

No. 12-17803 [DC# 3:09-cv-02143-RS]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON, et al.,
Plaintiffs - Appellants,

vs.

CITY and COUNTY OF SAN FRANCISCO; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Richard Seeborg, District Judge, Presiding

BRIEF *AMICI CURIAE* OF THE CALGUNS
FOUNDATION, INC., AND MADISON SOCIETY, INC.,
IN SUPPORT OF APPELLANTS'
PETITION FOR REHEARING OR REHEARING EN BANC

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July 3, 2014

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CORPORATE DISCLOSURE STATEMENT

The Calguns Foundation, Inc., has no parent corporations. No publicly traded company owns more than 10% of *amicus* corporation's stock.

The Madison Society, Inc., has no parent corporations. No publicly traded company owns more than 10% of *amicus* corporation's stock.

Dated: July 3, 2014

/s/ Donald Kilmer
Counsel for *Amici Curiae*

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Statement of Amici Curiae

The Petition for Rehearing or Rehearing En Banc should be granted to standardize this Circuit's approach to Second Amendment litigation, and specifically to address questions left unanswered in: *Jackson, et al., v. City and County of San Francisco, et al.*; 746 F.3d 953, 962 (9th Cir., March 25, 2014).

The Calguns Foundation, Inc., (CGF) is a non-profit organization incorporated under the laws of California with its principal place of business in Roseville, California. The purposes of CGF include supporting the California firearms community by promoting education for all stakeholders about California and federal firearm laws, rights and privileges, and defending and protecting the civil rights of California gun owners. CGF's expertise and experience in the field of Second Amendment civil rights would aid the Court.

The Madison Society, Inc., is a not-for-profit Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society, Inc., has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. The Society's

expertise and experience in the relation to the rights and responsibilities associated with the Second Amendment can assist the Court.

No counsel for any party in this matter has authored this brief in whole or in part. No party or counsel for any party has contributed money intended to fund the preparation of this brief. No person(s), other than *amici curiae* and its members have funded the preparation of the brief.

Consent to File

All parties have consented to the filing of this brief.

Argument

The 3-judge panel noted that one of the reasons facial challenges are disfavored is that:

[They] “often rest on speculation.” *Wash. State Grange [v. Wash. State Republican Party]*, 552 U.S. [442] at 450 [2008]. Consequently, “they raise the risk of premature interpretations of statutes on the basis of factually barebones records,” and “threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner inconsistent with the Constitution.” *Id.* at 450–51.

Jackson, et al., v. City and County of San Francisco, et al.
746 F.3d 953, 962 (9th Cir., March 25, 2014)

Never-the-less, the panel analyzed the plaintiff-appellants’ challenge as a facial one after a finding that the facts of this case presented no such concerns. The 3-judge panel (rightly) went on to find that the Second Amendment was burdened by the local ordinances under step #1 of the analysis articulated in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) [and collected cases *Id.*, at 1136-37].

At this point of the Court’s inquiry, the liberty interest that a home-owner has under the Second Amendment for choosing how best to defend herself and her domicile should be presumed correct. And it should be the government’s duty to produce non-speculative

justifications for its policy. The burden of production refers to a “party's obligation to come forward with evidence to support its claim.”

Director, Office of Workers' Comp. Programs, Dept. of Labor v.

Greenwich Collieries (1994) 512 U.S. 267, 272, 114 S.Ct. 2251, 2255.

During the course of a trial, the burden of producing evidence may shift from one party to another, although the burden of persuasion remains at all times with the party who originally had that burden. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 511, 113 S.Ct. 2742, 2749 (plaintiff at all times bears ultimate burden of persuasion in Title VII discrimination suit).

Because this is a Second Amendment case with an undisputed finding that San Francisco's ordinances burden that fundamental right, the burden of persuasion should remain, at all times, with Defendant-Appellees. Amici herein contend that San Francisco did not meet that burden because the 3-judge panel did not address the standard of evidence (i.e., burden of proof) that the City must meet to prevail.

Amici urge the adoption of a standard of at least “clear and convincing” evidence – because, although 'preponderance of the evidence' is the general rule in civil cases, courts should require that some issues be established by a higher degree of proof. *California ex*

rel. Cooper v. Mitchell Bros.' Santa Ana Theater (1981) 454 U.S. 90, 93, 102 S.Ct. 172, 173.

A 'clear and convincing evidence' standard of proof should be mandated when the individual interests at stake are both 'particularly important' and 'more substantial than mere loss of money.' *Santosky v. Kramer* (1982) 455 U.S. 745, 756; *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389-390.

What could be more important than the right of self-defense? The Supreme Court has already answered that question. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Some examples of courts requiring a 'clear and convincing' standard of proof:

1. Deportation proceedings: The government has the burden of proving by clear and convincing evidence that the facts alleged as grounds for deportation are true. *Woodby v. I.N.S.* (1966) 385 U.S. 276, 286, 87 S.Ct. 483, 488; *Espinoza v. I.N.S.* (9th Cir. 1995) 45 F.3d 308, 311.
2. Denaturalization proceedings: The government carries a heavy burden of proof in a proceeding to divest a naturalized citizen of

his or her citizenship; the evidence supporting revocation must be 'clear, unequivocal and convincing.' *Schneiderman v. United States* (1943) 320 U.S. 118, 125; *United States v. Arango* (9th Cir. 2012) 670 F.3d 988, 992.

3. Civil contempt: To hold another party in contempt, movant must demonstrate by clear and convincing evidence that the alleged contemnor violated the court's prior order. *In re Bennett* (9th Cir. 2002) 298 F.3d 1059, 1069.
4. Termination of parental rights: Before a state may completely and irrevocably terminate parental rights, due process requires that the State support its allegations by at least clear and convincing evidence. *Santosky v. Kramer* (1982) 455 U.S. 745, 747-748, 758-759 (parent's right to companionship, care and custody of his or her children is 'an interest far more precious than any property right'); *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1057.
5. Waiver of constitutional right: It is unclear whether the waiver of a constitutional right must be shown by clear and convincing evidence:
 - a. Several cases have held that waiver of constitutional rights

must be established by clear and convincing evidence the waiver was voluntary, knowing and intelligent. *See Curtis Pub. Co. v. Butts* (1967) 388 U.S. 130, 145 (no waiver unless circumstances are 'clear and compelling'); *Gete v. I.N.S.* (9th Cir. 1997) 121 F.3d 1285, 1293; *Hollins v. Methodist Healthcare, Inc.* (6th Cir. 2007) 474 F.3d 223, 226 (When First Amendment rights are at issue, 'evidence of waiver' must be clear and compelling (internal quotes omitted)).

- b. But other cases are *contra*, holding that waiver of constitutional rights need not be proved by clear and convincing evidence. *Chicago Tribune Co. v. National Labor Relations Bd.* (7th Cir. 1992) 974 F.2d 933, 937-938; *Colorado v. Connelly* (1986) 479 U.S. 157, 167-169.

- 6. Defamation of a public figure: The First Amendment requires that a 'public figure' plaintiff prove by clear and convincing evidence that defendant published the defamatory statement with 'actual malice' (i.e., with knowledge that it was false or with reckless disregard for its truth or falsity). *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510.

7. Civil commitment: Because an involuntary commitment for an indefinite period of time deprives a person of basic freedoms, due process requires proof by clear and convincing evidence.
Addington v. Texas (1979) 441 U.S. 418, 432-433.
8. Defendant's burden in whistleblower's retaliation claim: In a whistleblower's retaliation claim under the Sarbanes-Oxley Act (18 USCA § 1514A), plaintiff must make a prima case by a preponderance of the evidence. The burden of proof then shifts to defendant to establish, 'by clear and convincing evidence, that (it) would have taken the same unfavorable personnel action in the absence of that behavior.' [See 18 USCA § 1514A(b)(2)(C) (adopting burden-shifting procedures specified in 49 USCA § 42121 (b)(2)(B)(i)-(iv)) (parentheses added); see also 29 CFR §§ 1980.104(e)(1)-(4), 1980.109(a), (b); *Harp v. Charter Communications, Inc.* (7th Cir. 2009) 558 F.3d 722, 723; *Allen v. Administrative Review Bd.* (5th Cir. 2008) 514 F.3d 468, 475-476; *Bechtel v. Administrative Review Bd., U.S. Dept. of Labor* (2nd Cir. 2013) 710 F.3d 443, 446-448.

If for no other reason, the Appellants' Petition for Rehearing and/or Rehearing En Banc should be granted so that this Circuit can

establish what evidentiary burden (preponderance or clear/convincing) is necessary when a government entity's policies admittedly burden a fundamental right and that entity seeks to justify its infringement of those rights in our Courts.

A. The Standard of Proof May be Outcome Determinative.

In making its finding that the ordinance is appropriately tailored to fit San Francisco's interests and therefore passes constitutional muster, the Court indulged San Francisco's "evidence" showing that section 4512 (the locked storage requirement) imposes only a minimal burden on the right to self-defense in the home because it causes a delay of only a few seconds while the firearm is unlocked or retrieved from storage. *Jackson* at 966.

The Supreme Court, in a recent case, ruled 9-0 that Secret Service Agents have broad discretion to act (and are entitled to qualified immunity) because "[o]fficers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy," citing: *Reichle v. Howards*, 566 U. S. ___, 132 S. Ct. 2097, 2091, 182 L. Ed. 2d 985, 997 (2012) (GINSBURG, J., concurring in judgment). See *Wood, et al., v. Moss, et al.*, 134 S.Ct. 2056, 2067 (2014).

Is there any reason to assume that a “delay of only a few seconds” would be tolerated if the life of the President of the United States was at stake? Why are those seconds tolerable only when the lives of individual citizens are at stake? What “clear and convincing” evidence could San Francisco produce that the lives of public officials require “swift, on the spot” decisions, but the lives of San Francisco residents are to be subject to “the law’s delay” of a few seconds?

The question becomes more compelling, not less, if the training of Secret Service Agents is taken into account, they receive training to react instantaneously and effectively in high stress situations.

Perhaps this is what Chief Justice Roberts and Justice Scalia were driving at in their colloquy with the attorney who represented the losing side of the compelled “safe storage” theory during oral argument in the *District of Columbia v. Heller*, 554 U.S. 570 (2008). [TX of Oral Argument 83:8 – 84:17. See: E.R. III 205-06]

B. The Ban on Hollow Point Ammunition is Irrational.

In order for a private citizen to justify the use of deadly force under California law, and using a gun is always deadly force, she must be resisting murder, or the attempt to commit a felony or the infliction of great bodily injury upon her person. She may also commit justifiable

homicide in defense of habitation, property or person against anyone who manifestly intends or endeavors, by violence or surprise, to commit a felony or enter her dwelling for the purpose of offering violence to her therein. The law also permits deadly force to defend wife, husband, child, master, mistress or servants who are subject to the same dangers. In defense of one's home a person is entitled to evidentiary presumptions that they acted in self-defense at trial. California Penal Code. §§ 197, 198.5.

In order for a public officer to justify the use of deadly force, they must merely act: (1) in obedience to any judgment of a competent court; or (2) when necessarily committed to overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or (3) when necessarily committed to retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest. California Penal Code § 196. Presumably the justification for use of deadly force by a public officer pursuant to Penal Code § 196 is commutative to the justifications of § 197.

Attached to this brief is a Memorandum authored by the Congressional Research Service, dated March 7, 2013. The subject of

the letter is the Department of Homeland Security's Ammunition Solicitations, Contracts and Purchases. A true and correct copy is attached as Exhibit A. This Court can take judicial notice of the reports of public bodies. FRE 201(b)(2).

Even if the "evidence" is "clear and convincing" that hollow-point ammunition is more lethal than other types, it is overwhelmingly the standard type of round carried by law enforcement officers for precisely that reason (in addition to the prevention of inadvertent harm to bystanders because the bullet is less likely to exit its intended target). *See page 7, Exhibit A.*

What "clear and convincing" evidence can possibly exist for the proposition that individual citizens may only have access [i.e., purchase in their own city without having to travel, *see generally Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011)] to ammunition that is less lethal when defending their own lives, family and domiciles, than the ammunition that is available to police officers? Why are police entitled to the most lethal tools available when enforcing the "judgment[s] of a competent court" and/or when "execut[ing][..] some legal process" – but ordinary citizens are effectively subject to the Hague Peace Conference of 1899? *See page 7 of Exhibit A.*

Furthermore, if the ban on hollow-point ammunition isn't much of a burden on the Second Amendment rights of San Francisco residents, because the law does not ban possession, merely purchase, then what rational policy is advanced by the ordinance? That the legislators can sleep soundly knowing that they don't sanction the sale of ammunition in their city that is designed to be the most efficient at stopping a deadly threat with the least risk to the person exercising the right of self-defense?

How will San Francisco answer the inevitable lawsuit when a bad guy who wasn't stopped by round-nose ammunition manages to kill or rape someone, and the plaintiff in that inevitable lawsuit pleads that San Francisco's ammunition policies put them in a worse position to defend themselves than if the City had not acted all. *See generally Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) and *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992).

The City should not have prevailed under a preponderance standard of proof. They certainly cannot prevail under a "clear and convincing" standard of proof.

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Conclusion

The Petition for Rehearing and/or Rehearing En Banc should be granted to set forth the burden of proof necessary for governments to infringe constitutional rights.

Date: July 3, 2014

/s/ Donald Kilmer

Donald Kilmer for
Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Circuit because it consists of 2487 words and because this brief has been prepared in proportionally spaced typeface using WordPerfect Version X5 in Century Schoolbook 14 point font.

Date: July 3, 2014

/s/ Donald Kilmer
Donald Kilmer, Attorney for Amici

CERTIFICATE OF SERVICE

On July 3, 2014, I served the foregoing BRIEF *AMICI CURIAE* OF THE CALGUNS FOUNDATION, INC., AND MADISON SOCIETY, INC., IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct. Executed July 3, 2014,

/s/ Donald Kilmer
Attorney for Amici

Exhibit A

**MEMORANDUM**

March 7, 2013

Subject: Recent Department of Homeland Security Ammunition Solicitations, Contracts, and Purchases

This memorandum was prepared to enable distribution to more than one congressional office.

This memorandum addresses recent ammunition solicitations issued and contracts awarded by components of the Department of Homeland Security (DHS). This memorandum provides information to clarify the size and scope of select acquisitions that have garnered public attention, and provides information to place those solicitations and contracts in context. This memorandum is not intended as an exhaustive survey of non-military acquisition of ammunition by the federal government, nor is it an authoritative assessment of the ammunition requirements of any particular component of the federal government.

Non-military Use of Ammunition

Many federal government components have law enforcement officers and investigative agents as part of their workforce. Others do not have traditional law enforcement functions but nonetheless have criminal investigators as part of their Inspectors' General functions. Law enforcement officers and investigative agents are authorized to carry firearms, and are required to train in their use and pass certain firearms qualification standards. This training and qualification process in many cases consumes ammunition far in excess of duty consumption.

For example, one local law enforcement agency in the national capital region has its officers qualify twice a year with a pistol, twice a year with a shotgun, and four times on a rifle, if they are issued a long gun. This qualification alone consumes slightly more than 200 pistol rounds per officer annually (if they do not carry an approved backup handgun, which would require additional qualification). Typical law enforcement handgun practice sessions consume 200-300 rounds or more.¹ Specialty units—such as those employing special weapons and tactics, those that work with dogs, and counternarcotics units—train more frequently with their firearms, and often must qualify on a wider range of weapons than their counterparts. Some officers in civilian law enforcement specialty units may shoot 1,000 rounds in training in a week.²

¹ E-mail to analyst from local law enforcement official, February 25, 2013.

² Ibid.

Department of Homeland Security (DHS)

DHS inherited the existing structures and ongoing requirements of its individual components when it was established in 2003. It did not begin operations in an environment that allowed for the establishment of department-wide contracting and procurement systems. Starting about five years ago, DHS began to look for ways to consolidate its ammunition procurements—with congressional encouragement. These changes and relatively short timeline mean there are not any data with which to make consistent comparisons of department-wide ammunition solicitations and contracts over DHS's ten-year existence. Nevertheless, the limited data available are discussed below.

Who DHS Buys Ammunition For

According to the 2008 Census of Federal Law Enforcement Officers, DHS employed more than 45% of all federal law enforcement officers with arrest and firearms authority.³ This report, developed by the Department of Justice (DoJ), indicates that from 2004 to 2008, the number of full-time officers in U.S. Customs and Border Protection rose 33%. Over that same time period, the number of U.S. Immigration and Customs Enforcement officers rose 20%, and Secret Service officers rose more than 9%.⁴ All of these types of officers are trained and certified in the use of firearms.

Several other DHS components have ammunition requirements. These include the Coast Guard (USCG), the Federal Air Marshal Service, the Federal Protective Service (FPS), and the DHS Office of the Inspector General (OIG). **Table 1** provides a breakdown of the number of law enforcement officers in most DHS components based on data from the Department of Justice as of September 2008. Data from the Office of Personnel Management (OPM) and DHS confirm that growth in these components continued into 2012.⁵

³ The total number of DHS law enforcement personnel is not available, as the number of Federal Air Marshals is classified, and the *Census* did not include Coast Guard personnel with law enforcement duties.

⁴ Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, *Federal Law Enforcement Officers, 2008*, June, 2012, p.2

⁵ This is evident from FedScope data on employment levels and classifications. However, the FedScope data are a tally of employed individuals, not the number of full-time equivalents (FTEs). Also, FedScope does not directly indicate which positions are law enforcement officers and/or carry firearms. Therefore meaningful direct comparisons of numbers between FedScope data and the Justice Department data are not possible.

Table I. Select DHS Components' Law Enforcement Officers with Firearms Authority
(As of September 2008)

Agency	Number of full-time officers
U.S. Customs and Border Protection	37,482
U.S. Immigration and Customs Enforcement	12,679
<i>Federal Protective Service</i>	[900]
U.S. Secret Service (USSS)	5,226
Office of the Inspector General	157
Federal Emergency Management Agency	84
Federal Air Marshal Service	<i>Classified</i>

Source: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, *Federal Law Enforcement Officers, 2008*, June, 2012.

Notes: The Bureau of Justice Statistics analysis was based on the 2008 Census of Federal Law Enforcement Officers, the most recently available data from the Bureau of Justice Statistics. The Federal Protective Service (FPS) was part of U.S. Immigration and Customs Enforcement at the time the underlying survey was made—it is now part of the National Protection and Programs Directorate (NPPD) of DHS. The survey did not include FPS contract guards. Coast Guard personnel, both military and civilian, were not surveyed, and therefore are not included in Table I.

DHS does not track the total number of law enforcement officers in its ranks, citing a lack of formal definition of the term *law enforcement officer*. However, it does track by job classification the number of personnel required to carry a gun and be trained and certified in its use. **Table 2** shows DHS's outline for most of these job descriptions. These numbers include personnel from U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), the Secret Service (USSS), civilian employees of the Coast Guard (USCG), the Office of the Inspector General (OIG), and the Federal Emergency Management Agency (FEMA). Not included in **Table 2** are the Transportation Security Administration's (TSA's) Federal Air Marshals, as the number of marshals is classified; and the more than 41,000 uniformed members of the Coast Guard, as they typically purchase their ammunition through Department of Defense (DoD) contracts.

Table 2. DHS Personnel Trained and Certified in Firearms Use

Number of employees, as of February 9, 2013

Job Classification Series	Description	Employee Count
0090 (FPS only)	Security Administration	829
0083	Police	1,482
1801 (ICE only)	General Inspection, Investigation, Enforcement, and Compliance Series	6,645
1811	Criminal Investigating	10,772
1895	Customs and Border Protection	21,688
1896	Border Patrol Enforcement	21,202
Grand Total		62,618

Source: DHS Legislative Affairs e-mail to CRS, February 22, 2013.

The combined training and certification of these personnel, and supply of ammunition for duty use does not constitute the full scope of DHS demand for ammunition. DHS also includes the Federal Law Enforcement Training Center (FLETC), which annually trains roughly 60,000 law enforcement officers and agents from the federal, state and local levels. It has an entire division entirely dedicated to firearms training. The components of DHS and the many other law enforcement organizations that send officers to train at FLETC use different types of ammunition. Therefore, FLETC not only needs to buy ammunition, but it maintains an inventory of a range of round types for use in training.

DHS Purchases of Ammunition

Table 3 shows the total number of rounds of firearms ammunition purchased by DHS, by component over FY2010-FY2012. Unlike contracts or contract solicitations these numbers represent actual purchases.

Table 3. DHS Ammunition Procurement, FY2010-FY2012

Component	FY2010		FY2011		FY2012	
	Rounds Purchased	Cost	Total Rounds Purchased	Cost	Total Rounds Purchased	Cost
CBP	66,248,000	\$17,376,248	48,461,000	\$13,895,900	36,475,000	\$12,255,040
FLETC	17,056,000	\$5,507,057	22,735,654	\$7,062,254	7,678,946	\$2,485,045
FPS/NPPD	2,946,000	\$976,621	1,498,000	\$517,412	2,804,000	\$928,345
ICE	25,212,000	\$7,703,308	13,221,000	\$4,505,731	28,061,000	\$6,633,460
TSA	15,383,000	\$2,818,760	7,124,000	\$2,010,642	14,864,000	\$4,484,581
USCG	17,472,325	\$11,465,150	6,782,540	\$8,442,495	9,791,274	\$8,309,944
USSS	3,997,500	\$2,097,971	8,841,860	\$1,802,871	3,503,980	\$1,439,495
Total DHS	148,314,825	\$47,945,115	108,664,054	\$38,237,305	103,178,200	\$36,535,910

Source: DHS Legislative Affairs e-mail to CRS, February 22, 2013.

The data provided by DHS show declining budgets for ammunition procurement from FY2010 through FY 2012, and an overall decline in the number of rounds purchased. The downward trend is not universal. CBP had the largest annual expenditures for ammunition reflected in the above table, and was the only component to see its budget for ammunition purchases and actual number of rounds purchased decline each year. Purchase rates for other components show significant variation, falling only to rise again, or vice versa. Ammunition purchases were not always conducted on the basis of anticipated demand in the upcoming budget year alone, but instead combined multiple years' needs in a single purchase. Changes in the average cost per round from year to year are the likely the result of different combinations of rounds being bought each year.

Has DHS Bought Comparatively More Ammunition in Recent Years?

Some have asked whether DHS is purchasing more ammunition now than it has in the past. While over the past three years, the number of rounds purchased has declined, the number of DHS personnel who carry guns and must train and certify in their use overall has grown over the longer time period beginning from the establishment of the department.

The best documented example of this growth is in the size of the Border Patrol, shown in **Table 4**:

Table 4. Number of Border Patrol Agents, FY2004-FY2012

Fiscal Year	Number of Border Patrol Agents
FY 2004	10,819
FY 2005	11,264
FY 2006	12,349
FY 2007	14,925
FY 2008	17,499
FY 2009	20,119
FY 2010	20,558
FY 2011	20,736
FY 2012	21,370
Growth, FY2004-FY2012	10,551 (97.5%)

Source: DHS Legislative Affairs e-mail to CRS, February 22, 2013; H.Rept. 112-492.

The Border Patrol is a part of CBP, and CBP is the largest non-military purchaser of ammunition in the DHS budget, representing more than a third of the demand in recent years. Therefore, although we do not have data to illuminate levels of ammunition purchase from the first years of DHS, it follows that, holding all other factors equal except for the growth in personnel, DHS would over time need to purchase more ammunition than it has in the past for training, qualification, and field use.

DHS FY2013 Proposed Ammunition Purchases

Table 5 reflects the DHS budget request for ammunition procurement for FY2013. These figures were based on the administration's FY2013 budget submission made in February 2012. If funded, this request

would represent an increase of over \$700,000 above the level spent in FY2012, but would be almost \$1,000,000 below the FY2011 spending level.

Table 5. DHS Ammunition Acquisition: FY2010-FY2012 Expenditures Compared to the FY2013 Budget Request

DHS Components	FY2010 Acquisitions (Actual)	FY2011 Acquisitions (Actual)	FY2012 Acquisitions (Actual)	FY 2013 Budget Request
CBP	\$17,376,248	\$13,895,900	\$12,255,040	\$12,528,146
FLETC	\$5,507,057	\$7,062,254	\$2,485,045	\$5,900,000
FPS/NPPD	\$976,621	\$517,412	\$928,345	\$470,000
ICE	\$7,703,308	\$4,505,731	\$6,633,460	\$5,200,000
TSA	\$2,818,760	\$2,010,642	\$4,484,581	\$4,515,552
USCG	\$11,465,150	\$8,442,495	\$8,309,944	\$7,400,000
USSS	\$2,097,971	\$1,802,871	\$1,439,495	\$1,250,000
Total DHS	\$47,945,115	\$38,237,305	\$36,535,910	\$37,263,698

Source: DHS Legislative Affairs e-mail to CRS, February 22, 2013

Given the late resolution of the FY2013 appropriation and impact of the sequester, the amount DHS components might have available to spend on ammunition in FY2013 cannot be determined at this time. However, it would be highly unlikely that the Department would have the requested level of resources available in FY2013 to purchase ammunition.

DHS Ammunition Stocks

An assertion in media reports is that DHS has billions of rounds of ammunition stockpiled.⁶ CRS does not keep a running track of the department's ammunition stocks. However, according to DHS, in November of 2012, departmental components reported 263.7 million rounds of all types of ammunition on hand—slightly more than was purchased in FY2010 and FY2011 combined.⁷ The media assertion that DHS has more than 2 billion round of ammunition stockpiled is therefore high by nearly an order of magnitude.

To put that number in further context, CRS analysis of publicly available DHS contracting information shows that in FY2012, over half of DHS procurement actions for firearms ammunition⁸ took place in the fourth quarter of the fiscal year. The funds obligated represented 63% of DHS expenditures on that type of ammunition. While examination of dates for completion of these procurements indicate that it is unlikely that all rounds purchased in that time frame would have been delivered by the date of the inventory, it is possible that this number represents a higher than normal total of rounds on hand.

⁶ See, for example, "DHS adds 21.6 million rounds of ammo to its nearly 2 billion round stockpile," February 7, 2013. <http://www.examiner.com/article/dhs-adds-21-6-million-rounds-of-ammo-to-its-nearly-2-billion-round-stockpile>.

⁷ E-mail to CRS from DHS Legislative Affairs, February 22, 2013.

⁸ According to data from the Federal Procurement Data System, this product code (1305) covered almost 80% of the value of DHS ammunition contracts in FY2012.

Commonly Mentioned Types of Ammunition

Hollow-point Ammunition

A significant concern raised about government purchases of hollow-point ammunition is its effect on the human body. Hollow-point rounds expand on impact, thus causing more damage to the human body than other types of rounds. The expansion of the bullet increases the likelihood that the target will absorb more of the bullet's energy, and therefore stop the round, causing more damage to the target, while reducing the chance that the bullet will exit the target and inadvertently harm bystanders.

The propensity for expanding rounds like the hollow-point to cause greater damage to the target prompted the parties to the Hague Peace Conference of 1899 to agree "to abstain from using bullets that expand or flatten easily in the human body" in warfare.⁹ This declaration has not led to general international bans on the manufacture, ownership, or use of these types of rounds, however, by governments within their borders. There is no U.S. restriction on the use of hollow-point ammunition by law enforcement agencies.

In fact, hollow-point ammunition is a standard type of round for handguns carried by law enforcement officers. Media reports quote two experts on the widespread use of hollow-point ammunition:

"For practice ammunition, they do not have to be hollow-points, but hollow-points are the normal police round used for duty ammunition due to their ability to stop when they hit an object as opposed to going through it and striking more objects," said William J. Muldoon, president of the International Association of Directors of Law Enforcement Standards and Training.

... John W. Worden, director of the University of Missouri's Law Enforcement Training Institute [said,] "Hollow points are carried by law enforcement all over the country and are probably the preferred type of ammo no matter what caliber."¹⁰

"High-powered" Ammunition

CRS research was unable to identify a broadly agreed upon technical definition of "high-powered rifle" or "high-powered ammunition." Generally, the label "high-powered" is applied to a rifle, not a handgun or a shotgun. One definition of a "high-powered rifle" says the term is used to describe "any modern rifle that fires a bullet at high velocity from a hollow cylindrical metal shell by means of igniting a primer and detonating a smokeless powder charge contained within."¹¹ Others note the rifle must be "full length," others state that the cartridge must be "centerfire"—which is triggered from the firing pin striking a primer in a separate pocket in the center of the cartridge's "head" — rather than "rimfire"—which is triggered when the firing pin strikes the cartridge rim, compressing a primer located there.¹² Modern shooting sports have types of competition known as "high power rifle" and "high power sporting rifle," but the rules for these competitions do not define these terms inasmuch as they note the equipment allowed for the competition in question, which includes an array of military and civilian long arms.¹³

⁹ Declaration III of The Hague Convention of 1899, as found at http://avalon.law.yale.edu/19th_century/dec99-03.asp.

¹⁰ Stephen Ohlemacher, "Social Security Shoots down Web Theories on Ammo," *The Washington Post*, September 5, 2012, p. B4.

¹¹ www.firearmstruth.com/2010/media-misinformation-high-powered.

¹² www.shootingusa.com/GUN_QUESTION/gun_questions.html.#25.

¹³ See rule books for "High Power Rifle" and "High Power Sporting Rifle" at <http://compete.nra.org/official-nra-rule-books.aspx>.

Selected Recent DHS Solicitations and Contracts for Ammunition

The most common misinterpretation in media reports surrounding this issue confuses a solicitation for proposals—an early stage of the procurement process—with the actual purchase. For ammunition, recent solicitations have frequently been for multiple year contracts, on which multiple future purchases will be made, depending on the department’s demand for the ammunition in question and the availability of appropriations.

Immigration and Customs Enforcement Contract for .40-caliber Hollow-Point Ammunition

In March 2012, DHS’ Immigration and Customs Enforcement (ICE) awarded a five-year contract for a DHS-wide procurement of up to 90 million rounds of .40-caliber hollow-point ammunition per year—a total of 450 million rounds over the life of the contract if every option period is fully exercised.

DHS released the following statement regarding this ammunition contract in 2012:

A 5-year department-wide contract was awarded to Federal Cartridge, a wholly-owned subsidiary of ATK. The contract allows the department-wide purchase of up to 450 million rounds of this ammunition, which is the quantity projected to be used over the next five years. The contract is one of a number of department-wide contracts for duty ammunition, but it is the primary vehicle for .40 cal. S&W 180 grain ammo. This contract is intended to be used by all components, except USCG, who uses DoD ammunition contracts. This contract is part of the Department’s strategic sourcing efforts to combine multiple previous contracts in order to leverage the purchasing power of the entire Department to efficiently procure equipment and supplies.¹⁴

DHS provided further detail on the previous contracts in February 2013, noting that there had been three contracts for procurement of .40-caliber hollow point ammunition issued in 2008 and 2009: one five-year contract for a total of 375 million rounds of 180-grain ammunition; another five-year contract for a total of 75 million rounds of 155-grain ammunition; and a third five-year contract for a total of 16 million rounds of 135-grain ammunition. These contracts would have, if all option periods were fully exercised, allowed DHS to purchase 466 million rounds of ammunition. However, DHS found very few purchases were made of the lighter-weight ammunition, as officers preferred to train with the weight of ammunition used in the field and in qualifications.¹⁵

FLETC Solicitation for “750 Million Rounds of High-powered” Training Ammunition¹⁶

In July 2012, the Federal Law Enforcement Training Center (FLETC) requested proposals from vendors for training ammunition. Misinformation has circulated describing this contract being for a purchase of 750 million rounds of “high-powered” or hollow-point ammunition.¹⁷ As described below, CRS analysis of the solicitation (HSFLGL-12-B-00003), finds this description to be incorrect on several counts.

¹⁴ E-mail to CRS from ICE Legislative Affairs, April 25, 2012.

¹⁵ E-mail to CRS from DHS Legislative Affairs, February 22, 2013.

¹⁶ Information in this section is an analysis of Solicitation Number HSFLGL-12-B-00003, as found at https://www.fbo.gov/index?s=opportunity&mode=form&id=7f6a48adb7fe40b7489fbbf5b86eaa0e&tab=core&_cview=1.

¹⁷ See, for example, “Homeland Security finishing acquisition of millions of rounds of high-powered ammo”, August 13, 2012. <http://rt.com/usa/dhs-ammo-rounds-security-560/>

According to the breakdown of ammunition types requested over the term of the solicitation, if each term of this solicitation was fully exercised for every ammunition type, FLETC would purchase slightly more than 10,354,000 rounds of ammunition in the first year of the contract, rising to slightly more than 15,158,000 rounds in the final option period of the contract, for a total of 63,258,000 rounds of ammunition over the course of five years.¹⁸ In addition, an amendment was filed to the solicitation in August 2012, clarifying that language on page 25 of the 91-page solicitation should read “The maximum limit for the resultant award(s) is 70 million rounds for life of the five-year contract(s).”¹⁹

As to the categorization of the type of ammunition sought through this solicitation as hollow-point or “high-powered,” FLETC’s solicitation identified 31 different types of pistol, rifle, and shotgun ammunition. Fourteen of these ammunition types were hollow-point. As noted above, pistol and shotgun ammunition types do not fall under colloquial definitions of “high-powered ammunition.”

FLETC Contract for “21.6 Million Rounds” of Training Ammunition”²⁰

In February 2013, FLETC requested proposals for training ammunition. Media accounts cited the number of rounds as 21.6 million.²¹ An examination of the solicitation documents, available at the Federal Business Opportunities website (<http://FBO.gov>) shows several changes to the solicitation after its release, including correction of the classification of ammunition being sought, and clarification of language in the summary description.

The description of what was being sought included the total number of rounds, followed by a statement that the price is to be provided for 1,000 round lots. The next column showed the number of 1,000 round lots to be purchased. The unknown author²² of the 21.6 million round assertion seems to have multiplied the total sought from the first column by the number of 1,000 round lots to be purchased. Hence two requests for 100,000 rounds become 10 million each, and a request for 40,000 rounds becomes 1.6 million (40,000 x 40), for a mistaken total of 21.6 million.

The amended solicitation dropped one request for 100,000 rounds, and the amended summaries made it clear that the solicitation clearly sought 140,000 rounds. The contract was awarded on February 21, 2013, for less than \$40,000.

¹⁸ Solicitation Number HSFLGL-12-B-0003, solicitation, July 19, 2012, p. 6-24.

¹⁹ Solicitation Number HSFLGL-12-B-0003, amendment 2, August 16, 2012, p. 1-3.

²⁰ Content in this section is an analysis of Solicitation Number: HSFLAR-13-Q-00014, as found at https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=82540780e445be72bef7699c0cd872f7&_cvview=1.

²¹ See, for example, “DHS adds 21.6 million rounds of ammo to its nearly 2 billion round stockpile,” February 7, 2013. <http://www.examiner.com/article/dhs-adds-21-6-million-rounds-of-ammo-to-its-nearly-2-billion-round-stockpile>.

²² CRS has been unable to identify the original source of the claim made in multiple media reports circulating on the Internet that the solicitation was for 21.6 million rounds.
