

Red Flag Laws and the Second Amendment

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About a year ago, Shea [wrote](#) about red flag laws, sometimes called gun violence restraining orders or extreme risk protection orders. More than a dozen states have such laws, and several bills are pending in the General Assembly that would enact a red flag law here. But are red flag laws constitutional?

What are red flag laws? Most red flag laws allow a family member to petition to have guns removed from a respondent's control when the petitioner believes that the respondent's gun possession poses a danger to the respondent or to others. A few states only allow law enforcement officers to initiate the process, and a few states allow either a family member or an officer to do so. The process is somewhat similar to the process for obtaining a DVPO, in that there is typically an ex parte stage, where a petitioner may obtain a temporary order that may last a week or two, and an adversarial stage, which may result in the imposition of a final order that typically lasts a year. Final orders may be renewed if appropriate or terminated early if the respondent can demonstrate that the danger has passed. The standard of proof varies by state and by stage of the proceeding, with probable cause the most common standard at the ex parte stage and clear and convincing evidence the most common at the final order stage.

Status in North Carolina. The two bills in the General Assembly that would enact red flag laws are [H454](#) and [S565](#). They are similar though not identical. Both would allow a family or household member or a law enforcement officer to seek an extreme risk protection order. Both would allow a court to issue a temporary ex parte order, and both would allow a final order to last up to a year. Under both bills, the standard for issuing a final order would be a preponderance of the evidence showing that the respondent poses "a danger of causing physical harm to self or others by having in his or her custody a firearm."

All the primary sponsors of both bills are Democrats. As I understand the information available on the General Assembly's website, the bills don't appear to be moving forward this session. However, the partisan divide on red flag laws is not as strong as it is on many other gun-related issues. [Media reports](#) indicate that "many Republicans [in the United States Senate] sounded open and enthused about" red flag laws during a recent hearing, and President Trump has expressed some support for such laws. It seems entirely possible that North Carolina will adopt a red flag law at some point.

Do red flag laws violate the Second Amendment? The answer may depend on the details of the law in question, but in general, I doubt that most red flag laws violate the Second Amendment.

By way of background, recall that the Supreme Court decided in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to bear arms for lawful purposes like self-defense. However, the Court did not establish a standard for lower courts to use in deciding whether a given regulation violates the Second Amendment. The federal courts generally have adopted a two-step test, asking first whether the challenged law burdens conduct protected by the Second Amendment at all. If it does not – for example, if the law concerns a class of weapons that are outside the scope of the Amendment, or addresses a group of people not entitled to Second Amendment rights – that's the end of the inquiry. If the law does burden conduct protected by the Second Amendment, the court moves to the second step, which requires the court to evaluate the law under some form of heightened

means-end scrutiny, either intermediate or strict. *See generally Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (discussing the steps and adopting intermediate scrutiny for the purpose of evaluating and upholding Maryland's ban on assault weapons). North Carolina's appellate courts have applied a similar analysis. *See State v. Fernandez*, ___ N.C. App. ___, 808 S.E.2d 362 (2017) (applying the two-step analysis and rejecting a defendant's constitutional challenge to the Felony Firearms Act).

How would this analysis apply to red flag laws? Starting with the first prong of the analysis, because red flag laws prohibit a person from possessing firearms of any kind, even in the home, it seems to me that they do burden conduct protected by the Second Amendment. Perhaps one could argue that such laws fall under the Supreme Court's statement in *Heller* that its "opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill," 554 U.S. at 626, and so fall outside the scope of the Second Amendment. But that strikes me as a stretch, especially given that most red flag laws – including the ones proposed in the bills pending in North Carolina – do not require the petitioner to allege, or the court to find, that the respondent is mentally ill. (If the respondent is mentally ill and dangerous, he or she may be subject to involuntary commitment, which itself result in legal disenfranchisement to possess firearms.)

That brings us to the second prong of the test, the means-end fit analysis. The importance of the end goal is beyond dispute. The United States experiences approximately 10,000 gun homicides and 20,000 gun suicides each year. The key concern is whether red flag laws are an adequately tailored means to address the problem of preventable gun violence. I suspect that most courts would say that they are. Such laws typically include a number of provisions designed to minimize the extent to which they infringe on the rights of gun owners. For example, they place the burden of proof on the petitioner; allow an ex parte order to last only a brief time; and require an adversarial hearing and a judicial finding of a risk of harm before a final order may be issued. Many red flag laws require an elevated standard of proof at the final order stage, such as proof by clear and convincing evidence. Most allow the respondent to reclaim his or her guns before the order expires if he or she can establish that he or she no longer poses a danger.

Obviously, the more protective a red flag law is of respondents' rights, the more likely it will be to survive Second Amendment scrutiny. But the limited case law that we have so far suggests that many red flag laws will be deemed constitutional. *See Hope v. State*, 133 A.3d 519 (Conn. Ct. App. 2016) (upholding Connecticut's statute under the first prong of the test because the law "does not implicate the second amendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes"; it only limits "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"). *Cf. Redington v. Indiana*, 992 N.E.2d 823 (Ind. Ct. App. 2013) (upholding Indiana's statute against challenge under the state constitution's right to bear arms). As noted above, the structure of such laws is similar to the laws governing domestic violence protective orders, and the federal prohibition on gun possession by persons subject to DVPOs has been repeatedly upheld against Second Amendment challenges. *See Stimmel v. Sessions*, 879 F.3d 198 (6th Cir. 2018) (so ruling, and noting that "[e]very circuit that has considered a post-*Heller* Second Amendment challenge to . . . the statute" has upheld it).

Of course, not everyone agrees that red flag laws are appropriately tailored responses to preventable gun violence. *Reason* magazine argues [here](#) that with red flag laws, "the process is rigged against the respondent from the beginning" and that "it seems inevitable that the vast majority of people who lose their constitutional rights under this sort of law will pose no real threat to themselves or others." The NRA "[could support](#)" red flag laws that provide robust due process protections for gun owners, but generally has opposed the red flag laws that have been enacted to date based on what it sees as insufficiently stringent procedures.

Comparing North Carolina's proposals to each other and to other states' laws. [This chart](#) compares existing red flag laws on criteria such as the standard to obtain an order and how long an order lasts, and effectively illustrates how different some states' laws are from others.

North Carolina's proposals are generally within the mainstream of red flag laws, though is worth noting several of their

specific provisions. For example:

- S565 would require a petitioner to provide corroborating evidence along with his or her own allegations, meaning that he or she would need to supply “a written statement made by a witness other than the petitioner that states specific facts supporting the allegation set forth in the petition or . . . an audio and visual recording of the incident the petitioner is using as the basis for seeking an ERPO.” H454 contains no such requirement, and in that regard, is more typical of red flag laws enacted in other states.
- S565 would set a relatively high bar for the issuance of an ex parte order. The petitioner would need “clear, cogent, and convincing evidence that the respondent poses an imminent danger of causing physical injury to self or others by having in his or her custody a firearm.” By contrast, H454 would require only that it “clearly appear” from “specific facts” that the respondent poses an imminent danger. As noted in the chart linked above, many other states set lower thresholds at this stage. For example, in [Colorado](#), an ex parte order may be issued based on a preponderance of the evidence. In California, it may be based on “reasonable cause.”
- Both North Carolina bills would allow a final order to be issued based on a preponderance of the evidence. A majority of other jurisdictions require an elevated standard of proof at that stage, such as clear and convincing evidence.
- Both North Carolina bills would allow the respondent to make a motion to terminate a final order prior to its expiration date. In such a proceeding, the burden would be on the respondent to prove by a preponderance of the evidence that he or she no longer posed a danger.
- Neither North Carolina bill provides respondents in these matters with a right to counsel. As far as I know, Colorado is the only state that does guarantee counsel to respondents.

Final thoughts. As always, I’m interested in others’ thoughts and opinions. I should emphasize here that the School of Government is policy neutral and nothing in this post should be interpreted as expressing a view on whether red flag laws are a good idea or a bad idea – the post is intended only to explore whether such laws are constitutional. Finally, the North Carolina Constitution in some ways protects the right to bear arms more broadly than the Second Amendment does, so even if red flag laws are compatible with the Second Amendment, there could be some question about their status under the state constitution.