by Elias Alias , December 16, 2015

Note: ***Oath Keepers is grateful for the vast body of knowledge which Edwin Vieira makes available to the American people. We have been invited to post this article in full here at Oath Keepers national, but I wish to include this link to Dr. Vieira's articles archive at News With Views, where the reader will discover a world of informative articles, each written with the masterful style and laser-beam accuracy bountifully demonstrated in this his latest piece. To see a listing of Dr. Vieira's books please click this link: https://www.oathkeepers.org/oath-keepers-academy/edwin-vieira/***

Salute!

Elias Alias, editor

Photo of Dr. Edwin Vieira, Jr. taken from James Jaeger's latest documentary film, *Midnight Ride*.

Edwin Vieira 111AAA

Edwin Vieira on "Gun Control" and "The No Fly List"

In the political realm, as elsewhere, evil never sleeps. And apparently there is no enormity which the present rogue régime in the Disgrace of Columbia, and equally rogue régimes in certain States, are not capable of, and not intent upon, committing with the expectation that sheepish Americans will remain somnolent and submissive until it is too late for them to recognize the danger and set about resisting it. The latest piece of "in-your-face" effrontery is an extension of these régimes' never-ending push for systematic "gun control" aimed at the thoroughgoing disarmament of Americans—the goal so pithily and provocatively expressed in Senator Dianne Feinstein's words: "Mr. and Mrs. America, turn them all in." In his recent televised address following the mass shooting in San Bernardino, California, the present resident in the

White House, Barack Obama, asked "What could possibly be the argument for allowing a terrorist suspect to buy a semiautomatic weapon?" and urged that "Congress should act to make sure no one on a no-fly list is able to buy a gun." Shortly thereafter, Governor Dannel Malloy of Connecticut announced that he would sign an "executive order" directing the Connecticut State Police, not only to prevent individuals on "the no-fly list" from buying firearms or ammunition in the future, but also to revoke those individuals' permits for firearms they already possess. These actions are open to the obvious questions: "What is Mr. Obama's definition of a 'terrorist'?", "Under what theory of constitutional due process can a mere 'suspect' be denied a right explicitly guaranteed by the Constitution?", and "How can a mere 'executive order' override the Second Amendment?" But, assuming for the purposes of argument that in some conceivable circumstances an individual suspected of "terrorism" could be denied "the right * * * to keep and bear Arms" (as, for example, because he were under arrest preliminary to being arraigned under a constitutionally valid criminal charge), what could possibly be the justification for employing a "bill of attainder" to deny that right to all "suspects" whom some nameless, faceless bureaucrats had included in some "list", based on perhaps utterly fanciful definitions of "terrorism" known only to them? For the undeniable constitutional fact is that "the no-fly list" (and any other "list" of that genre) is an unconstitutional "Bill of Attainder".

In general, an "attainder" is an act which extinguishes some or all of an individual's civil rights. A "bill of attainder" is a legislative act which imposes a sentence of death upon an individual without any conviction in the ordinary course of judicial proceedings. And a "bill of pains of penalties" is a legislative act which imposes a sentence less severe than death upon an individual without any conviction in the ordinary course of judicial proceedings. In Article III, Section 3, Clause 2, the Constitution allows for an "Attainder" in only one instance: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." But in Article III, Section 3, Clause 1, the Constitution requires that "[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." So an "Attainder of Treason" cannot come about through a "bill of attainder", because it requires a prior conviction based upon extraordinary evidence in the course of ordinary judicial proceedings. Otherwise, the Constitution absolutely outlaws all "Bill[s] of Attainder", whether issued by Congress or the States. As to Congress, Article I, Section 9, Clause 3 provides that "[n]o Bill of Attainder * * * shall be passed." As to the States, Article I, Section 10, Clause 1 provides that "[n]o State shall * * * pass any Bill of Attainder[.]" These prohibitions apply to both "bills of attainder" and "bills of pains and penalties". See Ex parte Garland, 74 U.S. (4 Wallace) 333 (1867); Cummings v. Missouri, 71 U.S. (4 Wallace) 277 (1867); United States v. Lovett, 328 U.S. 303 (1946); United States v. Brown, 381 U.S. 437 (1965).

As I have explained in detail in previous articles for NewsWithViews—to wit, "Death Squads" and "Where Is the Outrage?", which dealt with "official assassinations" of individuals on the Obama régime's supremely secretive "hit list"—no public official in any branch of the General Government may enact, enforce, or otherwise give effect to any "Bill of Attainder" (or "bill of pains and penalties"). To complete the analysis, it is easy enough to prove that no public official in any State may enact or enforce a "Bill of Attainder", whether that "Bill" purports to derive from the State herself or from the General Government. As already noted, Article I, Section 10, Clause 1 of the Constitution prohibits all "Bill[s] of Attainder" emanating from a State: "No State shall * * * pass any Bill of Attainder[.]". To be sure, a State is not the political jurisdiction which has "pass[ed]" "the no-fly list". But (as in Connecticut) a State might attempt to enforce that "list" against individuals who sought to acquire, or who already possessed, firearms. Section 1 of the Fourteenth Amendment provides, however, that "[n]o State shall * * * enforce any law which shall abridge the privileges or immunities of citizens of the United States". "[A]ny law", not just a purported "law" of the State. According to rogue officials in the General Government, "the no-fly list" is an actual "law" or an official action "with the force of law". The prohibition against "Bill[s] of Attainder" is one of the constitutional "immunities of citizens of the United States". Therefore, no State may "enforce" "the no-fly list" for any purpose.

Of course, "the no-fly list" does not explicitly describe itself as a "Bill of Attainder". In constitutional analysis, though, mere labels mean nothing. See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 795-796 (1988); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); New York Times Company v. Sullivan, 376 U.S. 254, 268-269 (1964); NAACP v. Button, 371 U.S. 415, 429 (1963). Substance, not form, controls. "The no-fly list" is plainly an unconstitutional "Bill of Attainder", because inclusion of an individual automatically denies him the ability to travel by airplane, without any judicial determination that such a disability is justified by some plainly constitutional law. Oh, I know that some

apologists argue that flying on commercial airlines is supposedly not a "right", but instead is a "privilege" which somehow can be extinguished at public officials' discretion. This is a specious contention. The right to travel, even by air, has both constitutional and statutory foundations. Compare, e.g., Crandall v. Nevada, 73 U.S. 35 (1868), with 49 U.S.C. § 40103. The airlines are common carriers, highly regulated by law, to the services of which all Americans have a claim in common law and various statutes. And the freedom of average Americans to contract with the airlines for passage is part of both parties' constitutional "liberty" and "property" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. To be sure, "freedom of contract" can in some instances be subjected to constitutional regulations, as (for example) by exertion of Congress's power under Article I, Section 8, Clause 3 of the Constitution "[t]o regulate Commerce with foreign nations, and among the several States". But no power of Congress may be exercised through a "Bill of Attainder". In any event, the hypothetical "right/privilege distinction" has no bearing whatsoever on the matter at issue here, which is the invocation of "the no-fly list" for the purpose of denying individuals an explicit constitutional right: namely, "the right of the people to keep and bear Arms", whether that be to purchase "Arms" in the first instance or simply to retain possession of "Arms" previously acquired by whatever lawful means.

Use of "the no-fly list" as a basis for disqualifying an individual from the purchase or possession of a firearm is quite different from the use, say, of criminal records in a typical "background check" performed by a firearms dealer as the precondition for a sale. Individuals on lists of criminal convictions maintained by the FBI and various State law-enforcement agencies have been indicted, tried, and convicted of serious infractions of the law in the normal course of judicial process. One may debate whether or not the commission of a particular crime by a particular individual is a constitutionally sound basis for denial to him of "the right * * * to keep and bear Arms" (or denials of the right to vote or to hold public office, which often are disabilities that stem from a criminal conviction). But the principle is valid in at least some cases. In contrast, an individual on "the no-fly list" has not been indicted, tried, or convicted of anything. He may be suspected of something—but, even then, the degree of suspicion is not sufficient to warrant his arrest. So the principle involved in "the no-fly list" is invalid in all cases. Criminal records are not "Bill[s] of Attainder", because a particular legal disability (say, denial of the right to purchase or possess a firearm) arises from the prior presumably justifiable criminal conviction, not from the later listing of the individual as having been convicted . Whereas "the no-fly list" is a "Bill of Attainder", because whatever legal disabilities it rationalizes arise merely from an individual's inclusion in that "list", coupled with a vague implicit prediction that he might misbehave in the future, but with no need for any prior, or subsequent, conviction in a court of law for actual criminal misbehavior.

One need not be the victim of paranoia, only the possessor of a modicum of political insight and foresight, to conclude that the proposal by Mr. Obama that Congress should enact a new species of "gun control" based upon "the no-fly list", together with the nearly simultaneous announcement by the Governor of Connecticut that he will impose "gun control" in that State perforce of "the no-fly list" through the fiat of an "executive order", are parts of an integrated complot to test the waters of public opinion in order to determine if Americans will sit silent and still for such a scheme. This is a variant of the well known Leninist tactic of "salami slicing": here, by installing the most obvious, pervasive, and obnoxious form of "gun control"—actual prohibition of purchase and possession of "Arms"—slowly and steadily, individual by individual, State by State, and then nationwide only after most Americans have been sufficiently "softened up". And one can rest assured that, if the Governor of Connecticut succeeds in using an "executive order" to apply "the no-fly list" to purchases and possession of firearms in that State, then all too soon Mr. Obama will announce that he, too, can employ an "executive order" for that purpose throughout the United States, without the need for any new statute from Congress.

Perhaps it is merely accidental, albeit ironic, that "gun-control" fanatics have selected Connecticut—which calls herself "the Constitution State"—as their "test bed" for this operation, simply because the upper echelons of that State's governmental apparatus happen to be infested with home-grown Stalinists and other totalitarians. Or, more ominously, perhaps their choice of "the Constitution State" is intended to demonstrate their belief that they can get away with anything, no matter how plainly contradictory of the Constitution it may be, because common Americans (especially in Connecticut) are just too stupid and cowardly to do anything about it.

Now, in my NewsWithViews commentaries cited above, I have written about "official assassinations" and "Bill[s] of Attainder"—without, I have noticed, any significant result. This may be because vanishingly few

Americans imagine that they may become the victims of such an atrocity. As far as they are concerned, such a fate is likely to be visited only upon little brown people in far-away lands, who probably deserve it anyway, because they have the audacity to object to interference by rogue American officials in the internal affairs of what they foolishly imagine are their very own countries, when everyone knows that American officials have an overarching license to interfere in the internal affairs of any country, even to the extent of overthrowing its government, massacring its citizens, destroying its infrastructure, and poisoning its lands with depleted uranium. But I suggest that a program aimed at the total domestic disarmament of America tomorrow would be arguably worse than the one which allows "official assassinations" today, because no one can imagine that such assassinations might ever be conducted against the general populace throughout the United States, or even that the present resident of the White House would dare openly to claim a prerogative to kill just anyone and everyone whom his minions had inscribed on some "list" of proscribed individuals. The total domestic disarmament of America, in contrast, aims at no less than the assassination of "a free State" for everyone within the United States—because just about everyone could be, and in the predictable course of events no doubt would become, a target. Once the "gun-control" fanatics finally succeeded in disarming all, or even most, Americans, the number of political murders and other enormities could, and would, be raised to whatever level the tyrants wanted, without fear of effective (or perhaps any) resistance on the victims' part—just as has occurred during the last century in country after country in which systematic "gun control" has been imposed.

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.

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About Author

Elias Alias

Editor in Chief for Oath Keepers; Unemployed poet; Lover of Nature and Nature's beauty. Slave to all cats. Reading interests include study of hidden history, classical literature. Concerned Constitutional American. Honorably discharged USMC Viet Nam Veteran.

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