Forbes

The ABA is Committed to Due Process, Unless You're a Gun Owner

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September 13, 2017

It's common for lawmakers to go after guns when there's a "crisis." The governor of the U.S. Virgin Islands ordered the National Guard to seize guns before Hurricane Irma hit, and the mayor of New Orleans did something similar before Katrina. More broadly, lawmakers often go after guns in smaller crises, such as domestic violence situations or when there are concerns that a potentially dangerous person might misuse a gun. While that might seem like a good policy in theory, it should concern anyone who cares about due process and protecting constitutional rights. That's why it was troubling when, at the 2017 American Bar Association annual meeting, the ABA House of Delegates formally adopted resolution 118B, which urges state governments to put in place "GVRO"s (Gun Violence Restraining Orders). GVROs enable law enforcement to search for and seize a person's lawfully possessed arms on the theory that they may pose a danger to themselves or others.

The ABA, whose primary purpose is to set academic standards for law schools and propose codes of ethics for lawyers, has never been too fond of the Second Amendment. As early as 1965, the ABA favored restrictive gun control. What is surprising about this resolution, though, is the lack of attention paid to the due process rights of gun owners. In its resolution, the ABA explicitly endorses issuing GVROs *ex parte*, meaning the constitutional rights of the accused could be stripped without the opportunity to defend himself in court.

The ABA has often fancied itself a bulwark of due process, fervently defending the rights of unpopular groups including enemy combatants, illegal immigrants, and war criminals. Resolution 118B, though, barely pays lip service to the due process rights of gun owners. Clearly, whatever commitment the ABA has to due process is second to political expediency, raising serious questions as to the Association's commitment to the Constitution.

Ex parte proceedings always pose constitutional concerns, as they deal with the rights of a person who is not before the court. The classic situation is a domestic violence restraining order, which is what most GVROs are based on. Those are more justifiable as *ex parte* proceedings because they involve a balancing of the rights of the accused and potential victim, and they specifically focus on the protecting an identifiable person. Those orders are issued in certain terms and do not require a physical invasion into the life of the accused.

The GVROs urged by the ABA, however, are orders to search for and seize the arms of the person it is issued against. But most states lack any reliable way of knowing who does and does not own guns, and thus someone could suddenly find his home torn apart by police in search of

weapons that may not even exist. That person may not even know about the circumstances leading to the order.

The ABA believes that a GVRO would be brought at the behest of "law enforcement, family, or other community members." An unaccountable civilian, therefore, could report their neighbor, who, for whatever reason, is a little creepy. If a GVRO is issued, police might then show up at the neighbor's house and confiscate his guns. That creates an unacceptable potential for abuse, and increases the already substantial threat of constitutional violations.

The ABA provides three historical examples where they contend a GVRO would have prevented harm. Each example is fatally flawed. In each, the GVRO would have either needed to be broad enough to strip gun rights from third-parties, or impinge on still more fundamental rights.

The ABA cites the case of Elliot Rodger, for example, who killed six in Isla Vista, California. By shifting focus from "firearms" to "access to firearms," the ABA's report treats the rights of third parties as subject to limitation if they are too close to someone subject to a GVRO. Rodger lived with others, therefore preventing his "access to firearms," as the ABA seeks, would have required removing all arms accessible to Rodger.

Next, the ABA recounts the spree killing of Jared Loughner, who killed six and wounded 13 in a Tucson parking lot in 2011. The ABA laments that Loughner's parents could not take further action to restrict his access to guns. The tragic irony is that Loughner's firearm had actually been seized—by his parents. He simply gained access to another, as a motivated person can do through a variety of means.

Most problematically, the ABA recounts the case of Dylann Roof, who shot and killed nine at a Church in Charleston, South Carolina. In support of the notion that a GVRO would have averted that tragedy, the ABA recounts that Roof was "known to have made violent, racist statements." Does the ABA support disarming people based on speech? This would be a shocking position to take for an organization that historically has fought for free speech and due process.

It is no surprise that the ABA doesn't care about a robust Second Amendment, but their continually aggressive stance against gun rights is becoming impossible to reconcile with their supposed commitment to protecting constitutional rights. In any event, the ABA should consider sticking to regulating law school class sizes rather than setting unconstitutional and unnecessary policy ideals for the states.

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