

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

QUESTION FOR JUSTICE McCAFFERY:

1. When a judge issues a protective order in Pennsylvania (and in other states, if you know), does the judge already have, in the absence of federal law, the authority to place restrictions or conditions on the possession of firearms?

A judge in Pennsylvania does have the authority under Pennsylvania law to issue restrictions on a person who is the subject of a Protection From Abuse (“PFA”) order prohibiting that person from owning or possessing a firearm. To obtain a temporary PFA, there must be an allegation that the gun was used or threatened to be used against the complainant when the initial petition is filed for a temporary order. For a permanent PFA, the judge can, after a hearing, determine that it is appropriate for the defendant to not possess any guns and for the defendant to turn in any guns possessed to the sheriff.

2. 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?

When a search warrant is issued, the police officer must swear in an affidavit that the officer has certain information that the officer states justifies probable cause for the search warrant. For an individual seeking a temporary PFA, which is what I believe Sen. Grassley refers to when he refers to an ex-parte TRO, the individual attests to certain information (*i.e.*, the defendant beat me up, threatened to kill me or other information indicating a threat of violence or actual violence against the complainant), and signs an affidavit swearing that the information is true and correct just as a police officer does when seeking a search warrant. If a judge believes that the allegation shows that there was a threat of or actual physical violence that endangers the person, then the ex-parte order is issued. The “standard” is merely the allegation that the person

swears to in his/her petition and anything else the judge ascertains when the judge questions the plaintiff at the temporary PFA proceeding. The standard is similar to that when a search warrant is issued, which is assuming that the information contained in the search warrant is correct, does it provide the police with the basis/ authority to search, subject to a later review by a judge during a motion to suppress hearing. Likewise when a temporary PFA is being sought, the judge grants it assuming that the information is true, subject to a later hearing where the defendant can challenge the PFA prior to a permanent PFA being granted.

As to the issue of depriving someone of their property, such as a firearm, without due process, I think the key is the temporary nature of the deprivation versus longer-term or permanent deprivation. When someone's property is taken pursuant to a search warrant, it is only temporary, subject to judicial review either in a motion to suppress and criminal trial, and/or a defendant can file a return of property motion to request judicial review of the property seized by the government, including guns. Likewise, when a temporary PFA is granted, including any order relating to the seizure of guns, this order is subject to a full, follow-up hearing before a judge, who must determine whether to make the temporary order permanent, and if so, under what conditions, including any part of the permanent order dealing with gun possession.

Finally, as to the question about depriving someone of property based on a prior conviction, the Violation of the Uniform Firearms Act, Pennsylvania Statute 6105 states that if someone has been convicted of certain crimes, is the subject of a PFA order that prohibits gun possession, or has a prior commitment to a mental health facility, the person is ineligible to own or possess a firearm. No Pennsylvania court has ever found this statute to be unconstitutional because there is a rational basis related to the prohibition in question, to wit, that of certain categories of people being ineligible to possess guns.