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Susan M. Collins J

AMENDMENT NO. _____ Calendar No. _____

Purpose: To authorize the Attorney General to deny the transfer of firearms and explosives and Federal firearms and explosives licenses and permits to known or suspected terrorists.

IN THE SENATE OF THE UNITED STATES—114th Cong., 2d Sess.

	AMENDMENT NO. 4858		
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pose		<u>motion to commit H.R. 2578 to Judiciary</u>	
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		GPO: 2010 63-070 (mac)	

AMENDMENT intended to be proposed by Ms. COLLINS (for herself, Ms. HEITKAMP, Ms. AYOTTE, Mr. HEINRICH, Mr. FLAKE, Mr. KAINE, Mr. GRAHAM, and Mr. KING) ~~to the amendment (No. 4685) proposed by Mr. SHELLEY~~

Nelson, manchin
Baldwin, Kirk

Viz:

- 1 At the appropriate place, insert the following:
- 2 SEC. ____ . DISCRETIONARY AUTHORITY TO DENY TRANS-
- 3 FERS OF FIREARMS, EXPLOSIVES, AND FIRE-
- 4 ARMS AND EXPLOSIVES LICENSES AND PER-
- 5 MITS TO TERRORISTS.
- 6 (a) AUTHORITY.—
- 7 (1) IN GENERAL.—On and after the date of en-
- 8 actment of this Act, in accordance with the proce-

1 dures under this section, and without regard to sec-
2 tion 842, 843, section 922(g) or (n), or section 923
3 of title 18, United States Code, the Attorney Gen-
4 eral may deny the transfer of a firearm, not later
5 than 3 business days after a licensee under chapter
6 44 of title 18, United States Code, contacts the na-
7 tional instant criminal background check system es-
8 tablished under section 103 of Public Law 103-159
9 (18 U.S.C. 922 note), deny the transfer of an explo-
10 sive, or deny the issuance of a Federal firearms or
11 explosives license or permit, if either of the following
12 are met:

13 (A) NO FLY LIST.—The Attorney General
14 determines that the transferee or applicant—

15 (i) based on the totality of the cir-
16 cumstances, represents a threat to public
17 safety based on a reasonable suspicion that
18 the transferee or applicant is engaged, or
19 has been engaged, in conduct constituting,
20 in preparation of, in aid of, or related to
21 terrorism, or providing material support or
22 resources therefor; and

23 (ii) based on credible information,
24 poses—

1 (I) a threat of committing an act
2 of international terrorism or domestic
3 terrorism with respect to an aircraft
4 (including a threat of piracy, or a
5 threat to airline, passenger, or civil
6 aviation security);

7 (II) a threat of committing an
8 act of domestic terrorism with respect
9 to the homeland;

10 (III) a threat of committing an
11 act of international terrorism against
12 any United States Government facility
13 abroad and associated or supporting
14 personnel, including United States
15 embassies, consulates and missions,
16 military installations, United States
17 ships, United States aircraft, or other
18 auxiliary craft owned or leased by the
19 United States Government; or

20 (IV) a threat of engaging in or
21 conducting a violent act of terrorism
22 and is operationally capable of doing
23 so.

1 (B) SELECTEE LIST.—The Attorney Gen-
2 eral determines that the transferee or appli-
3 cant—

4 (i) based on the totality of the cir-
5 cumstances, represents a threat to public
6 safety based on a reasonable suspicion that
7 the transferee or applicant is engaged, or
8 has been engaged, in conduct constituting,
9 in preparation of, in aid of, or related to
10 terrorism, or providing material support or
11 resources therefor; and

12 (ii) based on credible information,
13 is—

14 (I) a member of a terrorist orga-
15 nization (including a foreign terrorist
16 organization designated pursuant to a
17 statute or Executive Order); and

18 (II) associated with terrorist ac-
19 tivity, unless information exists that
20 demonstrates that the application of
21 secondary screening to such individual
22 is not necessary.

23 (2) NICS.—Solely for purposes of sections
24 922(t) (1), (2), (5), and (6) of title 18, United
25 States Code, and section 103(g) of Public Law 103—

1 159 (18 U.S.C. 922 note), a denial by the Attorney
2 General under paragraph (1) shall be treated as
3 equivalent to a determination that receipt of a fire-
4 arm would violate subsection (g) or (n) of section
5 922 of title 18, United States Code. During the 3-
6 business-day period beginning when a licensee under
7 chapter 44 of title 18, United States Code, contacts
8 the national instant criminal background check sys-
9 tem established under section 103 of Public Law
10 103-159 (18 U.S.C. 922 note), and notwithstanding
11 section 922(t)(2) of title 18, United States Code, the
12 Attorney General may delay assigning a unique iden-
13 tification number to a transfer of a firearm in order
14 to determine whether the transferee or applicant
15 meets the requirements under paragraph (1).

16 (b) NOTIFICATION OF PROSPECTIVE FIREARMS AND
17 EXPLOSIVES TRANSFERS TO KNOWN OR SUSPECTED
18 TERRORIST.—The Attorney General and Federal, State,
19 and local law enforcement shall be immediately notified,
20 as appropriate, of any request to transfer a firearm or ex-
21 plosive to a person who is, or with in the previous 5 years
22 was, identified in the Terrorist Screening Database main-
23 tained by the Terrorist Screening Center of the Federal
24 Bureau of Investigation.

25 (c) REVIEW OF DENIAL.—

1 (1) REMEDIAL PROCEDURES AND PETITION
2 FOR REVIEW.—

3 (A) IN GENERAL.—An individual who is a
4 citizen or lawful permanent resident of the
5 United States who seeks to challenge a denial
6 by the Attorney General under subsection
7 (a)(1) may—

8 (i) pursue the remedial procedures
9 under section 103(g) of Public Law 103–
10 159 (18 U.S.C. 922 note); or

11 (ii) file a petition for review and any
12 claims related to that petition in the
13 United States District Court for the Dis-
14 trict of Columbia or in the district court of
15 the United States for the judicial district
16 in which the individual resides.

17 (B) EXHAUSTION NOT REQUIRED.—A peti-
18 tioner is not required to exhaust the remedial
19 procedures authorized under clause (i) of sub-
20 paragraph (A) before filing a petition for review
21 under clause (ii) of subparagraph (A).

22 (C) PROCEDURES.—Notwithstanding any
23 other provision of law, the Attorney General
24 may promulgate regulations governing pro-
25 ceedings under subparagraph (A)(i) to prevent

1 the unauthorized disclosure of information that
2 reasonably could be expected to result in dam-
3 age to national security or ongoing law enforce-
4 ment operations.

5 (2) DEADLINES FOR FILING.—

6 (A) IN GENERAL.—Except as provided in
7 subparagraph (B), a petition for review under
8 paragraph (1)(A)(ii), and any claims related to
9 that petition, shall be filed not later than the
10 earlier of—

11 (i) 1 year after the petitioner receives
12 actual notice of the reason for the denial
13 by the Attorney General; or

14 (ii) 5 years after the petitioner re-
15 ceives notice of the denial by the Attorney
16 General.

17 (B) EXCEPTION.—The district court in
18 which a petition for review is to be filed under
19 paragraph (1)(A)(ii) may allow the petition to
20 be filed after the deadline specified in subpara-
21 graph (A) only if there is good cause for not fil-
22 ing by that deadline.

23 (3) AUTHORITY OF DISTRICT COURTS.—The
24 district court in which a petition for review is filed
25 under paragraph (1)(A)(ii)—

1 (A) shall have—

2 (i) jurisdiction to decide all relevant
3 questions of law and fact; and

4 (ii) exclusive jurisdiction to affirm,
5 amend, modify, or set aside any part of the
6 denial of the Attorney General that is the
7 subject of the petition for review; and

8 (B) may order the Attorney General to
9 conduct further proceedings.

10 (4) EXCLUSIVE JURISDICTION.—

11 (A) IN GENERAL.—No district court of the
12 United States or court of appeals of the United
13 States shall have jurisdiction to consider the
14 lawfulness or constitutionality of this section ex-
15 cept pursuant to a petition for review under
16 subsection (c)(1)(A)(ii).

17 (B) NONCITIZENS.—No district court of
18 the United States or court of appeals of the
19 United States shall have jurisdiction to hear
20 any claim by an individual who is not a citizen
21 or lawful permanent resident of the United
22 States related to or arising out a denial by the
23 Attorney General under subsection (a)(1).

24 (d) REQUIREMENT FOR AN ADMINISTRATIVE
25 RECORD AND PROCEDURES FOR JUDICIAL REVIEW.—

1 Notwithstanding any other provision of law, the following
2 procedures shall apply with respect to a petition for review
3 filed in a district court under subsection (c)(1)(A)(ii):

4 (1) The United States shall file with the court
5 an administrative record, which shall consist of—

6 (A) the information the Attorney General
7 relied upon in denying the transfer or applica-
8 tion;

9 (B) a summary of known material mitiga-
10 tion information;

11 (C) any information the petitioner has sub-
12 mitted pursuant to any administrative process;
13 and

14 (D) any information determined relevant
15 by the United States.

16 (2)(A) The petitioner may file with the court
17 any information determined relevant by the peti-
18 tioner.

19 (B) With leave of the court, the United States
20 may supplement the administrative record with addi-
21 tional information.

22 (3) All information in the administrative record
23 that is not classified and is not otherwise privileged
24 or subject to statutory protections shall be provided
25 to the petitioner.

1 (4) No discovery shall be permitted, unless the
2 court shall determine extraordinary circumstances
3 requires discovery in the interests of justice.

4 (5) Sensitive security information contained in
5 the administrative record may only be provided to
6 petitioners counsel, pursuant to a protective order.

7 (6)(A) The administrative record may include
8 classified information, which the United States shall
9 submit to the court in camera and ex parte. The
10 court shall review all classified information in cam-
11 era and ex parte unless it enters an order under
12 paragraph (C).

13 (B) The United States shall notify the peti-
14 tioner if the administrative record filed under para-
15 graph (1) contains classified information.

16 (C) The court is authorized to determine the
17 extent to which cleared counsel shall be permitted to
18 access classified information necessary to protect the
19 due process rights of a petitioner and enter an ap-
20 propriate order.

21 (D)(i) If the court enters an order under sub-
22 paragraph (C) providing for the disclosure of infor-
23 mation and the United States files with the court an
24 affidavit of the Attorney General objecting to the

1 disclosure, the court shall order that the information
2 not be disclosed.

3 (ii) If information is not disclosed under clause
4 (i), the court shall enter such an order as the inter-
5 ests of justice require, which may include an order
6 quashing the denial by the Attorney General under
7 subsection (a)(1).

8 (iii) An order under subparagraph (C) or clause
9 (ii) of this subparagraph shall be subject to review
10 by a court of appeals pursuant to section 1292 of
11 title 28, United States Code.

12 (iv) An order under clause (ii) shall be adminis-
13 tratively stayed for 7 days.

14 (v) The functions and duties of the Attorney
15 General under this subparagraph—

16 (I) may be exercised by the Deputy Attor-
17 ney General, the Associate Attorney General, or
18 by an Assistant Attorney General designated by
19 the Attorney General for such purpose; and

20 (II) may not be delegated to any other offi-
21 cial.

22 (E) Any information disclosed under subpara-
23 graph (C) shall be subject to an appropriate protec-
24 tive order.

1 (7)(A) The administrative record may include
2 information obtained or derived from an order issued
3 under the Foreign Intelligence Surveillance Act of
4 1978 (50 U.S.C. 1801 et seq.), without regard to
5 subsections (c), (e), (f), (g), and (h) of section 106
6 (50 U.S.C. 1806), subsections (d), (f), (g), (h), and
7 (i) of section 305 (50 U.S.C. 1825), subsections (c),
8 (e), (f), (g), and (h) of section 405 (50 U.S.C.
9 1845), and section 706 (50 U.S.C. 1881e) of that
10 Act. If the United States intends to use such infor-
11 mation against an aggrieved person (as defined in
12 section 101, 301, or 401 of the Foreign Intelligence
13 Surveillance Act of 1978 (50 U.S.C. 1801, 1821,
14 and 1841)), it shall provide in camera and ex parte
15 notice to the court concerning such use.

16 (B) If the court receives a notice under sub-
17 paragraph (A), the court shall review, in camera and
18 ex parte, the order described in that subparagraph
19 and any other materials that may be submitted by
20 the United States.

21 (C) If the court determines that the order de-
22 scribed in subparagraph (A) was not lawfully au-
23 thorized, or the information was not obtained in con-
24 formity with the order, it shall exclude such informa-

1 tion from consideration as part of the administrative
2 record.

3 (8) Any classified information, sensitive security
4 information, law enforcement sensitive information,
5 or information that is otherwise privileged or subject
6 to statutory protections, that is part of the adminis-
7 trative record, or cited by the court or the parties,
8 shall be treated by the court and the parties con-
9 sistent with the provisions of this subsection, and
10 shall be sealed and preserved in the records of the
11 court to be made available in the event of further
12 proceedings. In no event shall such information be
13 released as part of the public record.

14 (9) The court shall award reasonable attorney
15 fees to a petitioner who is a prevailing party in an
16 action under this section.

17 (10) After the expiration of the time to seek
18 further review, or the conclusion of further pro-
19 ceedings, the court shall return the administrative
20 record, including any and all copies, to the United
21 States. All privileged information or other informa-
22 tion in the possession of counsel for the petitioner
23 that was provided by the United States under a pro-
24 tective order shall be returned to the United States,

1 or the counsel for the petitioner shall certify its de-
2 struction, including any and all copies.

3 (e) SCOPE OF REVIEW.—The district court shall
4 quash any denial by the Attorney General under sub-
5 section (a)(1), unless the United States demonstrates,
6 based on the administrative record, on a de novo review
7 of fact and law—

8 (1) that the transferee or applicant—

9 (A) based on the totality of the cir-
10 cumstances, represents a threat to public safety
11 based on a reasonable suspicion that the trans-
12 feree or applicant is engaged, or has been en-
13 gaged, in conduct constituting, in preparation
14 of, in aid of, or related to terrorism, or pro-
15 viding material support or resources therefor;
16 and

17 (B) based on credible information, poses—

18 (i) a threat of committing an act of
19 international terrorism or domestic ter-
20 rorism with respect to an aircraft (includ-
21 ing a threat of piracy, or a threat to air-
22 line, passenger, or civil aviation security);

23 (ii) a threat of committing an act of
24 domestic terrorism with respect to the
25 homeland;

1 (iii) a threat of committing an act of
2 international terrorism against any United
3 States Government facility abroad and as-
4 sociated or supporting personnel, including
5 United States embassies, consulates and
6 missions, military installations, United
7 States ships, United States aircraft, or
8 other auxiliary craft owned or leased by
9 the United States Government; or

10 (iv) a threat of engaging in or con-
11 ducting a violent act of terrorism and is
12 operationally capable of doing so; or

13 (2) that the transferee or applicant—

14 (A) based on the totality of the cir-
15 cumstances, represents a threat to public safety
16 based on a reasonable suspicion that the trans-
17 feree or applicant is engaged, or has been en-
18 gaged, in conduct constituting, in preparation
19 of, in aid of, or related to terrorism, or pro-
20 viding material support or resources therefor;
21 and

22 (B) based on credible information—

23 (i) is a member of a terrorist organi-
24 zation (including a foreign terrorist organi-

1 zation designated pursuant to a statute or
2 Executive Order; and

3 (ii) is associated with terrorist activ-
4 ity, unless information exists that dem-
5 onstrates that the application of secondary
6 screening to such individual is not nec-
7 essary.

8 (f) EFFECT OF QUASHING.—If the district court
9 quashes a denial by the Attorney General under subsection
10 (e), notwithstanding any other provision of law, the Attor-
11 ney General shall—

12 (1) for a denial of the transfer of a firearm,
13 cause a unique identifier to issue pursuant to section
14 922(t)(2) of title 18, United States Code, not later
15 than 3 days after the issuance of the order under
16 subsection (e); and

17 (2) for a denial of a license or permit, expedi-
18 tiously issue a license or permit under chapter 40 or
19 44 of title 18, United States Code, as applicable.

20 (g) REVIEW OF DECISION OF DISTRICT COURT.—A
21 final decision of a district court under this section shall
22 be subject to review by a court of appeals in accordance
23 with section 1291 of title 28, United States Code.

24 (h) EXCLUSIVE REMEDIES.—The remedial proce-
25 dures and a petition for review authorized under sub-

1 section (c)(1)(A) shall be the sole and exclusive remedies
2 for a claim by an individual who challenges a denial under
3 subsection (a)(1).

4 (i) EXPEDITED CONSIDERATION.—

5 (1) COURTS.—Not later than 14 days after the
6 date on which a petition is filed challenging a denial
7 under subsection (a)(1), a district court shall deter-
8 mine whether to quash the denial, unless the peti-
9 tioner consents to a longer period.

10 (2) OF QUASHING.—If the district court
11 quashes a denial by the Attorney General under sub-
12 section (e), a petitioner may submit the order quash-
13 ing the denial to the Department of Homeland Secu-
14 rity for expedited review, as appropriate.

15 (j) TRANSPARENCY.—Not later than 60 days after
16 the date of enactment of this Act, and quarterly there-
17 after—

18 (1) the Attorney General shall submit to the
19 Committee on the Judiciary and the Select Com-
20 mittee on Intelligence of the Senate and the Com-
21 mittee on the Judiciary and the Permanent Select
22 Committee on Intelligence of the House of Rep-
23 resentatives a report providing—

24 (A) the number of individuals denied a
25 firearm or explosives transfer or a license or

1 permit under subsection (a)(1) during the re-
2 porting period;

3 (B) the number of petitions for review filed
4 under subsection (c)(1)(A)(ii); and

5 (C) the number of instances in which a
6 district court quashed a denial by the Attorney
7 General under subsection (e); and

8 (2) the Secretary of Homeland Security shall
9 submit to the Committee on Homeland Security and
10 Governmental Affairs, the Select Committee on In-
11 telligence, and the Committee on the Judiciary of
12 the Senate and the Committee on Homeland Secu-
13 rity, the Permanent Select Committee on Intel-
14 ligence, and the Committee on the Judiciary of the
15 House of Representatives a report providing—

16 (A) the number individuals—

17 (i) with respect to whom a district
18 court quashed a denial by the Attorney
19 General under subsection (e); and

20 (ii) who submitted the order quashing
21 the denial to the Department of Homeland
22 Security under subsection (i)(2); and

23 (B) a description of the actions taken and
24 final determinations made by the Department
25 of Homeland Security with regard to submis-

1 sions described in subparagraph (A)(ii) respect-
2 ing the status of individuals on the No Fly List
3 or Selectee List, including the length of time
4 taken to reach a final determination.

5 (k) DEFINITIONS.—In this section:

6 (1) CLASSIFIED INFORMATION.—The term
7 “classified information” has the meaning given that
8 term in section 1(a) of the Classified Information
9 Procedures Act (18 U.S.C. App.).

10 (2) DOMESTIC TERRORISM.—The term “domes-
11 tic terrorism” has the meaning given that term in
12 section 2331(5) of title 18, United States Code.

13 (3) INTERNATIONAL TERRORISM.—The term
14 “international terrorism” has the meaning given
15 that term in section 2331(1) of title 18, United
16 States Code.

17 (4) MILITARY INSTALLATION.—The term “mili-
18 tary installation” has the meaning given that term
19 in section 2801(c)(4) of title 10, United States
20 Code.

21 (5) NATIONAL SECURITY.—The term “national
22 security” has the meaning given that term in section
23 219 of the Immigration and Nationality Act (8
24 U.S.C. 1189).

1 (6) SENSITIVE SECURITY INFORMATION.—The
2 term “sensitive security information” has the mean-
3 ing given that term by sections 114(r) and 40119 of
4 title 49, United States Code, and the regulations
5 and orders issued pursuant to those sections.

6 (7) TERRORIST ACTIVITY.—The term “terrorist
7 activity” has the meaning given that term in section
8 212(a)(3)(B) of the Immigration and Nationality
9 Act (8 U.S.C. 1182(a)(3)(B)).

10 (1) RULE OF CONSTRUCTION.—Nothing in this sec-
11 tion shall be construed to—

12 (1) except as set forth in this section, authorize
13 the Attorney General to modify the length of period
14 before a firearm may be transferred under section
15 922(t) of title 18, United States Code; or

16 (2) apply to any claim other than a claim chal-
17 lenging the denial of a firearm, explosive, or
18 issuance of a firearm or explosives permit or license
19 by the Attorney General.