



June 20, 2016

RE: Vote “NO” on Cornyn Amendment No. 4749 on Firearms Permits

Vote “NO” on Feinstein Amendment No. 4720 on Firearm Permits

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Dear Senator

The American Civil Liberties Union strongly urges you to vote “NO” on both the Cornyn Amendment No. 4749 and the Feinstein Amendment No. 4720 on firearms permits, which will be considered on the Senate floor this week as amendments to H.R. 2578, the Commerce, Justice, Science, and Related Agencies appropriations bill. Our concerns about both amendments are informed by our policy on the regulation of firearms, as well as our knowledge of the overbreadth and misuse of watchlists, and are twofold: the use of vague and overbroad criteria and the lack of adequate due process safeguards.

We recognize that enacting new regulations of firearms can raise difficult questions. The ACLU believes that the right to own and use guns is not absolute or free from government regulation since firearms are inherently dangerous instrumentalities and their use, unlike other activities protected by the Bill of Rights, can inflict serious bodily injury or death. Therefore, firearms are subject to reasonable regulation in the interests of public safety, crime prevention, maintaining the peace, environmental protection, and public health. We do not oppose regulation of firearms as long as it is reasonably related to these legitimate government interests, and note that public safety interests encompass not only terrorism, but—more often—other firearm use that results in serious injury or death. At the same time, regulation of firearms and individual gun ownership or use must be consistent with civil liberties principles, such as due process, equal protection, freedom from unlawful searches, and privacy.

The ACLU urges you to oppose the Cornyn Amendment and the Feinstein Amendment for the following reasons:

Vote “No” on the Cornyn Amendment Because It Would Use the Error-Prone and Unfair Watchlist as a Predicate

The ACLU strongly urges you to vote against the Cornyn Amendment because it uses the error-prone and unfair watchlist as a predicate for a proceeding to deny a firearms permit. The Cornyn Amendment establishes the watchlist system as the basis for the government to seek a court order denying a gun permit.

The Cornyn Amendment would further entrench a watchlist system that is rife with problems. As we have long cautioned, our nation’s watchlisting system is error-prone and unreliable because it uses vague and overbroad criteria and secret evidence to place individuals on blacklists without a meaningful process to correct government error and clear their names. The government’s internal guidance for watchlists specifies that nominations to the master watchlist need not be based on “concrete facts,” and it permits placement on the master watchlist based on uncorroborated or even questionably reliable information.

The criteria for placement on the No Fly List further exacerbate and illustrate these flaws. The government contends that it can place on the No Fly List Americans who have never been charged let alone convicted of a crime, on the basis of prediction that they nevertheless pose a threat (which is undefined) of future conduct that the government concedes “may or may not occur.” The overly broad criteria result in a high risk of error and it is imperative that the watchlisting system include due process safeguards—which it does not. In the context of the No Fly List, for example, the government refuses to provide even Americans who know they are on the list with the full reasons for the placement, the basis for those reasons, and a hearing before a neutral decision-maker. These are fundamentals of constitutionally-required due process.

Publicly available information and the ACLU’s experience with people who know or credibly suspect that they have been watchlisted raises serious concerns that the government applies the watchlists in an arbitrary or discriminatory fashion, particularly against American Muslim, Arab, and South Asian communities. An internal August 2013 government document, for example, shows that Dearborn, Michigan—home to the country’s largest concentration of Arab-Americans—was second only to New York City in the number of people on the government’s “known or suspected terrorist” watchlist. This was despite the fact that, as the U.S. Attorney for the Eastern District of Michigan noted at the time, not a single person from Dearborn had ever been prosecuted for terrorism.

We appreciate that the sponsor specifies that any judicial proceeding shall be subject to the procedures contained in the Classified Information Procedures Act (CIPA). We have argued that CIPA procedures can help mitigate the unfairness of the watchlisting redress process. Nevertheless, given the extraordinary problems caused by the watchlist system, the Senate

should reject any legislation that would rely on it as a predicate, thereby institutionalizing a system that must be reformed or scrapped. The ACLU strongly urges you to vote “NO” on the Cornyn Amendment.

Vote “No” on the Feinstein Amendment Because It Applies a Vague and Overly Broad Standard for Denial of a Firearm Permit, Lacks Sufficient Due Process Protections, and Effectively Creates a New Watchlist that Includes Even Persons Cleared of Any Wrongdoing

Feinstein Amendment No. 4709 raises three areas of concern:

The Feinstein Amendment Applies a Vague and Overly Broad Standard for Denial of a Firearm Permit: The standard for denial of a firearm permit in the Feinstein amendment is vague and overbroad, which raises significant concerns about arbitrary and discriminatory government action. The standard includes the vague and undefined term “related to” terrorism as an element of reasonable suspicion. It also includes “material support,” which the Senate should clarify to make clear this it cannot be interpreted to include First Amendment-protected activity. These vague and overbroad terms, which appear to be borrowed from the existing watchlist standard, could open the door to arbitrary and discriminatory denial of a firearm, and the right to judicial review is too uncertain to correct for potential mistakes or abuse.

At the same time, we would like to make clear that, despite recent reporting on the Feinstein Amendment, it does not rely on the mere presence of an individual on a watchlist as a basis for denial of a firearms permit. The amendment states criteria for denial of a firearms permit that are in addition to, and different from, the criteria for inclusion on a watchlist. Most noticeably, the criteria include a determination by the attorney general, “based on the totality of the circumstances, that the transferee represents a threat to public safety.” Those aspects of the criteria are not part of the criteria for inclusion on any existing watchlist, and mean that the attorney general must make an individualized determination, and cannot presumptively bar all persons on a watchlist from obtaining a firearm permit. The attorney general must rely on evidence sufficient to meet the requirements of each element of the standard, including elements that are not already included in watchlist criteria. Although we have concerns about the standard in the Feinstein Amendment, we appreciate that it does not allow the government to deny a permit based on mere presence on a watchlist.

The Feinstein Amendment Lacks Sufficient Due Process Protections: With respect to remedial procedures and judicial review, the amendment does not ensure basic due process protections. Of particular concern is the provision authorizing the attorney general to develop “remedial procedures and judicial review” to protect information that “would likely compromise national security or ongoing law enforcement operations, consistent with due process.” It is inappropriate for the attorney general to develop procedures for the judiciary, an independent and co-equal branch of government. The amendment also provides no assurance of basic due

process safeguards: full notice of the reasons why a permit was denied and the basis for those reasons, which necessarily requires that secret evidence not be used as the basis for the denial.

The Feinstein Amendment Effectively Creates a New Watchlist that Is Broader than Any Current List: Finally, the Feinstein amendment would impose a notification requirement that could result in a new “watchlist” broader than any that currently exists—in fact, so broad that it would include even persons long ago cleared of any wrongdoing by law enforcement. The amendment would require the attorney general to establish procedures for the Department of Justice to be informed of each application for a firearm by any person who has been investigated for “conduct related to” a federal terrorism offense over the past five years—even if the person has been cleared of any wrongdoing or the investigation was otherwise closed. Tens of thousands of federal and state law enforcement officers have authority to conduct terrorism investigations, using standards that require no factual predicate. Some investigations are undoubtedly legitimate, but the basis for others is sometimes nothing more than discriminatory profiling, an exercise of First Amendment-protected rights, or a spiteful neighbor or coworker. Any list created in response to this provision will likely be far bigger than any existing watchlist, using even broader criteria. While mere presence on a new five-year past investigation watchlist would not, on its own, be sufficient for the attorney general to deny a firearm permit, the creation of such a broad, new watchlist, which could be used for additional purposes, raises significant concerns.

Thank you for your consideration of our concerns.

Sincerely,



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