



January 20, 2016

Hearing to Review the Department of Justice's Role in Implementing New Executive Actions Related to Gun Control

Subcommittee on Commerce, Justice, Science, and Related Agencies,
Committee on Appropriations, United States Senate, One Hundred
Fourteenth Congress, Second Session

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**Chairman Richard Shelby Opening Statement
Committee on Appropriations Subcommittee on Commerce, Justice, Science, and
Related Agencies**

**Hearing to review to Review the Department of Justice's Role in Implementing
President Obama's Executive Actions Related to Gun Control**

January 20, 2016

(As prepared for delivery)

Madam Attorney General, thank you for joining us today to discuss the President's recent executive actions.

As Chairman of this Subcommittee, I believe that it is my duty to the American people to properly oversee the Department of Justice and ensure that any funding provided by this Subcommittee is used as Congress intended – and within the bounds of the Constitution.

It is clear to me that the American people are fearful that President Obama is eager to strip them of their Second Amendment rights.

Let me be clear: The Second Amendment is not a suggestion. It is an individual right protected in the Bill of Rights that has been recognized by the Supreme Court.

With that in mind, I am very concerned with the recent executive actions by this President for two main reasons.

First, President Obama is far too willing to end run Congress through executive action.

The President has said that he believes that when Congress doesn't act the way he wants us to, then he must act alone. Our Constitution won't allow for this kind of unilateral action, and the American people will not stand for it.

Whether through executive amnesty to thousands of illegal immigrants or increased gun control measures, the President has unwisely acted alone.

However, what the President fails to remember is that we have a system of checks and balances – a system that was created to ensure that power was not concentrated in a single branch of the federal government.

The President has ignored the Founders' system and has accelerated the use of executive fiat to an alarming new level.

Secondly, none of the executive actions that President Obama has proposed would have prevented the recent tragic events in our nation.

Whether it is a terrorist attack or a single gun crime, I firmly believe that those responsible should be held accountable and that we must work to prevent it from happening again.

However, as we have seen time and again, this President uses tragic events to push his political agenda.

I believe that he is more interested in grandstanding and engaging in anti-gun theatrics than actually doing the work necessary to protect this country.

In the wake of the terrorist attacks in San Bernardino, President Obama did not address our law enforcement's failures, which allowed those terrorists to live among us.

He also did not look at making changes to our immigration system after it clearly failed us by allowing an individual who should have been known to be a violent extremist to enter our country.

Instead, the President's immediate response was to propose additional gun control measures.

Criminals and terrorists are not buying their guns from gun shows, gun stores, or collectors because criminals – by definition – do not follow the law.

Madam Attorney General, we live in a dangerous world and the American people are looking to us to do everything in our power to keep them safe.

The next time a terrorist attack occurs in this nation, innocent law-abiding Americans must have the ability to protect themselves and their loved ones from harm if they so choose.

It is our responsibility to preserve their rights, not limit them.

We all know that this President has made no secret of his desire to restrict the Second Amendment rights of law-abiding American citizens.

The American people deserve and expect more from their President. They also expect more from their members of Congress, and I intend to live up to their expectations.

Madam Attorney General, the Department is on notice. This Subcommittee will have no part in undermining the Constitution and the rights it protects.”

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Department of Justice

STATEMENT OF

**LORETTA E. LYNCH
ATTORNEY GENERAL**

BEFORE THE

**SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND
RELATED AGENCIES
COMMITTEE ON APPROPRIATIONS
UNITED STATES SENATE**

FOR A HEARING REGARDING

**OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S ROLE IN
IMPLEMENTING NEW EXECUTIVE ACTIONS
RELATED TO GUN CONTROL**

PRESENTED

JANUARY 20, 2016

**Statement of Attorney General Loretta E. Lynch
Before the Subcommittee on
Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
United States Senate
January 20, 2016**

Good morning, Chairman Shelby, Vice Chairwoman Mikulski, and distinguished members of the Subcommittee. I appreciate this opportunity to appear before you today to discuss steps the Department of Justice is taking to reduce gun violence and ensure smart and effective enforcement of our nation's gun laws.

As this Subcommittee well knows, our nation faces an epidemic of gun violence that has taken a devastating toll on communities throughout the country. Each and every year, tens of thousands of Americans are injured or killed by firearms – in armed robberies, domestic disputes, suicides, accidents, shootouts, and heinous acts of mass violence. From law enforcement officers shot down while defending their communities, to children killed in tragic accidents, our friends and family members, neighbors and fellow citizens are being taken from us – day after day after day.

As the list of tragedies involving firearms has grown, so has the American people's belief that we must do more to stem the tide of gun violence – and this Administration is committed to doing our part. The executive actions that the President announced two weeks ago, including the measures I recommended to him, are essential components of our effort. They are important steps that are within the Executive's power to clarify existing legal provisions, focus enforcement efforts, and spur innovation.

I have complete confidence that the common sense steps announced by the President are lawful. They are consistent with the Constitution as interpreted by the Supreme Court and the laws passed by Congress. For example, the Gun Control Act lists the people who are not allowed to have firearms – such as felons, domestic abusers, and others. Congress has also required that background checks be conducted as part of sales made by federally licensed firearms dealers to make sure guns stay out of the wrong hands. The actions announced by the President, which focus on background checks and keeping guns out of the wrong hands, are fully consistent with the laws passed by Congress.

Taken together, the new executive actions will bring progress on a number of fronts. By clarifying what it means to be “engaged in the business” of dealing firearms, we raise awareness of and enhance compliance with laws that are already on the books. By issuing new regulations, we ensure that licensed dealers who ship weapons will report them if they are lost or stolen in transit, and that those trying to acquire some of the most dangerous weapons through trusts or corporations undergo background checks. By enhancing our national system of background checks, we will be better prepared to keep guns out of the wrong hands in the first place. By increasing access to mental health care treatment with a proposed \$500 million investment to the Department of Health and Human Services (HHS), we will not only be helping those in need, but also curbing gun deaths – the majority of which result from suicide. And by supporting research

on gun safety technology, we will be laying the groundwork for a safer future and drawing on our strength as the most technologically advanced nation on Earth.

These actions will involve important investments in the Federal Bureau of Investigation (FBI) and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) over the course of Fiscal Years 2016 and 2017 – some of which have already been appropriated, and some of which will be requested in the coming year. This year, the FBI will be dedicating \$6.6 million to begin filling 230 new positions to support the National Instant Criminal Background Check System (NICS), which we are currently working to transition to a round-the-clock service. ATF will be investing \$4 million to enhance the capabilities of its National Integrated Ballistic Information Network (NIBIN), including support for the National NIBIN Correlation and Training Center in Huntsville, Alabama, which is set to open in February 2016.

In FY 2017, the President's Budget will request \$80.3 million to sustain and expand upon these critical investments. When the Budget submission is delivered to Congress on February 9th, the FBI's request will include \$35.0 million to sustain the FY 2016 NICS expansion, enabling the Bureau to increase the number of personnel processing firearms background checks and enhance the recruitment and retention of the personnel in these critical jobs. ATF's request will include \$35.6 million for an additional 200 Special Agents and Industry Operations Investigators – vital personnel who will enforce existing federal firearms laws, take violent criminals off the street, prevent firearms from getting into the wrong hands, and enhance ATF's ability to perform its regulatory duties. ATF will seek to invest an additional \$4.0 million in NIBIN above the FY 2016 funding level to support additional staff hiring, and \$5.7 million to help process federal firearms license applications and National Firearms Act applications, as well as to support gun crime tracing – a critical service provided to federal, state, and local law enforcement across the country.

The steps that I have outlined – and the actions that President Obama has described – are all well-reasoned measures, well within existing legal authorities, built on work that's already underway. They clarify laws that are already on the books – because clear notice will help ensure that those laws are followed. They direct important resources to our law enforcement agents – because these men and women deserve to have the support they need to do their difficult jobs effectively. They lay the groundwork for state governments to more easily provide information to our background check system and for helping people with mental illnesses gain access to care – because in addition to helping people get the treatment they need, we must make sure we keep guns out of the hands of those who are prohibited by law from having them. And they invest in research and promising technology that will make weapons safer – because problem-solving through innovation has always been one of our country's greatest strengths.

I am confident that these actions will help to make our people safer, our communities more secure, and our law enforcement more effective. But I also have no illusions that these measures by themselves will end gun violence in America. At a time when there is so much work to be done and so much capacity for progress, there are many areas where only Congress can act. We would welcome the opportunity to work with you to further these goals. That's why I am so grateful to have this opportunity to speak with you today about how we can work together to reduce gun violence in this country. And I look forward to continuing this conversation in the days ahead as we discuss how to keep our promise to protect and defend every American's right to safety and security, and to life and liberty.

At this time, I'd be glad to answer any questions you may have.

Alabama Attorney General Luther Strange
Testimony before
U.S. Senate Appropriations Subcommittee on Commerce, Justice,
Science and Related Agencies
January 20, 2016

Chairman Shelby, Vice Chairman Mikulski, and members of the Senate CJS subcommittee, I am honored by your invitation to speak today about an issue of importance to all Americans – reducing gun violence while ensuring that the fundamental right of law-abiding citizens to bear arms is not infringed.

I wish to commend your subcommittee for convening this panel to explore how best to balance these goals. They are not mutually exclusive.

My duty as attorney general is to enforce the law. I don't have the ability to pick and choose which laws to uphold because of political pressure or personal preference. As the chief law enforcement official of the State of Alabama for the last five years, I have witnessed firsthand the challenge of safeguarding the gun rights of law abiding citizens while also working to deny law breakers the ability to use firearms to commit crimes.

And in those five years I have learned an important lesson. Further limiting the ability of responsible citizens to buy a gun will not keep criminals from getting one.

In fact, after I learned I would be testifying before this committee, I reached out to local police chiefs soliciting their advice on what is working and what is not in stopping gun violence on the street. I wanted to be able to carry their message, based on decades of

experience on the front lines of this fight, to this committee. Again and again, I heard the same thing.

- Enforce the laws already on the books
- Prosecute criminals for gun-related crimes
- Stop releasing violent criminals from jail before their sentences are completed

They directed their concerns squarely at a federal government which they see as failing to uphold its commitment to hold criminals accountable for gun crimes. And they have their doubts about the promises they hear coming out of Washington.

As one police chief put it, “If anyone of any political stripe was sincerely concerned about gun violence they would take a no-holds-barred approach to enforcing the seemingly endless laws relating to guns that are already on the books!”

I don’t think there is anyone in America whose heart doesn’t break over the news of mass shootings that take innocent lives. There is no one in this country who opposes making our streets safer. We all want to do everything we can to prevent more gun crimes. But we must also be sure that political actions taken in the name of solving the problem are grounded in facts. They must be vetted by representatives of the American people, and they must not undermine our constitutional rights.

Three weeks ago President Obama announced a series of executive actions he asserted would reduce gun violence. But while he may have the best of intentions, the law enforcement officers in my state tell me these actions will have not have a meaningful impact.

The centerpiece of the president’s order – expanding background checks to close what some call the gun show loophole – is not only an unwarranted assault on the Second Amendment, but it will also be

ineffective in making a significant contribution toward reducing overall gun crimes.

It will be ineffective because less than one percent of illegal gun purchases are determined to come from gun shows and fewer still are involved in violent crimes. If our goal is to reduce crime and make our streets safer, the President's actions will not accomplish it.

The only practical impact of the president's gun show provision will be to intimidate and frighten law abiding citizens so that they will refrain from selling their guns at all for fear they will be prosecuted for failure to register as a firearms dealer.

Instead of new rules and regulations, a better approach would be to enforce the laws we have by increasing the efficiency of and funding for the existing National Instant Check System. The NICS system is critical to ensuring that guns don't end up in the wrong hands. And yet we can do better. With more funding and support, states can ensure that every felony conviction is reported to the system. Because if the information isn't in the system, the system can't work. And just as importantly, when the system does work and we find felons attempting to buy guns, we must prosecute them.

Using the same laws which are on the books today, the Bush administration launched the Project Safe Neighborhoods initiative, a program piloted in Richmond by now FBI Director James Comey. That program had a zero-tolerance, must prosecute requirement for felons caught in possession of a firearm. Because of this program, the Bush Administration secured 35 percent more federal gun convictions in 2004 and 2005 than the Obama administration did in 2014. With the exception of a slight uptick in 2012, federal gun convictions have fallen every year President Obama has been in office.

There's a lesson there. If we are not enforcing our laws intended to keep criminals from getting guns, then adding new executive orders on top of those laws, even if well-designed, will accomplish nothing.

At the same time, the federal government must do more to provide law enforcement the tools they need to do their jobs. We need a federal-state partnership, whether it is through increased training, access to better equipment, or simply providing funding to prosecute crimes.

I recently heard from Calhoun County Sheriff Larry Amerson, former president of the National Sheriffs' Association and one of the finest law enforcement officers in Alabama. Too many times, he's had to visit officers in the hospital with gunshot wounds or attend funerals of officers killed in the line of duty. He knows the importance of this issue. And his message to this committee is give officers the tools they need to do their jobs. Recent actions here in Washington have prevented Sheriff Amerson from getting the equipment he needs to keep his officers safe. He wrote to me, "Now we have no protection. We cannot even get surplus military helmets."

Finally, we need to do more at the state and federal level to address issues related to mental health. While I may not agree with the approach, I was glad to see that President Obama made a focus on mental health a priority in his executive actions. There is no doubt that mentally ill individuals have been responsible for many violent gun crimes in our country and they represent a particular threat to law enforcement who often are unaware of their condition. I've seen it firsthand.

In 2012, I attended the funeral of a Baldwin County, Alabama Sheriff's deputy who lost his life in the line of duty. He had responded to a call in which a mentally ill man was acting aggressively toward family members. He pulled a gun and fired on two deputies, killing one and wounding the other.

But while mental illness is a serious concern, it is a problem that cannot be addressed through an executive order. There is no quick fix. We must ensure that while instituting any enhanced reporting requirements that we do not deny the constitutional rights of those who might not truly be mentally incompetent. Instead, there should be a procedure in place to protect the rights of the mentally ill while ensuring that they are not a danger to themselves or society.

And we must ensure that in focusing on mental illness, we do not inadvertently discourage people from seeking help for their problems. For instance, a soldier who returns home from war should not lose the right to bear arms that he fought to defend simply because he seeks help for PTSD or other psychological problems. A person on Social Security should not lose their right to bear arms simply because they decide to assign a family member or friend to handle their affairs. These are the subtle nuances that any attempt to address this problem will bring. And to handle them correctly will require a bipartisan effort, led and debated here in Congress.

In summation, Mr. Chairman, I join a majority of Americans in supporting legitimate efforts to curb gun violence in our land. I also follow the recommendations of law enforcement in my state that the most effective way to address gun crimes is to enforce the abundant existing laws we already have, while giving law enforcement the tools they need to do their jobs. As Sheriff Amerson has said, "Many people opposed to more gun laws support enforcing existing laws. Why not try it?"

Americans' right to bear arms should be protected and we can do that and protect Americans from gun crimes by enforcing the law.

Thank you.

STATEMENT OF THE HONORABLE KEN CUCCINELLI
FORMER ATTORNEY GENERAL, COMMONWEALTH OF VIRGINIA
FOUNDING PARTNER AND ATTORNEY, UNITED SELF DEFENSE LAW FIRM

BEFORE THE UNITED STATES SENATE
COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES

January 20, 2016

Opening Statement before the U.S. Senate Committee on Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies regarding the President's recently announced Executive Actions related to gun violence of Kenneth "Ken" Cuccinelli, II, 46th Attorney General of Virginia and current partner in the Second Amendment law firm of United Self Defense Law, PLLC.

Nothing – not one thing – in the President's executive actions *related to guns* that we are discussing today would have any meaningful effect on tragedies like Virginia Tech in my state or San Bernardino, much less more common gun-related street crime. However, the President's focus on improving *mental health care* does have the potential to assist in avoiding future tragedies, particularly given that over 60% of all gun deaths are mental-health related.

There are two basic categories of actions advanced by President Obama in his recent Executive Actions, those relating to guns and law enforcement, and those relating to mental health care.

Everything the President advocates costs money, so let me begin by saying that it would be my strenuous hope that, given the fact that our national government is astonishingly bankrupt, that this Congress would cut more money than it proposes to spend on any of these programs. Presumably you would cut lower priority expenditures if you decide that funding more FBI agents or more mental health care is of greater importance, and I would urge you in the strongest possible terms to do exactly that.

The President's actions directed at stemming gun violence appear to be in some cases merely aspirational, and in other cases intentionally intimidating and harassing of law-abiding citizens in an effort to get them to shy away from selling guns that they legally own.

The procedural proposals to more quickly and smoothly run background checks are unarguable, so long as they are paid for. All of us want the laws on the books to be enforced, and if that can be done more efficiently and effectively than we are doing today, that would be wonderful.

However, when the President (and the Attorney General) seek to intentionally create confusion and ambiguity about when someone selling a single gun might be in violation of a law with 5

year jail penalties, one can only call that dishonorable intimidation of the citizenry by its government.

I would note that this jail threat includes a problem found across the entire universe of federal regulatory law, namely, there is no clear mens rea requirement – no necessity for a finding of culpable intent on the part of the hypothetical offender/citizen. This is another of a long list of examples of Presidents (plural and bi-partisan) expanding federal power using regulatory bodies that have been imbued with criminal law-making authority. Now our President wants federal law enforcement authorities to “crack down” on people selling as few as one gun by forcibly classifying them as “gun dealers.” This is obviously ludicrous, but the President and Attorney General don’t seem to care.

Please remember to put yourself in the position of the individuals involved. From an individual citizen’s perspective, having your own federal government simply investigating you to make sure one gun sale that you conducted privately and innocently (perhaps to then use the money to go buy a different gun, for example) is an excruciating and painfully expensive experience fraught with peril.

And that is exactly how this President wants it. His rhetoric surrounding the release of his proposed actions makes it very clear that while he cannot do much, he can threaten much, and that he intends his bureaucracy to torment many of my fellow citizens who also happen to be gun owners.

As a lawyer who has worked on hundreds of mental commitment cases and been deeply involved in how my own community’s mental health care system interacts with the judicial system, I would urge efforts to improve mental health care at the state and local level to address some of the problems of violence in this country. The federal government’s role in such efforts should be purely supportive, as this is one of many types of challenges best addressed at the local level.

In addition to the dearth of mental health care available throughout most of our country, as it relates to public safety, we have a challenging balance to strike between patient privacy and liberty, public safety, and yes, liability.

It would be my hope that the federal government would do two things, and only two things, in the area of mental health care: first, provide funding to expand mental health care in the states by cutting lower priority programs in the federal government, and second, get out of the way of the states. Eliminate all of your federal rules and requirements and trust the states to find ways to provide better and more cost-efficient care over time.

Other than providing funding for mental health care, the President vaguely mentioned the Department of Health and Human Services removing barriers to states reporting information about people disqualified from purchasing guns due to mental health reasons. I would urge this committee to go much farther than that and urge HHS to cut back and simplify HIPPA more

generally, as the impediments to basic – though protected – information sharing cause significant problems and inefficiencies.

In the case of the Virginia Tech tragedy, the shooter's Virginia public high school had figured out how to manage the shooter's mental health issues, but they were not allowed to talk to Virginia Tech about the subject. Thus, Virginia Tech didn't even know they had a seriously mentally ill student when Cho (the shooter) arrived as a freshman. While we fixed that under Virginia law, such opportunities for improved information sharing exist throughout our legal system.

I will finish by calling your attention to very serious concerns I have about threats to due process rights referenced in the President's rhetoric. And when I say "referenced," I mean his threats... not due process rights.

If the Social Security Administration is going to make conclusions resulting in the loss of Second Amendment rights by citizens, then such citizens must have notice that their Second Amendment rights are at risk and they must have an opportunity to be heard in protection of those rights. Loose talk by this President about sweepingly denying people the right to buy a gun without any adjudicatory process is irresponsible, and actual steps in that direction would be downright tyrannical. I wish I could assume that no one on this committee would ever fund or countenance such action, but how about if I just express my hope that none of you would be so unconstitutionally rash?

I am happy to answer any questions that you may have.

STATEMENT OF MR. MARK BARDEN
FOUNDER AND MANAGING DIRECTOR, SANDY HOOK PROMISE
BEFORE THE UNITED STATES SENATE

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES

January 20, 2016

My name is Mark Barden, a little over three years ago I was a professional musician, husband and father enjoying a simple, happy family life. My wife Jackie grew up in the Bronx and put herself through school to pursue her passion which is teaching. We now live in Newtown CT. with our three beautiful children; James, Natalie and Daniel

Daniel was our youngest and an absolute light of happiness and joy. Daniel's sense of awareness, empathy and tenderness transcended his seven years in a way that prompted many to refer to him as an old soul. In school, Daniel earned the reputation as the sweet, little boy who would ask to sit with someone who was sitting alone or having a bad day. In fact, the parents of some of Daniel's kindergarten classmates requested that their children were placed with Daniel again in first grade. At home Daniel was a bastion of ethics and respect, for instance, at dinnertime he would scold James and Natalie if they tried to pick at their food before Jackie and I were seated, and he also insisted that we offer a prayer of gratitude before we enjoyed our meal.

I apologize if I sound like a braggy parent, but I feel it is important, especially in this context, that you take a moment to consider the humanity and the personal impact of what has been taken from us and what is at stake here.

My family had what we all considered an idyllic existence and an ideal life.

And it all changed on the morning of December 14th 2012. When a gunman wielding an AR-15 semi-automatic assault rifle, equipped with 30 round magazines, shot his way into Sandy Hook Elementary school and shot and killed 6 educators and 20 first grade children. One of those children was my sweet, precious Daniel. In an instant, the little boy who danced around our house, rescued worms from the sun and held doors for strangers - was gone forever.

In the days and weeks following Daniel's murder, like all of us, James and Natalie were left bewildered and heartbroken, with questions that Jackie and I were ill equipped to answer. Questions like "Why would somebody do this" "How could this happen?"

Through the course of research in the hopes of answering these questions, we have learned that over 30,000 people are killed as a result of gun related tragedies in the U.S every year, that's 89 people, including 7 children. Every single day. Gun related fatalities are on track to exceed deaths by car accidents nationally, and already do in some states. This is unacceptable.

I have subsequently made it my life's work to try to identify realistic, sustainable solutions and ultimately save other families from living this never ending pain.

I am now one of 3 managing directors of Sandy Hook Promise, a national nonprofit organization dedicated to bringing the numbers of gun related tragedies down through prevention programs.

The bottom line here is that we as a nation, as Americans and as individual members of our families and communities - have to do better.

Shamefully, congress has done nothing to address this epidemic. Thankfully, President Obama is doing what he can within his authority as our elected leader - and as a father, to take meaningful steps toward protecting our nation's children and making our communities safer.

The package of executive actions the President is offering will help enforce laws already on the books. Adding staff and resources to the existing background check system will facilitate a faster, more efficient transaction for law abiding citizens who wish to purchase firearms. Since many guns used in crimes have been stolen, reporting lost or stolen guns in transit will help minimize the number of firearms that end up in the hands of criminals through this pipeline. Applying better technology to make firearms safer will cut down gun tragedies across the board from stolen guns, accidental discharge by a child and suicide. The President has also proposed increased funding and resources be made available to bolster and improve our mental health care system. Access to quality mental health care is critical to early identification and treatment for individuals who may be on the path to hurt themselves or someone else.

I am before you today as an informed, proud American who knows these modest proposals will go a long way toward not only saving lives, but also improving quality of life. And I am before you today as a grieving father who knows firsthand the cost of inaction. I'm asking you to think of my sweet little Daniel and what was lost here...and the 90 American families who will lose a loved one today, and another 90 tomorrow...and so on every day until we do something.

President Obama is trying to do something, please help him.

SENATE COMMITTEE ON APPROPRIATIONS,
SUBCOMMITTEE ON COMMERCE, JUSTICE,
SCIENCE AND RELATED AGENCIES
HEARING, January 20, 2016
President's Announced Executive Actions on Gun Violence

Joyce Lee Malcolm
Patrick Henry Professor of Constitutional law
and the Second Amendment
George Mason University School of Law

We are here today because on January 5th 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.ⁱ Thwarted in his effort to get his preferred ideas through Congress, President Obama is acting on his own initiative to address gun violence.ⁱⁱ 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.ⁱⁱⁱ 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.^{iv} 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.”^v 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.”^{vi} 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.”^{vii} 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.^{viii} 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.^{ix} 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.

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

ⁱⁱ 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.

ⁱⁱⁱ [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)

^{iv} Justice Jackson, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), p. 343 p. 343 U.S. 635.

^v *Ibid.*, p. 343 U. S. 636.

^{vi} *Ibid.*, footnote 4/3.

^{vii} *Ibid.*, p. 343 U.S. 638. Footnote 4/4.

^{viii} 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>.

^{ix} 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>.