Gun control and the no-fly list Pt. 2

Moreover, the salami-slicing tactic of gradually insinuating "gun control" throughout America by the attainder of individuals is not limited to the use of the present "no-fly list". That is merely the first slice, and certainly one too thin for achieving the ultimate purpose of the exercise. In the nature of things, once the principle has been established, "gun control" by attainder can and will employ any and every "list", based upon any and every imaginable theory of ineligibility—whether the listed individuals are denounced as "terrorists", or extremists", or "subversives, or "dissidents", or by some other opprobrious epithet (including, no doubt, anyone who dares to deny the supposed power of "the government" to employ the tactic of "listing" itself). Everyone with access to the Internet knows that today's "homeland-security" bureaucrats at every level of the federal system, and the subversive private organizations with which they regularly interact, entertain all sorts of truly crackpot notions as to who qualifies as an "extremist", or a potential "domestic terrorist", or a "home-grown terrorist"—including those Americans who identify themselves as "patriots" (because they love their country), as "constitutionalists" (because they believe in the rule of law), or as opponents of a "new world order" (because they defend the Declaration of Independence). Everyone is entitled, as well, to suspect that the "homeland-security" establishment is even now compiling extensive "lists" of Americans whom some bureaucrats and private organizations want to shoe-horn into such categories. Rogue politicians and bureaucrats may deny that these "lists" exist. But no sensible individual believes any such imposture, in light of the long-standing false denials by the FBI and the TSA that "the no-fly list" existed. See Laura K. Donohue, The Cost of Counterterrorism: Power, Politics, and Liberty

(Cambridge, United Kingdom: Cambridge University Press, 2008), at 254.

In addition, one can expect that “gun-control” fanatics will run to the red lines their engines of deceitful propaganda and hysterical agitation, not simply (as they always have done in the past) to demonize as a run-of-the-mill “extremist” anyone who supports “the right * * * to keep and bear Arms”, but also to denounce as an extraordinarily clear and present danger to society everyone who holds “fundamentalist” views about the Second Amendment, who manifests “intolerance” of “gun control”, or who expresses “hatred” for “gun controllers”—and to demand that such people be denied that right precisely because of their zealous promotion of it and their uncompromising opposition to its detractors. In a stupendous display of ideological jiu jitsu, the big “mainstream media” and their allies across the Internet will transform an individual’s support for “the right of the people to keep and bear Arms” into an excuse for denying that very individual that very right for that very reason. And this tsunami of “politically correct” invective will rationalize the creation of what amounts to “no-gun lists” for suspected “domestic terrorists”, to be enforced through “executive orders” according to the precedents soon to be set by Connecticut’s Governor Malloy and others of his ilk. All of which is already beginning to move forward in high gear (just as if it had been planned well ahead of time).

Interestingly enough, the ACLU has, with some success, been attacking “the no-fly list” in the General Government’s courts. Unfortunately, its approach to the problem has been faulty. In an Internet article from the ACLU entitled “Until the No Fly List Is Fixed, It Shouldn’t Be Used to Restrict People’s Freedoms” (7 December 2015), Hina Shamsi, the Director of the ACLU’s National Security Project, reports that the organization is litigating a case in which it demands that the General Government provide individuals with notice of

their inclusion in “the no-fly list”, a statement of the reasons for that inclusion, and an opportunity for a hearing on the matter before a neutral decision-maker. The self-evident confusion here, however, is that the courts enjoy no power to “fix” a “Bill of Attainder” by applying ex post some remedial processes in order to mitigate its rigors while still allowing its existence and operation to continue. Rather, the duty of the courts is to strike down in law and render ineffective in fact each and every “Bill of Attainder” in its entirety right then and there. The Constitution’s prohibitions of “Bill[s] of Attainder” do not say that a “Bill” is permissible if it (or some court reviewing it) provides notice, reasons, and a hearing for a listed individual. The Constitution absolutely prohibits all “Bill[s] of Attainder”, no matter what purported procedural “safeguards” they may originally contain or may have grafted onto them in the course of litigation. The reason for this is obvious: The harms which a “Bill of Attainder” causes—namely, the supposed legal disabilities it imposes on the individuals it lists—occur as soon as the “Bill” comes into existence. The rights of listed individuals are lost or otherwise compromised at that moment, according to the very definition of a “Bill of Attainder”. True enough, procedural “safeguards” might allow for those rights to be regained at a later date, but always at substantial costs in time, effort, and expense imposed on the targets of the “Bill”. Moreover, as the ACLU’s own litigation demonstrates, the burden of seeking to set up procedural “safeguards”, so that the effect of a “Bill of Attainder” is not as bad as it might otherwise be, always rests squarely on the victims’ shoulders. This is an intolerable imposition, inasmuch as, being absolutely unconstitutional, a “Bill of Attainder” is utterly void ab initio. A “Bill of Attainder” can no more be transformed into a constitutional creation by a court’s application of ex post procedural “safeguards” than Frankenstein’s Monster can be transformed into Miss America by a make-up artist’s generous application of lipstick, rouge, and eye-liner.

Reliance on the ACLU's strategy would have especially perverse effects in a situation in which "the no-fly list" were employed, as Governor Malloy threatens to employ it, for the purpose of stripping individuals of the possession of firearms they already own. Consider the following scenario: Having discovered that Jones is included in "the no-fly list", the Connecticut State Police descend on his home, armed with some jury-rigged administrative process based upon Malloy's "executive order", which purports to empower them to seize Jones' firearms and ammunition sine die. If he is not shot to death by a gun-crazy SWAT team executing the raid, Jones must then initiate some sort of judicial proceeding in order to recover his property. While he is doing so (if his financial situation enables him to hire a competent attorney), the police destroy or otherwise dispose of his firearms and ammunition as supposed "contraband" or "forfeited" property (perhaps by turning those items over to some rogue agency of the General Government, which then black-markets the material to Mexican drug cartels or to "moderate" jihadi terrorists in the Middle East). So, even if Jones eventually does prevail in court, the most he can obtain from the official malefactors of the State of Connecticut is monetary damages, not his firearms. In overall effect, he will be completely disarmed until he can purchase new arms—which, in the case of so-called "assault rifles", Connecticut's new law (recently upheld on typically specious grounds by the United States Court of Appeals for the Second Circuit) makes difficult. So, at least for a while—and perhaps for quite a while at that—Jones' "right * * * to keep and bear Arms" will be palpably "infringed". That this scenario could be extended throughout the State of Connecticut (and any other State, for that matter), limited only by how extensive were the various "lists" rogue agencies of the General Government had compiled, shows how dangerous to "the security of a free State" the situation could become.

Of course, patriots need not worry about the involvement of

the ACLU in such a situation, because that organization is unlikely to challenge rogue public officials' use of "the no-fly list" (or any other "list" of that genre) to disarm common Americans. As Hina Shamsi reports in the article cited above, according to the ACLU "[t]here is no constitutional bar to reasonable regulation of guns, and the No Fly List could serve as one tool for it, but only with major reform." In this, she seems to be following sotto voce Justice Breyer's anti-constitutional dissenting opinion in District of Columbia v. Heller. Contrary to both her and Justice Breyer, though, there most assuredly is a "constitutional bar to reasonable regulation of guns", as the two of them understand "reasonable regulation"—that is, any "regulation of guns" which rogue public officials deem "reasonable" (including, one supposes, outright confiscation). The Second Amendment declares what constitutes the only "reasonable regulation of guns": namely, that "the right of the people to keep and bear Arms, shall not be infringed", where the term "Arms" includes any and every type of "Arms" and related accoutrements which could serve any conceivable purpose in "[a] well regulated Militia". And "the No Fly List could [not] serve as [any] tool for [the reasonable regulation of guns]", because "the no-fly list" is a "Bill of Attainder", which is absolutely unconstitutional and void, no matter what sort of "major reform" might arguably be applied to it.

But what about the National Rifle Association in this brouhaha? Disappointingly, although not unpredictably, the NRA approaches this problem from the same wrong direction as the ACLU. In an Internet article from POLITICO entitled "Administration keeps up media barrage on terror fight" (8 December 2015), Josh Gerstein quotes an NRA spokeswoman as saying that "[t]he NRA's only objective is to ensure that law-abiding American citizens who are wrongly on the list are afforded their constitutional right to due process." If this reference to "due process" means that "the no-fly list" should be declared an unconstitutional "Bill of Attainder", root and

branch and at one fell swoop, well and good. But it probably means “due process” only in the sense the ACLU understands “due process” in this situation: namely, as requiring notice, reasons, and a hearing which might serve to remove individuals from the “list” in the course of litigation, on a tedious and uncertain case-by-case basis.

So, what should be done? If litigation simply had to be pursued, the logical parties to initiate it would be firearms dealers in Connecticut, who would file suit as soon as Governor Malloy issued his threatened “executive order”. The theory of their case would be straightforward: The dealers are licensed by the General Government (specifically, by the BATFE). Although the products of governmental regulations (the constitutionality of which need not be explored here), their licenses constitute valuable “property”, entitled to constitutional protection. These licenses grant statutory rights to the dealers to enter into contracts with citizens for the purchase and sale of firearms and ammunition. The dealers and their customers also have constitutional “liberty” and “property” rights of contract recognized by the Constitution. All of these rights, whatever their sources, are “civil rights” under 42 U.S.C. §§ 1983, 1985(3), and 1988(b) and (c). The employment by public officials in Connecticut of “the no-fly list” (or any other such “list”) in order to preclude the dealers from selling arms to an entire class of individuals, none of whom has ever been judicially determined to be lawfully disabled from purchasing firearms or ammunition, is unconstitutional on its face, under both Article I, Section 9, Clause 3 of the Constitution and Section 1 of the Fourteenth Amendment thereto, and for that reason deprives the dealers of their “civil rights”, along with the economic benefits which would accrue to them from their unrestricted exercise and enjoyment of those rights. Those deprivations entitle them (in judicial jargon, afford them “standing”) to sue Malloy, the Connecticut State Police, and any other public officials involved in the use of “the no-fly

list", seeking a declaratory judgement, injunctive relief, monetary damages, and attorneys' fees.

To be sure, a suit of this sort would inevitably encounter practical difficulties—not the least of which would be the various claims of "official immunity" the defendants would interpose. Nonetheless, perhaps such a strategy will appeal to the NRA, which, in the manner of a compulsive gambler, apparently cannot restrain itself from betting the Second Amendment's farm, time and again, on yet another spin of the roulette wheel of litigation.

Yet the NRA would be wise to recall that in roulette the odds always strongly favor the house, even if the croupier does not apply a greasy finger to the wheel. But when it comes to "the right of the people to keep and bear Arms", are contemporary judges as honest as the croupiers in the average casino? After all, on the basis of its past performances, who can trust the General Government's Judiciary in general—especially within the Second Circuit? Or, for that matter, who can trust the Supreme Court in particular, which is but a single Justice's vote away from endorsing Justice Breyer's "reasonable regulation" theory of the Second Amendment?

Of course, there is another route by which to secure the benefits of the Second Amendment with respect, not just to individuals' rights to self-defense (upon which the NRA is fixated), but also to "the security of a free State" for this country as a whole (which is the Amendment's true goal). Having written more than enough about that elsewhere, I shall refrain from repeating myself here.