

# ***EXECUTIVE ACTIONS TO PREVENT GUN VIOLENCE***



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# THE PRESIDENT'S AUTHORITY TO ISSUE EXECUTIVE ACTIONS

Presidents routinely exercise their authority to use some form of executive action to direct the behavior of actors within the Executive branch and to promote or provide leadership with respect to federal policy objectives.<sup>1</sup> Colloquially, such actions are referred to as “executive orders,” a catch-all phrase used to reference executive orders that, on their own, carry the force of law, as well as other instruments, such as proclamations, findings, memoranda, or guidance, that influence policy indirectly.<sup>2</sup> Although neither the U.S. Constitution nor a federal statute address the authority of the president to issue executive orders, they have been in use since George Washington held the office.<sup>3</sup> The Supreme Court has recognized executive orders as valid when the president properly invokes powers granted to him by Article II of the Constitution or permissibly delegated by Congress.<sup>4</sup> In practice, however, Congress delegates lawmaking authority to both the president and federal agencies operating within the executive branch, so the constitutional viability of any given executive order hinges on the source of authority invoked and the actor wielding the power in a manner that carries the force of law. Most important for the purposes of the recommendations made here: although the president is not subject to the procedural requirements of the Administrative Procedures Act (APA), they do apply to federal agencies.<sup>5</sup> Accordingly, assessments of the viability of the proposed executive orders consider potential attacks on the order itself and any agency action required to implement the order.

Aside from the baseline that the president's use of executive authority does not violate Constitutional rights, the legality of an executive order that carries the force of law but is not authorized under Article II depends largely on Congress' own exercise of authority in the relevant space. Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>6</sup> established a tripartite scheme that has become the starting point for analyzing the legality of executive actions rooted in authority delegated by Congress. The three categories are as follows:

1. The president's authority to act is at its maximum when he acts pursuant to an express or implied authorization of Congress because this includes “all that he possesses in his own right plus all that Congress can delegate.” Such action would be “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”<sup>7</sup>
2. “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential

responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>8</sup>

3. The president’s authority is considered at its “lowest ebb” when he “takes measures incompatible with the express or implied will of Congress . . . for he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Courts can “sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.”<sup>9</sup> Presidential action in this category deserves more scrutiny.

Executive orders that do not carry the force of law are not subject to judicial review and are often challenged after an agency takes final action pursuant to the executive order.<sup>10</sup> There are well-established doctrines guiding judicial review of agency action under the APA.<sup>11</sup> These

doctrines require unelected actors within agencies to adhere to specific procedural requirements and constrain them from exceeding the scope of authority delegated by Congress. First, Section 553 of the APA outlines the procedures agencies must follow when issuing rules that carry the force of law, including a notice and comment period and the issuance of a “concise general statement” that explains the basis and purpose of a final rule.<sup>12</sup> Second, courts will review the substance of agency action and, under Section 706(2)(A) of the APA, “hold unlawful and set aside [any] action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>13</sup> The doctrine of “*Chevron* deference” instructs courts to defer to an agency’s interpretation of ambiguities in its statutory mandate, provided the procedural requirements to act with the force of law are followed and the agency’s interpretation is reasonable and not contrary to Congress’ intent.<sup>14</sup>

## CATEGORY 1: ENHANCE AND STRENGTHEN THE BACKGROUND CHECK SYSTEM

### Strengthen Brady Background Checks by Limiting the Private Sales Loophole

*Option # 1: Limiting the private sales exception to those who sell 5 or fewer firearms a year to unlicensed individuals for profit.*

The president has ample authority to direct the Attorney General and ATF to engage in rulemaking to close this loophole in the federal background check system. Such a directive by the president would not carry the force of law on its own, but would instruct an agency to engage in rulemaking to clarify the meaning of an ambiguous statutory term. The Attorney General, acting through ATF, can lawfully address the private sale loophole pursuant to authority granted by Congress under 18 U.S.C. § 926 to implement rules and regulations necessary to carry out the various provisions of the Gun Control Act. Specifically, ATF has authority to clarify when a gun dealer is “engaged in the business” of selling firearms, and therefore required to obtain a federal license and to comply with the obligations of a federal licensee, including the requirement to conduct background checks prior to firearms transfers.

In § 921(a)(21)(C), Congress provides that a person is “engaged in the business” of selling firearms if that person “devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby or who sells

all or part of his personal collection of firearms.” By statute, Congress further clarified “with the principal objective of livelihood and profit” to mean “that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other interests, such as improving or liquidating a personal firearms collection.”

The statute does not specify when repeated transfers for profit amount to more than a hobby. One federal appellate court acknowledged the ambiguity of “locating precisely the border between, on the one hand, an unlicensed dealer that unlawfully engages in the regular business of dealing firearms and, on the other hand, an unlicensed hobbyist that lawfully engages in periodic sales” based on the statute’s text.<sup>15</sup> Nevertheless, the plain language of the statute makes clear Congressional intent to criminalize dealing in firearms as a business without a license, whether as a means of sole or supplemental income.<sup>16</sup>

The implementing regulations, 27 C.F.R. § 478.11, should be clarified through the notice and comment rulemaking to include individuals that sell more than five guns a year to unlicensed individuals with the intent to profit. The section of the regulation pertaining to *principal objective of livelihood and profit* should be amended to include:

“Provided further, that a rebuttable presumption of profit will be assumed when a person makes repeated sales amounting to more than five firearms per year, to unlicensed individuals.”

Individuals who repeatedly make firearms transfers using online platforms or gun shows in lieu of traditional marketing practices to generate profit are still, in fact, engaged in the business of selling firearms, and such persons should take on the obligations of a federally licensed firearms dealer, including the obligation to complete background checks. This interpretation is reasonable, not contrary to legislative intent, and eligible for *Chevron* deference.

### **Treat “Ghost Guns” Like All Other Guns**

***Option #2: ATF may be instructed to broaden its interpretation of the term “firearm” to include unfinished frames and receivers which are designed and marketed to be easily converted into firearms.***

The president has ample authority to direct the Attorney General and ATF to engage in rulemaking to regulate unfinished frames and receivers which are designed and marketed to be converted into ghost guns as firearms. Such a directive by the president would not carry the force of law on its own, but would instruct an agency to engage in rulemaking to clarify the meaning of an ambiguous statutory term. The Attorney General, acting through ATF, can lawfully regulate unfinished frames and receivers as firearms pursuant to authority granted by Congress under 18 U.S.C. § 923(i), which instructs the Attorney General to implement regulations regarding the placing of serial numbers on firearms, and § 926, which authorizes the Attorney General to implement rules and regulations necessary to carry out

the various provisions of the Gun Control Act. Specifically, ATF has authority to interpret “firearms” to include unfinished frames and receivers that are marketed and sold to be assembled into firearms.

Federal law requires licensed importers and manufacturers of firearms or ammunition to engrave or cast a serial number on the frame or receiver of a firearm.<sup>17</sup> In 18 U.S.C. § 921(a)(3), Congress defined the term “firearm” to mean “any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive and the frame or receiver of such weapon. . . .” The meaning of the term “frame or receiver” is ambiguous to ATF, which has, in turn, created an arbitrary point in the “stage of manufacture” at which an unfinished receiver becomes a firearm for the purposes of federal law.<sup>18</sup> ATF currently instructs citizens that are “unsure about whether an item [he or she is] planning to buy or sell is considered a firearm under [federal law]” to email ATF for guidance.<sup>19</sup>

The plain language of the statute makes the intent of Congress clear: that frames and receivers which are designed to, or have the capacity to be, readily converted into firearms are to be regulated as firearms. 27 C.F.R. § 478.11 should be amended through notice and comment rulemaking to clarify that the term “frame or receiver” encompasses unfinished frames or receivers marketed and sold to be readily converted into firearms. This interpretation is reasonable, not contrary to legislative intent, and eligible for *Chevron* deference.

## **Prevent Domestic Abusers from Accessing Guns**

***Option #3: ATF may be instructed to expand the prohibitor preventing individuals convicted of misdemeanor crimes of domestic violence to include individuals convicted of violence against dating partners regardless of sex, sexual orientation, or gender identity.***

The president has ample authority to direct the Attorney General and ATF to engage in rulemaking to close a loophole in the federal background check system. Such a directive by the president would not carry the force of law on its own, but would instruct an agency to engage in rulemaking to clarify the meaning of an ambiguous statutory term. The Attorney General, through ATF, can lawfully expand the interpretation of “misdemeanor crimes of domestic violence” to include misdemeanor crimes of violence against dating partners pursuant to its authority, under 18 U.S.C. § 926, to implement rules and regulations necessary to carry out the various provisions of the Gun Control Act.

Section 922(g)(9) prohibits firearm possession by an individual who has been convicted in any court of a misdemeanor crime of domestic violence. A “misdemeanor crime of domestic violence” is statutorily defined as an offense committed by “a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”<sup>20</sup> The statute does not define who qualifies as one “similarly situated” to a spouse.

ATF has already addressed the ambiguity of the term “similarly situated,” providing parenthetical examples of the agency’s determination of what constitutes this expression<sup>21</sup>

The implementing regulations, 27 C.F.R. § 478.11, should be clarified through the notice and comment rulemaking process to indicate that dating partners are similarly situated to spouses. A plain reading of the statute indicates that Congress intended the scope to be broader than romantic partners that cohabit or have cohabited in the past. The provision’s legislative history makes clear that Congress intended to “keep guns away from people who have been proven to engage in violence with those with whom they share a domestically intimate or familial relationship, or those who live with them or the like.”<sup>22</sup> This interpretation is reasonable, not contrary to Congress’ intent, and eligible for Chevron deference.

## **Restore An Interpretation of “Fugitive from Justice” That Ensures All Fugitives Are Prohibited From Buying Firearms**

***Option #4: The president may instruct the DOJ to clarify that fugitives from justice, regardless of whether or not they have crossed state lines, are prohibited from purchasing guns.***

The Trump Administration issued the above interpretation of “fugitive from justice” in a memorandum from the Federal Bureau of Investigation (FBI), a component of the DOJ.<sup>23</sup> The memorandum purports to be guidance settling a discrepancy between ATF and FBI interpretations of the term, and therefore the instrument neither carries the force of law nor

invites judicial review, even under the APA.<sup>24</sup> Under direction from the president, or on its own, the DOJ or FBI can supplant this guidance by issuing a new memorandum at any time without legal implications.<sup>25</sup>

## **Close the “Fire Sale Loophole”**

***Option #5: ATF may be instructed to allow dealers whose licenses have been revoked only two options with regard to their remaining inventory of firearms: 1) sell their firearms to another FFL, or 2) surrender their inventory to ATF***

The president has ample authority to direct the Attorney General to close the “fire sale” loophole in the Gun Control Act. This loophole represents an existing policy preference of ATF and does not require legally enforceable action by the president to reverse. Federal law requires persons “engaged in the business” of selling firearms to obtain a license, but allows individuals who sell from their private gun collection for non-pecuniary purposes to do so without such a credential.<sup>26</sup> Congress defined “engaged in the business” to mean “a person who devotes time, attention, and labor to the dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”<sup>27</sup>

The loophole appeared as federal policy in 2006, when the Bush Administration’s Department of Justice read it into the law via court filings. These filings indicated “it has been ATF’s longstanding position that . . . when a dealer loses his license he can dispose of his inventory by selling those firearms without being deemed to have engaged in the business without a license in violation of

[federal law, and] will only run afoul of [that law] if he chooses to *purchase and resell* firearms.”<sup>28</sup> The president can instruct the DOJ to issue guidance interpreting § 921(a)(21)(C) to not allow a person with a revoked firearms license to sell firearms already in his or her business inventory. Such a directive from the president would not be subject to judicial review; the nonbinding guidance or interpretive statement from the DOJ would be subject to procedural requirements under the APA.<sup>29</sup>

Moreover, a president can instruct the Attorney General, through ATF, to engage in rulemaking to reflect this interpretation in the Gun Control Act’s implementing regulations, a change which may not be as readily reversed by a subsequent administration. Such a directive by the president would not carry the force of law on its own, but would instruct an agency to engage in rulemaking to clarify the meaning of an ambiguous statutory term. Under 18 U.S.C. § 926, ATF may act to implement rules and regulations necessary to carry out the various provisions of the Gun Control Act. The statute is ambiguous, as evidenced by multiple proposals from both Republican and Democratic lawmakers to clarify it, though none of these propositions have become law.<sup>30</sup> Legislative intent leans heavily in favor of closing the loophole; Congress qualified the personal collection exception to licensee obligations with the important caveat that if dispositions or acquisitions to a personal collection are “made for the purpose of wilfully evading the restrictions placed upon licensees by this chapter, then such firearms shall be deemed part of such licensee’s business inventory.”<sup>31</sup> This interpretation is reasonable, not contrary to Congress’ intent, and eligible for Chevron deference.

## CATEGORY 2: GUN INDUSTRY OVERSIGHT AND ACCOUNTABILITY

### **Shut Down Persistently Noncompliant Dealers**

*Option #6: The president may instruct ATF to overhaul its internal standards for issuing remedial actions — including license revocations — so that repeat and serious violators are no longer permitted to sell guns to the public.*

The president has the authority necessary to adequately enforce existing law. Congress has granted ATF express authority under 18 U.S.C. § 923(e) to revoke a federal firearms license for willful violations of the Gun Control Act or related regulations. The president may also invoke this authority under Article II of the Constitution, which requires he “take care that the laws be faithfully executed” to ensure that willful violators do not continue to operate under a federal license.

Based on guidance from the president, ATF may establish “rules of agency organization, procedure, or practice” that indicate when the volume and/or severity of violations by a licensee merit revocation.<sup>32</sup> Rules governing agency procedure are not required to undergo notice and comment rulemaking under the Administrative Procedures Act.<sup>33</sup>

### **Require Gun Dealers to Perform Annual Background Checks on Employees**

*Option #7: The president may direct the ATF to require that FFLs perform annual background checks on all employees who transfer or may transfer firearms.*

The president has ample authority to direct the Attorney General and ATF to engage in rulemaking requiring FFLs to conduct background checks on the employees that transfer firearms on the licensee’s behalf. Such a directive by the president would not carry the force of law on its own, but would instruct an agency to implement rules and regulations necessary to carry out the various provisions of the Gun Control Act, as authorized by 18 U.S.C. § 926. ATF currently uses this authority, granted by Congress, to regulate the business conduct of FFLs.<sup>34</sup>

Congress, which regulates the possession and sale of firearms “in or affecting interstate commerce,” has, in 18 U.S.C. § 922(g) and (n), expressly stated its intent to prevent certain prohibited persons from possessing or receiving firearms. Although ATF currently recognizes that it is unlawful for FFLs to employ prohibited purchasers, it has not yet implemented a regulatory requirement to implement or enforce that provision.<sup>35</sup> ATF should, through notice and comment rulemaking, amend subpart F of its regulations to require FFLs to complete criminal history background checks on all employees that conduct firearms transfers on the FFL’s behalf.<sup>36</sup>

### **Empower State and Local Law Enforcement with Federal Inspection Data**

*Option #8: The president may require that ATF share FFL inspection data with state and local law enforcement on a regular basis.*

Based on guidance from the president, ATF may establish “rules, agency organization, procedure[s], or practice[s]” that instruct

employees of ATF to share inspection data with state and local law enforcement.<sup>37</sup> Rules governing agency procedure are not required to undergo notice and comment rulemaking under the Administrative Procedures Act.<sup>38</sup> Neither the directive from the president nor the non-legislative rule governing agency practice would be subject to APA's procedural requirements or judicial review.<sup>39</sup>

## **Prioritize Enforcement of Existing Federal Law to Oversee Gun Dealers**

***Option #9: The president may instruct the Attorney General to prioritize legal action against the gun industry for violations of federal law.***

The president has the authority necessary to adequately enforce existing law. Congress has imposed criminal penalties on FFLs who knowingly enter false information on any records they are required to keep pursuant to their license. The president may also invoke authority under Article II of the Constitution, which requires he “take care that the laws be faithfully executed,” to ensure that FFLs that violate the law are prosecuted. The president and the Attorney General have ample authority and discretion to set enforcement priorities.

The president can direct the Attorney General to prosecute gun dealers that engage in criminal conduct, such as the aiding and abetting of straw purchasers or gun traffickers. Federal criminal law provides that any person who “aids, abets, counsels, induces or procures [the commission of a crime]” is punishable as a principal offender of that crime.<sup>40</sup> In the Gun Control Act, Congress imposes criminal penalties on individuals that engage in the business of dealing in firearms

without a license<sup>41</sup> or misrepresent their identity to an FFL when attempting to procure a firearm.<sup>42</sup> It is also unlawful for a person, including an FFL, to knowingly transfer a firearm to a prohibited purchaser<sup>43</sup> or enter false information on ATF Form 4473.<sup>44</sup> Accordingly, in instances where an FFL violates the law or knowingly aids another in violating the law, the prosecution of the offense should be prioritized.

Based on guidance from the president, DOJ may issue a general policy statement to initiate a “lie-and-try” program focused on FFLs. Nonbinding policy statements issued by agencies are not required to undergo notice and comment rulemaking under the Administrative Procedures Act.<sup>45</sup> Similarly, DOJ may prioritize the investigation and prosecution of violations of the NFA.

## **Leverage Purchasing Power to Promote Gun Dealer Code of Conduct**

***Option #10: The president may instruct federal agencies to procure firearms solely from manufacturers, distributors, and dealers that have adopted safe business practices, and mandate that the FFLs in their distribution chains implement these policies and standards.***

Congress has granted the president authority to direct, as a prerequisite to the sale of firearms to the federal government, the adoption of a code of responsible business practices for firearms marketing, distribution, and/or sales. Through the Federal Property and Administrative Services Act of 1949 (FPASA), Congress grants the president specific, broad authority to procure supplies and services and to establish and manage an “economical and efficient” procurement system.<sup>46</sup>

The Youngstown framework applies here to presidential actions that would impose directives on federal procurement transactions. Courts generally have concluded that FPASA grants broad authority.<sup>47</sup> For instance, the U.S. Court of Appeals for the D.C. Circuit, sitting en banc, held that FPASA gives the president “broad-ranging authority” to promote “economy” and “efficiency” in federal procurement.<sup>48</sup> Further, “economy” and “efficiency” are not “narrow terms.”<sup>49</sup> They “encompass those factors like price, quality, suitability and availability of goods or services that are involved in all acquisition decisions.”<sup>50</sup> The D.C. Circuit has stated that an executive action is valid under FPASA if it has a “sufficiently close nexus” to economy and efficiency.<sup>51</sup> This “sufficiently close nexus” exists if the executive action is “reasonably related” to the goals of economy and efficiency.<sup>52</sup>

Although the primary goal of executive action under FPASA should be to “promote the fundamental interests of the federal government as a market participant,” previous presidents have considered secondary policy goals when leveraging this authority.<sup>53</sup> President Clinton’s executive action on safety locks, which imposed gun safety standards on federal government procurement transactions, provides close precedent.<sup>54</sup> President Clinton directed each federal agency “to develop and implement a policy requiring that a safety lock device . . . be provided with any and every handgun issued by [its] law enforcement officers.”<sup>55</sup> Although it was not a procurement or assistance program directive per se, agencies procured safety lock devices and lock boxes.<sup>56</sup> President Obama’s anti-trafficking executive order also shows that the president can

require the adoption of a compliance plan and/or code of conduct by a prime contractor and parts of that contractor’s supply chain as a condition of a federal procurement transaction. Certain prime contractors and subcontractors must maintain “a compliance plan during the performance of the contract or subcontract” to address and combat the risk of human trafficking.<sup>57</sup>

Further, the president can use executive action to direct federal agencies to exclude from procurement programs an entity that does not comport with certain standards of behavior. For example, a prime contractor or subcontractor can face suspension or debarment if it fails to comply with the directives of President Obama’s anti-trafficking order.<sup>58</sup> Relatedly, President Obama ordered an evaluation of whether to suspend or debar procurement contractors with “serious tax delinquencies,”<sup>59</sup> and he directed that federal agencies consider, on a case-by-base basis, whether noncompliance with labor laws should bar a contractor from receiving certain contracts.<sup>60</sup>

There is a sufficient nexus between a safe business practices firearms procurement requirement and the federal government’s authority and interests in such transactions. For example, as a purchaser of firearms for law enforcement, the government has an interest in not doing business with a party who irresponsibly supplies firearms to criminals. The “economy” or “efficiency” of a firearm procurement by a law enforcement agency is served by incentivizing gun dealers to establish strong business practices ensuring they do not arm those who would target law enforcement officers or engage in criminal activity.

## **Restore Thorough Oversight of Arms Exports**

*Option #11: The president may return regulatory authority of arms exports back to the State Department.*

Assuming the rulemaking procedure conducted to transfer the export controls of certain firearms, ammunition, and artillery from the State Department to the Department of Commerce

adhered to the procedural requirements set forth in the APA (the rule went into effect this year and has not yet been defended against a court challenge), the measure can be undone through a subsequent rulemaking proceeding. The Directorate of Defense Trade Controls (DDTC) within the Department of State may propose another rulemaking proceeding under the International Trade in Arms Regulations (ITAR) 22 CFR parts 120-130, in accordance with the requirements set forth in the APA.<sup>61</sup>

## CATEGORY 3: PREVENT THE DIVERSION OF FIREARMS TO THE ILLEGAL MARKET

### **Pull Back the Curtain on America’s Worst Gun Dealers**

*Option #12: The president may direct ATF to interpret the phrase “statistical aggregate data” in the Tiahrt Amendments to include the aggregate number of crime gun traces on a per dealer basis, and to include information about the largest crime gun suppliers in the annual state trafficking reports.*

The president has authority to direct ATF to issue an interpretive rule clarifying that “statistical aggregate data” includes the aggregate number of crime gun traces on a per dealer basis. The president may issue a nonbinding directive to ATF, which does not invite judicial review. Likewise, ATF may issue general statements of policy and interpretive rules that do not carry the force of law and are not subject to the procedural requirements of the APA.<sup>62</sup>

This interpretation of statistical aggregate data is not inconsistent with Congressional intent provided by statute. Congress, through the so-called “Tiahrt Amendments,” placed restrictions on the use of gun trace data by preventing ATF from disclosing “part or all of the contents of the Firearms Trace Systems database maintained by the National Trace Center.”<sup>63</sup> The statute goes on to provide an exception for “the publication of annual statistical reports on products regulated by [ATF] . . . or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations.”<sup>64</sup> The plain text of the statute does not restrict ATF from publishing the aggregate number of crime gun traces on a per dealer basis as it relates to trafficking channels and investigations.

### **Give States Discretion to Utilize Trace Data**

*Option #13: The president may direct ATF to assess the terms of all MOUs with state and local law enforcement agencies regarding the use of eTrace data and ensure that no provisions place any restrictions on state and local use of trace data that are not necessary to comply with the language of Tiahrt.*

The president has authority to direct ATF to review its MOUs with state and local law enforcement agencies. The president may issue a nonbinding directive to ATF, which does not invite judicial review. Likewise, ATF may issue rules regarding agency practices that do not carry the force of law and are not subject to the procedural requirements of the APA.

MOUs regarding the eTrace system are written agreements between ATF and state and local law enforcement entities governing how state and local law enforcement may access the system and make use of the data it contains. Based on samples obtained by Brady through Freedom of Information Act (FOIA) requests, ATF may restrict the use of trace data beyond what is required by law and/or which contain overly broad descriptions of such limitations that chill appropriate uses of the data. Through the so-called “Tiahrt Amendments,” Congress placed restrictions on ATF’s use of gun trace data, subject to certain exceptions, including disclosure to state and local law enforcement and the public release of “statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations.”<sup>65</sup> Congress enacted these restrictions through the

federal appropriations process, instructing ATF that it may not expend funds allocated by Congress to disclose the contents of the eTrace system. The statute therefore only restricts ATF's use of federal funds to disclose eTrace data, not the use of parties to whom the data is permissibly disclosed. For example, the city of Chicago has released crime guns reports which have included trace data obtained from the eTrace system.<sup>66</sup> In response to inquiries as to whether this violated the law, former ATF spokesman Brian Ganer stated, and one Senator agreed, that "the requesting agency owns trace data for firearms they submit . . . [and] they can do with that data whatever they want."<sup>67</sup>

ATF may instruct relevant agency actors to review existing MOUs to ensure that any limitations placed on the use of trace data are consistent with this interpretation of the Tiahrt Amendments. Where an MOU does stipulate that a state or local law enforcement agency cannot disclose or publish trace data, the agreement should be amended accordingly.

### **Require Multiple Sales Reporting to Tackle Domestic and International Trafficking**

*Option #14: In order to stem the flow of trafficked guns in and across the border, the president may instruct ATF to require all states to report multiple sales of long guns so that it can identify traffickers and the dealers that facilitate gun trafficking.*

Federal law requires that FFLs report to ATF the sales of "two or more pistols, or revolvers, or any combination of pistols and revolvers to the same buyer within five business days."<sup>68</sup> Under 18 U.S.C. § 923(g)(5)(A), Congress further authorized ATF to require additional reporting beyond what is specified

in the statute.<sup>69</sup> The 2011 reporting requirement was issued by ATF via a demand letter sent to certain FFLs operating in Arizona, California, New Mexico, and Texas.<sup>70</sup> Prior to the demand letter, ATF conducted notice and comment rulemaking. The Court of Appeals for the D.C. Circuit has upheld a challenge under the APA to the 2011 requirement, declining to find that ATF exceeded its statutory authorization or that the substance of the demand failed arbitrariness review.<sup>71</sup> The ruling relied on the plain text of § 923(g)(5)(A) alone, which made clear that Congress authorized ATF to require multiple sales reporting to by FFLs.

Based on a directive from the president, ATF can engage in a rulemaking procedure, as it did before issuing the 2011 demand letter, to expand the scope of FFLs subject to the current reporting requirements.

### **Bolster Interstate Law Enforcement Capabilities**

*Option #15: The president may direct ATF to permit entities with eTrace logins to share trace data across state lines.*

Based on guidance from the president, ATF may issue policy guidance or establish "rules of agency organization, procedure, or practice" that permit cross-state trace data sharing, and may further make any necessary system modification to facilitate such exchange.<sup>72</sup> Rules governing agency procedure or practice are not required to undergo notice and comment rulemaking under the Administrative Procedures Act, provided the agency does not act contrary to the will of Congress.<sup>73</sup> Congress has not indicated legislatively that states should not share trace data across state lines.

## CATEGORY 4: ATF ACCOUNTABILITY AND REFORM

### Enhance ATF Inspection Efficacy

***Option #16: The president may direct ATF to prioritize crime gun suppliers, non-compliant FFLs, and other high-risk FFLs for more frequent compliance inspections, and to formally track and report its progress on an annual basis.***

The president has the authority and obligation to enforce existing law. Congress has tasked ATF with conducting inspection of FFLs to ensure compliance with the Gun Control Act.<sup>74</sup> The president may invoke authority under Article II of the Constitution, which requires he “take care that the laws be faithfully executed,” to hold ATF accountable to its enforcement obligations. Further, Congress granted the Attorney General authority to impose rules and regulations necessary to implement and enforce the Gun Control Act, which includes instructing ATF to develop internal processes, protocols, and reports which ensure the agency is efficiently and effectively carrying out its mandate.<sup>75</sup> The issuance of a rule governing the internal operations of actors within the agency would not constitute legislative rulemaking or be required to adhere to the procedural requirements of the APA.

### Increase ATF Inspection Transparency

***Option #17: The president may direct ATF to issue an annual report providing detailed information about legal violations by gun dealers, distributors, and manufacturers and how ATF has chosen to address such violations, broken down by geographic areas that correspond with ATF field divisions, to provide transparency about***

***gun industry compliance and ATF compliance inspections.***

The president has the authority and obligation to enforce existing law. Congress has tasked ATF with the inspection of FFLs to ensure their compliance with the Gun Control Act.<sup>76</sup> The president may invoke authority under Article II of the Constitution, which requires he “take care that the laws be faithfully executed,” to hold ATF accountable to its enforcement obligations. Further, Congress granted the Attorney General authority to impose rules and regulations necessary to carry out the Gun Control Act, which includes instructing ATF to produce reports detailing patterns in enforcement.<sup>77</sup>

### Lift the Veil on Crime Gun Trace Data

***Option #18: The president may direct ATF to release an annual report containing all of the information contained in the 2000 report. This would both equip policymakers with information necessary to prevent violence in their communities***

Based on a nonbinding directive from the president, ATF can lawfully release an annual report containing statistical aggregate data regarding crime gun traces, as was reflected in the 2000 Commerce in Firearms report. The restrictions Congress placed on the use of trace data — the so-called “Tiahrt Amendments” — explicitly do not prohibit the disclosure or publication of “annual statistical reports on statistical aggregate data regarding firearms traffickers and trafficking channels, or misuse, felons, and trafficking investigations.”<sup>78</sup>

## CATEGORY 5: PRIORITIZE PUBLIC HEALTH AND SAFETY

### **Appoint a National Director of Gun Violence Prevention**

*Option #19: The president may appoint a National Director of Gun Violence Prevention to coordinate federal responses to gun violence.*

### **Create a Task Force on Police Violence**

*Option #20: The president may convene a task force that would seek comprehensive, actionable solutions to police violence.*

Presidents routinely establish task forces within the executive branch to address pressing policy issues. For example, presidents have created task forces by executive order to advance policy on private sector initiatives,<sup>79</sup> concerns related to environmental and safety risks to children,<sup>80</sup> how the country should care for returning veterans,<sup>81</sup> and twenty-first century policing.<sup>82</sup>

Executive orders establishing such task forces detail the task force’s policy mission, requirements for membership and administration, and expected output. Presidents typically invoke general authority under the Constitution and/or the Federal Advisory Committee Act (FACA). Under FACA, Congress has authorized the president to establish advisory committees or similar groups for the purpose of providing recommendations to the “President or one or more agencies of the federal government.”<sup>83</sup> The legislation requires the General Services Administration (GSA) to

facilitate legislative oversight of executive advisory committees and restricts the committees from exceeding an advisory function.

### **Direct the CDC to Reform its Methodology for Collecting Gunshot Injury Data**

*Option #21: The president may direct the CDC to adopt a methodology that provides reliable and accurate data regarding gunshot injuries.*

Congress provides broad authority to the Secretary of Health and Human Services (HHS) to conduct and encourage research related to public health.<sup>84</sup> 42 U.S.C. § 242 instructs the Secretary of HHS, acting through the National Center for Health Statistics, to produce a report to Congress on national disease prevention data in order “to provide a database for the effective implementation of [the law] and to increase public awareness of the prevalence, incidence, and any trends in the preventable causes of death and disability in the United States.” Based on a directive from the President, the Secretary of HHS may issue non-binding guidance directing officials within HHS to collect gunshot injury data from an existing database available to the agency that will provide a more robust sample size. Such nonbinding guidance issued by an agency, directing operations and practices within it, does not constitute legislative rulemaking and is not subject to related procedural requirements under the APA.

## **Promote Safe Storage and Gun Safety to End Family Fire**

*Option #22: The president may direct ATF to establish federal guidance for firearm safety and home storage safety and encourage FFLs to provide all firearms purchasers with educational materials on safe storage options, including offsite storage that may be available in their area.*

The president and ATF have ample authority to issue nonbinding guidance to FFLs and the public about the importance of safely storing firearms. As such a directive by the president would not carry the force of law on its own, it would not invite judicial review, and related action by ATF would not be subject to the procedural requirements of the APA.

## **Promote Safety and Security at Gun Ranges**

*Option #23: The president may instruct the ATF to provide guidance, education, and suggested procedures to gun range owners and their employees to prevent incidents of gun violence onsite, as well as theft or burglary.*

The president and ATF have ample authority to issue nonbinding guidance to gun ranges to reduce incidences of gun violence and theft. Such a directive by the president would not carry the force of law on its own, and accordingly would not invite judicial review — just as similar action by ATF would not be subject to the APA's procedural requirements.

# ENDNOTES

1. See Lisa Manheim & Kathryn A. Watts, Reviewing Presidential Orders, 86 U Chi L Rev 1743 (2019); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2010).
2. Erica Newland, Note, *Executive Orders in Court*, 124 Yale L J 2026, 2046 (2015) (adopting the term “executive order” to include de jure action, as well as other informal actions by the President referred to as “executive orders” by the press and others, in comprehensive study of judicial review of executive orders).
3. NYU L Rev., Online, *Sources of Law (Part One): Executive Orders, Unilateral Executive Action, and Faithful Execution of the Laws*, available at <https://www.nyulawreview.org/online-features/sources-of-law-part-one-executive-orders-unilateral-executive-action-and-faithful-execution-of-the-laws/> (last visited May 24, 2020) (citing Gary J. Schmitt, *Washington’s Proclamation of Neutrality: Executive Energy and the Paradox of Executive Power*, 29 Pol. Sci. Reviewer 131 (2000).
4. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
5. *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).
6. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635.
7. *Id.* at 637.
8. *Id.*
9. *Id.* at 637-38.
10. Monheim & Watts, at 1750-62.
11. *Id.*
12. *Id.* at 1755 (citing 5 U.S.C. § 553).
13. *Id.* at 1755 (citing 5 U.S.C. § 706(2)(A)).
14. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); Cong. Research Serv., *Chevron Deference: A Primer*, R44954 at 1-3 (2017) (discussing that a court’s interpretation of the reasonableness of an agency’s interpretation is rooted in principles of statutory construction).
15. *United States v. Shipley*, 546 Fed. Appx. 450, 456 (5th Cir. 2013).
16. *United States v. Focia*, 869 F.3d 1269, 1281 (11th Cir. 2017) (discussing congressional intent after the enactment of the Firearms Owners Protection Act, Pub. L. No. 99-308, 100 Stat. 450 (1986)).
17. See 18 U.S.C. § 923(i).
18. U.S. Dep’t of Just., Bureau of Alcohol, Tobacco, Firearms & Explosives, “*Are 80% or Unfinished Receivers Illegal?*,” available at <https://www.atf.gov/firearms/qa/are-unfinished-receivers-illegal> (last visited May 29, 2020).
19. *Id.*
20. See 18 U.S.C. § 921(a)(33)(A)(ii).
21. See 27 C.F.R. § 478.11, *misdemeanor crime of domestic violence*.
22. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (reviewing the legislative history of § 922(g)(9)).
23. Memorandum from FBI to CJIS Systems Officers and State Points of Contact (Feb. 15, 2017) (on file with author).
24. Rules that do not operate with the force of law, such as interpretive rules and policy statements, are considered non-legislative and not required to be promulgated in accordance with § 553 of the APA. See Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, Cong. Research. Serv. R41546 at 1 (2017) (citing Nat’l Mining Ass’n. V. McCarthy, 758 F.3d 243, 250 (D.C. Cir. 2014)).
25. *Id.* at 6 (citing *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984)).
26. See 18 U.S.C. § 923(c).
27. See 18 U.S.C. § 921(a)(21)(C).
28. U.S. Dep’t of Just. (emphasis in original text).
29. Garvey
30. *Compare*, H.R. 5092, 109th Cong. 2006; and H.R. 3450, 109th Cong.
31. See 18 U.S.C. § 923(c).
32. See Garvey, at 6 (citing 5 U.S.C. § 553(b)(A)).
33. *Id.* (discussing nonlegislative exceptions to APA § 553 rulemaking procedures).

34. See 27 C.F.R. subpart F §§ 478.91-478.103.
35. See 18 U.S.C. §§ 922(g) or (n), and 2; Bureau of Alcohol, Tobacco, Firearms & Explosives, *May a Licensee Employ an Individual Who Is Prohibited From Receiving or Possessing Firearms and Ammunition?*, available at <https://www.atf.gov/firearms/qa/may-licensee-employ-individual-who-prohibited-receiving-or-possessing-firearms-and> (last visited May 29, 2020).
36. The National Instant Criminal Background Check Systems (NICS), the database that processes background checks for firearms transfers, cannot lawfully be used for purposes unrelated to the transfer of a firearm. If it is not permissible under existing regulation, § 28 C.F.R. 28.11, to use NICS for this purpose, FFLs should conduct a criminal history background check.
37. See Garvey (citing 5 U.S.C. § 553(b)(A)),
38. See *Id.* (discussing nonlegislative exceptions to APA § 553 rulemaking procedures).
39. *Id.*
40. 18 U.S.C. § 2(a).
41. 18 U.S.C. § 922(a)(1)(A).
42. 18 U.S.C. § 922(a)(6).
43. 18 U.S.C. §§ 922(d),(g).
44. 18 U.S.C. § 922(m).
45. See Garvey (discussing nonlegislative exceptions to APA § 553 rulemaking procedures).
46. 40 U.S.C. § 101. Today FPASA is codified in scattered provisions of Title 40 and Title 41 of the U.S. Code. Provisions codified under Title 40—including the provision authorizing the President to prescribe procurement policies and directives—apply government-wide. See Vanessa K. Burroughs and Kate M. Manuel, *Presidential Authority to Impose Requirements on Federal Contractors*, Cong. Research Serv. R41866 at 1 (2011)
47. See Memo. Opinion for the Attorney General, Authority to Issue Executive Order on Government Procurement at 92 (1995).
48. See *Am. Fed. of Labor & Congress of Indus. Orgs. v. Kahn*, 618 F.2d 784, 787-89 (D.C. Cir. 1979) (en banc).
49. *Id.*
50. *Id.* at 789.
51. *Id.* at 792
52. *Id.* at 793, n.49
53. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1336-37 (D.C. Cir. 1996)
54. Cf. Daniel P. Gitterman, *The American Presidency and the Power of the Purchaser*, Pres. Studies Q. 43, no. 2, at 242 (June 2013) (“This action was significant because the government purchased (and purchases) a lot of guns—for the armed forces, FBI agents, DEA agents, IRS agents, postal inspectors, immigration agents, and park rangers (Clinton 1997).”).
55. Memo. on Child Safety Lock Devices for Handguns (1997).
56. See Govt’ Accountability Office, *Firearm Safety Locks: Federal Agency Implementation of the Presidential Directive*, GGD-98-201 at 3 (1998).
57. Exec. Order No. 13,627 (2012).
58. *Id.* at § 2(a)(1)(C).
59. Memo. for the Heads of Exec. Departments and Agencies (2010).
60. Exec. Order No. 13,673 (2014).
61. *Garvey*
62. *Garvey*
63. Consolidated and Further Appropriations Act P. L. 112-55, 125 Stat. 609 (2012).
64. *Id.*
65. *Id.*
66. City of Chicago, Office of the Mayor & Chicago Police Department, *Gun Trace Report* (2017).
67. Alex Yablon, *ATF to Chicago: Your Release of Detailed Crime Gun Data Was Prohibited Under Federal Law*, *The Trace* (Nov. 2, 2017) available at <https://www.thetrace.org/2017/11/atf-chicago-release-detailed-crime-gun-data-prohibited-federal-law/>
68. 18 U.S.C. § 923(g)(4).
69. *Nat’l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 211-212 (D.C. Cir. 2013).
70. *Id.* at 205
71. *Id.* at 206

72. Garvey (citing 5 U.S.C. § 553(b)(A)).
73. *Id.* (discussing nonlegislative exceptions to APA § 553 rulemaking procedures).
74. 18 U.S.C. § 923(g)
75. 18 U.S.C. § 926
76. 18 U.S.C. § 923(g)
77. 18 U.S.C. § 926
78. William J. Krouse, Gun Control: Statutory Disclosure Limitations on ATF Firearms Trace Data and Multiple Handgun Sales Reports, Cong. Research. Serv RS22458 (2009) (citing Consolidated Appropriations Act of 2008 P. L. 110-161, 125 Stat. 609).
79. E.O. 12,329 (1981).
80. E.O. 13,045 (1997).
81. E.O. 13,426 (2007).
82. E.O. 13,684 (2014).
83. *Id.* Section 4 excludes certain agencies from the requirements of the act, including the Central Intelligence Agency and the Federal Reserve.
84. 42 U.S.C. § 241



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