

SENATE COMMITTEE ON APPROPRIATIONS,  
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SCIENCE AND RELATED AGENCIES  
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President's Announced Executive Actions on Gun Violence

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We are here today because on January 5<sup>th</sup> President Obama announced plans to impose increased gun control measures on the country without obtaining the legislative approval of Congress. Certainly public safety is a central duty of government and a concern of us all. We are rightly dismayed by the rash of shootings, most notably in the President's hometown of Chicago, and recent terrorist murders in San Bernardino, California. And the President has the authority, indeed the duty, to see that existing laws are well enforced. However, members of Congress have not ignored the problem. They are sensitive to the need to balance the fundamental constitutional right of Americans to firearms for self-defence with government measures to keep persons likely to misuse weapons from obtaining them. With the exception of bills now under discussion in Congress proposing more facilities for the dangerous mentally ill, the majority of members have concluded that there is sufficient gun legislation in place, it simply needs better enforcement.<sup>i</sup> Thwarted in his effort to get his preferred ideas through Congress, President Obama is acting on his own initiative to address gun violence.<sup>ii</sup> Beyond the efficacy of his proposed measures--and there is good reason to doubt that they would prevent gun crime-- is the fundamental question whether Obama's plan to

impose these measures without congressional approval is constitutional. I would like to address two of his proposed measures that fail the test of constitutionality.

The President has many opportunities through executive orders and actions to direct federal agencies in the execution of the law. But what the Constitution clearly forbids him from doing is changing the law. That is what he means to do in his plan to expand the definition of “firearms dealer.” Current law requires individuals who are in the business of selling guns to get a federal license and perform background checks on buyers.<sup>iii</sup> Obama would now expand this to require everyone who sells even a few guns and who federal law expressly excludes, to get a federal gun dealer license and perform background checks on buyers. The administration was unclear how many gun sales would require the seller to obtain a license but the penalty for failure to do so would be up to 5 years in prison and a fine of up to \$250,000 in addition to further penalties for the failure to carry out a required background check. The ATF has warned that under the 1968 Gun Control Act, a law that required licensing for so-called “kitchen table” gun sales, courts upheld convictions for failing to have a license when as few as two firearms were sold in a year. In short Obama is planning to alter the present law in opposition to the explicit will of Congress.

Is this permissible? In the famous case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where the Supreme Court found President Truman’s seizure of steel mills unconstitutional, Justice Jackson carefully explained the scope of a president’s powers to take unilateral action, setting out three scenarios to guide us.<sup>iv</sup> First, he points out, “When the President acts pursuant to an express or implied

authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate in these circumstances.”<sup>v</sup> The second type of action Jackson describes occurs “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.”<sup>vi</sup> But Justice Jackson insists, “when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only 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>vii</sup> The justice warns, “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” The present instance is in this category. Congress has expressly exempted individuals who only occasionally sell a gun from the requirement to be licensed. Only Congress can change that requirement. The President’s action to alter the law unilaterally is plainly unconstitutional.

Another of Obama’s proposals would prohibit anyone whose name appears on the government No Fly List from being able to purchase a gun. While this sounds like a sensible idea since the No Fly List is meant to target potential terrorists, it is compiled in secret and includes people who have no specific evidence against them and whose names are on the list merely because they sound like or are spelled like

someone else's. The late Senator Edward Kennedy was surprised to find his name on the No Fly List. By 2014 the Obama administration had greatly increased the number of people on the No Fly List although since the list is classified it is uncertain how many names are on it. Estimates vary from 21,000 to 47,000.<sup>viii</sup> For the past five years the American Civil Liberties Union has challenged the law's operation. Last year the organization complained that in twelve months the government's secret list of suspected terrorists banned from flying to or within the United States had more than doubled. They estimated that 35 percent of the nominations to the terrorist watch lists were outdated, while the government watch list network included tens of thousands of names placed on the lists without adequate factual basis. Worse, the government had no meaningful way to correct the errors and permit people to clear their names. In fact the ACLU has been suing to change the list's redress process.<sup>ix</sup> Their challenge is on behalf of fifteen American citizens and lawful residents who found themselves on the list and unable to fly. These include two Marine Corps veterans, one of whom is disabled, a US Army veteran, and a U.S. Air Force veteran. None were told why they were on the list or given a chance to clear their names. These people were stripped of their right to travel without proper due process. Now President Obama wants to add the names of all those on the No Fly List to the National Instant Criminal Background Check System (NICS) also depriving them of their fundamental right to be armed. The title of an article written by the ACLU director of its National Security Project protests, "Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms." That certainly

holds true for their freedom to exercise their Second Amendment right to be armed for self-defence and other lawful purposes.

There is much the President can do to enforce those laws already on the books to defend citizens against gun violence. The NICS depends on states reporting the names of felons and individuals whose mental illness has made them dangerous to themselves and others from buying guns. These records are woefully incomplete. Despite Congress passing the NICS Improvement Amendments Act in 2007 the NICS lacks up-to-date and accurate reports from many states. Without timely reporting the background checks cannot be effective.

If the President has a case to make for his ideas on preventing gun violence he needs to work with the Congress to pass the necessary legislation. Taking unilateral action that is patently unconstitutional is, in the long run, just as dangerous to the welfare of Americans as gun violence itself.

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<sup>i</sup> Representative Tim Murphy, Helping Families in Mental Health Crisis Act (H.R. 2646) has bipartisan support with 178 cosponsors.

<sup>ii</sup> Although the President refers to “the epidemic of gun crime,” in fact gun crime and gun murders have been declining for more than twenty years. See for example Robert Farley, “Gun Rhetoric vs. Gun Facts,” December 21, 2012, <http://www.factcheck.org>; “Firearms and Crime Statistics,” Bureau of Justice Statistics, Jan. 22, 2015.

<sup>iii</sup> [A] person who 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. 18 U.S.C. ss 921(a)(21)(c)

<sup>iv</sup> Justice Jackson, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), p. 343 p. 343 U.S. 635.

<sup>v</sup> *Ibid.*, p. 343 U. S. 636.

<sup>vi</sup> *Ibid.*, footnote 4/3.

<sup>vii</sup> *Ibid.*, p. 343 U.S. 638. Footnote 4/4.

<sup>viii</sup> Jeremy Scahill, Ryan Devereaux, “Barak Obama’s Secret Terrorist-Tracking System, by the Numbers,” *The Intercept*, August 5, 2014, <https://theintercept.com>. The ACLU reported that only 21,000 people were on the NO Fly List including some 500 Americans. “No Fly List Grows, Along with Injustice for Those Wrongly Stuck on It,” American Civil Liberties Union, <https://www.aclu.org>.

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<sup>ix</sup> Hina Shamsi, “Until the No Fly List Is Fixed, It Shouldn’t Be Used to Restrict People’s Freedoms,” December 7, 2015, <https://www.aclu.org>.