115TH CONGRESS
2D SESSION

S. 2458

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

FEBRUARY 27, 2018

Ms. COLLINS (for herself, Ms. HEITKAMP, Mr. FLAKE, Mr. HEINRICH, Mr. TOOMEY, Ms. BALDWIN, Mr. KING, Mr. NELSON, Mr. MANCHIN, and Mr. KAINE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘‘Terrorist Firearms Prevention Act’’.

SEC. 2. DISCRETIONARY AUTHORITY TO DENY TRANSFERS OF FIREARMS, EXPLOSIVES, AND FIREARMS AND EXPLOSIVES LICENSES AND PERMITS TO TERRORISTS.

(a) AUTHORITY.—

(1) IN GENERAL.—On and after the date of enactment of this Act, in accordance with the procedures under this section, and without regard to section 842, 843, section 922(g) or (n), or section 923 of title 18, United States Code, the Attorney General may deny the transfer of a firearm, not later than 3 business days after a licensee under chapter 44 of title 18, United States Code, contacts the national instant criminal background check system established under section 103 of Public Law 103–159 (34 U.S.C. 40901), deny the transfer of an explosive, or deny the issuance of a Federal firearms or explosives license or permit, if either of the following are met:

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

(i) based on the totality of the circumstances, represents a threat to public safety based on a reasonable suspicion that the transferee or applicant is engaged, or has been engaged, in conduct constituting, in preparation of, in aid of, or related to terrorism, or providing material support or resources therefor; and

(ii) based on credible information, poses—

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

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

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

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

(B) SELECTEE LIST.—The Attorney General determines that the transferee or applicant—

(i) based on the totality of the circumstances, represents a threat to public safety based on a reasonable suspicion that the transferee or applicant is engaged, or has been engaged, in conduct constituting, in preparation of, in aid of, or related to terrorism, or providing material support or resources therefor; and

(ii) based on credible information, is—

(I) a member of a terrorist organization (including a foreign terrorist organization designated pursuant to a statute or Executive order); and

(II) associated with terrorist activity, unless information exists that demonstrates that the application of secondary screening to such individual is not necessary.

(2) NICS.—Solely for purposes of sections 922(t) (1), (2), (5), and (6) of title 18, United States Code, and section 103(g) of Public Law 103–159 (34 U.S.C. 40901(g)), a denial by the Attorney General under paragraph (1) shall be treated as equivalent to a determination that receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code. During the 3-business-day period beginning when a licensee under chapter 44 of title 18, United States Code, contacts the national instant criminal background check system established under section 103 of Public Law 103–159 (34 U.S.C. 40901), and notwithstanding section 922(t)(2) of title 18, United States Code, the Attorney General may delay assigning a unique identification number to a transfer of a firearm in order to determine whether the transferee or applicant meets the requirements under paragraph (1).

(b) NOTIFICATION OF PROSPECTIVE FIREARMS AND EXPLOSIVES TRANSFERS TO KNOWN OR SUSPECTED TERRORIST.—The Attorney General and Federal, State, and local law enforcement shall be immediately notified, as appropriate, of any request to transfer a firearm or explosive to a person who is, or within the previous 5 years was, identified in the Terrorist Screening Database maintained by the Terrorist Screening Center of the Federal Bureau of Investigation.

(c) REVIEW OF DENIAL.—

(1) REMEDIAL PROCEDURES AND PETITION FOR REVIEW.—

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

(i) pursue the remedial procedures under section 103(g) of Public Law 103–159 (34 U.S.C. 40901(g)); or

(ii) file a petition for review and any claims related to that petition in the United States District Court for the District of Columbia or in the district court of the United States for the judicial district in which the individual resides.

(B) EXHAUSTION NOT REQUIRED.—A petitioner is not required to exhaust the remedial procedures authorized under clause (i) of subparagraph (A) before filing a petition for review under clause (ii) of subparagraph (A).

(C) PROCEDURES.—Notwithstanding any other provision of law, the Attorney General may promulgate regulations governing proceedings under subparagraph (A)(i) to prevent the unauthorized disclosure of information that reasonably could be expected to result in damage to national security or ongoing law enforcement operations.

(2) DEADLINES FOR FILING.—

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

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

(ii) 5 years after the petitioner receives notice of the denial by the Attorney General.

(B) EXCEPTION.—The district court in which a petition for review is to be filed under paragraph (1)(A)(ii) may allow the petition to be filed after the deadline specified in subparagraph (A) only if there is good cause for not filing by that deadline.

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

(A) shall have—

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

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

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

(4) EXCLUSIVE JURISDICTION.—

(A) IN GENERAL.—No district court of the United States or court of appeals of the United States shall have jurisdiction to consider the lawfulness or constitutionality of this section except pursuant to a petition for review under subsection (c)(1)(A)(ii).

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

(d) REQUIREMENT FOR AN ADMINISTRATIVE RECORD AND PROCEDURES FOR JUDICIAL REVIEW.—Notwithstanding any other provision of law, the following procedures shall apply with respect to a petition for review filed in a district court under subsection (c)(1)(A)(ii):

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

(A) the information the Attorney General relied upon in denying the transfer or application;

(B) a summary of known material mitigation information;

(C) any information the petitioner has submitted pursuant to any administrative process; and

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

(2)(A) The petitioner may file with the court any information determined relevant by the petitioner.

(B) With leave of the court, the United States may supplement the administrative record with additional information.

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

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

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

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

(B) The United States shall notify the petitioner if the administrative record filed under paragraph (1) contains classified information.

(C) The court is authorized to determine the extent to which cleared counsel shall be permitted to access classified information necessary to protect the due process rights of a petitioner and enter an appropriate order.

(D)(i) If the court enters an order under subparagraph (C) providing for the disclosure of information and the United States files with the court an affidavit of the Attorney General objecting to the disclosure, the court shall order that the information not be disclosed.

(ii) If information is not disclosed under clause (i), the court shall enter such an order as the interests of justice require, which may include an order quashing the denial by the Attorney General under subsection (a)(1).

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

(iv) An order under clause (ii) shall be administratively stayed for 7 days.

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

(I) may be exercised by the Deputy Attorney General, the Associate Attorney General, or by an Assistant Attorney General designated by the Attorney General for such purpose; and

(II) may not be delegated to any other official.

(E) Any information disclosed under subparagraph (C) shall be subject to an appropriate protective order.

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

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

(C) If the court determines that the order described in subparagraph (A) was not lawfully authorized, or the information was not obtained in conformity with the order, it shall exclude such information from consideration as part of the administrative record.

(8) Any classified information, sensitive security information, law enforcement sensitive information, or information that is otherwise privileged or subject to statutory protections, that is part of the administrative record, or cited by the court or the parties, shall be treated by the court and the parties consistent with the provisions of this subsection, and shall be sealed and preserved in the records of the court to be made available in the event of further proceedings. In no event shall such information be released as part of the public record.

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

(10) After the expiration of the time to seek further review, or the conclusion of further proceedings, the court shall return the administrative record, including any and all copies, to the United States. All privileged information or other informa-

tion in the possession of counsel for the petitioner that was provided by the United States under a protective order shall be returned to the United States, or the counsel for the petitioner shall certify its destruction, including any and all copies.

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

(1) that the transferee or applicant—

(A) based on the totality of the circumstances, represents a threat to public safety based on a reasonable suspicion that the transferee or applicant is engaged, or has been engaged, in conduct constituting, in preparation of, in aid of, or related to terrorism, or providing material support or resources therefor; and

(B) based on credible information, poses—

(i) a threat of committing an act of international terrorism or domestic terrorism with respect to an aircraft (including a threat of piracy, or a threat to airline, passenger, or civil aviation security);

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

(iii) a threat of committing an act of international terrorism against any United States Government facility abroad and associated or supporting personnel, including United States embassies, consulates and missions, military installations, United States ships, United States aircraft, or other auxiliary craft owned or leased by the United States Government; or

(iv) a threat of engaging in or conducting a violent act of terrorism and is operationally capable of doing so; or

(2) that the transferee or applicant—

(A) based on the totality of the circumstances, represents a threat to public safety based on a reasonable suspicion that the transferee or applicant is engaged, or has been engaged, in conduct constituting, in preparation of, in aid of, or related to terrorism, or providing material support or resources therefor; and

(B) based on credible information—

(i) is a member of a terrorist organization (including a foreign terrorist organization) designated pursuant to a statute or Executive order; and

(ii) is associated with terrorist activity, unless information exists that demonstrates that the application of secondary screening to such individual is not necessary.

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

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

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

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

(h) EXCLUSIVE REMEDIES.—The remedial procedures and a petition for review authorized under subsection (c)(1)(A) shall be the sole and exclusive remedies for a claim by an individual who challenges a denial under subsection (a)(1).

(i) EXPEDITED CONSIDERATION.—

(1) COURTS.—Not later than 14 days after the date on which a petition is filed challenging a denial under subsection (a)(1), a district court shall determine whether to quash the denial, unless the petitioner consents to a longer period.

(2) OF QUASHING.—If the district court quashes a denial by the Attorney General under subsection (e), a petitioner may submit the order quashing the denial to the Department of Homeland Security for expedited review, as appropriate.

(j) TRANSPARENCY.—Not later than 60 days after the date of enactment of this Act, and quarterly thereafter—

(1) the Attorney General shall submit to the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives a report providing—

(A) the number of individuals denied a firearm or explosives transfer or a license or permit under subsection (a)(1) during the reporting period;

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

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

(2) the Secretary of Homeland Security shall submit to the Committee on Homeland Security and Governmental Affairs, the Select Committee on Intelligence, and the Committee on the Judiciary of the Senate and the Committee on Homeland Security, the Permanent Select Committee on Intelligence, and the Committee on the Judiciary of the House of Representatives a report providing—

(A) the number of individuals—

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

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

(B) a description of the actions taken and final determinations made by the Department of Homeland Security with regard to submissions described in subparagraph (A)(ii) respecting the status of individuals on the No Fly List or Selectee List, including the length of time taken to reach a final determination.

(k) DEFINITIONS.—In this section:

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

(2) DOMESTIC TERRORISM.—The term "domestic terrorism" has the meaning given that term in section 2331(5) of title 18, United States Code.

(3) INTERNATIONAL TERRORISM.—The term "international terrorism" has the meaning given that term in section 2331(1) of title 18, United States Code.

(4) MILITARY INSTALLATION.—The term "military installation" has the meaning given that term in section 2801(c)(4) of title 10, United States Code.

(5) NATIONAL SECURITY.—The term "national security" has the meaning given that term in section

219 of the Immigration and Nationality Act (8 U.S.C. 1189).

(6) SENSITIVE SECURITY INFORMATION.—The term ''sensitive security information'' has the meaning given that term by sections 114(r) and 40119 of title 49, United States Code, and the regulations and orders issued pursuant to those sections.

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

(l) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to—

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

(2) apply to any claim other than a claim challenging the denial of a firearm, explosive, or issuance of a firearm or explosives permit or license by the Attorney General.

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