifle Association, to the 2004 funding bill for the Commerce, Justice and State departments.

Tiahrt's eight-point amendment, which targets the Bureau of Alcohol, Tobacco and Firearms and was drafted with the NRA's help, would prohibit the use of federal funds for several bureau activities. It would prevent the bureau from requiring firearms dealers to conduct a physical inventory, from denying licenses to dealers whose sales fall below a certain level, and from demanding that certain dealers provide documentation for all used guns sold in a specific period.

Rep. Frank R. Wolf (R-Va.), who chairs the appropriations subcommittee on Commerce, Justice and State, objected to the amendment, saying he had not had time to review it. "They may all have been good amendments, they may not," Wolf said. "I just didn't have an opportunity to go through and look at them. I could not accept an amendment without knowing what all the provisions do."

Tiahrt refused to withdraw the amendment and won passage on a 31 to 30 vote. Before the vote, Tiahrt assured colleagues the NRA had reviewed the language, which won over some Democrats as well as several Republicans. "I wanted to make sure I was fulfilling the needs of my friends who are firearms dealers," Tiahrt said. NRA officials "were helpful in making sure I had my bases covered."

Wolf said House leaders would take a second look at the amendment when they enter talks with senators to resolve differences in the two chambers' appropriations bills. Tiahrt said he is confident his measure would survive the negotiations.

With House-Senate conferees facing weeks or months of negotiations over proposals to add a prescription drug benefit to Medicare, Democratic and Republican lawmakers in the House are taking their arguments to constituents.

At least 75 House Democrats held town hall meetings on the subject this weekend to tell their side of the story. Most Democrats oppose the GOP-written House bill, which would subsidize the cost of private insurance plans that would compete for seniors' business once the bill is fully implemented in 2010. Under that scenario, seniors would choose between Medicare and private plans to

obtain drug coverage as well as insurance for doctor visits and hospital stays. The House adopted the measure by a single vote last month.

According to Stacy Farnen, spokeswoman for House Minority Whip Steny Hoyer (D-Md.), lawmakers from California to Maine spoke to elderly Americans about the flaws in the GOP bill.

"Democratic members are taking the prescription drug issue straight to seniors to explain what Democrats are fighting for, and the irresponsible plan that Republicans are trying to push through Congress," Farnen said.

Republicans have launched an aggressive outreach effort as well, according to GOP Conference spokesman Greg Crist. During the July 4th recess, he said, "several dozen" Republican lawmakers held "early birthday" celebrations for Medicare, made pharmacy visits and held town meetings to publicize their party's plan.

"We intend and plan to see those same events during August," Crist said.

Bear baiters, beware. Rep. Elton Gallegly (R-Calif.) has gotten fed up with hunters laying out extensive food traps for bears in national parks. While such baiting practices are legally permissible, Gallegly says they have created "a major safety issue" because the increased exposure to human food has made bears bolder about breaking into campsites and cabins.

Gallegly has a bill before the House Resources Committee, and he describes it as a reasonable curb on bear feeding. "I just say you can't put a truckload of Twinkies by the side of the road for the purpose of enticing a bear out to shoot it," Gallegly said in an interview. The bill has about 170 co-sponsors, and Gallegly said he is optimistic the measure will pass the House.

The proposal to allow U.S.-made prescription drugs to be reimported from foreign countries sparked a fierce debate among conservatives in Republican activist Grover Norquist's weekly meeting on Wednesday. Rep. Gil Gutknecht (R-Minn.) outlined his bill before representatives from several think tanks. The attendees -- including Steve Moore from the Club for Growth and Fred Smith from the Competitive Enterprise Institute -- blasted the proposal, according to participants. Pharmaceutical companies oppose the reimportation idea, but consumer groups support it.

At one point, Smith accused Gutknecht of trying to stifle pharmaceutical innovation. The bill, he said, would prevent U.S. companies from speeding lifesaving drugs to the commercial market. "Your bill's going to kill people," Smith said.

Gutknecht spokesman Bryan Anderson dismissed the criticism. "It's a scare tactic, and what the congressman wants to do is open up markets because he's a free trader," Anderson said.

The House will consider a mix of bills before leaving for the August recess, including pension law changes, the proposed reimportation of prescription drugs and several spending bills. The Senate will take up the homeland security appropriations bill as well as trade agreements with Chile and Singapore.

Staff writer Dan Morgan contributed to this report.

LOAD-DATE: July 21, 2003

Mr. KUCINICH. Mr. Bilbray, you have 9 minutes.

Mr. BILBRAY. Thank you, Mr. Chairman. I hope to not use it all up.

I would first of all like to thank Ms. Thomas. I think too often we don't talk about where we really want to go with these issues. Ms. Thomas, I think it might have been a slip of the tongue, but you indicated you really would like to see national registration of all firearms within the Nation.

My question to you though, is, you made a comment about registering motor vehicles. What State requires that you must register a car to own a car?

Ms. THOMAS. I believe the State of California does. You and I are both from California and I believe I registered my car, and that is because I had to. When a police officer pulls me over and they ask me for my registration, I believe I need to provide that.

Mr. BILBRAY. Ma'am, let me clarify. Are we not required to register a car simply to own a car? You are required to register a car to operate that car on a public right of way. Ownership of a motor vehicle, motorcycle, car, tractor, whatever, is not regulated by the State for ownership. It is regulated for use on public right of ways.

So there is a distinct difference here, when we talk about this, that from now on, I am just saying as a local government guy, there is a huge difference, and I think now if you think about it, if you own a motorcycle that is just going to be used off-road, you don't have a registration, right? You don't have to license it then. But if you use it on the road, there is a distinct difference. I would use, a fair comparison would be the fact that we do register and permit those who want to carry a firearm, loaded, in the public. So there is a distinct difference.

So in the future, I hope that when you bring this up, you think about the fact that to drive a car on California roads, you are required to register it. But mere ownership is not a registration.

Ms. THOMAS. I brought that up as an example of ways in which we as a society have balanced the rights of the individual against the risk to society. We take steps in order to ensure that there are safety provisions, preventive safety provisions and tracking in place. Certainly, I trust you are 100 percent about car registrations.

Mr. BILBRAY. From now on, there was a mis-speak there, to own a car, you don't have to have it registered, to drive it on a public street, you do, though.

Ms. THOMAS. If you say so, then I am sure you are correct.

Mr. HELMKE. In Indiana, it is a little bit different. If it is an operable vehicle, you do need to have it licensed and registered. There are distinctions.

Mr. BILBRAY. Usually, it is because, specifically on a tax purpose, there is a personal property tax, and that is used to levy a tax.

Mr. HELMKE. I know in Indiana the concern is abandoned vehicles, too, on the streets that are inoperable.

Mr. BILBRAY. Junk. And there you come back to—John, your city sued the car, I mean, the manufacturers of the firearms, because the ATF was not enforcing the law?

Mr. FEINBLATT. What I was referring to, no, is gun dealers. New York City, along with many other cities, does have a suit against

manufacturers. However, what I referred to in my testimony and the discussion here today was a suit against 27 gun dealers in five States.

Mr. BILBRAY. In five States?

Mr. FEINBLATT. In five States.

Mr. BILBRAY. And you have other activities against those who manufacture?

Mr. FEINBLATT. We do have a pending suit against manufacturers that requires them to conduct basically a code of conduct which will require them to take notice of dealers who have high traces and continue to sell illegally.

Mr. BILBRAY. Are they violating the ATF regulations?

Mr. FEINBLATT. The dealers, which is the suit I talked about, are absolutely violating them.

Mr. BILBRAY. OK, you said you are suing them because ATF is not doing the work. I am talking about the lawsuits against gun dealers.

Mr. FEINBLATT. We are suing them, what we are actually suing the dealers for is violating the law. All we are trying to do is enforce the law.

Mr. BILBRAY. OK, you have one group that are the dealers you are suing because they are violating the law. Are the gun manufacturers violating the law?

Mr. FEINBLATT. The gun manufacturers is a completely different type of suit. It is a suit where we are basically calling upon them to take notice of illegal sales practices and just adopt a code of conduct. But when you talk about the dealers, what we are suing is 27 dealers who flagrantly sold guns to straw purchasers. They are on tape, caught red-handed. What we are only asking for is to enforce the law. That is all that we want to do. Most gun dealers play by the rules. Most gun dealers are absolutely honest. But breaking the law——

Mr. BILBRAY. Getting back to this issue, though, you have two sets of lawsuits now and you are willing to defend one based on the fact that they are violating the law. I went back and said you had another one——

Mr. FEINBLATT. I agreed.

Mr. BILBRAY. You are suing them because they make guns or because they are breaking the law?

Mr. FEINBLATT. We are suing them because they are not taking notice, it is a civil suit and they have a responsibility, it is a negligence action based on the fact that they continue to supply guns to dealers who are breaking the law.

Mr. BILBRAY. Do you have that kind of lawsuit to the manufacturers of alcoholic beverages?

Mr. FEINBLATT. We actually do, certainly——

Mr. BILBRAY. Beer, wine?

Mr. FEINBLATT [continuing]. Sting operations all the time——

Mr. BILBRAY. I meant the manufacturers, the national manufacturers of alcohol, as opposed to——

Mr. FEINBLATT. No, we don't, but there is a big difference, which is, the manufacturers actually know who are the illegal gun dealers.

Mr. BILBRAY. Oh, so they do, so they are breaking the law, you are saying?

Mr. FEINBLATT. No. What I am saying is they are on notice. I don't believe the manufacturers of Camel cigarettes knows when the corner bodega sells illegally to a minor. But there is no question——

Mr. BILBRAY. So you are saying, I thought you said that the gun dealers weren't breaking the law. Now you are saying they are, they are knowingly breaking the law?

Mr. FEINBLATT. The gun dealers are without a doubt breaking the law.

Mr. BILBRAY. No, but I meant the gun manufacturers.

Mr. FEINBLATT. I said that the gun manufacturers are on notice that they continue to supply to dealers that are breaking the law. All we are seeking in that manufacturing suit, along with many other cities who have brought similar suits, is that they stop selling to those.

Mr. BILBRAY. Is it against the law for them to make those sales?

Mr. FEINBLATT. It is a, I think that it creates a nuisance, it creates a civil nuisance and that is a colorable claim under law.

Mr. BILBRAY. OK, that's why you are going civil, as a nuisance.

Mr. FEINBLATT. We are talking about civil cases, absolutely.

Mr. BILBRAY. I would ask, you are a high ranking individual in law enforcement, or in the city. Is New York City a sanctuary city for illegal immigrants?

Mr. FEINBLATT. Absolutely not. And I am not sure what relevance it has to today's testimony.

Mr. BILBRAY. The activity of information sharing, the activity of focusing on certain deals, city of New York in the past has had major problems. I don't know what your status at this time. But we have had open discussion about not having law enforcement cooperate with Federal law enforcement, not sharing information with Federal law enforcement over on one side. I just feel it is really inconsistent for the city of New York, who has in the past said, we are not going to participate with the Federal Government on this issue, because we are worried about privacy, we are worried about individual rights, we are worried about violation of some, a segment of our population because it is so important to protect these individual rights and this privacy, and then on another issue for the same city to say, it is ridiculous to worry about those, not sharing information, it is ridiculous to worry about the privacy and moving it over. I just have to say, John, I really see an inconsistency with the history.

Mr. FEINBLATT. There would be an inconsistency if it were true, Congressman. However, let me tell you, because in fact I have testified before Congress on this very issue. It is certainly our policy to notify people when there have been criminal convictions.

The problem is, actually that the INS has, makes it extremely difficult to make these reports. In fact, I wish I had a document from the INS which basically goes through step by step what instructions to INS officials, what they are to do when they receive a call from a local. And let me paraphrase it, since I don't have it in front of me. The instructions go something like this: if you get a phone call from a local law enforcement agency trying to report

that a person who is undocumented has committed a crime, tell the caller that you should now write a letter. If they then follow that up and write a letter, rather than making a phone call as instructed, you should then instruct them to have their supervisor write a letter. If they then write a letter according, if the supervisor then writes a letter, advising of the conviction or the arrest of somebody, you should then, and I can't remember the next steps of it, provide documentation.

So the problem really is that the INS has historically, and I want to be truthful, I don't know whether this has been changed, but historically has made it extraordinarily difficult for locals to do it. Because in fact, the INS has not wanted to enforce these laws.

Mr. BILBRAY. Well, I appreciate that concern and the history of a previous administration, at least, and I would be interested to see what this administration looks at, cooperation with the Federal Government or specific direction to law enforcement, that unless somebody has committed other crimes, that individuals who are illegally present in the United States would not be apprehended or engaged by New York law enforcement.

My biggest point is this. The privacy issue needs to be addressed on both sides. But the consistency of law enforcement to say, one issue we are going to be engaged in lawsuits and litigation on the other side, we are basically going to be saying, unless one of our city laws are broken or State laws are broken, we are not going to be engaged.

Mr. KUCINICH. The gentleman's time has expired.

Mr. FEINBLATT. Let me just respond.

Mr. KUCINICH. The gentleman's time has expired.

Mr. FEINBLATT. Gun trace data——

Mr. KUCINICH. Sir?

Mr. FEINBLATT [continuing]. Only has crime data in it. So the only privacy that it is actually protecting is criminals.

Mr. KUCINICH. The witness is out of order. Actually, the gentleman's time has expired. I appreciate your presence here, but I would just appreciate your following the decorum of this committee.

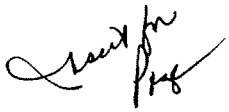
Mr. BURTON. Mr. Chairman.

Mr. KUCINICH. The gentleman's time has expired. I want to thank this panel for its presence.

Mr. BURTON. Can I submit something for the record?

Mr. KUCINICH. The gentleman certainly can, without objection.

[The information referred to follows:]



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
OFFICE OF THE CRIMINAL JUSTICE COORDINATOR
MUNICIPAL BUILDING • ONE CENTRE STREET • TENTH FLOOR NORTH
NEW YORK, NEW YORK 10007
(212) 788-6810

JOHN FEINBLATT
Criminal Justice Coordinator

May 16, 2007

The Honorable Dennis Kucinich
Chairman, Subcommittee on Domestic Policy,
Committee on Oversight and Government Reform
2445 Rayburn House Office Building
Washington, D.C. 20515

Re: Follow-up to May 10, 2007 Testimony.

Mr. Chairman:

I would like to thank you and the subcommittee for inviting me to testify for hearing entitled "Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws" on May 10, 2007.

During my testimony, Representative Bilbray asked some questions on a matter unrelated to illegal gun policies. His questions involved New York City's practices regarding reporting the immigration status of persons who come to the attention of the New York City's criminal justice system. It has come to my attention that during the questioning of the second panel, when I was no longer present at the hearing, Representative Bilbray made some statement referencing New York City Executive Order No. 41 and apparently suggested that this executive order inhibits federal investigations.

Executive Order No. 41 does in fact relate to New York City policies regarding immigration status, but – in contrast to Representative Bilbray's apparent representations – the executive order clearly provides that City law enforcement personnel shall provide information regarding persons who are known or suspected of committing "criminal activity." For your reference and to supplement the record of the subcommittee, I am enclosing here a full copy of Executive Order No. 41.

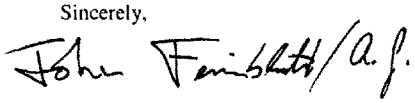
New York City actively assists Federal Immigration and Customs Enforcement (ICE) to ensure that criminal aliens are identified, detained, and deported. Examples of the City's practice of working cooperatively with federal authorities include:

- ICE has its own office on Rikers Island, the City's jail, for its "Detention and Recovery Operation."

- Operation Retrack, a joint operation between the City Department of Probation and ICE, targets persons on probation for violent or drug-related crimes. Since 2006, the City Department of Probation has turned over 106 undocumented aliens in this operation.
- Operation Predator, a series of joint operations between the City Department of Probation and ICE, targets sexual predators whose victims were children. The City Department of Probation has handed over a total of 269 undocumented aliens as a result of Operation Predator efforts since 2004.

If you have any other questions, please don't hesitate to contact me.

Sincerely,



John Feinblatt

cc: Hon. Brian Bilbray
Enclosure

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

EXECUTIVE ORDER No. 41

September 17, 2003

CITY-WIDE PRIVACY POLICY AND AMENDMENT OF EXECUTIVE ORDER NO. 34 RELATING TO CITY POLICY CONCERNING IMMIGRANT ACCESS TO CITY SERVICES

WHEREAS, it is the policy of the City of New York to promote the utilization of its services by all of its residents who are entitled to and in need of them; and

WHEREAS, individuals should know that they may seek and obtain the assistance of City agencies regardless of personal or private attributes, without negative consequences to their personal lives; and

WHEREAS, the obtaining of pertinent information, which is essential to the performance of a wide variety of governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved, and preserving confidentiality in turn requires that governments regulate the use of such information by their employees; and

WHEREAS, in furtherance of this policy, confidential information in the possession of City agencies relating to immigration status or other personal or private attributes should be disclosed only as provided herein;

NOW, THEREFORE, by virtue of the power vested in me as Mayor of the City of New York, it is hereby ordered:

Section 1. As used herein, "confidential information" means any information obtained and maintained by a City agency relating to an individual's sexual orientation, status as a victim of domestic violence, status as a victim of sexual assault, status as a crime witness, receipt of public assistance, or immigration status, and shall include all information contained in any individual's income tax records.

Section 2. No City officer or employee shall disclose confidential information, unless

(a) such disclosure has been authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or legal guardian; or

(b) such disclosure is required by law; or

(c) such disclosure is to another City officer or employee and is necessary to fulfill the purpose or achieve the mission of any City agency; or

(d) in the case of confidential information other than information relating to immigration status, such disclosure is necessary to fulfill the purpose or achieve the mission of any City agency; or

(e) in the case of information relating to immigration status, (i) the individual to whom such information pertains is suspected by such officer or employee or such officer's or employee's agency of engaging in illegal activity, other than mere status as an undocumented alien or (ii) the dissemination of such information is necessary to apprehend a person suspected of engaging in illegal activity, other than mere status as an undocumented alien or (iii) such disclosure is necessary in furtherance of an investigation of potential terrorist activity.

Agencies shall promulgate such rules as may be appropriate to detail circumstances in which confidential information may or may not be disclosed pursuant to this executive order. Any City officer or employee with a question relating to the disclosure of confidential information under this section shall consult with the general counsel of such officer's or employee's agency.

Section 3. Section 2 of Executive Order No. 34, dated May 13, 2003, is amended by adding a new subdivision d to read as follow:

d. "Illegal activity" means unlawful activity but shall not include mere status as an undocumented alien.

Section 4. Sections 3 and 4 of such Executive Order are amended to read as follows:

Section 3. Information respecting aliens.

a. A City officer or employee, other than law enforcement officers, shall not inquire about a person's immigration status unless:

(1) Such person's immigration status is necessary for the determination of program, service or benefit eligibility or the provision of City services; or

(2) Such officer or employee is required by law to inquire about such person's immigration status.

Section 4. Law Enforcement Officers.

a. Law enforcement officers shall not inquire about a person's immigration status unless investigating illegal activity other than mere status as an undocumented alien.

b Police officers and peace officers, including members of the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity.

c. It shall be the policy of the Police Department not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.

Section 5. This Order shall take effect immediately.

MICHAEL R. BLOOMBERG
MAYOR

Mr. KUCINICH. All Members will have 5 days to submit testimony. I want to thank each of the witnesses for being here. Your presence is very much appreciated and I am grateful for the testimony which you have brought to this committee.

This is the opening of a much longer discussion and your presence has helped to ensure that we were able to make a positive beginning. So I am going to dismiss the first panel and ask for the second panel to be ready.

We are now going to move to our second panel of witnesses on this Domestic Policy Subcommittee hearing entitled, "Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws." I would now ask the witnesses to, first I will introduce them.

We have Rachel Brand. Rachel Brand was confirmed as Assistant Attorney General for the Office of Legal Policy of the U.S. Department of Justice on July 28, 2005. In her position, she manages the development of a variety of civil and criminal policy initiatives, the creation of departmental regulations and the Department's role in the confirmation of the President's judicial nominees. Her office also oversees legal policy for the ATF and the FBI.

Before her current appointment, Ms. Brand worked in the Office of Legal Policy principally on terrorism issues; served as an associate counsel to the President and clerked for Supreme Court Justice Anthony Kennedy.

In addition to Ms. Brand, the Department of Justice has made Steve Rubenstein, the ATF's Chief Counsel, available to sit at the witness table and respond to any questions Members may have regarding the ATF's role in enforcing firearms law, including the Brady Act. Stephen Rubenstein was appointed Chief Counsel of ATF on September 29, 2003. He serves as the principal legal advisor to the ATF's director and oversees legal services related to, among other laws, Federal firearms and explosives laws.

His office provides technical assistance to congressional committees in legislative drafting sessions; makes recommendations to the Department of Justice concerning litigation and furnishes legal advice and assistance to other Federal, State and local agencies including the U.S. attorneys and Justice Department officials in the prosecution of ATF cases. Prior to becoming Chief Counsel, Mr. Rubenstein held the position of Associate Chief Counsel for 5 years.

It is the policy of this subcommittee and also of our full committee, the Committee on Oversight and Government Reform, to swear in all witnesses before they testify. I would ask that the witnesses rise, raise your right hands.

[Witnesses sworn.]

Mr. KUCINICH. Thank you. Let the record reflect that the witnesses answered in the affirmative.

As in panel one, I ask our witnesses to give an oral summary of their testimony. Keep the summary under 5 minutes in duration. I want you to keep in mind that your complete written statement will be included in the hearing record. Ms. Brand, you may begin your testimony.

STATEMENT OF RACHEL L. BRAND, ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY, DEPARTMENT OF JUSTICE, ACCOMPANIED BY STEPHEN R. RUBENSTEIN, CHIEF COUNSEL, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES

Ms. BRAND. Thank you, Chairman Kucinich, Congressman Burton. I appreciate the opportunity today to talk about the National Institute Criminal Background Check System [NICS]. The Brady Act required the Attorney General to establish a system that gun dealers can contact to determine whether a prospective gun purchaser is prohibited under Federal or State law from buying a gun. The NICS is that system.

The NICS has had a significant impact in preventing prohibited persons from buying guns from gun dealers. Since 1998, as you mentioned earlier, chairman, over 75 million background checks have been processed by the NICS. Those checks have denied about 1.1 million gun transfers to persons prohibited from possessing firearms.

The NICS has also gone a long way toward fulfilling the Brady Act's requirement that background checks be completed promptly, so that lawful purchasers can buy a firearm without unreasonable delay. Currently, 92 percent of NICS checks are completed during the initial phone call, usually within a minute. Ninety-five percent of all checks are completed within 2 hours.

The NICS is a computerized system that queries several national data bases simultaneously, including what we call the III, which is a data base of criminal history records, the NCIC, which includes among other things records of protection orders and wanted persons, and the NICS index itself, which includes other records that are relevant specifically to gun background checks.

The effectiveness of the NICS in preventing gun transfers to prohibited persons depends directly upon the availability of records to the system. Although the Brady Act requires Federal agencies to provide the NICS upon the Attorney General's request with information about those who are prohibited from buying firearms. States are not required to provide any information to the NICS. So to the extent that they do so, they do so voluntarily.

To improve the availability of State records of the NICS, NCIC and III, the Brady Act established the NCHIP Federal funding program, which since 1995, has awarded over $500 million to the States. With the help of NCHIP, the States have come a long way in increasing the automation and accessibility of records to the Federal data bases.

In addition to providing funding to the States, the FBI and ATF have worked tirelessly since the inception of the NICS to encourage States to provide more records to the system. This outreach has included education of State officials about the NICS and about the contours and parameters of the Federal firearms prohibitors and given technical support to State agencies that hold the records.

Specifically relevant to the Virginia Tech tragedy, both the ATF and FBI have done outreach and provided education to States and encouragement to provide more mental health records to the NICS system. One of the most recent examples of that is a letter sent yesterday by ATF to all the States, explaining the Federal mental

health prohibitor and offering to help the States determine whether their records meet the Federal standard. If we have not already provided you with a copy of that letter, we will do so after the hearing.

ATF also plans to amend its Form 4473, which is the form that the person fills out when they go to a gun dealer to buy a gun, to provide more information to the prospective buyers about the parameters of the mental health disqualifier.

Despite the Department's efforts and the tremendous progress that has been made in improving the completeness of records available to the NICS, there are still significant shortcomings in the system. They include, for example, the fact that about half of III arrest records are missing final dispositions, and the fact that fewer than half of the States provide any mental health records to the NICS, even though States that do provide records, only a handful of those provide any significant number of mental health records to the NICS.

We are continuing our efforts to encourage the States to provide more information to the NICS and several States are actively engaged in changing their law or in taking other efforts to provide more information to the NICS.

So I appreciate the opportunity to testify today. I would like to note that Federal firearms prosecutions are one of the Department's top priorities. We take that very seriously through Project Safe Neighborhood. I would note that since fiscal year 2001, when Project Safe Neighborhood was stood up, we have charged over 71,000 defendants with gun charges. The number of gun prosecutions starting in the 6-years from fiscal year 2001 to fiscal year 2006 is more than twice the number of Federal gun prosecutions that was brought in the previous 6 year period. So I want the committee to know that we take enforcement of the gun laws very seriously.

Thank you very much, and I would be happy to answer your questions.

[The prepared statement of Ms. Brand follows:]

Department of Justice

STATEMENT OF

RACHEL L. BRAND
ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON DOMESTIC POLICY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"LETHAL LOOPHOLES: DEFICIENCIES IN STATE AND FEDERAL GUN PURCHASE LAWS"

PRESENTED

MAY 10, 2007

STATEMENT OF

RACHEL L. BRAND
ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON DOMESTIC POLICY
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON

"LETHAL LOOPHOLES: DEFICIENCIES IN STATE AND FEDERAL GUN PURCHASE LAWS"

MAY 10, 2007

Good afternoon, Chairman Kucinich, Ranking Member Issa, and members of the Subcommittee. Thank you for the opportunity to speak to you today about the National Instant Criminal Background Check System (NICS), established by the Attorney General under the Brady Handgun Violence Prevention Act of 1993, Pub. L. 103-159, known as the Brady Act.

The Federal Gun Control Act (GCA) of 1968, and subsequent amendments, created categories of persons who are prohibited from receiving or possessing firearms, including any person who: (1) has been convicted of, or is under indictment for, a felony; (2) is a fugitive from justice; (3) is an unlawful user or addicted to any controlled substance; (4) has been adjudicated as a mental defective or committed to a mental institution; (5) is an illegal or unlawful alien or, with certain exceptions, a non-immigrant alien; (6) has been dishonorably discharged from the Armed Forces; (7) has renounced his United States citizenship; (8) is subject to a domestic violence protection order; and (9) has been convicted of a misdemeanor crime of domestic violence. See 18 U.S.C. 922(g). In addition, some States have laws that impose additional restrictions on gun ownership.

The Brady Act, enacted in 1993, required the Attorney General to establish no later than November 1998 a system for federally licensed gun dealers to contact to obtain information, "to be supplied immediately," on whether a non-licensed gun buyer (i.e., a person who is not a federally licensed dealer) is prohibited from receiving a firearm under Federal or State law. Brady Act background checks replaced an honor system under the GCA in which gun dealers generally had to accept at face value buyers' representations that they were not prohibited from receiving a firearm.

The NICS has had a significant impact in preventing prohibited persons from buying firearms from federally licensed gun dealers, while at the same time facilitating immediate completion of the vast majority of background checks so that lawful purchasers can buy a firearm without unreasonable delay. After more than eight years of operations, over 75 million

background checks have been processed through the NICS. Those checks have denied approximately 1.1 million gun transfers to persons prohibited by law from possessing firearms. The NICS has also gone a long way toward fulfilling the Brady Act's requirement that the background checks be completed promptly, with 92% of checks being completed during the initial call by the dealer, and 95% of the checks being completed within 2 hours.

What is the NICS?

At the Attorney General's direction, the Federal Bureau of Investigation (FBI) developed the NICS through a cooperative effort with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and State and local law enforcement agencies. The system is operated by the NICS Section of the FBI's Criminal Justice Information Services (CJIS) Division located in Clarksburg, West Virginia.

The NICS is a computerized system that queries several national databases simultaneously in order to process a name-based background check. The databases checked include (1) the Interstate Identification Index (III or "Triple I"), a database of criminal history records, (2) the National Crime Information Center (NCIC), which includes files of protection orders and wanted persons relevant to gun background checks, and (3) the NICS Index, which includes records collected by the FBI relevant to gun background checks that are not in the III or NCIC. The NICS is designed to respond to a dealer within 30 seconds in the vast majority of cases with information on whether a prospective buyer is prohibited from receiving a firearm under Federal or State law.

FBI personnel process NICS checks generated by most States, but the system is designed so that States can elect to serve as a point of contact (POC) for NICS checks in their States. As a POC, a State designates a State or local law enforcement agency to process NICS checks for the gun dealers in that State. Currently, 13 States serve as POCs for all firearm transactions within those States, so they are referred to as full POCs. An additional 8 States serve as partial POCs for background checks for either handgun sales or handgun permits within those States.

How a NICS Check Works

The NICS is available to its users 364 days a year, from 8:00 am to 1:00 am EST. Gun dealers submitting checks directly to the FBI NICS Section can do so either by calling a toll-free number and submitting the required information about the buyer to a contract call center that sends the request to the FBI for the database check or by sending a request directly to the NICS electronically via a secure internet portal, referred to as "NICS e-check." Dealers in POC States use the method prescribed by the POC agency.

A NICS check begins after a prospective purchaser provides a government-issued photo identification to the gun dealer and fills out an ATF firearms transaction form, known as the ATF form 4473. The gun dealer then contacts the appropriate agency, either the FBI (through its contract call center or through NICS e-check) or the State POC, and provides the purchaser's descriptive information from the ATF form 4473. This information is used to search the databases queried by the NICS for possible matching records. This descriptive information

includes name, date of birth, sex, race, State of residence, and citizenship, as well as other information voluntarily provided by the purchaser, such as social security number.

After the purchaser's information is entered into the NICS, a search is conducted for matching records in III, the relevant files in NCIC, and the NICS Index. If the database search does not yield a record that potentially matches the descriptive information provided by the dealer, then the call center responds immediately advising the FFL that the firearm transaction may "proceed," signifying that no information was discovered to indicate that the purchaser is prohibited from purchasing or possessing a firearm. In addition to the "proceed" response, the NICS generates a unique number associated with the check, referred to as a NICS transaction number, or NTN, which the gun dealer is required to record on the ATF form 4473. These "immediate proceed" transactions take 30 seconds or less.

If the search hits on a record that potentially matches the purchaser, the call center provides the dealer with the NTN and immediately transfers the dealer and transaction to a NICS legal instruments examiner, or "NICS examiner," at CJIS. NICS examiners are FBI personnel who, unlike the call center personnel, are authorized to access and trained to analyze criminal history and other sensitive information. Once the transaction is transferred, the NICS examiner reviews the records returned by the NICS search to determine if any match the prospective firearm purchaser, if the matching records are complete, and whether a matching record indicates that the purchaser is prohibited from the purchase or possession of a firearm. If a record matches the purchaser and does not demonstrate a disqualification from purchasing or possessing firearms, then the NICS examiner will instruct the dealer that the transaction may "proceed." If the matching record does indicate a disqualification from purchasing or possessing firearms, the dealer is instructed to "deny" the transaction. If the record is incomplete or inconclusive, then the NICS examiner advises the dealer that the transaction has been "delayed" for further review. Delayed transactions are automatically placed in a "delay queue" by the NICS and are then assigned to a NICS examiner to attempt to obtain complete information in order to make a final determination regarding the prospective purchaser's eligibility to purchase or possess a firearm. In no case is the gun dealer provided information about the underlying reason for a "denied" or "delayed" response.

The NICS has an appeal process that provides delayed or denied purchasers the reasons for the delay or denial and the opportunity to seek the correction of the underlying records through an appeal that can filed with the NICS Section or the State POC.

The Record of NICS Operations

Of the more than 75 million checks processed by the NICS since November 1998, over 38 million were processed by the FBI and over 36 million were processed by POC States. Through the end of 2006, the NICS Section made more than 540,000 denials, and State POCs made more than 500,000 denials. More than half of the denials were based on a felony conviction, with the next biggest category of denials relating to domestic violence (including convictions for a misdemeanor crime of domestic violence and domestic violence restraining orders). A breakdown of the reasons for denials by the FBI through the end of 2006 is provided in the attached chart, and a similar breakdown for State POC denials through the end of 2005 can

be found in the publication "Background Checks for Firearm Transfers, 2005," available on the Bureau of Justice Statistics (BJS) website.

Since 2002, an average of 92 percent of the checks processed through the NICS Section provided the gun dealer with a final status of proceed or deny during the initial call. The following is a breakdown of the remaining 8 percent of the FBI-processed transactions that are delayed beyond the initial call for further review or research:

- An additional 3 % are completed within two hours, so that 95 % of all checks are completed within two hours.
- The remaining 5 % require a call or fax to a State agency for additional information to make the determination. These inquiries are usually only handled by the court or State agency on business days (Monday through Friday).
- Approximately 2 % of this remaining 5 % of checks reach final determination within 3 business days, for a total of 97 percent of checks completed within 3 business days.
- Of the remaining 3 % of checks that are still open by the end of 3 business days, approximately 1.23 % reach final determination (based on information returned by State courts or agencies) within 20 days, and approximately 1.77 % never reach a final determination because no response from the court or agency contacted by the NICS is ever provided (mostly as a result of the unavailability of older records).

In 2006, the NICS processed over 10 million background checks, which was the highest number of transactions ever processed in a single year. On December 22, 2006, the NICS experienced a record day, processing 75,132 background checks through the NICS. While there have been a small number of unscheduled system outages, the NICS experienced an average system availability rate of 99.58% in 2006.

NICS Firearm Retrieval Referrals

Under the Brady Act, if the NICS is unable to provide a gun dealer with a final determination of "proceed" or "deny" for a background check within three business days, the dealer is allowed to transfer the firearm, although some dealers have a policy not to transfer the firearm without a "proceed" from the NICS. The NICS Section continues to actively seek information for up to 20 days to try to reach a final determination on an "open" transaction. In cases where the NICS receives prohibiting information about a delayed transaction more than 3 business days after the check was submitted, the FBI contacts the dealer to change the status from "delayed" to "denied." If the dealer has already transferred the firearm, the FBI refers the case to ATF so that ATF can investigate and retrieve the firearm or otherwise ensure that the firearm is not in the hands of the prohibited person. These are priority cases for ATF field agents who are required to initiate action on retrieval cases within 7 days of referral to the field office.

Authority to Obtain Relevant Records for the Databases Checked by the NICS

The effectiveness of the NICS in preventing gun transfers to prohibited persons depends directly on the availability to the system of automated information about which individuals are prohibited from receiving a firearm. The Brady Act requires Federal agencies to submit to the

NICS upon the request of the Attorney General information on persons prohibited from receipt of a firearm under Federal or State law. The Brady Act does not require States to submit information on prohibited persons to the NICS. Thus, the States are under no obligation or requirement under the Brady Act or any other Federal law to submit information on disqualified persons to the NICS. To the extent that States submit information on prohibited persons to the NICS, they do so voluntarily. Similarly, States' submission to the FBI of criminal history and other information relied upon by NICS and generally used by law enforcement officials in the III and NCIC is not mandated by Federal law. States submit such information voluntarily in order to gain the mutual benefit of having ready access to criminal history and other information relevant to law enforcement activities on an individual arising in other States. Thus, all of the relevant State information available for NICS checks is provided voluntarily by the States to the FBI and entered into one of the three information systems checked by the NICS – the III, the NCIC, or the NICS Index.

The III

The III is the FBI's national system designed to provide access to automated criminal history record information to authorized government agencies. Under the III, the FBI maintains an index of persons arrested for felonies or misdemeanors under either State or Federal law. The vast majority of the records in the III are provided by the States. The index includes identification data such as name, birth date, race, and sex. Search queries using names and other identifiers are made by law enforcement agencies throughout the country. The automated name search process takes about two seconds and, if a hit occurs, data are automatically retrieved from the appropriate repositories, including State repositories, and forwarded to the requesting agency. A broad range of criminal justice uses are made of the III, including assisting law enforcement investigators in arrest and charging decisions and assisting criminal justice agencies in making case processing decisions, such as pretrial release, career criminal charging, sentencing inmate classification, and community supervision. The information is also used by Federal agencies in support of immigration enforcement and border control. The III is used in NICS checks because it provides automated access to criminal history information that is relevant to a determination on whether a person is prohibited by law from receiving a firearm.

The NCIC

The NCIC is the FBI's broad information system that supports law enforcement, criminal justice, and homeland security agencies in the United States. It provides access to the III and includes other files of interest to law enforcement, such as those relating to wanted persons, civil protection orders, registered sex offenders, known or suspected terrorists, and missing persons. The great majority of this information comes from the States. Two of the files in the NCIC that are checked by the NICS include the Wanted Persons File, which contains information on over 1.3 million individuals subject to an outstanding arrest warrant, and the Protection Order File, which contains information about nearly one million individuals subject to protection or restraining orders.

The NICS Index

When the NICS was first established, the FBI created a new database for the collection of information not already included in the III or NCIC on persons who are prohibited under Federal law from possessing firearms. The NICS Index currently contains over 4.3 million such records. Of these, 3.6 million have been submitted by the United States Bureau of Immigration and Customs Enforcement (ICE) on removable aliens who fall within the category of illegal aliens prohibited from receiving guns. The other categories of records contained within the NICS Index include individuals who have received a dishonorable discharge from the armed forces, individuals who have renounced their United States citizenship, individuals who have been adjudicated by a court, commission, board, or other lawful authority as a danger to themselves of others or incapable of managing their own affairs or who have been involuntarily committed to a mental institution, and individuals who have been convicted of a misdemeanor crime of domestic violence. The NICS Index also includes a Denied Persons File that contains any records that do not meet the criteria for entry into NCIC or III, but that nevertheless demonstrate an individual is federally prohibited under any of the categories under the Gun Control Act. Examples of records in the Denied Persons File include protection orders or active arrest warrants that are not eligible for entry in NCIC, persons who are under court order not to possess a firearm as a condition of deferred adjudication, a felony conviction posted to the State record that is not reflected in the III, and prohibiting mental health records that cannot be placed in the NICS Index's Mental Defective File because State law or policy prevents the submitting State from identifying the information as a mental health record.

NICS Index records are not available for general law enforcement purposes. The NICS regulations provide that the NICS Index may only be used for gun and explosives-related background checks and enforcement efforts relating to firearms laws. See 28 CFR 25.6(j).

DHS Records On Aliens

When the information supplied by the prospective purchaser indicates a citizenship other than United States, the NICS automatically initiates a query to the ICE Law Enforcement Support Center (LESC), which searches for matching records in DHS databases and responds electronically to the NICS indicating the purchaser's immigration status.

State Databases

In addition to the databases searched by the NICS, State databases may also be checked by POC States for disqualifying information. These State databases include the State's own criminal history records, which generally have more complete information on arrest dispositions, including information on whether the charges were dismissed or the person was convicted of the arrest charge or some different charge. POC States may also check State records that have not been provided to the FBI on individuals who have a disqualifying mental health record or are under a domestic violence restraining order.

The National Criminal History Improvement Program (NCHIP)

As noted above, State provision of information to the NICS and related databases is voluntary. The amount and quality of data provided varies among States. The Brady Act established the NCHIP Federal funding program, administered by BJS, to improve the automation and accessibility of State criminal records. NCHIP awards totaled just over $506 million between 1995 and 2006, and the States have spent approximately $30 million in matching funds since a matching requirement was imposed in 2000. In general, NCHIP allows States to: (1) develop and enhance automated adult and juvenile criminal history record systems, including arrest and disposition reporting; (2) implement and upgrade their automated fingerprint identification (AFIS) systems, which must be compatible with the FBI's integrated automated fingerprint identification system (IAFIS); (3) establish programs and systems to facilitate full participation in the III and the NICS, including the submission of records on individuals prohibited from possessing firearms under Federal or State law; (4) support court-based criminal justice systems that report dispositions to the State repositories and the FBI and are compatible with other criminal justice systems; (5) to support the development of accurate and complete State sex offender identification and registration systems that interface with the FBI's National Sex Offender Registry; and (6) to identify, classify, collect, and maintain records of arrest warrants (wanted persons) and of protection orders to protect victims of stalking and domestic violence.

NCHIP has been successful in increasing the accessibility of records. Among the estimated 71 million criminal records in the United States, about 9 out of 10 are now automated, and 3 out of 4 of these are accessible for a firearms check. Over the last decade, increases in the number of records available for a background check has increased at twice the rate of increase in the number of records held by repositories. All but two States are now III participants, which entails compliance with rigorous FBI standards. Over the last 10 years, the number of States participating in III has roughly doubled to 48, with only Vermont and Maine still working to make the technological changes needed to become III participants. Finally, two NCIC files created since the beginning of NCHIP, the Protection Order File and the National Sex Offender Registry, now have nearly one million records and over 474,000 records, respectively, available for background checks. Information on the number of records that have been submitted by each State into the NCIC Protection Order and Wanted Persons files is reflected in an attached chart.

In addition to providing funding to States through NCHIP, the FBI, in coordination with ATF, has been working to encourage the States to submit information on prohibited persons to the NICS. This outreach has included education on the Federal firearm prohibitions, as well as technical support to facilitate the electronic submission of information.

The Continuing Need for Record Improvements

Despite the tremendous progress NCHIP and the Department's other efforts have made in creating a national system for automated access to criminal history records and other information used by law enforcement, significant shortcomings remain in the completeness of the records in the system and the availability of relevant records for NICS checks. They include:

- Most significantly, the fact that approximately one half of III arrest records are missing dispositions. The lack of complete information about arrest dispositions is the major reason for NICS checks being delayed, as well as the main reason more than half of delayed checks remain in that status for more than 3 business days.

- The limited submission by the States of disqualifying mental health records to the NICS Index. As explained in more detail below, only a handful of States currently provide such records in any significant number.

- Less than full State participation in and complete submission of records to the NCIC Protection Order File. This file contains records of individuals who are the subject of certain protective orders, such as in domestic violence and stalking cases, and therefore legally prohibited from receiving a firearm. BJS and the NICS Section have worked with the National Center for State Courts and other State court associations in outreach to courts personnel on protection orders and their proper entry into the NCIC file. However, while the majority of States now are submitting records to the Protection Order File, some States have yet to submit any protection order information. In addition, many States that are submitting information do not have the systems in place to submit all protection orders that would prohibit a subject from receiving or possessing a firearm. Resource limitations for State and local agencies are the primary factor cited to the FBI for less than complete reporting.

- Less than complete submission of records to the NCIC Wanted Person File. Although all States submit records to the Wanted Persons File, according to BJS, there is great variation among the States in arrest warrant submissions to NCIC, and many States are not submitting all arrest warrants that would prohibit the subject from receiving or possessing a firearm. Resource limitations is one of the factors cited for less than complete reporting.

- The lack of flagging of misdemeanor convictions of domestic violence, preventing the NICS from readily identifying these disqualifying records. The records of most misdemeanor assault convictions do not identify whether the victim had a domestic relationship with the offender that makes the offense one that prohibits the offender from receiving or possessing a firearm.

The challenge of achieving greater record completeness in our national criminal history record systems was noted in a report recently submitted to Congress in June 2006 entitled T*he Attorney General's Report on Criminal History Background Checks*. The report was called for in the *Intelligence Reform and Terrorism Prevention Act of 2004* and made recommendations concerning the authority and programs for access to the III for non-criminal-justice purposes. The FBI's national criminal history record system has a myriad of uses in addition to the NICS, including uses for a wide variety of criminal justice, homeland security, and non-criminal justice purposes.

The report includes recommendations on record improvement. Two of the report's recommendations are particularly relevant to this discussion. First, the report recommends that "there should be a renewed federal effort to improve the accuracy, completeness, and integration of the national criminal history records system." The report noted that over the last several years, NCHIP has been funded at smaller and smaller fractions of the amount requested in the President's budget each year. NCHIP Budget requests for FY 2003-2006 averaged approximately $60 million dollars, and the NCHIP request in FY 2007 was approximately $40. In contrast, the direct appropriations for NCHIP were $40 million in FY 2003, $30 million in FY 2004, $25 million in FY 2005, $10 million in FY 2006, and $10 million in FY 2007. At the same time that funding has declined, the purposes for which the money is to be used have increased, such as participation by the States in the national sex offender registry and the creation of Protection Order File. The report indicates that, in order to guide budget requests and funding decisions, it is important to "develop a realistic assessment of the cost to achieve these record improvement goals."

Second, the report recommends that "federal funds should be targeted at reaching national standards established by the Attorney General relating to prompt disposition reporting and record completeness," so that there is uniformity in record improvements nationwide. The report states that financial support to the States should be restricted to applications that will meet national standards established by the Attorney General concerning the content of records systems and the mechanisms by which such records can be merged and shared with the law enforcement and criminal justice community. The report notes that accomplishing prompt disposition reporting will require developing electronic connections between record repositories and all local law enforcement agencies, including investigative agencies, prosecutors' offices, and courts. Creating these electronic connections should allow for much prompter and automated updating of the dispositions, perhaps allowing for updating at the repository on the same day the disposition is entered by the responsible agency. Such uniform national improvements in record completeness would improve the service provided by the FBI's national criminal records systems for all of its uses, including NICS checks.

Prohibiting Mental Health Records

The Mental Health Prohibitor

The Gun Control Act makes it unlawful for any person who has been "adjudicated as a mental defective" or who has been "committed to a mental institution" to receive or possess firearms. ATF regulations published in 1997 (27 C.F.R. § 478.11) define those terms as follows:

Adjudicated as a mental defective.
(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
(1) Is a danger to himself or to others; or
(2) Lacks the mental capacity to contract or manage his own affairs.
(b) The term shall include—

(1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Thus, a person is disqualified under Federal law on the basis of mental illness only when a court or other lawful authority makes a finding of dangerousness to self or others or of incompetence *or* issues a formal order involuntarily committing a person to a mental institution. The prohibition does not cover persons who voluntarily seek or receive treatment for mental illness. Only records of findings or orders by courts or other lawful authorities identified in the ATF definition are used for purposes of identifying a person in this category.

There are two files in the NICS Index into which Federal agencies and the States can enter information about individuals who have a disqualifying mental health history – the Mental Defective File and the Denied Person File. The Mental Defective File contains only the names and other biographical information, such as date of birth or social security numbers, of the individuals with a disqualifying mental health history. The Denied Persons File contains the names and biographical information of individuals who are prohibited from receiving a firearm, but whose record is not entered into another system or file checked by the NICS. The FBI allows States to enter names about disqualifying mental health histories in the Denied Persons file. This allows a State to share this information for purposes of NICS checks without necessarily identifying the person whose name is entered as having a mental health history. Neither file contains information about medical records or the details of the mental health history. If a prospective firearm purchaser is found to match a name in the file, the proposed gun transfer is denied. If the individual wishes to challenge the denial, the agency that provided the name then becomes involved in the appeal and the review of the underlying facts.

Outreach Seeking State Mental Health Records

The FBI and ATF have made continuing efforts to encourage States to provide more mental health records to NICS. Examples of outreach efforts seeking relevant mental health include a letter sent by the NICS in June 2001 to the heads of all State central records repositories urging the States to make submissions to the NICS Index, including mental health records. Letters specifically urging the submission of relevant mental health records also were sent on May 14, 2004, to all State attorneys general, all State governors, and to all State departments of mental health. A similar letter was sent on March 7, 2007, to the attorneys general of all States and territories that are not yet making significant, or any, submissions of records to the Mental Defective File. Additional outreach by the NICS Section includes, for

example, presentations on the topic of disqualifying mental health records to annual NICS User Conferences that have in attendance representatives from most States, State clerk of court and court manager conferences, the National Association of State Mental Health Program Directors, judicial conferences, and sheriff association meetings. The three NICS Operation Reports published by the FBI since the NICS began have also included information on this topic.

In addition to these efforts by the FBI to encourage State submission of mental health records to the NICS, BJS has included in all NCHIP program announcements as an allowable cost funding for providing disqualifying mental health information for gun background checks. Every NCHIP program announcement since 2002 has identified the submission of such information to the NICS Index as a "program priority."

ATF is also now planning to send letters to all State attorneys general, offering to provide additional guidance on the Federal mental health prohibitor and to work with the States in reviewing State laws making relevant mental health records available for NICS checks. In addition, ATF is planning to amend its form 4473 to provide additional information to purchasers about the definitions of "adjudicated mentally defective" and "committed to a mental institution."

Mental Health Records Currently Available for NICS Checks

The FBI has obtained 138,766 disqualifying mental health records from the Veterans Administration and one such record from the Department of Defense, all of which are entered into the Mental Defective file. The following is a list of States that submit mental health information directly to the Mental Defective File. The totals represent the number of records submitted as of April 30, 2007.

Alabama	24	Missouri	401
Arkansas	51	North Carolina	330
Arizona	1	New Hampshire	1
California	27	New York	1
Colorado	9,269	Ohio	2
Florida	1,530	South Carolina	1
Iowa	47	Tennessee	15
Kentucky	1	Utah	12
Kansas	1,506	Virginia	81,233
Maryland	3	Washington	63
Michigan	73,382	Wyoming	3

States may, at their discretion, submit names of persons disqualified on mental health grounds into the Denied Persons File instead of the Mental Defective File. When a State submits a name to the Denied Persons File, it does not indicate why the person is disqualified. Therefore, the NICS Section is unaware of how many of the records submitted to the Denied Persons File relate to mental health. A State may choose to submit information this way if, for example, it has privacy-related concerns about informing the Federal system which records relate to mental health. The States of Georgia and Washington have advised the NICS that they submit mental

health information to the Denied Persons File, although they did not specify the number of mental health records entered. The total entries in the Denied Persons File by those States are:

Georgia	2,713
Washington	37,453

Certain POC States, including California, Oregon, Illinois, Nebraska, and Connecticut, check their own state mental health records when processing their gun eligibility background checks even though they have not submitted that information to the NICS Index. This ensures that a person disqualified on mental health grounds by a State agency in Illinois, for example, will not be allowed to purchase a gun from a dealer in Illinois. It does not, however, prevent such a person from purchasing a gun in another State because a check performed in that State will not have access to Illinois' records. Virginia began submitting its mental health information to the NICS Index in November 2003, and the hits on those records demonstrate the difference this can make. As of November 2006, the Virginia disqualifying mental health records had resulted in 438 denials, of which 60 of the attempts to purchase were in Virginia and 378 of the attempts were in other States.

Some States that do not currently submit mental health information to the NICS Index have State statutes that require a court order to allow the sharing of mental health information. In some States, a change in law would be required to allow the sharing of such information with the NICS. Other States simply do not have the funding to support the gathering and submission of mental health information. BJS is currently developing and expects to send out soon a survey to identify States whose barriers to sharing this information are simply resource limitations, rather than issues of law or policy.

Some States already are working with the NICS to make the necessary changes in State law to authorize the submission to mental health records to the NICS Index. For example, in February 2007, based on a recent State law change, the State of Florida began the process of collecting and submitting information on current involuntary commitments to the Mental Defective File. FBI representatives testified before the Connecticut legislature on the submission of mental health records to the NICS and provided State officials with information on the definition of the Federal mental health prohibitor. On November 17, 2006, the NICS Section signed a memorandum of understanding with the Connecticut Department of Public Safety authorizing the submission of mental health information to the NICS Index. The NICS and the California Department of Justice have been working through the technical requirements that will enable California to soon submit to the NICS Index information on the existence of disqualifying mental health records held by California on over 300,000 individuals. In addition, the FBI's NICS Index Liaison Office has worked with officials in the States of Arkansas, New York, and Texas, where State legislative proposals recently were introduced to allow the submission of information about disqualifying mental records to the NICS Index. In Arkansas, the legislation was passed on March 23, 2007, and will become effective on July 1, 2007.

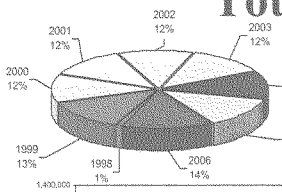
Conclusion

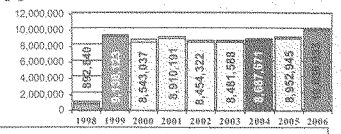
Thank you for the opportunity to speak to you today about the NICS. I am happy to answer your questions.

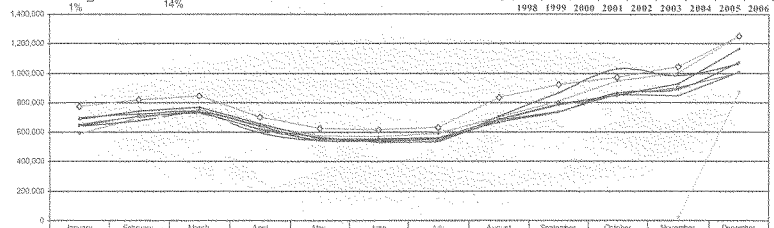
Total NICS Checks

November 30, 1998 – December 31, 2006

PTD 72,097,650







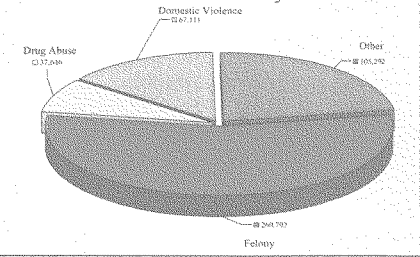
	January	February	March	April	May	June	July	August	September	October	November	December
1998											21,196	871,644
1999	591,355	695,323	753,083	646,712	576,272	569,483	589,476	783,394	808,627	945,701	1,004,333	1,253,384
2000	679,972	707,070	736,543	617,689	538,648	530,561	542,520	682,501	762,087	845,886	898,598	1,006,962
2001	640,528	675,156	729,532	594,723	543,501	540,491	539,498	707,298	864,038	1,029,691	983,186	1,062,559
2002	685,803	694,668	714,865	627,745	569,247	518,351	535,594	695,139	724,123	949,281	887,647	974,059
2003	653,751	708,261	736,894	622,832	567,436	529,334	533,269	683,517	738,371	898,893	842,932	1,008,118
2004	685,000	723,654	738,206	642,589	542,456	545,847	561,773	686,598	740,260	865,741	890,754	1,073,701
2005	685,811	743,070	768,290	658,054	557,038	555,560	561,358	687,012	791,353	852,478	927,419	1,164,562
2006	773,518	820,679	845,219	700,373	626,270	616,697	631,156	833,070	919,487	970,030	1,045,194	1,253,846

Project to Date

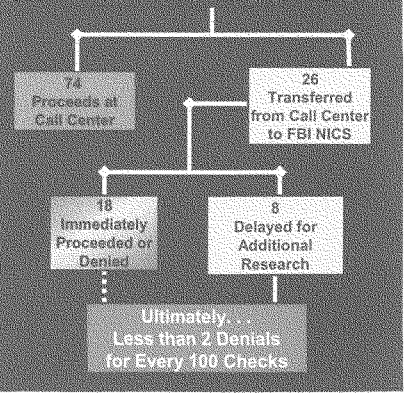
Reasons Why the FBI Denies

Criminal History	470,841
Fugitive from Justice	22,171
Mental Defective	2,336
Illegal/Unlawful Aliens	7,282
Dishonorable Discharges	297
Citizenship Renounced	31
Domestic Violence Restraining Order	24,433
Denied Persons File	8,741
Denial Based on Other Reasons	7,231
Total Denials	543,363

Criminal History



A Sampling of NICS Transactions



NCIC PROTECTION ORDER FILE RECORD COUNT EFFECTIVE 5/3/2007				
ALABAMA	4,002		ALASKA	869
ARIZONA	18,032		ARKANSAS	6,043
CALIFORNIA	204,207		COLORADO	28,617
CONNECTICUT	18,060		DELAWARE	867
WASHINGTON D.C.	5		FLORIDA	149,986
GEORGIA	7,766		HAWAII	0
IDAHO	1,007		ILLINOIS	29,501
INDIANA	46,017		IOWA	11,658
KANSAS	4,581		KENTUCKY	22,997
LOUISANA	6,389		MAINE	4,957
MARYLAND	7,498		MASSACHUSETTS	25,123
MICHIGAN	19,546		MINNESOTA	5,650
MISSISSIPPI	0		MISSOURI	12,789
MONTANA	3,222		NEBRASKA	366
NEVADA	0		NEW HAMPSHIRE	2,284
NEW JERSEY	0		NEW MEXICO	2,091
NEW YORK	99,252		NORTH CAROLINA	11,554
NORTH DAKOTA	46		OHIO	32,701
OKLAHOMA	4,876		OREGON	11,435
PENNSYLVANIA	21,188		RHODE ISLAND	8,024
SOUTH CAROLINA	2,736		SOUTH DAKOTA	2,273
TENNESSEE	11,124		TEXAS	14,244
UTAH	0		VERMONT	2,345
VIRGINIA	12,856		WASHINGTON	81,147
WEST VIRGINIA	5		WISCONSIN	15,068
WYOMING	369		PUERTO RICO	0
GUAM	0		US VIRGIN ISLANDS	0
			TOTAL	975,373

NCIC Wanted Person Records
As of March 1, 2007

State/Territory	Number of Active Wanted Person Records
Alaska	139
Alabama	8,988
Arkansas	12,874
Arizona	16,331
California	248,123
Connecticut	2,862
Colorado	32,508
District of Columbia	2,804
Delaware	3,306
Florida	99,839
Georgia	257,130
Guam	0
Hawaii	673
Iowa	5,683
Idaho	3,026
Illinois	29,547
Indiana	19,338
Kansas	6,962
Kentucky	7,810
Louisiana	8,592
Massachusetts	12,590
Maryland	18,144
Maine	1,413
Michigan	39,745

Wisconsin	9,024
West Virginia	857
Wyoming	538
TOTAL	**1,343,619**

Mr. KUCINICH. I thank the gentlelady.

Mr. Rubenstein.

Mr. RUBENSTEIN. I am happy to be here and would be happy to answer any questions.

Mr. KUCINICH. You are going to be here just to answer any questions?

Mr. RUBENSTEIN. Yes.

Mr. KUCINICH. OK. Thank you very much.

Ms. Brand, in your written testimony, you have outlined the amount of data submitted into NICS. But what is particularly important to establish here is how much data NICS would contain if the data base were complete and consequently, how much data is still missing. It is kind of a continuation of the discussion from the last panel. That is what I had asked your staff to prepare for this hearing. I am disappointed that it hasn't been produced yet. Do you have it now?

Ms. BRAND. Are you asking how many records exist, for example, in mental health that we do not have? Is that what you are asking?

Mr. KUCINICH. I am asking, how much data is missing from your data base?

Ms. BRAND. It is really impossible for us to know that, to take the mental health disqualifier, for example, as was discussed in the first panel, under Federal law, a person is prohibited from possessing or purchasing a gun if they have been adjudicated by a court or other government agency as a danger to themselves or others as a result of mental illness, or if they have been involuntarily committed.

We at the Federal level have no way of knowing how many such persons are out there. In some States, it would be difficult for the State even to know right now, because most of those adjudications, or many of those adjudications, will be made by State courts in all the different counties around the State, with no centralized——

Mr. KUCINICH. So what is the completeness of your data base, then, at NICS?

Ms. BRAND. We know that very few States provide significant numbers of mental health records to the NICS, and so we know that it is substantially incomplete. We just don't know the number, the total number that might be out there.

Mr. KUCINICH. I will get more specific. Let's say including all the Federal prohibited persons categories, what is the percentage of data that has been entered into the NICS data base in a form that can be used in the Brady background check?

Ms. BRAND. The best data that we have concerns criminal dispositions. My written testimony does provide a little bit more detail on that. We think about three out of four criminal records are available to the NICS, so about 75 percent available to the NICS in some form. The main problem with criminal history records is that although the arrest record may go into the III at the beginning, less than half of those records have a final disposition in the system. So if someone who had been arrested goes to buy a gun, then NICS may see in the system that there was an arrest, but have no idea whether the person was actually convicted. Simply being arrested doesn't prohibit one from buying a firearm. Having been convicted of certain crimes does. So then the NICS system

would have to go and contact the State to find out what the final disposition was.

Mr. KUCINICH. How deficient is that, then, with respect to State reporting? Let's talk about criminal history.

Ms. BRAND. We think three out of four criminal records are in the system in some form, but only about 44 percent of those have final dispositions.

Mr. KUCINICH. What about mental health?

Ms. BRAND. We don't know what the total universe of mental health records is, so we are unable to know.

Mr. KUCINICH. What do you have in terms of the data base? Do you have anything?

Ms. BRAND. We know the total number of records that we have. We know how many States provide any records, which is 22 States provide any records. But many of those States have only provided maybe one or two records ever to the system.

Mr. KUCINICH. So you are saying that data base, as far as with respect to mental health reporting, wouldn't be——

Ms. BRAND. Is very incomplete.

Mr. KUCINICH. Right. What about domestic violence records?

Ms. BRAND. Well, domestic, if you are talking about misdemeanor crimes of domestic violence, we believe that many of those are in the system. The difficulty there, though, is that they would be provided to the III as an assault charge, maybe. But the State wouldn't flag it, necessarily, as a crime of domestic violence. So when a person goes to buy a gun, the NICS would have to take a look at the record and try to then contact the State and go behind it and figure out whether it was a crime of domestic violence or not.

Mr. KUCINICH. Excluding domestic violence convictions, what percentage of conviction data that are relevant to the prohibited persons have been submitted by the Federal Government and the States to the NICS data base?

Ms. BRAND. The best information I have is that we have three out of four criminal records. I believe that includes both Federal and State. Yes.

Mr. KUCINICH. In your written testimony, you state that fully one half of disposition data, that is data regarding whether an individual charged with a crime was ultimately convicted, is not currently in that NICS data base. So taking the deficiency of disposition data into account, I would like to see if you want to revisit your estimate.

Ms. BRAND. I am not sure I want to do the math on the fly, Mr. Chairman. But we could see if we could provide better information about the statistics to you after the hearing.

Mr. KUCINICH. Actually, we want to have that kind of a dialog with you.

Ms. BRAND. It is 44 percent of 75 percent, I guess, whatever that is. Because we have 75 percent of all criminal records, 44 percent of those have complete dispositions, that is my understanding.

Mr. KUCINICH. So that would be about 33 percent or something like that. OK. So given your conclusion that the NICS data base is deficient and substantially incomplete, and the testimony you have heard from witnesses on the first panel that the pending leg-

islation, the NICS Improvement Act, would improve the quantity and quality of data in NICS, does the Department of Justice have a position on the NICS Improvement Act and H.R. 297 that provides both what you could carrot and stick to States to report to NICS?

Ms. BRAND. We support the bill's general aims of encouraging, providing a financial incentive to States to provide more information. We actually already do something similar through the NCHIP program that I mentioned in my testimony and that was discussed in more detail in my written testimony. We most likely will have some technical comments on the bill and with respect to what the right dollar amount is, we haven't taken a position on that. But we certainly support its general aims.

I thank you, Ms. Brand.

Mr. Bilbray.

Mr. BILBRAY. Mr. Chairman, I just wanted to clarify for the record, because there was a statement made here, a testimony, the city of New York was talking about the fact that they were sort of outraged that the criminal activity, information was not being shared with the city of New York. When the witness was asked about the sanctuary status for illegals in New York, he clearly said that there wasn't any.

I would just like the record to show that on September 22, 2003, Executive Order 41 was signed by the mayor which said that any information pertaining to illegal immigration or that status is confidential and shall not be shared with Federal immigration or Federal officials. So I just want to make it clear that the testimony, I am sure the individual meant well and did not realize that he mis-spoke. But the city of New York is and has been for a long time a sanctuary city. And I just think that when we talk about exchanging information about lawbreaking, not telling people who are criminals and who are not, that we should be consistent on this. So I yield back, Mr. Chairman, to the gentleman.

Mr. BURTON. I just have a couple of questions, Mr. Chairman.

First of all, I want to say to Ms. Brand, the record that you spoke of just a minute ago is very, very good. And you are to be congratulated. The Justice Department is to be congratulated on the record that has been compiled in dealing with these criminals and these people that break the law.

Ms. BRAND. Thank you.

Mr. BURTON. I will preface my questions with that.

I think the only question I would really like to know the answer to is, you said that you generally agree with the goals of the NICS legislation to get additional information for the Federal Government to deal with these people. Do you have any idea of the cost to the States to garner the information on mental health records and also from the courts, the convictions of people that have been convicted of felonies or other crimes?

Ms. BRAND. I have never seen a specific dollar amount about how much it would cost the States to get their systems in a state that would allow them to provide all the mental health information. I will see if anyone at the Department has that information. I do know that the Bureau of Justice Statistics, which is part of the Department of Justice, is in the process of doing a survey to the

States to determine which of them don't provide mental health records because of resource limitations and which of them don't provide mental health records of other reasons. Because there are a number of States that have State statutes and regulations that prevent them from providing that information to the Federal Government.

Mr. BURTON. Well, let me just say that the goals may be laudable, but the mandates to the States or the local, the cities throughout the country without funding from the Federal Government, unfunded mandates are something that the State and local governments do not want. So if we are going to go down that path where you need additional information on mental health records or convictions, then we ought to find out the cost and we ought to make sure that the States don't bear that burden.

In Indiana right now, our property taxes are so high already that people pay are ready to march on the State house. So we want to make sure we don't add any more liabilities on the States from the Federal Government with a mandate that is not going to be funded.

Ms. BRAND. I agree, we would not support an unfunded mandate. My understanding is that the NICS Improvement Act doesn't mandate States to provide the information, but it provides money to do it. The NCHIP program which exists now provides grants every year to many States around the country to just help, for example, if they don't have an automated system at all to collect the records, it would help them fund the creation of something like that, or it would help them create the electronic systems to provide information electronically to the NICS. It assists them without requiring them to provide the information to the Federal Government.

Mr. BURTON. Thank you very much, Mr. Chairman. I don't have any other questions.

Mr. KUCINICH. I thank the gentleman.

Ms. Brand, a July 2004 Department of Justice report found that most federally licensed firearm dealers are inspected infrequently or not at all. According to the former ATF Director, the agency's goal is to inspect each FFL at least once every 3 years to ensure that they are complying with Federal firearms laws.

However, due in part to resource shortfalls, the ATF is currently unable to achieve that goal. ATF workload data show that the ATF conducted 4,581 federally licensed firearm dealer compliance inspections in fiscal year 2002, or about 4.5 percent of the approximately 104,000 federally licensed firearm dealers nationwide. At that rate, it would take the ATF more than 22 years to inspect all federally licensed firearm dealers. That is right from the Department of Justice report.

Why is this the case and is it still the case, and how can the ATF improve on its inspection performance?

Ms. BRAND. If you don't mind, I would like to refer that question to Mr. Rubenstein, who is Chief Counsel of ATF.

Mr. KUCINICH. Mr. Rubenstein.

Mr. RUBENSTEIN. Mr. Chairman, thank you for the question.

ATF tries to target its resources to inspect those licensees who come to our attention. The vast majority of licensees follow the rules and regulations and it is not necessary that we inspect them

very often. We try to target our investigations to licensees who do come to our attention, either through local law enforcement or through our own undercover efforts, to ensure that they are in fact complying with the rules and regulations.

So while we may not be able to inspect all the licensees as often as we might like, we try very hard to inspect those licensees who do need to be inspected to ensure that they are complying with laws and regulations.

Mr. KUCINICH. How do you know who needs to be inspected and who doesn't, if you have so few personnel?

Mr. RUBENSTEIN. We get that through targeting our inspections, each field division has a plan in which it determines whether or not, who it is going to inspect, by talking with local law enforcement, undercover operations it may be using, random inspections that it conducts. Over the years, we look at trace data, obviously, and determine whether or not that might be a reason why we might look at a licensee.

So we try very hard to target the resources we do have for those licensees. Our primary goal is to ensure that they are in fact complying with the law. When we go out to inspect a licensee, our goal is to ensure that they know what the regulations require and that they are in fact following those regulations.

Mr. KUCINICH. Here is what I am wondering. I am trying to square what you had to say with the former panel, representative from New York City, who said that they were able to identify 27 licensed gun dealers, and that they had to sue them to come into compliance. Did New York City do a better job than the ATF in the case of their sphere of operation?

Mr. RUBENSTEIN. I am not going to comment on whether New York City did a better job or not.

Mr. KUCINICH. Were they luckier with enforcement?

Mr. RUBENSTEIN. Again, I am not going to comment. We did look, they did send us some information about the 27 investigations. In reviewing that with the U.S. Attorneys, it was determined that there was not enough evidence to bring criminal actions at the Federal level.

But be that as it may, I think ATF sets its priorities as to who it should inspect, and I think uses its resources to its fullest capability to ensure that licensees are in fact complying with the Federal firearms laws. I think as the first panel represented and as I think we all know, the vast majority of licensees are in fact complying with the law.

Mr. KUCINICH. One of the things that you said, you said you didn't have enough, there wasn't enough evidence. It was my understanding that New York City actually had these gun dealers on tape. Were you aware of that?

Mr. RUBENSTEIN. I was aware that there were some tapes, yes, sir. I did not review the tapes.

Mr. KUCINICH. In terms of evidence, just for my information, what standard of evidence does a tape provide? Is it a low standard? Is it a high threshold of evidence?

Mr. RUBENSTEIN. I am not in a position to testify about what was or was not on the tape, or whether or not it met a standard. All

I can tell you was that the U.S. Attorneys who reviewed the tape determined that it did not meet the standard for prosecution.

Mr. KUCINICH. I would just say that, with all due respect, Mr. Rubenstein, it was obviously enough evidence that the gun dealers voluntarily entered into a consent agreement that dramatically changed the way in which they operated. I am just pointing that out to you as someone who is the counsel for the Department.

Mr. RUBENSTEIN. I understand, and again, I can't comment on that.

Mr. KUCINICH. This isn't a point of view, this is a point of law.

Mr. RUBENSTEIN. I am just saying, as far as whether or not it met a Federal standard for prosecution, is perhaps different than entering into a consent agreement with a private party.

Mr. KUCINICH. Does the DOJ support repeal of the Tiahrt Amendment?

Ms. BRAND. The answer is no. The President's budget request contained language that was similar to the Tiahrt Amendments.

Mr. KUCINICH. Why not?

Ms. BRAND. I am going to defer to Steve on that one.

Mr. RUBENSTEIN. We don't believe the Tiahrt Amendment impedes law enforcement. Over the last several weeks, and perhaps months, there have been numerous articles and questions about the Tiahrt Amendment and what trace data can be released and what can't be released. What I want to say is that, firearms trace data is critically important, that is developed by ATF to assist State and local law enforcement in investigating and solving violent crimes. ATF traces approximately 280,000 firearms every year for approximately 17,000 law enforcement agencies around the country.

We consider that to be law enforcement-sensitive information. Because it is often the first investigative lead in the case. If I can briefly explain what occurs, a police department will find a gun at a crime scene, they will ask ATF to trace it. We will trace that firearm for that local police department.

That may be the last ATF hears about that trace. We will give that information to that local police department and assist them in any way possible to help investigate that crime. They at some point, if they are asked by another law enforcement agency outside the jurisdiction, are free to disclose that information to any other law enforcement agency. In fact, there are multi-jurisdictional task forces in which trace data is disclosed.

The concern for ATF, the historical concern, predating the Tiahrt Amendment, has been the release of trace information to other than a law enforcement agency who recovered a firearm. Because the concern would be, if it is released to third parties, it could help criminals evade detection, it could interfere with undercover operations, it could interfere with ongoing State investigations that were being pursued. But ATF's primary goal, one of its primary goals under the Gun Control Act, is to assist State and local law enforcement in their fight against crime. I think the Tiahrt Amendment, we don't believe, does anything to stop ATF or to impede ATF in assisting the States in that fight.

Mr. KUCINICH. I thank the gentleman.

Mr. Issa, do you have questions?

Mr. ISSA. Just following up on that, can we all agree that the two biggest challenges we face today is in fact making sure that all persons, whether mentally defective, criminal in their background, illegally in this country, need to be on a 50 State basis, plus the territories, excluded from being able to purchase guns. Is that a fair, broad statement?

Ms. BRAND. Federal law already prohibits the categories of people you just mentioned.

Mr. ISSA. Right, except in fact, Virginia Tech shows us that we have not yet successfully implemented those existing laws.

Ms. BRAND. There are significant gaps, there are a significant number of records that are not in the NICS system, that is true.

Mr. ISSA. The reason for my question, we are an oversight and reform committee. It is actually very good that we are, because our job is to say, in many ways, are the existing laws sufficient and is it an absence of implementation, is it a defect in the law, or is it in fact, if you will, bureaucracies that are in the way. It appears as though we do have a State cooperation and information sharing problem, State and local, that has to be worked on. Some of it will have to be, consistent with the Constitution, it will have to respect the States, but encourage the States.

The second and obvious one is, and I think Mr. Bilbray brought this up earlier, we have a challenge in that we have 12 million illegals in this country. They represent, in California, nearly half of all the people who are incarcerated in our prisons and they represent a huge part of the gun crime. So we have a Federal issue that would appear to be not fully taken care of.

And then last one, and I think, Mr. Rubenstein, you were hitting on it, we do have a mandate to track weapons from womb to tomb and in fact to provide law enforcement the ability to get the information necessary in criminal prosecutions. If I heard you right, basically you are saying you are reasonably satisfied that you are going that direction. I want to make sure I give you a chance to say whether or not you believe that is as big a problem as the State and local cooperation and the Federal implementation of persons who should not be able to purchase, which clearly, this committee, we didn't even meet and we knew we had a problem there.

Mr. RUBENSTEIN. If I understand your question correctly, I think that is correct.

Mr. ISSA. OK, but your satisfaction level is relatively high as to release of information State and local law enforcement?

Mr. RUBENSTEIN. Yes, sir.

Mr. ISSA. So if, and hopefully we will get unanimity here, if we were to focus most narrowly to get the most effectiveness from this committee's energies and time, both in oversight and potential legislation we might introduce, although it probably wouldn't come back to this committee, it would be referred to another committee, we should work on things which would allow or encourage or bring about 50 State cooperation and compliance with the individuals, the groups that I mentioned that are prohibited from gaining firearms?

Ms. BRAND. If I understand what you are saying, yes. It has been a goal of the Department since NICS was stood up in 1998 to constantly increase the number of records the State put into the sys-

tem. Now, we can't constitutionally force them to do that, but we, it is not as though we just woke up after Virginia Tech and started encouraging them to do it. We have been encouraging them to do it for years.

Mr. ISSA. Right. And if you were here, on an earlier panel, I made the point that this President has clearly made it a priority for the U.S. Attorneys, this Attorney General and his predecessor have, for gun crime enforcement, even where it wasn't necessarily popular, has made the point that U.S. Attorneys have to do a substantial amount of that.

But circling back again, as you all know, the power of Congress in interstate commerce and other areas has been used, the highway implementation, we were able to get States to all go to 55 when we wanted them to go to 55, we were able to get them to go to 21 for the age of drinking when we wanted to. We have ways of encouraging States to do certain things and to comply. We certainly have tremendous amounts of dollars that come from the Federal Government to provide law enforcement tools. And we can reasonably expect that if they don't want that money, they can choose not to cooperate. If they do want that money, we can hook, perfectly constitutionally, that they shall comply with certain aspects of enforcement.

The question is, is that the best use for this committee and if it is, what recommendations could you make to us for tools to do it or, more importantly, where we should first put our priority within that major group of non-compliance with making sure that certain groups or individuals do not get weapons?

Ms. BRAND. We already have the NCHIP funding program, which the President funds in his budget request every year. Congress actually has funded the NCHIP program at lower levels than the President's budget request for the last several years running, and for the last 2 fiscal years that program has been funded at only $10 million when the budget request has been around $50 million.

So $10 million is really not that much money to parse out among all the 50 States to help improve their systems. So we certainly support improving systems that way.

Now, the NCHIP programs that it has funded has priority areas to encourage the States and their grant applications to focus on those areas. One of those areas is improving mental health records provision to the system. So that is something, that and the criminal records dispositions are two of the areas that the NCHIP program focuses on.

Mr. ISSA. Thank you, Chairman.

Mr. KUCINICH. Thank you. The time has expired.

Mr. Burton.

Mr. BURTON. I have no questions. Thank you.

Mr. KUCINICH. I want to thank this panel for appearing.

This committee will submit questions in writing and we would appreciate your response so that we can complete our work for this particular hearing. I want to thank you for your presence here, and we appreciate it.

We are going to recess for two votes and I think we will probably be back here in about 25 minutes to a half hour, at which time we

would ask the third panel to join us. This committee stands in recess.

[Recess.]

Mr. KUCINICH. Good afternoon. Welcome to the witnesses. The committee will come to order again.

This is the third panel of the Domestic Policy Subcommittee's hearing entitled, "Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws."

We heard from panels who represent the legal community against violence, the Brady Campaign Against Handgun Violence, Criminal Justice Coordinator for New York City, and Assistant Attorney General of Legal Policy, U.S. Department of Justice, and the Chief Counsel of the Bureau of Alcohol, Tobacco, Firearms and Explosives.

This third panel consists of witnesses from Johns Hopkins University, University of Pennsylvania and from the National Alliance on Mental Illness. Susan Sorenson, Professor Sorenson is a professor of social policy and criminology at the University of Pennsylvania and part of the graduate group in public health. Since 1986, she has taught a graduate course at UCLA at Penn on family and sexual violence. Professor Sorenson has published widely in the epidemiology and prevention of violence, including homicide, suicide, sexual assault, child abuse, battering and firearms. She was a member of the National Academy of Sciences Panel on Research and Violence Against Women, a consultant to Unicef's May 2000 report on domestic violence against women and girls, and a member of the advisory panel for the 2001 U.S. Surgeon General's report on youth violence.

We will also hear from Professor Daniel Webster, who is an associate professor of health policy and management at the Johns Hopkins Bloomberg School of Public Health, where he serves as co-director of the Center for Gun Policy and Research and associate director of research for the Center for the Prevention of Youth Violence. Professor Webster has published numerous articles on firearm policy, youth gun acquisition and carrying, firearm injury prevention, intimate partner violence and adolescent violence prevention. He is currently leading studies that evaluate policies to reduce illegal gun sales, he is leading a community gun violence prevention initiative and an intervention designed to encourage protective measures for victims of domestic violence.

Finally, Mr. Ronald Honberg. Mr. Honberg is the national director for policy and legal affairs at the National Alliance on Mental Illness [NAMI]. During his 18 years with NAMI he has worked on issues affecting people with mental illnesses involved with criminal justice systems, including jail diversion, correctional treatment and community re-entry, and has drafted amicus curiae briefs on precedent-setting mental health legislation. Before coming to NAMI, Mr. Honberg worked as a vocational rehabilitation counselor for the State of Maryland, and in a variety of direct service positions in the mental illness and developmental disabilities field.

It is the policy of the Committee on Oversight and Government Reform to swear in our witnesses before they testify. I would ask that the witnesses please stand, raise your right hands.

[Witnesses sworn.]

Mr. KUCINICH. Thank you. Let the record show that the witnesses answered in the affirmative.

As with panel two, I will ask you to give an oral summary of your testimony and to keep this summary under 5 minutes in duration. Bear in mind, your complete written statement will be included in the hearing record. We will begin with Professor Sorensen.

STATEMENTS OF SUSAN B. SORENSON, PROFESSOR OF SOCIAL POLICY AND CRIMINOLOGY, UNIVERSITY OF PENNSYLVANIA; DANIEL W. WEBSTER, ASSOCIATE PROFESSOR AND CO-DIRECTOR OF THE CENTER FOR GUN POLICY AND RESEARCH, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH; AND RONALD S. HONBERG, PROFESSOR OF SOCIAL POLICY AND CRIMINOLOGY, DIRECTOR OF POLICY AND LEGAL AFFAIRS, NATIONAL ALLIANCE ON MENTAL ILLNESS

STATEMENT OF SUSAN B. SORENSON

Ms. SORENSON. Thank you for the invitation to be here today, and I begin with good news. The number of homicides committed by an intimate partner has dropped during the past 30 years. Also, the proportion of intimate partner homicides that were committed with a gun has dropped in the past 30 years.

However, one bit of information remains disturbingly constant. That is that women are more than twice as likely to be shot by a male intimate as they are to be shot, stabbed, strangled, bludgeoned or killed in any other way by a stranger.

When it comes to firearms, much of the discussion tends to focus on fatalities. But a firearm does not have to be fired to have an impact. It can be used to intimidate and to coerce an intimate partner to do what the abuser wants. An estimated 4 million U.S. women have been threatened with a gun by an intimate partner, and nearly 800,000 have had an intimate partner use a gun against them.

It would be as if every woman in Washington, DC, Boston, San Francisco, Chicago, Los Angeles, Miami, Hartford, Columbus, Indianapolis, Salt Lake City, Albany, Rochester, Syracuse, Buffalo, Milwaukee, Richmond and Des Moines had at least once in her life an intimate partner use or threaten to use a gun against her.

Congress has passed two pieces of legislation that are relevant here. I will reiterate what we heard earlier today. The 1994 Violent Crime Control and Enforcement Act expanded the list of persons who are prohibited from possessing a firearm to include those against whom a domestic violence restraining order has been issued. Then in 1996, the Lautenberg Amendment, by which persons convicted of a domestic violence misdemeanor are prohibited from purchasing or possessing a firearm.

Now, responsibility, as we have heard for how the laws were implemented, was left to the individual States. Some States already had laws in place and data bases against which purchase applications could be checked. Others have yet, more than a decade later, to develop such capacity. This is important because each year, about a million people in the United States obtain a restraining order against an intimate partner. Persons who come under a do-

mestic violence restraining order likely are the single largest class of new prohibited purchasers each year.

Reports by the Bureau of Justice Statistics indicate that about one out of every seven firearm transfer applications were denied due to domestic violence. Many more, however, are not denied, because the information about the domestic violence is not available, it is not made available or it is not easily accessed. The purchase prohibitions are more easily addressed than possession prohibitions. Although persons under a domestic violence restraining order are required to relinquish their firearms, very few do.

I offer several recommendations in my written testimony, and I will just focus on a couple here. First is that States should implement, maintain and monitor the quality of an electronic data base for all domestic violence restraining orders and misdemeanors, and the data should be submitted, so they can be part of NICS. Work at the States is essential so that the intent of the Federal law is met. Therefore, some sort of incentive might be useful to speed quality compliance.

We heard earlier from some of the other speakers who are concerned about requiring States to do the work of the Federal Government. I was thinking about that a bit over one of the breaks. It is not that, I would like to ask the question, compared to what. Because if the States don't do this, they are going to be picking up the costs for the incarceration and the prosecutions when the guns remain in the hands of those who should not be having the guns.

So it is not a zero sum game, because the costs are still going to be borne by the States and local municipalities. But the issue is how those get spent. Personally, I would rather see them spent in prevention.

Second, a Federal agency should monitor the amount and quality of the data that is submitted to NICS, and should issue periodic reports on these findings. There are concerns specific to these records. I can expand on that. And they merit very close monitoring, until there is more complete compliance.

There will be perhaps some that won't comply. We know death certificates, for example, that are submitted to the National Center for Health Statistics, my understanding is that is a voluntary process that the States participate in. So the Feds have figured out how to make this work and how to get voluntary compliance. There is one State, I believe, that still has not complied and doesn't submit their death certificate records.

But Federal agencies do know how to monitor the data they get to have a good sense of whether these are underestimates and to make sure of the quality of the records that they do receive.

Next we need models and guidelines for firearm relinquishment and removal. It would be great if we could have allocations to an appropriate Federal agency so we could convene key stakeholders from around the country to develop guidelines to ensure compliance with Federal law.

Last, consideration should be given to whether firearm prohibitions should be extended to related circumstances. I think specifically of former dating partners, as was pointed out already, as not covered under Federal law, and also to stalking. Stalking is a situation in which you have someone who becomes obsessed with an-

other, and even though there may not be any relationship, they perceive a relationship or they want a relationship. When attempts to make contact are not met or are rebuffed, the person can develop motivation for wanting to harm the other. And it would be important to make sure that we don't allow them to have the means.

So in summary, there is useful, relevant legislation already in place. Some expansion of dating partners and stalking merits consideration. But mostly, however, you have passed laws that need to be implemented and enforced. And by making a few other changes, you can help bring your intent into reality.

Thank you.

[The prepared statement of Ms. Sorenson follows:]

Testimony of
Susan B. Sorenson
before the
Domestic Policy Subcommittee
of the
Oversight and Government Reform Committee

U.S. House of Representatives
May 10, 2007

Homicide

The sheer number of homicides committed by an intimate partner as well as the proportion of intimate partner homicides that were committed with a firearm has dropped over the past thirty years.[1] However, women remain more than twice as likely to be fatally shot by a male intimate than to be shot, stabbed, strangled, beaten, or killed any other way by a stranger.[2-3]

An abuser's access to a gun is a consistent and substantial predictor of intimate partner homicide. In an 11-city study of nearly 600 women who were assaulted by a male intimate, the largest single predictor of homicide was whether the abuser used a gun in the assault.[4]

Women are at highest risk of being killed by an intimate partner when they attempt to end the relationship.[5] In other words, a woman who is being abused by her partner increases her risk of being killed when she does exactly what society tells her to do, to leave him.

Threats with a firearm

A gun does not have to be fired to have an impact. It can be used to intimidate and coerce an intimate partner to do what the abuser wants.

Using findings from a recent national survey,[6] an estimated 4.0 million U.S. women have been threatened with a gun by an intimate partner and nearly 800,000 have had an intimate partner use a gun against them. In other words, it would be as if every woman in Washington, D.C., Boston, San Francisco, Chicago, Los Angeles, Miami, Hartford, Columbus, Indianapolis, Salt Lake City, Albany, Rochester, Syracuse, Buffalo, Milwaukee, Richmond, and Des Moines had, at least once in her life, an intimate partner use or threaten to use a gun against her.

Firearms and firearm use appear to be more common in the homes of battered women. Handguns, specifically, are more than three times as common in homes where battering recently had occurred than in homes of the general public.[7,8] In two thirds of homes with an male abuser and a firearm, the man used the gun against the woman. Most often (71.5%) he threatened to kill or shoot her; 5.1% of the women were actually shot at. The firearm was not the only weapon used: If the intimate partner used a firearm against her, he was

more likely than the intimate partners who did not use guns to use multiple other weapons (8.1 vs. 4.6 other weapons, respectively).

Women sometimes turn to restraining orders in an attempt to increase their safety, particularly when they are trying to end a relationship. Restraining orders, in which a judge or commissioner orders the person to be restrained to have either no or only peaceful contact with the protected person, are available in all 50 U.S. states. The orders are known by different names (e.g., restraining orders, protection from abuse orders) and the criteria for obtaining and the time period for which they are issued varies.

Federal policy

Recognizing the deadly combination of abuse, firearms, and ending a relationship, Congress passed the 1994 Violent Crime Control and Enforcement Act. The list of persons who are prohibited from purchasing and possessing firearms was expanded to include persons against whom a domestic violence restraining order has been issued.[a] This law was enacted along with the 1994 Violence Against Women Act, which created federal crimes of domestic violence and the honoring of restraining orders across the nation (i.e., Full Faith and Credit).

Then, in 1996, Congress passed what is commonly known as the Lautenberg Amendment, by which persons convicted of a domestic violence misdemeanor are prohibited from purchasing and possessing a firearm. Those convicted of a felonious assault upon an intimate partner (or any other person) already were subject to these restrictions as part of the 1968 Gun Control Act. A primary reason for expanding the prohibitions to include domestic violence misdemeanors was the perceived difficulty in obtaining a felony conviction when the victim was an intimate partner.

Responsibility for how the laws were implemented was left to the individual states. Legislation typically was required. Some states already had or soon thereafter enacted such prohibition provisions and developed a data base against which firearm purchase applications could be checked. Others have yet to pass relevant laws and develop a fully functioning data base. Up to eight years after the enactment of the relevant federal legislation, only 12 states had laws that prohibited domestic violence misdemeanants and only 24 had laws that prohibited persons under a domestic violence restraining order from possessing firearms.[9]

Implementation and enforcement

Each year about a million people in the U.S. obtain a restraining order against an intimate partner because of physical assault, sexual assault or stalking.[6] Persons who come under a

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[a] Several conditions must be met for the firearms prohibitions to be valid under federal law: a) the petitioner is an intimate partner of the defendant; b) the order restrains the defendant from harassing, stalking, or threatening the petitioner; c) the order includes a finding that the defendant is a credible threat to the physical safety of the petitioner; and d) the order was issued after a hearing of which the restrained person was notified and had an opportunity in which to participate.

domestic violence restraining order likely are the largest single class of new prohibited purchasers each year.

Between 1999 and 2005, just under 2% of the applications for a firearm transfer (about one million of 57 million applications) were denied.[10] Prohibitions related to domestic violence were the second most common reason for denial. (A felony was the most common reason.) Roughly 150,000 applications to purchase a firearm during this time were denied because of a domestic violence restraining order or misdemeanor. In 2004 and 2005, about one of every seven firearm transfer applications were denied due to domestic violence. Many more are not denied purchase because the information about the domestic violence is not available, not made available, or not easily accessed.

Although it is against the law to attempt to purchase a firearm while prohibited from doing so, few denials are investigated and prosecuted.[11] This holds true for all NICS denials, not just denials due to domestic violence.

Purchase prohibitions are more easily addressed than possession prohibitions. Although persons under a domestic violence restraining order are required to relinquish their firearms, few do. Preliminary findings from our on-going California-based research indicate that slightly fewer than 2% of the handguns each year are purchased by individuals who later are subject to a restraining order; these guns should be relinquished. This estimate is based on handguns only and the data are from one of only three states that limit the number of firearm purchases, therefore, in other locales, a higher proportion of recently purchased firearms are likely to come under relinquishment requirements. New state-level legislation may be needed to facilitate relinquishment and removal. As of 2004, only 18 states had law enforcement gun removal laws and 16 had court-ordered removal laws related to domestic violence.[12]

A recent task force created by former California Attorney General Bill Lockyer[13] identified multiple weaknesses in the implementation of laws designed to keep firearms out of the hands of those who have committed domestic violence. The following are but two of the problems that make compliance with state and federal law difficult:

- Based on the size of their population, many counties were generating fewer than expected restraining orders for criminal domestic violence defendants and many were not noting firearm prohibitions on the restraining order.
- Few criminal justice agencies had a coordinated policy of proactively enforcing the firearm prohibitions that accompany domestic violence restraining orders.

The task force identified multiple promising practices ranging from monitoring the data, developing new administrative forms, and training those responsible for implementing and enforcing these laws. Thoughtful implementation of these practices can be expected to improve compliance with the law and increase the safety of victims of intimate partner violence.

Recommendations

To ensure the integrity of federal laws designed to keep firearms out of the hands of persons subject to a domestic violence restraining order or who have been convicted of a domestic violence misdemeanor, I offer the following recommendations:

1. States should implement, maintain and monitor the quality of an electronic data base for all domestic violence restraining orders and misdemeanors, and the data base must be submitted so that it can be part of NICS.

- Domestic violence restraining orders and misdemeanors should be entered immediately (within one business day) into an electronic data base, and responsibility for this action must be designated.
- Domestic violence misdemeanors should be flagged or otherwise indicated as such so that they are entered into the data base of prohibited persons.

Work of the states is essential to meet the intent of federal law, therefore, some sort of incentive may be useful to speed quality compliance.

2. A federal agency should monitor the amount and quality of the data submitted to NICS and should issue periodic reports on these findings. Current efforts by the National Criminal History Improvement Project of the Bureau of Justice Statistics can be expanded to more fully address concerns specific to domestic violence records.[e.g., 13]

3. Persons who are denied purchase may pose a particular risk to their intimate partners. When this occurs, NICS should notify local law enforcement so that prevention is possible. In addition to their own efforts to prevent harm, local law enforcement should notify the protected person (or victim in a misdemeanor domestic violence conviction) of the attempt to obtain a firearm.

4. Allocations should be made to an appropriate federal agency that can convene key stakeholders from across the nation to develop guidelines for ensuring state-level compliance with federal law. Doing so will reduce the duplication of effort: Although enforcement of these laws will occur primarily at the state and local levels, many of the implementation and enforcement issues are shared across jurisdiction and locale.

- Standard court documents given to a restrained person or domestic violence misdemeanant should include a statement (in bold typeface or otherwise highlighted) indicating that firearm purchase and possession is prohibited.

Models and guidelines for firearm relinquishment and removal should be a central topic.

5. Consideration should be given to whether firearm prohibitions should be extended to related circumstances. For example, federal law does not address the needs of those who did not live with or have a child with an abuser, that is, former dating partners are not covered. Federal firearm prohibitions should include provisions for victims of stalking even if there was no prior intimate relationship. Stalkers typically either strongly desire a relationship or perceive one when none exists. When attempts to establish contact are not fulfilled, stalkers may develop the motivation yet should not be allowed the means by which to harm their victims.

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Mr. KUCINICH. Thank you very much, Professor Sorensen.

We will next hear from Professor Webster. You may proceed.

STATEMENT OF DANIEL WEBSTER

Mr. WEBSTER. Thank you, Mr. Chairman.

I have submitted my written testimony. I am going to try to just cover some highlights.

Basically, the general objectives of most gun control laws, Federal, State or local, are actually well-founded in science. Violence is not a random phenomenon, there are predictors and prior criminal offending problems with mental health are factors that a number of studies have shown to be associated with a risk for violence. There is frankly little disagreement about the general objectives of these basic polices. But the reason I guess we are here is, there is a huge disconnect between the objectives of the policies and whether the current laws are inadequate or are being enforced adequately.

I would like to focus first on whether our criminal history restrictions are really adequate to address the objective, again, of trying to keep guns from dangerous people. Professor Sorensen mentioned the exclusions that were put into place in the 1990's for domestic violence offenders. Aside from that prohibition, we prohibit felons.

But the question is, is that really the appropriate bar we want to set for someone, as long as you have been able to avoid getting a felony conviction or conviction for domestic violence, then you can have as many guns as you would like?

There is precious little research, I am very sorry to say, to tell us enough about the adequacy of these current standards. There is, however, one study that looked at homicide offenders in the State of Illinois. What that study found was that, while the offenders typically had very long criminal histories, 57 percent of those did not have a felony conviction. So we are clearly missing a lot of criminal offenders by setting the bar at felony.

There has been research done in California that showed that individuals with misdemeanor convictions have elevated risk for future violence. Those who are going to purchase firearms and have prior misdemeanor convictions are seven times more likely to commit future crimes of violence and firearms-related crimes than are individuals who don't have those kinds of convictions.

California changed its policies in the early 1990's to deny violent misdemeanors firearms and what further research showed is that those who were denied were significantly less likely to re-offend than were individuals with similar arrest histories prior to them adding the new misdemeanor restrictions. So I think that is an important area to really fully achieve our objective of keeping guns from criminals and dangerous individuals.

Another category of criminal offense that is not adequately addressed in Federal law and in 23 States is offenses committed while the offenders were juveniles. If those same offenses had been committed by an adult, they would have been prohibited from being able to purchase a firearm when they are of age. Criminal offending as a juvenile, particularly if that offending is serious or chronic, is very strongly related to adult offending. So that is another area in which, to achieve our objectives of keeping guns from

dangerous people, we could expand those kinds of exclusion criteria.

I want to sort of, I see that my time is about over, but I want to mention that with respect to the Tiahrt Amendment, many good points were made on the effects that has on local law enforcement. I want to say, as a researcher, it also impedes the kind of work that I have done to inform gun violence prevention efforts.

And a study that we published last year showed that prior, when the data were more available, did not have the Tiahrt restrictions, and it was discovered that a gun dealer just outside of Milwaukee was a leading seller of crime guns, when that was made public, that dealer voluntarily changed his sales practices, and our research showed that the rate at which his guns went into the criminal commerce reduced by more than 70 percent. We got more recent data through the assistance of the Milwaukee police department and found that post-Tiahrt, when the data were not readily available and basically gun dealers could do what they want, the problem went exactly back to where it was before the gun dealer was revealed as having problems with his sales practices.

So I think that aside from simply helping address a very specific criminal case, there is also the issue of having data available to researchers and the public, so people will be more accountable.

[The prepared statement of Mr. Webster follows:]

Testimony of Daniel W. Webster, ScD, MPH, Associate Professor and Co-Director of the Center for Gun Policy and Research at the Johns Hopkins Bloomberg School of Public Health to the Domestic Policy Subcommittee of the Oversight and Government Reform Committee, House of Representatives, May 10, 2007

Violence is not a random behavior. While there is no test to identify with 100% accuracy who will commit acts of violence, studies have identified several risk factors. Committing prior acts of violence, particularly if there is a chronic pattern, is a good predictor of future violence.[1, 2, 3] Mental illnesses, addiction and substance abuse also significantly heighten risk for committing acts of both interpersonal violence and self-inflicted violence.[4, 5]

The consensus among researchers who study violence is that access to firearms increases the lethality of violent acts.[6] Relatively unrestricted access to firearms may be the factor that best explains why the homicide rate in the United States is many times higher than that found in other high-income countries. Compared with other industrialized countries, U.S. cities are no more crime-ridden,[7] our schools are no more overrun by bullies, nor are our teenagers more inclined to get into fights or carry weapons.[8, 9] Violence in the United States is unique in its high level of lethality, a phenomenon largely explained by the much wider use of firearms in assaults.[10]

The primary objective of the Gun Control Act of 1968 and most other gun control policies at the federal, state, and local level – to keep firearms from individuals deemed to be dangerous based on their prior criminal history and mental health status – is well founded in science as well as in common sense. It is also an objective that virtually all citizens, including virtually all gun owners, support.[11, 12]

Yet our federal laws and enforcement efforts are inadequate to achieve this fundamental and widely-supported objective. Current federal criteria for prohibiting firearm sales and possession miss a large portion of persons who go on to commit murder and other violent crimes. As we have seen with the tragic homicide spree at Virginia Tech, there is great need for improvement in our systems for identifying individuals who meet current legal firearms prohibitions. There is an enormous loophole that only requires licensed firearms retailers to screen firearm purchasers, even though 40% of firearms purchases do not involve a licensed retailer.[13] Until necessary reforms are made in our federal gun policies and their enforcement, the United States will continue to be exceptional among high-income countries for our incredibly high homicide rates.

Using Criminal History to Screen Firearm Purchasers

Given the enormity of gun violence in the United States and the broad public support for keeping guns from dangerous people, it is scandalous how little research has been done to assess the appropriate criteria for prohibiting individuals from possessing firearms. Until the mid-1990's when domestic violence offenders were targeted, federal firearms prohibitions for criminal infractions were limited to felons. A study of homicide offenders in Illinois found that 43% had a prior felony conviction within 10 years of committing a murder, compared with 4% of comparisons who had not committed a murder.[14] Thus, most homicide offenders in this study would not have been prohibited from possessing a firearm due to a felony conviction.

But there are criminal histories short of felony convictions that predict future violence. A study of young handgun purchasers in California found that those with a prior misdemeanor

conviction were 7 times more likely to commit future crimes than those without such convictions. Men with two or more prior misdemeanor convictions were more than ten times as likely to commit future crimes involving firearms and violence than were handgun purchasers that, at the time of purchase, had been law-abiding.[15] In 1991, California expanded legal firearms exclusion criteria to include convictions of misdemeanors for violence. Researchers found that handgun purchase applicants who were denied for misdemeanor convictions following the expanded restrictions were significantly less likely to commit new crimes involving guns and violence than were individuals with similar arrest histories that were allowed to purchase a handgun in the years preceding the new restrictions.[16] More research is needed to fully assess the effectiveness of prohibiting violent misdemeanants from possessing firearms.

Many juveniles who engage in delinquent behavior desist from such behaviors when they enter adulthood. However, criminal offending as a juvenile, particularly if the offending is serious or chronic, is predictive of offending as an adult.[1,2,3,17] Thus, it is prudent to prohibit firearm ownership for young adults who have committed offenses as juveniles that would have prohibited an adult from possessing a firearm. Twenty-seven states have laws that prohibit firearm sales to or possession by individuals who have committed disqualifying crimes as juveniles, but six of these states do not provide or access the juvenile records needed to enforce these laws. Consistent with research findings on the trajectories of criminal offending over the life span, some states restore firearm ownership privileges at age 30 if juvenile offenders have no disqualifying adult violations. To my knowledge, the effectiveness of firearm prohibitions for juvenile violations has not been studied.

Firearm Prohibitions for Persons with Mental Illnesses

Persons with serious mental illnesses, particularly if untreated, are at increased risk for committing violent acts against themselves and others.[1,3,4,5] Very few people with mental illnesses associated with heightened risk for violence are likely to meet the legal criteria for firearm prohibitions. Such criteria include court orders committing someone to a mental hospital, being adjudicated "mentally defective," legal findings that a person is incompetent to manage his or her affairs or is a danger to himself or to others, and court findings that a person was incompetent to stand trial or was not guilty by reason of insanity.

To my knowledge, there are no published studies evaluating the impact of firearms prohibitions based on mental illness; however, there is reason to be skeptical that these restrictions are having a substantial impact. The restrictions apply to a relatively small number of people, some of whom are not dangerous. Only 22 states currently report any mental health records to the National Instant Criminal Background Check System to allow for screening of prospective firearm purchasers. And even in these states that do report data on mental health exclusions, the systems for reporting cases are far from perfect.

States' privacy laws, which restrict the sharing of data about an individual's mental health status, are an important barrier to the effectiveness of the current mental health exclusions. I will not address the legal hurdles to states submitting data on mental health exclusions for the purpose of screening firearm purchasers. But from a policy perspective, concerns about privacy of mental health records relevant to firearms prohibitions might be minimized by the FBI maintaining two separate databases for firearms-related background checks – one for criminal offenses and one for mental health exclusions. While the database for criminal history could be made available to

employers, the one for firearm prohibitions for the mentally ill would have stricter security and its use would be limited to law enforcement agencies. While there is a public safety interest in keeping firearms from individuals with serious mental illnesses, there is little evidence that policies prohibiting the seriously mentally ill from possessing firearms play a role in determining whether individuals seek care for their mental illness.[18]

Improving Systems for Keeping Firearms from Legally Prohibited Persons

While there are many ways that we can improve policies designed to keep firearms from dangerous persons, perhaps the most important would be to close the most substantial loophole in federal laws. There is no rational basis for limiting the required background checks for gun purchasers to licensed firearm dealers. Forty percent of firearms sales in the U.S. do not involve a licensed gun dealer, and 80% of the public supports a law requiring background checks for private firearms sales.

While it facilitates firearms commerce, the instant background check system in place in most states is vulnerable to errors and abuse and enables dangerous individuals to obtain firearms. Although it typically takes more than a week for authorities to determine dispositions of arrests when the information is not in the NCIC database,[19] federal law allows firearm dealers to sell firearms after three business days have elapsed from when the background check was initiated. This results in thousands of guns going into the hands of prohibited individuals.

Relatively few states require firearm purchase applicants to be fingerprinted. The individuals entrusted with providing and verifying the information for the background check are the prospective purchasers and sellers rather than a public safety official. The General Accounting Office conducted a study in which they sent individuals with fake identification into gun shops in several states. Not a single one of those ID's or purchasers were questioned or their sales stopped.[20]

A handful of states have adopted the type of broader exclusions and comprehensive regulations of firearms sales that our federal laws lack. Our research shows that these systems are quite effective in keeping guns sold within the state from getting into the hands of criminals.[21]

Conclusion

Keeping firearms from dangerous individuals is vital to the public's safety and is achievable. A large majority of the public, including gun owners, supports necessary reforms. Congress has an opportunity to enact such reforms that will save lives.

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Mr. KUCINICH. Thank you, Professor Webster.

I will now hear from Mr. Honberg. You may proceed.

STATEMENT OF RONALD S. HONBERG

Mr. HONBERG. Thank you, Chairman Kucinich. I am very pleased to be here today on behalf of NAMI, which is a grassroots advocacy organization comprised of people with serious mental illness and their families.

I would like to say at the outset that NAMI very much supports efforts to prevent violent or potentially violent individuals from possessing firearms. We thank you for the opportunity to help guide the committee's inquiry toward that end.

In the wake of the Virginia Tech tragedy, many questions have been raised about how someone like Mr. Cho could have been allowed to purchase handguns. The real lessons of the tragedy, however, lie in the failed mental health system. Although we realize this hearing's focus is on our gun laws, it is equally important to recognize that timely and appropriate treatment might well have prevented that tragedy.

With respect to the gun laws, I would like to make three basic points. First, there has been a suggestion today that the regulations guiding reporting of mental health information are clear. We don't think that the guidelines in the Brady regulations are sufficiently clear and that may be part of the problem. For example, the term that is used to describe mental illness is "Adjudicated as a mental defective."

That term needs to be changed. It is both stigmatizing and incompatible with modern terminology used in the diagnosis and treatment of people with mental illness. It also creates significant uncertainty over who is and who is not covered under the law. The regulations implementing the Brady law attempt to define this term, but for reasons enumerated in detail in my written testimony, this definition is still very unclear.

No State official charged with carrying out the requirements of the Brady bill could possibly know what this means, as it is a term that has been obsolete for close to 40 years. And just as we wouldn't use the term idiot or imbecile in Federal law, so too should we not use the term "adjudicated as a mental defective."

Second, as I stated at the outset, we support efforts to prevent violent or potentially violent individuals from possessing firearms. However, mental illness should not be a proxy for violence. Current research, including the findings of the landmark Surgeon General's report on mental health in 1999, strongly demonstrate that the overwhelming majority of people with mental illness are not violent. Research does show that a small subset of people with mental illness may pose higher risks of violence, and predictors include a past history of violence, non-participation in treatment, and co-occurring abuse of illegal drugs or alcohol.

The NICS reporting system needs to be based on these kinds of clear risk factors. One model to consider for reporting is that under California law, which is categories that directly link to violence or potential violence. It is also important to keep in mind that other categories included in the NICS data base are more directly linked with violence. For example, as you have heard, court orders that

restrain individuals from harassing, stalking or threatening an intimate partner or child of an intimate partner, and misdemeanor convictions for domestic violence are included. These categories are probably more directly relevant to potential violence than mental illness per se.

So we believe that efforts must be made at the Federal level incorporating expertise from the National Institute of Mental Health and the Substance Abuse and Mental Health Services Administration to develop clear reporting criteria and mechanisms that are linked to violence, not solely to mental health treatment.

Finally, NAMI believes that standards must be developed in Federal law to protect the privacy of information provided to the NICS system. We are very concerned that concerns about the inappropriate disclosure of sensitive information about mental health treatment may be a significant impediment for people with mental illness to seek help when they need it. Representative McCarthy has included a provision in H.R. 297, the NICS Improvement Act, which we have heard referenced a number of times today, requiring the publication of regulations by the Attorney General for protecting the privacy of information provided to the system. This would indeed be a positive step.

But we believe these regulations must specify that only names and addresses should be included in the NICS system—I heard today that is in fact the case, that is not very well known to the public—with no further information about why a person is on the list. The law should also prohibit sharing the list with any Federal or State agency or individual for any other purpose, and privacy protections should apply to all agencies and individuals responsible for collecting and providing information for the NICS system.

In conclusion, as I have said, we support efforts to prevent violent individuals from possessing firearms. In accomplishing this laudable goal, it is very important to establish criteria that achieve this objective without inadvertently subjecting people with mental illness to further stigma and prejudice, which can deter people from seeking treatment when they need it the most.

Therefore, NAMI recommends a regulatory process that incorporates current scientific knowledge and brings clarity to this very, very complex issue. Thank you again.

[The prepared statement of Mr. Honberg follows:]

DOMESTIC POLICY SUBCOMMITTEE

OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

THURSDAY, MAY 10, 2007

2154 Rayburn HOB – 2:00 P. M.

FEDERAL GUN REPORTING REQUIREMENTS AND THEIR APPLICATION TO PEOPLE WITH MENTAL ILLNESS

TESTIMONY SUBMITTED BY RONALD S. HONBERG

DIRECTOR OF POLICY AND LEGAL AFFAIRS

NATIONAL ALLIANCE ON MENTAL ILLNESS

Chairman Kucinich, Congressman Issa, and distinguished members of the Subcommittee, my name is Ron Honberg and I am the Director of Policy and Legal Affairs for the National Alliance on Mental Illness (NAMI). NAMI is a grassroots advocacy organization comprised of people with serious mental illness and their families, with more than 1,100 affiliates in all 50 states and the District of Columbia.

In the wake of the Virginia Tech tragedy, many questions have been raised about how something of this magnitude could have happened and how someone like Mr. Cho could have been allowed to purchase handguns. For NAMI, the story of someone falling through the cracks and not getting the mental health treatment they obviously needed is all too common. Of course, it is very rare that such individuals commit acts of violence towards others. More commonly, they suffer silently – desperately needing treatment and support but failing to get it from a system and a society that frequently turns a blind eye.

NAMI has been asked to address the National Instant Background System (NICS) but we believe the real lessons of the Virginia Tech tragedy lies in the failed mental health system. We call on Congress and the States to allocate sufficient resources and direct these resources to ensuring that people get the treatment they need when they need it.

Turning to the issue of gun control, the Virginia Tech tragedy revealed flaws in the NICS system. Under federal law, states are required to report certain categories of individuals for inclusion in the NICS system, but it appears that many states are not complying with these reporting requirements

Our focus at NAMI is specifically on severe mental illness. Thus, our comments today are focused on the impact – or potential impact – of federal gun reporting requirements on people with severe mental illness. NAMI strongly supports an effort to prevent violent or potentially violent individuals from owning guns. Our concern however is that mental illness should not be a proxy for violence.

To recount some of the history, when Congress passed its first gun disclosure law in 1968, people "adjudicated as mental defectives" and "people committed to a mental institution" were identified among those who should not be permitted to own or purchase guns.

No attempt to define these terms occurred until 1998, when the U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, promulgated regulations to implement the Brady Act.

The term "adjudicated as a mental defective" is defined as follows: (27 CFR § 555.11)

"A determination by a court, board, commission or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease:

> *(1) Is a danger to himself or to others; or*
> *(2) Lacks the mental capacity to contract or manage his own affairs.*

(b) The term will include –

(1) A finding of insanity by a court in a criminal case; and
(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility by any court or pursuant to articles 540a and 76b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

No definition of the term "committed to a mental institution" is in either the Brady Handgun Violence Prevention Act or the implementing regulations.

NAMI has four major concerns about the current definition in the Brady bill: the vague and outdated language in the definition, the lack of a clear connection between mental illness and violence, the lack of time limits, and privacy concerns. We recommend a regulatory process that involves the relevant federal agencies, including the National Institute of Mental Health (NIMH) and the Substance Abuse and Mental Health Services Administration (SAMHSA), to develop a clearer definition that reflects modern science.

1. The definitions used to implement the Brady law are vague and do not clearly define who should and should not be included:

First, as a threshold consideration, the term "adjudicated as a mental defective" is both stigmatizing and incompatible with modern terminology used in the diagnosis and treatment of people with mental illness. No state official charged with carrying out the requirements of the Brady bill could possibly know what this means, as it is a term that has been obsolete for close to 40 years. We have received emails and other communications in the last few weeks from people who are incredulous that such a term would still be used in federal law.

Second, as stated above, the Brady implementing regulations do not define the meaning of the term "committed to a mental institution." Thus, it may be presumed that anyone ever civilly committed to a hospital would be included. Yet, not all people under involuntary civil commitment orders have been determined to be dangerous to self or others. In fact, many state statutes contain criteria for civil commitment such as "gravely disabled", inability to provide for basic needs, inability to make rational decisions, and other factors. If past violence is a strong predictor for future violence, as the research strongly suggests, then criteria for excluding people from possessing guns should be linked to violence, not just to treatment for serious mental illness.

Third, the inclusion of people who "lack the capacity to contract or manage their own affairs" in the definition, without any durational limits for inclusion on the list, may be problematic as well. Mental illnesses are episodic by their nature. Symptoms fluctuate over time. With proper treatment, people whose capacity to manage their own affairs may be temporarily impaired can and do recover and go on to live independently and productively, sometimes for the remainder of their lives. Should a person who experiences a short-term impairment in capacity to manage money or personal affairs but recovers that capacity be included in the NICS database for the rest

of his or her life? What impact will knowledge of this have on a person's willingness to seek help when they need it? We are very concerned that an irreversible inclusion in the NICS database is not only inappropriate, but may reduce the willingness of people to seek help for their mental health condition.

Finally, the broad language in the regulations could be read to include decisions by administrative agencies. For example, the Social Security Administration sometimes temporarily assigns Representative Payees to beneficiaries of Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) to help them manage their benefits. These individuals may require assistance in managing their benefits, but this does not correlate with violence or potential violence.

NAMI strongly believes that any legislative initiative to strengthen state compliance with reporting requirements for the NICS system should incorporate greater specificity and clarity in defining criteria for including certain people with mental illness in the database. As discussed in further detail below, certain states such as California have definitions that are far clearer and easier to implement. The federal government should similarly strive for greater clarity.

2. **The current definition, as it applies to mental illness does not clearly establish a connection between the categories included for reporting and a history of violence.**

The goal of the NICS reporting system is presumably to prevent guns from coming into the hands of individuals who are dangerous or potentially dangerous to self or others. The broad criteria for including people with mental illness apparently reflect the judgment that people with these illnesses are, as a class, predictably more violent. This is not necessarily the case. Current research – including the findings of the landmark Surgeon General's Report on Mental Health (1999) - strongly demonstrates that the overwhelming majority of people with mental illness are not violent. And, notwithstanding the publicity that surrounds cases involving violence perpetrated by individuals such as Cho or Russell Weston (the U.S. Capitol shooter), most acts of violence in America are not perpetrated by people with mental illness.

The research does show that a small subset of people with mental illness may pose higher risks of violence. Predictors for increased risks of violence include:

- A past history of violence;
- Non-participation in treatment; and
- Co-occurring abuse of alcohol or illegal substances.[1]

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It is important to keep in mind that court orders that restrain individuals from harassing, stalking or threatening an intimate partner or child of an intimate partner, and misdemeanor convictions for domestic violence are all covered under the Brady law.

These categories are probably more directly relevant to potential violence than mental illness per se. The Committee should take a close look at state reporting to the NCIC under them--not as a substitute for inquiries about mental illness, but because they may represent a far greater, direct concern.

Local courts that issue involuntary treatment orders in many cases are the same ones that issue protective orders. From a perspective of administrative priorities, individuals with mental illnesses—illnesses that exist through no fault of their own--should not be singled out in a way that only adds to the stigma that often surrounds the illness. Fundamental fairness is important in administration of the law.

A regulatory process is needed that carefully examines these risk factors and state laws to identify those who should be included in the NICS system and those who should not.

3. There are no time limits pertaining to mental illness in the federal regulations for the NICS system. Once people are placed on the list, they will remain on the list forever.

Since NAMI was founded in 1979, significant progress has occurred in our understanding of serious mental illness and in treating these disorders. For example, whereas a diagnosis of schizophrenia was once a life sentence to dependency and suffering, today many people with this disorder recover and live meaningful, productive, and non-violent lives in the community.

The definitions applicable to people with mental illness in the regulations implementing the Brady law entirely ignore the effectiveness of mental health treatment. As stated above, there are no limits in the definition on the length of time a person who meets one of the criteria should be included on the list, nor are there any mechanisms available to petition to have one's name removed from the list.

Interestingly, reporting criteria set forth in the law of California, a state that has been identified as a model for reporting, include durational limits in most categories linked with mental illness. For example, individuals placed under 72-hour holds in psychiatric treatment facilities on the basis of dangerousness to self or others (as was the case with Mr. Cho) are prohibited from possessing firearms for five years following discharge. Moreover, the law includes a mechanism for an individual subject to this prohibition to petition the court to have it lifted based on the

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al, "Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods", Archives of General Psychiatry 55: 393-401 (1998).

determination that they can possess and use firearms safely. And, individuals under a court-ordered conservatorship due to grave disability are prohibited from possessing firearms as well, but only until they are found to have recovered their capacity and no longer require a conservatorship.

While NAMI is not advocating for verbatim adoption of California's law, we applaud an approach that identifies factors that increase risk of violence by people with mental illness, without being overbroad either in scope or duration.

4. **The Brady law and regulations currently do not contain specific provisions designed to protect the privacy of individuals with mental illness whose names are reported by states and included in the NICS database.**

In 2007, people with serious mental illness continue to encounter stigma and prejudice in all aspects of their lives - housing, employment, and social relationships. And, this prejudice grows every time a horrendous tragedy occurs involving an act of violence connected to a person with a mental illness. In recent weeks, as the issue of gun reporting requirements has garnered national attention, I have received calls from people with mental illness and family members concerned that the overly broad inclusion of people with mental illness within the NICS database could have unintended negative consequences.

For example, we are concerned that the awareness that one's mental health treatment may be linked to inclusion in the NICS database could serve as a deterrent for people to seek and accept treatment when they most need it. We know that there are many factors that impede people's willingness to seek needed treatment, including certain symptoms that may impair a person's awareness of the illness and need for help. Concerns about the inappropriate disclosure of sensitive information about mental health treatment may significantly reduce people's willingness to seek treatment. We know, for example, that many people eschew seeking reimbursement for mental health treatment through private insurance because they fear the consequences of potential disclosure.

Thus, we strongly believe that privacy protections in federal gun reporting laws need to be strengthened. Representative McCarthy has included provisions designed to increase privacy protections in her proposed legislation, HR 297. However, we believe these protections must go further. For example, we recommend that only name and address should be included in the NICS system, with no further information about why the person's name is on the list. And, the law should specify that the FBI, which maintains the NICS system, is prohibited from utilizing or sharing the list for any other purpose or with any other federal or state agency or individual representative. Finally, privacy protections should also apply to agencies and individuals responsible for collecting and providing the information for the NICS database.

In conclusion, NAMI supports efforts to prevent violent individuals from possessing firearms. In accomplishing this laudable goal, it is important to establish criteria that achieve this objective without inadvertently subjecting people with mental illness to further stigma and prejudice which can deter people from seeking treatment when they need it the most. Therefore, NAMI recommends a regulatory process that incorporates current scientific knowledge and brings clarity to this very complex issue.

Thank you for affording us this opportunity to testify.

Respectfully Submitted,

Ronald S. Honberg

Mr. KUCINICH. Thank you, Mr. Honberg.

Professor Sorenson, one of your recommendations is extending the purchase prohibitions to those who stalk former dating partners. Could you explain why the prohibition should be expanded to include those individuals?

Ms. SORENSEN. I believe it should be expanded to both former dating partners and stalking, regardless of the relationship, whether there was a prior relationship or not. People who are in the public eye are sometimes stalked by others and that kind of obsessive quality of wanting to have a relationship with someone is, and then to not have that be met, can be very disappointing. Then the person can sometimes become violent.

So I don't think that there should be, the firearms provision, there should be discussions about whether it should be extended to all cases in which stalking has been, and there is a restraining order in place, where a judge or commissioner has already decided that this person constitutes a credible threat to this other person, so that it goes through the regular due process. But I think it should be extended there.

Also, I believe it is former boyfriends and girlfriends, or maybe it is boyfriends and girlfriends in general, are those who are at highest risk of intimate partner homicide. So it seems like we would want to include that group in this protection under Federal law about domestic violence restraining orders.

Mr. KUCINICH. Do you see any wisdom in allowing States to adopt more stringent laws to see what works and how to balance rights, or do you think that we know enough now to establish uniformity at a Federal level for the expanded categories that you have discussed?

Ms. SORENSEN. Several States have already had these in place. California has had these in place for quite some time. This information is entered into the system that California uses to check for background checks and for purchases. So there is evidence that it is already working, or at least it can be implemented, is a better way to put it.

Mr. KUCINICH. Tell me more about who you work for in terms of the statistics that you gather and the policy recommendations that you make.

Ms. SORENSEN. This has been a content area for me, for my research, for a number of years. I also had the privilege of serving on an attorney general, this is for the State of California, former Attorney General Bill Lockyer, his policy committee, it was a task force. One of the things that we looked into was whether firearms prohibitions were being enacted appropriately and were being enforced correctly. We were surprised to find that there were a number of counties that were, as we put it, under-reporting. We would have expected far more restraining orders from them than we were getting. Sometimes it was because they weren't entering them, sometimes because the judges had crossed their prohibitions off on restraining orders. And sometimes because they lacked personnel to do it.

And when it was brought to the attention, from the State Attorney General, to the local DAs and such, and the local police officers, and the persons who were responsible for that, they changed

practices. So simply letting them know that, we are paying attention and we are going to be monitoring this, brought them quickly into compliance on some things.

I think federally, if we know that is going to happen and that is happening at a Federal level, that would be great. We have fewer than 1 million restraining order records in NICS right now. There should be lots more than that.

Mr. KUCINICH. Thank you very much.

Professor Webster, the ways that the laws are designed now, the prohibited categories at the Federal level and at the State level are mostly permanent. You do mention the case that some States restore firearm privileges at age 30 if juvenile offenders have disqualifying adult violations.

Should this happen for other categories?

Mr. WEBSTER. I am not sure if I get the question. So the question is whether some prohibitions might be time limited? OK. I think if it is a matter of not having, if that is the only way you can get the restrictions, I think it makes a lot of sense. We do know a fair amount about developmental trajectories for criminal offending. Typically, if there is no offending during the adult years, it is pretty darned rare that they are going to be a problem later.

Mr. KUCINICH. So for example, if a person is convicted of a felony or domestic violence misdemeanor as a young man or woman, would they be a demonstrated risk purchasing a handgun in their 50's when their record is otherwise immaculate?

Mr. WEBSTER. It would be an unusual set of circumstances. I am not saying there is no risk.

Mr. KUCINICH. Is there any social science there at all?

Mr. WEBSTER. I don't know of a very specific study that examines exactly that. I will just say it would be an unusual set of circumstances.

Mr. KUCINICH. I have a question for both you and Mr. Honberg. Are there any good studies that show what classes of mentally ill people are likely to commit a crime, or specifically, whether the Federal definitions of mentally defective and committed to a mental institution are based on sound social science? Professor Webster.

Mr. WEBSTER. I have not been able to find a study that would define the mental health problems in the way that the Federal law does. I think Mr. Honberg was right on in saying that sort of the definitions and how we define that doesn't line up with how scientists and clinicians tend to do that kind of thing.

So there is really nothing to go on to say for sure whether those set of criteria really are logical. I do agree with what he was saying earlier, that there are certainly a number of very seriously mentally ill people who might be technically disqualified but who probably really are not a threat. On the other hand, there are certainly a number of individuals when mental health conditions that research shows does elevate risk.

Mr. KUCINICH. Mr. Honberg.

Mr. HONBERG. There certainly have not been any studies that I have seen that have looked specifically at the relationship between mental illness and the likelihood of committing a violent act with a gun. But there have been studies that have looked at mental ill-

ness and violence, a number of them, some recently published. As I said, the risk factors that have been identified, with the caveat that the overwhelming majority of people are not violent, if the person is not receiving treatment, if the person has engaged in violence in the past and if the person is engaging in what is known as the co-occurring use of alcohol or substance abuse.

I will say that a lot of the categories that are in the Federal law seem to have a fairly tenuous link with violence. Involuntarily committed may be legitimate if the basis of the commitment is on the basis of being dangerous to self or others. But we know that there are many people who are involuntarily committed who are committed for other reasons that have nothing to do with violence.

We also know that included in the Federal definition potentially are people who may have been found at one time or another to be incompetent, to manage, for example, their money for a temporary period of time, were assigned a guardian but after a period of time regained their competence. We also know that recovery from mental illness is very possible these days and that people can go from a time when they may not have been doing well to 20 or 25 years of independence and productivity. So the idea of having a durational limit or some criteria in law makes sense to us. Interestingly, California, which actually has a definition which in some respects is broader than the Federal definition, but also has durational limits, in one category 5 years, in another category when the person regains their competence. It also has procedures in place that would enable people to petition to have their name taken off the list. It makes sense to us.

Mr. KUCINICH. Obviously, everyone who may have at one time or another suffered from mental illness is not necessarily violent. Do you have any comments based on your study or analysis of the individuals involved in the tragedy at Blacksburg?

Mr. HONBERG. I don't think we know enough yet about Mr. Cho to know what his diagnosis was. What we do know is that there were some, based on the media stories that have come out, that there were some telltale signs. He was actually held on an involuntary basis on a 72 hour hold in a hospital. He was released on strict conditions that he participate in outpatient treatment. He was actually committed on an outpatient basis to outpatient treatment. There was clear language in that commitment order that said he was potentially dangerous to self or others.

Then 2 years passed before the tragedy occurred. And the last thing I want to do is play Monday morning quarterback here. But this was somebody where there was clear notice that he was potentially at risk. What happened, as happens time and time again, is that the mental health system didn't do its job, didn't provide him with the services that he needed. There was no coordination between the court and the mental health system. So he basically went without treatment for 2 years, and his symptoms, it appears, only got worse.

So in a situation like that, where there was actually a finding of potential dangerousness, we would have no problem with a person under that circumstance going on the list, at least for a period of time, until the dangerousness is abated.

Mr. KUCINICH. Anyone else on the panel want to comment on that one?

I would like to ask Professor Webster, you wrote that there is little evidence that policies prohibiting the seriously mental ill from possessing firearms play a role in determining whether individuals seek care for their mental illness. You cite a 2001 study. Can you explain this study?

Mr. WEBSTER. Yes. It was a study that was a survey and asked individuals the reasons, individuals with mental health problems. They asked simply what are the reasons that you did not seek care. The study did not reveal any responses that indicated that they did not seek care because they were concerned about being on a list that would prohibit them from purchasing firearms. Only——

Mr. KUCINICH. Did you say they were or weren't?

Mr. WEBSTER. They were not. There were no responses reported in that study that had anything to do with that. The only thing that was even remotely close to that was that 14 percent said that they did not seek treatment due to issues of stigma around that. The degree to which we conflate criminality with mental health, that of course creates the stigma. But that is a few, that is a little bit removed.

So I think that the general objective of keeping firearms from, basically I am in agreement with Mr. Honberg that there is a set of individuals with mental illness that at least temporarily are going to be potentially dangerous. By restricting access to firearms, it should not be a barrier, will not be a barrier to them getting care.

Mr. KUCINICH. Do you have a comment, Mr. Honberg?

Mr. HONBERG. Yes. Again, I think we are in agreement, certainly on the point that we need to try to identify the people who are at risk and make sure that they don't get firearms. But I do want to emphasize just how pervasive the stigma that people with mental illness face and how even the perception that your name may go on a list, people worry about the time about sensitive information, about their mental health records being disclosed and adverse consequences as a result.

I will just give you an example that I think you I am sure have heard before, that a lot of people, when they need mental health treatment, if they are fortunate enough to have private insurance, oftentimes choose to not seek reimbursement through their private insurance, for fear that somehow the information that they received that treatment will be disclosed and that there will be adverse consequences in terms of losing their jobs or impacting in their social relationships.

So my point is that we have to be very, very careful about this. We certainly can't be careful enough in terms of the privacy protections that we put in place for people.

Mr. KUCINICH. That raised a question. One of the early panelists today in testimony stated the following: "FBI data indicate that a small fraction of the number of Americans who have been involuntarily committed in mental institutions has been reported to the NICS. As of November 30, 1999, the FBI had received from all States a total of only 41 records of mentally ill persons. Although the number of mental health records provided to NICS has in-

creased, in 2003 there were more than 143,000, mental illness remain significantly under-reported. As a result of the FBI's lack of information about mentally ill persons, it cannot be assured that an FBI background check will find that a person is ineligible to possess a firearm due to mental illness."

So there is that kind of a quandary. The question that you raise about just the reporting, so if someone is involuntarily committed, let's say they have a nervous breakdown because of the loss of a loved one. Is this the kind of concern that you are——

Mr. HONBERG. I would say, just addressing broadly the question of why so many names aren't being reported, I think there are two reasons for that. I think in the process of giving you those reason I will get at your question.

First, I have to make a point that a lot of States don't do a very good job of keeping data. We did a report last year, we did a national report card on States. We found that a number of States couldn't even provide you with an unduplicated count of people that they served in their mental health system in a given year. So that clearly, the technology has to be improved.

But I also get back to the point I made in my testimony, which is that the definition is really vague and unclear. I don't think that States really understand who they are supposed to report and who they are not supposed to report. That is why I think it is very important to revisit the definition at this point.

What Representative McCarthy is trying to accomplish in her legislation is very important, and we support her goals. But there is an aversion, perhaps for understandable reasons, based on what I heard earlier today, to reopen the Brady law and to reopen the regulations. But I really think that when it comes to the definition of who with mental illness should be reported and who shouldn't, it is important to do that. That is really what we are pushing for as an organization.

Mr. KUCINICH. Thank you very much.

One of the things I want to comment on, in this discussion about the gun violence and the reporting of statistics, and of course, your presence here is to talk about the role of mental illness as one of the reporting categories, one of the things that occurs to me is the fact that we are still struggling with the issue of mental health parity in this country, and making sure that those who are mentally ill have access to the health care services that they need on an equal basis with people with other types of illnesses.

John Conyers and I have produced a bill, H.R. 676, the Universal Single Pair Not-for-Profit Health Care Bill, that among other areas provides for fully covered mental health. That would be one way in which we would have a chance to look at those issues in much more detail and provide the kind of care that people obviously need.

With respect to Professor Sorensen and to Professor Webster, your familiarity with various types of violence and their relationship to crimes of violence using implements like guns, you may be familiar with another proposal, H.R. 808, to create a Cabinet-level department of peace and non-violence, which looks specifically at the issues that both of you have talked about, domestic violence, spousal abuse, child abuse, violence in schools, gang violence, gun

violence related to that, racial violence, violence against gays, police community conflicts. It creates an organized approach to dealing with it based on really reaching out to professionals such as yourself to get that expertise and get it into solid programs that work with existing groups or work with the educational system to teach non-violence and non-violent conflict resolution at an early age.

So as I am listening to your testimony, I am thinking about how a new model essentially could be constructed to look at the problems that were presented today, which are basically quantitative, in effect, trying to get the data to try to determine where do we go from here. Even as we do that, it is still possible to look at creating other models that change the gross numbers that we see reflected in these tragedies.

So I want to give each of you a chance for a closing statement, if you would like. Professor Webster.

Mr. WEBSTER. I would just close in saying that it is my sincere hope that Congress will act to make some of the reforms that were discussed today that really can achieve the objectives that truly the vast majority of Americans agree upon. When I say that, I mean gun owners. Virtually all kinds of common sense regulations that have been discussed in this hearing today gun owners support. There may be extremist organizations that don't. But when you do polling, gun owners agree with it.

So I hope that we can start to make progress on this. It is one of the largest public health problems that we face. The Federal Government needs to step up to the plate.

Mr. KUCINICH. Professor Sorensen.

Ms. SORENSEN. Professor Webster said it well. The piece that I would add is that there have been a number of organizations, groups of former battered women and those who advocate on behalf of them who have worked hard to get those laws in place. It is really important, I think, that we make sure they are implemented and enforced so that we can ensure safety and greater health.

Mr. KUCINICH. Thank you.

Mr. Honberg.

Mr. HONBERG. I just want to express my gratitude for your focus on broader issues around health care and access to quality health care. I really think that is at the crux of this tragedy. Without in any way trying to trivialize the importance of the gun issue, it has been frankly a little frustrating to me the last couple of weeks that there has been so much focus on the gun issue with respect to Mr. Cho and very few questions asked about, well, how could somebody like this have not gotten treatment.

The answer is, because in many parts of the country, there is no mental health system in place. Where there is a system, it is crisis oriented. So you only get services when you are in crisis and only for so long as you are in crisis.

It would be akin to having a system for treatment of heart disease where you would only get treatment if you had a heart attack, and then as soon as the immediate life-threatening event were averted, you wouldn't get any more treatment. So it is no wonder why so many people fall through the cracks. You have certainly

been, over the years, a great champion for trying to fix our health care ills in this country and we really appreciate it.

Mr. KUCINICH. I thank the gentleman, and thank all the witnesses. Certainly the discussion that you have started today has the potential to be the basis of other hearings by this subcommittee. So the staff will certainly be in touch with you. I am grateful for the professional commitment that each of you have shown to these issues.

This has been a hearing of the Domestic Policy Subcommittee of the Oversight and Government Reform Committee. The hearing today has been about Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws. I am Congressman Dennis Kucinich of Ohio and the chairman of this subcommittee. I want to thank all the witnesses for your participation, and this committee stands adjourned.

[Whereupon, at 6:43 p.m., the subcommittee was adjourned.]

[The prepared statement of Hon. Elijah E. Cummings follows:]

CONGRESSMAN ELIJAH E. CUMMINGS OF MARYLAND
OPENING STATEMENT

"LETHAL LOOPHOLES:
DEFICIENCIES IN STATE AND FEDERAL GUN PURCHASE LAWS"

DOMESTIC POLICY SUBCOMMITTEE
OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
THURSDAY, MAY 10, 2007
2154 RAYBURN HOB –2:00 P. M.

Mr. Chairman,

Thank you for holding this vitally important hearing to examine the loopholes and deficiencies in firearm purchasing prohibitions.

I think we were all disturbed to watch the news unfold on April 16, when we learned that a troubled young man at Virgina Tech University gunned down 32 students and teachers, and wounded many others, before turning the gun on himself.

This tragedy represented the deadliest incidence of gun violence in U.S. history, but it certainly was not the first.

The Amish schoolhouse shootings six months ago, and the Columbine shooting eight years ago, raised similar concerns about our society and its prevalence of gun violence.

Those of us involved with policymaking have much to contemplate in the wake of the Virginia Tech massacre.

We must consider how we protect our young people, how we respond to individuals who display symptoms of mental illness and

how our cultural attitudes toward violence impact our communities.

In my District, I will be meeting with University leaders to determine what they are doing to better protect their students.

But the federal level, we must carefully examine our firearms laws.

The fact remains that Seung-Hui Cho, the young man who killed 32 people at Virginia Tech, had been flagged as mentally ill and a potential danger to himself and others.

Under the 1968 Gun Control Act, Mr. Cho should not have been allowed to purchase a firearm. Yet we know that he did in fact pass a background check by the state of Virginia, and he legally purchased two guns that he used to carry out his heinous act.

There is something wrong with this picture. Story after story coming out of the Virginia Tech incident indicated that officials had good reason to suspect that Mr. Cho might inflict violence against his community.

Other factors certainly contributed to his actions on April 16; however, the best safety measure we could have taken would have been to stop him from purchasing a firearm.

It defies logic that we would allow any person deemed to be a danger to himself and others to purchase a firearm. Because we have failed to do so, we now have the example of the Virginia Tech massacre to bear out this assumption.

Thirty-two people are dead because we cannot seem to implement an effective gun control law in this country—and that certainly is not the extent of the problem.

Every year, almost 30,000 Americans die by gunfire. We live in the most violent society in modern history.

How much more killing must we endure before we do something about it?

I certainly am ready for action. That is why I would like to thank you again, Mr. Chairman, for holding this hearing to examine this critically important issue.

I look forward to the testimonies of today's witnesses and yield back the remainder of my time.

ELIJAH E. CUMMINGS
Member of Congress

QUESTIONS

Mr. Honberg

- In your testimony, you stated that you think including "mental illness" as a reason for being prohibited from buying a gun on the NICS is inappropriate. Do you believe there should be no category for people with mental health problems at all?
- You stated that having them listed would preclude people from seeking help. I have to wonder, is that really that much of an issue? Would people actually not seek help because they are afraid they might not be able to purchase a gun in the future?
- Do you believe that the FBI should share the NICS list with local law enforcement agencies if that list includes mental illnesses?

Ms. Sorenson

- You stated that guns are not being removed from households when the husband is under a domestic violence restraining order.
- What would be the easiest way to remove the gun? i.e. when the order is served, the man arrested, a certain time period after the order is served?
- What is the law in regards to dating relationships? If a boyfriend is served a restraining order, can he still legally purchase and possess a gun?

Mr. Helmke

- Other witnesses seem to think there is no clear definition of mental illness and that those who commit themselves voluntarily may be ensnared by the law and that mental illnesses are clearly listed on the NICS list. Can you address these discrepancies?
- H.R. 297 would provide incentives (in the form of grants) to states to provide their records on people prohibited from buying guns to the NICS but would not make mandatory. Do you think it should be mandatory?
- You stated in your testimony that 28 states do not make mental health orders available, and thus allow people who should be prohibited from buying guns to purchase them. How do you think we could close what is clearly a loophole in the federal law?

Mr. Webster

- You recommend in your testimony that adults with violent misdemeanors and juveniles with criminal offenses should be included in the NICS list. Do you think they should be included for the remainder of their lives or for certain amounts of time?
- If you could implement only one of your recommendations, which would it be?

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