

Statement of Law Professors on the Constitution and Executive Action to Reduce Gun Violence

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In speaking to the nation in the wake of the mass shooting at Umpqua Community College in Roseburg, Oregon, President Obama implored Congress to act but also pledged that his Administration would take whatever actions it could to reduce gun violence in America.¹

We, the undersigned professors with expertise in constitutional law, write to urge the President to follow through on his pledge. There are numerous actions the Administration can take which are fully consistent with the constitutional limitations on the President's power, which preserve the Second Amendment rights of Americans, while reducing gun violence and saving lives.

Twice in the last decade, the Supreme Court has stressed that the Second Amendment right is “not unlimited” and that it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”² And twice in the last decade, the Court has made clear that a wide range of gun regulations are presumptively constitutional and do not infringe the Second Amendment. Indeed, the Court has endorsed the constitutionality of laws restricting access to firearms, regulating the carrying and storage of guns, and imposing conditions on gun sales that can keep guns out of dangerous hands.

The Court's recognition that these types of laws are compatible with the Second Amendment reflects the historical understanding of the constitutional right: since the Colonial and Founding Eras, robust government regulation of the ownership and use of firearms has coexisted alongside, and been understood as consistent with, the Second Amendment.³

That tradition continues today. Alongside numerous firearm laws adopted by state legislatures and municipal governments across the country, Congress has enacted a broad range of gun laws designed to promote public safety. Through a series of federal statutes adopted over the course of the last century, Congress has prohibited dangerous people—including felons, convicted domestic abusers, and the dangerously mentally ill—from purchasing or possessing firearms.⁴ Congress has required that anyone engaged in the business of dealing firearms must obtain a federal license, and has subjected licensed dealers to inspection and basic record-keeping requirements.⁵ And Congress has established a National Instant Criminal Background Check system and mandated that licensed gun dealers conduct criminal background checks to ensure that would-be gun purchasers are not prohibited from purchasing a gun.⁶

Within our constitutional government of divided powers, it falls on the President to ensure that these congressional mandates “be faithfully executed.”⁷ As such, the President must ensure full compliance with the federal gun laws that reflect the clear will of Congress. To do so, it is appropriate for the Administration to issue such rules and regulations as are necessary to ensure that the laws are enforced as written and intended. Executive action to ensure robust enforcement of the

law—including issuing clarifying guidance and directing comprehensive enforcement of federal gun laws—is entirely compatible with the will of Congress and the President’s constitutional authority.⁸

Accordingly, we join the many individuals and organizations that have urged the President to take every action within the power of his Administration to reduce gun violence and save lives. A recent report by the gun-violence-prevention organization Everytown for Gun Safety outlined more than a dozen actions within the President’s power,⁹ and we urge the Administration to act promptly to explore how to implement these and any other measures within its authority.

We do not purport to offer here a comprehensive list of all actions that the Administration might take to reduce gun violence. But we do highlight several important actions within the Administration’s power that would ensure the federal gun laws are applied consistent with congressional intent. Among these steps are:

- Clarifying which gun sellers are “engaged in the business” of dealing firearms, and therefore must obtain federal licenses and conduct background checks on would-be gun purchasers. Just as services like eBay and Craigslist allow Americans to offer a broad range of goods for sale online, numerous Internet services facilitate the sale of large numbers of firearms by unlicensed dealers, frequently without conducting any background checks. The failure of these high-volume sellers to obtain licenses and conduct background checks creates a ready source of firearms for dangerous criminals and other prohibited persons, and fuels the illegal gun trafficking that arms criminals and undermines efforts to reduce gun violence. The Administration should act to close this dangerous loophole.
- Directing the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and Federal Bureau of Investigation (FBI) to identify which prohibited persons are most likely to commit crimes after failing a background check when attempting to buy a gun; to prosecute these individuals for illegally attempting to obtain firearms; and to inform state law enforcement whenever a prohibited person in their state fails a background check. It is common sense that law enforcement has a strong interest in knowing when anyone the law deems too dangerous to buy a gun attempts to do so. The Administration should act to ensure prompt and appropriate follow-up by law enforcement when prohibited persons attempt to buy guns.
- Issuing guidance to ensure that the federal statute prohibiting gun possession by persons convicted of “misdemeanor crimes of domestic violence” is interpreted broadly to prohibit gun possession by convicted abusers, regardless of their marital status. In 2009, and again just last year, the Supreme Court made clear that Congress intended the federal domestic violence misdemeanor statute to be applied broadly to protect victims of abuse from gun violence.¹⁰ To effectuate this Congressional directive, the Administration should clarify that the term “similarly situated to a spouse” in the domestic violence misdemeanor law should be interpreted consistent with the Violence Against Women Act.¹¹

These are just three steps the Administration could take today to help reduce gun violence, and we urge it to explore the numerous other ways in which executive action can save lives, even in the absence of new action by Congress. We urge President Obama to direct his Administration to consider these and other steps that may be useful in reducing the deadly toll of American gun violence.

Signed,

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¹ The White House, Office of the Press Secretary, Statement by the President on the Shootings at Umpqua Community College, Roseburg, Oregon (Oct. 1, 2015); The White House, Office of the Press Secretary, Remarks by the President in Press Conference (Oct. 2, 2015).

² *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also* *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*).

³ *See generally* SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL* (2006); ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011); ROBERT J. SPITZER, *GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS* (2015).

⁴ *See* 18 U.S.C. §§ 922(d), (g).

⁵ *See id.* § 922(a); 27 C.F.R. § 478.1 *et seq.*

⁶ *See* 18 U.S.C. § 922.

⁷ U.S. CONST. art. II, § 3.

⁸ *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring) (noting that the president's authority is at its lowest when "incompatible with the express or implied will of Congress," but at its peak when the President acts consistent with the express or implied will of Congress).

⁹ *Beyond Gridlock: How White House Action on Gun Violence Can Save Lives*, EVERYTOWN FOR GUN SAFETY (2015), <http://everytownresearch.org/reports/beyond-gridlock/>.

¹⁰ *See* *United States v. Hayes*, 482 F.3d 749 (2009); *United States v. Castleman*, 572 U.S. ___ (2014).

¹¹ *See* 18 U.S.C. § 2266 (2006).