



Recommendations for Executive Action to Combat Illegal Gun Trafficking and Gun Crime

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The U.S. Senate vote on April 17, 2013, defeated a proposal to expand background checks for gun purchases. It was only the first round in the newly invigorated movement to enact common-sense legislation to reduce gun violence in our country. And while the moderate bipartisan proposal failed to gain the 60 votes necessary to overcome a filibuster, a majority of senators voted in favor of this legislation, which has overwhelming public support in all corners of the country.¹ Efforts are underway to gather more support for this legislation and proponents are hopeful that the measure will ultimately be enacted.

In the meantime, there are a number of actions President Barack Obama can take that do not require approval by Congress. The president began this process in January 2013 by signing 23 executive actions to address gun violence in the United States, including measures to ensure that more records are provided to the National Instant Criminal Background Check System, nominating a director for the Bureau of Alcohol, Tobacco, Firearms and Explosives, and directing the Centers for Disease Control to resume research into gun violence.² We urge the administration to take additional actions using its existing authority both to improve the federal government's ability to prevent dangerous individuals from acquiring or possessing guns and to enhance law-enforcement investigations of gun-related crime.

1. Develop a risk-assessment instrument to identify denied gun purchasers who are most at risk for future violence

In 2012 the FBI denied 88,479 applications to purchase firearms because the applicant was banned under federal law from buying or possessing guns.³ Since the National Instant Criminal Background Check System, or NICS, became operational in November 1998, 58 percent of denials were due to the applicant having been convicted of a felony, and an additional 14 percent were due to the applicant having a domestic-

violence misdemeanor conviction or a domestic-violence restraining order.⁴ Each of these attempted purchases is a crime, but federal law enforcement rarely chooses to pursue these cases. In 2010, for example, 72,659 gun sales were denied by NICS, a total of 1.2 percent of all NICS background checks. After further review and investigation by the Bureau of Alcohol, Tobacco, Firearms and Explosives, or ATF, only 63 of these denials were ultimately referred to the U.S. attorney for prosecution, and charges were filed in only 44 cases.⁵ This low prosecution rate for these “lie-and-try-to-buy” cases has persisted across administrations.⁶ While federal prosecutors commenced criminal actions against nearly 8,700 defendants in 2012 for other gun-related crimes, such as possession of a firearm by a prohibited person or using a gun in furtherance of a violent crime,⁷ the federal government should develop a risk-assessment instrument to better prioritize and bring more “lie-and-try-to-buy” cases for prosecution.

Little is known about the more than 2 million instances since November 1998 in which individuals were prevented from purchasing guns because of a federal prohibitor. ATF has an entire unit devoted to investigating these denied sales—the Denial Enforcement and NICS Intelligence Branch, or DENI Branch. These investigations are not informed, however, by a comprehensive review of which NICS denials are most associated with individuals who go on to acquire guns in the private market and commit future crimes.⁸ The information about these blocked sales and the prohibited individuals who attempted to buy guns could be used to help inform a study of the frequency or prevalence of future violent crimes, particularly gun-related crimes, committed by individuals barred from gun ownership.

The ATF DENI Branch should partner with the FBI to undertake a comprehensive study of all 2 million denied gun purchases since 1998 to determine how many individuals blocked from purchasing guns went on to commit future violent crimes, with a particular focus on subsequent gun-related crimes. Using the data gathered in this study, ATF and the FBI should develop a risk-assessment process for use by ATF and the U.S. attorney to assist in determining which attempted sales cases should be prioritized for prosecution. ATF and the FBI should also publish a report with the aggregated findings of this study to assist local law enforcement in making similar decisions regarding which offenders to target for further investigation and prosecution.

2. Establish an alert system for failed background checks

Although “lie-and-try-to-buy” cases are generally of low priority to federal prosecutors, state and local police and prosecutors often have a great interest in learning about which prohibited individuals in their communities are trying to buy guns, particularly felons and domestic abusers. The acquisition of firearms by such individuals poses a distinct risk to public safety in those communities; local law enforcement should be informed when such individuals have attempted to buy guns so that they can decide whether

to pursue state-law criminal charges, initiate investigations, or keep an eye on these individuals for signs of future criminal activity. In 2009 Mayors Against Illegal Guns recommended an alerting process for background-check denials.⁹ And since then law-enforcement sources report that the FBI has implemented a procedure to alert state and local law enforcement when fugitives attempt to purchase firearms, a group that makes up about 9.8 percent of NICS denials.¹⁰ The FBI should develop a similar electronic alert system to advise local law enforcement when *any* individual in their jurisdiction seeks to purchase a gun but has been blocked from doing so because they are prohibited under federal law from firearm possession.

In addition to reporting all blocked purchases to local law enforcement, the FBI should develop protocols for referring information to other state and local authorities about certain sales. State mental-health authorities, for example, should be notified when an individual prohibited from gun ownership because of mental illness attempts to buy a gun. Such an attempted purchase should raise a red flag that the individual may be an imminent risk to himself or to others, and the appropriate local law-enforcement or mental-health authorities should check in on this person. Likewise, individuals blocked from buying a gun who identify as college students or list a college campus as their address should be reported to campus police. Again, these attempted purchases may raise a red flag that a student prohibited from firearm possession potentially poses a risk to self or to overall campus safety.

3. Conduct background checks of gun-dealer employees

Individuals prohibited under federal law from buying or possessing guns are likewise prohibited from working for a federally licensed gun dealer in any capacity that involves handling guns. Gun dealers, however, are not currently required to conduct background checks as part of the hiring process to determine whether prospective employees are banned from firearm possession under federal law. And in fact, there have been numerous cases of prohibited individuals working behind the counter at gun dealers. In August 2012, for example, federal investigators arrested an Augusta, Kansas, gun dealer when her husband, a convicted felon, was caught repeatedly selling guns at the store and on behalf of the store at gun shows.¹¹

ATF should use the NICS system to incorporate background checks of all employees as part of the more than 13,000 gun-dealer audit inspections conducted each year. Doing so would help ensure that prohibited individuals don't have easy and unfettered access to guns.

ATF should also encourage gun dealers to voluntarily conduct background checks of employees using the NICS system. Some gun retailers, including Walmart, voluntarily conduct checks on all gun-handling employees, and the gun-industry lobby—the National Shooting Sports Foundation—recommends that dealers voluntarily conduct

such checks.¹² ATF should advise all gun dealers of the availability of NICS to conduct background checks of current and prospective employees. As part of his list of 23 executive actions on guns announced in January 2013, the president directed ATF to advise gun dealers that they are permitted to perform background checks to assist individuals engaged in private sales.¹³ On January 16 ATF issued an open letter to all federally licensed gun dealers encouraging them to perform background checks for such private sales and has provided detailed guidance regarding how to perform such checks and the applicable recordkeeping requirements for these transactions.¹⁴ ATF should issue a similar letter informing gun dealers that they may use NICS to perform background checks of current and prospective employees and develop protocols to enable and encourage such checks.

4. Verify the validity of a purchaser's identification document as part of every NICS check

Individuals are required to provide proof of identity when applying to buy a firearm. There is no mechanism in place, however, for verifying that the identification document provided is, in fact, valid and properly possessed by the individual. This gap in the background-check system allows prohibited individuals to easily circumvent the federal law by purchasing firearms using a forged or fake identification document. A General Accounting Office, or GAO, investigation in 2001 highlighted this weakness in the background-check system: Investigators were able to buy guns in five states using counterfeit driver's licenses.¹⁵

The FBI should incorporate an instant check of the validity of the proffered state-issued identification document as part of every NICS check, in much the same way as the E-Verify system checks information provided on I-9 Employment Eligibility Verification forms against data in the Department of Homeland Security and the Social Security administration systems.¹⁶ By linking state motor-vehicle databases with NICS, for example, the FBI could easily and quickly assess the validity of driver's licenses offered by prospective purchasers, thus eliminating an easy avenue for prohibited individuals to buy guns from dealers. Mayors Against Illegal Guns made a similar recommendation in 2009.¹⁷

Criminal gun dealers can also hide illegal gun sales by falsifying information in their records, including by listing fictitious individuals as legitimate gun buyers in the paperwork they are required to keep. ATF should also check the validity of the identity of purchasers listed in a dealer's records as part of each audit inspection.

5. Require manufacturers to put multiple serial numbers on guns

ATF regulations require that every gun manufacturer imprint a unique serial number on each gun it produces.¹⁸ This serial number serves a number of purposes, including allowing for the manufacturer to ensure quality control within the manufacturing process. But more importantly, these serial numbers allow ATF to trace guns found by local law enforcement at crime scenes. ATF uses the serial number to identify the manufacturer of the gun, who in turn uses the serial number to identify the gun dealer to which it was originally shipped. ATF can then reach out to that gun dealer, who can check their records to identify the individual who first purchased the gun. This provides a crucial lead for law enforcement attempting to identify the individual who may have been involved in the crime.

Unfortunately, savvy criminals know the power of the serial number and often go to great lengths to deface it or to remove it entirely from the gun. When the serial number has been defaced in this way, the gun becomes nearly impossible to trace. Data from the 2000 Youth Crime Gun Interdiction Initiative Report examining crime guns recovered in eight jurisdictions revealed that nearly 10 percent of trace requests from those jurisdictions involved handguns with partially or fully obliterated serial numbers.¹⁹ Indeed, the recent case of the Boston Marathon bombers provides an example of this problem: The serial number was filed off the gun used to kill a campus police officer at the Massachusetts Institute of Technology, or MIT, making it substantially more difficult—if not impossible—to trace.²⁰

ATF has the authority under existing law to require licensed importers and manufacturers to identify all guns with a serial number placed on the receiver or frame “in such manner as the Attorney General shall by regulations prescribe.”²¹ The Obama administration should use this authority to issue a new regulation requiring manufacturers and importers to place a second serial number on each gun in a hidden or difficult-to-access location. Some manufacturers have begun voluntarily placing the serial number in multiple places on the gun, a measure that makes it more difficult for criminals to completely eradicate this information from the gun and render it untraceable.

6. Expand multiple-sale reporting

Federal law requires gun dealers to report to ATF when an individual purchases more than two handguns in a five-day period.²² Such reporting is a crucial law-enforcement tool, as such multiple purchases are a strong indicator of illegal gun trafficking.²³ Similar reporting is not required, however, for multiple sales of long guns—a category of firearms that includes rifles and shotguns—despite the fact that many such guns are illegally trafficked and used in crimes.²⁴ In 2011 the Obama administration acted to partially fill this gap by using existing statutory authority given to ATF to require gun

dealers to provide information regarding certain gun sales on demand.²⁵ Invoking this “demand letter” authority, the administration began to require gun dealers in four southern border states to report whenever an individual buys more than one semiautomatic rifle within a five-day period.²⁶ This reporting requirement has been a key tool in the fight against gun trafficking by Mexican drug cartels: During the first eight months that the new reporting requirement was in effect, ATF initiated 120 investigations based on reports of multiple sales of long guns and recommended prosecution of more than 100 defendants in 25 separate cases.²⁷

The Christmas Eve ambush of firefighters in Webster, New York, provides an example of how failure to report multiple sales of long guns limits law enforcement’s ability to prevent gun crimes. That case involved a multiple purchase that included an assault rifle by a straw purchaser—an individual who buys a gun on behalf of someone who cannot legally buy a firearm.²⁸ Had the purchase involved multiple handguns, the circumstances of the sale may have triggered a straw-purchase investigation by ATF, and the straw purchaser may have been caught illegally transferring the assault rifle to the felon who ambushed the firefighters—heading off the attack. But because the multiple purchase involved an assault rifle, it went unreported to the bureau, which allowed the straw purchaser—and therefore the felon—to avoid investigation prior to the attack.

The administration should expand the multiple-sale-reporting requirement to help address the problem of illegal gun trafficking of assault rifles. Specifically, ATF should issue a new demand letter instructing all federally licensed dealers to report the following sales to ATF: (1) multiple sales of assault rifles by any dealer linked to more than five crime-gun traces in the prior year; and (2) multiple sales involving rifles that accept a detachable magazine and are capable of firing a round larger than a .22 caliber or any tactical shotgun with a pistol grip.

7. Penalize states that fail to provide records to NICS

Federal law prohibits nine categories of dangerous individuals from buying or possessing guns, including felons, domestic abusers, and fugitives.²⁹ This law is intended to protect the public from gun violence but is only effective if it is supported by an efficient system for checking the background of each potential purchaser. The FBI has operated NICS since 1998 for this purpose. Since that time, NICS has been used to perform more than 168 million background checks³⁰ and to block sales to more than 2 million prohibited purchasers.³¹

But NICS is only as good as the records that are contained within it. And historically, states have been slow to submit all relevant records to the FBI for inclusion in NICS, particularly records pertaining to individuals prohibited from firearm ownership due to mental illness. A GAO report found that in 2004 only around 126,000 records per-

taining to individuals disqualified from gun ownership due to mental illness had been submitted by the states for inclusion in NICS.³² Following the mass shooting at Virginia Tech in 2007 by an individual who should have been prevented from buying a gun because of mental illness, Congress passed the NICS Improvement Amendments Act of 2007, or NIAA, which provides incentives for states to submit these records.³³ This law gives the attorney general the discretion to withhold a percentage of federal grant funds otherwise due to a state if the state fails to provide a significant number of these records to the FBI for inclusion in NICS.³⁴ Following enactment of the NIAA, there has been a substantial increase in the number of mental-health records submitted to NICS—from nearly 300,000 in 2006³⁵ to more than 2.2 million today.³⁶ This progress, however, represents the efforts of only some states: 18 states have still submitted fewer than 100 mental-health records to NICS.³⁷ This indicates that the threat of a discretionary loss of funding is not a big enough stick to induce all of the states to start submitting more of these records.

Since the NIAA went into effect, the attorney general has yet to exercise the discretion to penalize states for failing to submit the required records to NICS. The administration should instruct the attorney general to begin withholding this grant funding to states that refuse to immediately begin to submit the required mental-health records to NICS, unless the state can demonstrate to the attorney general that extraordinary circumstances are preventing submission. While the statute gives the attorney general the discretion to withhold these funds, the administration should make it clear that this discretion should be exercised absent such a special showing by a state.

8. Make disarming prohibited domestic abusers a priority

While federal law prohibits domestic-violence misdemeanants and individuals subject to certain domestic-violence restraining orders from buying or possessing guns, federal and state law-enforcement agencies have largely failed to enforce this prohibition and ensure that these individuals are relieved of any guns in their possession. Some states have enacted laws or policies to help facilitate surrender of firearms by these individuals,³⁸ but these laws are often poorly enforced.³⁹

The failure to disarm domestic abusers can have devastating consequences for victims. An investigation by *The New York Times* in March 2013 found that over the past decade in Washington state, at least five women were shot and killed less than a month after obtaining protection orders.⁴⁰ In at least six other instances in the state, a person subject to a restraining order shot and killed a person other than the person protected by the restraining order.⁴¹ Another investigation by *The New York Times* found that since 2011 more than 50 people in Washington state with protection orders against them were arrested on gun charges, and in Minnesota, more than 30 people with protection orders were convicted of an assault with a dangerous weapon over the past three years.⁴²

The experience of one county in California—a state that requires individuals to surrender any guns in their possession within 24 hours of being served with a temporary restraining order—highlights the effectiveness of firearm-surrender protocol in reducing gun violence in domestic-violence situations. San Mateo County has instituted detailed protocol to ensure the surrender of firearms from these individuals, and there has not been a domestic-violence gun homicide in the county in the past three years.⁴³

ATF leads regional task forces around the country through its Project Safe Neighborhoods program, in which ATF agents work collaboratively with others in federal, state, and local law enforcement to reduce gun-related crime.⁴⁴ The administration should direct ATF to work with local law-enforcement partners in these Project Safe Neighborhood task forces to develop protocols for confiscating firearms from prohibited domestic abusers. Additionally, ATF should designate one agent in each field office to be a domestic-violence specialist to help ensure that this protocol is being properly implemented and to immediately address any domestic-violence-related issues that arise in the local community.⁴⁵

9. Incentivize gun-dealer inventory checks

ATF's primary tool to ensure that federally licensed gun dealers are in compliance with laws and regulations is to conduct regular inspections of these businesses. One of the most important parts of an ATF inspection of gun dealers is an inventory check to ensure that the dealer can account for every gun that has passed through its doors. In the event that dealers cannot account for large numbers of guns that should be in their inventory, a red flag is raised to ATF that illegal gun sales may be occurring. Guns reported as lost or stolen end up at crime scenes in large numbers,⁴⁶ indicating that this is a common way for guns to be diverted into criminal hands.

Despite the importance of regular inspections, current ATF resources limit the agency's ability to conduct an inspection of each gun dealer more frequently than around once every five years.⁴⁷ One way to fill the gap in the infrequent inspections would be to require gun dealers to regularly check their inventory against their sales and certify to ATF that all guns are accounted for. Because licensed gun dealers are required under federal law to report lost or stolen guns to ATF,⁴⁸ keeping an inventory would be an effective way of ensuring that missing guns are promptly identified and reported to law enforcement. Since 2004, however, ATF has been prohibited from requiring federally licensed gun dealers from conducting an annual check of their inventory to ensure that all firearms are accounted for. This prohibition takes the form of a rider in the annual appropriations legislation and is one of the so-called Tiahrt Amendments backed by the National Rifle Association, or NRA, that serve to hamstring the federal government's ability to regulate the firearms industry.⁴⁹

In the absence of the ability to require dealers to regularly check their inventory, the administration should create an incentive for gun dealers to voluntarily conduct annual inventory checks and certify to ATF that all guns are accounted for. ATF should create a form for dealers to voluntarily report, under penalty of perjury, that they have checked their inventory and accounted for all firearms. ATF should also create a form for dealers to voluntarily report that they conducted an audit of the records they are required by law to maintain regarding the acquisition and disposition of every gun in their inventory, and either certify that no errors were found or disclose any errors discovered. Voluntary provision of these certification forms would be one factor ATF would consider in determining which dealers should receive an extensive ATF audit each year.

10. Impose tighter restrictions on dealer inventory liquidations following a license revocation

ATF has the authority to revoke a gun dealer's license for repeated violations of federal firearms laws. Revoking a dealer's license is intended to stop the individual from continuing to sell firearms in a manner that violates the law. When a dealer's license is revoked, however, the dealer is permitted to transfer their inventory into their personal collection and then continue selling these guns as a private seller. Dealers are permitted to do this even if these private sales from their newly augmented personal collections rise to the volume of sales that normally put a seller in the category of being "engaged in the business" of selling guns and therefore require a federal license.⁵⁰ This practice was condoned by the Department of Justice, or DOJ, in an opinion issued in 2006.⁵¹ The result of this opinion is that former gun dealers who demonstrated that they were not responsible sellers by virtue of their violations of federal laws may continue high-volume gun sales as private sellers, only now they can do so without being required to perform background checks.⁵²

This interpretation of the law is at odds with a common-sense reading of the statute and creates a significant risk to public safety. The purpose of revoking a gun dealer's license is to prevent that individual—who has demonstrated they are incapable of following federal laws designed to protect public safety and ensure that guns don't end up in the wrong hands—from continuing to sell guns. Permitting such individuals to continue selling guns as private sellers completely undermines the punishment of revoking the license. Some of these so-called fire sales—when dealers lose their federal firearms license but continue to sell off their inventory as private sellers—have involved hundreds of guns. When ATF revoked the license for the owners of Valley Gun in Baltimore, Maryland, in 2006 after finding more than 900 violations of federal regulations—including hundreds of missing guns—the owner was permitted to sell more than 700 guns that remained in the store inventory as a private seller.⁵³ The DOJ should issue a revised opinion clarifying that a gun dealer who has had his license revoked may not engage in

private sales at a volume that constitutes engaging in the business, but rather must liquidate large quantities of inventory by selling to other licensed dealers.

11. Inspect dealer inventory for stolen guns

Many gun dealers and licensed pawnshops buy guns from private individuals. When they do so, they are required to keep a record of the purchase, including the name and address of the seller, in the same manner as when they acquire guns in their inventory from a licensed manufacturer or distributor. Dealers have no way of verifying, however, that the used guns they are purchasing have not been reported as stolen. Such guns then remain unwittingly hidden in dealer inventories and the criminals responsible for putting them there go unpunished with money in their pockets.

ATF should initiate a trial program to incorporate checks of used-gun inventories into some audit inspections to look for stolen guns. By crosschecking used guns in a dealer's inventory with the FBI database of stolen guns, ATF will be able to identify whether any of these guns have been reported stolen and conduct an investigation into the individual who sold the gun to the dealer. Doing such checks for stolen guns in dealer inventory will also allow ATF to gather intelligence, first about the types of dealers who are targets for criminals to unload stolen guns, and second about local criminal networks. This intelligence could then be used to target gun thieves for investigation.

12. Form a joint task force with ATF and the FBI to investigate Internet-facilitated gun crimes

The Internet has created a virtually unregulated marketplace for guns, one in which individuals banned from firearm possession under federal law can easily purchase guns from private sellers who advertise online and are not required to conduct a background check. A recent investigation by *The New York Times* found that 94 percent of ads for guns on the most popular websites were posted by such private sellers.⁵⁴ And while private sellers are still required to follow the federal law by refusing to sell a gun when they have reason to believe the recipient is prohibited from gun ownership, there is little to no oversight by law enforcement to ensure that illegal sales are not occurring. An investigation of gun sales online conducted by Mayors Against Illegal Guns in 2011 found that 62 percent of online sellers investigated agreed to sell a gun to an individual who indicated that they would not be able to pass a background check.⁵⁵ There have been numerous incidents in which prohibited individuals easily, and illegally, bought guns online and subsequently using them to commit heinous crimes. In 2012, for example, Radcliffe Houghton, a domestic abuser who was banned from gun ownership because of a restraining order issued against him, bought a gun online that he used to shoot and kill his estranged wife and two of her co-workers.⁵⁶

Similarly, in 2011 Dmitry Smirnov, a Canadian who was prohibited from gun ownership in the United States because of his immigration status, bought a gun online from a private seller, then stalked and killed his former girlfriend.⁵⁷

Some private sellers are likely violating other federal laws on these websites as well, such as the requirement that an individual who is “engaged in the business” of selling guns seek a federal firearms license from ATF.⁵⁸ The *New York Times* investigation found more than two dozen individuals who had each advertised more than 20 different guns for sale in a short time period.⁵⁹ Such individuals are likely breaking the law by selling guns at such a volume without a federal license.

ATF recently created a Cyber Crime Unit to focus on Internet-facilitated gun crimes.⁶⁰ The creation of this unit is long overdue and is a positive first step in the agency beginning to focus proper attention on these crimes. Given the agency’s lack of experience in this area, however, ATF is ill equipped to adequately address the increasing problem of Internet gun crimes. ATF should partner with the FBI to begin aggressively investigating Internet-facilitated gun crimes. The FBI has a well-developed and robust cyber-crime division that has prioritized investigating computer-related crimes for many years.⁶¹ Each FBI field office has at least one cyber squad consisting of special agents, intelligence analysts, and computer scientists,⁶² and the FBI also leads the National Cyber Investigative Joint Task Force, a group of 18 federal law enforcement and intelligence agencies that work collaboratively to combat cyber crimes. The DOJ should create an Internet gun-trafficking task force in which ATF and the FBI partner together to develop and implement targeted investigations of illegal online gun sales.

Conclusion

Most of the attention in the current gun debate has been focused on congressional action (or inaction) on legislation designed to protect public safety by preventing dangerous individuals from having easy access to guns. There is much that can be done outside of Congress, however, to help strengthen oversight of the gun industry, enhance law-enforcement investigations of gun-related crime, and make it more difficult for criminals to get guns. As he continues to work with members of Congress to pass common-sense gun legislation, President Obama should also use the powers under current law granted to the executive branch to take action to help prevent future gun violence and make our communities safer.

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