

MEMORANDUM

FROM: JOB

TO:

CC:

DATE: August 20 2019

RE: Red Flag Op Ed

The National Association for Gun Rights opposes Red Flag laws for two reasons. First, existing proposals, modeled after language created by Michael Bloomberg's gun control group, do not protect due process rights. Second, the idea underlying these laws is not to promote public safety, but to attack guns and gun owners.

First, every existing law and every proposed law calls for entry of a court order barring a person from possessing firearms, without any notice or opportunity to be heard by that person, before entry of the order. This is a so-called *ex parte* order. *Ex parte* is a phrase that means that only one side to the dispute is heard by the judge. The opposing side is not notified of the appearance and therefore cannot be heard. Due process is a phrase found in the 14th amendment to the U.S. Constitution:

“ . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ”

The term due process or procedural due process typically means two fundamental things. First, a person receives notice of planned adverse governmental action and second, the person gets an opportunity to be heard before such action is taken, before an impartial adjudicative body. Depending on the situation, due process can also mean a person is entitled to such things as appointment of an attorney at no cost if the person cannot afford one, the right to compel attendance of witnesses or compel production of documents at a hearing, the right to confront witnesses and cross examine witnesses, or the right to appointment of an expert witness (such as a psychologist or psychiatrist) at no cost, if the person cannot afford one.

Red Flag laws dispense with these fundamental aspects of due process. Instead Red Flag laws provide notice and a hearing after entry of the order. At that point, the person has already lost their right to keep and bear arms, and has had their firearms seized, under these laws. None of these laws explain why notice and a hearing cannot be provided before the civil right is revoked by court order. Further, these laws do not typically provide for appointment of counsel or an expert to the indigent. They are unclear or vague on a right to compel appearance of witnesses or compel production of documents. Some of these laws allow “evidence” to be in the form of written statements, depriving the person losing their civil right the chance to cross examine or confront the witnesses against them.

The closest existing process to Red Flag laws are civil commitment laws. These laws allow a person to be seized and detained by law enforcement without advance notice or even a court order, when the person suffers from a mental disease and is in imminent danger of harm to themselves or others. These laws provide for a short window of time (typically two or three days) that a person can be held and be involuntarily treated by a physician (typically with drugs) before they must be brought before a judge. These persons are entitled to an attorney at no cost to them. The basis for post-seizure process in these laws is that the person poses an immediate threat and it must be dealt with right then; there is no time to notify the person or seek an order before seizure.

However, Red Flag laws do not require a person be an imminent danger to themselves or others before such an order can be entered. Instead they speak of a “danger” in the “near future.” Imminence is not required, nor is a mental disease. These laws should provide due process before entry of the order. The laws themselves say that the danger need not be immediate or imminent; because the authors want as low a standard as possible for entry of the order. But a lower standard for the order means the denial of due process is unjustified.

Often the assumed reason that notice and a hearing is not provided is because of the fear that such notice would be the immediate cause of provoking the person to commit violence. Instead of giving the person a chance to act out before their firearms are seized, the firearms are seized first. However none of the laws require such a finding as a condition for entry of an *ex parte* order. This implicit assumption is never articulated. And this issue leads right into the second fundamental problem with Red Flag laws. If a person is such a danger to the public that they cannot be notified of a plan to revoke their right to keep and bear arms, why does the Red Flag law leave them free to act violently with the myriad of other tools and weapons available to them?

Given the proliferation of firearms in society, and their easy availability to persons such as felons who are already barred from firearm possession, it is likely that a person subject to a Red Flag order could still obtain firearms after entry of an order, barring them from possessing firearms. Even if we assume that the order would work to bar them from obtaining firearms, they could still act violently with other weapons. In terms of mass murder events, people who are motivated to commit them use other weapons (knives, bombs or motor vehicles) in nations where civilian firearm ownership is essentially prohibited and few firearms are found in society.

If a person is truly so dangerous to society that they cannot be allowed to possess firearms, they are too dangerous to be free in society. In this regard, Red Flag laws are not interested in preventing violence or harm, they are interested in firearm prohibition. A Red Flag law that means to prevent violence would remove persons who are too dangerous to possess firearms from society. Until the 1960's and the passage of laws promoting outpatient mental health treatment and laws barring Federal Medicaid dollars from paying for in patient hospitalization persons who were too violent to be free in society, were detained in mental hospitals or sanitariums. The invention of psychiatric drugs and public distaste for the poor treatment of persons incarcerated in mental

hospitals led to efforts to deal with the mentally ill and violent in society, rather than separating such persons from society. If Red Flag laws were serious about public safety, rather than stigmatizing and delegitimizing firearms ownership, they would seek to remove truly dangerous persons from society, not just strip them of one type of weapon and then leave them free to act as they see fit.