

**Questions for the Record from Senator Charles E. Grassley
To Mr. Dave Kopel
U.S. Senate Committee on the Judiciary
“Red Flag Laws: Examining Guidelines for State Action.”
Submitted on April 2, 2019**

1. Mr. Kopel, red flag laws have only been in effect for a few years in the states, with most actually enacted in the last year since the shooting in Parkland, Florida.
 - a. In your view, have these laws have been effective in limiting gun violence? What evidence can you point to supports your point of view?

The states with the longest experience with such laws are Connecticut and Indiana. No study has found a statistically significant reduction in homicides.

Gun prohibition groups describe suicide by gun as a form of “gun violence.” The studies were split on whether red flag laws result in net suicide reduction. There is no doubt that confiscating guns reduces gun suicides, but the availability of alternative methods that are nearly as likely to be lethal—such as hanging or carbon monoxide poisoning—greatly limits the effectiveness of removing just one method of suicide. One article purported to find that every 10 or 20 gun confiscation orders prevents a suicide; for the reasons detailed in my testimony, the claim is completely implausible, since it conflates suicide attempts with other forms of self-injury that are not intended to be lethal, such as cutting. (Kopel testimony, pp. 6-8).

A recent article in the *Annals of Internal Medicine* described 21 cases of gun confiscation under California’s law. 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 Medicine* (2019), doi: 10.7326/M19-2162, available at <https://annals.org/aim/fullarticle/2748711/extreme-risk-protection-orders-intended-prevent-mass-shootings-case-series?searchresult=1>. 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, 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 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.

As far as I know, there are no data on how many people make threats to shoot several people versus how many such threats are followed by actual shooting. 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.

- b. Of the proposed or enacted red flag laws that have been proposed, which in your view offer the best protections of Second Amendment rights?

There are no states that have sufficient due process from start to finish. A proper red flag would incorporate the best practices found among the various state laws. (Kopel testimony, pp. 10-27). These include:

- Confiscation petitions only from law enforcement officers or prosecutors (e.g., Connecticut).
- Ex parte confiscation petitions may be granted only by clear and convincing evidence (Oregon).
- Ex parte petitions should be allowed only when the petitioner provides specific evidence that an ex parte proceeding is necessary (partially so in Vermont).
- Confiscation order may be issued only if the court finds there is no reasonable alternative (e.g., Connecticut).
- Respondents may have the benefit of state-paid counsel (Colorado).
- A confiscation order issued after an adversarial hearing must be based on clear and convincing evidence (most modern statutes).
- Accusers must appear in court, testify under oath, and be subject to cross-examination (the opposite of the model currently being pushed by the gun control organizations, and adopted in some states).
- Automatic termination of orders after the time limit expires (several modern statutes).
- Orders may be renewed only by presentation of proof to the same standards as was needed for the original order (same).
- A respondent may have a short period of time to peaceably surrender the firearms, unless the court finds based on specific facts of the case that immediate confiscation is necessary (Oregon).
- The respondent's firearms may be directly given to and stored by any third party who can lawfully possess firearms (Connecticut, Florida, but with the flaw that police must confiscate the guns first).
- Government agencies that store confiscated arms must exercise care so that the arms are not damaged or stolen (most modern laws).

- Government agencies may not charge storage fees (no protections in current laws; exorbitant fees are common in California).
 - Upon the termination of an order, the arms must be promptly returned to the owner, without the owner needing to file court petition or other paperwork (some modern statutes attempt this but have drafting flaws).
 - Innocent victims of false and malicious accusations should have a civil remedy (included in the Colorado bill that passed the House but deleted in the Senate).
2. You testified at the hearing on March 26 that about thirty percent of Extreme Risk Protection Orders have been wrongly issued.

- a. In that collection of cases, how many have led to a perjury prosecution or other civil remedy to correct the invalid issuance of the ERPO?

I am not aware of any cases in which perjury charges were filed based on ERPO accusations. No state currently has a specific civil remedy for false or malicious ERPO accusations. I am not aware of any cases seeking a civil remedy based on some other, general tort theory.

- b. What would be the most effective way to limit the wrongful issuance of ERPOs?

Making civil remedies available for false and malicious accusations would likely have a deterrent effect. Further, petitions should only be initiated by law enforcement officers or prosecutors, and not by former dating partners and so on. Accusers and adverse witnesses should be required to testify in court and be subject to cross-examination. Ex parte orders should be limited to cases of proven necessity based on the facts of the particular case.

3. Some in the law enforcement community have expressed concern that red flag laws expose them to additional safety concerns as they seek to enforce ERPOs. In your view, how can legislators make sure to take into account the safety and other practical concerns of law enforcement?

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 seizure of firearms 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.