

David Trahan: “Red flag” laws ask judges to be clairvoyant

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By David Trahan

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The concept behind “red flag” laws is to put in place a statute that allows family members to petition the court to have a person’s civil rights suspended for a period of time while a court tries to determine whether a longer suspension of those rights — usually another 180 days or longer — is warranted.

In this case, advocates of red flag laws focus on taking firearms away from individuals when they are a danger to themselves or the public. The truth is, such a law robs a person of far more than their firearm rights, as defined in the U.S. Constitution. The Fifth Amendment to the Constitution was established to prohibit the federal government from depriving any person of “life, liberty, or property without due process of law.” The 14th Amendment was passed to extend this prohibition to the states, and the Fourth Amendment states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Ironically, all of these rights are suspended to take away the Second Amendment right to possess firearms.

In the case of red flag laws, these rights are suspended to allow family, broadly defined in Maine law to include ex-lovers, to petition the court, ex parte, without your knowledge and without the suspicion of a crime being committed.

The petitioner is allowed to present their arguments to a judge, who then, based upon those arguments, decide whether the state can forcibly remove privately and legally owned property — in this case, firearms — from that person’s possession.

In essence, the Legislature is asking judges to act as clairvoyants — someone who claims to be able to predict the future.

Last session, then-Sen. Mark Dion, D-Portland, introduced just such a bill, L.D. 1884. Some members of the Legislature’s Criminal Justice Committee

struggled mightily to find ways to get around the Constitution. I know — I attended the public hearing and work sessions on L.D. 1884.

At the end of the day, it was a minority of the committee and our newly elected governor, Janet Mills, then attorney general, that found a way forward.

Mills offered an amendment to L.D. 1884 that struck the bill and replaced it with an amendment, S-489, that stated a court “may” temporarily suspend a person’s firearm rights when they have been ordered by the court into a progressive outpatient treatment program.

In other words, once a person has been given their due process under the law and is deemed by the court to be in crisis and, furthermore, is directed by the court to undergo mandatory outpatient mental health treatment, firearms can be taken away if a judge deems the patient a threat to themselves or others.

The amendment further stated that all firearms were to be stored properly and returned to the person in the same condition they were taken. Also, the Department of Public Safety was directed to promptly restore that person’s right to possess firearms upon completion of the program.

This amendment was passed and vetoed, and the House upheld the veto, which was odd, because the NRA, the Sportman’s Alliance of Maine, and other gun rights groups signed off on the amendment.

Mill’s amendment is likely the starting point for this session’s debate; it at least recognized the balance between individual rights and public safety. But there are other ways to improve Maine law.

We already have a statute to protect victims of domestic violence as it relates to firearms, Maine courts can issue, on behalf of domestic violence victims, a protection from abuse order that includes the temporary or permanent suspension of firearm rights. In 2013, I served on the Gov. Paul LePage’s Court Order Enforcement Task Force, which examined that current protection order statute and made 11 recommendations to improve our existing law.

Recommendations included improvements to law enforcement procedures, information sharing and victim services, and highlighted serious deficiencies in the storage of confiscated firearms.

One of the important lessons I have learned is that the underlying causes of domestic violence, mental health problems and suicide are far more complicated than just taking away a gun.

Furthermore, advocates know best how to address these issues. Instead of trying to find more sophisticated ways to justify a new law that runs counter to our fundamental constitutional rights, I suggest bringing these groups

together, with lawmakers and state leaders, to examine these issues in a much more comprehensive and cooperative manner.

It seems like a better approach than relying on laws that ask judges and law enforcement to predict the future.

David Trahan of Waldoboro, a former state legislator, is executive director of the Sportsman's Alliance of Maine. This column does not necessarily reflect the opinion of that organization.