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The wrong way to control guns

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In the aftermath of horrific terrorist massacres such as the Orlando, Florida, nightclub shooting, the natural impulse of the American people is to ask what the government can do to prevent such tragedies. Securing public safety is indeed the government's most important job; keeping guns away from terrorists has obvious value. But this must be done in a way that complies with the Constitution.

This admonition has animated much of the recent debate about the rules governing National Security Agency surveillance of suspected terrorists. Regrettably, it has not been embraced in the gun control debate unfolding in the aftermath of Orlando.

Yet the Constitution's due-process protections are the vital safeguard of individual liberty and mitigate against arbitrary government action by setting the procedures the government must observe when it seeks to deprive an individual of a given substantive right.

Constitutionally "appropriate" procedure varies based on the importance of the right at issue and the risk of an erroneous deprivation of that right, and the government's interest. For example, while government officials may commit a person who is dangerous to himself or others on an emergency basis, a judicial determination of the validity of the commitment must follow. Law enforcement officers may arrest a person they believe to be guilty of a crime, but the person who has been arrested is entitled to appear before a judge.

Our legal traditions spell out the process that is due for the categories of people currently denied the right to keep and bear arms. Those include felons and those charged with felonies, people adjudged "mentally defective" and those dishonorably discharged from the military. The unifying factor is that people subject to these bars have all received their day in court.

But that's not the case with the new gun control proposals. One proposal is to block gun sales to those named on the terrorist watch list maintained by the FBI's Terrorist Screening Center. The list, however, is entirely unsuited to that task.

According to National Counterterrorism Center guidance, agencies can add someone to the list based on a "reasonable suspicion" or "articulable evidence" that the person is a "known or suspected terrorist." Listings can be based on anything from civilian tips and social-media

postings to actual government investigations. The guidance makes clear that "irrefutable evidence or concrete facts are not necessary."

The predictable result is a very long list, with entries of varying quality. As of July 2014, the main list contained about 800,000 names. More than 40 percent are designated as having "no recognized terrorist group affiliation." This kind of list may be valuable for prioritizing counterterrorism activities, supporting investigations and determining where additional scrutiny may be warranted, such as with visa applications.

However, the watch list was never intended to be used to punish listed individuals by depriving them of their constitutionally protected rights. And, legally, it is unsuitable for that task. While there is an administrative redress process to remove a name from the list, there is no judicial review, no hearing and not even notification of whether a request was granted or denied, much less the grounds of the decision.

The no-fly list, which contained about 47,000 names in 2013, is subject to the same shortcomings. Individuals are never informed why they've been listed and have no opportunity for a hearing before a neutral judge to clear their names. In court filings, the government has explained that the list represents officials' "predictive judgments" about who may pose a threat.

Whatever the merits of that approach as applied to the eligibility for air travel, it falls far short of the kind of concrete proof and procedure necessary to deprive a person of a constitutionally protected right.

Even narrower approaches being bandied about raise similar concerns. For example, an amendment by Sen. Dianne Feinstein, D-California, would authorize the attorney general to block a firearms sale if the attorney general determined that the buyer was engaged in conduct relating to terrorism. The amendment does provide that a frustrated buyer may bring a lawsuit in federal court to challenge a denial.

But its text suggests that this is just window dressing: The attorney general may withhold the evidence underlying the denial from the plaintiff, placing the burden on the plaintiff to prove his innocence by rebutting evidence that he's never seen.

Those agitating for firearms restrictions now should understand that the precedent they set is a dangerous one that extends far beyond the realm of the Second Amendment. If the government's say-so is sufficient to block a gun sale - thereby abridging a right enumerated in the Constitution, with little or no ability for redress - what right wouldn't be at risk of arbitrary deprivation, particularly among the powerless?

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