

RED FLAG LAWS



[FPC] FIREARMS
POLICY
COALITION POLICY BRIEF

Red Flag Laws Raise Red Flags of Their Own

WRITTEN BY:

MATTHEW LAROSIERE, JOSEPH GREENLEE, AND ADAM KRAUT

EXECUTIVE SUMMARY

RED FLAG” LAWS, OFTEN CALLED “Extreme Risk Protection Orders” and “Gun Violence Restraining Orders” (hereinafter referred to collectively as “red flag laws”), are mechanisms that allow a statutorily defined class of people to petition a court to seize the arms of an individual they believe to be dangerous.¹

As enacted thus far, these laws deprive people who have not committed any crime to be deprived of their property and ability to defend themselves without due process. And despite being conflated with mental health reform,² red flag laws do not improve access to mental health care or address the important issues of untreated or under-treated mental illness. Indeed, red flag laws may even deter those who might otherwise seek mental health treatment or counseling.³

Red flag laws pose serious due process concerns under every implementation to date.⁴ The 5th and 14th Amendments of the United States Constitution proscribe the deprivation of “life, liberty, or property without due process of the law.”⁵ By depriving individuals of their property and rights without having been formally charged, arraigned, or convicted of a crime, red flag laws violate this constitutional right.

In so far as orders are issued *ex parte* (i.e., without the person the order is sought against present for the proceedings), red flag laws invert the presumption of due process. This deprives the accused person of the opportunity to defend himself or cross-examine the accuser. The ACLU of Rhode Island expressed concern over a proposed red flag law due to “the breadth of [the] legislation, its impact on civil liberties, and the precedent it sets for the use of coercive measures against individuals not because they

¹ Presently the state of the law in: California, Cal. Penal Code §§ 18125, 18150; Colorado, Colo. Rev. Stat. Ann. § 13-14.5-103; Connecticut, Conn. Gen. Stat. Ann. § 29-38C; Delaware, 10 Del. Code Ann. §§ 7703-7704; The District of Columbia, D.C. Code Ann. §§ 7-2510.02-04; Florida, Fla. Stat. Ann. § 790.401; 430 Ill. Comp. Stat. Ann. 67/35, 40, Ind. Code Ann. § 35-47-14-2, Md. Code Ann. Pub. Safety § 5-602, Mass. Ann.Law. ch. 140 §131R, N.J. Stat. Ann. §§ 2C:58-23-24, N.Y. C.P.L.R. Law §§ 6341-43, Or. Rev. Stat. Ann. § 166.527, Wash. Rev. Code Ann. § 7.94.030, R.I. Gen. Laws §§ 8-8.3-1 *et. seq.*, Vt. Stat. Ann. tit. 13 §§ 40534054.

² Proponents often present red flag laws as mental health bills. For example, Ohio Governor Mike DeWine claimed his red flag bill would “get them the mental health treatment that they need, get them whatever help that they need.” Jon Schuppe, *Red flag laws often have bipartisan support. But do they stop mass shootings?* NBC News, Aug. 6, 2019, <https://nbcnews.to/2KvpzWY>. Indiana state representative Wendy McNamara explained, “we want to make sure that we find help for these individuals.” Isaiah Seibert, *Want to prevent gun violence? Some states turn to ‘red flag’ laws*, NC Health News, Aug. 13, 2019, <https://bit.ly/2ZcTIFf>. Sheriff Tony Spurlock, a leading proponent of Colorado’s law, argued that the law “will help save and support mental health.” Jennifer Kovalski, Blair Miller, *Colorado lawmakers introduce new ‘red flag’ gun violence and mental health measure*, The Denver Channel, Feb. 14, 2019, <https://bit.ly/2Zi170i>. Cf. Thomas Massie, John Lott, *‘Red Flag’ Laws Are the Wrong Solution to Mass Shootings*, National Review, Aug. 12, 2019, <https://bit.ly/2ZgfjYa> (“red-flag laws are not specifically about about mental illness. Indeed, only one state law even mentions the term.”).

³ See Shelby Arnold, Alisha Desai, & David DeMatteo, *Keeping Guns Away from Potentially Dangerous People*, Vol 49, No. 8 Am. Psychol. Ass’n 27 (2018) (“These laws may also overstate the relationship between gun violence and mental illness, which propagates stigma and may discourage people from seeking mental health treatment.”).

⁴ Cal. Penal Code § 18125 (reasonable cause), D.C. Code Ann. § 7-2510.04 (probable cause), Fla. Stat. Ann. §790.401(4)(c)(reasonable cause), 430 Ill. Comp. Stat. Ann. 67/35 (f) (probable cause), Md. Code Ann., Pub. Safety § 5-603(a)(4)(2019) (probable cause), Mass. Ann.Law. ch.140 § 131T(a) (reasonable cause), N.J. Stat. Ann. § 2C:58-23(e) (good cause), N.Y. C.P.L.R. § 6342(a) (probable cause), R.I. Gen. Laws § 8-8.3-4(a) (probable cause), Wash. Rev. Code Ann. § 7.94.050(3) (reasonable cause). Cf. Vt. Stat. Ann. tit. 13 § 4053 (clear and convincing evidence).

⁵ U.S. Const. amends. V, XIV.

are alleged to have committed any crime, but because somebody believes they might, someday, commit one.”⁶

Put another way, this “Minority Report”⁷ style legislation purports to predict crime before it occurs then attach a court order stripping that person of their rights and compelling them to give up—or have seized by armed police—their property (guns, ammunition, gun parts, etc.). Failing to abide by these court orders generally results in serious criminal liability.⁸ Those who find themselves subjected to such an order are not typically given a right to an appointed attorney,⁹ must engage in lengthy and onerous processes to “defend themselves”¹⁰ and face difficulty in having their property returned after being seized.¹¹ Lastly, many “red flag” laws provide no deterrent to prevent individuals from maliciously accusing others¹²

“Red flag” laws provide no deterrent to prevent individuals from maliciously accusing others

in 1999.¹³ Indiana came second in 2005.¹⁴ California was next, adopting a similar law in 2013,¹⁵ and creating the framework that other states would work from. It was not until 2018 that these laws gained momentum. As of August 2019, seventeen states and the District of Columbia have some form of red flag law. In the 115th Congress (2017-2018), Senators Richard Blumenthal (D - CT) and Lindsey Graham (R - SC) introduced the first federal bill on the topic, the “Federal Extreme Risk Protection Order Act of 2018.”¹⁶ Senator Marco Rubio introduced a similar bill in 2019.¹⁷

Red flag bills came front and center in mid-2019. After a series of horrific murders, the public push to “do something” in response to the murders landed, for one reason or another, on red flag laws. This was likely because of their perceptibility as moderate gun control, and the suggested (imperfect) connection to “mental health reform.” In any event, red flag laws found bipartisan support in 2019, albeit with passionate detractors.¹⁸

HISTORY OF THE ISSUE

The first “red flag” law was adopted in Connecticut

⁶ Rhode Island ACLU, *An Analysis of 18-H 7688 and 18-S 2492, Relating to Extreme Risk Protective Orders*, http://riaclu.org/images/uploads/180302_analysis_RedFlagsLegislation.pdf (last visited Aug. 18, 2019).

⁷ *Minority Report*, (20th Century Fox, 2002). (an action-detective thriller set in Washington D.C. in 2054, where police utilize a psychic technology to arrest and convict murderers before they commit their crime. Tom Cruise plays the head of this Precrime unit and is himself accused of the future murder of a man he hasn’t even met.)

⁸ E.g., In Illinois, it is a Class A misdemeanor. 430 Ill. Comp. Stat. 67/65. In Colorado, it is a class 2 misdemeanor. Colo. Rev. Stat. Ann. § 13-14.5-111. In Washington, the first two violations are gross misdemeanors that extend the firearms prohibition an additional five years each, and the third conviction is a class C felony. Wash. Rev. Code Ann. § 7.94.120.

⁹ Of the 18 jurisdictions that have imposed some red flag law as of August 13, 2019, only Colorado provides for appointed representation for those subject to orders. See Colo. Rev. Stat. Ann. § 13-14.5-104(1).

¹⁰ Respondents are put in a position of having to “defend” against an accusation that they are a danger to themselves or others.

¹¹ See Parker GF., *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006-2013*,

<https://www.ncbi.nlm.nih.gov/pubmed/25827648> (Finding that gun owners in Indiana waited an average of more than nine months before a court decided whether police could keep their firearms).

¹² Some states, like Colorado, provide no civil remedy for victims who were maliciously accused. Other states, like Maryland, do. MD. PUB. SAFETY § 5-609.

¹³ Conn. Gen. Stat. Ann. § 99-212.

¹⁴ P.L.1-2006, SEC.537, eff. Mar. 24, 2006

¹⁵ CA Stats. 2014, c. 872 (A.B.1014), § 3, eff. Jan. 1, 2015 16 Federal Extreme Risk Protection Order Act of 2018, S. 2521, 115th Cong. § 932 (2018).

¹⁶ Federal Extreme Risk Protection Order Act of 2018, S. 2521, 115th Cong. § 932 (2018).

¹⁷ Extreme Risk Protection Order and Violence Prevention Act of 2019, S. 7, 116th Cong. § 3042 (2019).

¹⁸ Thomas Massie, John Lott, ‘Red Flag’ Laws Are the Wrong Solution to Mass Shootings , National Review, Aug.12, 2019, <https://bit.ly/2ZgfjYa>.

PRESENT STATE OF THE ISSUE

Currently, seventeen states and the District of Columbia have enacted some form of red flag law.¹⁹ The policies vary in several meaningful ways, covered herein.

WHO CAN BRING A PETITION?

The exact method as to who can petition the court for an order to be issued against another varies from jurisdiction to jurisdiction. In some states, family or household members can submit a petition.²⁰ In others, it is restricted to law enforcement or other state officials.²¹ And there are some in which a much wider net of individuals, including mental health professionals, educators, school administrators, former roommates, or even co-workers are able to submit a petition.²²

WHAT HAPPENS AFTER A PETITION IS BROUGHT?

The manner in which an order is issued varies by jurisdiction. In all states, orders can be issued ex parte (that is, without the presence of the person

against whom the order is sought). Orders can also be issued after the subject person receives notice and has a hearing, although the manner in which the laws are worded seems to suggest that ex parte is the more commonly used method. Generally, “final” orders—that is, those after a hearing—last up to a year. Most states allow the restricted party to request a hearing to terminate the order early.²³ Most states allow the original petitioner to request that the order be extended once the initial year has concluded.²⁴

The standards of proof required to obtain an order also vary from state to state. In ex parte proceedings, ten states and the District of Columbia require only that a petitioner show “probable,” “good,” or “reasonable” cause for an order to attach.²⁵ Of all evidentiary standards, these require the lowest amount of proof to meet their burden—and are especially easy to satisfy when the opposing party is not present to defend himself. This malleable, easily cleared standard is inconsistent with the “extreme risk” the laws’ titles purport to require.²⁶

¹⁹ California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, New Jersey, New York, Nevada, Oregon, Rhode Island, Washington, Vermont.

²⁰ California (Cal. Penal Code § 18150), Colorado (C.R.S.A. § 13-14.5-103), Delaware (10 Del.C. § 7704. “Petitioner” defined as “[a] family member of the respondent...” 10 Del.C. § 7701), District of Columbia (DC ST §§ 7-2510.02, 7-2510.04. “Petitioner defined as “[r]elated to the respondent by blood, adoption, guardianship, marriage, domestic partnership, having a child in common, cohabitating, or maintaining a romantic, dating, or sexual relationship...” DC ST § 7-2510.01), Hawaii (2019 HI S.B. 1466, effective January 1, 2020. “Petitioner” defined to include “family or household member of the respondent...”), Illinois (430 Ill. Comp. Stat 67/35. “Petitioner” defined as “a family member of the respondent...” and “family member of the respondent” defined as “a spouse, parent, child, or step-child of the respondent, any other person related by blood or present marriage to the respondent, or a person who shares a common dwelling with the respondent.” 430 Ill. Comp. Stat 67/5), Maryland (Md. Code Ann., Pub. Safety § 5-601. “Petitioner” defined to include spouse, cohabitant, person related by blood, marriage or adoption, individual who has a common child, current dating or intimate partner, or current or former legal guardian. Id.), Massachusetts (M.G.L.A. 140 § 131R. “Petitioner” defined to include “family or household member.” Id.), Nevada (2019 NV AB 291, eff. Jan. 1, 2020. Sec. 11(2)), New Jersey (N.J. Stat. Ann. § 2C:58-21. eff. Sep. 1, 2019. “Petitioner” defined to include a “family or household member.” Id.), New York (McKinney’s CPLR § 6341. eff. Aug. 24, 2019. “Petitioner” defined to include a “family or household member.” McKinney’s CPLR § 6340.), Oregon (Or. Rev. Stat. Ann. § 166.527), and Washington (Rev. Code Wash. § 7.94.030).

²¹ Florida (Fla. Stat. § 790.401), Rhode Island (R.I. Gen. Laws § 8-8.3-1. “Petitioner means a law enforcement agency...”), and Vermont (13 V.S.A. § 4053).

²² District of Columbia (DC ST § 7-2510.01. “Petitioner” defined to include a “mental health professional.”), Hawaii (2019 HI S.B. 1466, effective January 1, 2020. “Petitioner” defined to include “medical professional, educator, or colleague”), Maryland (Md. Code Ann., Pub. Safety § 5-601. “Petitioner” defined to include a “physician, psychologist, clinical social worker, licensed clinical professional counselor, clinical nurse specialist in psychiatric and mental health nursing, psychiatric nurse practitioner, licensed clinical marriage or family therapist, or health officer or designee of a health officer who has examined the individual...”), and New York (McKinney’s CPLR § 6340. “Petitioner” defined to include “a school administrator” or their designee, including a “school teacher, school guidance counselor, school psychologist, school social worker, school nurse, or other school personnel required to hold a teaching or administrative license or certificate, and full or part-time compensated school employee required to hold a temporary coaching license or professional coaching certificate.”).

²³ Connecticut is currently the exception.

²⁴ Connecticut lacks a renewal process. Indiana and New Jersey do not require renewals.

²⁵ See *supra*, Note 4.

²⁶ “Florida nevertheless allows judges to consider any evidence they deem relevant, and its “significant danger” test is inherently vague, notwithstanding its “clear and convincing” standard of proof. Some states are even looser, requiring only “a preponderance of the evidence,” meaning any likelihood greater than 50 percent that the respondent poses a “significant” risk.” Jacob Sullum, *‘Red Flag’ Laws Leave Gun Owners Defenseless*, Reason.com, (Aug. 7, 2019) <https://reason.com/2019/08/07/red-flag-laws-leave-gun-owners-defenseless/>.

Moreover, despite being presented as an emergency solution to imminent crime, many of the laws require no imminence. In contrast, civil protection orders often do.²⁷

Whether, when, if, and to whom firearms are relinquished varies from state to state. Some states require that firearms, ammunition, and magazines be surrendered to law enforcement or a licensed dealer.²⁸ Other states allow a person to relinquish their firearms to another individual, provided that person is not prohibited from possessing firearms and ammunition or is a Federal Firearms Licensee.²⁹ Several states require that any license to carry a concealed firearm be relinquished at the same time.³⁰

In Colorado, the accused person's concealed carry license is automatically revoked as soon as the initial petition is filed.³¹

In ten states and the District of Columbia, ex parte orders can last from 14 to 21 days. The ex parte order will then automatically expire, unless a hearing is held, at which time a final order may be issued. In

five states, the evidentiary standard to obtain a final order is still an extremely low, preponderance of the evidence standard.³² While most final orders may last up to one year—an excessive duration for an emergency order—a final order obtained in New Jersey lasts indefinitely, unless a court orders the termination of the order after a hearing.³³

This malleable, easily cleared standard is inconsistent with the “extreme risk” the laws’ titles purport to require.

POTENTIAL FOR ABUSE

Because red flag laws are rooted in third-party enforcement, there is an inherent potential for abuse by third parties. Concerns include fraudulent, malicious, or reckless petitions. Against a backdrop of “swatting,”³⁴ and combined with

the lax standards of proof, red flag laws threaten ordinary Americans with potentially deadly encounters with police.³⁵ The laws, as presently written, invite domestic terrorists to weaponize the court system to strip the rights of their enemies or political opponents.³⁶ The potential for abuse is exacerbated by a distinct lack of neces-

²⁷ See *Domestic Violence Civil Protection Orders (CPO); Statutory Summary Chart*, American Bar Association, Mar. 2014, <https://bit.ly/2Mv6zLI>.

²⁸ California (Cal. Penal Code § 18120), Colorado (C.R.S.A. § 13-14.5-108), Connecticut (C.G.S.A. § 29-38c. Law Enforcement serves a search warrant to remove firearms.), Delaware (10 Del.C. §§ 7703, 7704), District of Columbia (DC ST § 7-2510.07), Florida (Fla. Stat. § 790.401(7)), Hawaii (2019 HI S.B. 1466, eff. Jan. 1, 2020.), 430 Ill. Comp. Stat 67/35(g)(2), Indiana (IC § 35-47-14-2), Maryland (Md. Code Ann., Pub. Safety § 5-604), Massachusetts (M.G.L.A. 140 § 131S), New Jersey (N.J. Stat. Ann. § 2C:58-26), New York (McKinney’s CPLR § 6342), Oregon (O.R.S. § 166.537), Rhode Island (R.I. Gen. Laws § 8-8.3-4), Vermont (13 V.S.A. § 4059), and Washington (Rev. Code Wash. § 7.94.090).

²⁹ California (Cal. Penal Code § 18120), Colorado (C.R.S.A. § 13-14.5-108), Connecticut (C.G.S.A. § 29-38c), Delaware (10 Del.C. §§ 7703, 7704), New Jersey (N.J. Stat. Ann. § 2C:58-26), Oregon (O.R.S. § 166.537), and Vermont (13 V.S.A. § 4059). ³⁰ Colorado (C.R.S.A. § 13-14.5-108(1)(b)), District of Columbia (DC ST § 7-2510.07(b)), Florida (Fla. Stat. § 790.401(7)), Massachusetts (M.G.L.A. 140 § 131S), Oregon (O.R.S. § 166.537), and Washington (Rev. Code Wash. § 7.94.090).

³¹ This exacerbates the due process concern, as the license itself is an interest lost immediately upon petition. See, e.g. , C.R.S.A. § 13-14.5-110(3).

³² “Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.” *Legal Information Institute, preponderance of the evidence*, https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Aug. 19, 2019).

³³ N.J. Stat. Ann. § 2C:58-25.

³⁴ “Swatting is a criminal harassment tactic of deceiving an emergency service (via such means as hoaxing an emergency services dispatcher) into sending a police and emergency service response team to another person’s address.” *Swatting*, Wikipedia, (last visited Aug. 18, 2019) <https://en.wikipedia.org/wiki/Swatting>.

³⁵ The enforcement of red flag laws have already claimed human life. In Maryland, law enforcement arrived at 61-year-old Gary Willis’s home at 5:17 a.m. to confiscate his firearms. Taken by surprise, Willis answered the door with his firearm in his hand. After a brief argument over the firearm, an officer fatally shot Willis. *Maryland Officers Serving Red Flag Gun Removal Order Fatally Shoot Armed Man*, CBS News, Nov. 6, 2018, <https://cbn.ws/2zJ2sTw>.

³⁶ This potential is summed up in a tweet by President Trump. “ Would Chris Cuomo be given a Red Flag for his recent rant? Filthy language and a total loss of control. He shouldn’t be allowed to have any weapon. He’s nuts!” @realDonaldTrump, TWITTER (Aug. 13, 2019, 12:01 AM), <https://bit.ly/2PgiAGS>.

sary penalties for those who bring fraudulent, malicious, or reckless petitions, and a lack of statutory civil remedy for victims of abuse.

HOW EFFECTIVE ARE RED FLAG LAWS?

There is no conclusive evidence that red flag laws are effective in deterring violence.³⁷ Given their “pre-crime” nature, it is extremely difficult to quantify what, if any, effect the laws have on deterring or preventing violence. Moreover, in some instances, the laws are not even utilized or layed dormant for a period of time before being put into action.³⁸

WHAT IS THE FUTURE OF RED FLAG LAWS UNDER PRESENT LAW?

Whether new laws sail through or are passed bitterly, what’s certain is that repealing extant law is incredibly difficult. Marriage to new and unproven policy is problematic. Sunset provisions, which would enable legislatures to look back and assess the efficacy of laws, while not curative of problems, are helpful.

Despite the novelty of “red flag” laws, they have to-date failed to include a sunset provision. Given the perilous nature of establishing a system designed to eliminate constitutional rights through ex parte proceedings, a sunset provision would be prudent in case the system is ineffective and abused as many suspect it will be.

The laws...invite domestic terrorists to weaponize the court system to strip the rights of their enemies or political opponents.

OUR POSITION & OUR POSITION’S CONNECTION TO VALUES/PRINCIPLES

Firearms Policy Coalition is firmly against the adoption and implementation of red flag laws in all current forms. The laws deprive individuals of their right to due process of law before their rights are eliminated and property seized, a result that should offend anyone who values the Constitution and what it stands for.

“Red flag” laws are riddled with constitutionally unsound principles,

as well as practical issues. For one, there are no provisions for a court-appointed attorney to represent an accused individual during the proceedings, resulting in people potentially having to expend thousands of dollars to avail themselves of any defense.

Many red flag laws lack provisions requiring the return of seized property after the expiration of an order. This means that individuals who seek the return of their rightfully owned property must take independent and expensive legal action in order to have their property returned.³⁹ Making matters worse, such legal action is often fruitless, as governments have not always been required to return firearms to their lawful owners.⁴⁰ This makes red flag laws especially harmful to financially disadvantaged individuals, who are most likely to be the target of abuse from the government,⁴¹ and also most likely to be violently victimized.⁴² Far from protecting potential victims, red flag laws manufacture a new class of victims, with a dangerous potential to disarm those most likely to need a competent mechanism of self-defense. □

³⁷ Found. for Econ. Educ., (Aug. 10, 2019), <https://fee.org/articles/7-reasons-to-oppose-red-flag-guns-laws/> (“The evidence,” *The New York Times* recently reported, “for whether extreme risk protection orders work to prevent gun violence is inconclusive, according to a study by the RAND Corporation on the effectiveness of gun safety measures.”).

³⁸ Peter Jamison & Peter Hermann, *Some US lawmakers want a ‘red flag’ law. But states have had mixed results*, *Washington Post*. (Aug. 8, 2019), <https://wapo.st/2HfHcJq> (“California’s law went nearly unused for two years after its passage in 2016. Not a single request for a gun to be removed has been filed under the D.C. measure, which took effect at the beginning of this year.”).

³⁹ Because there is no mandatory return of seized property, individual seeking their property back must formally petition the state for the return of their property, often requiring independent counsel to be successful.

⁴⁰ See *City of San Jose v. Rodriguez*, No. H040317, 2015 WL 1541988 (Cal. Ct. App. Apr. 2, 2015) (no constitutional violation when city seized and refused to return arms to citizen with Second Amendment rights intact); *Walters v. Wolf*, 660 F.3d 307 (8th Cir. 2011) (due process violation but no Second Amendment violation).

⁴¹ See *Criminalization of Race and Poverty*, Institute for Policy Studies, <https://ips-dc.org/criminalization-of-race-and-poverty/> (last visited Aug. 20, 2019).

⁴² Jim Norman, *Young, Poor, Urban Dwellers Most Likely to Be Crime Victims*, *Gallup*, Nov. 6, 2015, <https://bit.ly/2zdKQ2m>.

