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Firearm “Red Flag” Laws in the 116th Congress

In the last year, federal and state legislators have shown increased interest in passing so-called “red flag” or “extreme risk protection order” firearm laws. In general, such laws permit courts to issue temporary orders barring particular persons from possessing guns based on some showing of imminent danger or a risk of misuse. Following the February 2018 shooting at Marjory Stoneman Douglas High School in Parkland, FL, states have increasingly considered and enacted red flag laws. Legislation has also been introduced in the 116th Congress that would supplement or incentivize these state laws, criminalize at the federal level violations of qualifying extreme risk protection orders, or both. The Senate Judiciary Committee held a hearing on the subject of red flag laws in March 2019.

This In Focus provides an overview of the general features of red flag laws that have been enacted at the state level, briefly describes some of the red flag proposals in the 116th Congress, and notes the primary constitutional arguments that have been raised in favor of and in opposition to such laws.

General Features of Red Flag Laws

“Red flag” or “extreme risk protection order” laws generally provide procedures for certain persons to petition a court to order that firearms be temporarily taken or kept away from someone who poses a risk of committing gun violence. Currently, 17 states and the District of Columbia have passed some form of red flag law. These laws vary in the details, but common elements include the following:

- Only specified persons may petition a court for an extreme risk protection order. Typically, qualified persons are limited to law enforcement officers and, in many cases, family or household members.
- Both preliminary and final orders are available. A preliminary order may be entered *ex parte*, meaning that the person who is the subject of the order need not be given notice or appear. Such an order is typically of brief duration (anywhere from a few days to, at most, three weeks). After the person who is alleged to pose a risk of gun violence has been given notice and an opportunity to appear, a final order of longer duration may be entered. Final orders can last up to one year under most state provisions, with the opportunity for renewal.
- Before an order can be entered, some factual showing must be made that the person for whom the order is sought poses a risk of using a firearm to harm himself or others, with the stringency of the requisite showing depending on whether an *ex parte* or final order is requested. The standard of proof for many *ex parte* orders is reasonable or probable cause to believe the

person poses an imminent risk. For final orders, clear and convincing evidence of a significant danger is often required.

- Upon entry and service of an order, the person who is the subject of the order must relinquish his or her firearms (if he or she possesses any) immediately or within a certain amount of time. In many states, a warrant will or can also be issued authorizing seizure by law enforcement.

Proposals in the 116th Congress

Legislation has been introduced in both houses that would, among other things, incentivize additional states to adopt red flag laws and/or criminalize possession of firearms by persons who are subject to extreme risk protection orders. Some of these measures are briefly described below.

Incentivizing Adoption of State Legislation

Though varying in the details, several bills—chiefly, H.R. 744, H.R. 1236, S. 7, and S. 506— would establish grant programs to aid in implementation of red flag laws, conditioning the receipt of such grants by states or Indian tribes on adoption of laws that meet certain requirements (e.g., standards of proof for extreme risk protection orders and time limits on such orders). Under H.R. 1236, S. 7, and S. 506, states and Indian tribes that have adopted qualifying laws would also be given affirmative preference in the award of other discretionary grants.

S. 7 additionally would condition grant funding on a list of related requirements and prohibitions (e.g., requiring that *ex parte* orders be issued only on sworn affidavits or testimony). Further, the legislation would give states that have already enacted red flag laws that do not fully meet the requirements of the bill a one-year grace period during which they remain eligible to receive grant money so long as “similar” requirements are in place.

Violations of Extreme Risk Protection Orders

H.R. 744, H.R. 1236, H.R. 1745, S. 7, and S. 506 would amend Sections 922(d) and 922(g) of Title 18 of the U.S. Code. Section 922(g) currently criminalizes the possession, receipt, shipment, or transportation of firearms and ammunition by persons who fall into specific, risk-related categories (e.g., convicted felons). And Section 922(d), in current form, criminalizes the sale or disposal of firearms and ammunition to persons who fall into the same categories, provided that whoever sells or disposes of the firearms or ammunition knows or has reasonable cause to know of the disability.

Generally, the five bills propose to add persons who are subject to extreme risk protection orders to the prohibited

categories, making it a federal crime for persons subject to the orders to possess firearms and for anyone else who has reasonable cause to know about the orders to sell or give firearms to them.

Each bill would limit in different ways the kinds of orders that would make persons subject to the prohibitions in Section 922, and some of the limitations would potentially exclude certain states’ existing extreme risk protection order regimes. For example, H.R. 744 would limit the prohibitions to persons who are subject to final (not *ex parte*) orders, initiated by family members or law enforcement officers, based on clear and convincing evidence of “imminent, particularized, and substantial risk” of unlawful firearm use causing “death or serious physical injury.”

Constitutional Issues

The constitutionality of red flag laws has been a subject of public debate and unsuccessful court challenges in multiple states. Opponents of red flag laws argue that they are unconstitutional for two primary reasons: first, because they impose impermissible burdens on the Second Amendment right to keep and bear arms, and second, because they deprive law-abiding citizens of their rights (or their property) without due process of law in violation of the Fourteenth Amendment. Proponents counter that (1) under Supreme Court precedent, red flag laws place legitimate restrictions on gun possession by persons who pose serious risks to themselves and others, and (2) hearing and review procedures are sufficient to meet the constitutional demands of due process.

Second Amendment

The Second Amendment states that “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.” In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an individual right to possess firearms for historically lawful purposes. However, the Court also recognized that “[l]ike most rights, the right secured by the Second Amendment is not unlimited” and further announced that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by” certain persons, among other “presumptively lawful” regulations.

Based on these pronouncements, courts have upheld a number of state and federal firearm restrictions and prohibitions in the face of Second Amendment challenges, including red flag laws in at least two states. In *Hope v. State*, for example, an appellate court in Connecticut rejected a challenge to the state’s firearm removal law, reasoning that the law does not implicate the Second Amendment because “it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes.” The *Hope* court also viewed Connecticut’s law as “an example of the longstanding ‘presumptively lawful regulatory measures’ articulated” in *Heller*. Similarly, an Indiana appellate court determined in *Redington v. State* that Indiana’s red flag law does not violate a state

constitutional provision analogous to the Second Amendment, concluding that because only persons proven by clear and convincing evidence to “present a risk of personal injury to either themselves or other individuals” are subject to firearm seizure, the law does not “place a material burden” on the “core” right of law-abiding citizens to bear arms for self-defense.

It thus appears that, to date, red flag laws have withstood Second Amendment challenges in court. Nevertheless, because of the limited amount of case law, there remains the possibility that a court taking a broad view of the Second Amendment could reach a different conclusion.

Due Process

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from depriving a person of “life, liberty, or property, without due process of law.” Among other things, the Due Process Clauses require that the government afford persons with adequate procedures when depriving them of a constitutionally protected “liberty” or “property” interest. In the context of red flag laws, at least two constitutionally protected interests could be affected: (1) the fundamental liberty interest in a person’s right to keep and bear arms, and (2) the property interest in the arms themselves.

Assuming one of these interests to be at issue, a court will ask whether the government has used constitutionally sufficient procedures in deciding whether to deprive a person of the interest. The appropriate process due—that is, the type of notice, the manner and time of a hearing regarding the deprivation, and the identity of the decisionmaker—will vary based on the specific circumstances at hand, including both the private party’s and the government’s interests.

Opponents of red flag laws point out that typically, due process requires that a person be given an opportunity to be heard *before* the deprivation of a protected interest may occur. Because most red flag laws provide for an initial *ex parte* process by which guns may be ordered removed or kept from persons without notice to them, the argument goes that post-deprivation procedures are constitutionally inadequate. Conversely, proponents of red flag legislation point out that under Supreme Court precedent, post-deprivation process can satisfy the Due Process Clause where “a State must act quickly, or where it would be impracticable to provide pre-deprivation process.”

Thus far, it does not appear that any reported court decisions have addressed due process challenges to state red flag laws, though some federal and state courts have upheld *ex parte* orders in other contexts where there was imminent danger and post-deprivation hearings were held expeditiously.

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