

“RED FLAG” LAWS: DUE PROCESS IS CRUCIAL

Federal law prohibits certain individuals from purchasing or possessing firearms or ammunition.ⁱ Among these prohibitions is anyone with a (i) misdemeanor domestic violence conviction or (ii) a person involuntarily committed to a mental institution or adjudicated a “mental defective.” However, federal law does not authorize law enforcement to seize firearms from individuals who law enforcement believes are a threat to themselves or others or those who may have a mental illness but have not been involuntarily committed or adjudicated a “mental defective.”

State laws vary on the ability of law enforcement to intervene, e.g. take a person into custody to an emergency room for a psychiatric evaluation. Many states have prohibiting categories that extend beyond those set by federal law. Whether it is expanding the definition of domestic violence to cover siblings and parents or extending the time-period when an individual is a prohibited person to cover a period before a court hearing occurs, state laws vary.

STATES WITH LAWS ALLOWING THE SEIZURE OF FIREARMS FROM “DANGEROUS” INDIVIDUALS

Nineteen states and the District of Columbia have implemented broader laws to authorize law enforcement to seek a court order to temporarily prevent access to firearms in certain situations where an individual is suspected of being an immediate threat to



themselves or others. These states have laws that are sometimes called Extreme Risk Protective Orders (ERPOs) or “Red Flag” laws. In Californiaⁱⁱ, Coloradoⁱⁱⁱ, Connecticut^{iv}, Delaware^v, Florida^{vi}, Hawaii^{vii}, Illinois^{viii}, Indiana^{ix}, Maryland^x, Massachusetts^{xi}, Nevada^{xii}, New Jersey^{xiii}, New Mexico^{xiv}, New York^{xv}, Oregon^{xvi}, Rhode Island^{xvii}, Vermont^{xviii}, Virginia^{xix}, Washington^{xx} and Washington, D.C.^{xxi}, if law enforcement officials or family members believe an individual is a threat to themselves or others, they can petition a court to have the individual’s firearms removed on a temporary basis.

The laws in these states are very similar. They allow law enforcement and, in most cases, immediate family members and others with a very close relationship with the person to seek an ex parte court order authorizing law enforcement to seize a person’s firearms for a period of time, thereby infringing upon that person’s Second Amendment Rights. Because these

Extreme Risk Protection Orders (ERPOs) do not involve federal prohibitors, (18 USC 922(g)), they are not submitted to and contained within the FBI NICS databases, unless specified by law.

CONSTITUTIONAL REQUIREMENT FOR DUE PROCESS

The ERPO laws in place provide for some level of due process. Whether the due process provided in those laws is constitutionally adequate for the deprivation of a fundamental civil liberty and constitutional rights is a serious concern. Normally, to deny a fundamental civil liberty there must be a pre-deprivation hearing on notice and with an opportunity to participate, unless given the exigencies of the circumstances it is not feasible to hold a pre-deprivation hearing. In that case, due process requires a prompt post-deprivation hearing, e.g. 24-72 hours. For example, when a person is arrested and in

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custody, he or she must be arraigned before a judge within 24-72 hours. It is unconstitutional and a violation of due process for one to be held in jail for a week or more before being arraigned before a judge. Several of the existing state “red flag” laws do not provide for a pre-deprivation hearing. They also do not provide for a post-deprivation hearing until 14 days have passed. Two weeks to wait for a due process hearing when a person’s fundamental civil liberties – their Second Amendment right to keep and bear arms – has been infringed upon by the government is simply not consistent with the

constitutional requirements of the Due Process Clause. In addition to the constitutional requirement for adequate due process, an ERPO bill should provide that it can only be issued upon sworn testimony and showing by clear and convincing evidence that the person that is subject of the petition (“respondent”) is an immediate and imminent threat to themselves or others. ERPO legislation should provide for the appointment of counsel paid for by the government if the respondent is unable to afford counsel.

The legislation should also provide that making a false statement

in support of a petition for an ERPO order is a criminal offense. And, the respondent should have a statutory civil cause of action against a person making a false statement.

Other considerations when drafting ERPO legislation is the duration of the order and providing for periodic judicial review of the order to determine whether the respondent remains an immediate and imminent risk to themselves or others.

When lawmakers are drafting new “red flag” proposals, these details must be considered to protect the Second Amendment and Due Process rights of Americans.

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- i Full list of prohibiting categories is available here: <https://www.atf.gov/firearms/identify-prohibited-persons>
 - ii See California Penal Code sections 18100 to 18205: http://leginfo.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=PEN&division=3.2.&title=2.&part=6.&chapter=&article=Cal.Penal.Code.18100_et_seq
Close family members include spouses, domestic partners, parents, children, siblings, grandparents, and grandchildren as well as the spouse’s parents, children, siblings, grandparents and grandchildren. Also covered are people who regularly live in the same house, or who have cohabitated within the last six months.
 - iii CO HB 1177, <https://leg.colorado.gov/bills/hb19-1177>
 - iv Conn. Gen. Stat. § 29-38C <https://law.justia.com/codes/connecticut/2011/title29/chap529/Sec29-38c.html>
 - v HB 302, passed April 24, 2018. <http://legis.delaware.gov/BillDetail?LegislationId=26339>
 - vi SB 7026, <https://www.flsenate.gov/Session/Bill/2018/7026/BillText/er/PDF>
 - vii 2019 HI SB 1466, https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=1466&year=2019
 - viii HB 2354, <http://www.ilga.gov/legislation/fulltext.asp?DocName=10000HB2354enr&GA=100&SessionId=91&DocType=HB&LegID=102977&DocNum=2354&GAID=14&Session=>
 - ix Ind. Code Ann. § 35-47-14 <https://law.justia.com/codes/indiana/2010/title35/ar47/ch14.html>
 - x Maryland HB 1302 was enacted on April 24, 2018. http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_250_hb1302E.pdf
 - xi Chapter 123 of the Acts of 2018, H. 4670, <https://malegislature.gov/Bills/190/H4670>
 - xii 2019 NV AB 291, <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6530/Overview>
 - xiii “Extreme Risk Protective Order Act of 2018,” P.L.2018, c.35 (C.2C:58-20 et al.). Assembly, No. 1217, https://www.njleg.state.nj.us/2018/Bills/A1500/1217_R3.PDF
 - xiv NM SB5, <https://www.nmlegis.gov/Sessions/20%20Regular/final/SB0005.pdf>
 - xv NY CLS CPLR § 6340 et seq., https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02689&term=2019&Summary=Y&Actions=Y
 - xvi Or. Rev. Stat. §166.525-543 https://www.oregonlegislature.gov/bills_laws/ors/ors166.html
 - xvii S2492A/H7688Aaa, <http://webserver.rilin.state.ri.us/BillText/BillText18/HouseText18/H7688Aaa.pdf>
 - xviii 13 V.S.A. § 4058 <https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT097/ACT097%20As%20Enacted.pdf>
 - xix VA HB 674 is effective July 1, 2020, <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0887>
 - xx Wash. Rev. Code Ann. § 7.94.010 _et seq. <http://app.leg.wa.gov/rcw/default.aspx?cite=7.94>
 - xxi B22-0588 Possession of Firearm and Ammunition Penalties Amendment Act of 2017 (now known as “Firearms Safety Omnibus Amendment Act of 2018”) <http://iims.dccouncil.us/Download/39205/B22-0588-Enrollment.pdf>

