

President Obama's Actions on Gun Control Are Probably Lawful, but Are not Likely to Have a Major Impact

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President Obama recently announced a series of executive actions and policy initiatives regarding gun violence. The President's actions have been praised enthusiastically by some and condemned stridently by others. This post summarizes the actions and assesses their legality and likely effectiveness. In short, the actions are almost certainly lawful, but are unlikely to reduce gun violence significantly.

Summary. The White House explains the President's actions [here](#), and PBS highlights the main points [here](#). Some of the main initiatives are:

- ATF has published [this new guidance](#) on who qualifies as a firearms “dealer” and so must conduct background checks when selling a weapon pursuant to 18 U.S.C. 922(t).
- The FBI will hire 230 new people to help conduct background checks 24/7
- The President will seek funding for more ATF agents and better mental health care
- The President has directed the DOJ and others to research gun safety technology, including smart gun technology
- The President also noted the development of several administrative rules, on topics including gun trusts; requiring dealers to notify law enforcement if guns are lost or stolen in transit; and having the Social Security Administration report certain mental health-related information to the background check system.

Legality. Most of the President's actions are legally noncontroversial. For example, the President is the head of the executive branch, and therefore has substantial authority over executive agencies like the FBI and the Department of Justice. Likewise, the President is free to request funding for more ATF agents or for mental health treatment, though Congress ultimately controls the budget and will determine how such requests are received.

Some legal criticism has focused on the ATF guidance. For example, a former judge argues [here](#) that the guidance is unconstitutional because it constitutes an executive intrusion into the lawmaking function of the legislature. But I don't think that criticism is accurate. Congress has defined a “dealer” as “any person engaged in the business of selling firearms at wholesale or retail,” 18 U.S.C. § 921(a)(11), and the federal courts have interpreted that phrase in a number of cases. The President lacks the authority to change the definition created by Congress and interpreted by the courts, but the ATF guidance does not do that. It merely summarizes existing law for the benefit of ATF agents and the public. Several of the nation's most anti-gun-control law professors have reviewed the guidance and have concluded that it is not legally problematic, as noted [here](#), and [here](#). Notably, the judge who wrote the piece linked above incorrectly characterizes the guidance as an “executive order,” when no such order was issued. The guidance merely restates existing precedent.

Other commentary has focused on the forthcoming administrative regulations discussed by the President. For example, Professor David Kopel argues [here](#) that if the Social Security Administration promulgates a regulation that would have the effect of prohibiting gun possession by Social Security beneficiaries who have designated a personal

representative to manage their financial affairs, it would be unconstitutional. But the President's announcements did not detail exactly what he thought the SSA should do, and in any event, any action by the SSA would need to be effected through the administrative rulemaking process. In other words, while some administrative rules discussed by the President might raise legal concerns, it is too early to tell, and those legal concerns might be addressed during rulemaking.

Likely efficacy. The President's actions are generally lawful in part because they are modest. But modest initiatives are not likely to have major effects. Criminals generally do not obtain their guns directly from licensed dealers, so clarifying the dealer rules and improving the FBI's processing of background checks conducted by dealers will be of limited benefit. Conducting smart gun research may bear fruit in the future but is not likely to have large immediate consequences. Seeking additional funding for ATF agents and mental health treatment is dependent on Congressional approval at a time when the President and Congress are deeply at odds. Thus, [an Associated Press analysis](#) concludes that the initiatives would not have prevented any of the recent, high profile mass shootings that were part of the President's motivation in taking these steps. Of course, even small changes may be worth making. [CNN polling data](#) indicates that most Americans, including a majority of Republicans, support the measures, even though most doubt that they will be very effective.