WASHINGTON
LEGISLATIVE OFFICE

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RE: Vote "NO" on Collins Amendment No. 4814 on Firearms Permits, Which Raises Even More Serious Problems than Either the Cornyn Amendment or Feinstein Amendment

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Dear Senator,

The American Civil Liberties Union strongly urges you to vote "NO" on the Collins Amendment No. 4814 on firearms permits, which may be considered on the Senate floor as early as this week as an amendment to H.R. 2578, the Commerce, Justice, Science, and Related Agencies appropriations bill.

The ACLU wrote to you earlier this week, urging opposition to the Cornyn Amendment and Feinstein Amendment on firearm permits, and we appreciate that the Senate voted down both amendments. We had hoped that the Collins Amendment would correct the problems with the earlier amendments, but instead the Collins Amendment would cause even more serious problems. Our concerns about all of these 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 Collins Amendment principally for the following reasons:

The Collins Amendment Uses the Error-Prone and Unfair Watchlist System as a Predicate, Thereby Opening the Door to Arbitrary and Discriminatory Denial of a Firearm

The ACLU strongly urges you to vote against the Collins Amendment because it uses the error-prone and unfair watchlist system, along with vague and overbroad terms, as a predicate for a proceeding to deny a firearms permit. The Collins Amendment relies on both the No Fly List, by codifying its criteria, and the Selectee List, by direct reference. Relying on these lists would open the door to arbitrary and discriminatory government action.

The Collins 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 American citizens who have never been charged let alone convicted of a crime, on the basis of a 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.

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 Collins Amendment Lacks Even the Most Basic Due Process Protections

The Collins Amendment fails to provide basic due process safeguards and instead would entrench a largely one-sided and secret process that would not result in meaningful judicial review of executive branch decisions. We discuss here key concerns, and this is not an exhaustive list. As a threshold matter, the Collins Amendment strips the federal district courts of jurisdiction to hear claims or challenges, including constitutional claims. Under our system, federal district courts are best positioned to develop a factual record and hear claims in the first instance. Instead, the Collins Amendment vests jurisdiction in federal courts of appeal, but only to hear claims based on a largely secret and one-sided administrative record to which a petitioner would not meaningfully be able to respond. Although a petitioner may submit information to the appeals court, that information would necessarily be based on guess-work because the petitioner does not, under this system, have access to all the reasons for denial, the basis for those reasons, and a meaningful hearing before a neutral decision-maker. These are fundamental requirements of due process.

Moreover, unlike the Cornyn Amendment, which at least specified that any judicial proceeding shall be subject to the procedures contained in the Classified Information Procedures Act ("CIPA"), the Collins Amendment does not contain even those safeguards. To be clear, despite claims from sponsors, the Collins Amendment does not apply CIPA. Although the Collins Amendment does allow a federal appeals court to disclose classified information or a summary of it to a petitioner or counsel, those provisions are undercut by a subsequent provision that allows the attorney general to file an affidavit of objection after which the appeals court "shall" order the information not to be disclosed. Finally, the Collins Amendment presumes that information is in fact properly classified, or sensitive security information, or otherwise subject to legitimately-invoked privileges. Our experience and knowledge of challenges to the No Fly List and other watchlists, and national security litigation more generally, makes clear that no such presumption should be made and these executive branch claims must be subject to appropriate judicial review. The Collins Amendment instructs courts to seal all such records without regard to the First Amendment and common law right of access to judicial records.

The Collins Amendment Effectively Creates a New Watchlist that is Broader than Any Current List, and then Widely Disseminates the Names of Certain People on It

Finally, the Collins 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, along with "Federal, State, and local law enforcement," to be informed of each application for a firearm by any person who has been on the master watchlist at any point over the past five years—even if the person has been cleared of any wrongdoing, the investigation was otherwise closed, or the person was long ago removed from the list. The Collins Amendment also takes the unprecedented step of informing thousands of federal, state, and local law enforcement officers that someone who was on the list at some point over the past five years has applied for a firearm permit, thereby exposing the names of people who are no longer on the list to possible disclosure by any of thousands of law enforcement officers. While mere presence on a new five-year watchlist of people who are or have been on the master

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. If you have any questions or comments regarding this legislation, please contact Chris Anders at canders@aclu.org or 202-675-2308.

Sincerely,

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