Red Flag Laws:
Proceed with Caution

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Introduction

"Red flag" laws, or "extreme risk protection orders", have been enacted in several states. While the idea for these laws is reasonable, some statutes are not. They destroy due process of law, endanger law enforcement and the public, and can be handy tools for stalkers and abusers to disarm their innocent victims.

Many order are improperly issued against innocent people.

The Conference of Chief Justices asked the Uniform Law Commissioners to draft a national model red flag law, but the Giffords organization blocked the effort—lest it offer an alternative to the extreme and reckless system being pushed by Giffords and related groups, most notably the Bloomberg entities.

When Confucius was asked what would be the first step if a government sought his advice, he answered, "It would certainly be to rectify the names. . . . If the names are not correct, language is without an object."[2] Bills that claim to be about "Extreme Risk Protection Orders" are not correct; the bills cover much lower-level risks, or just "a danger." Likewise, the term "red flag" is dubious because some bills label as

[2] CONFUCIUS, THE ANALECTS OF CONFUCIUS 13:3, at 60 (Simon Leys trans., W.W. Norton 1997).

dangerous the peaceable exercise of constitutional rights. A more accurate name for these laws is "gun confiscation orders."

Such orders can be legitimate when fair procedures accurately identify dangerous individuals. Such laws include the following features:

- Petitions initiated by law enforcement, not by spurned dating partners or relationships from long ago.
- Ex parte hearings only when there is proof of necessity.
- Proof by clear and convincing evidence that has been corroborated.
- Guarantees of all due process rights, including cross-examination and right to counsel.
- Court-appointed counsel if the respondent so wishes.
- A civil remedy for victims of false and malicious petitions.
- Safe and orderly procedures for relinquishment of firearms.
- Strict controls on no-knock raids.
- Storage of relinquished firearms by responsible third parties.
- Prompt restoration of concealed carry permits for the falsely accused.
- Prompt return of firearms upon the termination of an order.
- Renewal of orders based on presentation of clear and convincing proof.
- Not allowing time-limited orders to be bootstrapped into lifetime federal prohibition.

The above features can be found in some state laws, as will be detailed below.

I. Problems with current statutes and the Giffords/Bloomberg model

A. About a third of gun confiscation orders are wrongly issued against innocent people.

Any procedure that allows a judge to hear only one side of a case necessarily will produce a high error rate. Data from the two states with the oldest confiscation laws so demonstrate.

In Connecticut, confiscation orders may be issued ex parte. Later, the respondent will have an opportunity to tell his or her side of the story in court. In Connecticut, once a judge eventually hears the respondent's side of the story, 32 percent of

confiscation orders are overturned.[3] A study in Marion County, Indiana reported similar results.[4]

As will be detailed below, Connecticut's 32 percent reported error rate is likely an underestimate, since government officials pressure respondents not to retain counsel and contest orders.

Some confiscation advocates brush off the data showing high reversal rates once the respondent gets notice and a chance to present evidence. The advocates speculate that the reversals might be for reasons other than the court hearing both sides of the story. For example, it is speculated that perhaps a person who was imminently dangerous on day one has calmed down sufficiently so that arms can be returned on day 15. Or perhaps the respondent agreed to get counseling, so that arms can be returned.

The speculation is not based on any evidence of actual cases. Moreover, it seems implausible that someone who is dangerous one day could suddenly become safe two weeks later. It is also implausible that only two weeks of counseling would render a dangerous person safe.

Accordingly, the most (and only) plausible explanation for the high reversal rates of ex parte orders is that judges see the situation differently once they hear both sides of a case.

Error rates for newer laws based on the Giffords/Bloomberg model are likely to be even higher. Connecticut requires that a petition be filed by two law enforcement officers only after they have conducted an independent investigation. Indiana also requires that petitions be filed by law enforcement. The Giffords/Bloomberg system, though, allows petitions to be filed by a very wide variety of people, including ex-girlfriends or ex-boyfriends. The Giffords/Bloomberg system does not require any

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[3] Michael A. Norko & Madelon Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 6 CONN. L. REV. 1609, 1619 (2014).

[4] George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006-2013*, 33 BEHAV. SCI. & THE L. 308 (2015) (29 percent) (for cases in which the respondent appeared). According to the *Behavioral Science* article, the Indiana ERPO law is not much used outside of Indianapolis (Marion County).

Besides the problem of orders that are later overturned, some orders that are not overturned may be inappropriate. Case reports of particular confiscations are not widely available. But the Uniform Law Commission obtained an annual report from the Santa Barbara County, California, Sheriff's Office describing gun confiscations in 2016. There were eight confiscations, and most of them seem appropriate, at least as described by the Sheriff's Office. But in another case:

> June of 2016, a 57-year-old Santa Maria woman was involved in a domestic disturbance with her husband. The woman struck her husband in the leg and poured soda on his head after discovering text message and a partially nude photograph a woman had sent to her husband's phone. The suspect began carrying her Glock handgun within her residence. The woman was arrested for cohabitant battery and a GVRO was obtained to confiscate the Glock handgun.

Office of the Sheriff, Santa Barbara County, *Santa Barbara Sheriff's GVRO (Firearms Emergency Protective Orders)*, Sept. 29, 2016.

corroborating evidence. Indeed, as Colorado's bill moved through the legislature, legislators removed a requirement that evidence be "corroborated."[5]

B. The Giffords organization blocked a model law from the Conference of Chief Justices and the Uniform Law Commission.

In 2018, the Conference of Chief Justices asked the Uniform Law Commission (ULC) to draft a model red flag law. The ULC convened a Study Committee representing a wide range of perspectives, such as the National Sheriffs Association, International Association of Chiefs of Police, psychiatric experts, state courts, pro-gun and anti-gun advocates, pro-gun and anti-gun state legislators, and others.[6] I was a member of the ULC Study Committee. The Committee overwhelmingly voted to recommend that the ULC move forward with drafting a model law. Support for a model law came from across the political spectrum, including all the state legislators, law enforcement, and the courts. Overt opposition to the model law was expressed only by the Giffords Law Center, which preferred that legislators use only the Giffords/Bloomberg model, and not the more careful and balanced approach that would likely be produced by the Uniform Law Commission. Perhaps, as a result of lobbying from Giffords and Bloomberg, the Uniform Law Commissioners later voted not to draft a model law.

C. Extremist laws will not be enforced in many jurisdictions.

The confiscation bill passed by the Colorado General Assembly had an effective date of January 1, 2020. But in some counties, the date might as well be "never," since a growing number of counties and sheriffs' offices are announcing that they will not enforce the bill.[7]

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[5] Colo. Senate State, Veterans, & Military Affairs Comm., amendment L.064, Mar. 15, 2019, https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2019A/amendments/HB1177_L.064.pdf.

[6] Uniform Law Commission, Study Committee on Extreme Risk Protection Orders, Nov. 30, 2018, Washington, D.C. Attendees from the Uniform Law Commission were Barry Hawkins, Co-Chair, Connecticut; Cam Ward, Co-Chair, Alabama; Steve Wilborn, Vice President, Kentucky; James Bopp, Jr., Commissioner, Indiana; Raymond Pepe, Commissioner, Pennsylvania; Steve Willborn, Interim Executive Director; Cam Pestinger, ULC Fellow (recorder). Stakeholder attendees: were American Psychiatric Association, Colleen Coyle; Brady Foundation, Josh Scharff & Kelsey Rogers; Coalition to Stop Gun Violence, Kelly Roskam; Conference of Chief Justices/National Center for State Courts, Blake Kavanaugh; Giffords Law Center, Nico Bocour & David Chipman; International Association of Chiefs of Police, David Thomas; National District Attorneys Association, Cari Steele; National Rifle Association, Josh Savani; National Sheriffs' Association, Jonathan Thompson; Senate Judiciary Committee, Aaron Cummings; University of Denver, David Kopel. Two subsequent telephonic Study Committee meetings in December included additional attendees.

[7] Sherrie Peif, *More counties join Second Amendment Sanctuary movement; recall efforts beginning to take shape*, COMPLETE COLORADO, Mar. 14, 2019.

Throughout the United States, elected sheriffs have been announcing that they will adhere to their oaths to enforce the U.S. and state constitutions—which means that they will not enforce extreme laws that trample civil rights.[8]

Such local resistance is as old as James Madison's Virginia Resolution and Thomas Jefferson's Kentucky Resolution against the unconstitutional Sedition Act of 1798.[9] The tradition has continued ever since, including in state and local refusal to assist enforcement of the Fugitive Slave Act of 1850.[10] More recently, many states, counties, and cities have adopted "sanctuary" status against assisting enforcement of laws against illegal aliens,[11] marijuana users, or gun owners.[12]

Sheriffs, county commissioners, and other elected officials always take oaths to uphold the United States Constitution and their state Constitution. The duty to uphold the federal and state constitutions necessarily requires not enforcing statutes that are contrary to the constitutions.

In New Mexico, many sheriffs stated that they would not enforce confiscation orders. So the legislative majority retaliated by authorizing lawsuits against law enforcement officers for injuries resulting from *any* decision not to enforce a statute or ordinance.[13]

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https://pagetwo.completecolorado.com/2019/03/14/more-counties-join-second-amendment-sanctuary-movement-recall-efforts-beginning-to-take-shape/. Complete Colorado is one of the largest daily newspapers in Colorado, based on online readership. It is affiliated with the Independence Institute.

[8] Dan Frosch & Jacob Gershman, *Rural Sheriffs Defy New Gun Measures*, WALL STREET JOURNAL, Mar. 10, 2019; Mary Hudetz *New Mexico Sheriffs' Gun Laws Protest Follows Other States*, Associated Press, Mar.1, 2019.

[9] Virginia Resolution of Dec. 24, 1798, § 3; Kentucky Resolution of Nov. 10, 1798, §§ 1, 8, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540, 543 (Jonathan Elliot ed., 1891). Elliot's Debates is a five-volume collection of materials on Founding Era. It is available on-line at https://memory.loc.gov/ammem/amlaw/lwed.html.

[10] *E.g.*, Ableman v. Booth, 62 U.S. (21 How.) 506 (1859) (Wisconsin obstruction of federal slave catchers); James H. Read & Neal Allen, *Living Dead, and Undead: Nullification Past and Present*, in Sanford Levinson ed., NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 111 (2016).

[11] Immigration Legal Resource Center, *Growing the Resistance: How Sanctuary Laws and Policies Have Flourished During the Trump Administration* (2019), https://www.ilrc.org/growing-resistance-how-sanctuary-laws-and-policies-have-flourished-during-trump-administration.

[12] *See* Tenth Amendment Center, *State of the Nullification Movement: 2019-20 Tenth Amendment Center Annual Report* (2020), https://s3.amazonaws.com/TAChandbooks/2019-20-state-of-the-nullification-movement-report.pdf

[13] The statute orders law enforcement officers to file a petition, without taking time for further investigation: "A law enforcement officer shall file a petition for an extreme risk firearm protection order upon receipt of credible information from a reporting party that gives the agency or officer probable cause to believe that a respondent poses a significant danger of causing imminent personal injury to self or others by having in the respondent's custody or control or by purchasing, possessing or receiving a firearm." N.M. Stat. Ann., § 40-17-5(D).

The new statute authorizing lawsuits states that governmental immunity

> does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights,

Consider the practical effect of the new personal liability. A county ordinance sets a speed limit of 45 M.P.H. on a certain county road. A deputy working a speed trap uses a radar gun to identify vehicles traveling 47, 45, 49, 46, 45, 44, 48, and 61 M.P.H. The deputy ignores the three cars that were speeding less than 5 M.P.H. The deputy pursues the 61 M.P.H. car and issues a ticket. Because the deputy ignored a legal obligation to enforce the county ordinance against the 47 M.P.H. car, three minutes after the car passed the deputy, the car hit a child who suddenly ran into the road. If the deputy had stopped the 47 M.P.H. vehicle to ticket it, the child would not have been injured. Under New Mexico's new statute, the child (or the child's parents) may sue the deputy personally.

Discretion is essential to law enforcement work. There are many situations in which law enforcement officers use discretion and choose not to investigate certain illegal acts, even when a complainant comes forward. If officers are worried about being personally sued whenever they decide not to investigate a violation of the law, officers will be much less effective, on the whole. Officers may divert their attention towards enforcement of less serious violations.

Depending on the situation and local mores, an officer might choose not to enforce violations of laws about: ticket scalping (such as when officers at a public event do not enforce against every instance of ticket scalping they observe);[14] marijuana,[15] indecent dancing,[16] indecent waitering,[17] prostitution,[18] bigamy,[19] a minor misrepresenting his age in order to obtain an obscene (as to minors) book or magazine,[20] interference with communications[21] (such as listening to someone else's phone call without permission, as some parents of teenagers have been known to do), falsely representing oneself as incapacitated,[22] personal gambling,[23] and commercial gambling[24] (with certain exceptions, such as bingo and lotteries).

> failure to comply with duties established pursuant to statute or law or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties. For purposes of this section, "law enforcement officer" means a public officer vested by law with the power to maintain order, to make arrests for crime or to detain persons suspected of committing a crime, whether that duty extends to all crimes or is limited to specific crimes.

Id., at § 41-4-12.

[14] *Id.*, at § 30-46-1

[15] Although New Mexico's SB 323 from 2019 partially relegalized marijuana, possession of any quantity is over half an ounce is a misdemeanor, and selling a $10 bag to an adult friend is a felony.

[16] *Id.*, at § 30-9-14.1.

[17] *Id.*, at § 30-9-14.2.

[18] *Id.*, at § 30-9-2.

[19] *Id.*, at § 30-10-1.

[20] *Id.*, at § 30-37-6.

[21] *Id.*, at § 30-12-1.

[22] *Id.*, at § 30-16-12.

[23] *Id.*, at § 30-19-2.

[24] *Id.*, at § 30-19-3.

Can nonenforcement of any of these provisions cause "personal injury, bodily injury, wrongful death or property damage," for which an officer could be personally sued? People under the influence of marijuana sometimes perpetrate violent or property crimes against third persons. Failure to enforce sexual regulation laws in the early evening can lead to the transmission of a STD by midnight. When an officer decides not to investigate a citizen complaint that an individual is engaged in social gambling, the individual's gambling problem could soon result in health problems and property damage for others.

How often could law enforcement officers be sued for "failure to comply with duties established pursuant to statute or law"? No one can say for certain, but it does seem likely that plaintiffs' attorneys will explore how far the new law can go.

The New Mexico liability statute is an example of how some confiscation advocates are willing to tear down established legal structures that stand in the way of confiscation. As discussed *infra*, Colorado created a special exemption from its rules limiting no-knock raids, in order to allow confiscations to *always* be carried out by no-knock, whenever or not the officers choose to do so.

D. Social science studies

Gun confiscation laws are new, and few states have much experience: California (2016), Connecticut (1999), Indiana (2005), and Washington (2016). Social science research on the topic is therefore sparse. No research has found any statistically significant reduction in crime, including mass shooting fatalities, from confiscation laws. Studies about suicide reduction show mixed results.

One study looked at suicide in Connecticut and Indiana. "Whereas Indiana demonstrated an aggregate decrease in suicides, Connecticut's estimated reduction in firearm suicides was offset by increased nonfirearm suicides."[25]

The theory of confiscation laws is that if potentially suicidal persons are deprived of firearms, they will be much less likely to complete suicide because firearms are so much more lethal than other means. This is incorrect. Several other methods of suicide—namely hanging, carbon monoxide exhaust, or drowning—are nearly as likely as firearms to result in death.[26]

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[25] Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015*, 69 PSYCHIATRIC SERV. (June 1, 2018), https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201700250 (abstract only; article is paywalled).

[26] Fatality rates of suicide attempts are as follows: shooting 83.7%, hanging 76.7%, and 67.2% for drowning. Gary Kleck, *The effect of firearms on suicide*, GUN STUDIES: INTERDISCIPLINARY APPROACHES TO POLITICS, POLICY, AND PRACTICE 319, table 17.3 (Jennifer Carlson et al. eds. 2019) (using "the largest set of suicides and suicide attempts ever employed in the computation of method-specific suicide fatality rates"). The low rates for some methods (e.g., cutting, drugs) indicate that these forms of self-inflicted injury are often a cry for help, and not an earnest attempt at fatality. *Id*. at 321-23.

Gun confiscation advocates, however, cite an article claiming that every twenty gun confiscation orders prevents one suicide.[27] That study, however, made a gross error: it treated every instance of self-inflicted injury as if it were a suicide attempt.[28] This is plainly incorrect. For example, many instances of self-inflicted injury with knives are not suicide attempts. Cutting one's arm is usually a sign of mental distress; whereas stabbing and ripping one's intestines is a suicide attempt.[29] Likewise, if the fatal dose of a particular prescription drug is twenty pills, taking eight pills may be a cry for help; taking eighty is a serious attempt at suicide. The "one in twenty" article wrongly assumed that *all* self-inflicted injury (e.g., banging one's head against a wall severely enough to cause injury) is a suicide attempt.[30] Starting with this false assumption, the article made various extrapolations to conjure up the "one in twenty" talking point. This is true only if you believe that a teenager who cuts her arm has the same lethal intentions as an elderly man who puts a revolver in his mouth.

Moreover, the 10:1 or 20:1 factoid ignores the harms inflicted on persons who were not actually suicidal—including dangerous and humiliating no-knock raids and property confiscation, plus the lifetime infliction of a scarlet letter, whose record will persist even after the confiscation order terminates.

Another study examined both crime and suicide in Connecticut, Indiana, Washington, and California.[31] The study found no statistically significant changes in "murder, suicide, the number of people killed in mass public shootings, robbery, aggravated assault, or burglary."

An article in the *Annals of Internal Medicine* described 21 cases of gun confiscation under California's law.[32] The article did not attempt any statistical analysis. Instead, the authors examined records of 159 gun confiscation orders in California. According to the authors, of the 159 confiscations for which the authors obtained information,

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[27] Jeffrey W. Swanson, et al. *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?* 80 L. & CONTEMP. PROBS. 179, 206 (2017). https://scholarship.law.duke.edu/lcp/vol80/iss2/8/ ("we estimated that approximately ten to twenty gun seizures were carried out for every averted suicide").

[28] *Id.* at 201, n.86 ("Case fatality rates for specific suicide methods in the Connecticut population are calculated by combining data on suicide deaths with data on hospital discharges for intentional self-inflicted injuries, using 2012 as the index year."). The article treats every instance of intentional self-injury as a "suicide attempt." *Id.* at 201.

[29] The latter is a form of ritual Japanese suicide known as *seppuku* or *harikari*; it was first practiced by samurai. Notwithstanding extremely severe gun control, Japan has a higher suicide rate than does the United States.

[30] *See* note ___.

[31] John R. Lott & Carlisle E. Moody, *Do Red Flag Laws Save Lives or Reduce Crime?* (Dec. 28, 2018), https://ssrn.com/abstract=3316573. One of the study's authors, Carlisle Moody, is an econometrician of the highest expertise and reliability. A decade ago, I co-authored a study with him: David B. Kopel, Carlisle E. Moody & Howard Nemerov, *Is There a Relationship between Guns and Freedom? Comparative Results from 59 Nations*, 13 TEX. REV. L. & POLITICS 1 (2008).

[32] Garen J. Wintemute, Veronica A. Pear, Julia P. Schleimer, Rocco Pallin, Sydney Sohl, Nicole Kravitz-Wirtz, & Elizabeth A. Tomsich, *Extreme Risk Protection Orders Intended to Prevent Mass Shootings: A Case Series*, ANNALS OF INTERNAL MED. (2019), available at https://annals.org/aim/fullarticle/2748711/extreme-risk-protection-orders-intended-prevent-mass-shootings-case-series?searchresult=1.

there were "21 cases in which ERPOs were used in efforts to prevent mass shootings." The 21 cases are described in the article's appendix, and not all of them support the utility or need for gun confiscation orders. In some cases, the court denied a confiscation order. In others, confiscation orders were issued, but were superfluous, since the respondents had been arrested for various crimes, and the firearms were seized pursuant to the arrest.

However, some of the cases did involve individuals who had spoken or written about shooting other people. Many of these individuals exhibited symptoms of mental illness. From a public safety viewpoint, the confiscation of their firearms was appropriate. Unfortunately, the appendix does not indicate that any of these individuals were given additional mental health treatment, although it is possible that treatment was provided in some instances not recorded in court or police records.

Because mass shootings are a small percentage of total homicide, it is unlikely that preventing even several mass shootings would result in a statistically significant effect on homicide rates. That said, because mass shootings are so traumatic to the American public in general, by causing widespread fear, a law that stops some mass shootings is very beneficial—provided that the law is fair and does not target innocents.

There are no data on how many people who make threats to shoot people carry out such threats. It is possible that the vast majority of such threats are just idle words. Even so, it is prudent to disarm individuals who make specific, credible threats. It is possible for a law to be beneficial in certain cases, even if the number of such cases is too low to have a statistically significant impact.

E. Badly-written confiscation laws endanger public safety

The Giffords/Bloomberg model, with its flimsy and unreliable procedures for ex parte orders, ensure that orders will be issued against innocent and peaceable individuals. The problem is aggravated by the Giffords/Bloomberg mandates for automatic, no-notice, surprise confiscation.

One person, Gary J. Willis, a 61-year-old black man, has already been killed by the Giffords system. In November 2018, a month after Maryland's new confiscation went into effect, police in Ferndale, Maryland, showed up at Mr. Willis's house at 5:17 A.M., announcing that they had come to take his guns. They talked for a while, then argued, and then the police shot him to death.[33] The victim's niece said that her late uncle, "likes to speak his mind," but "wouldn't hurt anybody." "I'm just dumbfounded right now," she continued. "They didn't need to do what they did."

In the Giffords/Bloomberg model, a respondent never receives notice of anything until the police show up to confiscate his or her firearms. This creates an inherently

[33] *Maryland officers serving "red flag" gun removal order fatally shoot armed man*, CBS/AP, Nov. 6, 2018, https://www.cbsnews.com/news/maryland-officers-serving-red-flag-gun-removal-order-fatally-shoot-armed-man/; Colin Campbell, *Anne Arundel police say officers fatally shot armed man while serving protective order to remove guns*, BALT. SUN, Nov. 5, 2018, https://www.baltimoresun.com/news/maryland/crime/bs-md-aa-shooting-20181105-story.html.

volatile and dangerous situation for law enforcement and the public. The safer approach is to authorize no-notice confiscation only when a court has made specific factual findings about why such an approach is needed.

Given the dangers imposed by the Giffords/Bloomberg model, it is no wonder that so many sheriffs are refusing to put their deputies and the public in harm's way to enforce a confiscation order that has a significant possibility of being wrong, and that can easily be obtained by a spurned former dating partner—even one from long ago.

A second danger of the Giffords/Bloomberg system is the disarmament of innocent victims. In St. Cloud, Florida, a drifter named Jon Carpenter (110 pounds, brown eyes, black hair) threatened an elderly couple. A red flag order was issued against a different Jon Carpenter (200 pounds, hazel eyes, bald).[34]

In another Florida case, an ex parte confiscation order was issued against a man because of a pair of social media posts. The first was a photo of an AR-15 that he had built at home (a perfectly legal act), along with the caption "It's done. Hooray." The second post criticized teenager anti-gun activists for trying to take away people's rights.[35]

Eighty-four-year-old Stephen Nichols had served in the Korean War and for six decades as a police officer in Tisbury, Massachusetts. In retirement, he worked as a school crossing guard. One day at a diner, he complained that the school's assigned police officer was often "leaving his post" to buy coffee. Nichols worried that a criminal might exploit the officer's frequent absences and "shoot up the school." As a result, a Massachusetts "red flag" order was issued against Nichols; his firearms license, which had first been issued in 1958, was confiscated, as were all his guns and ammunition. It took nearly half a year before his firearms license was restored, after Nichols filed suit.[36]

Even when the respondent finally gets a hearing, innocent people may still be wrongfully disarmed if they are denied basic due process rights at the hearing—such as the right to counsel or the right to cross-examine the accuser.

At the Uniform Law Commission meeting, I raised the problem of disarming the innocent. Giffords representative David Chipman retorted that disarmed victims could just buy a replica gun and scare the criminals away.

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[34] Craig Patrick, *Red flag laws: Mistaken identity leads to revocation of veteran's firearms license*, Fox 13 New (Tampa Bay), Feb. 4, 2020, https://www.fox13news.com/news/red-flag-laws-mistaken-identity-leads-to-revocation-of-veterans-firearms-license.

[35] Jacob Sullum, *States Are Depriving Innocent People of the Their Second Amendment Rights*, REASON, Nov. 2019, at 49.

[36] Rich Saltzberg, *Stephen Nichols reinstated as crossing guard*, MARTHA'S VINEYARD TIMES, Oct. 14, 2019, https://www.mvtimes.com/2019/10/14/stephen-nichols-reinstated-crossing-guard/; Rich Saltzberg, *Nichols remains without guns or license*, MARTHA'S VINEYARD TIMES, Dec. 11, 2019, https://www.mvtimes.com/2019/12/11/nichols-remains-without-guns-license/; Rich Saltzberg, *Nichols sues to get back gun license*, MARTHA'S VINEYARD TIMES, Dec. 20, 2019, https://www.mvtimes.com/2019/12/20/nichols-sues-get-back-gun-license/; Rich Saltzberg, *Nichols' license to carry restored*, MARTHA'S VINEYARD TIMES, Feb. 12, 2020, https://www.mvtimes.com/2020/02/12/nichols-license-carry-restored/. *See also* Charles C.W. Cooke, *A "Red Flag Law" Horror Story*, AMERICA'S 1ST FREEDOM 56 (Jan. 2020).

Many "gun control" advocates oppose gun ownership and Second Amendment rights. For example, in *District of Columbia v. Heller* an amicus brief of New York City Mayor Michael Bloomberg and the Legal Coalition Against Violence (which is now part of the Giffords organization) contended that the Founders had not "intended the Amendment to protect the right to possess guns for self defense and hunting."[37] They concluded: the Second Amendment "does not constrain firearms regulations in the District of Columbia or in the States or their political subdivisions."[38] The same groups that today are writing extreme confiscation laws are the same groups that have opposed any right to gun ownership. No wonder that they are blasé about depriving innocent citizens of their right of self-defense. In the view some of anti-Second Amendment advocates, preventing self-defense by a law-abiding citizen seems to be a feature, not a bug.

Some people argue that ex parte confiscation orders based on low standards are acceptable because the harm inflicted will last only a few weeks, until the respondent receives a hearing and can present her side of the story. First of all, a statute's nominal time for hearings may be a sham. In Indiana, the statute says two weeks, but over nine months is the typical waiting time before a respondent is allowed to present his or her side of the story.[39]

Sometimes, little harm will be done. If hearings are prompt, an individual might miss a few weekends of target practice. But there may be more substantial harms as well.

It is well-known in family and domestic law that ex parte procedures with low standards of evidence are often abused by angry spouses in a divorce, jilted lovers, and so on.[40] The Giffords system is well-adapted for abusers to disarm their victims—and if the abusers so choose, to attack a victim who has been rendered defenseless.

Of course, the risk of criminal prosecution for assault deters some attacks—but not attacks by people who are consumed by rage or who don't plan on living much longer. A good law includes fair procedures to ensure that arms are confiscated only from dangerous people, not from innocent people who are targeted by domestic abusers.

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[37] Brief of Amici Curiae Major American Cities, The United States Conference of Mayors, and Legal Community Against Violence in Support of Petitioners, *District of Columbia v. Heller*, No. 07-290, at 18 n.3 (Jan. 11, 2008), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_290_PetitionerAmCuMajorAmerCities.pdf.

[38] *Id.* at 25.

[39] Parker, *supra*, at ___.

[40] *E.g.*, Stop Abusive and Violent Environments, The Use and Abuse of Domestic Restraining Orders (Feb.2011), www.saveservices.org/downloads/VAWA-Restraining-Orders; Monit Cheung, *False Allegations on Child Sexual Abuse: Annotated Bibliography*, https://www.uh.edu/socialwork/_docs/cwep/bib%20False%20Sexual%20Abuse%20Allegations%20and%20Children.pdf.

II. Fair procedures for petitions and hearings

A. Procedural due process constitutional issues

Constitutional requirements of procedural due process are at their height when an individual is deprived of a "fundamental" enumerated right. The right to keep and bear arms is such a right.[41]

Courts have identified seven key elements in procedural due process:

1. Notice
2. A neutral decision-maker
3. An opportunity to make an oral presentation
4. The opportunity to present evidence
5. The opportunity to cross-examine witnesses and respond to evidence
6. Right to representation by counsel
7. A decision based on the record, and reasoning for the result.[42]

As will be detailed in Part II, an ex parte system deprives individuals of five of the seven elements of due process: notice, opportunity make an oral presentation, opportunity to present evidence, cross-examination and response to evidence, and the right to counsel.

As will also be detailed, even at a subsequent hearing, the Giffords/Bloomberg system continues to deprive the individual of due process, because the individual is not allowed to cross-examine adverse witnesses. Indeed, the adverse witnesses, including the accuser, never have to appear in court; they can submit affidavits instead.

B. Petitions should be filed after an investigation by law enforcement

In Connecticut, a confiscation petition may be filed only by law enforcement officers or a state's attorney. Any person—including family members, former dating partners, neighbors, co-workers, and so on—can meet with law enforcement or a state's attorney and request a petition. Then, officers or a state attorney must conduct their own investigation, moving forward with a petition if they find it warranted.[43] In

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[41] McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

[42] Rogin v. Bensalem Township, 616 F.2d 680, 694 (3d Cir. 2010). The Third Circuit's list is drawn from Morrissey v. Brewer, 408 U.S. 471 (1972). *See also* Vitek v. Jones, 445 U.S. 480 (1980); Pierce v. Thaler, 604 F.3d 197 (5th Cir. 2010); McQuillion v. Duncan, 306 F.3d 895 (9th Cir. 2002); United States v. Davila, 573 F.2d 986 (7th Cir. 1978); McGhee V. Draper, 564 F.2d 902 (10th Cir. 1977); Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974).

[43] CONN. GEN. STATS. § 29-38c:

> Seizure of firearms and ammunition from person posing risk of imminent personal injury to self or others. (a) Upon complaint on oath by any state's attorney or assistant

Indiana, only law enforcement may seek a confiscation order.[44] Similarly, Vermont requires that petitions must come from a state's attorney or the office of the attorney general.[45]

Gun control advocates argue that a very wide range of private persons should be allowed to file confiscation petitions. In the media, the advocates describe their position as favoring petitions by a "family or household member." But their statutes define "household" and "family" so broadly that they include "dating partners."[46] They also cover any "blood" relative—apparently including cousins of any degree.[47]

Some persons worry that if law enforcement officers are in charge of petitions, the officers will make up excuses not to follow up on a citizen's request. The Connecticut experience indicates otherwise. Connecticut has a very high per capita rate of confiscation, even with the requirement that confiscation petitions must come from two law enforcement officers or state's attorneys who have conducted an independent investigation.[48]

> state's attorney or by any two police officers, to any judge of the Superior Court, that such state's attorney or police officers have probable cause to believe that (1) a person poses a risk of imminent personal injury to himself or herself or to other individuals, (2) such person possesses one or more firearms, and (3) such firearm or firearms are within or upon any place, thing or person, such judge may issue a warrant commanding a proper officer to enter into or upon such place or thing, search the same or the person and take into such officer's custody any and all firearms and ammunition. Such state's attorney or police officers shall not make such complaint unless such state's attorney or police officers have conducted an independent investigation and have determined that such probable cause exists and that there is no reasonable alternative available to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm.

[44] IND. CODE § 35-47-14-2.

[45] VT. STATS. tit. 13 § 4053(a).

[46] *E.g.* WASH. REV. CODE ANN., § 7.94.020(2) ("Family or household member" means, with respect to a respondent, any: (a) Person related by blood, marriage, or adoption to the respondent; (b) dating partners of the respondent;….").

[47] *Id.* Compare the (relatively) narrower definition in California law: "any spouse, whether by marriage or not, domestic partner, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household." CAL. PENAL CODE §§ 422.4(b)(3), 18150(a)(2).

One new article presents a variant on expanding who can initiate the petitions. The article touts the new statute in New Mexico, whereby a wide range of people can ask law enforcement to file a petition. Gabriel A. Delaney & Jacob D. Charles, *Expanding Reporting Parties in Red Flag Laws: A Proposal for Balancing Rights and Risks in Preventing Gun Violence*, J.L., Med. & Ethics (forthcoming 2020). In the authors' view, the New Mexico system is balanced, because law enforcement can serve as a check on malicious or factually weak petitions. But the New Mexico statute converts law enforcement into a purely ministerial function, subject to personal liability if they decided not to file a confiscation petition requested by anyone. So the New Mexico law provides little quality control against improper petitions.

[48] As of early 2019, the following states had reported data for at least one year, allowing calculation of petitions per 100,000 state population: Maryland 20.0, Connecticut 7.47, Florida 6.35, Vermont 4.33, Oregon 1.96, Washington 1.25, California 1.07. Colorado Legislative Council, *Revised Fiscal Note HV 18-1177*, Mar. 1, 2019, https://leg.colorado.gov/sites/default/files/documents/2019A/bills/fn/2019a_hb1177_r2.pdf.

C. Ex parte orders should be allowed only when there is a showing of good cause.

Ex parte orders are disfavored in law. Normally, when a petitioner seeks a temporary restraining order on an ex parte basis, the plaintiff must explain why the defendant was not notified of the hearing and must prove that there will be "immediate" injury if the order is not granted.[49] If the court grants the order, the court must explain why it was necessary to issue the order ex parte.[50]

Vermont has a fair system: an ex parte confiscation order may be issued when "specific facts" show that "the respondent poses an imminent and extreme risk of causing harm."[51] This is superior to a system in which confiscation orders must always be issued ex parte, regardless of circumstances and facts.

When hearing motions for temporary restraining orders, judges sometimes decide that the most prudent course is to neither grant nor deny the order. Instead, a judge schedules a further hearing, perhaps one at which the defendant will have notice and the opportunity to be heard. Gun confiscation order statutes should give the judge a similar option to order a continuance after an ex parte hearing.

The usual purpose of temporary restraining orders is to preserve the status quo. But the Giffords/Bloomberg confiscation program is the opposite: it automatically sends law enforcement officers to a persons' homes to confiscate their guns.

In compliance with normal rules for temporary restraining orders, an ex parte gun confiscation order should simply prohibit the respondent from acquiring firearms—and should not authorize confiscation of the individual's property. When the facts of the particular case do indicate a need for confiscation before the respondent can

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[49] Fed. Rules of Civil Procedure 65(b):

> (b) Temporary Restraining Order.
> (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

[50] Fed. Rules of Civil Procedure 65(b)(2):

> Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

[51] VT. STATS. tit. 13 § 4054.

appear in court, the judge should be allowed to so order, based on specific findings—as in Vermont.[52]

D. An "extreme risk protection order" should be about "extreme risks."

Mislabeling has long been a problem in the gun control debate. For example, bills about "assault weapons" have targeted BB guns, paintball guns, almost all shotguns, and century-old low-power rifles.[53] Today, the public is being told about "extreme risk protection orders." But bills with this name are not limited to "extreme" risks.

While the titles of bills say "extreme risk," the text of the bills says the opposite. Rather than addressing "extreme risk," Colorado's impending law mandates confiscation based on a finding of a "significant risk."[54] Maybe a law about "significant" risk would be a good idea. But it would garner less public support than a bill about "extreme risk." Similarly, in the 2019-20 Congress, S. 506 is titled the "Extreme Risk Protection Order Act of 2019."[55] But it allows confiscations based on "a danger."[56]

In some states, such bills may violate the state constitution's requirement that bills have a Clear Title—rather than a misleading title.[57] Persons who believe in confiscating guns based on "a significant risk", or "a danger," or some other standard should forthrightly say so, including in bill titles.

E. Telephonic testimony should be allowed only when there is a showing of good cause.

Under some confiscation laws, a petitioner does not need to show up in court, ever. Instead, he or she can testify by telephone. Thus, the judge is deprived of the ability to observe the petitioner's demeanor, which is essential for a court to be able to make credibility judgments.[58]

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[52] *Id.* at § 4054(a)(2).

[53] David B. Kopel, *Defining "Assault Weapons,"* THE REGULATORY REVIEW (Univ. of Pennsylvania). Nov. 14, 2018, https://www.theregreview.org/2018/11/14/kopel-defining-assault-weapons/.

[54] *E.g.*, Colo. HB 19-1177, https://leg.colorado.gov/sites/default/files/documents/2019A/bills/2019a_1177_rn2.pdf.

[55] S. 506, § 1.

[56] *Id.*, § 4 (a)(3)(A)(ii), § 5 (1)(C). Likewise, the 2019 bill S. 7 is titled the "Extreme Risk Protection Order and Violence Prevention Act of 2019." § 1. But it allows confiscation for "a significant danger." *Id.* at iii.

[57] "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title;…" COLO. CONST., art. V, § 21. As the text indicates, the subject must be "clearly" expressed in the title. *In re Breene*, 14 Colo. 401, 406, 24 P. 3, 4 (1890)

[58] *See, e.g.*, NEV. REV. STAT. § 33.570(4) (if the petition is "filed by a law enforcement officer, the court may hold the hearing on the ex parte order by telephone, which must be recorded in the presence of the magistrate . . . by a certified court reporter or by electronic means."); N.J. ADMIN. DIRECTIVE 19-19, GUIDELINE 3(c) (allowing petitioners to submit sworn oral testimony by "telephone, radio, or other

As in other judicial proceedings, telephonic testimony should be allowed only when there is a specific showing of good cause in the individual case.[59] There should be rigorous procedures to verify the identity of the person on the telephone who is claiming to be the petitioner or a witness for the petitioner.

When telephonic testimony is allowed, the respondent should promptly be provided with a copy and transcript of the recording, so that the respondent can prepare his own case for the imminent court hearing.

F. Petition forms should not treat the exercise of constitutional rights as inherently suspicious.

Recently-enacted confiscation laws contain a lengthy list of specific risk factors for courts evaluating confiscation orders. Such laws also direct the state court system to create standard forms for gun confiscation petitions. The listed risk factors are a litany of trouble: recent acts or threats of violence, violation of a civil protection order, violation of previously-issued gun confiscation order (or sometimes, the mere existence of a terminated order), conviction of a domestic violence crime, reckless or unlawful use of firearms, history of unlawful violence, stalking, prior arrests, and drug or alcohol abuse.[60] Mixed into this list of stigmatizers is the lawful exercise of constitutional rights: owning or acquiring firearms or ammunition.[61] The fact that someone owns or recently acquired constitutionally-guaranteed items is of zero probative value in the assertion that the person is too dangerous to possess those items.

Thus, court forms tell the public and the courts that "ownership" of "a firearm" is in the same presumptively-suspicious list of activities such as "stalking," "credible

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means of electronic communication"); OR. REV. STAT. § 166.527(5)(b) (allowing the petitioner to appear by "electronic video transmission").

"All of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candor or evasiveness—may furnish valuable clues to his reliability . . . . So the courts have concluded." JEROME FRANK, COURTS ON TRIAL 21 (1950). Jerome Frank served on the Second Circuit Court of Appeals (1941-57), as Commissioner and then Chairman of the Securities and Exchange Commission (1935-41), and before that was a leading scholar, favoring legal pragmatism. *See generally* Charles L. Barzun, *Jerome Frank, Lon Fuller, and a Romantic Pragmatism*, 29 YALE J.L. & HUMAN. 129 (2017).

[59] *See*, *e.g.*, Fed. R. Civ. Pro. 43(a) ("For good cause in compelling circumstances and with appropriate safeguards…); Colo. Rev. Stats. § 13-14.5-103(4) ("The court may schedule a hearing by telephone pursuant to local court rule to reasonably accommodate a disability or, in exceptional circumstances, to protect a petitioner from potential harm. The court shall require assurances of the petitioner's identity before conducting a telephonic hearing. A copy of the telephone hearing must be provided to the respondent prior to the hearing for an extreme risk protection order.").

[60] WASH. REV. CODE ANN. §§ 7.94.050, 7.94.040(3)(*l*) ("Any prior arrest of the respondent for a felony offense or violent crime"). Colorado goes even further, including arrest for some nonviolent misdemeanors. COLO. REV. STATS. § 13-14.5-105(3)(i). Washington lists a violation of a prior confiscation order. WASH. REV. CODE ANN. § 7.94.040(3)(f) Colorado lists the mere existence any prior order, even a terminated one. COLO. REV. STATS. § 13-14.5-105(3)(d).

[61] *Id.* § 105(3)(f) & (*l*).

threats of violence," or conviction of "domestic violence." Law-abiding gun owners understandably resent their activities being included in this litany.

Of course, gun confiscation orders should only be issued against persons who are reasonably believed to be in possession of guns, or about to acquire a gun. The bills can separately require a petitioner to identify, to the extent possible, the arms possessed by the respondent.[62]

G. Standards of proof, continuances, and reasonable alternatives.

Requiring "clear and convincing evidence" at an ex parte hearing is fair to petitioners. After all, the petitioner at an ex parte hearing enjoys the advantage of being able to present one-sided evidence to the court, with no opportunity for the court to consider contrary evidence. A petitioner with a solid case, and facing no contradiction, ought to be able to meet the clear and convincing standard. It is likewise fair that at an ex parte confiscation hearing, the petitioner should have to prove imminence, just as petitioners have to do for other temporary civil protection orders.[63]

Connecticut's confiscation law does require a finding of "probable cause" of "imminent" danger.[64] Indiana and California do the same.[65] The imminence requirement is appropriate, but the "probable cause" standard is too low.

Some other confiscation laws have a much lower standard. Washington requires the judge to grant an ex parte confiscation order based on "reasonable cause to believe that the respondent poses a significant danger of causing personal injury to self or others in the near future."[66] Massachusetts allows "reasonable cause" confiscation for alleged threats that are neither imminent nor in the near future.[67]

Some people favor low standards for ex parte orders, and a higher standard at a later hearing.[68] This causes much trouble for innocent people. Using "probable cause," Connecticut and Indiana's ex parte hearings have a high error rate.[69] Errors are an inevitable consequence of a judge hearing only one side of the case and being forced to rule based on a too-low standard of evidence.

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[62] *E.g.* CAL. PENAL CODE § 18107 ("A petition for a gun violence restraining order shall describe the number, types, and locations of any firearms and ammunition presently believed by the petitioner to be possessed or controlled by the subject of the petition.").

[63] *E.g.*, COLO. REV. STATS. §13-14-104.5(7)(a) ("imminent danger exists").

[64] CONN. GEN. STATS. § 29-38c(a) ("probable cause to believe…a person poses a risk of imminent personal injury to himself or herself or to other individuals").

[65] IND. CODE §§ 35-47-14-2(a)(1) & 35-47-14-2(3)(C).

[66] WASH. REV. CODE § 7.94.050(3) (2018).

[67] MASS. GEN. L. ch. 140, § 131T(a) ("finds reasonable cause to conclude that the respondent poses a risk of bodily injury to self or others").

[68] *E.g.*, FLA. STAT. ANN. § 790.401(3)(b) (2018) ("reasonable cause" at ex parte hearing; "clear and convincing" at contested hearing).

[69] *Supra* notes ___.

Ex parte judges should have the option not to issue a confiscation order immediately, but instead to order a full hearing, with evidence from both sides. A judge might think that the evidence for a temporary confiscation order was borderline. Rather than having to grant or deny the petition immediately, the court could schedule a full hearing within a short time.

At any hearing, Connecticut requires a determination that there is "no reasonable alternative" to the confiscation order.[70] California does the same.[71] This is fair, since a prohibition on the exercise of constitutional rights should not be imposed when there are effective alternatives.

H. Right to counsel.

Sometimes government attorneys discourage people from having counsel, even at their own expense. A former Connecticut prosecutor explained how he talked respondents out of using lawyers:

> It's not a criminal matter; it is a civil matter. ... You [as a subject of gun removal] have an option. One, you can roll your dice with the hearing. Two, you can say to me [as the State's lawyer] right now, "I am not comfortable going forward without an attorney." And I will go up and tell the judge you would like counsel. And [you] would be told, "We are not going to have the hearing [now] and you're not going to get the guns back." And then [people think,] "Oh, I'm going to have to pay for an attorney now to get my guns back?" [So the hearing goes forward.] That happens most of the time ... I would then go into chambers and lay it out for the judge exactly what we talked about. I would say, "Look, I think this guy is a good guy," or "I think this guy is a borderline guy."[72]

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[70] CONN. GEN. STATS. § 29-38c(a)("Such state's attorney or police officers shall not make such complaint unless such state's attorney or police officers have conducted an independent investigation and have determined that such probable cause exists and that there is no reasonable alternative available to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm.")

[71] CAL. PENAL CODE § 18175(b):

> (b) At the hearing, the petitioner shall have the burden of proving, by clear and convincing evidence, that both of the following are true:
> (1) The subject of the petition, or a person subject to an ex parte gun violence restraining order, as applicable, poses a significant danger of causing personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition.
> (2) A gun violence restraining order is necessary to prevent personal injury to the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable, or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable.

[72] Quoted in Swanson et al., *supra* note __, at 196.

Colorado is taking steps to prevent such abuse, by making court-appointed counsel available to all respondents.[73]

As Colorado recognizes, having to suddenly find a lawyer and pay the fees for an imminent court hearing can be very difficult for many people. Of course the respondent can choose a different lawyer instead, at his own expense.

A good system of court-appointed counsel will encourage some attorneys to develop expertise in gun confiscation cases. Such attorneys will provide useful knowledge for future improvements to confiscation systems.

Statutes should clearly specify how respondents are to be given clear written notice of their right to counsel, as well their procedural and property rights. Federal funding can encourage states to broaden the availability of court-appointed counsel.

I. Right of cross-examination.

According to the Supreme Court, cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[74] But some statutes eradicate the right of cross-examination. The accuser and witnesses supporting the accuser never need to testify in court, where they would be subject to cross-examination. Instead, persons can simply submit an affidavit.[75]

In the Giffords/Bloomberg model, the petitioner need never be seen by a judge or opposing counsel. The petitioner can make a telephone call in an ex parte hearing. At the later hearing, where the respondent can present his or her side of the story, the petitioner can send a written document, instead of testifying. This makes a sham of due process. An attorney who cannot cross-examine adverse witnesses cannot function effectively.[76]

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[73] COLO. REV. STATS. § 13-14.5-104(1), https://leg.colorado.gov/sites/default/files/documents/2019A/bills/2019a_1177_rn2.pdf.

[74] Ford v. Wainwright, 477 U.S. 399, 415 (1986); Watkins v. Sowders, 449 U.S. 341, 349 n.4 (1981). The Court was quoting John Henry Wigmore, the pre-eminent expert on the rules of evidence. He called cross-examination "the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure." JOHN HENRY WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904-05). The treatise is usually known as *Wigmore on Evidence* or just *Wigmore*. Over a century later, successor *Wigmore* editions are still being published.

[75] *E.g.*, COLO. REV. STATS. § 13-14.5-105(4) "(The court may: (a) examine under oath the petitioner, the respondent, and any witnesses they may produce, or, in lieu of examination, consider sworn affidavits of the petitioner, the respondent, and any witnesses they may produce;").

[76] Gun confiscation hearings are styled as civil processes, not criminal ones, so some persons may believe that the Sixth Amendment's Confrontation Clause does not apply. The Sixth Amendment guarantees: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. CONST., amend. VI.

But although a confiscation case may have a civil form, it is criminal consequences: a confiscation order results in the execution of a criminal-style search and seizure warrant against the defendant. Accordingly, the Confrontation Clause should apply.

J. Venue should be where the respondent lives

Some statutes allow venue where the respondent resides *or* where the resident has a firearm.[77] The latter is inappropriate. Consider a respondent who lives in Denver and stores a gun there; he also stores two deer rifles at a friend's hunting cabin in Moffat County, 200 miles west in the mountains. He should be allowed to present his legal defense in Denver, where he lives—and not forced into a far-away venue.[78]

K. Mandatory announcement of orders to third parties should be carefully regulated.

As discussed above, ex parte confiscation orders have high error rates.[79] Therefore, statutes should not mandate government reporting of ex parte confiscation orders (or mere petitions for such orders) to third parties.[80] Such reporting stands a good chance of ruining innocent persons' reputations.

Reporting should take place only after a hearing in which the respondent has had an opportunity to be heard, with full due process rights. Reports should be made to persons whom the court has specifically identified as being at risk.

Even in civil cases, cross-examination has sometimes been held to be a right. *E.g.*, Pazienza v. Pazienza, 595 A.2d 235, 240 (R.I. 1991) ("The importance of cross-examination extends to civil cases as well."); Town of Geneva v. Tills, 129 Wis.2d 167, 178, 384 N.W.2d 701, 706 (in civil cases "meaningful cross-examination" is a common-law right); Neider v. Spoehr, 41 Wis. 2d 610, 617-18, 165 N.W.2d 171, 175 (1969) (In civil case, "It is fundamental that a party has a right to cross-examine another party who is adverse to him," but trial judge has the discretion to restrict cross-examination by multiple lawyers so as to keep trial proceedings orderly).

[77] *See, e.g.*, VT. STAT. ANN. TIT. 13, § 4052(c) (allowing a petition in the "the county where the events giving rise to the petition occur"); VA. CODE ANN. § 19.2-152.13(H) (allowing commencement of proceedings where "the person who is subject to the order . . . has engaged in any conduct upon which the petition for the [order] is based"); WASH. REV. CODE § 7.94 (allowing action to be filed in the county where the *petitioner* resides).

[78] Colorado's HB 19-1197 was amended to remove this problem.

[79] See the Connecticut and Indiana studies cited *supra*, text at notes ____.

[80] *See, e.g.*, FLA. STAT. § 790.401(10)(a) – (c) (requiring law enforcement agencies to enter orders into state and national crime information centers and that the court forward all identifying information about the respondent to the Department of Agriculture and Consumer Services); HAW. REV. STAT. § 134-69(a) – (b) (requiring the court to notify the Hawaii criminal justice data center of an ex parte order including identifying information about respondent); 430 ILL. COMP. STAT. § 67/55(c) (requiring law enforcement agencies to furnish information regarding ex parte orders to Department of State Police); MASS. GEN. LAWS CH. 140, § 131u (requiring the court to forward copies of emergency orders to licensing authorities, the commissioner of probation, and the department of criminal justice information services which "shall transmit the report . . . to the Attorney General of the United States"); NEV. REV. STAT. § 33.650(1)(a) (requiring the court to transmit ex parte orders to the Central Repository for Nevada Records of Criminal History).

L. Concealed carry restoration for the falsely accused

Confiscation laws sometimes require that a concealed carry permit be revoked immediately when a temporary order is entered.[81] If the court terminates a temporary order after the court hears the respondent's side of the story, the concealed carry permit should be promptly reissued.

In many jurisdictions, carry permits are expensive and time-consuming.[82] Innocent people who have been vindicated in court should not have to spend several months and pay high fees to re-apply for a carry permit all over again. Without prompt reissuance of permits, innocent persons are denied their right to bear arms for an extended period of time.

Similar procedures should be followed in the few states where a license is required to possess a firearm or a handgun in the home.[83]

M. Civil remedy for malicious and false petitions.

Laws about child abuse, sexual assault, and domestic violence are sometimes used as weapons by spurned lovers and by people seeking revenge for various motives. There is no reason to believe people who pervert the law by making false reports will somehow be more scrupulous regarding the new confiscation tool.

Many confiscation laws specifically declare that malicious or false petitions may be subject to prosecution.[84] This is appropriate. But the odds of criminal prosecution are low, even if an affidavit is sworn under penalty of perjury. Perjury prosecutions are rare, and rarer still from civil cases.[85]

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[81] *See, e.g.*, OR. REV. STAT. § 166.527(f) (upon issuance of a temporary order, respondent "must, within 24 hours, surrender . . . any concealed handgun license"; 430 ILL. COMP. STAT. § 67/35(g)(2) ("An emergency firearms restraining order shall require "the respondent to turn over to the local law enforcement agency any . . . concealed carry license in his or her possession"); Va. Code Ann. § 19.2-152.13(A) (the order "shall contain a statement . . . that such person is required to surrender his concealed handgun permit if he possesses such permit"). *See also* FLA. STAT. § 790.401(4)(e)(6); MASS. GEN. LAWS ch. 14, § 131t(c); R.I. GEN. LAWS § 8-8.3-4(6); WASH. REV. CODE § 7.94.050(6)(g); N.C. GEN. STAT. § 50B-3.1 ("Upon issuance of an emergency or ex parte order … the court shall order the defendant to surrender … permits to carry concealed firearms")

[82] *See*, *e.g.*, 430 ILL. COMP. STAT. ANN. § 66/60(b) ($150 for initial license or renewal); MASS. GEN. LAWS ch. 140, § 131(i) ($100); N.M. STAT. § 29-19-5(B)(2) ($100).

[83] *See* N.Y. PENAL CODE § 400.00(2) ("A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to . . . have and possess [a handgun] in his dwelling by a householder").

[84] *E.g.*, MD. PUB. SAFETY § 5-609.

[85] Only 16 criminal perjury cases were commenced in all federal district courts in 2019. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, TABLE D-2, available at https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2019/03/31. *See also Is Civil Perjury Punishable?*, SLATE (Aug. 19, 1998) (discussing low prosecution rate of civil perjury), https://slate.com/news-and-politics/1998/08/is-civil-perjury-punishable.html; Linda Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. Tol. L. Rev. 397 (2003) (discussing difficulty of prosecuting perjury charges).

Victims of abusive claims should be entitled to attorney's fees, and they should have a cause of action of civil damages. Without a strong civil remedy, there is little practical deterrent to malicious reports.

N. Constitutional challenges to confiscation laws

A thoughtful article in the *Virginia Law Review* argues in favor of the constitutionality of gun confiscation orders.[86] First, as the article points out, the Supreme Court's *Heller* precedent, like many precedents involving state rights to arms, allow for the disarming of people who are not the "law-abiding, responsible citizens" extolled in *Heller*.[87]

In analyzing original public meaning, several historical practices are precedents for the practice. First, two colonies had laws prohibiting gun possession by slaves, or only allowing possession while under the master's supervision.[88] Slaves were denied citizenship and for the most part excluded from civil society; having no legal obligation to that society, they had the moral right to win their freedom by any means necessary. Laws prohibiting or limiting gun ownership by people of color were the exception during the seventeenth and eighteenth centuries but became more common in the South during the nineteenth century.[89]

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[86] Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. (forthcoming 2020)

[87] *Id.* at ___. **No need to fill in the pinpoint cites, since the article isn't in page proof form yet.**

[88]' 1 The Laws of Maryland 117-18 (Virgil Maxcy ed., 1811) (enacted 1715) ("[N]o negro or other slave, within this province, shall be permitted to carry any gun or any other offensive Weapon, from off their master's Land, without licence from their said Master."); 19 (pt. 1) The Colonial Records of the State of Georgia 76-78, 117-18 (Allen D. Candler ed., 1904) (1755 statute, and 1768 revision) (forbidding slave possession or carrying of "Fire Arms or any Offensive Weapon whatsoever," unless the slave had written permission from his or her master, mistress, or overseer to hunt; also allowing slaves to carry guns without written permission when accompanied by a white of at least 16 years old, or when hunting destructive birds on their master's plantation during daytime; no slaves could have arms between sunset Saturday and sunrise Monday).

[89] *See*, *e.g.*, State v. Newsom, 27 N.C. (5 Ired.) 250 (1844) (gun licensing statute for free blacks); Aldridge v. Commonwealth, 4 Va. 447, 449 (Va. Gen. Ct. 1824) (the "numerous restrictions imposed upon this class of people"—free blacks—such as the limits "upon their right to bear arms," are "inconsistent with the letter and the spirit of the Constitution, both of this state and of the United States." Accordingly, the state and federal constitutions do not apply to them); Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?* 70 Chi.-Kent L. Rev. 1307, 1318-23 (1995).

While slaves were "servants for life," another category of unfree persons were servants for a term of year—namely indentured servants. No American laws ever disarmed them. Although most states and colonies included indentured servants in their militias, colonial Virginia and Maryland sometimes did not. JOHNSON et al., *supra*, at 181-82. When a servant's indenture contract was complete, the master was required to give the servant "freedom dues"—particular resources so that the servant could begin living independently. In Maryland, North Carolina, South Carolina, and Virginia, freedom dues for male servants included a firearm. JOHNSON et al., *supra*, at 185-86.

Second, almost every colony had laws that attempted (usually with little success) to prohibit arms trade to hostile Indian nations.[90] At the time, the various Indian tribes were recognized as genuinely separate nations; a Seneca Indian, for example, had no more duty of allegiance to the British colonies or to the United States than did a French citizen who lived in Paris.[91] All nations attempt to restrict arms provision to hostile foreign nations.

As for Indians who did accept living in the Anglo-American polity, some state or colonial laws did attempt to limit arms possession; these restrictions were loosened or removed in the various colonies or states as the threat of Indian warfare diminished.[92]

Finally, during the Revolution several states confiscated for public use the firearms of people who would not swear loyalty to the United States.[93]

Blocher and Charles, however, do not rely on the above precedents, some of which bear the taint of racial animus.

Arguing for the constitutionality of pre-hearing deprivations of rights, Blocher and Charles point to a litany of cases allowing ex parte seizure of commercial property or revocation of commercial licenses.[94] These examples, however, are not on point. None of them involve deprivations based on predictions of future danger growing out of lawful conduct. Rather, all of them demonstrated illegality before the order is issued. For example, a vendor has chickens that *are presently* contaminated are therefore illegal *at present* to sell; the chickens may be seized ex parte.[95] Or a mine *is currently being operated* in violation of safety laws; an ex parte order may suspend operation of the mine.[96] A commercial truck *has repeatedly been found guilty* of violating driving laws; his license may be suspended ex parte.[97] Notably, none of the ex parte cases cited by Blocher and Charles involve enumerated constitutional rights.

Challenges to state confiscation laws have been rejected by three intermediate courts of appeals. None of the cases involved the procedural due process questions discussed in this Article.

1. *State v. Hope* (Conn. App.)

[90] *See* NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE MOCSARY, & NICHOLAS J. JOHNSON, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 187-92 (Wolters Kluwer, 2d ed. 2017). With.

[91] *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994).

[92] JOHNSON et al., *supra*.

[93] JOHNSON et al., *supra*, at 279-80.

[94] *See* Blocher & Charles, *supra*, at ___.

[95] *See* N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315 (1908).

[96] *See* Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 298 (1981).

[97] *See* Dixon v. Love, 431 U.S. 105, 114 (1977).

The first case came from the Appellate Court of Connecticut.[98] On appeal, the respondent had no attorney.[99] He was obviously mentally ill; "the plaintiff had brought to the hearing two electronic devices wrapped in tin foil."[100]

He raised no constitutional claims other than the Second Amendment.[101] The court speedily rejected the Second Amendment argument. The law "does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms."[102]

Since the plaintiff in *Hope* raised only the Second Amendment, *Hope* offers no precedent on constitutional due process. Cases with pro se mentally ill plaintiffs do not benefit from well-presented adversarial argument, and therefore offer limited guidance to future courts.

2. *Redington v. State* (Ind. App.)

An Indiana case involved a plaintiff who was at least represented by counsel.[103] The court rejected the plaintiff's argument that the Indiana confiscation statute violated the Indiana constitutional right to arms. Indiana precedent allowed prohibiting "dangerous" persons from having arms.[104]

Secondly, the plaintiff argued that the seizure of his guns was a "taking" of his property, for which compensation is required by the Fifth Amendment of the Constitution of the United States and the Indiana Constitution. The court responded that the taking of dangerous property does not require compensation; for example, forfeiture laws allow uncompensated takings.[105]

Third, the plaintiff argued that a particular phrase in the statute was void for vagueness. The court held that the phrase was not vague, because it was qualified by another phrase.[106]

Redington's 51 guns were confiscated in 2012, and the confiscation upheld in 2013. In 2015 he filed a petition for their return. There was no hearing on the petition until

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[98] Hope v. Connecticut, 163 Conn. App. 36 (2016).

[99] *Id.* at 36 ("Donald Hope, self-represented, West Hartford, the appellant (plaintiff).").

[100] *Id.* at 40.

[101] *Id.* at 38 n.1.

[102] *Id.* at 43.

[103] Redington v. State, 992 N.E.2d 823 (Ind. App. 2013).

[104] *Id.* at 834-35.

[105] *Id.* at 836-37.

[106] The phrase was "may present a risk of personal injury to the individual or to another individual in the future." That phrase was qualified by the requirement that the petitioner prove by clear and convincing evidence that the individual either "(A) has a mental illness (as defined in IC 12–7–2–130) that may be controlled by medication, and has not demonstrated a pattern of voluntarily and consistently taking the individual's medication while not under supervision; or (B) is the subject of documented evidence that would give rise to a reasonable belief that the individual has a propensity for violent or emotionally unstable conduct." *Id.* at 839.

2018. Under the Indiana statute, he faced the burden of proof by a preponderance of evidence to show that he "is not dangerous."[107] At the hearing, Redington presented uncontradicted from a psychiatrist, a counselor, and his wife that Redington was nonviolent and nondangerous, as of 2018. The state presented no evidence. Relying solely on the 2012 confiscation order, the trial court denied Redington's petition. The Indiana Court of Appeals reversed, because the issue in 2018 was whether Redington was potentially dangerous in 2018, rather than in 2012. Indeed, "If the State's position were correct, the statute would be unconstitutional as applied to Redington because the *Redington I* decision that the statute passed constitutional muster would have been based on the false promise that he could someday regain possession of his firearms."[108]

3. *Davis v. Gilchrest County Sheriff's Office* (Fla. App.)

A county sheriff's office filed a confiscation petition against one of its deputies. The trial court issued the order based on evidence that Davis had expressed homicidal ideation and had threatened to shoot a deputy.[109] The appellate court rejected Davis's claims that the trial court had improperly sequestered a witness,[110] and rejected Davis's claim that his trial presentation had been cut short, as Davis's attorney had not asked for a continuance.[111] Constitutional vagueness challenges to the statutory terms "significant danger," "relevant evidence," and "mental illness" were rejected.[112]

Finally, the court considered Gilchrest's facial challenge that the law violated substantive due process because it allowed confiscation for "entirely innocent" activity. As the court noted, being seriously mentally ill, abusing alcohol, or recently acquiring firearms and ammunition may be entirely innocent.[113] "Importantly, these are simply factors, among many a court may consider (none of which were relied upon in this case) before issuing an RPO."[114]

III. Enforcement issues

A. Safe and orderly relinquishment of firearms.

In Vermont, a person served with a confiscation order must immediately relinquish his or her firearms to law enforcement *or* to a Federal Firearms Licensee (FFL, a licensed gun business, such as a retail store).[115] Alternatively, the court may

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[107] IND. CODE § 35-47-14-8(d)(2).
[108] Redington v. State, 121 N.E.3d 1053, 1064 (Ind. App. 2019).
[109] Davis v. Gilchrest County Sheriff's Office, 280 So.3d 524, 528-29 (Fla. App. 2019).
[110] *Id.* at 530.
[111] *Id.* at 531.
[112] *Id.* at 531-32.
[113] *Id.* at 532-33.
[114] *Id.* at 533.
[115] VT. STAT. tit. 13 § 4059(b)(1).

order the firearms be relinquished to a third person. The third person must be a person who is lawfully allowed to own guns, must not allow respondent access to the guns, and may not return the guns to respondent until the order is terminated.[116]

Oregon requires that the respondent "Within 24 hours surrender all deadly weapons in the respondent's custody, control or possession to a law enforcement agency, a gun dealer or a third party who may lawfully possess the deadly weapons."[117] In Washington, if the respondent was present at the hearing, he or she has 48 hours to surrender all firearms.[118]

But other statutes automatically force law enforcement to show up at someone's home and take their guns. The first notice that a person will receive is when the police arrive at a person's home and announce: "We're from the government and we're here to confiscate your guns."

This creates an inflammatory situation, endangering both law enforcement and the public. Undoubtedly there are situations where instant confiscation without notice might be necessary; laws can so provide, based on specific judicial findings about an individual case.

Since about 30 percent of temporary orders turn out to be incorrect, mandatory instant police confiscation puts many innocent people through a humiliating experience for no good reason. It evokes a police state.[119]

B. No-Knock Raids

No-knock raids must be the exception and not the norm. The Supreme Court has rejected the notion that an entire class of cases can automatically be no-knock at unfettered law enforcement discretion.[120] Although no-knock raids may be necessary in unusual circumstances, their routine use to execute search warrants endangers

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[116] VT. STAT. tit. 13 § 4059(b)(2).

[117] OR. STATS. § 166.537(1). "If the respondent indicates an intention to surrender the deadly weapons to a gun dealer or a third party, the law enforcement officer shall request that the respondent identify the gun dealer or third party." *Id.* § 166.537(3)(a).

[118] "Alternatively, if personal service by a law enforcement officer is not possible, or not required because the respondent was present at the extreme risk protection order hearing, the respondent shall surrender the firearms in a safe manner to the control of the local law enforcement agency within forty-eight hours of being served with the order by alternate service or within forty-eight hours of the hearing at which the respondent was present." WASH. STATS. § 7.94.090.

[119] Discussing a case in which a Connecticut judge improperly retained firearms that had been unlawfully seized, a police officer explained: "Firearms owners especially feel put-upon. I don't think the legislature, I don't think the judiciary realizes how, how strongly offended people are by that .... These are people that have trust in the system .... These are people that support the police, were in the military…I mean, that's who these people are. And then they come up with stuff like this, their whole universe is shaken, you know, and that's very distressful for people. Nobody recognizes that." Swanson, *supra* note __, at 197.

[120] *See* Richards v. Wisconsin, 520 U.S. 385 (1997) (drugs).

the public and law enforcement.[121] They are characteristic of a militarized police state, not a civil republic.

States regulate no-knocks in various ways. For example, in Colorado, no-knocks require a judicial warrant issued at the request of a district attorney.[122] But Colorado's new confiscation law has no such requirement for the gun seizures that it automatically mandates.[123]

Confiscation statutes should specify that no-knock warrant service must comply with all of the state's rules for no-knocks. Any law that directly or indirectly makes no-knocks easier for gun searches and seizures than for other searches and seizures is discriminatory.

States should not exempt ERPO confiscations from the ordinary limits on no-knock raids, as Colorado unfortunately did. Laws should allow respondents to peaceably surrender their arms within a certain period, unless the court makes a finding of the necessity of immediate forcible confiscation. Violent seizures should be allowed only in cases of necessity when specifically authorized by a court, or in exigent circumstances that could not have been presented to the court.

More broadly, law enforcement officers should not be put in the position of having to forcibly confiscate firearms based on a court order for which the petitioner never even appeared in court, which can be obtained by a former dating partner from the indefinite past, and for which the accuser's claims were never verified or investigated by law enforcement. Forcing law enforcement officers to enter someone's house based on potentially dubious and low-credibility claims is a reckless imposition of danger on officers and the public. Yet this dangerous system is exactly what the new Colorado statute mandates, following the model created by gun control lobbies.

C. Custody of seized firearms

In Connecticut and Florida, where the police must always personally confiscate guns, guns may then be transferred to an appropriate third person.[124] As the statutes specify, custodians must themselves be lawfully allowed to own guns, must not allow respondent access to the guns, and may not return the guns to respondent until the order is terminated.

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[121] *See* Brian Dolan, Note, *To Knock Or Not To Knock? No-Knock Warrants And Confrontational Policing*, 93 ST. JOHN'S L. REV. 201 (2019); Chase Patterson, Note, *Don't Forget to Knock: Eliminating the Tension Between Indiana's Self Defense Statute and No-Knock Warrants*, 47 IND. L. REV. 621 (2014); Amanda M. Yeaples-Coleman, Comment, *Reviving The Knock And Announce Rule And Constructively Abolishing No-Knock Entries By Giving The People A Ground They Can Stand On*, 37 U. DAYTON L. REV. 381 (2012); Dimitri Epstein, Note, *Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police*, 26 GA. ST. U. L. REV. 585 (2010).

[122] COLO. REV. STAT. § 20-1-1061. There is an exception for exigent circumstances. *Id.*

[123] COLO. REV. STAT. § 13-14.5-106.

[124] CONN. GEN. STATS. § 29-38c(e) ("Any person whose firearm or firearms and ammunition have been ordered seized pursuant to subsection (d) of this section, or such person's legal representative, may transfer such firearm or firearms and ammunition in accordance with the provisions of section 29-33 or other applicable state or federal law, to any person eligible to possess such firearm or firearms and ammunition.").

Other states, though, allow the guns to be transferred only to a Federal Firearms Licensee.[125] Colorado in general allows transfers only to FFLs, but allows "curios and relics" to be transferred to a relative who does not live with respondent.[126]

To reduce the risk that stored firearms will be ruined by neglect, and to reduce the humiliation of innocent people, statutes should allow firearms to be stored by any responsible lawful adult who will not allow access to the arms while an order is in effect.

When firearms are in law enforcement custody, the custodians should have the obligation to store them properly, and to pay damages for improper storage.[127]

D. Duration of orders

An ex parte order should be valid for no more than one week. A longer order should be allowed only after a full hearing with the petitioner having the burden of proof by clear and convincing evidence. Respondent should be represented by counsel, able to present evidence, and able to cross-examine.

Longer orders should extend no more than 180 days. Six months is sufficient for alternative proceedings, such as mental health commitments, or criminal prosecution. During the term of an order, the respondent should have the opportunity to petition for lifting of the order.

IV. Termination of Orders

Orders should expire on a specific date. Renewal of the order should be allowed if the petitioner proves the case for a renewal by clear and convincing evidence at a hearing with notice and due process.[128]

A. Preventing federal lifetime bans.

Upon termination of an order, information in databases should be revised to so indicate. In particular, the order should be removed from the National Instant Check System, where it is used as a firearms prohibitor. Unless the terminated order is

[125] This is a deviation from normal Colorado law. Ordinary restraining orders that involve firearms allow a transfer to a private party. COLO. REV. STATS. § 13-14-105.5.

[126] "Curios and relics" are certain historic firearms, defined in 27 C.F.R. § 478.11. The curios statute is COLO. REV. STATS., § 13-14.5-108(III).

[127] For problems caused by improper storage by law enforcement in other contexts, *see*, *e.g.*, Wright v. Beck, 723 Fed. Appx. 391 (9th Cir. 2017) (city seized hundreds of plaintiff's lawfully-owned firearms, eventually returned 26, and destroyed the rest); Wright v. Beck, No. 2:15-cv-05805-R-PJW, 2019 WL 404417 (C.D. Cal. Jan. 30, 2019); Emily Miller, *D.C. police damage soldier's guns*, WASH. TIMES, June 17, 2012.

[128] *E.g.*, CAL PENAL CODE § 18190.

removed from NICS, then an expired six-month or one-year order could function as a lifetime prohibition.

Federal agents should not be allowed to bootstrap expired orders into lifetime bans. Confiscation hearings are not criminal trials. A confiscation order is not based on the criminal standard of proof beyond a reasonable doubt. Unlike involuntary commitment hearings, confiscation hearings are not a mental health adjudication.

However, aggressive federal officials might scour state confiscation records, and declare that certain respondents are federally prohibited persons. For example, if a confiscation case record shows that the respondent was having mental health problems, a federal official could declare that the respondent has been "adjudicated as a mental defective."[129] Therefore, the respondent is banned by federal law for life from possessing firearms. Similar issues arise under the drug use prohibitor in federal firearms law, which has been applied even to medical use in compliance with state law.[130]

Federal laws and state laws should prohibit terminated confiscation orders from being used as a basis for federal gun bans.

B. Return procedures.

There should be specific rules for mandatory return of arms that have been seized, once the order expires or is overturned. Law enforcement agencies sometimes refuse to return firearms to lawful owners, and courts sometimes allow it—typically under the theory that the person's rights are not violated if they can legally acquire new firearms.[131] A strict deadline and a civil cause of action, including attorney's fees and punitive damages for failure to return lawful arms, should be part of a fair statute. Governments should not be allowed to charge the owners storage "fees" for temporarily confiscated guns—a common abuse in California, where fees can be exorbitant.

V. Conclusion

Red flag gun confiscation orders are legitimate tools for public safety when they are applied to persons who pose an extreme, imminent risk of misusing a firearm. But no red flag law enacted thus far has fully protected due process rights of the respondent, and some laws foster atrocious violations.

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[129] 18 U.S.C. § 922(g)(4).

[130] 18 U.S.C. § 922(g)(3). For application to medical marijuana, see Arthur Herbert, Asst. Dir., Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms & Explosives, *Open Letter to All Federal Firearms Licensees*, Sept. 21, 2011, https://www.atf.gov/file/60211/download.

[131] *See* City of San Jose v. Rodriguez, No. H040317, 2015 WL 1541988 (Cal. Ct. App. Apr. 2, 2015) (no constitutional violation when innocent spouse's arms seized and not returned); Rodriguez v. City of San Jose, 930 F.3d 1123 (9th Cir., 2019) (rejecting § 1983 lawsuit based on arms seizure), pet. for cert. no. 19-1057 (filed Feb. 21, 2020), response requested, May 20, 2020; Walters v. Wolf, 660 F.3d 307 (8th Cir. 2011) (due process violation but no Second Amendment violation).

Lawmakers should aim to reduce the high error rate of ex parte orders, and to ensure protection of due process at every step. States should go beyond the bare minimum for due process; they should provide appointed counsel for all respondents and careful controls on ex parte proceedings. States that thwart cross-examination, promote unnecessary no-knock raids, leave innocent victims without a civil remedy for false or malicious petitions, or deny any of the seven core elements of due process are complicit in the schemes of gun prohibition organizations to use laws that are ostensibly aimed at very dangerous people to disarm the peaceable.