

NATIONAL REVIEW

Donald Trump Is Right to Call for Red-Flag Laws

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Earlier today, President Trump delivered a televised statement in response to the weekend's mass shootings in El Paso, Texas, and Dayton, Ohio. He condemned white supremacy, he discussed violent video games, and he raised the issue of mental illness. Each of these topics is worth its own discussion, but I want to address and affirm the one gun-control measure he discussed: "red flag" laws.

Let's back up a moment. The fundamental flaw in most "common sense" gun-control proposals is simple: They burden the rights of law-abiding citizens without making a material impact on the problem they're designed to address.

Proposed "assault weapons" bans are perhaps the paradigmatic example. As I've written before, we know they won't affect overall gun-death rates, and there's no evidence they'll prevent mass shootings, because handguns are still overwhelmingly the weapon of choice for spree killers. They *will*, however, directly impact the millions of Americans who seek to use them for a myriad of valid lawful purposes, including home defense. I have an AR-15, and it's the first line of defense at my home against the multiple threats my family has received.

In fact, the reality that most modern gun-control proposals impact mainly the law-abiding is a principal reason for the consistent resistance to them from America's gun owners. But there *is* one place where gun owners and gun-rights opponents meet: Americans who have demonstrated *by their own conduct* that they're not fit to own a weapon should not be allowed to own a weapon.

That's why you see near-universal agreement that felons, people subject to restraining orders because of their past domestic abuse, or people who've been adjudicated as dangerously mentally ill should be kept from obtaining guns. These individuals were found to have engaged in dangerous or unlawful conduct, having received the due process to which the Constitution entitles them. Depriving them of a gun protects the individuals themselves and the public. Providing them due process protects their liberty.

At the same time, it's clear that a disturbing percentage of mass shooters have broadcast warning signs of violent, dangerous behavior without crossing specific, bright lines that permit criminal prosecution or involuntary commitment. To take the most recent example, consider this report about the Dayton killer:

“Dayton killer ‘was expelled from school after officials found a notebook where he reportedly wrote a list of people who he wanted to rape, kill and skin their bodies.’”

A so-called “red flag” law fills the gaps in criminal law and the laws governing mental-health adjudications by granting standing to a defined, limited universe of people to seek *temporary* seizure orders — called gun-violence-restraining orders — for a gun if they can present admissible evidence that the gun’s owner is exhibiting threatening behavior.

Properly drafted, these laws can save lives while also protecting individual liberty. Improperly drafted, they grant the state an overly broad tool that can be systematically abused to deprive disfavored citizens of a fundamental constitutional right.

So, what are the elements of a properly drafted red-flag law? I outlined my suggestions after the Parkland school shooting, and I’ll repeat them here:

1. It should limit those who have standing to seek the order to a narrowly defined class of people who have direct interaction with the respondent (close relatives, members of their household, employers, educators).
2. It should require petitioners to come forward with clear, convincing, admissible evidence that the respondent is a significant danger to himself or others.
3. It should grant the respondent an opportunity to contest the claims against him.
4. In the event of an emergency, *ex parte* order — one granted before the respondent can contest the claims — a full hearing should be scheduled quickly, preferably within 72 hours.
5. The order should lapse after a defined period of time unless petitioners can come forward with clear and convincing evidence that it should remain in place.

The Cato Institute’s David Kopel made a compelling argument in Senate testimony earlier this year that my first suggested element is wrong. He argued that seizure orders should be sought only by law-enforcement officers, either at their own behest or at the request of a gun owner’s family members. His case was a good one, but we need not resolve the question of standing here, in part because he made an even better suggestion for a coherent drafting process.

As Kopel explains, the Uniform Law Commission convened a study committee that brought together a “wide range of perspectives” to consider drafting model red-flag legislation. This was entirely the right course of action. Unfortunately, the commissioners faced opposition from gun-control groups and opted not to carry out this mission. They should revisit that decision now.

There is no question that poorly drafted laws are subject to abuse. Grant too many people standing to seek an order, lower the burdens of proof, or allow for easy access to *ex parte* orders, and you expose law-abiding citizens to the threat of vindictive proceedings. But these are fixable issues that should not be an impediment to effective reform. The Federal Commission on School Safety, which has recommended passing red-flag laws, wisely argues that “states should adopt clear and narrow definitions identifying appropriate persons with standing to file a petition” and that “states can deter misuse or abuse of the [red flag] process through appropriate criminal penalties for false (bad faith) or harassing petitions.”

No one should suggest that red-flag laws represent a cure for mass shootings. Of course they don't. The challenge is too complex and the trend too well entrenched to be defeated by any single public policy. If properly drafted, such laws do, however, provide the public with a vital tool that can cover the gaps left between a healthy criminal-prosecution regime and a woefully inadequate mental-health-adjudication process.

A partial public-policy cure — especially one that is targeted to the exact real-world challenges presented by mass shooters — is better than no cure at all. Trump is right to call for red-flag laws. State legislators should heed his call.