

RED FLAG GUN LAWS

CONTROVERSIAL ISSUES IN THE NEWS



CLOSE UP[®]
WASHINGTON DC



CENTRAL QUESTION



Should governments enact “red flag” gun laws?

INTRODUCTION



On August 3, 2019, a gunman opened fire at a Walmart in El Paso, Texas, killing 22 people and injuring 24 others. Approximately 13 hours later, another gunman murdered nine people and injured 27 in a crowded district of Dayton, Ohio.¹ As these two tragedies rocked the American people, policymakers reopened the debate about what could be done to reduce gun violence in the future. In this *Close Up in Class Controversial Issue in the News*, we explore the idea of red flag laws, examine some of the gun laws currently in place, and ask you to weigh the pros and cons of the paths forward.

BACKGROUND



The Second Amendment to the Constitution reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”² Although this language is vague and subject to much debate, the Supreme Court has interpreted the Second Amendment as an individual right to own a gun for traditionally lawful purposes, such as self-defense—an interpretation the Court outlined in *District of Columbia v. Heller* (2008). However, the Court also ruled that there can be regulations on the right to bear arms, such as bans on concealed weapons (which vary by state) or limits on gun possession by criminals and the mentally ill.³

Federal law—most notably, the Gun Control Act of 1968 (GCA) and its subsequent amendments—allows the federal government to regulate the transfer and possession of guns. As of 2019, the GCA forbids the following people from possessing guns:

- Convicted felons
- Fugitives from justice
- People under restraining orders
- People who have been convicted of domestic violence charges

- Unlawful drug users or addicts
- People who have been committed to mental institutions
- Undocumented immigrants or people who have renounced their U.S. citizenship
- Dishonorably discharged U.S. servicemen⁴

To help ensure that restricted persons do not obtain guns, the Federal Bureau of Investigation (FBI) maintains the National Instant Criminal Background Check System (NICS). Before finalizing a gun sale, licensed gun dealers use NICS to check records from three databases: (1) the National Crime Information Center, which contains information on wanted persons and protection orders; (2) the Interstate Identification Index, which contains criminal history records; and (3) the NICS Index, which contains information submitted by local, state, and federal agencies as well as mental health institutions and other sources.⁵ However, private gun sales—transactions between unlicensed collectors or hobbyists and buyers from the same state—do not require a NICS background check.⁶



How have recent mass shooters obtained their guns?

State and local governments also play a significant role in regulating the transfer and possession of guns. As of 2019, 21 states and the District of Columbia have expanded background checks to include at least some private sales.⁷ At least nine states and the District of Columbia have laws that ban high-capacity ammunition magazines.⁸ States also determine the necessary requirements for carrying a concealed weapon within their jurisdictions. Although every state allows the carrying of a concealed weapon in some form, 35 states generally require a state-issued permit to do so, and nearly every state places restrictions on where a concealed weapon may be carried.⁹

THE CURRENT CONTROVERSY



Should governments enact “red flag” gun laws?

In the aftermath of the El Paso and Dayton tragedies, some policymakers began focusing their attention on the potential of red flag laws. A red flag law—also known as an extreme risk protection order—allows a court to issue an order to temporarily confiscate the guns of an individual who is deemed to be a risk to himself/herself or to others. Depending on the state, a red flag law allows family members, household members, and/or law enforcement officers to request the court order. The petitioner must present evidence of why the individual in question poses a threat to himself/herself or to others.¹⁰

As of August 2019, red flag laws exist at the state level only, in 17 states and the District of Columbia. Prior to the 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida, five states (California, Connecticut, Indiana, Oregon, and Washington) had red flag laws. After the Parkland shooting, 12 more states (Colorado, Delaware, Florida, Hawaii, Illinois, Maryland, Massachusetts, Nevada, New Jersey, New York, Rhode Island, and Vermont) and the District of Columbia passed red flag laws.¹¹



How do red flag laws work in each state?

Following the El Paso and Dayton shootings, Senator Lindsey Graham, R-S.C., announced that he and Senator Richard Blumenthal, D-Conn., would introduce legislation to create a federal grant program to assist in enforcing existing red flag laws and to “encourage” other states to adopt red flag laws. According to Senator Graham, the grants would be given to law enforcement agencies so they could hire and consult with mental health professionals to better determine which cases require action.¹²

“We must make sure that those judged to pose a grave risk to public safety do not have access to firearms and that if they do, those firearms can be taken through rapid due process,” said President Donald Trump, who expressed his support for red flag laws in August 2019.¹³ He and other supporters of red flag laws argue that such policies are a commonsense reform that would help law enforcement agencies respond effectively to the warning signs displayed by homicidal or suicidal people. Opponents, however, fear that red flag laws give the government the power to seize citizens’ property without due process, thus violating the Constitution and creating a dangerous precedent for the future.



SHOULD GOVERNMENTS ENACT “RED FLAG” GUN LAWS?



YES: Red flag laws help law enforcement respond to the warning signs displayed by dangerous people.

Before he took the lives of nine people in Dayton, Connor Betts had a history of routinely discussing slaughter with friends. He once held a knife near another student’s throat, and he was suspended from school for compiling a list of people he wanted to kill.¹⁴

Before he murdered 17 students in Parkland, Nikolas Cruz was the subject of dozens of 911 calls and at least two separate tips to the FBI, including one regarding a YouTube comment left by a user named “nikolas cruz” that read: “Im [sic] going to be a professional school shooter.”¹⁵

“It was no surprise to anyone who knew him to hear that he was the shooter,” said Emma González, a survivor of the Parkland shooting.¹⁶ Added Senator Graham: “He did everything but take out an ad in the paper, [saying] ‘I’m going to shoot somebody.’ You know, you can’t just let that keep going and going. There will be another one tomorrow.”¹⁷

In both of these tragic cases, as well as in the cases of other mass shooters, the warning signs were there. Yet no one stepped in to take away the guns that would eventually be used on innocent people. This is why red flag laws are so important. They empower family members, household members, and/or law enforcement officers to present serious evidence in court in order to temporarily confiscate guns that dangerous individuals could use on themselves or others.

The trouble with current law is that the federal background check system prevents convicted felons or persons who have been committed to a mental institution from purchasing a gun from a licensed dealer—but it does not deny persons who have an undiagnosed mental illness or persons who have served no jail time but have talked with friends about wanting to kill. In fact, of the 114 mass shootings committed in the United States between 1982 and 2019, at least 74 percent involved guns that were purchased legally.¹⁸

“All these guys bought the gun legally,” said Senator Graham of the shooters in Parkland, El Paso, and Dayton. “[But] if you get kicked out of school for threatening your schoolmates, with a rape list and a kill list, maybe you shouldn’t buy a gun. That’s the heart of the matter here.”¹⁹

Thus, every state must make it a priority to enact a red flag law. These laws require petitioners to present serious evidence of danger, such as threats or acts of violence or a violation of a domestic violence emergency protective order.²⁰ If such policies go nationwide, they will be invaluable in preventing tragedy in the future.



NO: Red flag laws are an unconstitutional violation of due process guarantees.

The Fifth Amendment to the Constitution guarantees that no person shall “be deprived of life, liberty, or property, without due process of law.” The 14th Amendment reiterates the importance of this principle, promising, “Nor shall any state deprive any person of life, liberty, or property, without due process of law.”²¹

It is admirable that lawmakers want to eliminate the scourge of gun violence in the United States. But when doing so, they must remember that red flag laws are a dangerous violation of due process—the bedrock principle that requires the government to respect all legal rights that are owed to a person.

In every state that has a red flag law, the court order to confiscate a gun can be issued *ex parte* (without notice to the individual in question). In four states (Colorado, Delaware, Nevada, and Vermont), only a preponderance of the evidence—meaning “more likely than not”—is needed for an *ex parte* order.²² “Because it’s a civil process, you aren’t entitled to a public defender, or even afforded the opportunity to defend yourself,” wrote Missouri state Representative Tony Lovasco. “Once a protective order is issued, law enforcement are dispatched to search your property and seize your weapons—without criminal charges ever being filed, or even probable cause that an actual crime has been committed.”²³

“To make matters worse, red flag hearings can be adjudicated based on uncorroborated claims made by a single individual,” wrote Representative Lovasco. “Perhaps it’s an angry spouse, jealous co-worker, or disgruntled neighbor. All it takes is for someone to make a convincing argument that you are a danger to yourself or others, and your property is taken from you and you lose the right to defend yourself.”²⁴

There are those who say that Second Amendment rights are of little importance to them, as they do not plan to ever own a gun. But this debate is about so much more than guns. It is a question of whether or not the government can seize your constitutionally protected property, ignore constitutional rights in the name of “public safety,” and presume you guilty until proven innocent.

“Red flag laws stand for the proposition that people can have their rights and property taken from them on the basis of mere allegations,” wrote Matthew Larosiere, director of legal policy at the Firearms Policy Coalition. “And even if you don’t believe the right to keep and bear arms exists at all, or it is of little importance to you, do you really want this government to extend a relaxed notion of seizure and inverted due process to other areas of law? Because history shows it will.”²⁵

QUESTIONS TO CONSIDER



1. Do you believe states should pass red flag laws? Explain your reasoning.
2. What do you believe to be the most compelling argument of the opposition? Explain your reasoning.
3. Which principle do you believe to be the most important: protecting public safety or guaranteeing due process? Explain your reasoning.
4. How do you believe the government—at the federal, state, or local level—could best prevent public mass shootings in the future? Explain your answer.



- ¹ Lavandera, Ed, and Jason Hanna. "El Paso Suspect Told Police He Was Targeting Mexicans, Affidavit Says." CNN. 9 Aug. 2019. Web. 19 Aug. 2019. Talmazan, Yuliya, Caroline Radnofsky, and Doha Madani. "Shooting in Dayton, Ohio, Kills at Least 9 People and Injures 27; Suspect Also Dead." NBC News. 4 Aug. 2019. Web. 19 Aug. 2019.
- ² U.S. Constitution. Amendment II.
- ³ The Law Library of Congress. "United States: Gun Ownership and the Supreme Court." Web. 19 Aug. 2019.
- ⁴ U.S. Department of Justice. "Appendix C: History of Federal Firearms Laws in the United States." Web. 19 Aug. 2019.
- ⁵ Federal Bureau of Investigation. "Brady Handgun Violence Protection Act of 1993." Web. 19 Aug. 2019.
- ⁶ Giffords Law Center to Prevent Gun Violence. "Universal Background Checks." Web. 19 Aug. 2019.
- ⁷ Ibid.
- ⁸ Giffords Law Center to Prevent Gun Violence. "Large Capacity Magazines." Web. 19 Aug. 2019.
- ⁹ Giffords Law Center to Prevent Gun Violence. "Concealed Carry." Web. 19 Aug. 2019.
- ¹⁰ Segers, Grace. "What Are 'Red Flag' Laws, and Which States Have Implemented Them?" CBS News. 9 Aug. 2019. Web. 19 Aug. 2019.
- ¹¹ Dezenski, Lauren. "Trump Backs 'Red Flag' Gun Laws. What Do They Actually Do?" CNN. 5 Aug. 2019. Web. 19 Aug. 2019.
- ¹² Ibid.
- ¹³ Ibid.
- ¹⁴ Garbe, Will, Hasan Karim, Avery Kreemer, and Josh Sweigart. "Dayton Shooting: Oregon District Gunman Left Decade of Red Flags." *Dayton Daily News*. 9 Aug. 2019. Web. 19 Aug. 2019.
- ¹⁵ Rose, Joel, and Braktkton Booker. "Parkland Shooting Suspect: A Story of Red Flags, Ignored." NPR. 1 Mar. 2018. Web. 19 Aug. 2019. *Washington Post*. "Red Flags: The Troubled Path of Accused Parkland Shooter Nikolas Cruz." 10 Mar. 2018. Web. 19 Aug. 2019.
- ¹⁶ González, Emma. "Florida Student Emma González to Lawmakers and Gun Advocates: 'We Call BS.'" CNN. 17 Feb. 2018. Web. 19 Aug. 2019.
- ¹⁷ Schechter, Maayan. "SC's Lindsey Graham Explains 'Red Flag' Bill Ahead of Hamptons Trip with Trump." *The State*. 9 Aug. 2019. Web. 19 Aug. 2019.
- ¹⁸ Follman, Mark, Gavin Aronsen, and Deanna Pan. "U.S. Mass Shootings, 1982-2019: Data from Mother Jones' Investigation." Mother Jones. 4 Aug. 2019. Web. 19 Aug. 2019. KUNC. "Since 1982, 74 Percent of Mass Shooters Obtained Their Guns Legally." 13 Aug. 2019. Web. 19 Aug. 2019.
- ¹⁹ Schechter, Maayan. "SC's Lindsey Graham Explains 'Red Flag' Bill Ahead of Hamptons Trip with Trump." *The State*. 9 Aug. 2019. Web. 19 Aug. 2019.
- ²⁰ Giffords Law Center to Prevent Gun Violence. "Extreme Risk Protection Orders." Web. 19 Aug. 2019.
- ²¹ U.S. Constitution. Amendment V. U.S. Constitution. Amendment XIV.
- ²² Giffords Law Center to Prevent Gun Violence. "Extreme Risk Protection Orders." Web. 19 Aug. 2019.
- ²³ Lovasco, Tony. "'Red Flag Laws' Violate More than Just Gun Rights." *The Hill*. 12 Aug. 2019. Web. 19 Aug. 2019.
- ²⁴ Ibid.
- ²⁵ Larosiére, Matthew. "El Paso and Dayton Make You Want to Act, but 'Red Flag' Laws Violate Rights to Due Process." *USA Today*. 8 Aug. 2019. Web. 19 Aug. 2019.



Each year, the Close Up Foundation helps more than 20,000 students and teachers, in 1,200 schools nationwide, develop the skills they need to begin a lifetime of active citizenship. We accomplish this through our classroom publications, professional development, and Washington DC-based programs.

CLOSE UP IN CLASS: Enhance your classroom curriculum with resources from our three resource libraries that help students investigate current events and understand the critical issues facing our democracy.

- **Controversial Issues in the News:** Help students develop a greater understanding of current issues in the news. Receive a new chapter each month!
- **Public Policy In-Depth:** Delve into public policy issues with these long-form policy units that offer background, analysis, and informed debate.
- **Historical Perspectives:** Explore key moments in U.S. History through primary source records, literature, video, and virtual reality experiences.

PROFESSIONAL DEVELOPMENT: Our professional development and training provide teachers with the strategies and resources to facilitate meaningful discussion and debate of current issues.

CLOSE UP WASHINGTON, DC PROGRAMS: Choose from a variety of programs offered year-round to experience government in action and bring history to life—or customize your own journey for a one-of-a-kind experience!

For more info about the resources or professional development for your school or district, please visit us online at www.currentissues.org or contact us at **703-706-3665** or classroom@closeup.org.