COLORADO’S PROPOSED “RED FLAG” GUN BILL: EXTREME RISK PROTECTION ORDERS

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On February 14, 2019, in an effort to combat gun violence, democratic lawmakers in the Colorado General Assembly introduced a new bill, the Deputy Zackari Parrish III Violence Prevention Act. The proposed bill is designed to prevent gun violence by allowing the court to issue an Extreme Risk Protection Order against an individual who poses a significant risk to self or others if he or she is in possession of a firearm. Numerous states around the country have adopted similar legislative measures, which are commonly known as “red flag” gun laws. These states adopted the “red flag” laws in response to the gun violence incidents that have occurred throughout the country. Unfortunately, Colorado has experienced a number of these tragic incidents—the 1999 shooting at Columbine High School, the 2012 Aurora Theater shooting, and more recently, the 2017 death of Deputy Zackari Parrish III, the Colorado police officer who was shot and killed while responding to a call at the home of a known high-risk individual. It is therefore not surprising that early polls seem to indicate that a majority of Coloradans support the measure. The proposed bill provides a potential method to reduce gun violence by taking the weapons away from those considered “too dangerous to have weapons.” The proposed bill is expected to encounter intense debate this year, with proponents considering it a “saving-lives bill” and opponents contending that gun laws hurt law-abiding citizens and Extreme Risk Protection Orders conflict with due process rights. Colorado legislators introduced a similar bill in 2018, but the General Assembly’s republican majority rejected it.

THE PROPOSED BILL

Under the proposed bill (the Bill), a family member, law enforcement officer, or law enforcement agency (the Petitioner) may petition the court for an “Extreme Risk Protection Order” (ERPO) that would require the subject of the petition (the Respondent) to surrender his or her firearms to law enforcement for a period of time. The Bill outlines the specific procedural steps regarding the notice
procedures, the hearing, and the surrender of firearms for both temporary ERPOs and standard ERPOs.

TEMPORARY ERPO

Temporary ERPOs allow the court to act quickly in response to a potentially dangerous situation. In the interim time period between when the petition for an ERPO is filed and when the matter is heard by the court, the court may issue a temporary ERPO if the Petitioner establishes in the initial petition that the Respondent, by a preponderance of the evidence, “poses a significant risk of causing personal injury to self or others in the near future by having in his or her custody or control a firearm.”\(^\text{10}\) If a temporary ERPO is granted, then the Respondent must surrender his or her firearms to law enforcement until the matter is decided in the hearing.\(^\text{11}\) Law enforcement will still need to obtain proper search warrants for an ERPO, but the Bill allows for the temporary ERPO and the related warrant to be heard at the same time.\(^\text{12}\)

ERPO

The proceedings for an ERPO start when the court receives a petition for an ERPO from the Petitioner. Then, the court will set a hearing date, give the Respondent notice of the hearing, and may grant a temporary ERPO if applicable.\(^\text{13}\) Notice is given pursuant to Colorado’s rules of civil procedure and the procedural steps enumerated in the Bill.\(^\text{14}\) The court will then hear the matter and may issue an ERPO for a period of no more than 364 days if there is “clear and convincing evidence . . . that the Respondent poses a significant risk of causing personal injury to self or others by having in his or her custody or control a firearm or by purchasing, possessing, or receiving a firearm.”\(^\text{15}\) The Respondent may request for termination of the ERPO through a written submission to the court.\(^\text{16}\)

AFTER AN ERPO PETITION IS GRANTED

If the court grants the petition for an ERPO or temporary ERPO, the Respondent must, in accordance with the Bill, surrender his or her firearms by either 1) selling or transferring the firearms to a licensed dealer, or 2) arranging for the storage of the firearms with law enforcement.\(^\text{17}\) The Respondent is also prohibited from purchasing or possessing a firearm for the duration of the

\(^{10}\) Id.
\(^{11}\) Id.
\(^{12}\) Id.
\(^{13}\) Id.
\(^{14}\) Id.
\(^{15}\) Id.
\(^{16}\) Id.
\(^{17}\) Id.
ERPO. In addition, the Respondent must also surrender his or her Concealed Carry Permit. Furthermore, the Bill dictates that the Petitioner must be notified of the impending expiration of the ERPO, and can renew the ERPO—subject to a court hearing.

**SIMILAR LEGISLATION FROM OTHER STATES**

There has been a recent nation-wide push for stricter gun laws with fourteen states passing similar “red flag” laws. States with “red flag” gun laws similar to the Bill include: Washington, Oregon, California, Illinois, Indiana, New York, Vermont, Massachusetts, Connecticut, New Jersey, Rhode Island, Delaware, Washington D.C., and Maryland. Some of these states have seen a decrease in gun violence and suicides after adopting a “red-flag” law. For example, the number of gun related suicides decreased in Connecticut and Indiana by 10% and 7.5%, respectively. The federal government also introduced two separate firearm bills in February 2019 that aim to bolster background checks.

**POLITICS OF A “RED FLAG” LAW**

Although introducing a new firearm law is primarily a one-sided endeavor, recent legislation on firearms has seen some bipartisan support. Despite the bipartisan support, the issue is still hotly debated. Proponents of the “red flag” laws argue that these laws save lives, while opponents are concerned with protecting gun rights and due process.

*Proponents: How a “red flag” law could save lives*

How could a “red-flag” law prevent gun violence? The simple reason may be because most gun violence victims have close connections to the shooter and therefore generally consist of family members, spouses, or domestic partners. FBI data indicated that 54% of mass shootings in the United States involve domestic or family violence. Furthermore, that same FBI study group indicated that 42% of these mass-shooters exhibited warning signs. This combination
would seem to indicate that family members could prevent gun violence if they were given the ability to limit the potential shooter’s access to firearms. However, some analysts argue that statistics on the volatile combination of domestic violence and firearms do not establish that access to firearms is the cause of gun violence. Instead, they contend that such statistics only prove that extreme abusers use firearms and that firearms are more effective at killing than other methods.

**Opponents: The Second Amendment and Due Process**

There are numerous closely contested interpretations of the Second Amendment and what rights the Amendment affords to individuals. Nevertheless, in its landmark Second Amendment case, *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons . . . .” As a result, the Court established that there is a fundamental right to bear arms, and therefore due process must be followed to deprive an individual of that right. However, in that same opinion, the Court also notes that Second Amendment rights are not unlimited. For example, state and federal governments do not violate the Second Amendment when restricting the possession of firearms in sensitive places such as schools, or by restricting felons and mentally ill individuals from firearm ownership and possession.

Because the right to bear arms is considered a fundamental right, due process must be satisfied before that right may be deprived. Opponents of the Bill primarily contend that the Bill violates the Respondent’s due process protections. The due process clause, which is found in the Fourteenth Amendment of the United States Constitution, ensures that no state will “deprive any person of life, liberty, or property, without due process of law.” There are two kinds of due process: procedural and substantive. Procedural due process sets forth the procedures that must be followed before the government deprives an individual of “life, liberty, or property” and generally includes such as things as proper notice and a meaningful hearing before an impartial magistrate. Substantive due process tests whether the government “has adequate reason for taking away a person’s life, liberty, or property.” In conjunction with proper procedure,
substantive due process dictates that a governmental action that deprives a
“fundamental right” must be necessary to a compelling government interest.40

In an effort to address the opponents’ due process concerns, the drafters of
the Bill have included additional procedural protections.41 For example, in
addition to numerous other procedures outlined in the text, the Bill mandates that
the Respondent be provided with legal counsel for the hearing, a feature that goes
beyond what similar “red flag” laws provide for.42 Additionally, when compared
to other “red flag” laws, the Bill provides the Respondent with a longer period to
re-examine the validity of his or her ERPO.43 Despite these proposed protections,
the Bill is still expected to be one of the most “hotly-debated” items in the
Colorado General Assembly this year.44 In 2018, a similar bill was rejected by the
republican-controlled General Assembly, but this year the Bill is being introduced
to a democratic majority.45

CONCLUSION

The Deputy Zackari Parrish III Violence Prevention Act is a bipartisan
effort that could reduce gun violence in the State of Colorado. The Bill will be
closely followed in 2019 due to the current political makeup of the Colorado
General Assembly and the public’s changing view on gun laws. It will be
interesting to see what the final language of the Bill will consist of if the measure
is passed at all.

40 Id.
41 Paul, supra note 3.
42 Id.
43 Id.
44 Id.
45 Id.