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The Constitutional Case for "Red Flag" Laws

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JURIST Guest Columnist Timothy Zick, the John Marshall Professor of Government & Citizenship at William & Mary Law School, discusses the constitutionality of new "Red Flag" Laws which allow law enforcement to seize guns from private citizens...

Suppose someone **posts** a message on social media suggesting he might shoot up a movie theatre, and punctuates the point with a photo in which he is holding an AK-47-style rifle. Can the government temporarily confiscate the person's firearms, in order to ensure that he does not pose a threat to himself or members of the community?

Seventeen states and the District of Columbia have enacted so-called “red flag” or “risk-based gun removal” laws. The terms of the laws vary, but they generally allow law enforcement officers, family members, and others to petition courts to remove weapons from people who may be dangerous and prevent them from buying other weapons. Red flag laws allow a court to issue a temporary emergency removal order to seize guns, typically for between 14 to 45 days, in order to determine whether the owner poses a serious threat to himself or others. A subsequent order can result in the removal of guns for a longer period, in some states up to a year, upon a showing that the person continues to pose a threat to himself or others.

Red flag laws have proliferated in the wake of mass shootings at schools, churches, and other places. They currently enjoy widespread – including rare bipartisan – support. According to a poll by American Public Media Research Lab, Americans support such laws by as much as 77%. Not everyone is a fan. Gun rights proponents have warned that the laws presume guilt without a criminal trial, deprive owners of **Second Amendment** rights, violate freedom of speech, and are a means of **confiscating** firearms. An increasing number of localities have declared themselves “**Second Amendment sanctuaries**,” partly in response to the enactment of red flag laws. In some of these locales, law enforcement has vowed not to enforce the laws.

While red flag laws raise important constitutional issues, some opponents have overstated these concerns. The central constitutional question raised by red flag laws relates to process – the nature and timing of the hearing required before a court temporarily removes guns.

Even temporary deprivations of property or liberty raise serious constitutional concerns. Thus, President Trump’s suggestion in March 2018, “Take the guns first, go through due process second,” is wholly inconsistent with basic notions of procedural fairness. Contrary to **some claims**, however, red flag laws do not follow the President’s suggested approach. To the contrary, they expressly require a judicial order before removal of firearms. According to **some gun rights proponents**, only a criminal trial can support temporary removal of guns. However, red flag laws authorize a civil proceeding; they do not involve any criminal charges or punishments.

More generally, opponents characterize red flag laws as constitutional outliers, since they do not require a trial in advance of temporary removal. In fact, temporary deprivations are not foreign to law. Indeed, states have modeled red flag removals on domestic violence restraining orders, which temporarily deprive alleged abusers of significant liberty interests, including in some cases access to the residence and custodial rights, without a trial. Civil commitment proceedings, which can result in involuntary confinement in a mental institution for extended periods, also do not require full-blown trials. The process required varies with the nature of the deprivation and the risks involved. Thus, a higher standard of proof and greater process may be required for involuntary commitment on grounds of mental illness than for other temporary restrictions on a person’s liberty.

Typically, laws provide an opportunity to be heard prior to the deprivation of liberty or property. Another argument opponents of red flag laws have made is that initial *ex parte* removals – those ordered without providing the owner the opportunity to appear – are unconstitutional. However, the Supreme Court has held that where a state must act quickly, or where it would be impracticable to provide pre-deprivation process, post-deprivation process is adequate. For example, courts can issue *ex parte* civil protective orders in the domestic abuse context and civil commitment orders. Where the gun removal is for a very short duration and based on a finding that the owner poses a danger to self or others, *ex parte* proceedings satisfy due process.

Given that property and liberty interests are at stake, the standard for longer-term removals should be relatively high, and indeed higher than the standard for briefer *ex parte* removals. Several state laws require “clear and convincing” evidence that the person poses a safety risk to himself or others. Under that standard, petitioners have to present specific information indicating such a risk. Consistent with due process, red flag laws also require a prompt judicial decision. Additionally, the laws provide safeguards that allow courts to correct unfavorable rulings, such as suspension of a confiscation and hard time limits on removal. Finally, to curtail abuse, some state laws impose penalties for false removal petitions.

Thus far, lower courts have **upheld** laws that have some or many of these process features. State red flag laws vary, and insofar as the laws do not include these or similar kinds of protections they may still be subject to challenge on due process grounds. Although no procedure can guarantee a court will not wrongly deprive an owner of firearms, state red flag laws are generally consistent with procedural fairness. Although many of the laws are new, some **early evidence** indicates that courts are not rubber-stamping removal petitions. Courts must faithfully apply the standards in red flag laws, and legislatures should ensure their laws are serving the purpose of reducing suicide and gun violence.

Although possession of arms is at issue, the Second Amendment poses no serious barrier to enforcement of red flag laws. In **District of Columbia v. Heller**, the Supreme Court limited the individual right to keep and bear arms to “law-abiding and responsible citizens.” The petition itself does not render the subject an outlaw, or prove he is an irresponsible citizen. Rather, if the petitioner demonstrates that the stated risk is present, the law authorizes temporary removal. On this reasoning, courts have **held** that red flag laws do not violate the Second Amendment.

Finally, some have raised **First Amendment** concerns relating to removal petitions. Suppose, for example, that the basis for a removal petition consists solely of statements like the one at the beginning of this post. Gun owners do not have a First Amendment right to communicate threats or incite unlawful conduct. Even assuming the speech is fully protected courts may still consider it when performing the risk assessment, just as they do in domestic violence and civil commitment cases. That does not mean free speech concerns are wholly absent in some cases. Petitions based solely on communication of offensive or derogatory messages, judicial consideration of political or other associational affiliation in determining dangerousness, or

evidence of official retaliation for speech raise such concerns. In most cases, however, the standards of proof for gun removal, post-deprivation hearings, and punishment for false petitions alleviate these concerns.

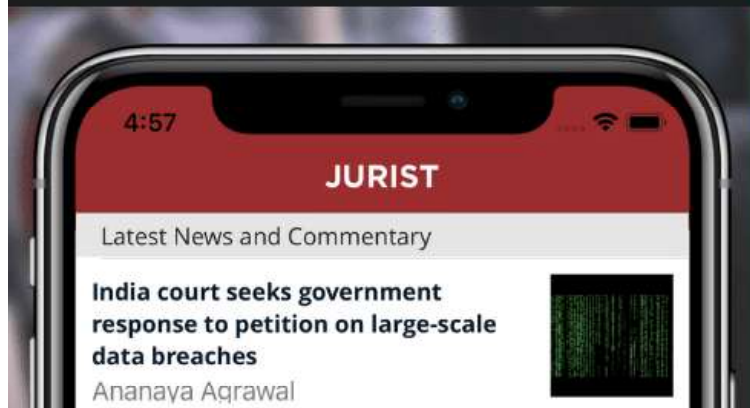
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