

**Questions for the Record from Senator Charles E. Grassley**

**U.S. Senate Committee on the Judiciary**

**Hearing on “VAWA Next Steps: Protecting Women from Gun Violence”**

**July 30, 2014**

**QUESTIONS FOR PROF. MALCOLM:**

1. Dr. Malcolm, you’ve studied violent crime in Britain, both before and after the country adopted strict gun control. Based on your research, did the adoption of gun control reduce rates of domestic violence in Britain?

As the British tightened and then prohibited private ownership of firearms and their use for self-defense the rate of violent crime and of armed crime, which had been very low for many years, increased dramatically. The Firearms Act of 1997 prohibited civilian ownership of handguns and confiscated all the handguns registered to civilians in the country. Within ten years of this massive disarmament violent crime with handguns had doubled. The country now has a gun problem. For the first time in their history many British policemen are carrying firearms. Home invasions in Britain are far higher than in the United States and more than half occur when people are at home compared to 13% here. Studies of burglars in America reveal that intruders are more afraid of armed homeowners than of the police.

2. Would you say that female homicide resulting from domestic violence is a “uniquely American” problem?

Female homicide resulting from domestic violence is certainly not a “uniquely American” problem. Sadly it is a problem in every country.

3. How does the fact that someone subject to a TRO, under this proposed legislation, would, upon granting of the TRO by a judge in an ex-parte proceeding, be prohibited from owning a firearm trigger practical enforcement concerns?

The party subject to the TRO would not have notice that it had been issued before the police arrived to search his home and confiscate his firearms. This sudden invasion of his home and the search for, and seizure of, legally owned weapons by armed law officers is likely to produce a dangerous situation for both the subject and the officers.

4. During the hearing, the process by which search warrants are issued during an ex-parte proceeding, was said to be similar to the manner in which temporary restraining orders are issued. What differences exist between a prosecutor seeking a search warrant under the constitutional requirement of probable cause and a private person obtaining a TRO under the evidentiary standard by which such an order is issued? Are there other constitutional differences between the Fourth Amendment’s standard for issuance of a search warrant and the Fifth Amendment’s prohibition on

deprivation of liberty of property without due process that would bear on depriving someone of firearms? Would a process that retroactively deprived someone of property based on a prior conviction differ from the issuance of a search warrant? Are there any other differences between the granting of a search warrant and the granting of a TRO?

During an ex parte hearing to obtain a search warrant probable cause has to be presented. In the hearing for a temporary restraining order the mere allegation that the complainant is anxious, or feels threatened is sufficient. Often no evidence at all of any threat or danger needs to be presented. In states such as California all the complainant needs to do is fill out a standard form. This TRO complaint is sometimes part of a standard divorce proceeding and judges regard it as a “rubber-stamp” exercise.

Ownership of a firearm, as the US Supreme Court has affirmed in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, is a core constitutional right with a fundamental liberty interest. To deprive someone of that right based on a mere allegation with no show of evidence required, without prior notice to the respondent, at a hearing to which he has no right to present evidence or confront his accuser, is a serious violation of his Second Amendment rights, as well as the Fifth Amendment protection by depriving him of liberty and property without Due Process of Law.

A procedure that deprived someone of legally owned property based on a prior conviction, and further deprives that individual of a core constitutional right for life is an unfair taking violating the individual’s Due Process right. This is all the more egregious since in many, if not most cases, both TRO’s and restraining orders themselves are issued based on little or no evidence that the respondent poses any danger.

**The Honorable Jeff Flake**

**Written Questions**

**Dr. Joyce Lee Malcom, George Mason University School of Law  
Hearing: VAWA Next Steps: Protecting Women from Gun Violence**

**August 6, 2014**

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1. As of December 31, 2013, only 36 states had submitted *any* domestic violence misdemeanor conviction records to the NICS Index, and of those, 21 states had submitted 20 or fewer records. Eight have submitted only 1 record. An even smaller number of states have submitted records regarding permanent restraining orders: 31 states have not submitted any domestic violence restraining order records to the NICS Index, and of the 19 that have, 9 states have submitted 10 or fewer. My home

state of Arizona has only submitted 2 records of convictions for domestic violence and no domestic violence restraining order records. Our background check system is only as good as the records it contains and states are failing to include disqualifying records under current law.

- a. Would you agree that we need to do more to make sure those disqualifying records are included in the NICS Index to ensure that those who are currently prohibited from purchasing firearms are prevented from doing so?

I would certainly agree that since the NICS is depended upon to permit purchase of a firearm, states need to fulfill their obligation to submit the records of domestic violence convictions for use in the index. Clearly too many states are failing to meet this key obligation.

- b. If Congress expands the types of records that are disqualifying and increases the burden on an already overwhelmed system without fixing it first, is that going to make women safer?

The two bills under consideration, by greatly expanding the categories of individuals prohibited from possessing or purchasing a firearm make it even more difficult for states, already finding it difficult to report, to keep track of current and past convictions and report to the NICS those newly disqualified from purchasing firearms.

2. Both bills mentioned at the hearing expand the definition of intimate partner to include a dating partner or former dating partner and the existence of the relationship determines whether a particular state offense is a qualifying offense that prohibits someone from possessing or buying a firearm.

- a. If this legislation was enacted, is it your understanding the definitions would apply retroactively?

Yes. If the legislation were enacted the expanded definitions would apply retroactively. Anyone who had been convicted of stalking in the past would be prohibited from being able to purchase a gun, ever. Moreover the definition of stalking is frequently vague, subjective and expanding.

- b. Can you expand on the Due Process concerns with applying the definitions retroactively that you mentioned in your testimony?

Many individuals with previous convictions for stalking or those having had restraining orders in the past would be unaware that their Second Amendment rights were to be forfeit at some point in the future. A great many people who accepted plea bargains would not have known they would lose a core right forever. Worse, many states have a very perfunctory process for restraining orders with the complainant given the benefit of the doubt, even in instances where there has been no threat of harassment or violence. The Second Amendment is a core right deserving of strict scrutiny and ought not to be removed on such a flimsy basis.

- c. In the past, when new categories of prohibited persons were added and applied retroactively, concerns were raised about the practical challenges of implementing the law. In 2002, GAO issued a report noting the difficulty of an automated system trying to determine whether a prior record contained the necessary elements to now be disqualifying. The report noted that additional manual research may be necessary to determine whether the offense constitutes a federal firearm prohibitor. Is it your understanding that a NICS background check examiner would have to make the determination of whether the relationship between the parties qualified as a dating or former dating relationship and the misdemeanor assault or battery charge now qualifies as a prohibitor or remains a nondisqualifying misdemeanor?

With categories of individuals expanded in these restraining orders to include dating partners and past dating partners, the task of determining whether the prior record constitutes an offense prohibiting gun ownership would be far more onerous and complex. That task is already a laborious one and this expansion will make it worse.

- i. On what basis will the reviewer make that determination?

It is not at all clear on what basis the reviewer will make that determination. Definitions of stalking and relationships vary widely from state to state and from time to time.

- ii. Do you see any Due Process concerns with dating partner determinations being made this way since, if such a relationship is found, it will prevent an individual from exercising a fundamental right?

The idea that a government reviewer will decide, perhaps years later and with variable evidence or no evidence at all, whether a dating relationship was in place, and that determination will prevent an individual from exercising a core constitutional right is a gross violation of Due Process. No appeal is envisioned. Since the initial conviction may have been under unfair circumstances to begin with, and varies from state to state, the entire process is arbitrary.

2. As I read the legislation, it does not provide a definition of stalking and instead relies on a particular state's definition of stalking. Do you agree there is no definition in the bill?
  - a. Some states have a high bar for conduct to be considered stalking, while other states have a relatively low bar. This varying array of state laws on the misdemeanor crime of stalking would cause this bill to have a varying effect in different states, resulting in one person potentially losing their Second Amendment right, while another person, who committed a similar act, would not. Do you see any constitutional concerns with such a result?

I agree there is no definition of stalking in the bill. That is a serious problem since the definition of stalking varies from state to state. I also find the varying definitions that would cause an individual in one state to be prohibited from exercising his Second Amendment

rights forever while someone convicted of the same offense in a second state would not, to be arbitrary and unjust. Constitutional rights must not to be taken away in such a capricious manner.

- b. Would this new prohibitor of stalking also apply retroactively and do you have concerns if it does?

As I understand it the new prohibitor of stalking would apply retroactively. The bill includes anyone convicted of that crime, past or future. Again this is harmful for several reasons including the variable procedures and definitions from state to state, the frequent absence of Due Process, and the great difficulty of actually adding these individuals to the NICS list.