

**Questions for the Record from Senator Charles E. Grassley
To Honorable Kimberly Wyatt
U.S. Senate Committee on the Judiciary
“Red Flag Laws: Examining Guidelines for State Action.”
Submitted on April 2, 2019**

1. At the hearing on March 26, I asked you about the standard of strict scrutiny used by courts to review laws affecting the Second Amendment. I also asked you to assess whether or not the appropriate evidentiary standard for Extreme Risk Protection Orders (ERPOs) is clear and convincing evidence. You stated that “[a]ll of our orders are civil orders, including our ERPOs, sexual assault, domestic violence, and stalking orders” and that the evidentiary standard for these civil orders are “done initially by a preponderance [of the evidence].” You later stated in response to a question posed by another Senator that as a prosecutor in your home state of Washington, “when we’re looking at clear and convincing evidence, that is our standard we use to terminate parental rights for someone. So those dependency proceedings that are at that high burden of clear and convincing evidence.”
 - a. **Do you agree that a high burden of clear and convincing evidence is warranted for when an individual’s constitutional rights are implicated?**

Thank you for asking for additional clarification.

Levels of Scrutiny:

Strict scrutiny, the highest level of scrutiny applied by courts to government actions or laws, requires the government to prove that (1) there is a compelling state interest behind the challenged policy, and (2) that the law or regulation is narrowly tailored to achieve its result. Extreme Risk Protection Order (ERPO) laws can be drafted to uphold the strict scrutiny test as well as the intermediate scrutiny and rational basis test. The legislative intent of ERPOs, is a compelling governmental interest: reducing gun violence (gun deaths and injuries), while respecting constitutional rights, by providing a court procedure for family, household members, and law enforcement to obtain an order temporarily restricting a person’s access to firearms when the person poses a significant danger of harming themselves or others by possession and access to firearms.

Standard of Proof and Due Process:

As a prosecutor, I believe it is fundamentally important that constitutional rights are vigorously safeguarded, whether the rights of victims, witnesses, respondents, defendants, or the general public. At the same time, constitutional rights must be (and are) weighed and balanced in our courts of law every day in all types of proceedings. With regard to protection orders, when the Violence Against Women Act was originally passed by Congress in 1994, it allowed courts to issue civil protection orders that by design, infringe or implicate certain constitutionally protected rights (e.g. assembly, speech, and

access to firearms). They do so in recognition of the importance of providing victims expedient relief in volatile and dangerous situations. Washington State requires a preponderance standard for courts to issue all types of civil protection orders (such as domestic violence, sexual assault, stalking and vulnerable adult protection orders) in conformity with the evidentiary standard adopted by other states for the same reason. States have adopted this standard after carefully balancing victims' rights to be free from harm and the due process rights of respondents. Extreme Risk Protection Orders present this same balancing of interests. When faced with a petition for an ERPO, a judge must, for example, assess the risk of harm to families, those in places of worship, workplaces or in schools, or to someone who is suicidal (due to a possibly lethal act of violence that can occur in an instant) against the respondent's right to continued access to a firearm.

It is also important to note that while a preponderance standard is less than a clear and convincing standard, it is not in fact a "low bar"; I have seen first-hand that it presents a challenge for many petitioners in protection order cases to meet. As the only Prosecutor's Office in Washington state, and one of the few nationally, who provide protection order advocacy services, we see daily reminders of the difficulties petitioners face in obtaining protection orders and the realities of how often they are actually granted. Obtaining a protection order is an arduous, emotional and risky task for petitioners. The vast majority seek protection orders without any legal assistance or the means to afford legal representation. They often take enormous personal risks to stand up in court. Despite all of these barriers, petitioners come forward because they are desperate for the relief and protection the law allows them. The same is true for ERPOs.

As with all civil restraining orders, including ERPOs, due process protections are built into the process ensuring an individual's constitutional rights are respected. The procedural safeguards include: (1) a petition to the court that is signed under penalty of perjury; (2) notice to the respondent; (3) a hearing before a judicial officer where the petitioner and respondent may testify; (4) the opportunity for the respondent to present witnesses or evidence as to why the ERPO should not be entered; and (5) the opportunity to file a motion to terminate the ERPO one time during the existence of the order (if it is granted for the full year). And, in the event that a temporary ERPO is granted but not extended to become a one year order, the court must balance the temporary loss of property with the ramifications and potential loss of life that could result if the court did not grant a temporary order.

b. Can you point to other constitutional rights that can be taken away based on a hearing involving anything less than clear and convincing evidence?

An individual can be charged with a misdemeanor or felony crime based on probable cause. An individual can be arrested based on probable cause that they have committed a crime. The standard for probable cause is a lower standard than clear and convincing evidence. Depriving someone of their liberty, has greater implications than depriving them of physical property (firearms) for a temporary period of time.

Protection and restraining orders allow the court to restrict the respondent's access to the petitioner in an ex parte proceeding, if the court finds that irreparable injury could result and that the order is immediately needed to prevent such injury. This implicates speech, assembly, and other fundamental rights, all of which are restricted for the respondent based on a preponderance of the evidence standard. Specifically, protection orders allow the court to restrict access to the respondent's home, their children's school, the protected party's workplace, and their children, all based on a preponderance of the evidence that the respondent poses irreparable injury if the order is not granted. Restricting access, particularly to an individual's children, is likely viewed by many as a greater implication of an individual's rights than restricting access to physical property (firearms).

- 2. Have any of your investigations in your office, or prosecutions conducted by yourself or a colleague resulted in a false allegation?**
 - a. If so, did your office seek a perjury charge in that instance?**
 - b. Were any remedies – in addition to or instead of a perjury prosecution – sought?**

We are unaware of any false ERPO petitions in Washington State. RCW 7.94.120(1) explicitly details the penalties one would be subjected to in Washington State for filing a false petition: "(1) Any person who files a petition under this chapter knowing the information in such petition to be materially false, or with intent to harass the respondent, is guilty of a gross misdemeanor." We do believe that it is important for all ERPO statutes to contain a provision such as this to deter any one who may want to file a false ERPO petition as a form of harassment.

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Questions for the Record
Submitted April 2, 2019

QUESTIONS FROM SENATOR BOOKER

1. Data and research shows that the most effective way to support urban communities of color suffering from gun violence is to implement comprehensive legislation that supports healing and trauma-informed approaches like Operation Ceasefire, Cure Violence, and Hospital Based Interventions Programs. Thus far, data is limited on who is utilizing extreme protection orders, and whether these orders are having a disparate impact on minority communities.

- a. **What can the federal government do to help states collect data on who is receiving protection orders and what is the outcome of that contact with law enforcement?**

The federal government can help states in two critically important and complementary realms of data collection. The two realms can be broken down into Operational/Implementation-related data and Evaluation-related data.

Operational/implementation-related data would collect the aggregate, day-to-day data of ERPO implementation. For example, data about overall numbers of orders filed; the nature of the risk; who petitioned (e.g. law enforcement, family/household member, or clinician petitioner); demographics of respondents; how many ERPOs are being issued at the temporary (ex parte) phase and at full hearings; whether the parties were represented; whether they appeared; amount of time between petition and court order; the jurisdictions involved; ERPO denials; ERPO terminations; number and types of firearms temporarily removed; number of search warrants sought/obtained; processes to ensure timely service and enforcement; any subsequent criminal ERPO charges/violations; and the number of ERPO renewals. Providing funding to states to support an Administrative Office of the Courts, State Attorney General's Office, or other centralized point of data collection for states, with a requirement that the data be publicly accessible for evaluation and reporting out, is an important first step. Comprehensive operational/implementation data collection may necessitate requiring the courts and law enforcement to send ERPO data each month to the centralized point of contact. Another important metric is to collect data that captures adherence to the use of best practices by law enforcement in their policies and training, such as how to petition for ERPOs, understanding indicators of lethality risks, the importance of swift and certain service and enforcement, and taking the safety steps to contact family/household members when the ERPO is soon to expire and a respondent has made a request to have their firearms returned.

Evaluation-related data collection is ensuring academic institutions, or public health agencies, have access to ERPO cases and data to investigate and research the implementation and outcomes of ERPO laws. Supporting the evaluation of ERPO

laws is critical to understanding the impact of the law in actual practice, allows for the review of the contextual characteristics of the cases, and helps to assess whether the law is doing what it was intended to do. It is within this realm that questions about disproportionality, “overreach” or other concerns can be examined. From comprehensive and proper evaluation comes greater understanding of the issues that gave rise to these situations including potential primary prevention opportunities or other intervention strategies to better support those in crisis. If one only captures the data in aggregate form (as in operational/implementation data), the rich and informative complexity of what is actually happening in these cases, and the effect the ERPO had on it, may be missed.

Alongside investment in the two realms of data collection above, it is also critical to ensure states have access to federal, state and local databases that assist with proper enforcement and implementation of the law. For both law enforcement and public safety, it is important to ensure that ERPO orders are always (and timely) entered into NCIC and NICS to prevent any unauthorized sales and to alert law enforcement of the existence of an ERPO. Accordingly, ERPO orders must be given full faith and credit in all 50 states as is the case with other civil protection orders. The federal government should also recognize that states that have ERPO laws need access to NICS to determine if a respondent is already ineligible to purchase a firearm (prohibiting factor in NICS database). For example, if a mental health disqualifier already exists in the NICS database (and thus the respondent is already prohibited from purchasing and possessing a firearm) then petitioning for an ERPO petition may be duplicative or expend scarce resources. A disqualifier in one state placed in the NICS database should be recognized in another state as is commonly done with protection orders, warrants, and criminal convictions.

2. Under existing extreme risk protection order laws, it is often left to the discretion of law enforcement to determine how firearms are surrendered and if a person fails to surrender his weapon or fails show proof that a weapon has been given up, courts may grant a search warrant. While, the extreme risk protection order process is a civil rather than a criminal process, there is concern that issuing warrants can lead to arrests for small or minor offenses such as marijuana possession.
 - a. **Are you aware of any states that have put into place guardrails to ensure that minorities are not further criminalized when interacting with law enforcement during the extreme risk protection order process?**

Although we are unaware of any specific “guardrails” in place in other states, this is a critically important question to raise and be mindful of as states develop their ERPO policies and practices. Technical assistance that is specifically designed to address these issues are important. Because ERPOs are designed to mitigate the risk of access to firearms when an individual is exhibiting signs that they are a danger to themselves or others, ensuring fidelity to that premise is fundamental. In our region, our unit regularly partners with law enforcement to assist pre-filing, provide

advocacy to families, and engage in legal consultation in all phases of the ERPO work from initial petitioning to enforcement.

It is essential to use a lens of racial equity and social justice in every facet of our work, including ensuring procedural justice, and efforts to address and confront implicit bias. Training and technical assistance that focuses specifically on identifying and triaging the “words, actions and behaviors” of individuals (as the first step to determine if an ERPO petition is appropriate) and ensuring procedural justice in law enforcement response, is critical.

Additionally, having prosecutors/city attorneys and advocates partner and consult with law enforcement in reviewing potential ERPO petitions adds another legal analysis and critical context to help ensure that ERPO petitions are being sought (and obtained) only when there is a legal basis to do so.

As these are new laws, looking at the demographics of ERPO respondents and other contextual characteristics will help to assess whether ERPO laws are being used fairly and help ensure that there is transparency in the process. Moreover, looking at demographics will help to ensure that ERPOs are accessible as a civil remedy or resource for marginalized communities who want alternatives to criminal intervention. ERPO implementation should strive not only to be fair and equitable in process and execution, but in availability to those who may not trust traditional systems.

One suggestion to assist with the process of helping to guide states is by establishing an “ERPO Commission” (for the first 5 years of the enactment of the law in each state). The Commission could include law enforcement, clinicians/public health officials, educators, faith leaders, and community members. The commission could provide oversight in the ERPO process by annually reviewing ERPO-related data and providing a report that includes demographic statistics as well as a year-end review of all of the ERPO data collected. In order to protect privacy concerns, the report would not include the identities of the respondent or family member petitioners.

3. You have a wealth of experience in prosecuting domestic violence cases and have seen firsthand the dangers abusers present to their victims. The State of Washington has laws in place to allow for extreme protection orders to be issued.

a. Can you talk a little about importance of that tool for you to protect victims of domestic violence?

Extreme Risk Protection Orders have an obvious role in many domestic violence situations. They allow a family or household member to petition, or request that law enforcement petition on their behalf, when their loved one is in a behavioral health crisis or exhibiting violent behavior and there is a concern about access, possession, and purchasing of firearms. Similarly, an ERPO may be appropriate in situations where the relationship of the parties or other factors mean that a criminal domestic violence charge may not be viable, but where there is a threat of self-harm or harm to others. Suicide and murder-suicide is an all too common occurrence in our country.

An ERPO can help to mitigate these and other risks by temporarily removing the firearms during periods of heightened risk. In some instances, law enforcement initiating the petition may be the most expedient and effective way to mitigate that risk.

Research shows that the most important element in preventing domestic violence fatalities is to remove the firearm from the situation. -New England Journal of Medicine. Domestic violence calls lead to more police fatalities than any other type of call. -National Law Enforcement Officers Memorial Fund.

Domestic violence convictions are also the greatest predictor of future violent crime. In 2007, the research arm of the Washington state legislature, the Washington State Institute for Public Policy (WSIPP), found strong connection between domestic violence and risk of violent crime.¹ In 2012, WSIPP found domestic violence offenders had rampant criminal recidivism with the highest risk of violent crime.² In 2015, WSIPP's risk assessment study from Washington State University confirmed domestic violence as the greatest criminal predictor of violent recidivism, not just of domestic violence, but all violent crime.³ Someone convicted of domestic violence is significantly more likely to commit future violent crime than someone convicted of kidnapping or robbery.

*To help address these risks, in 2014, the Washington State Legislature **unanimously** passed ESHB 1840- codified as RCW 9.41.800 et seq. It strengthened federal law by allowing courts to order a respondent, including during an ex parte proceeding (when subject to a qualifying protective order), to immediately surrender firearms to police for safe-keeping.*

b. What do you think makes Washington's law effective in keeping firearms out of the hands of people who pose a serious risk of committing gun violence?

Firearm prohibitions have been codified into law for several decades. What we have learned locally is that laws alone are often not enough. As our Elected Prosecutor Dan Satterberg often says, "laws do not implement themselves". What makes the difference in the effectiveness of most laws relates to whether there are investments and commitments to fully implement and enforce the law (e.g. the development of policies, training, onboarding, streamlining of processes, delineations of responsibilities, outreach, evaluation, etc.). In 2017, the City of Seattle and King County committed funding to create a dedicated, multijurisdictional and interdisciplinary unit to swiftly (and lawfully) remove firearms from those the court has deemed pose the highest risk of gun violence to victims, the community, law

¹ Barnoski, R, and Drake, E. (2007). *Washington's Offender Accountability Act: Department of Corrections' Static Risk Assessment.*

² Drake, E., Harmon, L., & Miller, M. (2013). *Recidivism Trends of Domestic Violence Offenders in Washington State.* (Document No. 13- 08-1201).

³ Hamilton, Z, Barnoski, B (2015). *Designed to Fit: The Development and Validation of the STRONG-R Recidivism Risk Assessment,* Washington State University, Journal of Criminal Justice and Behavior

enforcement and themselves.

Prior to the creation of the unit in January 2018, Seattle/King County courts were regularly issuing protective orders that required firearms to be surrendered by restrained parties (Order to Surrender Weapons). The problem was, without clear implementation and enforcement efforts, including people whose job it was to follow up, the court had to rely on an “honor system” for the respondent to turn in their firearms. This system was found to be entirely ineffective and did nothing to mitigate risk or reduce harm.

In 2018, applying the dedicated resources of the Regional Domestic Violence Firearms Enforcement Unit resulted in an almost 500% increase in the number of firearms that were recovered from respondents prohibited from possessing firearms based on Orders to Surrender Weapons or Extreme Risk Protection Orders. While not every jurisdiction can dedicate funding to create a unit to enforce and implement these specific laws, efforts can be made to create model policies for law enforcement, training and onboarding for law enforcement, prosecutors and courts and to streamline practices that assist in promoting harm reduction by removing firearms at the time of service of the order.