Gun Safety Priorities for the Biden-Harris Administration

November 2020

GIFFORDS
COURAGE TO FIGHT GUN VIOLENCE

Center for American Progress

November 2020

Dear President-elect Biden and members of the transition team,

The Biden-Harris administration will face unprecedented challenges to redress all of the damage done over the last four years. In addition to the new crises created by the Trump administration related to the COVID-19 pandemic that will warrant immediate attention, the next administration will take office during another significant public health crisis: gun violence.

Nearly 40,000 people are killed with guns in this country every year in incidents that involve homicides, suicides, and unintentional shootings, and another estimated 76,000 are grievously injured by gunfire. This means that every day, hundreds of American families and communities are torn apart by gun violence. Gun violence is a uniquely American problem: the gun death rate in this country is 11 times higher than other high-income nations. Because of the nexus between gun violence and domestic violence, women in America are 21 times more likely to be killed with a gun than women in other high-income countries.

The burden of this violence is not equally distributed across communities—Black Americans make up around 13% of the population, yet 58% of gun homicide victims. The summer of 2020 has been particularly devastating, with homicides spiking in many cities around the country as communities struggle with the intersecting challenges of the COVID-19 pandemic, economic hardship, systemic racial injustice, and gun violence.

President-elect Biden and Vice President-elect Harris have long been champions of gun safety, each with a demonstrated commitment to taking decisive action to address all facets of the gun violence epidemic. The Biden-Harris campaign released a strong platform on gun violence prevention that includes both legislative priorities and ideas for executive action. The administration will have a substantial opportunity to take meaningful action to address this public health crisis from day one.

Giffords and the Center for American Progress (CAP) have prepared the following memos to provide meaningful guidance on what actions should be considered as well as policy and legal analysis on how best to accomplish those priorities. These materials provide a roadmap for how best to accomplish more than three dozen ideas for executive action across the White House, Department of Justice, Department of Health and Human Services, and numerous other cabinet agencies. Giffords and CAP have also provided recommendations to help the Biden-Harris administration prioritize gun safety in their first proposed budget, and identify a diverse and qualified set of candidates to serve in the White House and federal agencies across the government.

As co-chairs of this effort, we bring a wealth of experience to this issue. Having worked at the community, city, state, and federal levels, we have developed gun violence prevention policies, signed legislation into law, treated gunshot patients in America's trauma centers, grieved with families of gun violence victims, and run violence intervention programs. Some of us have even survived gun violence ourselves.

We believe gun safety is an urgent priority and have identified the following actions we believe should be considered during the first few months of the Biden-Harris administration. Most of these recommendations require the participation of law enforcement and strong relationships between police and the communities they serve; as such, reforming American policing will be a critical part of ensuring these actions are successful.

- ***Create an interagency task force on gun violence prevention co-chaired by the White House chief of staff, the attorney general, and the secretary of Health and Human Services*** to signal the importance of this issue and implement a comprehensive government approach to addressing it.

- ***Nominate a strong director for the Bureau of Alcohol, Tobacco, Firearms and Explosives*** who will lend stability to the agency and prioritize the prevention of gun violence. The new director should immediately begin work on a comprehensive analysis of gun trafficking in the US and increase access to crime gun trace data to enable local law enforcement, policymakers, and research scholars to develop smart, targeted approaches to reduce gun violence.

- ***Prioritize community violence prevention within the Department of Justice,*** including by creating a Community Violence Intervention Task Force within the Office of Justice Programs to coordinate community-based violence prevention and intervention efforts across federal agencies, improve coordination of violence reduction initiatives with state and local stakeholders, conduct outreach to communities experiencing high rates of gun violence, and serve as a technical assistance resource for best practices. The Department of Justice should also immediately issue new guidance clarifying that funding available under the Project Safe Neighborhoods, Byrne JAG, and Victims of Crime Act grant programs should be used to support community-based violence intervention programs.

- ***Commence a rulemaking process to ban "ghost guns"*** to ensure that these untraceable firearms are not easily available, especially to prohibited purchasers.

The remaining recommendations are organized by agency and offer guidance as to prioritization to help ensure sufficient time to complete them.

Giffords and CAP stand ready to support the administration in all of its efforts to reduce gun violence. Our hope is that these materials serve as a helpful starting point as this critical work begins.

Former Congresswoman Gabrielle Giffords

Former Virginia Governor Terry McAuliffe

Former Secretary of Housing and Urban Development Julian Castro

Obama Administration Senior Advisor Valerie Jarrett

President and CEO of the Center for American Progress Neera Tanden

Former White House Press Secretary Joe Lockhart

Former Congressman Tom Perriello

Senior Partner, California Partnership for Safe Communities Reygan Cunningham

Director, Emergency General Surgery, Johns Hopkins Hospital Dr. Joseph Sakran

Director, Gun Violence Prevention & Justice Reform Program, The Joyce Foundation, Nina Vinik
Acting in individual capacity

RECOMMENDED EXECUTIVE ACTIONS ON GUN SAFETY

The following collection of recommended executive actions and proposed budget request is intended to help the next administration identify the most robust and effective steps the executive branch can take to reduce gun violence, as well as provide recommendations for exactly how to implement these actions quickly and efficientl .

The memos were developed by Giffords and the Center for American Progress with contributions from several of the nation's leading law firms including Bryan Cave Leighton Paisner; Covington & Burling; Hanson Bridgett; Keker, Van Nest & Peters; and Pillsbury Winthrop Shaw Pittman.

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- Pg. 184 Promulgate a regulation requiring federal firearm licensees to video tape all sales
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- Pg. 215 Issue new criteria to enforce the "sporting purposes" requirement under the Gun Control Act and ban the importation of semi-automatic assault rifles and handguns
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- Pg. 276 Promulgate a regulation requiring maintenance of all incomplete background check records until a determination is made whether the gun buyer is prohibited from possessing guns
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Recommendations for the President's FY 2022 Budget Request
November 2020

Overview

The following memo is intended to help inform the development of the next administration's FY 2022 budget request to Congress. It includes recommendations on funding and language on key gun violence prevention programs across all federal agencies, and includes a justification for each request.

Each section includes an overview of each program, recommendations on funding levels or changes, prior funding levels in both the Trump administration and the final year of the Obama administration, and an explanation of why each program deserves the level of recommended funding. We hope these recommendations will guide the new administration as it creates its first budget request and serve as a solid foundation for future growth. For more detailed recommendations related to criminal justice, policing, or racial justice, please see the Leadership Conference on Civil and Human Rights' publication *Vision for Justice 2020 and Beyond: A New Paradigm for Public Safety*.

The memo includes the following sections:

I. Proposed Budget Messaging

The Biden Administration can and should use its first congressional budget request to communicate its intent to immediately and comprehensively address our nation's gun violence epidemic.

Firearm homicides and assaults have risen precipitously in the last several years, and these increases have been particularly concentrated in communities of color. Nearly 40,000 Americans die from gun violence each year. On average, nearly 100 people killed by guns each day, meaning that a gun death occurs every 13 minutes in America. Nearly 14,000 people were killed in a gun homicide in 2018; more than 24,000 died by gun suicide.

The urgency of this crisis is only exacerbated by our nation's battle with the COVID-19 pandemic. The federal background check system initiated the most background checks in its history in March 2020; eight of NICS's 10 busiest weeks have occurred during the 2020 pandemic. The surge in background checks comes as the gun industry continues to innovate, producing more lethal guns and accessories, such as assault pistols or ghost guns, which are intended to skirt existing regulatory structures and laws.

The state of American gun violence has changed since 2016. Since then, researchers, policy makers, and gun safety advocates have developed a deeper understanding about the holistic and robust approach needed to tackle the gun violence epidemic. We know now, for example, that investments in gun violence prevention made now will save money and lives down the road. We understand the critical importance of ensuring that the NICS system has the staff and financial support it needs and of taking the unprecedented step of matching ATF's resources with its critical public safety mission. We must persist in our quest to understand gun violence in all its forms through scientific research, updating antiquated grant programs that are not producing desired results, and embracing newer evidence-based prevention and intervention models. As our nation once again embarks on the undoubtedly long journey of economic recovery we have ahead of us, investing financial resources proactively will be critical to long term success.

We recommend the next administration incorporate these lessons and this sense of urgency into both its messaging and funding requests when developing the president's proposed FY 2022 budget request.

Messaging could include:

> ***Tackling the Gun Violence Epidemic***. Gun violence touches nearly every aspect of American life. Investing in reducing the American gun violence epidemic will not only make people safer, but will save financial resources in the long term. Gun violence costs this country approximately $229 billion every year; on average, a single gun homicide generates approximately $448,000 in medical care and criminal justice expenses. Most of these costs are shouldered by the American taxpayer, who pays over $700 annually for this public safety emergency.
>
> Involving close collaboration among law enforcement, service providers, and community-based organizations, strategies like group-violence intervention, street outreach, and hospital-based violence intervention programs have been proven effective at reducing homicides and saving money. In Connecticut, for example, combined gun violence rates have dropped by more than 50% in three major cities since 2011 with help from a state- and federally- supported violence intervention program; at a total cost of less than $1 million per year, this program has prevented shootings and saved lives, while generating an annual savings of $7 million. On a national scale, similar investments in community-based programs would lead to major reductions in violence and cost. That is why this budget takes deliberate steps to direct federal funding to communities disproportionately impacted by gun violence.
>
> This administration is committed to achieving reductions in violence through a holistic approach to gun violence prevention, which must also include an investment in public health research and in the federal agencies tasked with enforcing federal gun laws. The National Instant Criminal Background Check System (NICS) must be strengthened both with increased record submission and increased staffing; the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) must be given a funding increase to put more agents and investigators on the ground, update its technology, and prevent gun violence before it happens. This budget identifies existing grant programs within various federal agencies that can and should be better used in gun violence reduction. It supports increased data collection and use of evidence-based models and strategies. It reflects the Biden administration's commitment to saving lives."

NOTE: *It is clear that DOJ and its grant programs are prime to be modernized for a post-Trump America. This may require broad structural change to the department, which will take time; this document, however, will provide shorter-term fixes to the DOJ and its programs so that the department can prioritize grant funding to applicants and communities in greatest need.*

II. Department of Justice (DOJ)

1. Bureau of Alcohol, Tobacco, Firearms, and Explosives

- Purpose: To revitalize the ATF's field operations and regulatory capacity.
- Overview: The ATF is the federal agency responsible for enforcing our nation's gun laws, investigating and preventing the illegal trafficking of guns, and ensuring

that federal firearms licensees are conducting business in compliance with federal laws and regulations.

- Previous Funding:
  - FY20 (appropriated): $1.4 billion
  - FY17 (appropriated): $1.23 billion
  - FY17 (Obama administration request): $1.3 billion

- **Funding Recommendation: $3 billion**
  - Note: The ATF should use the data it collects to inform evidence-based strategies and actions to reduce gun violence. Instead of a performance measurement framework rewarding cases opened, arrests made, firearms recovered, convictions made, and sentence length, the ATF should base its performance metrics on actual reductions in gun violence and gun crime.
  - Note: The DOJ's Assets Forfeiture Fund (AFF) collects the forfeited criminal proceeds of crime, and redistributes these liquidated assets to crime victims and for other appropriate law enforcement uses, as defined by statute, on a revolving fiscal year basis. However, these distributions are uneven among agencies. While nearly two-thirds of all seizures over the five-year period ending in FY18 were firearms, ammunition, and explosives—all of which fall under the ATF's purview—the ATF received less than half the funding for Joint Law Enforcement Operations than the Drug Enforcement Administration (DEA) and the FBI. While the ATF is the smallest among these agencies and thus has the smallest budget, allotting the ATF less funding than is necessary for the agency to engage with local partners and achieve its law enforcement mission makes no sense. While many organizations have called for changes to or the elimination of the ATF, should it remain, some of the ATF's recommended budget increase could come from changing the allocation of the AFF to ensure increased funding is directed toward the ATF's mission to prevent violent crime.
  - $20 million to update staffing, technology and physical infrastructure at ATF's National Tracing Center, the nation's only crime gun tracing facility, as well as the expanded use of crime gun trace data.
    - Justification: An FFL is required to transfer its records to the ATF when it goes out of business; yet an appropriations rider (see "Rider removal" below) prevents the agency from putting these records into an electronic database searchable by name or personal identification code. As a result, the ATF is forced to keep warehouses full of old, rotting, paper records at its tracing center in West Virginia until they can be scanned into non-searchable electronic files. Combing through these old records to find a match is tedious work that can take days or even weeks, slowing down the pace of time-sensitive investigations. In FY2019, the National Tracing Center received a record number of trace requests, processing 547 million paper out-of-business records. As the ATF stated in its FY21 budget request, the National Tracing Center now enters "117 million more records than we did 10 years ago, with less personnel."

- $2 million for the creation and public release of a new report providing updated statistical aggregate data regarding trafficking channels and trafficking investigations.
    - Justification: Firearms enter the illegal market through a limited number of channels, such as straw purchasers, corrupt firearms licensees, unlicensed sellers, and firearms theft. Law enforcement needs transparent data about these channels in order to develop the most effective enforcement strategies to reduce firearms trafficking. The last time the ATF provided a report describing the channels of firearms trafficking was in 2000. Since that time, the National Tracing Center has collected over five million traces of crime guns. Despite explicit authorization to release "statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations," since 2008, the ATF has only released statistical aggregate data regarding the geographical location where crime guns were first sold at retail. The ATF should release a new annual report with statistical aggregate data regarding trafficking channels and trafficking investigations.
- $5 million to hire and train new industry operations investigators (IOI).
    - Justification: Despite its large responsibilities, the ATF is small: as of December 2019, the ATF employed only 641 field industry operations investigators, who are responsible for compliance inspections of more than 55,000 federally licensed firearms dealers, other manufacturers, importers, and dealers of guns and explosives. As a result of such a vast staffing shortage, only 7.7% of all independent dealers were inspected in 2018. This issue is a sustained one: in 2013, an OIG report found that over 58% of FFLs had not been inspected within the past five years due, in part, to a lack of ATF resources. With 16,000 guns lost or stolen from federally licensed dealers last year, it is clear that the ATF must increase its oversight of dealers. The number of dealers to inspect is expected to grow, following changes to the regulation that determines who is "engaged in the business" of dealing firearms and thus requires a license.
- $20 million to update technology and staff to process National Firearms Act applications.
    - Justification: Over the past eight years, the number of silencers registered with the ATF has increased sixfold, with 285,087 silencers registered in 2010 (10% of all registered NFA weapons), and 1,750,433 registered in May 2019 (28.89% of all registered NFA weapons). This funding will ensure more efficient processing as demand increases.
- $4 million to enhance the National Integrated Ballistic Information Network (NIBIN) within the ATF.
    - Justification: The NIBIN is the only interstate automated ballistic imaging network across the US, helping federal, state, and local partner agencies identify the links between gun-related crimes and those who committed such crimes.

- Justification: While the ATF has operated with insufficient resources, staffing, and authority for years, the gun industry has expanded ruthlessly. An average of 8.4 million guns were manufactured each year from 2009 to 2018--double the yearly average from 1986 to 2008. In 2016, 11.5 million guns were manufactured--a 31-year high. The number of licensed gun manufacturers increased 255% from 2009 to 2018. While many of these manufacturers are law-abiding, others choose to capitalize on the ATF's limitations and antiquated federal gun laws by purposely producing products that skirt the law. In order to regulate this growing industry appropriately, prevent gun trafficking, and take on the increased workload that will come with statutory changes to give the ATF more authority and flexibility, increased resources will be absolutely essential.

- **Rider removal:** Even with the appropriate resources, the ability of federal law enforcement officers to do their jobs effectively will remain hindered by restrictive budget riders known colloquially as the Tiahrt Amendments. While these riders will need to be removed via legislation, any suggested budget should remove the following:
    - Language prohibiting the ATF from consolidating or centralizing firearm sales records maintained by federally licensed gun dealers
        - Justification: Dealers must keep records of every firearm sale and provide this information to the ATF upon request—for example, to assist police by tracing a gun found at a crime scene—but this rider prohibits the ATF from consolidating that information. This is inefficient and out of date.
    - Language prohibiting the ATF from putting gun sale records from defunct dealers into a searchable database
        - Justification: The ATF receives an average of 1.3 million records from out-of-business dealers each month. If dealers send electronic records in a searchable form, the ATF must actively remove the search function to make the records harder to use. These restrictions make tracing crime guns significantly more difficult and time consuming.
    - Language prohibiting the release of trace data to the public, except for annual statistical reports; language prohibiting trace data from being subject to subpoena for any state license revocation, civil lawsuit, or other administrative proceeding, unless filed by the ATF; and language prohibiting the admission of trace data in evidence
        - Justification: These restrictions on trace data have constrained academic researchers from studying, analyzing, and fully understanding gun trafficking patterns. They have also prevented the ATF from working with researchers to identify such patterns. These restrictions prevent law enforcement from describing the sources of crime guns in court, often blocking states and local governments from enforcing their own laws against gun trafficking. While the ATF can legally release trace data to agencies that request it, administration officials in the past have pushed back on such releases to keep such data secret.
    - Language requiring records of approved background checks to be destroyed after 24 hours, impacting both the ATF and the FBI
        - Justification: This rider makes it virtually impossible for federal law enforcement to identify gun purchasers who were mistakenly

approved. It also prohibits the FBI from auditing its background check processes to see how often it allows gun sales or transfers to ineligible individuals.

- Language prohibiting the ATF from transferring any of its functions, missions, or activities to other agencies
  - Justification: As a smaller agency with a notoriously small budget, the ATF has expressed interest in the past in moving some of its functions elsewhere. Should the administration gain interest in a larger-scale overhaul of the DOJ and its law enforcement agencies, it may make sense to reorganize the current responsibilities and jurisdictions of the FBI, ATF, and Drug Enforcement Administration (DEA); for example, allow the ATF to focus on all violent crime, the FBI to handle explosives and arson to deal with terror and hate crimes, and the DEA to prevent large-scale drug trafficking and money laundering.
- Language prohibiting the ATF from requiring gun dealers to conduct inventories
  - Justification: Gun dealer inventories would help the ATF fulfill its mission of gun dealer oversight and accountability by enabling more effective inspections of the more than 55,000 gun dealers nationwide, which would aid the ATF in identifying corrupt dealers who transfer guns without conducting background checks or keeping records. Instead of struggling to inspect each gun dealer a certain amount of times within a set number of years, investigators could use these inventories to ensure dealers are appropriately reporting lost or stolen firearms. With gun store burglaries rising in 2020, this is more critical than ever.
- Language prohibiting the ATF from denying applications to import new models of shotguns
  - Justification: Starting in 1989, the ATF actively used its authority to deny the importation of non-sporting use shotguns. However, since 2012, this rider has prevented the ATF from doing so, essentially giving the gun industry immunity so it can design and import new models of military-style shotguns without regard for whether they are suitable for sporting purposes. The ATF is thus unable to minimize the risk of highly lethal shotguns entering the United States and potentially ending up in the hands of individuals intending to perpetrate harm.
- Language prohibiting the ATF from denying an application or renewal for a federally licensed gun dealer due to a lack of business activity
  - Justification: This rider causes the ATF—a small, understaffed agency—to spend its already scarce resources attempting to regulate gun dealers who may not even sell firearms with any regularity. With the passage of universal background checks legislation and thus the likely licensure of more dealers, the ATF will need the discretion to make these decisions to ensure the most efficient use of time and resources.
- Language prohibiting the ATF from amending regulations defining "curios or relics"
  - Justification: "Curios or relics" are currently defined as firearms manufactured at least 50 years prior to the current date. Licensed

collectors are exempt from background checks when buying curios and relics, and can buy and sell them in interstate commerce without complying with the usual requirements. Because 50 years ago was 1970, this can include fairly modern, dangerous assault weapons designed for military use.

2. **Federal Bureau of Investigation: National Instant Criminal Background Check System (NICS)**

- Purpose: Strengthening NICS.

- Overview: The NICS Section processes background checks for licensed dealers in states that rely on the FBI to complete their background checks. FFLs contact NICS examiners and provide the information listed on the required Form 4473. The NICS examiner determines if that prospective purchaser is legally able to possess a gun.

- Previous funding:
  - FY20 (appropriated): $147.5 million, including current services funding for the National Threat Operations Center (NTOC)
  - FY17 (appropriated): $70.3 million
  - FY17 (Obama administration request): $121 million

- **Funding recommendation: $180 million, not including NTOC**

- Justification: Additional funding is critical to guarantee that the FBI has the staff capacity to manage this increased volume of background checks. Even before the coronavirus led to a 23.82% increase in background checks, in March 2019, the then-acting FBI assistant director told a House subcommittee that the NICS section was forced to pull FBI staff from other departments to handle surges in background check requests. This model is unsustainable, but can be remedied with increased staffing and training.

  A funding increase to correspond with an increased demand for background checks due to the passage of universal background checks legislation and changes in the way the ATF views and deals with unfinished frames and receivers (the building blocks of "ghost guns"), will help the FBI maintain quick and efficient processing, so that a final disposition can be made before a default proceed sale occurs, and ensure that NICS examiners can process denial appeals within the required 60 days. This increase will also enable the FBI to fully incorporate the National Data Exchange System (N-DEx) into the background check process, something it has planned to do for years.

  As the DOJ stated in its FY21 Authorization and Budget Request to Congress, "As firearm background check volumes continue to increase, the additional staff will ensure that information provided from federal, state, and tribal agencies for the NICS Indices is updated into the system in a timely manner and that technical assistance is available to these partners to identify the required records and transfer them to the FBI. In addition, this enhancement to the NICS staff will allow the legal instrument examiners to search the National Data Exchange (N-DEx)

for more detailed case files and court records, which will improve the accuracy and timeliness of the checks."

3. **Federal Bureau of Investigation: NICS denials for domestic violence protective orders**

   - Purpose: To establish an alert system for failed background checks due to a domestic violence protective order, so that various state and local officials are notified when an ineligible person has tried to buy a gun.

   - Overview: Current law prohibits certain individuals from purchasing or possessing a firearm. If, however,these individuals fail a background check at an FFL, they can easily go through a person-to-person or online sale to obtain firearm without background checks.

   - Previous funding:
     - FY20 (appropriated): $0, but Senate CJS report includes, "The Committee encourages the ATF to, when possible, notify local law enforcement when a felon in their jurisdiction tries to buy a firearm. If the NICS check is not completed within three days and a felon obtains a firearm, the Committee encourages the ATF to notify and utilize the help of local law enforcement in retrieving the firearm."
     - FY17 (appropriated): $0
     - FY17 (Obama administration request): $0

   - **Funding recommendation: $20 million**

   - Justification: While federal law enforcement is notified of background check denials, current law does not ensure that state or local law enforcement is made aware of these situations. A person subject to a domestic violence protective order represents an immediate danger; prompt notification of local law enforcement can help ensure the prohibited purchaser does not attempt to access firearms in other ways, such as through an unregulated private sale or over the internet. Increasing transparency by notifying state and local law enforcement gives them more time to help prevent individuals subject to domestic violence protective orders from getting their hands on a gun to harm or threaten others. This funding will be necessary to establish an alert system for these failed background checks and ensure appropriate follow-up from federal agencies, as directed in the House-passed H.R. 1585, the Violence Against Women Reauthorization Act, supported by the National Task Force to End Sexual and Domestic Violence.

4. **Office of Justice Programs: Technical assistance and research, evaluation, or statistical programs**

   - Purpose: To provide training and technical assistance to award recipients and conduct research on best practices.

   - Overview: Training and technical assistance (TTA) allows grant recipients to connect with experts in order to solve needs that arise in program implementation. This can include sharing best practices, information on model

strategies, planning assistance, and more. Conducting research on best practices to prevent crime and violence, including through alternatives to law enforcement and the increased use of community-based programs, will enable funding to be spent most effectively.

- Previous funding:
    - FY20 (appropriated): Up to 2% of funds made available to the Office of Justice Programs for grant or reimbursement programs may be used by such office to provide training and technical assistance and up to 2% of funds made available for grant or reimbursement programs under such headings, except for amounts appropriated specifically for research, evaluation, or statistical programs administered by the National Institute of Justice and the Bureau of Justice Statistics, shall be transferred to and merged with funds provided to the National Institute of Justice and the Bureau of Justice Statistics, to be used by them for research, evaluation, or statistical purposes, without regard to the authorizations for such grant or reimbursement programs.
    - FY17 (appropriated): Up to 3% of funds made available to the Office of Justice programs for grant or reimbursement programs may be used by such office to provide training and technical assistance; and up to 2% of funds made available for grant or reimbursement programs under such headings, except for amounts appropriated specifically for research, evaluation, or statistical programs administered by the National Institute of Justice and the Bureau of Justice Statistics, shall be transferred to and merged with funds provided to the National Institute of Justice and the Bureau of Justice Statistics, to be used by them for research, evaluation, or statistical purposes, without regard to the authorizations for such grant or reimbursement programs.
    - FY17 (Obama administration request): Up to 3% of funds made available to the Office of Justice Programs for grant or reimbursement programs may be used by such office to provide training and technical assistance; up to 3% of funds made available for grant or reimbursement programs under such headings, except for amounts appropriated specifically for research, evaluation, or statistical programs administered by the National Institute of Justice and the Bureau of Justice Statistics, shall be transferred to and merged with funds provided to the National Institute of Justice and the Bureau of Justice Statistics, to be used by them for research, evaluation, or statistical purposes, without regard to the authorizations for such grant or reimbursement programs.

- **Funding recommendation: Update language to direct up to 5% of funds** available to the Office of Justice Programs for grant or reimbursement programs may be used by such office to provide training and technical assistance; and **up to 4% of funds** available for grant or reimbursement programs under such headings, except for amounts appropriated specifically for research, evaluation, or statistical programs administered by the National Institute of Justice and the Bureau of Justice Statistics, shall be transferred to and merged with funds provided to the National Institute of Justice and the Bureau of Justice Statistics, to be used by them for research, evaluation, or statistical purposes, without regard to the authorizations for such grant or reimbursement programs.

- Note: this will require a change in legislative language from the appropriations committee, but should be included in any budget request.

- Justification: For some smaller grant programs, a 2% cap on technical assistance may not be enough. An effective technical assistance provider can mean the difference between success and failure in the implementation of a project, including gun violence reduction strategies. Technical assistance providers can assist program administrators in undertaking actions like a problem analysis, a critical piece for a city to understand its violence landscape and to ensure grant funds are focused on the appropriate population. Similarly, with violence reduction models, such as group violence intervention and relationship-based street outreach, technical assistance providers can help recipients with best practices in order to obtain best results. A larger amount set aside to allow for comprehensive research and comparisons of models to reduce gun violence will enable communities and award applicants to make better decisions when embarking on a violence reduction project.

5. **Bureau of Justice Statistics: National Criminal History Improvement Program (NCHIP)**

- Purpose: To strengthen NICS.

- Overview: This grant program provides states with resources to improve a wide range of criminal history records systems. All states have received broad and flexible NCHIP funding since the program's creation in 1995.

- Previous funding:
  - FY20 (appropriated): $53.29 million
  - FY17 (appropriated): $48 million
  - FY17 (Obama administration request): $50 million

- **Funding recommendation: $60 million**
  - Note: Give priority to grant funding applications under the program to states and tribal governments seeking to focus on domestic violence records, particularly proposals to increase pre-validating prohibiting records.
  - Note: Solicitation should build on existing language related to data sharing to measure performance to ensure states and tribal governments are transparent and accountable for their progress; it should also encourage applicants to plan to resolve issues in shorter time frames.

- Justification: The National Criminal History Improvement Program (NCHIP) and the NICS Act Record Improvement Program (NARIP) support states and federal agencies in their efforts to submit critical criminal history and mental health records to the National Instant Criminal Background Check System (NICS). While great progress has been made in recent years to upload hundreds of thousands of records to the system, the dangers of an incomplete system are clear, brought to light by the horrific November 2017 shooting in Sutherland Springs, Texas, which killed 26 people and injured 20 others. Investing $100 million, as authorized by the Fix NICS Act, passed in the FY18 omnibus, will ensure states and federal agencies have the funding needed to fully report these

records and prevent dangerous individuals from mistakenly passing a background check; this money should also be used to ensure states and federal agencies are appropriately trained to comply with their NICS reporting obligations.

6. Bureau of Justice Statistics: NICS Act Record Improvement Program (NARIP)

- Purpose: To strengthen NICS.

- Overview: This grant program has provided critical funding to states to improve their abilities to share domestic violence, mental health, and other disqualifying records with NICS. The program was created in the aftermath of the mass shooting at Virginia Tech in 2007, when the shooter should have failed a federal background check due to a previous mental health adjudication, but was able to purchase his firearm from a federally licensed dealer because Virginia had not submitted the record of his disqualification to NICS.

- Previous funding:
  - FY20 (appropriated): $25 million
  - FY17 (appropriated): $25 million
  - FY17 (Obama administration request): $25 million

- **Funding recommendation: $40 million**
  - Note: Currently, approximately 18–20 states remain ineligible for NARIP funding, because they lack an approved "relief from disabilities" program for people prohibited for mental health reasons. This requirement should be waived for states that intend to use their NARIP funding to upload domestic violence records and disqualifying records for certain other crimes.
  - Note: Solicitation should build on existing language related to comprehensive strategic planning to encourage problem resolution in shorter time frames; it should also build on existing language related to data sharing to measure performance to ensure states and tribal governments are transparent and accountable for their progress.

- Justification: The National Criminal History Improvement Program (NCHIP) and the NICS Act Record Improvement Program (NARIP) support states and federal agencies in their efforts to submit critical criminal history and mental health records to the National Instant Criminal Background Check System (NICS). While great progress has been made in recent years to upload hundreds of thousands of records to the system, the dangers of an incomplete system are clear, brought to light by the horrific November 2017 shooting in Sutherland Springs, Texas, which killed 26 people and injured 20 others. Investing $100 million, as authorized by the Fix NICS Act passed in the FY18 omnibus, will ensure states and federal agencies have the funding needed to fully report these records and prevent dangerous individuals from mistakenly passing a background check; this money should also be used to ensure states and federal agencies are appropriately trained to comply with their NICS reporting obligations.

7. **National Institute of Justice: Research, Evaluation, and Statistics**

- Purpose: The mission of NIJ is to advance scientific research, development, and evaluation to enhance the administration of justice and public safety by providing objective, independent, evidence-based knowledge, and tools to meet the challenges of crime and justice, particularly at the state and local levels.

- Overview: NIJ research, development, and evaluation efforts support practitioners and policy makers at all levels of government. The agency focuses its resources on crime control and related justice issues to provide objective, independent, evidence-based knowledge, and tools to meet the challenges of crime and justice, particularly at the state and local levels. NIJ has funded research and evaluation projects to understand and address the issues of gun violence and gun violence prevention since the late 1990s.

- Previous funding:
  - FY20 (appropriated): $36 million
  - FY17 (appropriated): $39.5 million
  - FY17 (Obama administration request): $48 million

- **Funding recommendation: $50 million**
  - Note: This funding should not replace gun violence-related public health research funded by CDC and NIH.
  - Note: NIJ should incorporate recommendations from the Task Force on 21st Century Policing in funding solicitations as appropriate.

- Justification: Gun deaths in the United States have reached their highest level in almost 40 years. Nearly 40,000 Americans died from gun violence in 2018—more than 100 people every day. However, we need more data about where gun violence trends geographically, the types of violence that occur in certain places, and how law enforcement responds to gun violence. Increasing funding to NIJ will provide an opportunity to prioritize research to identify community-based criminal justice approaches to reducing gun violence while reducing racial disparities in both gun violence and incarceration, such as building trust between communities and law enforcement and supporting community-based violence reduction. This funding can also be used to identify effective upstream strategies to reduce firearms trafficking.

8. **Office of Violence Against Women: STOP grants**

- Purpose: To enhance the capacity of local communities to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women and to develop victim services.

- Overview: A state or territory that is applying for a STOP grant must develop a four-year implementation plan and, among other things, submit to the attorney general "goals and objectives for reducing domestic violence-related homicides within the State." (34 USC § 10446.) They must split their grant among law enforcement (25%), prosecutors (25%), victim services (30%, 10% of which must go to culturally specific service providers), and state and local courts (5%).

Ensuring that this grant program is properly funded ensures that states can obtain the resources needed to achieve these goals.

- Previous funding:
  - FY20 (appropriated): $215 million
  - FY17 (appropriated): $215 million
  - FY17 (Obama administration request): $200 million

- **Funding recommendation: $223 million**
  - Note: Grant recipients should consider using their funding to develop, disseminate, and train law enforcement on best practices for firearm removal in domestic violence situations as authorized in STOP purpose areas.
  - Note: consideration should be given to increasing the percentage of STOP grants that fund direct victim services.

- Justification: A lethal connection exists between domestic abuse and firearm violence: the mere presence of a firearm in a domestic violence situation increases the risk a woman will die by five times. The majority of women killed by partners in the US are killed by firearms; of all women killed by intimate partners between 2001 through 2012, 55% were killed with guns.

9. Office of Violence Against Women: grants to Improve the Criminal Justice Response (ICJR)

- Purpose: To protect against domestic and sexual violence.

- Overview: The Improving Criminal Justice Response Program, also known as the Grants to Encourage Arrest and Enforcement of Protection Orders Program, is designed to allow local governments to develop collaborative responses to domestic violence, dating violence, sexual assault, and stalking. (See 34 U.S.C. §§ 10461-10465.)

- Previous Funding:
  - FY20 (appropriated): $53 million, of which $4 million is for a homicide reduction initiative
  - FY17 (appropriated): $53 million, of which $4 million is for a homicide reduction initiative
  - FY17 (Obama administration request): $62.25 million, of which $4 million is for a homicide reduction initiative and $4 million is for a domestic violence firearm lethality reduction initiative

- **Funding recommendation: $73 million,** of which $4 million is for a homicide reduction initiative

- Justification: Domestic violence assaults involving a gun are 12 times more likely to end in death than assaults with other weapons or physical force. Every 16 hours, a woman in the United States is fatally shot by a current or former intimate partner. It is critical that local law enforcement work closely with service providers and courts to ensure that domestic violence survivors, their families, and their communities are safe.

10. **Bureau of Justice Assistance: Byrne JAG**

- Purpose: To provide federal criminal justice funding to states and local governments.

- Overview: The Edward Byrne Memorial Justice Assistance Grant (JAG) Program is the primary provider of federal criminal justice funding to states and local governments. Sixty percent of the overall Byrne JAG grant is awarded to the state criminal justice planning agency (known as the State Administering Agency, or SAA), which, in turn, awards the funding to local governments and nonprofit service providers; the remaining 40% goes directly from the US Department of Justice, Bureau of Justice Assistance to local communities, based on population and crime data. In 2016, large amounts of JAG funds were used for "Drug, Gang, and other Task Force Operations/Personnel" and law enforcement equipment, but JAG funds are intended to be flexible in order to meet communities' specific needs.

- Previous Funding:
  - FY20 (appropriated): $547.21 million
  - FY17 (appropriated): $396 million
  - FY17 (Obama administration request): $383.5 million

- **Funding recommendation: Include report language** in the Commerce, Justice, Science and Related Agencies appropriations bill to encourage State Administering Agencies to use funding for evidence-based violence prevention programs and for communities to perform problem analyses, which allow city leaders and stakeholders to understand which community members are at the highest risk of violence now, what violence reduction strategies would be most effective in the near term, and how dollars can be spent most efficiently to achieve these goals.

- Justification: In localities most impacted by gun violence, a focus on prevention and intervention, rather than on arrests and prosecution, has proven to be effective. JAG funding thus can and should be used--as it has in the past, but not to an adequate extent--for evidence-based violence prevention and intervention programs, such as group violence intervention, focused deterrence, street outreach, and hospital-based violence intervention programs. These evidence-based programs have helped New Haven, Connecticut, achieve a 70% reduction in shootings over eight years; similarly, Richmond, California, saw a 70% reduction in homicides and shootings over 10 years through community-led violence intervention.

A series of grant programs exist within JAG, including Project Safe Neighborhoods and its authorized programs: the Community-Based Violence Prevention program and Innovations in Community-Based Crime Reduction (Numbers 10 through 13 listed below).

11. **Bureau of Justice Assistance: Project Safe Neighborhoods**

- Purpose: To "create and foster safer neighborhoods through a sustained reduction in violent crime."

- Overview: Project Safe Neighborhoods (PSN) works through collaboration among multiple levels of law enforcement. PSN funding is awarded to judicial districts and led by each United States attorney (94).

- Previous funding:
  - FY20 (appropriated): $20 million
  - FY17 (appropriated): $6.5 million
  - FY17 (Obama administration request): $5 million

- **Funding recommendation: PSN should be reinvented** as the Community-Based Violence Intervention Program, housed within the Bureau of Justice Assistance (and referenced below), as referenced in the *Break the Cycle of Violence Act* (Booker/Horsford). These grants should be awarded to local governments and community-based organizations in areas disproportionately impacted by gun violence, to be used to support, enhance, and replicate coordinated, evidence-based violence reduction initiatives. These initiatives include models like group violence intervention, relationship-based street outreach programs, and hospital-based violence intervention programs. This program should be funded at $90 million.

- Justification: While funding "competitive and evidence-based programs to reduce gun crime and gang violence" is an identified purpose area for PSN, its current authorizing language, which expires in 2021, directs grants to be used to prioritize prosecutions. As a result, PSN grants have been used in some jurisdictions to successfully decrease gun violence through evidence-based strategies that target those most at risk of violence; in other jurisdictions, the program has raised concerns about mass incarceration and over-policing. During the Trump administration, much of this funding is believed to have been allocated for immigration-related purposes.

12. Bureau of Justice Assistance: Community-Based Violence Prevention Program (CBVP)

- Purpose: To provide funding to localities so they can support federal, state, and local partnerships that replicate proven multi-disciplinary, community-based strategies that reduce violence in the near term.

- Overview: The CBVP program emphasizes effective collaborations between law enforcement, service providers, and community-based organizations. Additional funding will allow the program to expand its scope and impact in more cities nationwide.

- Previous funding:
  - FY20 (appropriated): $8 million
  - FY17 (appropriated): $8 million
  - FY17 (Obama administration request): $18 million ("community-based strategies that focus on street-level outreach, conflict mediation, and the changing of community norms to reduce violence, particularly shootings")

- **Funding recommendation: $40 million**

- Note: The BJA should prioritize applicants that seek to reduce gun violence through the use of evidence-based strategies, such as group violence intervention, relationship-based street outreach, and hospital-based violence intervention programs. The BJA should also prioritize communities with 15 or more homicides per year for at least two out of the three years preceding the grant application, and a homicide rate no less than double the national average; or that demonstrates a unique and compelling need for additional resources to address gun- and group-related violence within the community. Additionally, priority should be given to prior award recipients who can demonstrate a reduction in violence and commit to use future funding to continue the project.
- Note: The BJA should provide technical assistance and funding for evaluation and analysis as necessary. Applicants should be encouraged to include plans for technical assistance partnerships in their solicitation response, and, after awards are distributed, should be encouraged to use funding for such technical assistance as necessary.
- Note: Awards should be no less than $600,000 per year.
- Note: Law enforcement agencies participating in CBVP should align their strategies with the recommendations provided by the Task Force on 21st Century Policing.

- Justification: CBVP's focus on community-based organizations and partners make it well suited to help communities implement evidence-based intervention and prevention strategies that have been shown, through research and evaluation, to be effective in reducing violence. In most cities, violence is perpetrated by less than one percent of the population. Strategies such as group violence intervention, street outreach, and hospital-based violence intervention programs focus on this small subset of the population, and are proven to reduce violence. These evidence-based strategies have helped New Haven, Connecticut, achieve a 70% reduction in shootings over eight years; similarly, Richmond, California, saw a 70% reduction in homicides and shootings over 10 years through community-led violence intervention. A greater investment in CBVP, which has so far funded 16 cities, will give the program a bigger impact, and give more cities across the country access to critical, sustained funding.

13. Bureau of Justice Assistance: Innovations in Community-Based Crime Reduction (CBCR) Program

- Purpose: To support data-driven, community-oriented, partnership-based solutions to reduce crime and make communities safer, with an emphasis on addressing serious violent crime.

- Overview: The CBCR, previously known as the Byrne Criminal Justice Innovation Program, is well-positioned to fund targeted, evidence-based intervention programs geared toward individuals caught in a cycle of violence. The CBCR focuses on small geographic areas where crime occurs, and is intended to look at the root causes of violence, as opposed to simply prosecuting.

- Previous funding:
  - FY20 (appropriated): $17 million
  - FY17 (appropriated): $17.5 million

    - FY17 (Obama administration request): $24 million

- **Funding recommendation: $40 million**
    - Note: The BJA should prioritize applicants seeking to reduce gun violence through the use of evidence-based strategies, such as group violence intervention, relationship-based street outreach, and hospital-based violence intervention programs. The BJA should also prioritize communities with 15 or more homicides per year for at least two out of the three years preceding the grant application, and a homicide rate no less than double the national average; or demonstrates a unique and compelling need for additional resources to address gun- and group-related violence within the community. Additionally, priority should be given to prior award recipients who can demonstrate a reduction in violence, and commit to use future funding to continue the project.
    - Note: The BJA should provide technical assistance and funding for evaluation and analysis as necessary. Applicants should be encouraged to include plans for technical assistance partnerships in their solicitation response and, after awards are distributed, should be encouraged to use funding for such technical assistance as necessary.
    - Note: Awards should be no less than $600,000 per year.
    - Note: Law enforcement agencies participating in the CBCR should align their strategies with the recommendations provided by the Task Force on 21st Century Policing.

- Justification: Through the CBCR program, Detroit saw a 20% reduction in violent crime in the target area in 2014; Milwaukee saw a 24% reduction in violent crime in hot spots from 2013 to 2014; and Buffalo saw a 19% reduction in violent crime in the target area from 2013 to 2014. The CBCR's emphasis on geographic "hot spots" lines up with the reality that a very small percentage of a city's population is typically responsible for most violence, and targeted approaches to reduce violence among this population subset are most effective; however, it should not be used to justify a more militarized force. Increasing funding for this program will allow more cities to invest in evidence-based intervention and prevention programs such as group violence intervention, relationship-based street outreach, and hospital-based violence intervention programs that are proven to break cycles of violence.

14. Bureau of Justice Assistance: Community-Based Violence Intervention Program

- Purpose: To support, enhance, and replicate coordinated, evidence-based violence reduction initiatives.

- Overview: The Community-Based Violence Intervention Program, based on the *Break the Cycle of Violence Act* (Booker/Horsford), would replace Project Safe Neighborhoods, and build off of the Community-Based Violence Prevention Program and the Innovations in the Community Based Crime Reduction Program; this program would award grants to local governments and community-based organizations in areas disproportionately impacted by gun violence, to be used to support, enhance, and replicate coordinated, evidence-based violence-reduction initiatives, with the goal of reducing gun violence in the near term. These initiatives include models like group-violence intervention, relationship-

based street outreach programs, and hospital-based violence intervention programs that may or may not involve law enforcement.

- Previous funding:
  - $0. New funding required.

- **Funding recommendation: $90 million**
  - Note: $65 million is to be awarded by the BJA, and $25 million is to be awarded by the NIH.
  - Note: This program should be housed in the Center for Community Violence Intervention (referenced in "Establish a Community Violence Intervention Center within OVC") upon its creation.
  - Note: Technical assistance and funding for evaluation and analysis should be available as necessary. Applicants should be encouraged to include plans for technical assistance partnerships in their solicitation response and, after awards are distributed, should be encouraged to use funding for such technical assistance as necessary.

- Justification: Evidence-based violence intervention and prevention programs designed to interrupt cycles of violence and retaliation have proven to be highly effective at reducing rates of community gun violence, saving both lives and taxpayer dollars. From 2012 to 2013, a $2 million violence reduction program in two Massachusetts cities generated nearly $15 million in savings from decreases in crime. However, these programs require consistent and reliable federal funding to be successful. Currently, these effective programs have been implemented in only a handful of cities, and lack a reliable or adequate stream of resources. While the existing grant programs referenced above can fund similar work, no federal grant program currently exists specifically to fund evidence-based violence interruption. Given the impressive results, the protection of lives, and the cost savings, this should change.

15. Community Oriented Policing Services (COPS)

A. Operation Relentless Pursuit

- Purpose: To combat violent crime by building federal cases against violent actors and their organizations.

- Overview: Operation Relentless Pursuit (ORP) award recipients are required to work with the US Attorney's Office (USAO) and relevant federal agencies to investigate and prosecute suspects involved in gangs, drug trafficking, and other violent crime–related issues. In its first awards, COPS and BJA distributed $61 million in grant funding to seven cities: $51 million from the COPS office to hire law enforcement officers, and $10 million from BJA for prosecutors, technology enhancements, and development of plans to "address gaps in combating violent crime."

- Previous funding:
  - FY20 funding: DOJ allocated $71 million for this program
  - FY17 funding: N/A
  - FY17 Obama White House budget request: N/A

- **Funding recommendation: ORP should be discontinued.**

- Justification: Communities' distrust and estrangement from unjust, unaccountable, and militarized law enforcement is one of the leading root causes of gun violence in this country. The communities that have made the most significant progress in reducing violence have done so not by doubling down on mass arrest and incarceration, but by investing in community-based interventions and policing reform to build earned trust with the community. Group violence intervention, relationship-based street outreach, and hospital-based programs have been remarkably successful at interrupting entrenched cycles of community violence, and have led to significant, long-term reductions in shootings and gun homicides in cities across the US in short amounts of time. DOJ's resources would be better spent investing in these types of evidence-based programs and interventions.
    - *Additional information from the Civil Rights Corps and the Leadership Conference on Civil and Human Rights*

COPS funding should be prioritized for the following purposes:

B. Extreme risk protection orders and other community-oriented gun laws

- Purpose: To temporarily remove firearms from individuals at risk of harming themselves or others through a court-based process, and implement other community-oriented gun laws.

- Overview: The Community Oriented Policing Services (COPS) grant program is used to "develop and implement innovative programs to permit members of the community to assist State, tribal, and local law enforcement agencies in the prevention of crime in the community," among other uses. Currently, 19 states and the District of Columbia have extreme risk protection order laws, which create legal processes for temporary firearm removal, based on each state's domestic violence restraining order process. For both their safety and the safety of the order's subject, it is critical that both law enforcement and mobile response teams are trained in effective and correct practices to remove firearms from people experiencing crisis.

- Previous funding:
    - FY20 (appropriated): $343 million (total)
    - FY17 (appropriated): $286 million (total)
    - FY17 (Obama administration request): $286 million (total)

- **Funding recommendation: $20 million** within COPS to train officers to enforce extreme risk protection laws.
    - Note: Per Section VII (A) in Tab 1, DOJ should establish gun violence as a problem/focus area, and encourage use of this funding for the implementation of extreme risk protection order (ERPO) laws and/or other laws specifically aimed at gun violence. (See Tab 1, VII, A, 1)
    - Note: Law enforcement agencies receiving COPS funding should align their strategies with the recommendations provided by the Task Force on 21st Century Policing.

- Note: This funding can be repurposed from COPS hiring grants.

- Justification: The COPS Office is uniquely well positioned to issue grants to states and Indian tribes to implement extreme risk protection order laws (ERPOs) and other state and local laws to reduce gun violence. ERPO laws allow law enforcement and family members to petition a court to temporarily remove an individual's access to firearms if sufficient evidence exists that the individual is at risk of harming himself or herself or others. Nineteen states and the District of Columbia currently have ERPO laws in place. If effectively implemented, this policy has proven to be effective at reducing suicide, as four out of five individuals who attempt suicide show some signs of their intentions; research based on Connecticut's ERPO law suggests that for every 10 to 20 ERPOs issued, one life is saved. Federal funding would help provide the resources and training needed for courts and law enforcement agencies to implement these laws.

C. Focused deterrence

- Purpose: To fund evidence-based violence intervention programs.

- Overview: Focused deterrence strategies, such as Group Violence Intervention (GVI), are a form of problem-oriented policing that coordinates law enforcement, service providers, and community efforts to reduce risk of violence among the small, identifiable segment—in a given city, usually less than 0.5% of its residents—that is responsible for the vast majority of violence in most cities.

- Previous funding:
  - FY20: no specific funding in COPS
  - FY17: no specific funding in COPS
  - FY17 Obama White House budget request: $20 million for "training and technical assistance that supports the integration of community policing strategies throughout the law enforcement community to effectively address emerging law enforcement and community issues."

- **Funding recommendation: $20 million** for competitive grants to train officers in evidence-based violence intervention and prevention programs, including focused deterrence/group violence intervention, designed to interrupt cycles of violence and retaliation.
  - Note: Law enforcement agencies receiving COPS funding should align their strategies with the recommendations provided by the Task Force on 21st Century Policing.
  - Note: This funding can be repurposed from COPS hiring grants.
  - Note: COPS should provide technical assistance and funding for evaluation and analysis as necessary. Applicants should be encouraged to include plans for technical assistance partnerships in their solicitation response and, after awards are distributed, should be encouraged to use funding for such technical assistance as necessary.

- Justification: Focused deterrence/GVI programs are associated with reductions in homicides generally ranging from 30% to 60%. For example, Oakland, California, cut its annual shootings and homicides nearly in half over six years by

incorporating group violence intervention into its citywide response to crime. Through the Oakland Ceasefire partnership, community members, social service providers, and law enforcement officials work together to reduce violence, build police-community trust, and improve outcomes for high-risk individuals. Stakeholders discovered that only around 400 people—just 0.1% of Oakland's total population—were at highest risk for engaging in serious violence at any given time; service providers pivoted their programming to serve this small, high-risk population. Law enforcement developed the Ceasefire Section, composed of four units narrowly focused on addressing and preventing serious violence. Oakland's faith and community leaders partnered with law enforcement to provide officers with procedural justice training and help improve police-community relations. This model can and should be replicated in other cities.

D. Improving homicide solve rates

- Purpose: To solve homicides, interrupt cycles of violence, and improve relationships between communities and law enforcement.

- Overview: Cities with high rates of homicide clearance--meaning a perpetrator has been identified and a disposition has been made for that person regarding a particular homicide--have taken specific steps to train officers and investigators to solve homicides. All departments should be able to access these tools and provide the same training.

- Previous funding:
  - FY20: no specific funding in COPS
  - FY17: no specific funding in COPS
  - FY17 Obama White House budget request: no specific funding in COPS

- **Funding recommendation: $10 million** for competitive grants to train officers in solving homicides, incorporating recommendations from BJA's 2013 report *Homicide Process Mapping: Best Practices for Increasing Homicide Clearances*.
  - Note: Law enforcement agencies receiving COPS funding should align their strategies with the recommendations provided by the Task Force on 21st Century Policing.
  - Note: This funding can be repurposed from COPS Hiring grants.
  - Note: COPS should provide technical assistance and funding for evaluation and analysis as necessary. Applicants should be encouraged to include plans for technical assistance partnerships in their solicitation response and, after awards are distributed, should be encouraged to use funding for such technical assistance as necessary.

- Justification: In the mid-1970s, the average national homicide clearance rate was approximately 80%. By 2013, that rate had decreased to 65%. This decrease is related to a cycle of distrust and violence: when community members' distrust of law enforcement deepens, witness cooperation and engagement with officers diminish, policing becomes less informed and less effective, more shootings and murders go unsolved and unpunished, and more people seek vigilante justice in the streets--and community violence persists. But some cities have taken specific steps to break this cycle. As shootings and homicides dropped in Oakland through the use of community-based violence reduction programs, law

enforcement became more effective: homicide solve rates rose from 29% in 2011 to over 70% six years later, suggesting that community trust and partnership were improving too. By using COPS funding to specifically fund training on ways to effectively solve homicides and build community trust (which can involve improved accountability systems, including the collection and publication of data and officer complaints, among other actions) along with training law enforcement to participate in community-led programs to reduce gun violence, this can be replicated across the country.

E. Relaunch the Collaborative Reform Initiative

- Purpose: To improve trust between police agencies and communities.

- Overview: The COPS Office launched this initiative in 2011 as a "long-term, holistic strategy to improve trust between police agencies and the communities they serve by providing a means to organizational transformation." The initiative was a voluntary alternative to the consent decree process in which "law enforcement agencies facing significant issues that may impact public trust undergo a comprehensive assessment, are provided with recommendations on how to address those issues, and receive technical assistance to implement such recommendations."

- Previous funding:
  - FY20: $0
  - FY17: $10 million
  - FY17 Obama White House budget request: $20 million

- **Funding Recommendation: $20 million**
  - Note: Law enforcement agencies receiving COPS funding should align their strategies with the recommendations provided by the Task Force on 21st Century Policing.
  - Note: This funding can be repurposed from COPS hiring grants.

- Justification: By the end of 2016, 16 police departments had voluntarily requested to participate in the Collaborative Reform Initiative, and an early review of the initiative's impact concluded that it had "been shown to be a valuable tool for inspiring and accelerating change in many of the departments" and that evidence for "organizational transformation" in those police departments was "abundant." During the Obama Administration, collaborative reform was used as one tool to help departments make the kinds of structural reforms necessary for real accountability. The collaborative reform process included detailed assessments followed by technical assistance from police leaders and experts with the experience to institute accountability measures and action steps. Final reports offered the public information it could use to hold the departments accountable for sustainable change. At a time when the relationships between police agencies and the communities they serve are of the utmost importance, the COPS Office should relaunch and expand this project--for example, considering a more active role for state attorneys general--setting it up to continue despite changes in presidential administration.

16. **Office of Juvenile Justice and Delinquency Prevention (OJJDP): Children Exposed to Violence initiative**

- Purpose: To break cycles of violence at a young age.

- Overview: Funding under this program can be used to develop support services for children exposed to violence in their homes, schools, and communities; and to develop, enhance, and implement violent crime reduction strategies that focus on violent juvenile offenders.

- Previous Funding:
  - FY20 funding: $8 million
  - FY17 funding: $11 million
  - Final Obama White House budget request: $23 million

- **Funding recommendation: $11 million**

- Justification: Violence is a cycle; children exposed to violence are more likely to abuse drugs and alcohol and engage in criminal behavior later in life. This program has supported six communities and two tribal nations to interrupt these cycles of violence through early intervention strategies that address and treat children's exposure to trauma and violence.

17. **Office for Victims of Crime (OVC): VOCA Assistance grants**

- Purpose: To fund violence intervention programs.

- Overview: Victims of Crime Act (VOCA) funding presents an opportunity for states to leverage federal resources to fund critical violence intervention work. Funded through fines, penalty fees, charges on corporations convicted of felonies, and like payments--not by tax dollars--federal VOCA Assistance funds are provided as block grants to all 50 states, which are then responsible for redistributing these funds through subgrants to public agencies and organizations that provide a range of services to people who have been victims or witnesses to crime. Since the 1990s, significant percentages of the fund have come from large-scale corporate settlements.

- Previous funding:
  - FY20 VOCA cap: $2.641 billion, including $435 million transferred to the Office on Violence Against Women for VAWA programs; $10 million for the Inspector General's Office for auditing and oversight purposes; and 5% set aside ($132 million) for grants to Indian tribes to improve services for crime victims.
  - FY17 VOCA cap: $2.573 billion, including $326 million to OVW and $10 million for the DOJ OIG for oversight and auditing purposes.
  - FY17 Obama White House budget request: $2 billion, including $326 million transferred to the Office of Violence Against Women; $50 million for Vision 21, which provides supplemental victims services and other victim-related programs and initiatives in areas like research, legal services, capacity building, and national and international victim assistance; of that $50 million, $25,000 for tribal assistance for crime

victims; $45 million for the victims of trafficking program; and up to 3% set aside for NIJ and BJS for research, evaluation, or statistical purposes related to crime victims and related programs.

- **Funding recommendation:** The White House and Department of Justice should make clear that survivors of gun violence, and violence intervention organizations and programs are eligible and encouraged to apply for VOCA funds through the creation of the Office of Community Violence Prevention within the Office for Victims of Crime.
    - Note: The Department should encourage states to broaden eligibility requirements so gun violence survivors with criminal histories are still able to access funding.
    - Note: Transfers to the Immigration and Customs Enforcement to help fund the Victims Of Immigration Crime Engagement Office (VOICE) should be prohibited.

- Justification: Since 2016, federal regulations have required that at least 10% of VOCA Assistance awards be allocated to programs that serve "previously underserved populations of victims of violent crime." The US Office for Victims of Crime has noted that "victims of gang violence," "victims of violent crime in high crime areas," "victims of physical assault," and "survivors of homicide victims," are all "often underserved." In recent years, governors and attorneys general in states including New Jersey, Illinois, Pennsylvania, Virginia, Maryland, and California have taken executive action to use discretionary federal VOCA Assistance funds to support violence intervention efforts focused on crime victims and families at highest risk of re-injury from community violence. Yet many states have typically not used these federal crime victim dollars to meaningfully invest in violence intervention programs for victims of violence.

III. Department of Health and Human Services (HHS)

1. Office of the Secretary: Funding for public health emergency response

- Purpose: To fund programmatic solutions to the public health emergency of gun violence.

- Overview: When the secretary of Health and Human Services declares a public health emergency, the HHS may then access the Public Health and Social Services Emergency Fund (PHSSEF) for the purpose of supplementing other federal, state, and local funds, make grants, provide awards for expenses, enter into contracts, and conduct and support investigations into the cause, treatment, or prevention of the disease or disorder; and reassign state and local personnel temporarily, for the purposes of addressing the emergency (with the consent of the governor and relevant personnel). The declaration of gun violence as a public health emergency will allow the HHS to access funding to support evidence-based violence prevention and intervention programs proven to reduce shootings.

- Previous funding:
    - FY20 (appropriated): $1.04 billion "to support activities related to countering potential biological, nuclear, radiological, chemical, and

cybersecurity threats to civilian populations, and for other public health emergencies."
    - FY17 (appropriated): $950.96 million "to support activities related to countering potential biological, nuclear, radiological, chemical, and cybersecurity threats to civilian populations, and for other public health emergencies."
    - FY17 (Obama administration request): $956.11 million "to support activities related to countering potential biological, nuclear, radiological, chemical, and cybersecurity threats to civilian populations, and for other public health emergencies."

- **Funding recommendation: Ensure appropriate funding within the Public Health and Social Services Emergency Fund to address the public health emergency of gun violence.**
    - Note: The actual funding amount needed will be determined by the existing funding level of the PHSSEF, the number and scope of emergency declarations, and by the results of problem analyses conducted by working groups.

- Justification: The American Medical Association, the nation's largest physicians' group, has formally adopted a policy designating gun violence a public health crisis.The American Psychiatric Association reported in 2018 that 87% of Americans view gun violence as a public health threat, including 77% of Republicans and 96% of Democrats. These issues can only be exacerbated by the raging COVID-19 pandemic, which has stretched public health systems thin, thereby making shootings more likely to be fatal. Traumatic gunshot injuries that would have been survivable before the coronavirus may often be fatal when health care systems are overwhelmed. The HHS secretary declaring gun violence a public health emergency--as the coronavirus is considered--would provide some of the flexibility needed for health care systems to address both emergencies at once. Among other things, an emergency declaration gives the HHS the authority, upon the request of the governor of the state or tribe, to reassign certain federally funded personnel to address the emergency. A public health emergency declaration for gun violence in a particular community would therefore enable the personnel of local health care and community systems to shift appropriately between the needs of those affected by the coronavirus, the needs of those affected by shootings, and the needs of community organizations to prevent future shootings.

2. **Centers for Disease Control and Prevention (CDC) and National Institutes of Health (NIH): Funding for scientific firearms-related research**

- Purpose: To fund scientific firearms-related research.

- Overview: As the nation's premier institutions of public health, CDC and NIH have made life-saving progress in other critical areas: after scientists and engineers were able to identify risk factors of cars, for example, Congress passed the Highway Safety Act in 1966, which included new automobile safety laws to prevent people from driving while intoxicated, and discourage drinking underage. The CDC's continued research was able to inform policymakers,

which led to the fall of car-related deaths from over 41,000 in 1997 to just over 30,000 in 2013.

- Previous funding:
  - FY20 (appropriated): $25 million, split evenly between CDC and NIH
  - FY17 (appropriated): $0
  - FY17 (Obama administration request): $10 million

- **Funding recommendation: $100 million**
  - Note: CDC's Injury Prevention Center should monitor the Firearm Injury Surveillance Through Emergency Rooms (FASTER) program, in which hospitals will share real-time data with the CDC about patients entering ERs for nonfatal gunshot injuries. The CDC announced funding for pilot programs in the spring of 2020; should these programs be successful in their first 12–18 months, more funding should be offered to expand the program.
  - Note: This funding recommendation should continue to scale up in future budget requests.

- Justification: In FY20, Congress made history by appropriating $25 million for the Centers for Disease Control and Prevention (CDC) and National Institutes of Health (NIH) to study gun violence. This was the first investment of its kind in more than two decades, and it was badly needed. Gun deaths in the United States have reached their highest level in almost 40 years. Nearly 40,000 Americans died from gun violence in 2018—more than 100 people every day. However, we lack true scientific data about where gun violence trends geographically, the types of violence that occur in certain places, and how well-equipped medical providers are in responding to gun violence. We also, of course, need more information about the most effective public health approaches to reduce gun violence. The historic funding made available in Fiscal Year 2020 was a remarkable bipartisan achievement; however, as noted in the *Journal of the American Medical Association*, that funding must only be the beginning of this reinvestment in public health and violence prevention as we begin to make up for an over-20 year deficit.

3. **CDC: Division of Violence Prevention, National Center for Injury Prevention and Control**

- Purpose: To support hospital-based and hospital-linked violence intervention programs, which work to interrupt cycles of violent injury and retaliation while the victim is in recovery.

- Overview: Hospital-based violence intervention programs (HVIPs) were developed by Oakland-based nonprofit YouthAlive! *(*which later received Minority Youth Violence Prevention grant funding*)* in 1994 under the name "Caught in the Crossfire," built on the premise that the strongest risk factor for violent injury is a history of previous violent injury.

- Previous funding: $0. New funding required.

- **Funding recommendation: $20 million**

- Note: Grants should provide technical assistance and funding for evaluation and analysis as necessary.

- Justification: Researchers have found that within the first five years of hospitalization for an assault-related injury, the chances of recitivating are as high as 45%. The HVIP strategy focuses on reaching high-risk individuals who have recently been admitted to a hospital for treatment of a violent injury: HVIPs identify patients most at risk for reinjury and connect them with trained case managers who come from a similar background. Culturally competent case managers provide clients with intense oversight and assistance, both in the hospital and in the crucial months following the patient's release; they help clients access resources that promote their safety and recovery, including trauma counseling, mediation, tattoo removal, and other supportive services. Violently injured patients who receive HVIP services are four times less likely to be convicted of a violent crime and four times less likely to be subsequently reinjured. The FY18 omnibus conference report recognized HVIPs as effective at interrupting cycles of violence injury and retaliation. One study, for example, found that one San Francisco program reported a violence reinjury rate of 4.5% in six years for participants, compared to a 16% historical control group; a study of a hospital-based program in Indianapolis resulting in a zero percent reinjury rate for participants after one year compared to a historical control group with a reinjury rate of 8.5%.

4. CDC: National Violent Death Reporting System (NVDRS)

- Purpose: To provide state and local communities with information about violent deaths across the US.

- Overview: The NVDRS is an essential data system run by the CDC, and the only state-based system to combine data from law enforcement, coroners and medical examiners, and vital statistics to obtain the most comprehensive data available on homicides and suicides. Now collecting data from all 50 states, plus the District of Columbia and Puerto Rico, NVDRS data can better inform our approaches to violence prevention.

- Previous funding:
  - FY20 (appropriated): $23.5 million
  - FY 17 (appropriated): $16 million
  - FY17 (Obama administration request): $23.5 million

- **Funding recommendation: $30 million**
  - Note: This funding should continue to increase to meet a $50 million funding level in five years.

- Justification: Currently, no system exists in the United States to track gun-related injuries or deaths comprehensively, but the NVDRS comes the closest. From suicides to domestic violence homicides, the NVDRS can paint a picture of what gun deaths look like across the country, so policymakers can best respond. As the CDC states, the NVDRS "links information about the 'who, when, where, and how' from data on violent deaths and provides insights about 'why' they occurred." This has led to policy change, which can lead to better violence

prevention: Oklahoma, for example, used NVDRS data to measure the effectiveness of a pilot domestic violence lethality assessment program that led to its statewide use. The NVDRS needs stable, consistent funding to continue to grow and create more effective interventions to reduce gun deaths. Expanded resources are also needed to standardize data collection and death investigation systems across states, expand the use of technology to make reporting more immediate, and improve coordination among participants.

5. **Office of Minority Health: Minority Youth Violence Prevention (MYVP) program**

- Purpose: To support integrated public health and violence prevention approaches that reduce the prevalence and impact of youth violence among racial and ethnic minority and/or disadvantaged at-risk youth.

- Overview: The MYVP program is administered by the Department of Health and Human Services (HHS), Office of Minority Health in conjunction with the Department of Justice's Office of Community Oriented Policing Services. At a time when the national homicide rate has declined to an annual rate of 6 per 100,000, the national homicide rate for Black males between 10 and 24 is close to 50 per 100,000.

- Previous funding:
  - FY20 (appropriated): , $3.9 million from the Office of the Secretary
  - FY17 (appropriated): HHS allocated approximately $4.1 million in FY17
  - FY17 (Obama administration request): $0

- **Funding recommendation: $20 million**
  - Note: Unlike previous grant solicitations within MYVP that intended to serve individuals up to age 18, grants should not include an arbitrary age cutoff for participants at high risk of violence.
  - Note: RFPs dealing with reducing gun violence should emphasize evidence-based strategies, and provide technical assistance and funding for evaluation and analysis as necessary.

- Justification: This funding can and should be used to support street outreach, group violence intervention, and hospital-based and hospital-linked violence intervention programs, which work to interrupt cycles of violent injury and retaliation while the victim is in recovery. As Congress recognized in the Commerce, Justice, Science FY18 bill report, programs like these are proven to be effective. One study, for example, found that a San Francisco program reported a violent reinjury rate for participants of 4.5% in six years, compared to a 16%rate for the historical control group; a study of a hospital-based program in Indianapolis resulting in a zero percent reinjury rate for participants after one year compared to a historical control group with a reinjury rate of 8.5%. The first iteration of MYVP, which funded a grant cycle from FY14-FY17, funded hospital-based programs at some of its nine sites, but more funding and technical assistance is needed to ensure the success of later iterations.

6. **Office of Minority Health: Public-Health Based Violence Prevention/Intervention Pilot Program**

- Purpose: To use and measure the impact of public-health approaches to break cycles of violence.

- Overview: This pilot program, in conjunction with Centers for Medicare and Medicaid Innovation, is intended for state-based gun violence intervention programs that focus on health outcomes. The program should provide funding to states for Departments of Public Health to work directly with community violence intervention offices in specific cities in the state to examine the health impact of their programming. The pilot program could start with three to five states with existing effective community violence intervention programs.

- Previous funding:
    - FY20 (appropriated): $0
    - FY17 (appropriated): $0
    - FY17 (Obama administration request): $0

- **Funding recommendation: $15 million**

- Justification: This program would offer the opportunity for the impact of community violence intervention programming to be analyzed through a health lens, providing opportunities to identify and enhance areas where interjection and partnership with public health policies help efforts to reduce gun violence in communities.

7. **Substance Abuse and Mental Health Services Administration (SAMHSA): National Survey on Drug Use and Health (NSDUH)**

    - Purpose: To collect state data about US residents regarding their health-related risk behaviors, chronic health conditions, and use of preventive services.

    - Overview: The NSDUH is an annual 50-state survey which provides up-to-date information on tobacco, alcohol, and drug use; mental health; and other health-related issues in the United States. Information from NSDUH is used to support prevention and treatment programs, monitor substance use trends, estimate the need for treatment, and inform public health policy. Adding questions about firearms in the home and firearm storage behaviors to the annual NSDUH questionnaire will provide valuable information about health behaviors related to firearms, as well as crucial data that can support further analysis and allow for research on the interactions of these firearm related behaviors with other factors related to mental health and substance use. State-level data on firearm storage behaviors and household gun ownership has been collected in recent years through optional firearms-related modules added to the annual Behavioral Risk Factor Surveillance Survey (BRFSS). This data has provided crucial information for academic study, but information on gun ownership has not been collected in all 50 states since 2004, meaning that there has been no systematic federal collection of the percent of Americans that own firearms at the state or federal level since then.

    - Previous funding:
        - FY20 (appropriated): $14.595 million from SAMHSA's Health Surveillance and Program Support Appropriations

- FY 17 (appropriated): $5.326 million from SAMHSA's Health Surveillance and Program Support Appropriations
- FY17 (Obama administration request): N/A; not specifically requested

- **Funding Recommendation: $30 million**
  - Note: The Labor, HHS, and Education Appropriations bill should include language recommending the inclusion of firearms-related safety questions in NSDUH. The HHS Secretary should recommend the same.

- Justification: Requiring firearm ownership and storage data to be collected annually, in all 50 states, will help provide important information that can be used to support public education around safe firearm storage behaviors, and provide data that could serve as an important control variable in future studies of gun violence. Collecting this data through the NSDUH will allow researchers to examine firearm ownership and storage behaviors alongside other factors related to mental health and substance use.

8. Substance Abuse and Mental Health Services Administration (SAMHSA): National Strategy for Suicide Prevention

- Purpose: To prevent suicide.

- Overview: Then-Surgeon General David Satcher released the first blueprint to prevent suicide in 1999, which led to the first National Strategy for Suicide Prevention in 2001. In 2012, then-Surgeon General Regina Benjamin partnered with suicide prevention groups to produce an updated strategy, building upon progress made in research, practice, and care. Today, over half of all suicides result from self-inflicted gunshot wounds. Yet the link between gun access and suicide risk remains dangerously misunderstood, denied, and ignored.

- Previous funding:
  - FY20 funding level: $18.2 million
  - FY17 funding level: $11 million
  - FY17 (Obama administration request): $30 million

- **Funding recommendation: $40 million** for the National Strategy and Zero Suicides grant program.
  - Note: The SAMHSA should create an updated, culturally competent national strategy ,and plan to update this strategy at least every five years. The SAMHSA should make a concerted effort to include new voices in the creation of this updated strategy; it should also consider recent and future technological developments to allow and plan for faster and more complete data collection and ways of providing care. HHS should prioritize implementation of this strategy, including the expansion of the Zero Suicides model throughout the healthcare field.
  - Note: Like the current strategy, an updated strategy must include plans for public health surveillance to determine populations most at risk for suicide.

- Justification: Huge progress has been made in technology over the past eight years--and even in recent months. The National Strategy and Zero Suicide model

cannot be effective if they are outdated, and implementation cannot be effective if it does not involve programs to reduce access to guns for people at risk of harming themselves. Since 2004, over half a million American men, women, and children have taken their own lives. Most people attempt suicide impulsively during acute periods of mental crisis, and they typically use whatever suicide method is most quickly available. People are at least 40 times more likely to die if they attempt suicide with a gun instead of the two most common methods—overdosing on drugs or medication, and self-cutting with sharp instruments. As a result, gunshots account for 5% of life-threatening suicide *attempts* in the United States but over 50% of suicide *deaths*. This is why states with immediate, unrestricted access to guns have much higher suicide rates, and why gun safety reform must be part of a comprehensive suicide policy response.

9. Substance Abuse and Mental Health Services Administration (SAMHSA): National Child Traumatic Stress Network

- Purpose: To raise the standard of care and increase access to services for children and families who experience or witness traumatic events.

- Overview: The National Child Traumatic Stress Network (NCTSN) works to infuse trauma-informed care into systems across the country. Established through the Children's Health Act of 2000, NCTSN consists of 100 funded centers and more than 150 affiliate centers and individuals in hospitals, universities, and community-based programs in 44 states and the District of Columbia that create and promote effective community practices for youth and families exposed to trauma. Among other responsibilities, the National Center for Child Traumatic Stress provides technical assistance to its grantees, oversees resource development and dissemination, and coordinates national training and education; NCTSN Community Treatment and Services Centers work in community settings to implement and evaluate effective trauma treatment and services. Grantees and affiliates provide clinical services, develop and disseminate new interventions and resource information, provide education and training materials, collaborate with established systems of care to infuse a trauma-informed lens into their work, collect and evaluate data, and inform public policy.

- Previous funding:
  - FY20 funding level: $68.887 million
  - FY17 funding level: $46.887 million
  - FY17 (Obama administration request): $46.887 million

- **Funding recommendation: $72 million**
  - Note: Report language should be included within the Labor, Health and Human Services, Education and Related Agencies appropriations bill directing SAMHSA to work in conjunction with the Office of Minority Health and Office of Victims of Crime to ensure grant recipients who serve populations most at risk of violence and trauma.

- Justification: This funding can and should be used to support hospital-based and hospital-linked violence intervention programs (HVIPs), which work to interrupt cycles of violent injury and retaliation while the victim is in recovery. As Congress

recognized in the Commerce, Justice, Science FY18 bill report, programs like these are proven to be effective. HVIPs are trauma-informed at their core; culturally-competent case managers help clients access resources that promote safety and recovery, including trauma counseling, mediation, and other supportive services as they recover from violent injury. Increased funding will help the NCTSN reach more at-risk individuals and health systems in order to better aid and inform HVIP services.

10. **Substance Abuse and Mental Health Services Administration (SAMHSA): Resiliency in Communities After Stress and Trauma (ReCAST) grants**

- Purpose: To assist high-risk youth and families and promote resilience and equity in communities that have recently faced civil unrest (including police violence), through implementation of evidence-based, violence prevention, and community youth engagement programs, as well as linkages to trauma-informed behavioral health services.

- Overview: Part of project AWARE, created from the Obama administration's Now is the Time (NITT) initiative, the ReCAST program uses a trauma-informed lens to combat violence and build relationships within communities. The program is flexible: it can be used to support Offices of Violence Prevention within cities; improve residents' access to critical services, such as mental health care; promote and help build healthy relationships between communities and law enforcement; and more.

  Previous funding:
  - FY20 funding level: $102.001 million for project AWARE
  - FY17 funding level: $57.001 million for project AWARE; $10 million allotted for eight ReCAST grants. *Note: the SAMHSA tried to eliminate this program in FY18.*
  - FY17 (Obama administration request): $71.96 million for project AWARE
  - **Note: this funding originally came from reallocation of funding from Youth Violence Prevention in FY17.*

- **Funding recommendation: $25 million allocated within project AWARE for ReCAST grants.**
  - Note: Report language should be included specifically setting this funding aside for discretionary grants and technical assistance to support trauma-informed efforts in high–crime, high–poverty areas and, in particular, communities that are seeking to address relevant impacts and root causes of civil unrest, and to prevent and interrupt cycles of violence.
  - Note: RFPs dealing with reducing gun violence should emphasize evidence-based strategies and provide technical assistance and funding for evaluation and analysis as necessary.
  - Note: Where applicable, RFPs should encourage applicants to consider projects to build better relationships between police and communities, per recommendations provided by the Task Force on 21st Century Policing.

- Justification: Violence is a cycle: in studies of some urban hospitals, researchers have found that up to 45% of patients treated for injuries, such as gunshots, were

violently reinjured within five years. People who have been violently victimized are also at increased risk of retaliating and becoming perpetrators of violence: being shot, being shot at, or witnessing a shooting doubles the probability that a young person will commit violence in the next two years. Community-based programs have proven effective at breaking this cycle-- East New York experienced a 50% reduction in gun-injury rates after implementing the public health and relationship-based strategy Cure Violence, for example. As many cities face budget constraints due to COVID-19, federal support for these programs will become more important than ever.

IV. Department of Defense (DOD)

1. Focus on reporting to NICS

- Purpose: To comply with federal law, and ensure all necessary records are submitted to the federal background check system.

- Overview: As codified in the Fix NICS Act, federal agencies--including the Department of Defense--are required to establish an implementation plan to maximize reporting prohibiting records to NICS. This plan includes annual benchmarks and an estimated deadline for full compliance. Agencies must certify twice per year that they are uploading records to NICS, and confirm how many; the attorney general must make a yearly "substantial" compliance determination based on the agency's implementation plan, and publish on the DOJ's website and report to Congress any agency that has failed to submit the required certification or to comply with its implementation plan.

- Previous funding:
    - FY20 language in DOD Appropriations Bill: The secretary of defense, in consultation with the service secretaries, shall submit two reports to the congressional defense committees, not later than March 1, 2020, and not later than September 1, 2020, detailing the submission of records during the previous six months to databases accessible to NICS, including the Interstate Identification Index (III), the National Crime Information Center (NCIC), and the NICS Index, as required by Public Law 110–180: provided, that such reports shall provide the number and category of records submitted by month to each such database, by service or component: provided further, that such reports shall identify the number and category of records submitted by month to those databases for which the Identification for Firearm Sales (IFFS) flag or other database flags were used to pre-validate the records, and indicate that such persons are prohibited from receiving or possessing a firearm: provided further, that such reports shall describe the steps taken during the previous six months, by service or component, to ensure complete and accurate submission and appropriate flagging of records of individuals prohibited from gun possession or receipt pursuant to 18 U.S.C. 922(g) or (n), including applicable records involving proceedings under the Uniform Code of Military Justice.
    - FY17 funding level: N/A
    - FY17 Obama White House budget request: N/A

- **Recommendation**: The DOD should work with the FBI to ensure proper procedures to submit records to NICS, per the Fix NICS Act, are in place and being followed: the Fix NICS Act of 2018 (Public Law 115-141) requires the DOJ to develop federal department, federal agency, and state and Indian tribal implementation plans for the upload of relevant records to NICS. It also requires that the attorney general publish semiannual reports on federal department and agency compliance with such plans. The DOJ has released only one such report on November 14, 2019. The Committee/This budget directs the DOJ to use all funds and resources necessary to provide an updated report by June 2021 and publish said report on its website, and to provide and publish such reports on a semiannual basis thereafter. The Fix NICS Act also requires the attorney general to publish and maintain on the DOJ website a list of the state and Indian tribal governments that have failed to achieve substantial compliance with the benchmarks in their implementation plans, and a description of the types and amounts of records that have not been submitted. The Committee/This budget directs the DOJ to publish the first such list by November 14, 2020. The attorney general shall use all necessary resources available under this bill to comply with the requirements of Section 103(g) of the Brady Handgun Violence Prevention Act.

- Justification: The DOD has consistently failed to submit records sufficiently to NICS, leading to a horrific outcome in 2017, when a prohibited person was able to pass a background check, purchase a gun from an FFL, and go on to kill 26 people and injure 20 more in Sutherland Springs, Texas. In the first semiannual report on the Fix NICS Act, released in November 2019, the DOD was not compliant with its submission requirements to NICS; the DOD stated it did not even intend to publish its implementation plans until June 2021, let alone reach compliance until 2023. The DOD must be held accountable to its obligation to submit records to NICS, and must do so promptly.

V. Departments of State and Commerce

1. Return oversight of certain firearm exports to the Department of State from the Department of Commerce

- Purpose: To minimize risk of dangerous American firearms ending up in the hands of bad foreign actors.

- Overview: In January 2020, the Department of Commerce finalized a rule stating that the regulatory authority of certain firearms, ammunition, and technical data sales and exports will be transferred from the US Department's Munitions List (USML) to the Department of Commerce Control List (CCL).

- Previous funding:
  - FY20 funding level: N/A
  - FY17 funding level: N/A
  - FY17 Obama White House budget request: N/A

- **Funding recommendation:** Include language in the Departments of State and Commerce appropriations bills prohibiting the use of funding from the Department of Commerce for this oversight, requiring the funding to come from

the Department of State. *Notwithstanding any other provision of law or treaty, none of the funds appropriated or otherwise made available under this Act or any other Act in any fiscal year may be expended or obligated by a department, agency, or instrumentality of the United States to pay administrative expenses, or to compensate an officer or employee of the United States to permit or approve the export or a license for the export of any item that was included in category I, II, or III of the United States Munitions List as of August 31, 2017, unless such item continues to be included in such category.*

- Justification: Currently, the USML regulates all purchases and exports of firearms and ammunition—and because the USML is under the State Department's purview, there are stringent regulations and requirements. The State Department has to consider factors including national security, terrorism, international crime, and foreign policy when items from the USML are purchased and exported. The CCL, on the other hand, comes under the Commerce Department's authority. It is not overseen with a similar level of oversight, and has rules and regulations that are far less stringent.

2. End-use monitoring

- Purpose: To ensure exported American firearms and ammunition are not trafficked to ill-meaning actors if the export rule above cannot be reversed.

- Overview: As required by law, the Departments of State and Commerce have programs in place to monitor individuals in foreign countries who end up in possession of exported items, to ensure the items are not trafficked to bad actors. The Department of Commerce's end-use program is administered out of the Bureau of Industry and Security (BIS); it utilizes export control officers and special agents from BIS's Sentinel Program to determine if exported products are being used appropriately and according to export agreements.

- Previous funding:
  - FY20 funding level: $127.652 million for BIS
  - FY17 funding level: $112.5 million for BIS
  - FY17 Obama White House budget request: $126.945 million for BIS; $65.312 million for export administration

- **Funding recommendation: $70 million for export administration**

- Justification: The State Department's end-use monitoring program, Blue Lantern, relies primarily on embassy staff to conduct end-use checks of overseas exports. Whenever possible, officials are urged to physically visit a site to confirm that an end-user is reliable, and the transaction was legitimate. Blue Lantern requires export end users to certify that they will not re-sell or re-export the item in question. The Commerce Department, on the other hand, usually does not have such certification requirements; it relies primarily on export control officers based overseas for this responsibility. Commerce has officers based in only seven countries, which will make it easier for exported items to be trafficked without the knowledge of American officials. Commerce also tends to investigate end users after items have already been shipped, increasing the possibility that they have fallen into the wrong hands. If it assumes end-use monitoring duties from the

Department of State, Commerce will need to add more officers in different parts of the world, and increase the vigor of its end-use checks.

VI. Department of Education (ED)

1. Student Support and Academic Enrichment grants

- Purpose*:* "To (1) provide all students with access to a well-rounded education, (2) improve school conditions for student learning, and (3) improve the use of technology in order to improve the academic achievement and digital literacy of all students."

- Overview: Within the Every Student Succeeds Act (ESSA), Part A of Title IV creates the Student Support and Academic Enrichment (SSAE) block grants. Original guidance encourages jurisdictions to select evidence-based activities to accomplish these objectives. Grants are distributed to schools based on need, with consideration given in part to a school's amount of low-income students and whether a school is identified as persistently dangerous.

- Previous Funding:
  - FY20 (appropriated): $1.21 billion
  - FY 17 (appropriated): $1.21 billion
  - FY17 (Obama administration request): funding requested was not specific to part A of Title IV

- **Language recommendation:** Line item within Department of Education appropriations clarifying that SSAE funds, and no other funding from the Department of Education can be used for the purchase of firearms or firearms training; internal departmental guidance from the secretary of education saying the same.

- Justification: Guns are not an effective means of violence prevention in schools—or any active shooter situations. There is no evidence that arming teachers will protect children in schools, but broad awareness that teachers are not effective deterrents in active shooter situations. Yet in August 2018, it was reported that the secretary of education intended to allow school districts to use SSAE funds to arm teachers. The secretary has the authority to stop school districts from doing so, but she did not do so.

  This guidance would build upon language included in the FY20 Labor, Heath and Human Services, Education, and Related Services appropriations bill: "The Committee is deeply concerned by the department's internal July 2018 memo that indicated its Office of the General Counsel believes the Secretary has discretion to interpret the ESEA ''as to its permissiveness regarding the purchase of firearms and training on the use of firearms.'' However, the memo also indicates that ''it is reasonable for the Secretary not to allow this use of funds absent specific Congressional authorization, and it is unlikely that this interpretation would be subject to a successful legal challenge.'' Seeing as Congress never intended for SSAE funds to be used to purchase firearms or for firearms training in schools, and given the Department's Office of the General Counsel view that it would be reasonable, and legally sound, for the Secretary to

disallow such expenditures, the Committee directs the Secretary, within 30 days of enactment of this Act, to issue guidance clarifying that SSAE funds are not allowed to be used for the purchase of firearms or for firearms training.“

RECOMMENDED ACTION MEMO
Agency: Executive Office of the President (EOP)
Topic: Establishing a White House Task Force on Gun Violence Prevention
Date: November 2020

Recommendation: Issue an executive order establishing an interagency White House task force on gun violence prevention.

I. Summary

Description of recommended executive action

The next administration should leverage the full authority and resources of the executive branch to address the issue of gun violence by establishing a White House task force on gun violence prevention (GVP Task Force or the Task Force). This interagency task force—which should be established by the president via executive order (EO), co-chaired by the White House chief of staff, the US attorney general, and the secretary of Health and Human Services, and regularly staffed by a deputy assistant to the president—would bring together key leaders across the administration to develop a coordinated and sustained federal effort to address all aspects of gun violence in the United States.

The mission of this task force would be to identify opportunities across the federal government to address the gun violence epidemic more successfully, and oversee the implementation of executive actions, including regulatory reforms, new enforcement strategies, research and data collections, education and public awareness efforts, and new programmatic efforts to make meaningful change. The task force would also identify federal funding sources that can be leveraged to support gun violence prevention efforts at the state and local level.

The task force's mission would also include working with state and local leaders—both elected officials and community stakeholders—to identify best practices and effective gun violence prevention programs, increase federal support for these efforts, and lift up the voices and stories of the communities most affected by gun violence.

Overview of process and time to enactment

Establishing a White House GVP task force is within the president's authority and should be stood up within the first 100 days of the next administration, signalling a commitment to address the public health crisis of gun violence in America. To do that, the next president should issue an EO to create the GVP task force. The EO should include details related to the mission, membership, administration, and directives of the task force. In part, the task force would be responsible for producing a comprehensive set of executive action recommendations within three months of its establishment and members would be required to report regularly on the progress federal agencies are making in implementing recommendations.

II. Current state

There is currently no White House task force on gun violence prevention or any similar task force responsible for coordinating an interagency approach to fighting gun violence in the US. As such, the federal government's response to the gun violence epidemic is disjointed, occurring across a variety of federal agencies and policy issues areas. This reality creates both an organizational and policy-based justification for establishing a coordinating body within the White House.

A disjointed federal response to gun violence

With an average of 36,383 gun deaths, 100,000 gun injuries, and 393 million guns, America's gun violence epidemic far exceeds any comparable nation's.[1] From gun suicides to homicides, unintentional shootings, police shootings, urban gun violence, domestic violence, child access to firearms, and mass shootings, the full extent of the gun violence epidemic amounts to a complex and wide-ranging crisis falling under the direct purview of multiple government agencies.

For example, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is responsible for the enforcement and regulation of gun sales and dealers, crime gun tracing, and enforcing federal gun laws; the Federal Bureau of Investigation (FBI) is responsible for operating the National Instant Criminal Background Check System (NICS); the Department of Justice (DOJ) administers millions of dollars in federal grants that support local gun violence prevention efforts; the Department of Health and Human Services (HHS) is responsible for securing funding and conducting research to study gun violence as a public health crisis; and the Department of Education is responsible for ensuring the safety of America's schools. Given the multi-faceted nature of the gun violence epidemic in America and the overlap between key federal agencies responsible for mounting effective solutions, there is a need for a better coordinated response across the executive branch.

Previous White House task forces

Both Democratic and Republican administrations have established White House task forces by EO to make progress on key issues, offering a clear organizational and legal precedent for the next administration to follow a similar strategy. Past examples of task forces from the Obama and Trump administrations that could be used to model the GVP task force include the following.

Obama administration:

- **Federal Interagency Reentry Council.**[2] Established by President Obama via presidential memorandum in April 2016, the Federal Interagency Reentry Council was co-chaired by the attorney general and the director of the White House Domestic Policy Council (DPC). The Reentry Council's mission was to identify policies, strategies, programming, and research to improve the reentry of individuals following a term of imprisonment. The Reentry Council, which was made up entirely of government

[1] Giffords Law Center to Prevent Gun Violence, "Gun Violence Statistics," August 14, 2020, https://lawcenter.giffords.org/facts/gun-violence-statistics/.
[2] President Barack Obama, Presidential Memorandum, "Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals," April 29, 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/04/29/presidential-memorandum-promoting-rehabilitation-and-reintegration.

employees, was composed of the heads of a number of cabinet agencies and White House offices. It was directed to consult with local stakeholders at the state, local, and nongovernmental level to inform its work and was given authority to implement and promote policies to support successful reentry. The Reentry Council was required to present a federal strategic plan within 100 days of its creation, in addition to convening annually to further the Reentry Council's goals.[3]

- **The President's Task Force on 21st Century Policing.**[4] Established by President Obama via EO in December 2014, the Task Force on 21st Century Policing was co-chaired by non-government employees and tasked with identifying and recommending best practices to promote effective crime reduction while building public trust, captured in a final report.[5] As the task force included non-government appointees, it was only empowered to make recommendations. The task force was administratively supported, funded, staffed, and equipped by the Department of Justice (DOJ).

- **The White House Council on Women and Girls.**[6] Established by President Obama via EO in March 2009, the White House Council on Women and Girls was chaired by the senior advisor and assistant to the president for intergovernmental affairs and public liaison. The Council on Women and Girls was tasked with providing a coordinated interagency response to issues impacting women and girls and had representatives from 26 federal agencies and entities—all government employees. The council served in an advisory role only, tasked with making policy recommendations, assisting in the development of legislation, and coordinating outreach with relevant organizations and agencies. The council was responsible for presenting a federal interagency report,[7] and was tasked with providing relevant future updates, such as its 2016 annual report.[8]

- **The Task Force on Improving the Lives of Boys and Young Men of Color and Underserved Youth.**[9] Established by President Obama via presidential memorandum in February 2014,"My Brother's Keeper" initiative was chaired by the assistant to the president and the White House cabinet secretary. The task force's mission was to improve education and life outcomes for young men of color and address the opportunity gaps they face. The task force, which was made up entirely of government employees,

[3] The Federal Interagency Reentry Council, "A Record of Progress and a Roadmap for the Future," August 2016, https://s3.amazonaws.com/static.nicic.gov/Library/032749.pdf.
[4] President Barack Obama, "Establishment of the President's Task Force on 21st Century Policing," Executive Order 13684, December 18, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/12/18/executive-order-establishment-presidents-task-force-21st-century-policin.
[5] The President's Task Force on 21st Century Policing, "Final Report," May 2015, https://eji.org/wp-content/uploads/2020/06/taskforce_finalreport.pdf.
[6] President Barack Obama, "Creating the White House Council on Women and Girls," Executive Order 13506, March 11, 2009, https://obamawhitehouse.archives.gov/the-press-office/executive-order-creating-white-house-council-women-and-girls.
[7] U.S. Department of Commerce, Economics and Statistics Administration, Executive Office of the President, Office of Management and Budget, "Women in America: Indicators of Social and Economic Well-Being," White House Council on Women and Girls, March 1, 2011, https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/Women_in_America.pdf.
[8] The White House Council on Women and Girls, "Advancing Equity for Women and Girls of Color," December 2016, http://www.ncdsv.org/CWG_Advancing-Equity-for-Women-and-Girls_12-2016.pdf.
[9] President Barack Obama, Presidential Memorandum, "Creating and Expanding Ladders of Opportunity for Boys and Young Men of Color," February 27, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/02/27/presidential-memorandum-creating-and-expanding-ladders-opportunity-boys-.

was composed of 19 core members, empowered to perform various functions, including recommending federal policy reforms and creating a portal to collect ongoing criminal justice data. The task force was required to, *inter alia*, provide a report to the president summarizing the task force's progress within 90 days of its creation and 365 days after that.[10]

- **The White House Task Force on New Americans.**[11] Established by President Obama via presidential memorandum in November 2014, the White House Task Force on New Americans was co-chaired by the director of the Domestic Policy Council and the secretary of Homeland Security. The task force was composed of 16 core members—all government employees—and was empowered to recommend agency actions, measure and strengthen government services and programs, collect and disseminate data related to immigration, and provide technical assistance to federal grantees coordinating immigrant integration. The task force was required to deliver a series of proposed recommendations to the president within 120 days of its creation and a follow-up status report one year later. The task force's original report provided both an assessment of current programs and recommendations for future initiatives.[12]

Trump administration:

- **The Task Force on Missing and Murdered American Indians and Alaska Natives.**[13] Established by President Trump via EO in December 2019, the Task Force on Missing and Murdered American Indians and Alaska Natives is co-chaired by the attorney general and the secretary of the Interior. This task force is responsible for improving the criminal justice system as it relates to the American Indian and Alaska Native communities—more specifically its impacts on missing and murdered indigenous women and girls. The task force is made up of six core members—all government employees—and is empowered to implement recommendations, consult with relevant tribal governments, develop new protocols, improve law enforcement response policies, establish a multi-disciplinary and multi-jurisdictional team to review previous cases, clarify relevant roles in investigations, and develop and execute outreach and education campaigns. The task force is also responsible for producing two forthcoming annual reports on its accomplishments and activities.

- **President's Commission on Combating Drug Addiction and the Opioid Crisis.**[14] Established by President Trump via EO in March 2017, the commission was chaired by

[10] My Brother's Keeper Task Force, "My Brother's Keeper Task Force Report to the President," May 28, 2014, https://obamawhitehouse.archives.gov/sites/default/files/docs/053014_mbk_report.pdf.
[11] President Barack Obama, Presidential Memorandum, "Creating Welcoming Communities and Fully Integrating Immigrants and Refugees," November 11, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/11/21/presidential-memorandum-creating-welcoming-communities-and-fully-integra.
[12] White House Task Force on New Americans, "One Year Progress Report," December 15, 2015, https://obamawhitehouse.archives.gov/sites/default/files/image/tfna_progress_report_final_12_15_15.pdf.
[13] President Donald Trump, "Establishing the Task Force on Missing and Murdered American Indians and Alaska Natives," Executive Order 13898, November 26, 2019, https://www.govinfo.gov/content/pkg/FR-2019-12-02/pdf/2019-26178.pdf.
[14] President Donald Trump, Executive Order 13784, "Establishing the President's Commission on Combating Drug Addiction and the Opioid Crisis," March 29, 2017, https://www.federalregister.gov/documents/2017/04/03/2017-06716/establishing-the-presidents-commission-on-combating-drug-addiction-and-the-opioid-crisis.

the Governor of New Jersey. The commission's mission was to study the efficacy of the federal government's response to the opioid crisis and make recommendations to improve it. The commission was made up of both government and non-government employees, and included several other governors, a medical official, a state attorney general, and a member of Congress. The commission was directed to review current federal programs, examine the accessibility and affordability of addiction treatments, and identify best practices for addiction prevention. The commission was required to present an update to the president within 90 days of its creation, in addition to a final report presenting its recommendations and findings.[15]

- **The Task Force on Crime Reduction and Public Safety.**[16] Established by President Trump via EO in February 2017, the Task Force on Crime Reduction and Public Safety was chaired by the attorney general. who was given full authority to appoint the task force's other members. The task force's mission was to develop strategies to reduce crime, identify weaknesses in current laws, and make recommendations to strengthen federal enforcement. The task force was required to deliver at least one report to the president on its progress and recommendations, but that report was not publicly released.[17]

III. Proposed action

To better coordinate the federal government's interagency response to gun violence in America, the next president should issue an EO establishing an interagency White House GVP task force. The EO should be issued, and the GVP task force should be established within the first 100 days of the administration.

In part, the task force would be responsible for producing a comprehensive set of executive-action recommendations within three months of its establishment, and members would be required to regularly report on progress the agencies are making in implementing the recommendations.

Establishing the GVP task force would send a clear signal to government agencies, Congress, and the American people that the next administration is making gun safety a top priority. It would also allow the administration to establish goals and outline actionable priorities that could be tracked within an established, time bound reporting structure —ensuring meaningful progress and accountability from government agencies.

Using examples from previous executive branch task forces as a guide, the following should be considered when issuing an EO forming the GVP task force.

[15] President's Commission on Combating Drug Addiction and the Opioid Crisis, "Final Report," November 1, 2017, https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf.

[16] President Donald Trump, "Presidential Executive Order on a Task Force on Crime Reduction and Public Safety," Executive Order 13776, February 9, 2017, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-task-force-crime-reduction-public-safety/.

[17] Brennan Center for Justice, "Crime and Safety Task Force Recommendations Should be Made Public," July 26, 2017, https://www.brennancenter.org/our-work/analysis-opinion/crime-and-safety-task-force-recommendations-should-be-made-public.

- Purpose and Mission. The mission of the GVP task force would be to identify opportunities across the federal government to address aspects of the gun-violence epidemic and establish a coordinated federal response to reduce gun violence in America. The GVP task force would be responsible for, *inter alia*, providing recommendations on gun safety executive actions, conducting an audit of existing gun safety grant programs, assisting in the development of the president's gun safety legislative agenda, and reporting back on the progress individual agencies are making to address all aspects of gun violence, including urban violence, mass shootings, domestic violence, suicide, police-involved shootings, and unintentional shootings.

- Membership. The task force would be composed of key leaders across the administration who have unique expertise and perspective on gun violence, including:

    - White House chief of staff (co-chair)
    - US attorney general (co-chair)
    - US secretary of Health and Human Services (co-chair)
    - ATF director
    - director of the Centers for Disease Control and Prevention
    - director of the National Institutes of Health
    - director of the Substance Abuse and Mental Health Services Administration
    - FBI director
    - secretary of Homeland Security
    - secretary of Housing and Urban Development
    - secretary of Education
    - secretary of the Interior
    - secretary of Veterans Affairs
    - secretary of Defense
    - secretary of Commerce
    - surgeon general
    - senior White House officials, including the director of the Office of Management and Budget, the director of the Domestic Policy Council, the assistant to the president for Intergovernmental Affairs, the assistant to the president for Legislative Affairs, and the director of the Office of Public Engagement.

  Members of the task force would have authority to designate a senior-level official who is a part of the member's department, agency, or office, to perform the functions of the member.

- Administration. The GVP task force would be supported administratively by the Executive Office of the President for funds, facilities, staff, equipment, and other support services necessary to carry out its mission. The co-chairs would convene regular meetings of the task force, determine its agenda, and direct its work. At the direction of the co-chairs, the task force would have authority to establish subgroups consisting exclusively of task force members or their designees.

- Staffing. While the task force would be co-chaired by the White House chief of staff, attorney general, and the secretary of Health and Human Services, its day-to-day operations would be managed by a deputy assistant to the president, reporting directly to the chief of staff and serving as the council's executive director. This individual should have experience working on gun violence prevention issues and be well positioned to bring the full weight of the White House to bear on the task force's work, including by

coordinating among the Office of the Chief of Staff, the DPC, the White House Office of Legislative Affairs, the Office of the White House Counsel, and the White House Office of Public Engagement and Intergovernmental Affairs.

- Functions. The GVP task force would be tasked with the following functions, which should be included in the EO creating the task force.

    - **Assist in the development of the president's legislative agenda.** The GVP task force should advise the White House on the president's gun safety legislative agenda, including the president's 100-day priorities. This would include analyzing potential legislation, engaging key stakeholders, and coordinating a legislative strategy with congressional leaders.

    - **Recommend an action report to the president.** Within three months of its inception, the task force would be tasked with presenting to the president a federal interagency plan with recommendations for executive action consistent with the goal of reducing gun violence. The plan would include: (1) an assessment of major federal programs, offices, policies, and data sources concerning gun violence and gun safety, (2) recommendations for executive action across government agencies, including regulatory and subregulatory actions, (3) a recommended timeline for proposed action, and (4) recommendations for issues, programs, or initiatives that should be further evaluated or studied by the task force.

    - **Review grant funding.** The GVP task force would be tasked with conducting a comprehensive analysis of how current federal grant programs are being used to invest in community-based violence intervention programs, including recommendations for how agencies can use existing authority to increase investment in these programs, including group violence interventions, street interruption or outreach programs, and hospital-based violence intervention programs.[18]

    - **Advise the HHS secretary regarding PHE determinations.** Under the Public Health Service Act, the secretary of HHS can declare a public health emergency (PHE) if certain criteria are met.[19] Once the secretary declares a PHE, HHS can take action to respond to the PHE, including by making grants, entering into contracts, and conducting investigations into the cause, treatment, or prevention of the disease or disorder. In addition, the secretary may access funds appropriated to the Public Health Emergency Fund.[20] In making this determination, the secretary may "consult[] with such public health officials as may be necessary."[21] The GVP task force would serve in this advisory role, providing expertise to the HHS secretary in making PHE determinations on the basis of spikes in gun violence.[22]

[18] *See, e.g.,* Giffords Law Center, "Intervention Strategies," accessed August 20, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.

[19] 42 U.S.C. § 247d.

[20] *Id.*

[21] 42 U.S.C. § 247(f)(1).

[22] *See* "Recommended Action Memo: Declare public health emergencies in areas where shootings and gun homicides are greatest, and use the authority pursuant to those declarations to address those

- **Engage external stakeholders.** In accordance with applicable law, including the Federal Advisory Committee Act (FACA),[23] and in addition to regular meetings, the GVP task force would consult with external stakeholders, including gun violence survivors and advocacy groups, student groups, veterans, parents, local community organizations, and state and local officials.

- **Create a GVP task force website.** The GVP task force would create a domain on the White House website to publicize its work. The website would include the latest gun violence statistics, provide access to gun safety resources, and highlight announcements about the GVP task force's progress and recommendations.

- **Deliver bi-annual status update reports.** After submitting a recommended action report to the president, the GVP task force would be charged with delivering quarterly status updates to the president. Similar to the annual reports submitted by the White House Task Force on New Americans,[24] these reports would include a detailed account of the task force's progress toward delivering on its recommendations.

IV. Legal justification

Establishing a White House GVP task force is squarely within the president's authority, and would follow similar models of past administrations in establishing task forces to confront urgent issues facing the nation.

The power to create task forces draws on the president's Article II powers. Article II, Section 2 of the US Constitution allows the president to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," which includes cabinet members, who head executive departments. Article II, Section 3 speaks to the president's power to convene and report to Congress issues that concern him.

Executive orders and presidential memorandums

Past presidents have established White House task forces using either EOs[25] or presidential memorandums.[26] As the DOJ's Office of Legal Counsel has consistently held,

emergencies," https://giffords.org/wp-content/uploads/2020/11/Declare-public-health-emergencies-in-areas-where-shootings-and-gun-homicides-are-greatest-and-use-the-authority-pursuant-to-those-declarations-to-address-those-emergencies.pdf.

[23] Pub. L. 92–463, 86 Stat. 770.

[24] White House Task Force on New Americans, "One Year Progress Report," December 15, 2015, https://obamawhitehouse.archives.gov/sites/default/files/image/tfna_progress_report_final_12_15_15.pdf.

[25] *See e.g.,* President Barack Obama, "Establishment of the President's Task Force on 21st Century Policing," Executive Order 13684, December 18, 2014; President Barack Obama, "Creating the White House Council on Women and Girls," Executive Order 13506, March 11, 2009.

[26] *See e.g.,* President Barack Obama, Presidential Memorandum, "Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals," April 29, 2016; President Barack Obama, Presidential Memorandum, "Creating and Expanding Ladders of Opportunity for Boys and Young Men of Color," February 27, 2014.

"there is no substantive difference in the legal effectiveness of an executive order and a presidential [memorandum] that is not styled as an executive order."[27]

As such, whether the next administration creates the GVP task force via EO or presidential memorandum will have no substantive legal effect on the task force's work. However, we recommend the GVP task force be established via EO, as it will send a stronger signal to the public and to federal agencies that its work is a high priority.

Federal Advisory Committee Act

The GVP task force will not be subject to the requirements of the FACA.[28] Enacted in 1972, the FACA seeks to promote transparency into the workings of the "numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch."[29]

FACA imposes a variety of requirements on "advisory committees," which are defined to include "any committee...which is...established or utilized by the President, or...by one or more agencies, in the interest of obtaining advice or recommendations."[30] Advisory committees are subject to FACA's requirements unless specifically exempted by statute.[31] While FACA applies to presidential advisory commissions in the same way as it applies to agency-created advisory commissions, the law excludes from its coverage a committee that is composed wholly of government employees.[32] As the GVP task force outlined above would be composed wholly of government employees, it would not be subject to FACA.

This remains true even if members of the GVP task force seek input from individuals and organizations. In order for FACA to apply, the government must receive *consensus group advice*, as opposed to *individual advice*.[33] For example, in *Association of Americans Physicians and Surgeons v. Hillary Clinton*, the US Court of Appeals for the DC Circuit held that when members of a group composed of federal officials held forums with non-federal stakeholders to gather information, the meetings did not violate FACA, because no effort was made to reach a consensus, or bring a collective judgment to bear.[34] The same would be true for the GVP task force: as stakeholder meetings would be used by government officials to gather information from organizations and individuals—and not as a means to garner consensus recommendations—FACA's requirements would not apply.

[27] Off. Legal Counsel, "Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order," January 29, 2000, https://www.justice.gov/file/19436/download.

[28] Pub. L. 92–463, 86 Stat. 770.

[29] 5 U.S.C. App. 2 § 2(a).

[30] 5 U.S.C. App. 2 § 3(2).

[31] *Id.* § 4.

[32] *Id.*

[33] *See e.g.*, 41 C.F.R. § 102-3.40(e) (group of individuals "assembled to provide individual advice" is not a committee subject to FACA); *see also In re Cheney*, 406 F.3d at 730–31 (holding task force subgroups were not FACA committees in part because their meetings with individuals who were not federal employees did not "involve deliberations or any effort to achieve consensus on advice or recommendations" but merely "collect[ed] individual views"); *Nader v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975) (meetings between an Assistant to the President and various executive branch officials and special interest groups, held for the purpose of exchanging views, did not constitute an advisory committee under FACA; alleged committees "were not formally organized and there is little or no continuity").

[34] *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913-14 (D.C. Cir. 1993).

RECOMMENDED ACTION MEMO

Agency: Department of Justice: ATF

Topic: The Importance of Nominating an ATF Director with Strong Leadership and Public Safety Experience

Date: November 2020

I. Summary

Description of recommended nomination

Housed within the Department of Justice, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is responsible for enforcing federal firearms laws and regulating the gun industry. But the ATF has faced challenges: an estimated 393 million guns in civilian hands, the explosive growth of the firearms industry, and the rising rates of gun violence across the country have left an often-stagnant ATF unable to keep up. As evidenced by its lack of funding and staffing, and legal hamstrings, the ATF remains without the tools to fulfill its mission effectively. Thanks to years of opposition from the gun lobby, a broad mandate, and lack of strong leadership, the ATF has also faced a personality and purpose crisis. Under the Biden administration, however, that can change. **The nomination and Senate confirmation of a permanent director with a background in law enforcement, a comprehensive understanding of this country's gun violence crisis, and strong leadership experience are pivotal to putting the ATF on the right track.**

Overview of process and time to enactment

An official nomination should be made within the first 100 days of the term.

II. Current state

Gun violence in the United States has reached a 40-year high. Firearm homicides and assaults have risen precipitously in the last several years, and these increases have been particularly concentrated in communities of color. According to the Centers for Disease Control and Prevention (CDC), 39,740 people died from a gun in 2018—8,147 more than 10 years prior—and on average, nearly 109 people were killed by guns each day, which means that a gun death in America occurred every 13 minutes. Nearly 14,000 people were killed in a gun homicide in 2018; more than 24,000 died by gun suicide.

As the part of the federal government tasked with enforcing our nation's gun laws and protecting public safety, the ATF should be taking major steps to stop this scourge of gun violence. As the gun industry develops new products, the ATF's enforcement tactics should adapt; as guns flood communities through unlawful trafficking channels, the ATF should prioritize shutting down corrupt gun dealers and cracking trafficking cases. But instead of being the protectors of public

safety that they strive to be, ATF employees have been held back and limited due to resource and legal constraints. The ATF can only be most effective once the federal government treats gun violence like the public health crisis it is today.

How we got here

The ATF was originally established within the Office of Internal Revenue (IRS) in the Treasury Department, intended to collect taxes on alcohol and tobacco products. Over time, the ATF gained its enforcement responsibilities, which grew significantly in the 1920s during Prohibition. Violence also increased during Prohibition, leading the transfer of the Department of Prohibition, as it was then known, to the Department of Justice. In response to this increased violence, largely perpetrated by organized crime syndicates, Congress passed the National Firearms Act of 1934 (NFA) and tasked the ATF with its enforcement. The NFA imposed an excise tax and registration requirements on a narrow category of particularly dangerous firearms, including machine guns, short-barreled shotguns or rifles, and silencers; it was the first major regulation of firearms commerce.

The 1960s and 1970s gave the ATF new enforcement responsibilities with the passage of the Gun Control Act of 1968 and the Explosives Control Act in 1970, as well as new independence: it was officially established as the Bureau of Alcohol, Tobacco and Firearms in 1972. Both of these pieces of legislation defined, for the first time, eligibility standards for purchasing and possessing firearms and explosives, and established requirements for individuals seeking to sell these items. But as the Gun Control Act was implemented, internal strife and disagreements led to changes in leadership within the National Rifle Association (NRA), allowing a more extreme, anti-regulation faction to take control. The NRA sought to tear apart the Gun Control Act as enforced by the ATF, and many other of ATF's regulatory capabilities.

While other federal law enforcement agencies grew substantially in the wake of the September 11, 2001 terror attacks, the ATF did not. Instead, its enforcement and regulatory responsibilities were transferred completely to the Department of Justice, and it was renamed the Bureau of Alcohol, Tobacco, Firearms, and Explosives, as it exists today. The Department of Justice was laser-focused on terrorism and national security at that time, and giving the ATF similar national security responsibilities as those held by the FBI, caused friction between the agencies. This has only been exacerbated as the FBI continues to grow: the FBI's budget increased 62% from 2005 to 2015, while ATF's budget increased by only 34%.

The ATF is expected to enforce firearm laws across the entire country. Yet the agency has fewer special agents than the Washington DC Metropolitan Police Department has sworn officers. The agency had fewer employees in 2017 than it did in 2002, despite tens of millions of guns entering civilian hands during that period. Agents are tasked with more work than they can ever hope to accomplish and are forced to let certain leads go unpursued. As of June 2020, the ATF employed only 770 field industry operations investigators (IOI), who are responsible for compliance inspections of more than 53,000 federally licensed firearms dealers; other manufacturers; importers; and dealers of guns and explosives. As a result of such a vast

staffing shortage, only 7.7% of all independent dealers were inspected in 2018. This issue is a sustained one: in 2013, an OIG report found that over 58% of FFLs had not been inspected within the past five years, due, in part, to a lack of ATF resources.

The gun lobby's goal is to make the ATF ineffective at enforcing gun laws by cutting off its resources and tying its hands, and in large part, the gun lobby has succeeded. With the passage of the Firearm Owners Protection Act in 1986, the NRA succeeded in securing legislative language limiting the ATF to only one inspection of gun dealers per year and prohibiting a government-held national gun registry. In the 2000s, additional restrictions were added to the law in the form of legislative riders, known as the "Tiahrt amendments," which restrict the ATF's release of firearms trace data, require background check records to be destroyed within 24 hours of NICS approval, and prohibit the ATF from requiring gun dealers to submit inventories to law enforcement. Thanks to the gun lobby, the ATF is also limited in its ability to manage records from out-of-business gun dealers, consolidate current FFL records, deny dealer licenses, and change rules related to certain firearms imports. This makes the ATF's job significantly more difficult.

Lack of resources have also caused the ATF to struggle to keep up with high demand for NFA-regulated products: over the past eight years, the number of silencers registered with the ATF has increased sixfold, with 285,087 silencers registered in 2010 (10% of all registered NFA weapons), and 1,750,433 registered in May 2019 (28.89% of all registered NFA weapons). The average reported wait time for a silencer transfer to an individual is between 7 and 8.5 months.

The firearms industry, however, has responded to the increased demand. An average of 8.4 million guns were manufactured each year from 2009 to 2018—double the yearly average from 1986 to 2008—hitting its 31-year peak in 2016 with 11.5 million guns produced. The number of licensed gun manufacturers increased 255% from 2009 to 2018. While many of these manufacturers are law-abiding, others choose to capitalize on the ATF's limitations and antiquated federal gun laws by purposely producing products that skirt the law. Though the ATF took a positive step toward common sense gun regulation in banning bump stocks after one was used to kill 58 people and injure hundreds more in Las Vegas in 2017, the agency has failed to adequately regulate other products that are likewise intended to skirt the NFA's intent. The ATF routinely tells Congress that the agency is doing the best it can, given its legal and resource restrictions.

III. Proposed action

In order to make the case for increased staffing, resources, and help from Congress most effectively, the ATF needs a strong leader. During the first 34 years after its establishment as an independent bureau in 1972, the ATF had seven different directors; however, this steady pattern of leadership was upended in 2006, when the NRA successfully lobbied to require Senate confirmation for the position of ATF director. The gun lobby then opposed the nomination of a Republican US attorney, nominated by the Bush administration, as well as the head of the ATF Chicago division, nominated by the Obama administration. During this period, the ATF was led

by three different acting directors. As part of the Obama administration's gun violence prevention push after the 2012 shooting at Sandy Hook, then-Acting Director B. Todd Jones was nominated to fulfil the permanent role; in a victory for the administration, he was confirmed as the ATF's first permanent director in seven years with a vote of 53-42. Since his resignation in 2015, the ATF has returned to acting directors. The Trump administration's single official nominee, Fraternal Order of Police President Chuck Canterbury, did not come until 2019; due to a disastrous nomination hearing and long history with firearms that caused concern from both sides of the aisle, his nomination was rescinded in 2020. As a result, the ATF remains without a permanent leader today.

Without a permanent director, the ATF has been unable to prepare for its future effectively, or regulate the rapidly expanding gun industry. It has also been particularly susceptible to "mission creep" among the other DOJ agencies. The ATF is tasked with the enforcement of firearms laws as well as the investigation of firearms, arson, alcohol, and tobacco crimes, but also with the regulation of the gun and explosives industries. Because the ATF shares many of these investigatory responsibilities with the FBI, coordination between the two agencies is critical. This is especially true since the FBI is larger, better funded, and without the legal restrictions that hamper the ATF. Lacking experienced leadership can make this dynamic a challenge and result in the ATF being viewed as the "little brother" of federal law enforcement.

The Biden administration must nominate a permanent ATF director within the first six months of entering office and ensure their swift Senate confirmation. A strong ATF leader is also crucial for effectively advocating for additional resources and political support from Congress.

As outlined in the accompanying memos, among the ATF director's top priorities should be:

(1) regulating ghost guns
(2) increasing the ATF's emphasis on gun trafficking cases, and producing an updated gun trafficking report for public consumption
(3) ensuring the ATF inspects all licensed firearms and explosives dealers annually, and enforcing strict consequences on dealers who skirt the law
(4) improving and modernizing the ATF's process of tracing guns
(5) putting an end to the importation of assault weapons

IV. Legal justification

The ATF's current structure began to take shape through the Homeland Security Act of 2002, which codified the requirement that the agency have a director, although at that time, the attorney general could simply appoint the director.[1] Then, in 2006, Congress reauthorized the Patriot Act, including a provision requiring the ATF director to be appointed by the president, with the advice and consent of the Senate.[2] This provision was reportedly added at the behest

[1] 107 P.L. 296, 116 Stat. 2135 (2002).
[2] USA Patriot Improvement and Reauthorization Act of 2005, 109 P.L. 177, 120 Stat. 192 (2006).

of the NRA, which lobbied Rep. F. James Sensenbrenner Jr. (R-Wis), then chairman of the House Judiciary Committee, to insert it.

Thus, the president may nominate an ATF director, and the Senate must confirm this nominee. This process is well known and referenced in the Constitution, and is therefore unlikely to spark any legal challenges.[3]

Notably, since 2006, the NRA has lobbied against several nominees for ATF director, making it difficult for the Senate to fulfill its role in this process. This problem was confounded by the filibuster, which enabled a minority of senators to block the confirmation of an ATF director (and other officials). However, in 2013, the Senate changed its rules so that only a simple majority is needed to end debate and confirm a new director. Consequently, it may be easier for the next president to get the Senate to confirm an ATF director than it has been in the past.

[3] U.S. Const. Art. II, sec. 2 (“the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ...public Ministers and Consuls, ...and all other Officers of the United States, whose Appointments are not herein otherwise provided for...").

RECOMMENDED ACTION MEMO

Agency: Executive Office of the President; Office of the Attorney General
Topic: Building Police–Community Trust in Communities of Color with High Rates of Gun Violence
Date: November 2020

Recommendation: Use executive authority to restore DOJ's critical role in promoting oversight and reform of unconstitutional policing practices, and significantly expand the federal government's role in promoting the reforms necessary to build police-community trust nationwide.

I. Summary

Description of recommended executive action

A major barrier to reducing gun violence in communities around America is the lack of trust between these communities and law enforcement. Too often, communities of color experience disparate, harmful treatment at the hands of the criminal justice system, including the police. The harmful treatment takes the form of over-enforcement of minor infractions and police use of force, including shootings. As a result, community residents are less likely to report shootings and other crimes, cooperate with the police, or serve as witnesses. Without active community trust and collaboration, law enforcement often finds it challenging to solve violent crimes and fails to make an arrest in over half of homicides of Black Americans.[1] Unable to trust police for protection, some young people seek protection outside law enforcement, including carrying guns, despite the risks, or turning to groups that offer the perception of safety. A very small number of men within these groups, which constitute a fraction of 1% of the average city's population, drive a majority of shootings and homicides in our cities.[2]

To reduce gun violence in underserved communities of color, relationships between the community and the law enforcement officers who pledged to serve and protect need to be improved; trust needs to be built and earned; and communities need to feel justly and effectively protected from violence.

This memo is not intended to be a complete review of recommended criminal justice and policing reforms, but will identify key proposals for executive action to help address gun violence through renewed investment in efforts to build the police–community trust necessary to produce community safety and reverse cycles of violence. Under this proposal, the new administration

[1] A recent in-depth investigation by the *Washington Post* found that across 52 of the nation's largest cities over the past decade, 53 percent of all murders of Black Americans never led to an arrest, let alone a conviction. Nearly three-quarters of all unsolved murders in these cities involved a victim who was Black. Gun homicides and nonfatal shootings are even less likely to lead to an arrest. Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.

[2] *See* Stephen Lurie, et al., "The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities (forthcoming); Stephen Lurie, Alexis Acevedo, and Kyle Ott, "Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/nnsc_gmi_concentration_asc_v1.91.pdf.

should, via executive orders (EOs), budgetary action, and certain actions by specific DOJ agencies, restore the DOJ's critical role in promoting oversight and reform of unconstitutional policing practices; and significantly expand the federal government's role in promoting reform by implementing the recommendations of the 2015 Task Force on 21st Century Policing; the Leadership Conference Education Fund's recommended best practices for 21st century policing; and Giffords Law Center to Prevent Gun Violence's report on building police–community trust to stop cycles of violence. Finally, the administration should, in the absence of legislation, adopt, by executive action, key provisions of the George Floyd Justice in Policing Act.

Overview of process and time to enactment

(1) Executive order

Issuing executive orders to establish various task forces is within the president's authority and should be stood up within the first 100 days of the next administration, signaling a commitment to address the public health crisis of gun violence in America. To do that, the next president should issue EOs to create task forces. The EOs should include details related to each task force's mission, membership, administration, and directives.

(1) Budgetary action

Each year the president submits a budget request for the coming fiscal year to Congress. The new administration will need to submit their budget request within the first 100 days of their administration.

(2) Actions within the DOJ

The attorney general has broad authority over the DOJ.[3] The mission of the Office of the Attorney General is to supervise and direct the administration and operation of all DOJ agencies.[4] Consequently, the attorney general should take the lead at the start of the next administration and issue directives to DOJ agencies to take the actions recommended below. These actions should be a priority for these agencies.

II. Current state

Gun violence in communities of color

Nowhere is the gun violence crisis more evident than in our underserved communities of color, where homicide rates often reach 10 times the national average,[5] and the rate of gun injuries is 10 times higher for Black children and teens than for white children and teens.[6] Black men

[3] See 28 U.S.C. § 509.
[4] Dep't of Justice, *Organization, Functions and Missions Manual,* https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general.
[5] Giffords, "Urban Gun Violence," last accessed July 15, 2020, https://giffords.org/issue/urban-gun-violence/.
[6] The rate of non-fatal shootings is 51.1 per 100,000 people for young black Americans versus 5.0 per 100,000 people for young whites. Arthur R. Kamm, Violence Policy Center, and Amnesty International, "African-American Gun Violence Victimization in the United States, Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," June 30, 2014, http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17803_E.pdf.

constitute 7% of the US population but account for more than 50% of all gun homicides each year.[7] In 2016, violence was responsible for 4% of deaths among young white men and boys aged 15–24, 20% of deaths among young Hispanic men and boys ages 15 to 24, and, incredibly, more than half of all deaths among young Black men and boys of the same age.[8] Nearly all these deaths were caused by guns. The chance of a Black American family losing a son to a bullet is 62% greater than losing him to a car accident.[9]

This high concentration of violence creates a vicious cycle.[10] A study of adolescents participating in an urban violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence.[11] The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—doubles the probability that a young person will commit a violent act within two years.[12] In other words, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue, absent an intervention.

Further, in city after city, an incredibly small and identifiable segment of a given community is responsible for the vast majority of gun violence.[13] Shootings and homicides in America are highly concentrated within city neighborhoods marked by high levels of racial segregation, severe concentrated poverty, and estrangement from law enforcement. An analysis by *The Guardian* observed that more than a quarter of the nation's gun homicides occurred in city neighborhoods containing just 1.5% of the US population.[14] In 2019, research from the National Network for Safe Communities, based on data from nearly two dozen cities, confirmed that at least half of homicides and nonfatal shootings involve people—as victims and/or perpetrators—known by law enforcement to be affiliated with social networks involved in violence. These networks were found to constitute, on average, less than 0.6% of a city's population; an even smaller subset actually commits violent crime.[15]

[7] Giffords, "Community Violence," last accessed October 1, 2020, https://giffords.org/issues/community-violence/.
[8] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.
[9] Giffords, "As Teens Gather in South Side Chicago to Protest Lack of Action on Gun Violence Crisis, Giffords Law Center Releases New Report Highlighting How Summer Months Bring Spikes in Shootings," news release, https://giffords.org/press-release/2018/06/summertime-gun-violence/,
[10] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," last accessed July 15, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.
[11] Jonathan Purtle et al., "Scared safe? Abandoning the Use of Fear in Urban Violence Prevention Programmes," Injury Prevention, 21, no. 2 (2015): 140–141, doi: 10.1136/injuryprev-2014-041530.
[12] Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, "Firearm Violence, Exposure and Serious Violent Behavior," Science 308 (2005): 1323–1326.
[13] David M. Kennedy et al., "Reducing Gun Violence: The Boston Gun Project's Operation Ceasefire," US Department of Justice, Sept. 2001, https://www.ncjrs.gov/pdffiles1/nij/188741.pdf.
[14] Aliza Aufrichtig, et al., "Want to fix gun violence in America? Go local," The Guardian, January 9, 2017, https://www.theguardian.com/us-news/nginteractive/2017/jan/09/special-report-fixing-gun-violence-in-america.
[15] *See* Stephen Lurie, et al., "The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities (forthcoming); Stephen Lurie, Alexis Acevedo, and Kyle Ott, "Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/nnsc_gmi_concentration_asc_v1.91.pdf; Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the

Law enforcement

The vast majority of residents who live in cities with high rates of gun violence are not perpetrators, and in many cases hold positions of trust in their neighborhoods. This makes them valuable partners to law enforcement in interrupting cycles of violence. However, our country's most effective police departments know that to be successful in interrupting cycles of community violence, law enforcement officers "must have active public cooperation, not simply political support and approval."[16] They need witnesses to trust them, come forward with information, and testify. They need to work closely with community organizations and service providers to intervene and prevent violence before it occurs. They need grieving victims to trust that the justice system will deliver justice and keep them safe, so a desperate few don't resort to vigilante forms of justice.[17]

The challenge of building trust and collaboration is made much more difficult by policing tactics used in some cities. Reliance on an aggressive, punitive approach to low-level offenders does little to address the violence and trauma in communities most impacted;[18] instead, it often contributes to community distrust. Nationwide, our police forces arrest more people for possessing personal quantities of marijuana than for all violent crimes combined, while failing to make any arrests in the majority of murders of Black Americans.[19] This overenforcement and under-protection are two sides of the same coin.[20] Both devalue the lives and priorities of communities of color, and reinforce a destabilizing lack of trust that undermines public safety.

Research has also documented significant and durable declines in 911 calls following publicized incidents of police violence.[21] In 2016, a team of researchers demonstrated that after on- and off-duty officers brutally attacked Milwaukee resident Frank Jude in October 2004, city residents became significantly less likely to call 911 for over a year. The police department saw a significant drop in 911 calls reporting violent crimes after the incident was publicized, especially from predominantly Black neighborhoods. The police department received an estimated 22,000 fewer 911 calls after the incident, despite a concurrent 30% increase in the number of homicides citywide.

Cycle of Violence," January 17, 2020, 31-32, https://lawcenter.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf.

[16] Tom R. Tyler and Jeffrey Fagan, "Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?" *Ohio State Journal of Criminal Law*, Vol. 6 (2008), 266–267, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4027&context=fss_papers.

[17] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.

[18] *See* Giffords Law Center to Prevent Gun Violence, PICO National Network, and the Community Justice Reform Coalition, "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence/.

[19] See Timothy Williams, "Marijuana Arrests Outnumber Those for Violent Crimes, Study Finds," The New York Times, October 12, 2016, https://www. nytimes.com/2016/10/13/us/marijuana-arrests.html.

[20] Jill Leovy, Ghettoside: A True Story of Murder in America (New York: Penguin Random House, 2015), 283.

[21] Matthew Desmond, Andrew V. Papachristos, and David S. Kirk, "Police Violence and Citizen Crime Reporting in the Black Community," American Sociological Review (2016): 1–20, https://assets.documentcloud.org/documents/3114813/Jude-911-Call-Study.pdf.

Effective and sustained police reforms and a large-scale investment in building earned police-community trust are therefore critical to promote proactive, just, and effective responses to community violence.

Obama administration action

Under President Obama, the DOJ's Civil Rights Division completed thorough, independent investigations of unconstitutional policing practices, obtained consent decrees with 14 out of the nation's 18,000 law enforcement agencies, and finalized other oversight and reform agreements with 10 others.[22] (The department also concluded investigations of at least six other agencies without finding patterns or practices of unconstitutional policing).[23] While at times contentious, these decrees led to documented improvements in police practices and community trust; in Seattle, for instance, the independent monitor appointed by the court to oversee the consent decree concluded that Seattle had largely complied with its reform requirements, and found that "the results have been impressive," as "public trust in the Seattle Police Department ha[d] steadily increased."[24] After the police department implemented new training and reform requirements, the number of incidents in which officers used "moderate to severe force" against civilians dropped by 60%, and public surveys found notable gains in community approval of the department, especially among Black and Latino residents.[25]

In 2011, the DOJ also launched the Collaborative Reform Initiative, a voluntary alternative to the consent decree process in which "law enforcement agencies facing significant issues that may impact public trust undergo a comprehensive assessment, are provided with recommendations on how to address those issues, and receive technical assistance to implement such recommendations."[26] By the end of the administration, 16 law enforcement agencies had voluntarily requested to participate,[27] and an early review of the initiative's impact concluded that it had "been shown to be a valuable tool for inspiring and accelerating change in many of the departments" and that evidence for "organizational transformation" in those police departments was "abundant."[28]

In 2014, following the highly publicized death of Michael Brown at the hand of law enforcement, and in response to a recommendation in the My Brother's Keeper Task Force report, the DOJ launched and funded the National Initiative for Building Community Trust and Justice (National Initiative) pilot program. The National Initiative funded programs in six cities to work with

[22] "An Interactive Guide to the Civil Rights Division's Police Reforms," US Department of Justice, January 18, 2017, https://www.justice.gov/crt/page/file/922456/download.
[23] "Police Reform and Accountability Accomplishments," US Department of Justice, last accessed October 17, 2019, https://www.justice.gov/opa/file/797666/download.
[24] Merrick J. Bobb, "Op-Ed: Jeff Sessions thinks consent decrees increase crime. He's just plain wrong," Los Angeles Times, April 25, 2017, https://www.latimes.com/opinion/op-ed/la-oe-bobb-consent-decrees-work-20170425-story.html.
[25] *Id.*
[26] Megan Collins, et al., "Assessment of the Collaborative Reform Initiative in the Las Vegas Metropolitan Police Department: A Catalyst for Change," Crime and Justice Institute, last accessed January 14, 2018, https://www.hsdl.org/?abstract&did=804080.
[27] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.
[28] Christine Cole, et al, "The Collaborative Reform Initiative: Experiences of Selected Sites," Office of Community Oriented Policing Services (2017), http://www.crj.org/assets/2017/07/4_COPS_CRI_report.pdf.

community members and police departments to strengthen mutual trust and engagement. The National Initiative provided technical assistance and training to law enforcement on community-policing strategies and implicit bias; made recommendations for department policy changes to promote procedural justice, accountability, and transparency; and launched new public-facing efforts to interact with and engage community residents, acknowledge harms, and reset patterns of distrust.[29] In each city, law enforcement held listening sessions with residents to facilitate trust-building and reconciliation.

A survey of the residents in "street segments" that had the highest rates of both poverty and crime in each of the six pilot cities found modest but critical gains in various measures of community–police relations three years after an initial survey was conducted, including:

- An 8% increase in respondents who said they felt comfortable around the police
- An 11% increase in respondents who said they felt relatively safe in their neighborhood
- A 10% decrease in respondents who said that shootings or shooting attempts were a weekly or daily occurrence in their neighborhood
- A 13% decrease in respondents who said they knew someone who had been the victim of a shooting or an attempted shooting in the previous year[30]

Finally, a few months after the National Initiative was launched, President Obama signed an executive order to create a national blue-ribbon Task Force on 21st Century Policing. The task force studied best practices from cities and police forces around the country, holding hearings in which they received testimony of community members, crime experts, researchers, police chiefs, unions, frontline officers, mayors, and civil rights advocates. In May 2015, the task force released its comprehensive final report of concrete recommendations for how police departments could "promote effective crime reduction while building public trust."

Trump administration action

The Trump administration has sharply curtailed federal efforts to investigate, collaborate with, and reform troubled police departments to build community trust, forsaking these powerful tools to inspire and accelerate change.[31] The Trump administration has not entered into a new consent decree with any law enforcement agency suspected of "systemic abuses of constitutional rights," and has only announced the completion of one pattern-or-practice

[29] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.
[30] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.
[31] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.

investigation.[32] Though the Trump administration inherited 15 consent decrees from the Obama administration, it has also withdrawn from at least one, and relaxed enforcement of the others.[33]

In addition, by September 2017, the DOJ had effectively ended the Collaborative Reform initiative, and blocked release of reports assessing systemic practices contributing to community distrust in cities from North Charleston to Milwaukee.[34]

Despite the administration's actions described above, in 2018, President Trump signed into law a modest but important piece of criminal justice reform legislation, called the FIRST STEP Act. And, in October 2019, he signed an executive order to establish the Commission on Law Enforcement and the Administration of Justice, tasked with "review[ing]...relevant research and expertise and mak[ing] recommendations [to the attorney general] regarding important current issues facing law enforcement and the criminal justice system" in the United States.[35] However, the 18-member Commission is solely composed of local, state, and federal law enforcement officials, and created 15 working groups of 112 members, with only five non-law enforcement members.[36] On October 1, 2020, a judge ordered that "the Commission's proceedings be halted—and no work product released—until the requirements of [the Federal Advisory Committee Act] are satisfied."[37] Following the murder of George Floyd at the hands of law enforcement in May 2020, President Trump issued an executive order on "safe policing for safer communities," which called for federally approved credentialing of state and local law enforcement; information sharing between federal, state, and local law enforcement on use of force incidents; law enforcement training on engaging with persons living with a mental illness or an addiction, or experiencing homelessness; and improving other law enforcement practices and building community engagement.[38]

III. Proposed action

[32] Robert Faturechi, "The Obama Justice Department Had a Plan to Hold Police Accountable for Abuses. The Trump DOJ Has Undermined It." ProPublica, September 29, 2020, https://www.propublica.org/article/the-obama-justice-department-had-a-plan-to-hold-police-accountable-for-abuses-the-trump-doj-has-undermined-it.
[33] *Id*.
[34] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.
[35] See President Donald J. Trump, "Executive Order on the Commission on Law Enforcement and the Administration of Justice," October 28, 2019, https://www.whitehouse.gov/presidential-actions/executive-order-commission-law-enforcement-administration-justice/.
[36] Tom Jackman, "Judge rules federal law enforcement commission violates law, orders work stopped as attorney general prepares to issue report," Washington Post, October 1, 2020, https://www.washingtonpost.com/crime-law/2020/10/01/judge-rules-federal-law-enforcement-commission-violates-law-orders-work-stopped-attorney-general-prepares-issue-report/?utm_source=The+Trace+mailing+list&utm_campaign=27081e2736-EMAIL_CAMPAIGN_2019_09_24_04_06_COPY_01&utm_medium=email.
[37] NAACP Legal Defense Fund, Inc. v. Barr, Civil Action No. 20-1132 (JDB) (October 1, 2020), https://www.washingtonpost.com/context/judge-s-ruling-on-presidential-commission-on-law-enforcement/68e1dad7-bbb9-4207-81c9-ec7e74800f58/?itid=lk_inline_manual_3. (The NAACP LDF challenged the composition and operation of the Commission—the Commission failed to file a charter, provide public notice of its meetings, and open its meetings to the public—are required under the Federal Advisory Committee Act.)
[38] President Donald J. Trump, "Executive Order on Safe Policing for Safer Communities," June 16, 2020, https://www.whitehouse.gov/presidential-actions/executive-order-safe-policing-safe-communities/.

To build police–community trust in communities of color with high rates of gun violence, the next administration should, via executive orders, budgetary action, and certain actions by specific DOJ agencies, restore the DOJ's critical role in promoting oversight and reform of unconstitutional policing practices; and significantly expand the federal government's role in promoting reform. The list of key proposals for executive actions below should not be considered exhaustive. The actions are compiled from and based on the Task Force on 21st Century Policing final report, The Leadership Conference Education Fund's recommended best practices for 21st century policing (which builds on the recommendations of the Task Force report), Giffords Law Center's *In Pursuit of Peace* report, and the George Floyd Justice in Policing Act.

(1) Executive orders

- The administration should issue separate EOs directing the DOJ to:
    - rescind and replace the Trump administration's directives, which currently limit the Civil Rights Division's ability to robustly investigate unconstitutional policing practices or pursue consent decrees and collaborative reform
    - establish a Law Enforcement Diversity initiative "to help communities diversify law enforcement departments to reflect the demographics of the community"
    - establish a Task Force on Law Enforcement Oversight to develop recommendations specific to policing. This task force should address:
        - "effective management, training, recruiting, hiring, and oversight standards and programs to promote effective community and problem-solving strategies for law enforcement agencies"
        - the creation of civilian review boards with subpoena power and effective enforcement authority
        - certification and decertification program standards
        - the involvement of trauma-informed community intervention workers in law enforcement responses to non-violent calls (e.g., homelessness); intimate partner violence situations; the serving of extreme risk protection orders; and in other situations where the addition of this expertise would facilitate de-escalation, increase safety, and assist in connecting people to services
        - reporting of incidents involving the use of force by or against law enforcement, including the demographics of civilians and substantive details surrounding the incident
        - establishing a policy on the elimination of, and process for administrative complaints on racial, religious, and discriminatory profiling by law enforcement
    - establish a National Crime and Justice Task Force "to review and evaluate all components of the criminal justice system," (including drug policy, the bail system, and sentencing and incarceration) and make recommendations for reform.

- The administration should also issue separate EOs directing:
    - the Department of Education and DOJ to establish a task force that develops model policies and programs "that address the needs of children and youth most at risk for crime or violence and reduce

aggressive law enforcement tactics that stigmatize youth and marginalize their participation in schools and communities."
    - the Department of Health and Human Services and the DOJ to "establish a task force to study mental health issues unique to officers and recommend tailored treatments."
    - "[A]ll federal law enforcement agencies to review the recommendations made by the Task Force on 21st Century Policing and, to the extent practicable, to adopt those that can be implemented at the federal level."

(2) Budgetary actions

- The new administration should include in its FY 2022 budget proposal:
    - expanded targeted investments in community-based violence intervention and street outreach efforts (including group violence intervention) to build trust, interrupt cycles of violence, and protect those at greatest risk
    - funding for increased pattern-or-practice investigations, consent decrees, and collaborative reform efforts by the DOJ and state attorneys general.
    - targeted Community Oriented Policing Services (COPS) funding to help cities create and implement civilian oversight efforts; improve homicide and non-fatal shooting solve rates; expand partnerships and utilization of violence intervention professionals and mental health counselors when responding to public safety crises; and support evidence-based trust-building efforts modeled after the National Initiative
    - funding to "support research into the factors that have led to dramatic successes in crime reduction in some communities through the infusion of non-discriminatory policing and to determine replicable factors that could be used to guide law enforcement agencies in other communities."

(3) Directives for agencies within the DOJ

- The DOJ should issue separate directives to:
    - the Civil Rights Division (CRD) to relaunch pattern-and-practice investigations and the use of settlement agreements and consent decrees, rescinding former Attorney General Jeff Sessions' memorandum effectively eliminating the use of settlement agreements and consent decrees
    - the Bureau of Justice Assistance (BJA) to:
        - launch comprehensive training for local, state, and federal law enforcement on racial profiling, implicit bias, procedural justice, and investigatory activities
        - "[c]onduct research to develop and disseminate a toolkit on how law enforcement agencies and training programs can integrate community members into [the] training process"
    - the Bureau of Justice Statistics (BJS) to collect and analyze demographic data on detentions (including stops, frisks, searches, summons, and arrests), use of force, and police misconduct
    - COPS to:
        - "[p]rovide technical assistance and collect best practices from existing civilian oversight efforts"
        - work with the Office of Justice Programs to encourage law-enforcement professional organizations to modify their curricula to include prominent coverage of the topical areas addressed in the Task Force on 21st Century Policing final report

- the Federal Bureau of Investigation (FBI) to "modify the curriculum of the National Academy at Quantico to include prominent coverage of the topical areas addressed in" the Task Force on 21st Century Policing final report
- the National Institute of Justice (NIJ) to "expand its research agenda to include civilian oversight"
- the deputy attorney general and associate attorneys general to review all law enforcement–related activities, including the Collaborative Reform Initiative, to ensure that they promote just and effective policing

IV. Risk analysis

This memorandum recommends a variety of actions. The likelihood of successful judicial challenges will depend on the form and substance of the particular actions the administration takes, and the impact of these actions on relevant stakeholders. The following discussion includes some preliminary thoughts.

(1) Executive orders

Past presidents have established task forces using either EOs[39] or presidential memorandums.[40] As DOJ's Office of Legal Counsel has consistently held, "there is no substantive difference in the legal effectiveness of an executive order and a presidential [memorandum] that is not styled as an executive order."[41] As such, whether the next administration creates a task force via EO or presidential memorandum will have no substantive legal effect on the council's work. However, we recommend the task forces be established via EO as it will send a stronger signal to the public and to federal agencies that their work is a high priority.

Establishing task forces

Establishing a task force is squarely within the president's authority and would follow similar models of past administrations in establishing task forces and councils to confront urgent issues facing the nation.

The power to create task forces draws on the president's Article II powers. Article II, Section 2 of the US Constitution allows the president to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," which includes Cabinet members, who head executive departments. Article II, Section 3 speaks to the president's power to convene and report to Congress issues that concern him.

(2) Budgetary actions

[39] *See e.g.,* President Barack Obama, Executive Order 13684, "Establishment of the President's Task Force on 21st Century Policing" (Dec. 18, 2014); President Barack Obama, Executive Order 13506, "Creating the White House Council on Women and Girls" (Mar. 11, 2009).

[40] *See e.g.,* President Barack Obama, Presidential Memorandum, "Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals" (Apr. 29, 2016); President Barack Obama, Presidential Memorandum, "Creating and Expanding Ladders of Opportunity for Boys and Young Men of Color," (Feb. 27, 2014).

[41] Off. Legal Counsel, "Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order" (Jan. 29, 2000), https://www.justice.gov/file/19436/download.

Each year, usually by the first week in February, the president submits a budget request for the upcoming fiscal year to Congress.

(3) Agency actions within the DOJ

Timing of review

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components. One, the action must mark the consummation of the agency's decision-making process—it cannot be of a tentative or intermediate nature. Two, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow."[42]

Agency action committed to discretion by law

The DOJ may argue that challenges to their directive fail as a matter of law because such decisions are committed to agency discretion by law. The Administrative Procedures Act withdraws judicial review when "an agency action is committed to agency discretion by law."[43] "[I]f the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," then it is unreviewable.[44]

In addition, the DOJ may argue that, pursuant to federal law or federal regulations, the recommended agency action described in the previous section is within the authority of BJA,[45] BJS,[46] CRD,[47] COPS,[48] FBI,[49] and NIJ,[50] respectively. These threshold arguments may or may not prevent judicial review of the directives proposed here.

Judicial challenges to agency actions

If challengers are able to overcome the threshold issues mentioned above—such as finality and the extent of agency discretion—they may challenge the DOJ directives as being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[51]

The actions mentioned above may be within the authority of the respective DOJ offices.[52] Provided that these actions are consistent with the relevant statutes and constitutional principles, such as separation of powers and the Tenth Amendment's reservation of power to the states, there is a reasonable likelihood that these actions will be upheld. In addition, the BJA, BJS, CRD, COPS, FBI, and NIJ may avoid a challenge based on procedural concerns by carefully following the particular procedures applicable to the particular actions.

[42] *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997).
[43] 5 U.S.C. § 701(a)(2).
[44] *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).
[45] 34 U.S.C. § 10142.
[46] 34 U.S.C. § 10132(c).
[47] 28 C.F.R. § 0.50.
[48] 34 U.S.C. § 10381(b).
[49] 28 C.F.R. § 0.85(e). *See also* 28 U.S.C. § 531 et seq.
[50] 34 U.S.C. § 10122(c).
[51] 5 U.S.C. § 706.
[52] 34 U.S.C. §§ 10122(c); 10132(c); 10142; 10381(b). 28 C.F.R. §§ 0.50; 0.85(e).

RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF)
Topic: Updating Definition of "Frame or Receiver" to Close Loopholes Related to "Unfinished Frames and Receivers" and "Split Receivers"
Date: November 2020

Recommendation: Update the definition of "frame or receiver" through rulemaking to address the proliferation of untraceable firearms or "ghost guns."

I. Summary

Description of recommended executive action

Modern firearms are a highly modular product; components can be swapped out, and firearms can be assembled from individually purchased components. Only one component on a firearm is regulated under federal law. This component is called the "frame" on a handgun and the "receiver" on a rifle.

Beginning in the Bush administration, the ATF began issuing guidance about the classification of a "frame" or "receiver" that allowed for nearly-completed versions of these components, called "80%" or "unfinished" frames and receivers, to evade classification as "firearms."

The result has been a proliferation of untraceable firearms, or "ghost guns," so called because they evade federal serialization and documentation requirements that enable the tracing system used by law enforcement to link a recovered firearm back to its owner. What's more, this industry sells its wares without conducting a background check: they sell products that are intended to be used, and indeed can only be used to produce firearms, without knowing whether their customers are legally allowed to possess firearms.

The ATF can resolve this issue by returning to a more sensible definition of "frame or receiver" that captures these products, which are clearly designed for the single purpose of evading federal firearm laws, and should do so by changing the regulatory definition through notice and comment rulemaking.

This new definition would also resolve a second, increasingly grave issue. A number of modern firearms, including AR-15-style assault rifles, do not have a single "receiver" in the traditional sense, but instead a "split receiver" that includes an "upper receiver" and a "lower receiver." The ATF has long characterized the lower receiver as the "receiver" on these types of weapons for regulatory purposes, but some courts have recently rejected that characterization. The consequences could be dire, frustrating prosecutions of federal firearm laws, and potentially opening the door for the ghost gun industry to drop the "unfinished" workaround and simply sell fully completed lower receivers.

Overview of process and time to enactment

The ATF can accomplish this change in regulatory definition through rulemaking under the Administrative Procedures Act (APA). This process begins with a Notice of Proposed Rulemaking listed in the Federal Register. After the 90-day public comment period,[1] the ATF would review these comments, and prepare a Final Rule that reflects and responds to the public comments, and which would also be published in the Federal Register. A rule may become effective as soon as 30 days after the Final Rule's publication.[2] This multi-phase process generally extends for a year.

II. Current state

Ghost guns

The statutory definition of a "firearm" includes the frame or receiver; this is the only component regulated as a firearm. There is no statutory definition of "frame or receiver," although a definition is included in the Code of Federal Regulations.

The ATF has issued guidance that the definition of "frame or receiver" does not reach certain products that it considers "unfinished." This has allowed for an explosion in companies exploiting this guidance and selling easy-to-finish "do it yourself" firearms, while evading statutory requirements for the sale of firearms, including background check, serialization, and documentation requirements.

The result has been the proliferation of "ghost guns," so called because they cannot be traced. Ghost guns are increasingly used in shootings, often by shooters who would be prohibited from obtaining a firearm through traditional means.[3] They are favored by traffickers: law enforcement

[1] 18 U.S.C. § 926(b) (requiring a 90-day comment period for ATF rule-making).
[2] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.

[3] *E.g.,* John Beauge, "'Ghost Gun' Used in Shooting that Killed Two Outside Snyder County Restaurant," *Penn Live Patriot-News,* July 14, 2020, https://www.pennlive.com/crime/2020/07/ghost-gun-used-in-shooting-that-killed-two-outside-snyder-county-restaurant.html; Jeff Reinitz, "Untraceable 'Ghost Guns," Like One Used in Waterloo Shooting, Draw Attention of ATF," *The Courier*, January 19, 2020, https://wcfcourier.com/news/local/crime-and-courts/untraceable-ghost-guns-like-one-used-in-waterloo-shooting-draw-attention-of-atf/article_93b64b90-e777-557c-90a3-702419b30806.html; Richard Winton, "Santa Clarita Shooting: Weapon Used in Saugus High Attack a 'Ghost Gun,' Sheriff Says," *L.A. Times*, November 21, 2019, https://www.latimes.com/california/story/2019-11-21/santa-clarita-shooting-45-caliber-gun-saugus-high-attack-a-ghost-gun-sheriff-says.

busts of trafficking rings often find large cases of ghost guns,[4] and they are making up an increasing share of the number of crime guns recovered by law enforcement.[5]

Statutory law and Code of Federal Regulations

There are two general statutory regimes that regulate firearms at the federal level. The older of these regimes is the National Firearms Act of 1934 (NFA), 26 U.S.C. § 5801 *et seq.*, which primarily regulates a subset of firearms, including machine guns, silencers, short-barreled rifles and shotguns, and certain other weapons.[6] It imposes registration requirements and restrictions on the sale of covered weapons.

The second regime, the Gun Control Act of 1968 (GCA), 18 U.S.C. § 921 *et seq.*, regulates firearms more generally. The GCA imposes serialization, documentation of sale, and background check requirements on firearms. It defines a firearm as "any weapon...which will or is designed to or may readily be converted to expel a projectile by the action of an explosive...[or] the frame or receiver of any such weapon."[7] A GCA "firearm," therefore, includes

[4] *E.g.*, Bureau of Alcohol, Tobacco, Firearms & Explosives, "Man Sentenced to 15 Years for Trafficking "Ghost Guns" and Drugs," February 14, 2020, https://www.atf.gov/news/pr/man-sentenced-15-years-trafficking-ghost-guns-and-drugs; State of New Jersey Office of the Attorney General, "Indictment in "Operation Stone Wall" Charges Nine Alleged Members of Ring that Trafficked Untraceable "Ghost Gun" Assault Rifles & Cocaine," June 5, 2019, https://www.nj.gov/oag/newsreleases19/pr20190605a.html; "12 Arrested in Bust of Alleged Camden County 'Ghost Gun' Assault Rifle Ring," *Philadelphia Inquirer,* March 18, 2019, https://www.philly.com/news/new-jersey-ghost-guns-assault-rifles-pistol-gun-trafficking-camden-county-20190318.html; Emily Masters, "State Police: Downstate Cop Sold 'Ghost' Guns to Motorcycle Gang," *Times Union,* March 1, 2019, https://www.timesunion.com/news/article/State-Police-Downstate-cop-sold-ghost-guns-to-13656862.php; Zusha Elinson, "The Rise of Untraceable 'Ghost Guns,'" *Wall St. J.,* January 4, 2018, https://www.wsj.com/articles/the-rise-of-untraceable-ghost-guns-1515061800; U.S. Attorney's Office, Eastern District of California, "Eight Men Indicted for Manufacturing and Dealing AR-15 Type Rifles and Silencers Without a License," Dep't of Justice, October 15, 2015, https://www.justice.gov/usao-edca/pr/eight-men-indicted-manufacturing-and-dealing-ar-15-type-rifles-and-silencers-without; New York State Office of the Attorney General, "A.G. Schneiderman Announces Thirty-Two Count Indictment of Two Defendants Charged with Illegally Trafficking Untraceable 'Ghost Guns,'" September 21, 2015, https://web.archive.org/web/20171214094951/https://ag.ny.gov/press-release/ag-schneiderman-announes-thirty-two-count-indictment-two-defendants-charged-illegally.

[5] According to ATF, approximately 30% of the firearms recovered in California, and approximately 40% of those recovered in the Los Angeles area, are ghost guns. Alain Stephens, "Ghost Guns are Everywhere in California," *The Trace*, May 17, 2019, https://www.thetrace.org/2019/05/ghost-gun-california-crime/; Bradi Hitt, "'Ghost Guns' Investigation: Law Enforcement Seeing Unserialized Firearms on Daily Basis in SoCal," ABC 7 Eyewitness News, January 30, 2020, https://abc7.com/5893043/. Other municipalities are reporting significant increases in ghost gun recoveries. *E.g.*, Testimony of Robert Contee, Assistant Chief of Police, Metropolitan Police Department, Before the Committee on the Judiciary & Public Safety, Council of the District of Columbia, October 3, 2019, https://lims.dccouncil.us/downloads/LIMS/41601/Hearing_Record/B23-0018-HearingRecord2.pdf, 5, 35 ("Our colleagues at DPS have identified 75 untraceable ghost guns recovered so far in 2019, three times as many as the 25 recovered in all of 2018").

[6] *See* 26 U.S.C. § 5845; 27 C.F.R. § 479.11..

[7] 18 U.S.C. § 921(a)(3). The full definition is as follows: The term "firearm" means (A) 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; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

an operational gun; a weapon that is designed to or may be readily converted into an operational gun; or a single component, the frame or receiver. Statutory law does not define a "frame" or a "receiver."

The regulatory definition of a "frame or receiver" is as follows:

> *Firearm frame or receiver*. That part of a firearm which provides housing for the hammer, bolt or breechblock and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.[8]

Classification letters by the ATF and the problem of ghost guns

Through its Firearms and Ammunition Technology Branch (FATB), the ATF regularly issues guidance, in the form of "letter rulings classifying firearms," to manufacturers that "may generally be relied upon by their recipients as the agency's official position concerning the status of the firearms under Federal firearms laws."[9] To receive a classification letter, a manufacturer submits a prototype to the FATB, along with a request for classification.

Since the 1980s, the FATB has opined in these classification letters about the stage of manufacture at which a product is legally classified as a frame or receiver. In 1983, the FATB evaluated an "unfinished AR-15 type firearm receiver" that was "basically complete" except that its "interior cavity [had] not been milled."[10] The FATB determined that "[a]pproximately 75 minutes time was required to make the receiver functional," and concluded that "the unfinished receiver as provided, is still a firearm subject to the provisions of the Gun Control Act of 1968." This approach analyzed the length of time and difficulty of the tasks required to "make the receiver functional"—that is, to complete it to the stage that it could be used to assemble a functional firearm. In subsequent classification letters, the FATB determined that various clearly identifiable, but not fully completed frames and receivers, "may be readily converted to function as the frame or receiver of a firearm," and accordingly provided guidance that the products were frames or receivers within the meaning of the Gun Control Act.[11]

[8] 27 C.F.R. § 479.11.

[9] Bureau of Alcohol, Tobacco, Firearms & Explosives, "ATF National Firearms Act Handbook," April 2009, §§ 7.2.4, 7.2.4.1, https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download.

[10] "Letter from Edward M. Owen, Jr., Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, and Firearms, to Henry A. Roerich, General Manager, SGW, Inc.," May 3, 1983, *Cal. Rifle & Pistol Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosive*s, No. 1:14- CV-01211 (E.D. Cal. Jan. 9, 2015), ECF 23 (certified filing by ATF collecting ATF-issued determinations regarding unfinished frames and receivers) ("ATF Determinations Filing"), 60.

[11] "Letter from Edward M. Owen, Jr., Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, and Firearms, to Thomas C. Miller, Att'y," July 14, 1994, available at ATF Determinations Filing at 63–64; *see also* "Letter from Curtis H.A. Bartlett, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, and Firearms, to Lane Browne, Mega Machine Shop, Incorporated," December 27, 2002, available at ATF Determinations Filing at 65–66.

However, by 2004, the FATB had significantly altered its approach to this issue. In that year, the FATB began including guidance that went beyond analysis of the submitted product in its classification letters, and began providing a roadmap for producing receiver products that would not be classified as "firearms." In a classification letter opining that the submitted product was a firearm, the FATB described a hypothetical product, "a solid AR-15 type receiver casting, without having the critical internal areas machined (magazine well and central area for the fire control components) or crosspin holes drilled," and opined that such a product "would not constitute a 'firearm' as defined in the NFA."[12] By 2006, the FATB was providing more detailed advice in classification letters: at least twice, the FATB advised that "an AR-15 type receiver which has *no machining performed at all in the area of the trigger/hammer recess* might not be classified as a firearm... Such a receiver could have *all* other machining operations performed, including pivot pin and takedown pin hole(s) and clearance for the takedown pin lug, but must be completely solid and un-machined in the trigger-hammer recess area."[13] These letters even included an illustration providing instructions on what a product meeting this standard would look like.[14]

In 2009, the FATB issued a classification letter opining that a product that satisfied these standards was not a firearm:

> Our Branch has previously determined that if an AR-type receiver-blank possessed either pivot pin holes or indexing marks for the fire-control components (trigger group); or if any of the cavity for the trigger group had been milled, then the receiver-blank would have been finished to the point at which it could be recognized as a firearm frame or receiver. Your submitted sample does not contain any of these critical features. Based on our examination, FATB finds that this sample AR-15 type receiver-casting is not yet finished to the point at which it would be classified as a firearm. As such, it is not regulated by the Gun Control Act or the National Firearm Act.[15]

In a 2011 classification letter to a repeat submitter, the FATB noted that "a prior letter" had provided guidance that "an AR-15 type receiver which has *no machining of any kind performed in the area of the trigger/hammer (fire-control) recess* might not be classified as a firearm," and provided an acknowledgement: "You have submitted the current item for classification with the

[12] "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Mark Malkowski, Continental Machine Tool Company, Inc.," January 29, 2004, available at ATF Determinations Filing at 68.
[13] "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Kevin Audibert," July 26, 2006, available at ATF Determinations Filing at 74–75; "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Justin Halford," April 24, 2006, available at ATF Determinations Filing at 78–79.
[14] "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Kevin Audibert," July 26, 2006, available at ATF Determinations Filing at 75; "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Justin Halford," April 24, 2006, available at ATF Determinations Filing at 79.
[15] "Letter from John R. Spencer, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Chris Coad, Ultra-Tech, Inc.," May 20, 2009, available at ATF Determinations Filing at 135–38.

above qualifications in mind."[16] The letter concluded that the submitted product was not "completely solid and un-machined" because of a carefully described detail, and therefore had to be classified as a firearm, then concluded with additional detailed instructions to meet the hypothetical standard.[17]

In 2015, the ATF publicized this guidance on a section of the ATF website entitled "Receiver Blanks."[18] It includes specific guidance and instructions:

> ATF has long held that items such as receiver blanks, "castings" or "machined bodies" in which the fire-control cavity area is completely solid and un-machined have not reached the "stage of manufacture" which would result in the classification of a firearm according to the GCA.[19]

Having laid out clear directives for producing receiver products that the ATF would not regulate, these classification letters and public-facing guidance have laid the foundation for the ghost gun industry. The FATB has gone on to issue classification letters blessing a growing number of companies.[20]

These changes opened the door for an entire industry to grow up around this loophole, an industry that has moved as close to selling a gun as possible without crossing over the arbitrary line that the ATF has drawn. Firearm "kits," sold online and in brick-and-mortar stores, include nearly finished frames and receivers along with all the other components needed to assemble a firearm, including tools and instructions that enable the assembly of an operable firearm without any particular skill or experience. Firearm "kits" don't include background checks, licensing, serialization, or any of the other requirements triggered by firearms manufacture and sales.

In a court submission in litigation initiated by a company that received an unfavorable classification, the ATF provided the following explanation for this guidance:

[16] "Letter from John R. Spencer, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Kas McManus, Lancer Systems," March 16, 2011, available at ATF Determinations Filing at 74–75; "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Justin Halford," April 24, 2006, available at ATF Determinations Filing at 82.
[17] *Id.* at 82–83.
[18] "Receiver Blanks," Bureau of Alcohol, Tobacco, Firearms & Explosives, accessed October 14, 2020, https://www.atf.gov/qa-category/receiver-blanks; for 2015 index of the relevant pages, see Wayback Machine archive at https://web.archive.org/web/20150905071514/https://www.atf.gov/qa-category/receiver-blanks.
[19] "Are "80%" or "Unfinished" Receivers Illegal?," Bureau of Alcohol, Tobacco, Firearms & Explosives, accessed October 14, 2020, https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal; for 2015 index, see Wayback Machine archive at https://web.archive.org/web/20150905204055/https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal.
[20] One of the most prolific ghost gun companies, Polymer 80, hosts the classification letters it has received from FATB on its website: https://web.archive.org/web/20191221202320/https://www.polymer80.com/media/wysiwyg/porto/LegalDocs/P80_Product_Determination_Letters.pdf.

> For a casting to qualify as a receiver, it must have reached a certain advanced stage of manufacture. ATF makes this determination based upon the difficulty of the process (i.e., of machining and drilling), *the cost and availability of the tools required, the skill required, and the time it would take to fashion the blank into an item suitable for use as part of a functional weapon*. . . .
>
> ATF's technical experts have determined that for an AR-type receiver blank to remain outside the purview of the Act, its fire-control area must remain solid, viz., uncreated, unformed, and unmachined in any way. In order to ensure consistency, ATF created this uniformly applicable baseline standard, determining that the critical manufacturing process occurs when any step is taken toward completion of the critical area.[21]

This explanation purports to rely on markers of the ease of finishing the product into a receiver that can be used in assembling a functional firearm, but the bright line rule requiring specific areas remain "solid and unmachined" fails to adequately address whether these products are designed or readily convertible for use. Among other things, it fails to account for ancillary products that ghost gun companies now sell alongside the nearly finished frames or receivers, or sometimes in kits with them, which further simplify and expedite the machining process.

One such set of products, called "jigs," are three dimensional guides that fit over the receiver product, providing an easy template that shows what holes need to be drilled and what cavities milled.[22] Another set of still more sophisticated products are single-purpose CNC milling machines, sold under the brand "Ghost Gunner," that are designed specifically to finish machining nearly completed receiver products.[23] The sellers of the Ghost Gunner advertise the product as a machine that "automatically finds and aligns your 80% lower to get to work," and that it requires "no prior CNC knowledge or experience" to "manufacture unserialized rifles and pistols in the comfort and privacy of home."[24]

Courts overrule ATF classifications of an AR-15 component as a "receiver"

There is a second issue with the regulatory definition of "receiver" that has emerged in recent years, threatening to negate gun laws for highly dangerous weapons. The definition describes a single component providing "housing for the hammer, bolt or breechblock and firing mechanism."[25] Some models of rifles, including AR-15-style rifles, have a "split receiver" comprised of an "upper receiver" (sometimes referred to as an "upper assembly") and a "lower

[21] "Memorandum in Support of Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment," *Cal. Rifle & Pistol Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 1:14-CV-01211 (E.D. Cal. Jan. 9, 2015), ECF 20-1, at 6–7 (emphasis added) (citations omitted).
[22] *See, e.g.,* 80% Lowers, "Builder's Guide to 80% Jigs (Drill & Mill vs. Router)," July 17, 2020, https://www.80-lower.com/blogs/80-lower-blog/builders-guide-to-80-jigs-drill-mill-vs-router/; 80% Arms, "80 Lower Jigs," accessed October 14, 2020, https://www.80percentarms.com/80-jigs/.
[23] *See* "Ghost Gunner," accessed October 14, 2020, https://ghostgunner.net/.
[24] *Id.*
[25] 27 C.F.R. § 479.11.

receiver," two separate components that together provide housing for the components listed in the definition. For these weapons, the ATF has characterized the "lower receiver" as a "receiver" and therefore definitionally a "firearm" subject to federal regulation (including serialization, documentation, and background check requirements), and federal prohibitions on the possession of firearms.

In recent cases involving federal prosecutions for gun crimes involving firearms with a split receiver, some courts have held that the "receiver" definition contained in the Code of Federal Regulations cannot be applied to a lower receiver, because a lower receiver alone does not house all of the components listed in the definition. This has led to several instances where prosecutions for violations of firearms laws based on the acquisition or possession of lower receivers have been dismissed.[26] Three of these cases are described below. If these rulings are accepted more broadly, particularly dangerous weapons could be exempted from firearm laws.

United States v. Jimenez

In a 2016 federal court case in California, a man prohibited from possessing firearms was charged after purchasing the lower receiver to an AR-15 style rifle, modified to accommodate automatic firing, during a sting operation.[27] Because the lower receiver was modified for automatic fire, he was charged with unlawful possession of a machine gun under both the GCA, 18 U.S.C. § 922(o), and the NFA, 26 U.S.C. § 5861(d). A "machine gun" is defined by statute as an automatic weapon, including "the frame or receiver of any such weapon."[28] The court noted that the statutory provisions at issue "criminalize the possession of a machinegun receiver, but neither statute says what a receiver is."[29]

The defendant's indictment was based on the theory that the lower receiver constituted a "machine gun" under this definition. He challenged his conviction on vagueness grounds, arguing that "nothing in the statutes or CFR gave him fair notice that possessing the lower receiver of an AR-15 rifle would count as the criminal possession of 'the receiver," because there is no statutory definition, and "the AR-15 lower receiver does not fit the CFR definition of a 'receiver' that is illegal under the gun laws."[30]

[26] *See* generally Jake Bleiberg & Stefanie Dazio, "Design of AR-15 Could Derail Charges Tied to Popular Rifle," *Associated Press*, January 13, 2020, https://apnews.com/396bbedbf4963a28bda99e7793ee6366 (noting that "[s]ince 2015, at least five defendants have challenged the government and succeeded in getting some charges dropped").
[27] *United States v. Jimenez,* 191 F. Supp. 3d 1038 (N.D. Cal. 2016).
[28] The Gun Control Act provides that "[t]he term 'machinegun; has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b))." 18 U.S.C. § 921(a)(23). The full definition is as follows: Machinegun. The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. 26 U.S.C. § 5845(b).
[29] *Jimenez,* 191 F. Supp. 3d at 1040.
[30] *Id.* at 1040–41.

The government stipulated that "the lower receiver for which Jimenez was arrested and indicted houses only two of the required features—the hammer and the firing mechanism," but argued that notice was provided in sub-regulatory documents, including an IRS memorandum and letters issued by the ATF.[31] The court characterized this as "in effect, conced[ing] . . . that the plain language of the law does not answer the vagueness challenge," and overturned the conviction on vagueness grounds.[32]

United States v. Roh

In a subsequent prosecution, again involving AR-15 lower receivers, a court relied on *Jimenez*'s reasoning to hold that a lower receiver is not a "firearm" as defined under the GCA. The case, *United States v. Roh*, concerned a defendant who was charged with engaging in the business of manufacturing, importing, or dealing of firearms without a license.[33] The defendant had set up a business in which he would provide his customers with all of the parts for an AR-15 rifle, except for the lower receiver; his customer would then press a button to initiate a pre-programmed process that would manufacture the lower receiver from a receiver blank.[34] In a "tentative ruling" following the trial, the court found that "a finished AR-15 receiver does not contain a bolt or breechblock and is not threaded to receive the barrel," and therefore that it failed to satisfy the regulatory definition of "receiver."[35] The Government argued at trial that "ATF had 'classified' finished receivers as firearms" in determination letters. Because the court found it "clear that the ATF's classification of articles as firearm [sic] does not comply with the rule making process which brought into effect the public definition for firearm found in [27 C.F.R.] Section 478.11," it held that the defendant's activities "were not within the scope of the statute or the ATF regulatory definition," and therefore that the defendant "did not violate the law by manufacturing receivers."[36] The court also held that "when applied to include finished lower receivers, Section 478.11 is unconstitutionally vague."[37]

[31] *Id.* at 1041.

[32] In an aside, the court commented on "an element of randomness in ATF's enforcement practices," noting that in some rifles with a split receiver, "the upper receiver is classified as a weapon but the lower receiver is legal to acquire." *Jimenez,* 191 F. Supp. 3d at 1043-44. "[T]he patchwork of enforcement practices," the court concluded, "is another strike against the Government's position." *Id.* at 1044.

[33] No. 8:14-CR-167-JVS (C.D. Cal.) The facts, reasoning, and quotations below are from a "tentative ruling" that the court issued at the conclusion of the trial. It was not initially published on the electronic docket, although a purported copy of the originally issued tentative ruling has also been uploaded by Second Amendment attorney Alan Beck (who was not counsel on the case), at https://www.scribd.com/document/429889179/Roh-Ruling-on-R-29-Motion; *see also* Alan Beck, "Here is the tentative ruling…" Facebook post, October 12, 2019, https://m.facebook.com/ABeckLaw/posts/682014588874800.

[34] *Id.* at 3–4.

[35] *Id.* at 4.

[36] *Id.* at 5, 6.

[37] *Id.* at 6. Subsequently, the court appended the "tentative ruling" document to a minute order granting the defendant's motion to vacate a previously entered guilty plea and the government's motion to dismiss, *United States v. Roh,* No. 8:14-CR-167-JVS (May 6, 2019), ECF No. 164. The pagination here refers to the document appended to the minute order. Substantively, the two documents are identical.

Following this tentative ruling, prosecutors agreed to dismiss the case. CNN later reported that "[f]ederal authorities preferred to let Roh go free rather than have the ruling become final and potentially create case law that could have a crippling effect on the enforcement of gun laws."[38]

United States v. Rowold

In December 2019, a federal court in Ohio issued a similar decision. In *United States v. Rowold*, the defendants were charged with making false statements in connection with the acquisition of firearms, and unlawful possession of firearms by a person with a felony conviction.[39] The "firearms" in question were AR-15-style lower receivers. The defendants moved to dismiss on the grounds that the lower receivers were not "firearms."

The court found, based on undisputed testimony of two witnesses, including an ATF agent, that:

> The upper receiver houses the bolt and enables insertion of the barrel. The lower receiver provides housing for the hammer and the firing mechanism. The...lower receiver at issue here is a container that would, in a fully assembled weapon, house only the hammer and the firing mechanism.[40]

After noting that there is no statutory definition of "receiver," the court referred to the regulatory definition in 27 C.F.R. § 478.11, which it characterized as a "gap-filling regulation," and concluded that the regulation is "unambiguous" and "lends itself to only one interpretation: namely, that under the GCA, the receiver of a firearm must be a single unit that holds three, not two, components: 1) the hammer, 2) the bolt or breechblock, and 3) the firing mechanism."[41] Based on this reading, the court held that the lower receivers at issue were not "firearms" because one of the three essential components, the bolt, is housed in the upper receiver, and dismissed the charges on that basis. The court noted that "ATF retains the authority — and has the duty — to fix the regulatory scheme and to regulate AR-15 lower receivers as firearms within the GCA."[42]

III. Proposed action

To address the dual problems of ghost guns and classification of split receivers, under the incoming administration, the ATF should initiate notice and comment rulemaking to formally replace the current definition of "frame or receiver" in 27 C.F.R. § 478.11 with the following:

[38] Scott Glover, "He Sold Illegal AR-15s. Feds Agree to Let Him Go Free To Avoid Hurting Gun Control Efforts," CNN, October 11, 2019, https://www.cnn.com/2019/10/11/us/ar-15-guns-law-atf-invs/index.html.
[39] 429 F. Supp. 3d 469 (N.D. Ohio 2019). These counts were charged under 18 U.S.C. § 922(a)(6) and § 922(g)(1), respectively.
[40] *Rowold,* 429 F. Supp. 3d at 471 (internal citations omitted).
[41] Id. at 475–6.
[42] *Id.* at 476.

> *Firearm frame or receiver*. That part of a firearm that provides or is intended or designed to provide the housing for the trigger group, regardless of the stage of manufacture. It includes a blank, casting, or machined body that requires modification, such as machining, drilling, filing or molding, to be used as part of a functional firearm; provided, that it does not include a piece of material that has had its size or external shape altered solely to facilitate transportation or storage, or solely its chemical composition altered.

This change would have two key effects. First, it would clearly specify which part of a split receiver is the "receiver" for definitional purposes: it would be whichever part "provides . . . the housing for the trigger group." The lower receiver of an AR-15 would clearly fall within this definition, and because the definition specifies the housing for only a single element, the ambiguities and "patchwork of enforcement practices" decried in *Jimenez* would be resolved. Second, it would resolve the ghost gun problem by closing the loopholes that the industry has been exploiting. It would provide that products currently marketed as "unfinished" frames and receivers, which are intended to be used as frames and receivers, are subject to regulation as firearms. Sellers of "unfinished" frames and receivers would no longer be able to evade background check, serialization, and record-keeping requirements, shutting down the supply of ghost guns at its source.

In order to effect this change, the administration must go through the notice and comment rulemaking process under the APA.[43]

First, an agency must provide notice that it intends to promulgate a rule by publishing a Notice of Proposed Rulemaking in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then the agency must accept public comments on the proposed rule for a period of at least 90 days.[44] Received comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting proposals or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the *Federal Register* along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

IV. Legal justification

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[45]

[43] 5 U.S.C. § 553.
[44] 18 U.S.C. § 926(b).
[45] 5 U.S.C. § 706.

ATF's statutory authority

Regulating ghost guns as firearms is clearly within the ATF's statutory authority and is unlikely to be challenged on such grounds.[46] Congress has invested the attorney general with the power to "prescribe only such rules and regulations as are necessary to carry out the provisions" of the GCA.[47] The attorney general has, in turn, delegated these authorities to the ATF.[48] Following the *Jimenez* decision, then-Attorney General Loretta Lynch notified the speaker of the House, calling attention to the case and conveying the Department of Justice's position that while administrative or regulatory action may be appropriate, an appeal of the decision was not:

> [T]he district court held that the regulatory definition of 'frame or receiver' did not provide the defendant with notice that his conduct violated the law. To the extent that the Bureau of Alcohol, Tobacco, Firearms and Explosives believes that the definition should encompass the lower receiver of an AR-15 or should otherwise be modified or clarified, the appropriate course is regulatory or administrative action, not an appeal of the district court's decision in this case.[49]

Furthermore, the rulings in which courts have rejected the ATF's classification of lower receivers as "receivers" for the purposes of the NFA and the GCA, have invited regulatory changes to bring the letter of the regulation into compliance with agency practice. The *Roh* court indicated that the defect with ATF determinations about lower receivers was the absence of APA rulemaking.[50] The *Jimenez* court had gone further, calling notice and comment rulemaking the "solution" to the fear that rejecting the ATF's classification would cripple enforcement of federal gun laws.[51] And in *Rowold*, the court went further still, calling a regulatory solution through rulemaking the ATF's "duty."[52]

Constitutional challenges

[46] *See* 16 U.S.C. § 460(d) ("The water areas of all such projects shall be open to public use . . . all under such rules and regulations as the Secretary of the Army may deem necessary . . . .").
[47] 18 U.S.C. § 926(a).
[48] 28 C.F.R. § 0.130(a)(1); *see also Vineland Fireworks Co. v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 544 F.3d 509, 517 n. 12 (3rd Cir. 2008) (noting ATF's rulemaking authority deriving from a Congressional delegation to the Attorney General); *United States v. Flores,* 404 F.3d 320 (5th Cir. 2005) (noting Congress's delegation of authority to implement provisions in the GCA to ATF); *Garner v. Lambert,* 503 F. Supp. 2d 953, 957 (N.D. Ohio 2007) (affirming Congress's delegation of rulemaking authority for the GCA to ATF via 18 U.S.C. § 926).
[49]" Letter from Hon. Loretta E. Lynch, Att'y Gen., to Hon. Paul Ryan, Speaker H.R.," September 8, 2016, https://www.justice.gov/oip/foia-library/osg-530d-letters/9_8_2016/download.
[50] ECF No. 164 at 5.
[51] 191 F. Supp. 3d at 1044–45 ("The solution to the Government's worry is not to relax our constitutional protections but to give proper public notice and possibly revise the regulations to make plain that conduct like Jimenez's will result in criminal exposure.")
[52] 429 F. Supp. 3d at 476 ("ATF retains the authority — and has the duty — to fix the regulatory scheme and to regulate AR-15 lower receivers as firearms within the GCA.")

Opponents might claim the new "firearm frame or receiver" definition recommended above to replace the current definition in 27 C.F.R. § 478.11 infringes on their Second Amendment rights or is void for vagueness. However, the new definition will not be struck down as unconstitutional.

Federal law prohibits firearm possession by categories of individuals deemed dangerous or irresponsible. It is well established that laws designed to restrict gun ownership by persons who are high-risk are constitutional. The Supreme Court affirmed in *Heller* that "longstanding prohibitions on the possession of firearms by felons and the mentally ill" are presumptively lawful,[53] and the Third Circuit has found that such laws are consistent with the Second Amendment.[54] Similarly, numerous courts have upheld background checks, licensing, and permitting laws as consistent with the Second Amendment.[55] This new definition would limit the ability of disqualified persons from accessing firearms (including unfinished firearms or receivers), and as such, it is constitutional.

Federal law requires persons who engage in the business of dealing firearms to be licensed. Federal dealer licensing requirements are plainly constitutional. The Supreme Court stated in *Heller* that "laws imposing conditions and qualifications on the commercial sale of arms" are presumptively lawful regulatory measures that do not offend the Second Amendment.[56] To the extent the new definition would require firearm dealers (including those who sell unfinished firearm frames or receivers) to be licensed to sell firearms, it is constitutional.

The new definition does not add any new burdens on conduct falling within the scope of the Second Amendment.[57] The new definition captures those "unfinished" frames or receivers that

[53] 554 U.S. 570, 626 (2008).
[54] *United States v. Barton,* 633 F.3d 168 (3d Cir. 2011) (upholding federal felon prohibitor under the Second Amendment); *see also Binderup v. AG of United States,* 836 F.3d 336, 343 (3d Cir. 2016) (en banc) (recognizing that some "individuals" are "unprotected by the right to keep and bear arms").
[55] *See, e.g., Colo. Outfitters Ass'n v. Hickenlooper,* 24 F. Supp. 3d 1050 (D. Colo. 2014), vacated on other grounds, 823 F.3d 537 (10th Cir. 2016) (upholding Colorado background check law as applied to temporary gun transfers); *Libertarian Party of Erie v. Cuomo,* 300 F. Supp. 3d 424 (W.D.N.Y. 2018), appeal docketed, No. 18-386 (2d Cir. Feb. 8, 2018) (upholding New York license-to-possess and license-to-carry laws, finding that "licensing laws place no more than 'marginal, incremental, or even appreciable restraint on the right to keep and bear arms'"); *see also Cruz-Kerkado v. Puerto Rico,* No. 16-cv-2748, 2018 U.S. Dist. LEXIS 59290 (D. P.R. Apr. 5, 2018) (upholding Puerto Rico's permit-to-possess law); *Murphy v. Guerrero,* No. 1:14-CV-00026, 2016 U.S. Dist. LEXIS 135684 (D. N. Mar. I. Sep. 28, 2016) (upholding licensing law that functioned as a "universal background check" law in the Commonwealth of Northern Mariana Islands); *Gutierrez v. Ryan,* No. 14-CV-11995, 2015 U.S. Dist. LEXIS 145622 (D. Mass. Oct. 1, 2015) (Massachusetts' firearm license law does not violate the Second Amendment).
[56] 554 U.S. at 626-27. Two Circuit Courts have expressly upheld them under the Second Amendment, see *United States v. Focia,* 869 F.3d 1269 (11th Cir. 2017) (federal law prohibiting unlicensed dealing of firearms "'impos[es] conditions and qualifications on the commercial sale of arms'" so "qualifies as the kind of 'presumptively lawful regulatory measure[]' described in Heller"); *United States v. Hosford,* 843 F.3d 161, 166 (4th Cir. 2016) (federal law prohibiting unlicensed firearms dealing is a facially constitutional "longstanding condition or qualification on the commercial sale of arms"),
[57] Most circuits have adopted a two-step approach to evaluating Second Amendment challenges, in which they ask whether the regulation burdens conduct falling within the scope of the Second Amendment, and if so, applying traditional principles of heightened scrutiny to determine whether the

have evaded classification as a "firearm" and thus evaded federal firearm laws. As described above, the laws that would apply to these devices based on this new definition have been found constitutional. So any Second Amendment challenge associated with the new definition is likely to fail.

It is also highly unlikely that a court will hold the new definition to be unconstitutionally vague. To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement."[58] The void-for-vagueness doctrine embraces these requirements.

The new definition in the proposed regulation is sufficiently definite. Under this definition, whether conduct with regards to a particular firearms component would be subject to the laws that apply to firearms would depend on whether the part "provides or intended or designed to provide the housing for the trigger group." The definition further ensures against arbitrary and discriminatory enforcement by specifying that "the stage of manufacture" is irrelevant. It also specifies several examples and the exact circumstances in which they would be included in the definition ("a blank, casting, or machined body that requires modification, such as machining, drilling, filing or molding, to be used as part of a functional firearm"). Finally, it further defines outer parameters of the definition by specifying that "it does not include a piece of material that has had its size or external shape altered solely to facilitate transportation or storage, or solely its chemical composition altered." A court would probably note these features of the new definition in rejecting any claim that it is unconstitutionally vague.

Procedural challenges

By following the NCRM process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.[59]

regulation nevertheless passes constitutional muster." *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) ("A two-step inquiry has emerged as the prevailing approach . . . ."); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (noting that the Second Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted the two-part test); *Gould v. Morgan,* 907 F.3d 659, 662 (1st Cir. 2018) (adopting the same test).

[58] *Kolender v. Lawson,* 461 U. S. 352, 357 (1983).

[59] *See* Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," 92 N.C.L. Rev. 721, 737-38 (2014) (describing "first" and "second" order inquiries into an agency's decision making). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

In particular, the ATF should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.[60] The agency must address the concerns raised in all non-frivolous and significant comments.[61] The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.[62]

Arbitrary or capricious challenge under the APA

A court will invalidate the regulation if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[63] The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, establishing a nexus between the facts and the agency's choice.[64]

Where an agency fails to consider important facts or where its explanation is either unsupported or contradicted by the facts, it is grounds for the court to find the rule "arbitrary or capricious."[65]

Further, when a challenged rule reverses or rescinds an existing rule, an agency must provide a "reasoned analysis," in which it acknowledges a change in policy and provides a "good reason" for the proposed change.[66] However, the additional "reasoned analysis" requirement does not automatically subject rule reversals to a higher level of scrutiny.[67] There are some circumstances in which a justification must be more detailed for policy changes than for initial policies, such as when the new policy relies on factual findings contradicted by those underlying the existing policy.[68] The "reasoned analysis" does not require agencies to persuade the court that a new policy is superior to the one being reversed; it merely requires an agency to "display awareness that it is changing position" and demonstrate that "there are good reasons for it."[69]

[60] 5 U.S.C. § 553(c).
[61] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).
[62] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).
[63] 5 U.S.C. § 706(2)(A).
[64] *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[65] *Id.* at 43.
[66] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[67] *Id.* at 515.
[68] *Id.* at 515-516.
[69] *Id.* at 515.

Therefore, to withstand a potential judicial challenge that the new regulation is an arbitrary and capricious action by the ATF, the agency must be able to demonstrate that it considered all factors pertinent to the issue in its decision-making, and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy based on sound evidence, empirical or otherwise. Second, it should contain an acknowledgment of reliance interests, and address why these interests are outweighed by public safety factors.

1. *Evidence supporting a new policy*

The threat posed by ghost guns is clear. Federal law prohibits numerous categories of persons from purchasing firearms, laws which have protected many Americans from gun violence. However, persons prohibited can bypass their prohibition by purchasing unfinished frames or receivers, and completing the firearm without any background check. Thus, ghost guns attract individuals who are so prohibited, as well as traffickers, who can use these products to mass-produce untraceable guns without a paper trail or a need to recruit straw purchasers. And the industry caters to these traffickers, selling ten-packs of nearly completed receivers and four-figure dedicated milling machines that come pre-programmed to finish a receiver with the press of a button. Consequently, ghost guns are increasingly recovered after use in crime.

- In 2017, a man under prosecution for multiple crimes killed six people and injured 10 in Rancho Tehama Reserve, California, with two assault-style rifles he assembled using parts ordered online.
- In 2018, a man prohibited from accessing guns built his own ghost gun from parts ordered online and perpetrated a mass shooting at his workplace in Middleton, Wisconsin.
- In 2019, a man in Dallas, Texas, who was prohibited from possessing firearms due to a history of domestic violence, was arrested for possessing an AR-15-style rifle made with a 3D-printed receiver. When he was arrested, he was carrying a hit list with the names and addresses of several federal lawmakers.
- In late 2019, a 16-year-old used a ghost gun to kill two students and injure three others at Saugus High School in California. He was too young to legally purchase a gun.

A 2016 US Government Accountability Office report noted an “emerging reliance by criminal organizations on this source of weapons.” Ghost guns allow gun traffickers to avoid the challenges and risks they would come up against if they attempted to purchase a traditional gun from a licensed dealer.[70]

[70] Giffords Law Center to Prevent Gun Violence, “Ghost Guns: How Untraceable Firearms Threaten Public Safety,” May 21, 2020, https://giffords.org/lawcenter/report/ghost-guns-how-untraceable-firearms-threaten-public-safety/ (explaining the various steps a person prohibited from purchasing firearms would have to go through to purchase a traditional gun from a licensed dealer, including using a “straw

60 Minutes found that "at least 38 states and Washington DC have seen criminal cases involving ghost guns," including "at least four mass shootings, violent police shootouts, high-profile busts of gangs making and selling ghost guns on the street, and cases involving terrorism and white supremacists."[71] A review of 114 federal prosecutions involving ghost guns from 2010 to April 2020, connected 2,513 ghost guns to criminal activity, more than 1,300 of which were possessed, made, or sold by a person prohibited from purchasing and possessing firearms.[72] The review also found that more than half of the ghost guns connected to criminal activity were used or sold by criminal enterprises to facilitate gun trafficking, robbery, drug trafficking, terrorism, and murder.[73] The proliferation of the ghost gun has also increased the time and resources law enforcement must spend to solve and deter gun crimes.

The ATF considers firearms tracing "the single most important strategy in determining the sources of crime guns, linking suspects to firearms in criminal investigations, and determining strategies to address firearms-related violence."[74] Firearms tracing depends substantially on the serialization of all firearms manufactured and sold in the United States. However, ghost guns allow at-home "manufacturers" to make unserialized firearms that are entirely untraceable.

Due to the lack of serialization requirements, there is no way to know exactly how many ghost guns exist nationwide, but in some areas where concrete numbers do exist, the count is frighteningly high. For example, in Southern California, ghost guns now represent more than 40% of all crime guns recovered.[75]

The demand for guns in general—and ghost guns specifically—has spiked in the wake of the COVID-19 pandemic, with reports that at least 16 ghost gun companies have experienced such high demand that they have notified customers of delays.[76] Once ghost guns are completed, they are indistinguishable from guns purchased in a gun shop, except they do not have a serial number and thus cannot be traced, making it difficult, if not impossible, to determine the chain of custody of the gun itself.

purchaser" who must pass a background check and be present to purchase the serialized firearm and fill out the paperwork that law enforcement can use to trace back to the initial sale).

[71] Bill Whitaker, "Ghost Guns: The Build-It-Yourself Firearms that Skirt Most Federal Laws and Are Virtually Untraceable," 60 Minutes, May 10, 2020, https://www.cbsnews.com/news/ghost-guns-untraceable-weapons-criminal-cases-60-minutes-2020-05-10/.

[72] Everytown for Gun Safety, "Preface to Untraceable: The Rising Specter of Ghost Guns," May 2020, https://everytownresearch.org/reports/untraceable-ghost-guns/.

[73] Everytown for Gun Safety, "Preface to Untraceable: The Rising Specter of Ghost Guns," May 2020, https://everytownresearch.org/reports/untraceable-ghost-guns/.

[74] *See* "ATF Firearms Tracing Guide: Tracing Firearms to Reduce Violent Crime," ATF Publication 3312.13, March 2012, https://www.atf.gov/file/58631/download.

[75] Brandi Hitt, "'Ghost Guns' Investigation: Law Enforcement Seeing Unserialized Firearms on Daily Basis in SoCal," ABC News 7, January 30, 2020, https://abc7.com/ghost-guns-california-gun-laws-kits/5893043/.

[76] Tess Own, "People Are Panic-Buying Untraceable 'Ghost Guns' Online in the Coronavirus Pandemic," VICE News, March 27, 2020, https:// www.vice.com/en_us/article/g5x9q3/people-are-panic-buying-untraceable-ghost-guns-online-in-the-coronavirus-pandemic.

The threat posed by the current regulatory definition of *frame or receiver* is evident in case law.

- In *Jimenez*, the court overturned the defendant's indictment for unlawful possession of a machine gun on vagueness grounds, because the lower receiver, which was modified for automatic fire, did not fall into the regulatory definition of a "receiver," and thus the definition did not provide the defendant (who was also prohibited from purchasing and possessing firearms) notice that his conduct was in violation of the law.
- In *Roh*, the court found that the defendant did not violate the law by manufacturing lower receivers, which he then sold to customers, to whom he also provided all of the other parts of an AR-15 to, because the lower receivers did not fall into the regulatory definition of a "receiver."
- In *Rowold*, the court overturned the defendants' indictment for making false statements in the acquisition of a firearm and the unlawful possession of a firearm by a person with a felony conviction, because the *fifty* lower receivers purchased did not fall into the regulatory definition of a "receiver."

2. Public safety factors outweigh reliance interests

Some people are engaged in the business of selling unfinished frames or receivers. Others may possess these devices with the intent to complete and then sell or transfer them to others. However, these groups' reliance on the ATF's current interpretation should be limited. As the ATF handbook makes clear, while "ATF letter rulings classifying firearms may generally be relied upon,...classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations."[77] The need to address the danger that ghost guns pose to public safety, as described above, clearly outweighs these groups' reliance interests.

V. Next steps

A change to the regulatory definition of "frame or receiver" is the clearest and most efficient way that the administration can resolve the dual problems of ghost guns and rejected classifications of lower receivers. As a more immediate step, which could be taken alongside the initiation of a rulemaking process, the ATF could issue new classification letters and other guidance regarding unfinished frames and receivers.

In addition, bills were introduced in the 115th and 116th Congress that would address these issues by creating a statutory definition of "frame or receiver." These bills include H.R. 6643 (115th Cong.), S. 3300 (115th Cong.), H.R. 3553 (116th Cong.) and S. 3743 (116th Cong.). These bills are substantially similar; the most refined language is in S. 3743, which would

[77] Bureau of Alcohol, Tobacco, Firearms & Explosives, "ATF National Firearms Act Handbook," April 2009, § 7.2.4.1, https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download.

establish a statutory definition of “frame or receiver” that closely tracks the proposed regulatory definition in Part III *infra*, and would address both ghost gun and split receiver issues.

Several states have enacted laws that partially address the problem of ghost guns. For example, California and Connecticut require individuals assembling firearms to apply for a serial number to be issued by the state, which must then be affixed to the firearm; and Hawaii and New Jersey prohibit the purchase of parts from which an unserialized firearm can be readily assembled. While additional state laws can mitigate the dangers of ghost guns, only federal action can adequately address this nation wide issue.

RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF)
Topic: Gun Trafficking Report
Date: November 2020

Recommendation: Resume compiling aggregate information about the ATF's illegal gun trafficking investigations, and make this information available to policymakers, academics, and the public.

I. Summary

Description of recommended executive action

Twenty years ago, the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) released a comprehensive report on trends in its gun-trafficking investigations entitled *Following the Gun: Enforcing Federal Laws Against Firearm Traffickers*. This report, which was based on an analysis of the ATF's criminal investigations into gun trafficking from 1996 through 1998, provided invaluable information about illegal gun trafficking that policymakers have relied on ever since.[1] Gun trafficking has changed since that time, however, and policymakers require updated information.

To inform the development of smart policies and programs narrowly tailored to address the most common sources of illegal gun trafficking, the ATF, under the incoming administration, should produce an annual report, similar to *Following the Gun,* to analyze recent firearms trafficking investigations, crime gun trace data, and other key information.

Overview of process and time to enactment

Producing a gun trafficking report is currently within the ATF's authority, and as such, no further regulatory or sub-regulatory action would be needed. As discussed below, while a provision included in appropriations bills from 2004 through 2007 could have been interpreted to prohibit the release of this information, in 2008, the provision was amended explicitly to allow its release.

As such, the ATF could simply begin the analysis for an updated gun trafficking report, using data the agency already collects. In order to do this, the ATF would need to conduct a review of its firearms trafficking investigations during the preceding one-year period, and their disposition by prosecutors and courts. The ATF may wish to contract with independent researchers, or researchers in another agency within the DOJ, to conduct this review. After conducting this

[1] US Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, "Following the Gun: Enforcing Federal Laws Against Firearm Traffickers," June 2000, https://lawcenter.giffords.org/wp-content/uploads/2020/06/Following-the-Gun_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf.

review, the ATF should be able to produce the first of these public reports by June 2022. Similar reports should be produced annually thereafter.

II. Current state

The ATF is the lead federal agency charged with investigating and preventing gun trafficking and gun violence. This role gives the agency unique insight into the larger nationwide trends that state and local law enforcement agencies cannot provide. Along with this role comes a responsibility to inform the public about these trends, so that policymakers and the public can properly focus their own efforts to reduce gun violence in their communities. *Following the Gun* was an appropriate way for the ATF to fulfill this responsibility, and the ATF should once again release this information. While the ATF's authority to do so has been clear since 2008, the ATF has failed to do so.

The ATF report in the year 2000

Following the Gun, which was released in June 2000, was the result of an effort to gather and analyze information about all of the ATF investigations into firearms trafficking during the period from July 1996 through December 1998. To report on the gun trafficking problem and the federal enforcement response to it, the ATF documented and analyzed all criminal investigations that it undertook during that period that involved firearms traffickers.[2] This information yielded an abundance of data about firearms traffickers and trafficking channels, as described in detail in 21 numerical tables and 54 pages of narrative descriptions.

As defined in the *Following the Gun* report, "firearms trafficking" refers to the illegal diversion of legally owned firearms from lawful commerce into unlawful commerce, often for profit.[3] *Following the Gun* revealed how every year, tens of thousands of guns enter the illegal market through a number of channels, including straw purchases; corrupt gun dealers; sales by unlicensed sellers, who aren't required to conduct background checks; gun thefts; and bulk gun purchases.[4] *Following the Gun* revealed a number of key insights into firearms trafficking.

- Straw purchases. Purchases in which a gun is purchased from a licensed dealer on behalf of someone else are the most common channel identified in trafficking investigations.[5]

- Federal firearms licensees: Federally licensed gun manufacturers, dealers, and importers are "a particular threat to public safety when they fail to comply with the law"; although they were involved in under 10% of the trafficking investigations, these

[2] *Id.* at ix.
[3] *Id.* at 3.
[4] ATF calculated that 46.3% of ATF's firearm trafficking investigations during the study period involved firearms trafficked through straw purchasers, 20.5% through unlicensed sellers, 13.9% through gun shows and flea markets, and 24% through theft. *Id.* at 11.
[5] *Id.* at xi.

businesses were associated with the largest number of diverted firearms—over 40,000 guns.[6]

- Private sellers: Unlicensed sellers, who may purchase guns from licensed dealers, then sell the guns on the secondary market, are not required under federal law to conduct background checks.[7] The report noted that almost 60% of the trafficking investigations it reviewed involved second hand guns, *i.e.,* guns sold or transferred through private sellers.[8]

Policymakers' continued reliance on the 2000 report

Since *Following the Gun* was published, policymakers at both the federal and state level aiming to reduce gun violence have continued to rely on the report in their efforts to address gun trafficking.[9]

For example, to address the role private sales play in gun trafficking, many states, including Colorado, Delaware, New Mexico, and New York have enacted "universal background check" laws, which require a background check before the sale of a gun even if the seller is unlicensed.[10] In February 2019, the House of Representatives passed a bill modeled on these laws.[11] Similarly, in January 2019, due to the large number of guns associated with corrupt or negligent gun dealers, and after a decade-old fight in the legislature, Illinois finally enacted the "Combating Illegal Gun Trafficking Act," a law that comprehensively regulates firearms dealers in the state by requiring them to obtain a state license, use proper security measures, and conduct background checks on employees.[12]

In 2014, even the Supreme Court of the United States cited *Following the Gun* for the proposition that straw purchases play a large role in gun trafficking.[13] In 2013, the Senate Judiciary Committee cited *Following the Gun* in its report on the "Stop Illegal Gun Trafficking Act of 2013" (S. 54, 113th Cong. (2013)).[14] These are just examples of the many times policymakers have relied on the data provided by *Following the Gun* as the best description of the activities of gun traffickers and law enforcement responses to these activities.

[6] *Id.* at x.
[7] *Id.* at 4.
[8] *Id.* at x.
[9] *See, e.g*, William J. Krouse, *"Gun Control: Federal Law and Legislative Action in the 114th Congress,"* Congressional Research Service, April 19, 2017, 14, https://fas.org/sgp/crs/misc/R44655.pdf (citing *Following the Gun* for its description of gun trafficking).
[10] *See* Giffords Law Center to Prevent Gun Violence, "Universal Background Checks," accessed June 10, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/.
[11] H.R. 8, 116th Cong. (2019).
[12] Combating Illegal Gun Trafficking Act, Pub. Act 100-1178 (enacted, January 18, 2019).
[13] *Abramski v. United States,* 573 U.S. 169, 180 (2014).
[14] Sen. Report 113-9 (April 13, 2013).

Changes in gun trafficking

Gun trafficking has changed since the ATF released *Following the Gun* in 2000. In the intervening two decades, prohibited purchasers have found new and dangerous methods for obtaining guns. However, the lack of updated information about these methods is hindering policymakers' ability to make informed decisions about the forms of gun trafficking that threaten public safety most.

With respect to unlicensed sellers, *Following the Gun* provided gun shows as an example of the context for their gun transactions. At the time *Following the Gun* was published, "Gun shows were a major trafficking channel, involving the second highest number of trafficked guns per investigation (more than 130), and associated with approximately 26,000 illegally diverted firearms."[15] However, since that time, the internet has grown and evolved, and enormous numbers of unlicensed gun sellers now sell guns to strangers online.[16] The internet has made it increasingly easy for dangerous people to take advantage of the private sale loophole by arranging gun sales with unlicensed sellers in online chatrooms, social media sites, auctions, and classified ad platforms. Predictably, the online market has become an attractive source of weapons for people who cannot pass a background check at a gun store.

One can assume online marketplaces have now taken the place of gun shows as the focal point for unlicensed gun sales, but without more data from the ATF, we cannot be sure. Advocates have done their best to gather information about the scope of online gun sales and the role they play in gun trafficking,[17] but much remains unclear. We know even less about the ATF's response, in terms of criminal investigations, to the problem of online gun trafficking.

Another modern form of gun trafficking, virtually unknown at the time *Following the Gun* was published, involves so-called "ghost guns." Ghost guns do not have a serial number and are untraceable. Ghost guns have grown in popularity, increasingly used in illegal firearm trafficking and found at crime scenes.

Ghost guns are attractive to criminals because they lack the markings necessary for law enforcement to trace them. In the traditional manufacturing process, the firearm manufacturer or importer will affix a serial number and markings that identify the manufacturer or importer, make, model, and caliber. Using this information, the ATF can track firearms from the manufacturer or importer through the distribution chain to the first retail purchaser.[18] The ATF works extensively

[15] *Id.* at xi.
[16] *See* Giffords Law Center to Prevent Gun Violence, "Interstate and Online Gun Sales," accessed June 11, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/interstate-and-online-gun-sales/.
[17] *See, e.g.,* Everytown for Gun Safety, "Online and Off the Record: Washington State's Vast Internet Gun Market," July 31, 2017, https://everytownresearch.org/reports/online-and-off-the-record/.
[18] *See* Giffords Law Center to Prevent Gun Violence, "Ghost Guns," accessed June 11, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/ghost-guns/.

with other law enforcement agencies to trace firearms using this technique—in 2017 alone, the ATF conducted more than 408,000 traces.[19]

Ghost guns, which can be self-assembled using kits or common household tools, or parts of which can be 3D printed, are increasingly used by illegal gun-trafficking rings across the country. A 2015 bust of a ghost-gun trafficking ring in Long Island, revealed ghost guns as the "new frontier of illegal firearms trafficking."[20] In July 2018, the Los Angeles Police Department broke up a brazen ghost-gun trafficking enterprise in Los Angeles.[21] Individuals have been caught manufacturing and selling untraceable guns in locations across the country.[22] For example, in April 2018, a New Jersey grand jury indicted a man for unlawfully manufacturing and selling untraceable guns after law enforcement seized nearly three dozen weapons from his home, including nearly 20 untraceable guns.[23] Congress and the states are now presented with this growing threat, but to address it, they need better information about the extent of the problem. An updated version of *Following the Gun* would provide this information.

III. Proposed action

To inform the development of smart policies and programs narrowly tailored to address the most common sources of illegal gun trafficking, the ATF under the incoming administration should produce an annual report analyzing recent firearms trafficking investigations, crime gun trace data, and other key information. As the ATF first did for *Following the Gun, the* ATF should publish the results in a comprehensive report that identifies predominant firearms trafficking channels and sources of trafficked firearms.

In producing the report, the ATF should consider the following.

[19] US Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, "ATF By the Numbers," June 14, 2018, https://www.atf.gov/resource-center/infographics/atf-numbers.
[20] Office of the Attorney General of the State of New York, "A.G. Schneiderman Announces Thirty-Two Count Indictment of Two Defendants Charged with Illegally Trafficking Untraceable 'Ghost Guns,'" news release, September 21, 2015, https://ag.ny.gov/press-release/ag-schneiderman-announces-thirty-two-count-indictment-two-defendants-charged-illegally.
[21] Richard Winton, "L.A. Gangs Stockpile Untraceable 'Ghost Guns' that Members Make Themselves," *Los Angeles Times*, July 6, 2018, http://www.latimes.com/local/lanow/la-me-la-gangsters-homemade-guns-20180706-story.html.
[22] E.g., Tamara Sacharczyk, "Unregistered, Untraceable Guns Recovered in Massachusetts," WWLP News 22, March 28, 2018, https://www.wwlp.com/news/i-team/unregistered-untraceable-guns-recovered-in-massachusetts/1086053922; Alex Ceneviva, "Bridgeport Police Confiscate Ghost Guns," WTNH News 8, August 2, 2018, https://www.wtnh.com/news/connecticut/fairfield/bridgeport-police-confiscate-ghost-guns/1341726044; Lauren Sellew, "Warrant: Authorities Began Investigating Southington Man Charged with Firearm Offenses When He Tried to Sell Homemade Rifle Online," Record-Journal, November 21, 2018, http://www.myrecordjournal.com/News/Southington/Southington-News/Police-Southington-man-charged-after-raid-at-Darling-Street-apartment.html.
[23] Maxwell Reil, "Man indicted after selling 'ghost gun' in Hammonton," Atlantic City Press, April 13, 2018, https://www.pressofatlanticcity.com/news/man-indicted-after-selling-ghost-gun-in-hammonton/article_16aa48bc-519c-50d5-b66b-748689e9c5b4.html.

- Outside research assistance. In order to produce *Following the Gun,* the ATF contracted with outside researchers affiliated with accredited institutions of higher education with expertise in criminology. These criminologists, Dr. Anthony A. Braga of Harvard University and Dr. Joel Garner of the Joint Centers for Justice Studies, designed surveys through which the ATF's special agents in charge provided information about the firearms trafficking investigations they are responsible for.[24] The researchers reviewed the results of these surveys and firearms trafficking investigations, and assisted the ATF in tabulating and categorizing firearms trafficking investigations for the report. In order to do this, the researchers had access to information necessary to validate the survey results, including case disposition and sentencing information available from the Bureau of Justice Statistics; directly from federal, state, or local courts; the Executive Office for US Attorneys; or the Administrative Office of the US Courts. The researchers oversaw the analysis of the survey results and the drafting of the report.

- Data included in the report (trafficking statistics). Like *Following the Gun,* the new reports should include comprehensive information about gun trafficking, including:
    - the number of firearms trafficking investigations during the period
    - the number of firearms involved
    - an estimate of the proportion of the diverted firearms that were seized by agents in connection with investigations
    - a description of how the trafficking investigations were initiated, including the number and percentage that were initiated through multiple sales records, crime gun trace data analysis, inspections of licensees, or licensees' reporting of lost or stolen firearms
    - a description of the role of firearms tracing in firearms trafficking investigations, and the number of investigations in which firearms tracing was used as an investigative tool
    - the number and percentage of investigations that involved each type of firearms trafficking[25]
    - the total, average, and median number of trafficked firearms involved in each type of firearms trafficking investigation
    - descriptions of several representative firearms traffickers and their sentences

- Data included in the report (FFLs). *Following the Gun* included data that illuminated the role of federal firearm licensees in gun trafficking, and the new reports should include similar data. In particular, the report should include:

[24] ATF ensured that each of its Special Agents in Charge responded to the survey by providing information on all firearms trafficking investigations in their respective areas to their respective Field Divisions, and each of its Field Divisions submitted this information about investigations to ATF Headquarters, including ongoing investigations and perfected cases referred for prosecution. More information about the process can be found in Appendix B of *Following the Gun*.

[25] This includes straw purchases; unlicensed sellers; gun shows and flea markets; firearms stolen from licensees; firearms stolen from residences; firearms trafficked by licensed firearms dealers; street criminals buying and selling firearms from unknown sources; firearms stolen from common carriers; and online or internet sales.

    - the number and percentage of firearms-trafficking investigations involving licensees for each type of firearms trafficking
    - of the firearms trafficking investigations that involved a licensee, the number and percentage that operated out of a retail store, pawnshop, or residence
    - a comparison of the number of firearms associated with firearms trafficking investigations involving a licensee, and the number of firearms associated with firearms trafficking investigations that did not involve a licensee
    - data regarding the relationships between straw purchasers and other individuals involved in trafficking the same firearms

- Data included in the report (ghost guns). Given the threat posed by ghost guns, the ATF's new report should also include the number and percentage of firearms trafficking investigations that involved ghost guns, and the average number of ghost guns (versus firearms that are not ghost guns) involved in each case involving ghost guns.

- Data included in the report (crime guns). *Following the Gun* set forth important data on firearms trafficking investigations that involved firearms known to have been subsequently involved in an additional crime. The new reports should include similar data, including:
    - the proportion of firearms trafficking investigations that involved firearms known to have been subsequently involved in an additional crime, including homicide, robbery, assault, and illegal gun possession
    - the number and percentage of firearms-trafficking investigations in which a youth or juvenile was involved as a possessor, straw purchaser, thief, robber, or trafficker
    - the number and percentage of firearms-trafficking investigations that involved a firearm recovered after use in each of the main categories of gun crime, including homicide, robbery, assault, felon-in-possession, juvenile possession, and other illegal possession cases
    - a discussion of the involvement of convicted felons in firearms trafficking, including data regarding their roles as thieves, straw purchasers, actual buyers in straw purchases, licensees, former licensees, or other traffickers
    - information about the geographical context of gun trafficking, including the number and percentage of firearms-trafficking investigations that involved interstate, intrastate, international firearms trafficking, or some combination of these types
    - a discussion of how trafficking in stolen and secondhand guns impacts the gun tracing process, and the number and percentage of firearm trafficking investigations that involved new, secondhand, or stolen firearms, or some combination of these categories.

- Data included in the report (criminal justice response): The 2000 report described the criminal justice response to the ATF gun trafficking investigations. The new reports

should include similar data, except that additional information should be provided to break down the data by race. This information should include:

- the crimes firearms traffickers were charged with, and convicted of, and the number and percentage of investigations and defendants that were involved in the crimes
- how and whether firearms trafficking investigations were recommended for prosecution, and the reasons why firearm trafficking investigations were not recommended for prosecution
- of the firearms trafficking investigations that were referred to prosecutors, the total number of the referrals, the percentage of trafficking case referrals that prosecutors accepted, and the number of defendants involved in the cases, broken down by race
- the number of firearms traffickers found guilty and sentenced in federal, state, and local courts, broken down by race
- the percentage of the defendants in these cases who received sentences of incarceration, broken down by race
- the sentence length and term of probation for relevant groups of defendants, broken down by race
- the percentage of the referrals to state or local prosecutors (versus federal authorities)
- of the cases that prosecutors accepted, the percentage in which the prosecutors proceeded with other charges not related on their face to firearms trafficking
- a description of the role of United States attorneys and state and local law enforcement and prosecutors in firearms trafficking investigations
- descriptions of several representative firearms traffickers and their sentences
- challenges and obstacles to the prosecution and enforcement of the law against straw purchasers, unlicensed dealers, corrupt licensees, and large-scale traffickers

- Breakdown of report data by state. In order to ensure the report provided a description of the larger context for these investigations, *Following the Gun* included a breakdown of some data by state. Such data is critical, as it reflects the ultimate success or failure of anti-trafficking policies in jurisdictions around the country. It also reveals which jurisdictions may be declining to engage at all with anti-trafficking efforts. As such, the new reports should include:
  - breakdown of the number and percentage of firearms trafficking investigations by state
  - the percentage of firearms trafficking investigations in which state or local law enforcement agencies participated

IV. Legal justification

The ATF's authority to gather and release information about its gun trafficking investigations is clear, so long as it does not release information that would interfere with these investigations,

such as the names and identities of suspects, informants, or other individuals involved. Yet, the ATF has not provided this kind of information since the year 2000. The ATF's failure to provide this information in the years since *Following the Gun* may be due in part to the agency's interpretation of two appropriations riders: (1) the Tiahrt Amendment, and (2) the centralization and consolidation rider.

The first of these riders, known as the Tiahrt amendment, limits the information the ATF may disclose to the public.[26] However, since 2008, the Tiahrt amendment explicitly authorizes the ATF to issue reports like *Following the Gun*.

The second rider prohibits the ATF from consolidating or centralizing gun-sale records. This rider did not prevent the ATF from issuing *Following the Gun,* and does not prevent it from now issuing updated reports.

1. The Tiahrt Amendment

Language of the Tiahrt amendment and its exception

The Tiahrt amendment prohibits disclosure of firearms tracing information; information about gun sales and transfers included in the records of federal firearms licensees; and information that these licensees are required to report to the ATF. The general rule established by the Tiahrt amendment is that:

> .... no funds appropriated under this or any other Act may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section ...[27]

A version of this language first appeared in 2003 and was repeated in various iterations in subsequent years. Despite the limited nature of the Tiahrt amendment, it had a detrimental effect on the ATF's public disclosures. Consequently, in 2005, Congress included the first version of the exceptions provision in the Tiahrt amendment. This exception focused on the number of firearms each licensed importer and manufacturer produced, imported, or exported. The legislative history for that amendment provides that:

> [T]he Committee is concerned that the previous language has been interpreted to prevent publication of a long-running series of statistical reports on products regulated

[26] Other riders included in appropriations bills related to guns are also sometimes referred to as "Tiahrt amendments," but are not relevant here.

[27] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609-10 (2011). *See also* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 53 (2004) (very similar language).

> by ATF. This was never the intention of the Committee, and the new language should also make clear that those reports may continue to be published in their usual form as they pose none of the concerns associated with law enforcement sensitive information.[28]

Then in 2008, the rider was again amended to include an exception for aggregate data:

> ...except that this provision shall not be construed to prevent:... (C) the publication of … statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations…[29]

This language has been included in every iteration of the Tiahrt amendment since then, including the 2012 version that was made permanent through the use of futurity language.[30]

This language purposefully mirrors the language that the ATF used in *Following the Gun*, which repeatedly used the terms "traffickers," "trafficking channels," and "trafficking investigations." As noted above, the report also included 21 tables of "statistical aggregate data."

In *Following the Gun*, the ATF defined "firearms trafficking" as "the illegal diversion of legally owned firearms from lawful commerce into unlawful commerce, often for profit."[31]The report also explained the closely related term "trafficking channels":

> Firearms traffickers are using a variety of channels to divert firearms, and investigations usually involve multiple trafficking channels, such as a corrupt FFL [federal firearms licensee] and a straw purchaser, or theft and unlicensed dealing. …[32]

The report also defined the term "firearms-trafficking investigation" and used a data set based on this definition.[33]As noted above, this information yielded an abundance of data about firearms traffickers and trafficking channels, such as the number and percentage of the ATF investigations that involved each of the identified channels.

It is clear that Congress contemplated reports like *Following Gun* when it added the exception for the publication of statistical aggregate data regarding firearms traffickers and trafficking channels. Still, despite this exception, the ATF has released almost no data on firearms traffickers, trafficking channels, or trafficking investigations in the last decade and a half. The

[28]H.R. Rep. 108-576, at 30 (2004).

[29] Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1903-04 (2007).

[30] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609-10 (2011) (adding in the futurity language "during the current fiscal year and in each fiscal year thereafter"); Consolidated Appropriations Act, 2010. Pub. L. No. 111-117, 123 Stat. 3034, 3129 (2009); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 575 (2009).

[31] US Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, "Following the Gun: Enforcing Federal Laws Against Firearm Traffickers," June 2000, 3, https://lawcenter.giffords.org/wp-content/uploads/2020/06/Following-the-Gun_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf.

[32]*Id.* at x.

[33]*Id.* at ix.

ATF's failure to release this information has not only impeded progress on the issue of gun trafficking, but also flies in the face of Congress's intent in including this exception.

The ATF's failure to implement the exception

The only information concerning firearms traffickers, trafficking channels, or firearms trafficking investigations that the ATF has released in recent years identifies the number of crime guns recovered in each state that have been traced to other states. This information arguably concerns "trafficking channels,"[34] but was not included in *Following the Gun*. Congress clearly intended the term "trafficking channels" to refer to more than geographical information. Yet, the information released provides the public with hardly any information about firearms traffickers, and zero insight into the ATF's trafficking investigations.

In addition to the vast amount of numerical data, *Following the Gun* also included descriptive information about the various categories of gun traffickers, trafficking channels, and trafficking investigations. This information was included to identify, label, and explain the categories that the numerical data represented.

Arguably, the Tiahrt amendment prohibits the release of certain data that is not "statistical" or "aggregate." However, significant descriptive information, such as that included in *Following the Gun,* falls within the meaning of the term "statistical aggregate data."

According to a basic statistics textbook, there are two main types of "statistical data": (1) categorial data, and (2) numerical data. "Categorical data are generally non-numeric or qualitative, in the sense that each individual item is a description rather than a number."[35] While not numerical, the descriptive information about gun-trafficking investigations in *Following the Gun* is categorical, statistical data.

The term "aggregate data" is used generally in the law to refer to statistical information that does not disclose any individual person involved.[36] The term "aggregate" in this context indicates that the ATF is authorized to categorize trafficking cases, and provide total numbers and percentage of traffickers, trafficking cases, and trafficked firearms that fall within specific categories, provided that it does not disclose the name or other personally identifiable information about a particular trafficker, gun purchaser, or gun seller. The term necessarily implies that the ATF is authorized to identify categories and label them with descriptive information; otherwise, there would be no information to aggregate.

[34]However, firearms that are traced are not necessarily trafficked. A person who purchases a gun from a licensed dealer lawfully and later uses it in a crime has not engaged in firearms trafficking, since he or she has not diverted the firearm into unlawful commerce. Law enforcement in that case would trace the firearm directly to the violent criminal who used it.
[35]Gosling, Jenny. *Introductory Statistics*. Pascal Press, 1995. https://books.google.com/books?id=zDVcG46aBT0C&printsec=frontcover#v=onepage&q&f=false.
[36]*See, e.g.,* 7 U.S.C. § 2276.

Disclosure to researchers for the purpose of the report

The ATF may be construing the Tiahrt amendment to prevent the disclosure of information to outside researchers, thus limiting its authority to replicate the process used to produce *Following the Gun*. The Tiahrt amendment broadly prohibits disclosure to most individuals, with law enforcement agencies as the primary exceptions.

However, the exception to the Tiahrt amendment explicitly prohibits the Tiahrt amendment from being "construed to prevent" the publication of the relevant statistical data. Government agencies, like the ATF, are therefore under an obligation to avoid interpreting the Tiahrt amendment in any way that would prevent the publication of this data. Based on this exception, it's clear that the ATF can hire external researchers and disclose protected data to those researchers. Should the ATF decide to use internal government researchers, those from the Bureau of Justice Statistics would also be able to do this work.

2. The centralization and consolidation rider

Another appropriations rider, which first appeared in 1978 and was made permanent in 2012, prohibits the ATF from using funds "in connection with consolidating or centralizing, within the Department of Justice, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees."[37] Any investigation into gun trafficking may necessarily involve gathering two or more records of firearm sales as evidence of trafficking by the same person or group of people. Nevertheless, this rider does not prevent the ATF from investigating gun trafficking, since bringing select records together, when they may indicate trafficking, does not constitute "consolidating or centralizing" such records. Multiple courts have reiterated, "'The plain meaning of consolidating or centralizing does not prohibit the mere collection of some limited information. Both consolidating and centralizing connote a large-scale enterprise relating to a substantial amount of information.'"[38]

Furthermore, the consolidation and centralization rider does not prevent the publication of aggregate information derived from these records and the related investigations. Even though this rider has been included in appropriations laws since 1978, this rider did not prevent the ATF from issuing the original *Following the Gun*. There is no reason why the rider on consolidating and centralizing gun sales records should be interpreted to prevent the ATF from issuing further trafficking reports now.

The ATF clearly has the authority, if not the obligation, to issue reports like *Following the Gun* on a regular basis. There are no legal obstacles to the publication of the information in these

[37] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 4 (2011).
[38] *Ron Peterson Firearms, LLC v. Jones,* 760 F.3d 1147, 1161 (10th Cir. 2014) (quoting *Blaustein & Reich, Inc. v. Buckles,* 365 F.3d 281, 289 (4th Cir. 2004). See also *Nat'l Shooting Sports Found., Inc. v. Jones,* 716 F.3d 200, 212-14 (D.C. Cir. 2013).

reports. Given the importance of this information for policymakers and ultimately for public safety, the ATF should begin regularly producing these reports again as soon as possible.

RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Issue Numerical Threshold to Define Firearm Sellers as "Dealers"
Date: November 2020

Recommendation: Clarify who qualifies as a firearms dealer by issuing a regulation stating that any person who sells five guns or more in any 12-month period is "in the business" of selling firearms.

I. Summary

Description of recommended executive action

Under the Gun Control Act of 1968 (GCA), any person who is engaged "in the business" of selling guns is a firearms dealer and must obtain a federal firearms license (FFL).[1] This distinction triggers certain federal laws and regulations that federal firearm licensees (FFLs) must follow, including the statutory requirement that they conduct a background check on potential purchasers. Gun sellers who do not qualify as a firearms "dealers" are not required to obtain an FFL, and thus, are not required under federal law to conduct background checks.

The GCA is vague as to the level of sales activity that distinguishes someone who sells guns occasionally—and is not subject to federal licensing requirements—from someone who is "engaged in the business" of firearm sales and qualifies as a firearms dealer. According to a report issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the federal definition of "engaged in the business" often frustrates the prosecution of "unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons."[2]

Because of this vagueness, individuals prohibited from purchasing or possessing firearms under federal law can easily buy them from unlicensed sellers with no background check in most states. In fact, an estimated 22% of US gun owners acquired their most recent firearm without a background check—which translates to millions of Americans acquiring millions of guns, no questions asked, each year.[3]

To limit the number of unlicensed dealers and increase the number of gun sales subject to a background check, the next administration should issue a new rule clarifying that any person

[1] 18 U.S.C. § 923(a).
[2] ATF, "Gun Shows: Brady Checks and Crime Gun Traces," January 1999: 13-14, http://www.atf.gov/files/publications/download/treas/treas-gun-shows-brady-checks-and-crime-gun-traces.pdf.
[3] Matthew Miller, Lisa Hepburn & Deborah Azrael, "Firearm Acquisition Without Background Checks," *Annals of Internal Medicine* 166, no. 4 (2017): 233–239.

who sells five guns or more for profit in any 12-month period is "engaged in the business" of selling firearms, and thus qualifies as a gun dealer under federal law.

Overview of process and time to enactment

The Administrative Procedure Act (APA") requires that federal agencies issue rules through the notice and comment rulemaking (NCRM) process.[4] To finalize a new rule under the GCA, the ATF will be required to issue a notice of proposed rulemaking (NPRM), provide a 90 day period for receiving public comments,[5] respond to significant received comments (either by modifying the proposed rule or by addressing substantive comments directly), and publish the final rule in the *Federal Register*. A rule generally goes into effect 30 days after it is published.[6] In total, the multi-phase NCRM process generally extends for a year.

II. Current state

Federal regulatory scheme

The GCA makes it unlawful for any person except a licensed dealer to "engage in the business" of dealing in firearms.[7] By contrast, a so-called "private seller" (one who is not "engaged in the business") is exempt from federal licensing requirements.[8] Thus, private sellers are not subject to the myriad of federal requirements imposed on dealers under the GCA, including: mandatory background checks on prospective buyers; keeping firearms transaction records so that crime guns can be traced to their first retail purchaser; and ensuring safety locks are provided with every handgun and are available in any location where firearms are sold.[9]

Many private sellers take advantage of the GCA's vague definition of "engaged in the business" to purchase and sell high volumes of firearms without a license, without conducting background checks, and without oversight from the ATF.[10] These unregulated sales are a significant threat to public safety; unlicensed sellers regularly provide firearms to people who go on to commit violent crimes or engage in illegal firearms trafficking.[11]

[4] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[5] The GCA explicitly requires a 90 day comment period. 18 U.S.C. § 926(b).
[6] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.
[7] 18 U.S.C. § 922(a)(1)(A).
[8] *Id.*
[9] 18 U.S.C. § 922(t)(1)(A)–(B).
[10] *See, e.g.,* Chelsea Parsons, Eugenio Weigend Vargas, and Rukmani Bhatia, "The Gun Industry in America—the Overlooked Player in a National Crisis," Center for American Progress, August 6, 2020; Chelsea Parsons and Arkadi Gerney, "Executive Action to Strengthen Background Checks by Addressing High-Volume Gun Sellers," Center for American Progress, October 15, 2015, https://www.americanprogress.org/issues/guns-crime/reports/2015/10/15/123346/executive-action-to-strengthenbackground-checks-by-addressing-high-volume-gun-sellers/.
[11] *See, e.g.,* Scott Glover, "Unlicensed dealers provide a flow of weapons to those who shouldn't have them, CNN investigation finds," CNN, March 25, 2019, https://www.cnn.com/2019/03/25/us/unlicensed-gun-dealers-law-invs/index.html.

As applied to a firearms dealer, the term "engaged in the business" is defined as:

> [A] 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[12] 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.[13]

The GCA fails to define the amount of "time, attention, and labor" devoted to "dealing in firearms" that a person must commit prior to needing to obtain an FFL. The statute also does not specify the frequency of firearm sales that would give rise to a "regular course of trade or business," nor does it clearly define at what point periodic "sales, exchanges or purchases" are deemed more than "occasional." The lack of clarity on these points means that some private firearm sellers who arguably should qualify as dealers may think that they are not required to apply for an FFL. Others may take advantage of these vague standards to justify a decision not to become licensed or to intentionally avoid ATF oversight.

When the current language that allows unlicensed people to make "occasional sales" and sell guns from their "personal collections" was passed in 1986 as part of the Firearm Owners' Protection Act (FOPA), the standard was discussed in legislative hearings. According to an analysis conducted by Everytown for Gun Safety, the testimony indicates that the goal of the legislation was to create a clear definition for what constitutes "engaged in the business" and to protect people who sell guns in very small numbers.[14]

For example, Senator James McClure (R-ID), sponsor of the FOPA, said that the legislation would address the problem wherein sellers were prosecuted for transferring "two, three, or four guns from their collection."[15] Senator Orrin Hatch (R-UT) said that the new definition would protect people from selling "two or three weapons from their personal collections and thus unwittingly violating" the law.[16] The head of the National Rifle Association's Institute for

[12] 18 U.S.C. § 921(a)(22) states that "[t]he term 'with the principal objective of livelihood and profit' means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection."
[13] 18 U.S.C. § 921(a)(21)(C).
[14] Everytown for Gun Safety, "Business as Usual," November 12, 2015, https://everytownresearch.org/report/business-as-usual/#intro.
[15] The Firearms Owner Protection Act, Hearing Before the S. Comm. On the Judiciary, 97th Cong. 47(1981) (statement of Sen. James McClure).
[16] The Federal Firearms Owner Protection Act, Hearing Before the S. Comm. on the Judiciary, 98th Cong. 5 (1983) (Statement of Senator Orrin Hatch).

Legislative Action described the problem as "prosecutions on the basis of as few as two sales."[17]

In the face of this ambiguity, federal courts have not effectively resolved the vague statutory definition of "dealer." Courts have declined to impose by themselves any specific threshold of gun transactions, such as a "'magic number' of sales that need be specifically proven" before a person is deemed a firearms dealer.[18] Although courts have published dozens of opinions addressing the GCA's definition of "dealer," they have tended to consider the totality of the circumstances to evaluate whether the particular individual in the case is "engaged in the business" of selling firearms.[19] However, as the ATF has noted, "courts have upheld convictions for dealing without a license when as few as two firearms were sold, or when only one or two transactions took place."[20]

Obama administration efforts

In January of 2016, in response to the shooting at Sandy Hook Elementary School, the Obama administration undertook a series of executive actions designed to reduce gun violence.[21] One such action sought to clarify that it "doesn't matter where you conduct your business—from a store, at gun shows, or over the Internet: If you're *in the business* of selling firearms, you must get a license and conduct background checks" (emphasis added).[22] In particular, the ATF clarified the following principles via guidance:

> A person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted. For example, a person can be engaged in the business of dealing in firearms even if the person only conducts firearm transactions at gun shows or through the Internet. Those engaged in the business of dealing in firearms who utilize the Internet or other technologies must obtain a license, just as a dealer whose business is run out of a traditional brick-and-mortar store.

[17] The Firearms Owner Protection Act, Hearing Before the S. Comm. On the Judiciary, 97th Cong. 47 (1981) (Statement of Neal Knox, Exec. Dir. NRA-ILA).
[18] *U.S. v. Nadirashvili*, 655 F.3d 114, 119 (2d Cir. 2011) (quoting *U.S. v. Carter*, 801 F.2d at 82); *U.S. v. Palmieri*, 21 F.3d 1265, 1268–69 (3d Cir.), vacated on other grounds; *U.S. v. Brenner*, 481 Fed. App'x 124, 127 (5th Cir. Apr. 30, 2012).
[19] *See, e.g., U.S. v. Tyson*, 653 F.3d 192, 201 (3d Cir. 2011) (factors to consider include "the quantity and frequency of sales," "the location of the sales," "the conditions under which the sales occurred," "the defendant's behavior before, during, and after the sales," "the price charged for the weapons," "the characteristics of the firearms sold," and "the intent of the seller at the time of the sales"); *U.S. v. Shipley*, No. 10-50856, 2013 WL 5646965, *3 (5th Cir. Oct. 17, 2013) (unpublished) (quoting id.); *Brenner*, 481 Fed. App'x at 127 (quoting id.); *Palmieri*, 21 F.3d at 1268; *U.S. v. Valdes*, No. 12–80234– CR, 2013 WL 5561131, at *5 (S.D. Fla. Oct. 4, 2013).
[20] ATF, "Do I Need a License to Buy and Sell Firearms?," January 2016, https://www.atf.gov/file/100871/download.
[21] Executive Office of the President, "Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer," White House Archives, January 4, 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.
[22] *Id.*

> Quantity and frequency of sales are relevant indicators. There is no specific threshold number of firearms purchased or sold that triggers the licensure requirement. But it is important to note that even a few transactions, when combined with other evidence, can be sufficient to establish that a person is "engaged in the business." For example, courts have upheld convictions for dealing without a license when as few as two firearms were sold or when only one or two transactions took place, when other factors also were present.[23]

A rule setting a bright line threshold would build on this guidance and further shrink the private sales loophole.

State regulatory regimes

At the state level, several state legislatures have opted to quantify the number of sales that triggers a licensing requirement. For example, in California, no state firearm dealer license is required for "infrequent" sales of handguns, which the state defines to mean fewer than six transactions, each involving any number of handguns, per calendar year.[24] In Massachusetts, residents who transfer "not more than four firearms…in any one calendar year" are exempt from the state licensure regime, so long as the buyer and seller comply with certain other requirements.[25]

III. Proposed action

In order to effectuate the purpose of the GCA and ensure those who genuinely deal in firearms are required to comply with federal law, the next administration should promulgate a rule providing that anyone who sells five or more firearms for profit within any 12-month period is "engaged in the business" as a dealer and is therefore obligated to obtain an FFL.

A. Substance of proposed rule

The new proposed rule (or NPRM) should have several elements.

- It should create a numerical threshold stipulating that a person who sells or offers for sale five guns or more in any 12-month period is presumed to be "engaged in the business" of selling firearms**.** The next administration could set this threshold somewhere between 5–10 guns (we recommend the lower end), and this threshold would serve as a rebuttable presumption that an individual is selling firearms in the "regular course of trade or business," clarifying the language in § 921(a)(21)(C). In addition to this numerical threshold, the new proposed rule should codify a set of factors

[23] *Id. See also,* ATF *supra* note 20.
[24] Cal. Penal Code §§ 16730, 27545, 27966.
[25] Mass. Gen. Laws Ch. 140, § 128A.

that courts have used to determine if a person is dealing firearms in the "regular course of trade or business," including: (1) selling guns unused or still in their original packaging, (2) the repetitive sale of guns, (3) selling guns for profit, (4) re-selling guns shortly after obtaining them, (5) selling multiple guns of the same make and model, and (6) expressing a willingness or ability to obtain guns upon request.

If an individual sells or offers for sale five guns or more in any 12-month period, these other factors would be required to strongly outweigh the presumption that the person is "in the business" of selling firearms. However, if an individual sells or offers for sale four guns or fewer in any 12-month period, the new proposed rule would *not* create a presumption that the individual is selling firearms *outside* the "regular course of trade or business." Instead, the analysis would be similar to that of the current regime: it would weigh the factors codified by the proposed rule.

- <u>It should clarify that any person who falls before the five-gun threshold is not affirmatively released from the licensing and regulation regime.</u> The new proposed rule should explicitly state that it is still possible for someone who sells or offers for sale *fewer* than five firearms per year to qualify as a dealer under the GCA. The analysis in cases with fewer than five gun sales will rely on the set of factors codified by the NPRM, as outlined above. This clarification to the new rule ensures that bona fide dealers are not able to avoid licensing and regulation simply because they sell or offer to sell fewer than five firearms per year,[26] and that prosecutors are not required to prove that an individual who sold or offered to sell a specific number of firearms before that person can be convicted of dealing firearms without a license.

- <u>Clarify the definition of "personal collection" to include only firearms obtained or possessed for personal use.</u> The GCA's statutory exemption for those who sell "all or part of [their] personal collection of firearms" would still apply, regardless of the number of guns an individual sells or offers to sell.[27] The new proposed rule should clarify the term "personal collection" to include only those firearms obtained for a person's own personal use, and not those obtained for the purpose of selling or trading. The definition should also clarify that, as with dealer-owned firearms, guns are not considered a part of a person's personal collection until the owner has possessed them for at least one year, unless they were obtained through inheritance.[28]

[26] Also, some individuals who sell fewer than five guns for profit per year presumably would still like to apply for FFLs, and should be allowed to do so. And a regulation that strictly excludes all individuals who engage in fewer than a specified number of transactions would likely result in ATF denying licenses to applicants "due to lack of business activity" and would conflict with the Tiahrt Rider. *See* Pub. L. 113-6, 127 Stat. 198, 248 (Mar. 26, 2013) (codified at 18 U.S.C. § 923).

[27] *Id.*

[28] Defining the term "personal collection" in this way is supported by the use of that term at 18 U.S.C. § 923(c). That provision authorizes dealers to maintain "personal collection[s]" of firearms, but limits this authority by: (1) prohibiting all sales from a dealer's personal collection if the firearms were transferred from the dealer's business inventory during the past year, and (2) requiring dealers to keep records of sales from their personal collections. Nevertheless, ATF has allowed dealers whose licenses are revoked

B. Process

To issue a new rule, the ATF must go through the NCRM process under the APA.[29] First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Next, the agency must accept written public comments on the proposed rule for a period of at least 90 days, as specified by the GCA.[30] An oral hearing is not required.[31] Received comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting those proposals or by modifying the proposed rule to reflect their input.

In order to prevail in a substantive legal challenge to the rule, the ATF should confirm that setting the threshold at five firearms in any 12-month period is consistent with the statutory language, and reasonable in light of the statute's purposes, agency experience enforcing the statute, and the comments submitted on the NPRM.

Because this regulation is novel, the ATF should anticipate a significant influx of comments from the public and industry stakeholders. Consequently, it may take several months after the comments period has closed for the ATF to draft a final rule that meaningfully responds to and/or incorporates all of the significant comments.

Once the revision process is complete, the final rule will be published in the *Federal Register* along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

C. Legal justification

The attorney general has the power to prescribe "such rules and regulations as are necessary to carry out the provisions of" the GCA.[32] In turn, the attorney general has delegated authority to issue to the ATF rules and regulations related to the GCA.[33] These provisions are "general

to convert their business inventories into their personal collections and then sell them as private sellers (i.e., without background checks). *See* Mem. in Support of Mot. Dismiss or in the Alt. to Transfer, *Abrams v. Truscott*, No. 06-cv-643 (CKK), at 7 (D.D.C. filed June 15, 2006). The regulation proposed here would close this so-called "fire sale loophole" by preventing guns acquired for the purpose of selling or trading from being considered part of a "personal collection." ATF should acknowledge and explain this change in interpretation in the NPRM, and may wish to add clarifying language to 27 C.F.R. Subpart E regarding the activities of a dealer after the dealer's license is suspended or revoked.

[29] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

[30] 18 U.S.C. § 926(b).

[31] *See Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990).

[32] 18 U.S.C. § 926(a).

[33] 28 C.F.R. §§ 0.130, 0.131.

conferral[s] of rulemaking authority" that would lead a court to defer to the agency's interpretation.[34] The ATF's interpretation of who qualifies as a dealer is in the exercise of its general rulemaking authority.[35] Indeed, the definition of dealer is central to the regulatory regime established by the GCA, including the enforcement of the licensing requirement under § 923(a).

IV. Risk analysis

Agency rulemaking is generally subject to two types of challenges: procedural and substantive. Procedural challenges center on whether the agency promulgated the final rule in accordance with the requirements outlined by § 553 of the APA.[36] The procedural requirements of the APA and the GCA are discussed in Section III of this memorandum. So long as the ATF is careful to observe these requirements, the new rule is likely to withstand procedural challenges.

The proposed regulation is also likely to withstand constitutional challenges. Laws imposing conditions and qualification on the "commercial sale of arms" are presumed constitutional.[37]

Relevant here, substantive challenges will likely be mounted against the five-gun threshold (i.e. the clarification of "regular course of trade or business"). APA challenges will argue either that the rule is "in excess of [the agency's] statutory jurisdiction, authority or limitations,"[38] or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[39]

When a court reviews an agency's interpretation of a statute it is charged with administering, the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[40] Pursuant to that rubric, at step one, courts examine "whether Congress has directly spoken to the precise question at issue."[41] If so, "that is the end of the matter," and courts must enforce the "unambiguously expressed intent of Congress."[42] In the case of statutory silence or ambiguity, however, step two requires courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.[43] This reflects the fact that "*Chevron* recognized that [t]he power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[44]

[34] *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013); *Guedes*, at 20-21.
[35] *Id.*
[36] 5 U.S.C. § 553.
[37] *See District of Columbia v. Heller*, 554 U.S. 570, 626-27, 627 (2008).
[38] 5 U.S.C. § 706(2)(C).
[39] 5 U.S.C. § 706(2)(A).
[40] *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842-43 (1984).
[41] *Id.* at 842.
[42] *Id.* at 842-43.
[43] *Id.* at 843.
[44] *Id.* at 55–56 (internal quotation marks and citation omitted).

Here, at *Chevron* step two, the ATF has ample evidence to support the reasonableness of its interpretation of "regular course of trade or business," including past case law on the issue, legislative history of the GCA, past ATF rulemakings, and existing state licensing regimes.

A. Jurisprudence supports threshold number of five sales as reasonable

Past cases applying the definition of "dealer" provide some guidance about the number or frequency of firearm sales that courts may find reasonably establish a "regular course of trade or business."[45] Courts frequently uphold convictions for dealing firearms without a license in cases with a relatively small number of sales,[46] including cases where the sales activity was:

[45] 18 U.S.C. § 921(1)(21)(C).

[46] *U.S. v. McGowan*, 746 F. App'x 679, 680 (9th Cir. 2018) (defendant bought 8 guns over a span of "a few years" and sold six of them during such period); *Brenner*, 481 Fed. App'x at 126 (defendant sold at least 14 guns over a several month period); *Tyson*, 653 F.3d at 201 (defendant sold 23 firearms over the course of approximately seven months and intended to sell 11 more); *U.S. v. White*, 175 Fed. App'x 941, 942 (9th Cir. 2006) (unpublished) (defendant sold between 23 and 25 firearms in a year); *U.S. v. Kubowski*, 85 Fed. App'x 686 (Dec. 30, 2003) (unpublished) (defendant sold undercover agents 24 handguns and one rifle over five months, offered five more firearms for sale, and was found in possession of nearly 400 firearms); *U.S. v. Conn*, 297 F.3d 548 (7th Cir. 2002) (rejecting the defendant's sufficiency-of-the-evidence argument on plain-error review where the defendant sold undercover agents seven firearms on six occasions in a three-month period and government presented indirect evidence of additional transactions); *U.S. v. Collins*, 957 F.2d 72 (2d Cir. 1992) (defendant agreed to sell undercover officers five guns in three transactions over seven months and government presented evidence of additional sales; defendant did not challenge sufficiency of the evidence on appeal); *U.S. v. Berry*, 644 F.2d 1034 (5th Cir. 1981) (defendants sold undercover agents about 16 guns over three months and offered dozens more); *U.S. v. Wilmoth*, 636 F.2d 123, 125 (5th Cir. 1981) (defendant's "activity was greater than that of occasional sales entered into by a hobbyist" when defendant sold undercover agents eight guns in one month and offered at least 24 other guns for sale at one point or another); *U.S. v. Perkins*, 633 F.2d 856, 860 (8th Cir. 1981) (defendant engaged in at least three transactions involving eight guns over three months); *U.S. v. Huffman*, 518 F.2d 80 (4th Cir. 1975) (per curiam) (defendant engaged in "more than a dozen transactions in the course of a few months"); *U.S. v. Wilkening*, 485 F.2d 234, 234-36 (8th Cir. 1973) (defendant made 20 sales over a 17-month period and stated that he also made additional sales); *U.S. v. Gross*, 451 F.2d 1355, 1357-58 (7th Cir. 1971) (defendant sold 11 weapons over less than two months).

two firearms,[47] three firearms in four months,[48] four firearms in one month,[49] four firearms in two months,[50] five firearms in one month,[51] five firearms in four months,[52] and six firearms.[53]

The proposed rule is more likely to be upheld as reasonable if the specified number or frequency of sales is supported by existing case law. Based on this review of the jurisprudence, the proposed rule's threshold number of five guns sold or offered for sale in any 12-month period is within the range supported by case law and is reasonable.

B. Legislative history supports the proposed rule

The legislative history of the GCA also sheds some light on the scope of the ATF's discretion in promulgating regulations to quantify the meaning of "dealer." Although there is no significant legislative history regarding the meaning of "regular course of trade or business," the legislative history of § 921(a)(21) suggests that Congress intended the statutory exception for "occasional sales, exchanges, or purchases" to be quite limited.[54]

In the proposed rule, the ATF should assert that the GCA's exception for individuals who make only "occasional sales, exchanges, or purchases of firearms for the enhancement of a personal

[47] *U.S. v. Swinton*, 521 F.2d 1255, 1259 (10th Cir. 1975) (defendant sold at least two firearms, facilitated an additional sale, and offered to sell additional weapons).
[48] *U.S. v. Carter*, 801 F.2d 78, 81-83 (2d Cir. 1986) (defendants sold three firearms to an undercover agent in two transactions four months apart and there was indirect evidence of other sales or potential sales); *U.S. v. Orum*, 106 Fed. App'x 972, 974 (6th Cir. 2004) (unpublished) (defendant "offered to sell firearms to [confidential informants] on several occasions and actually sold them three different firearms on two different occasions").
[49] *U.S. v. Shirling,* 572 F.2d 532 (5th Cir. 1978) (defendant sold four firearms to two persons over the course of one month).
[50] *U.S. v. Day*, 476 F.2d 562, 567 (6th Cir. 1973) (defendant sold firearms on four occasions over a two-month period and offered to sell additional firearms); *U.S. v. Fridley*, 43 Fed. App'x 830, 831-33 (6th Cir. 2002) (unpublished) (defendant sold undercover officers four guns in two months and offered as many as 20 more).
[51] *Palmieri*, 21 F.3d at 1267-68 (defendant sold undercover officer five firearms in three transactions over approximately four weeks); *U.S. v. Williams*, 502 F.2d 581, 582-83 (8th Cir. 1974) (defendant engaged in five firearms transactions in one month).
[52] *U.S. v. Beecham*, 993 F.2d 1539 (4th Cir. June 2, 1993) (unpublished) (defendant engaged in five transactions over approximately four months).
[53] *U.S. v. Van Buren*, 593 F.2d 125, 126 (9th Cir. 1979) (per curiam) (defendant sold at least six new firearms over the course of five weeks); *U.S. v. Powell*, 513 F.2d 1249, 1250 (8th Cir.1975) (defendant sold six shotguns within "several" months of acquiring them); *U.S. v. Zeidman*, 444 F.2d 1051, 1055 (7th Cir. 1971) (defendant sold six firearms).
[54] *See, e.g.,* 131 Cong. Rec. S16,987 (daily ed. June 24, 1985) (statement of Sen. Hatch) (in proposing amendments to the 1968 Act, describing the 1968 Act as requiring clarification because it could be read to permit the prosecution of "hobbyists who sell a few guns out of their collection"); 131 Cong. Rec. S18,225 (daily ed. July 9, 1985) (statement of Sen. Hatch) (describing the 1968 Act as requiring clarification because it "allow[ed] law-abiding citizens to be convicted of a felony for selling one or two guns inherited from a family member"); 131 Cong. Rec. S18,226 (daily ed. July 9, 1985) (statement of Sen. Durenberger) (describing the 1968 Act as requiring clarification because "[m]any gun collectors have been enticed into two, three, or four gun sales out of their collection over a period of 6 months, then charged with having engaged in the business").

collection or for a hobby" is narrow, and that five sales or offers of sales for profit per year reasonably exceeds the exception.

C. Past rulemaking supports imposing numerical thresholds

Past rulemaking under the GCA offers precedent for imposing a numerical threshold where the statute's plain language does not directly contain one.

For example, the GCA prohibits firearms' possession by any current "unlawful user of or [person] addicted to any controlled substance."[55] The implementing regulations define this statutory provision to include a person who has had one drug conviction or failed one drug test in the past year, or has had multiple arrests for drug offenses in the past five years.[56]

Additionally, the GCA prohibits assembling semi-automatic assault rifles from imported parts, but does not specify the number of imported parts at which the rifle becomes prohibited. The implementing regulations provide that the statute is triggered only if a fully assembled weapon has more than 10 specified imported parts (a firearm generally has 20 major parts).[57] Notably, the NPRM for this regulation initially set the threshold at two or more parts (reasoning that "two" satisfies the plural "parts" language), but the final rule increased that number to 10 or more parts.[58]

D. State licensing regimes also suggest numerical thresholds are reasonable

Some state licensing regimes are also instructive. For example, Massachusetts exempts from the state licensure requirement state residents who transfer "not more than four firearms … in any one calendar year," provided that the buyer and seller comply with certain other requirements.[59] In California, no license is required for "infrequent" sales of handguns, which the state defines to mean fewer than six transactions, each involving any number of handguns, per calendar year.[60]

[55] 18 U.S.C. § 922(g)(3).
[56] 27 C.F.R. § 478.11.
[57] 18 U.S.C. § 922(r).
[58] *See* Domestic Assembly of Nonimportable Firearms (91—0001F), 58 Fed. Reg. 40,587 (July 29, 1993).
[59] Mass. Gen. Laws ch. 140, § 128A.
[60] Cal. Penal Code §§ 16730, 27545, 27966.

RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Federal Firearm License Revocation
Date: November 2020

Recommendation: Issue guidance clarifying that the ATF will revoke a federal firearms license when a gun dealer has one serious and willful violation of federal, state, or local law.

I. Summary

Description of recommended executive action

The Gun Control Act of 1968 ("GCA") gives the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) the responsibility of ensuring federal firearms licensees (FFLs) comply with applicable laws and regulations.[1] Under the GCA, if an FFL willfully fails to comply with federal law, the ATF has the ability to revoke the FFL's license.

Despite this authority, the ATF rarely revokes the licenses of noncompliant FFLs. For example, while more than one-third of inspected FFLs were found to violate federal firearms laws in FY 2011, the ATF only revoked the license of approximately 0.3% of gun dealers inspected that year.[2] Instead, the ATF routinely gives noncompliant gun dealers multiple chances over a period of years to correct violations, including serious violations such as selling guns to minors, failing to report missing or stolen guns, and failing to conduct a background check.

The result of this lax enforcement policy is that noncompliant FFLs continue to violate the law, and guns routinely end up in the wrong hands—with serious consequences. One report by the ATF analyzed 1,530 trafficking investigations conducted between July 1996 and December 1998 and found that dealers and pawnbrokers were associated with over 40,000 trafficked guns.[3] The report concluded that these FFLs' "access to large numbers of firearms makes them a particular threat to public safety when they fail to comply with the law."[4]

To reduce gun trafficking and hold FFLs accountable for violating the law, the ATF should issue guidance clarifying the following.

[1] 18 U.S.C. Chapter 44, § 921 et seq.

[2] U.S. Dep't of Justice Office of the Inspector General, "Review of ATF's Federal Firearms Licensee Inspection Program," April 2013, https://oig.justice.gov/reports/2013/e1305.pdf.

[3] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers," June 2000, https://web.archive.org/web/20180409033440/http://everytown.org/wp-content/uploads/2014/08/Following-the-Gun_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf.

[4] *Id.*

(1) **In addition to a violation of federal law, a violation of <u>state or local law</u> is an applicable violation of the GCA for license revocation purposes.** Currently, the ATF focuses its enforcement efforts on violations of federal law, but the GCA prohibits an FFL from failing to comply with state or local gun laws as well.

(2) **A <u>single</u> willful and serious violation is sufficient to trigger FFL license revocation.** Currently, the ATF will not revoke an FFL's license until it establishes a series of violations and the FFL fails to respond to multiple warnings. However, the GCA does not require a series of violations. Rather, the law only requires that the FFL be aware it is failing to comply with applicable laws and/or regulation and continue to be noncompliant despite this knowledge. In its new guidance, the ATF should clarify that it will generally consider an FFL to be willfully violating the GCA if the FFL is found to commit the same violation a second time after being previously warned.

This guidance should replace or significantly amend the May 2018 guidance the ATF issued on this subject.

Overview of process and time to enactment

Issuing agency guidance is an expedient and discretionary process, and the next administration should take this step immediately upon assuming office. Because the guidance will be released in the form of a non-binding policy statement, rather than through a new rule, the policy statement does not need to go through notice-and-comment rulemaking (NCRM) proceedings.

To comply with best practices for agency guidance, the document should acknowledge that such guidance does not have legislative authority, and provide details on how the public may submit a complaint seeking the rescission or modification of the guidance. Once finalized, the document should be published on the ATF's website.

<u>II. Current state</u>

ATF license revocation authority

To sell firearms in the US, a gun dealer must obtain a license from the ATF. After issuing such a license, the ATF is responsible for ensuring the gun dealer complies with the GCA and its implementing regulations.[5] To ensure FFLs comply with relevant laws and regulations, the ATF sends industry operations investigators (IOIs) to inspect FFL operations.

Under federal law, the ATF is permitted to conduct one regulatory compliance inspection of each FFL per year, and given their limited resources, the ATF has set an internal goal of

[5] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet: Federal Firearms Compliance Inspections and Revocation Process," May 2018, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-compliance-inspections-and-revocation-process.

inspecting all gun dealers once every three years.[6] The inspection program's goals are to ensure that only qualified individuals receive licenses to sell guns; to educate FFLs about federal firearms laws; and to increase "compliance with firearms laws in order to prevent the transfer of firearms to those prohibited from having them."[7]

As part of an FFL compliance inspection, IOIs will review all sales transactions an FFL has made in the last 12 months and analyze the data for aberrant patterns, allowing inspectors to issue a report of violations or recommend administrative action against an FFL. Violations such as inventory discrepancies, failing to record firearms, missing or improperly filled out Form 4473s, or failures to complete background checks require IOIs to make a recommendation for an administrative action.

Based on the severity and frequency of these violations, the ATF can institute a series of such actions, including warning letters and warning conferences.[8] If an FFL "willfully violate[s]" the GCA, the "Attorney General may, after notice and opportunity for hearing, revoke any license issued."[9] The willfulness requirement was added in 1986 through the passage of the Firearms Owners' Protection Act of 1986 (FOPA). FOPA's stated purpose was to ensure that the GCA did not "place any undue or unnecessary federal restrictions or burdens on law abiding citizens"; however, it also made enforcing the GCA more difficult.[10]

Despite the importance of this part of its mission, the ATF has struggled for decades with serious budget limitations that disproportionately affect the agency's regulatory work. Since 2007, the number of FFLs has increased by nearly 20%.[11] During roughly the same period, the number of IOIs has increased by 0.02%.[12] In fact, the number of IOIs has essentially remained stagnant since the ATF's inception in 1972.[13]

The result: in FY 2019, the ATF employed only 770 regulatory investigators to conduct compliance inspections of FFLs.[14] These inspectors were responsible for overseeing 130,048

[6] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Congressional Budget Submission Fiscal Year 2020," U.S. Dep't of Justice, February 2019, https://www.justice.gov/jmd/page/file/1144651/download.
[7] *Supra* note 2.
[8] Office of Inspector Gen., "Review of ATF's Federal Firearms License Inspection Program," U.S. Dep't of Justice, April 2013, https://oig.justice.gov/reports/2013/e1305.pdf.
[9] 18 U.S.C. § 923(e).
[10] DOJ, "History of Federal Firearms Laws in the United States," accessed October 13, 2020, https://www.justice.gov/archive/opd/AppendixC.htm.
[11] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet - Federal Firearms and Explosives Licenses by Types," May 2019, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-and-explosives-licenses-types.
[12] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet: ATF Staffing and Budget," May 2014, https://www.atf.gov/file/11081/download.
[13] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet - Staffing and Budget," May 2019, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-staffing-and-budget.
[14] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet - Facts and Figures for Fiscal Year 2019," June 2020, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2019.

active FFLs, including 53,746 gun dealers.[15] The ATF was only able to conduct 13,079 firearm compliance inspections that year, accounting for roughly 10% of total active FFLs.

License revocation is extremely rare

Each fiscal year, the ATF routinely discovers that a large number of FFLs have violated federal law. For example, in FY 2019, 34.3% of inspected FFLs were discovered to have at least one violation.[16] Many of these violations are not insignificant, or are merely technical in nature. The most frequently cited violations in FY 2019 and FY 2018 included: the failure "to obtain and/or document purchaser's Identification document," the failure "to report multiple handgun sales," and the failure "to contact NICS [National Instant Criminal Background Check System] and wait stipulated time prior to transfer of firearm."[17]

Despite committing even serious violations, few FFLs have their licenses revoked in any given year:

	2019[18]	
Recommendation	**Number**	**Share**
License surrendered; out of business	1,634	12.49%
No violation	6,911	52.84%
Violation found	4,491	34.3%
● *Report, no further action*	2,594	19.83%
● *Warning letter issued*	1,482	11.33%
● *Warning conference*	415	3.17%
● ***Revocation***	**43**	**0.33%**

In part, the GCA's "willfulness" requirement for license revocation is to blame for the lack of FFL accountability. Because an FFL must be found to have willfully violated a provision of federal law for its license to be revoked, the ATF "does not revoke for every violation it finds," noting that "revocation actions are seldom initiated until after an FFL has been educated on the requirements of the laws and regulations and given an opportunity to voluntarily comply with them but has failed to do so."[19]

The concept of "willfulness" is discussed more fully in Section IV below, but courts and the ATF interpret it as "the intentional disregard of a known legal duty or plain indifference to a licensee's legal obligations."[20] This standard, however, even when plainly met, does not always result in license revocations.

[15] *Id.*
[16] *Supra* note 13.
[17] *Id.*
[18] *Id.*
[19] *Supra* note 5.
[20] *Id*.

In practice, the ATF will rarely revoke a license even after an FFL repeats a serious violation for a second time after being warned (or arguably commits the violation "willfully" for the first time). Instead, the ATF will repeatedly issue reports of violations, send warning letters, and/or hold warning conferences before considering revocation.

For example, in 2016, a gun dealer in Ohio was found "to have repeatedly sold firearms to people who appeared to be prohibited from owning them, including a customer who self-identified as a felon."[21] The IOI recommended the gun dealer's license be revoked, citing this incident as well as "extensive noncompliance history."[22] Despite this, the IOI's supervisor ultimately "downgraded the recommendation to a warning, saying it would give the dealer 'one more opportunity' to get into compliance."[23] Similarly, in 2017, an IOI and a supervisor recommended revoking the license of a gun dealer who repeatedly failed "to conduct federal background checks before selling firearms."[24] However a senior supervisor downgraded the recommendation to a warning.[25]

The ATF's failure to take decisive action after a wilful violation is found, is compounded by its inability to regularly reinspect FFLs. In a 2013 report, the Department of Justice, Office of Inspector General found that 58% of FFLs were not inspected over a five-year period.[26]

A May 2018 ATF guidance on FFLs revocations, labeled "Fact Sheet: Federal Firearms Compliance Inspections and Revocation Process," confirms that the ATF takes an extremely lax approach to revocations. It notes that "ATF does not revoke for every violation it finds" and that "revocation actions are seldom initiated." It says the ATF only revokes an FFL's license "on rare occasions" when revocation "becomes the only viable option."[27]

This language has encouraged some noncompliant FFLs to become serial offenders. For example, one gun dealer had a 15-year history of serious GCA violations, including selling guns to minors, failing to report missing guns, selling large capacity magazines that were prohibited by law, and failing to conduct background checks before selling to non-licensed individuals.[28] While the ATF first discovered the gun dealer was noncompliant in 1993, the ATF did not recommend the gun dealer lose its license until 2009, choosing instead to issue warnings and pursue alternatives to revocation.[29]

[21] Ali Watkins, "When Guns Are Sold Illegally, A.T.F. Is Lenient on Punishment," *New York Times,* June 3, 2018, https://www.nytimes.com/2018/06/03/us/atf-gun-store-violations.html.

[22] *Id*.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Supra* note 8.

[27] ATF, "Fact Sheet: Federal Firearms Compliance Inspections and Revocation Process," May 2018, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-compliance-inspections-and-revocation-process.

[28] Office of Inspector Gen., "Review of ATF's Actions in Revoking the Federal Firearms License of Guns & Ammo," U.S. Dep't of Justice, September 2013, https://oig.justice.gov/reports/2013/e1308.pdf.

[29] *Id.*

Dangers of noncompliant gun dealers

Failure to hold noncompliant FFLs accountable has real consequences. Nationally, between 2004 and 2011, the ATF discovered nearly 175,000 guns were unaccounted for during dealer compliance inspections.[30] In one study of illegal firearms trafficking cases, the ATF found that gun dealers were responsible for nearly half of the total number of trafficked guns documented during a two-year period.[31]

These weapons pose serious risks: guns sold or lost by noncompliant dealers can directly be traced to gun violence. "For example, Bull's Eye Shooter Supply in Tacoma, Washington, lost 238 guns over a three-year period, one of which was used in 2002 by John Allen Muhammad—the 'Beltway sniper'—during his multiweek shooting spree in the Washington DC area. Bull's Eye had been on the ATF's radar since at least 1994 for regulatory violations; however, its federal firearms license was not revoked until after the sniper shootings in 2003."[32]

This is not just a stray anecdote. Between 1998 and 2010, "60 percent of the 6,800 guns sold in Virginia in that time and later seized by police [were] traced to just 40 dealers," who had regulatory violations dating to the early 1990s and collectively were warned 73 times that they were violating federal law.[33] The guns from these noncompliant FFLs were associated with "40 homicide cases, 63 robberies, 96 suicides or attempts, 173 brandishings, 301 shootings with or without injuries, 655 drug probes and 1,043 weapons-related violations."[34]

III. Proposed action

To send a signal to FFLs that they must comply with gun laws and regulations, and to hold those who don't accountable, the next administration should issue guidance clarifying the ATF will revoke a federal firearms license when a gun dealer has one serious and willful violation of federal, state, or local law. This amendment may take the form of an amendment or replacement for ATF's May 2018 guidance on this subject.[35]

[30] Supra note 7.
[31] ATF, "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers," U.S. Dep't of the Treasury, June 2000, https://web.archive.org/web/20180409033440/http://everytown.org/wp-content/uploads/2014/08/Following-the-Gun_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf.
[32] Chelsea Parsons, Arkadi Gerney, et.al., "The Bureau and the Bureau," Center for American Progress, Spring 2015, https://cdn.americanprogress.org/wp-content/uploads/2015/05/ATF-report-webfinal.pdf.
[33] David S. Fallis, "Virginia Gun Dealers: Small Number Supply Most Guns Tied to Crimes," *Washington Post,* October 25, 2010, https://www.washingtonpost.com/wp-srv/special/nation/guns/overlay/va-dealers.html?cn=nation.
[34] *Id*.
[35] ATF, "Fact Sheet: Federal Firearms Compliance Inspections and Revocation Process," May 2018, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-compliance-inspections-and-revocation-process.

A. Substance of the guidance

The ATF regularly provides guidance to regulated entities in the form of fact sheets,[36] guides,[37] and open letters.[38] This guidance could take any of those forms and make two important clarifications regarding the ATF's enforcement priorities: (1) a violation of state or local law is an applicable violation of the GCA for license revocation purposes, and (2) a single willful and serious violation is sufficient to trigger license revocation.

i. Violation of state or local gun laws

Under federal law, the ATF director, with authority delegated from the attorney general, may "revoke any [federal firearm] license...if the holder of such license has willfully violated any provision of [18 U.S.C. §§ 921-931] or any rule or regulation prescribed by the Attorney General under [18 U.S.C. §§ 921-931]."[39]

Currently, the ATF focuses its enforcement efforts on violations of several major requirements of the GCA, including:

- failure to verify or record purchaser's identification document[40]
- failure to report multiple sales or other dispositions of pistols and revolvers[41]
- failure to complete a NICS/POC background check[42]

However, two sections of the GCA prohibit FFLs from violating state or local law, which means violations of such laws constitute a violation of the GCA itself. This includes:

- **18 U.S.C. § 922(b)(2).** This provision makes it unlawful for an FFL to "sell or deliver—any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition…".
- **18 U.S.C. § 923(d)(F)(ii)(I).** This provision requires an FFL to certify that "business will not be conducted under the license until the requirements of State and local law applicable to the business have been met."

[36] ATF, "Fact Sheets," accessed October 13, 2020, https://www.atf.gov/resource-center/fact-sheets.
[37] ATF, "Publication Library," accessed October 13, 2020, https://www.atf.gov/resource-center/publications-library.
[38] ATF, "Firearms Open Letters," accessed October 13, 2020, https://www.atf.gov/rules-and-regulations/firearms-open-letters.
[39] *Supra* note 9.
[40] 27 C.F.R. 478.124(c)(3)(i).
[41] 27 C.F.R. 478.126a.
[42] 27 C.F.R. 478.102(a).

Under the new guidance, the ATF should clarify that violations of state or local laws applicable to the FFL's business would constitute violations of the GCA, which, if willful, could constitute grounds to revoke an FFL's license. Importantly, the guidance should clarify that applicable state and local laws for purposes of license revocation decisions include, as the text of the GCA suggests, violations of generally applicable laws regulating businesses. Such laws—including negligence laws and unfair trade practices laws—are rarely enforced against gun dealers in the civil context due to the Protection of Lawful Commerce in Arms Act (PLCAA).[43] However, PLCAA's immunity protections do not apply to ATF regulatory actions, and the law itself explicitly excepts "an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26."[44]

ii. Establishing willfulness

The ATF's present process for revoking licenses gives noncompliant gun dealers multiple chances to correct the error: if an IOI discovers a violation, the ATF may issue a report of violations, send a warning letter, or hold a warning conference before ultimately issuing a recommendation to revoke the FFL's license. Often, FFLs receive multiple warnings before the license revocation process begins.

Under the new guidance, the ATF should clarify that a finding of a single willful and serious violation of applicable federal, state, or local laws is sufficient for a recommendation of revocation. The guidance should specify that the ATF will treat the failure to comply with regulations that are the most critical to minimizing gun-related violence and crime (e.g., conducting background checks, not selling firearms to persons prohibited from possessing firearms, filing reports of individuals who purchase multiple handguns, failing to report lost firearms) as a "serious" violation. Any such serious violation, if it is found to be willful, is sufficient for a recommendation of revocation, and the guidance should clarify that a single prior finding and warning of such a violation is generally sufficient to establish willfulness on behalf of the FFL. There may be situations where a single prior finding and warning is not sufficient to establish willfulness. For example:

- a new, corrupt employee selling a gun off books and who was promptly fired upon detection
- a sudden, serious illness of an owner who otherwise has had an unblemished record
- a natural disaster which overwhelmed an FFL who made corrective enhancements post-disaster
- a new FFL who truly misunderstood the first warning

However, absent these extenuating circumstances, a single prior finding of a violation and a warning is sufficient to establish willfulness.

[43] 15 U.S.C. §§ 7901-7903.
[44] 15 U.S.C. § 7903 (5)(A)(vi).

B. Process

This type of guidance may appropriately be considered an interpretive rule, because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[45] The Administrative Procedure Act's (APA's) NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another statute provides otherwise.[46] As the Supreme Court observed in *Perez*, issuing interpretive rules is "comparatively easier" than issuing legislative rules.[47] However, "that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'"[48]

Unlike notice and comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[49] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, and the process by which the public may petition the agency to modify or remove the guidance.

Agencies should also consider the recommendations of the Administrative Conference, most recently updated on June 13, 2019.[50] The most relevant recommendations concern transparency and public participation. These include: (1) providing "members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule," (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint,[51] and (3) avoiding

[45] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,99 (1995)).

[46] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

[47] *Perez*, 575 U.S. at 97.

[48] *Id.* (citing *Guernsey*, 514 U.S. at 99).

[49] Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents.

[50] Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

[51] *Id.* at 7.

the use of mandatory language (such as "shall" or "must") to accurately reflect the non-legislative nature of the guidance.[52]

As discussed further below, in issuing this new guidance and amending the May 2018 guidance, the ATF must provide a reasoned explanation for the change, and demonstrate an awareness of the new policy. The ATF must also acknowledge the possibility that FFLs have relied on the earlier guidance and the ATF's former practices, and address why those reliance interests are outweighed by public safety factors.

C. Legal justification

The attorney general has the power to prescribe "such rules and regulations as are necessary to carry out the provisions of" the GCA.[53] This includes policy statements, interpretive rules, and rules of agency procedure. Additionally, 18 U.S.C. § 923(e) states that the "Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General." The attorney general has delegated its responsibility to enforce the GCA to the director of the ATF, subject to the direction of the attorney general and the deputy attorney general.[54] ATF guidance interpreting § 923(e) is directly relevant to its ability to defend its revocation or denial of license application decisions.

IV. Risk analysis

There are likely two types of challenges that could be brought against the new guidance: (1) challenges to the guidance document itself, and (2) as-applied challenges by FFLs in the context of the license revocation process.

Challenges to the guidance document

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components: first, the action must mark the "consummation" of the agency's decision making process—it cannot be of a tentative or intermediate nature. Second, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow."[55] Consequently, the guidance document proposed by this memorandum may not qualify as a final agency action.

If a court determines the guidance document is a final agency action, however, it can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[56] The ATF's

[52] *Id.*
[53] 18 U.S.C. § 926(a).
[54] 28 CFR 0.130(a).
[55] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).
[56] 5 U.S.C. § 706.

authority to interpret and provide guidance on FFL revocations is clear, as demonstrated by its long history of doing so.[57] The Supreme Court has also made clear that laws that impose conditions and qualifications on the commercial sale of firearms are presumptively lawful.[58] Therefore, constitutional challenges are unlikely to succeed. As a result, the two most likely challenges against the ATF's new policy are those claiming that the ATF has not properly complied with procedural requirements and that the ATF's new guidance is arbitrary or capricious agency action.

Procedural challenges

As noted above, the APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another statute provides otherwise.[59] However, the NCRM requirement does apply to legislative rules. Courts are commonly asked to determine whether interpretive rules, such as guidance documents, are legislative rules in disguise, and the gun industry will likely challenge the ATF's guidance under this theory.

An interpretive rule "describes the agency's view of the meaning of an existing statute or regulation."[60] The court's inquiry is "whether the new rule effects a substantive regulatory change to the statutory or regulatory regime."[61] Interpretive rules "are those that clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required."[62] In other words, to be interpretive, a rule "must derive a proposition from an existing document whose meaning compels or logically justifies the proposition."[63] By contrast, a rule is legislative "if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy."[64]

While the gun industry will likely challenge the proposed guidance as being a legislative rule that needed to go through NCRM, the ATF has a strong argument in response: that the guidance is just interpretive in nature. As the DC Circuit made clear in *American Mining Congress v. Mine Safety & Health Administration*,[65] a rule cannot be interpretive if there would not be an adequate

[57] ATF's guidance documents have taken various forms, including FFL newsletters, a manual regarding the National Firearms Act, and others. See atf.gov for numerous examples.

[58] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[59] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

[60] *Mendoza v. Perez,* 754 F.3d 1002, 1021 (D.C. Cir. 2014).

[61] *Id*.

[62] *Id.*

[63] *Id.*

[64] *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

[65] 995 F.2d 1106 (1993).

legislative basis for enforcement action. Here, both aspects of the guidance—clarification of the willfulness requirement and the state and local offenses that can trigger revocation proceedings—are already required by the GCA.[66] Therefore, this guidance "only reminds affected parties of existing duties" required by law, and is therefore an interpretive rule.[67]

That said, the ATF should be careful in crafting the proposed guidance. It should not be "cast in 'mandatory language' so 'the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences.'"[68] While articulating enforcement priorities consistent with existing legal duties has consistently been viewed by courts as interpretive, courts have found an articulation of guidance that is binding on the parties to be a legislative rule and thus require NCRM. For example, in *Community Nutrition Institute v. Young*,[69] the DC Circuit found that the FDA's issuance of standards that declared the maximum allowable contaminants in food was legislative, rather than interpretive, because it had a present effect and was binding. Therefore, to guard against a successful NCRM challenge by the gun industry, the ATF should be mindful not to be too prescriptive in issuance of this new guidance, and instead leave some measure of discretion up to the individual IOIs responsible for enforcing the GCA's requirements of FFLs.[70]

Arbitrary and capricious challenge under the APA

A court will invalidate the regulation if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[71] The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, thereby establishing a nexus between the facts and the agency's choice.[72]

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change and demonstrate an awareness of the new policy.[73] However, the agency must provide good reasons for such change and an explanation as to why such change may ignore or disregard any "facts and circumstances that underlay or were engendered by the

[66] *See* Section III.

[67] *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)). See also *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92 (2015) (holding that NCRM is not necessarily required when an agency modifies its guidance).

[68] *Nat'l Ass'n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 237 n.18 (D.D.C. 2018), *aff'd and remanded sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of Californ*ia, 140 S. Ct. 1891 (2020) (citation omitted).

[69] - 818 F.2d 943 (D.C. Cir. 1987).

[70] *See also Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667 (D.C. Cir. 1978) ("The mere existence of some discretion is not sufficient, although it is necessary, for a rule to be classified as a general statement of policy.").

[71] 5 U.S.C. § 706(2)(A).

[72] *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[73] *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009).

prior policy."[74] The agency's document must contain an acknowledgment of reliance interests and address why those interests are outweighed by public safety factors. Even if such reliance interests are serious, public safety factors can outweigh them.[75]

Here, the ATF should acknowledge its prior lax approach to FFL violations and the detrimental effect this approach has had on public safety, as described above. The ATF should also acknowledge that FFLs may have relied on the ATF's approach in establishing their own business practices and protocols. However, to the extent these practices and protocols have allowed criminal and regulatory violations of the laws regarding firearms sales to occur, they are illegitimate. As a result, the ATF can and should appropriately put FFLs on notice that it will no longer continue its lax approach, and in the future, FFLs who willfully fail to comply with the law will be held accountable.

As-applied challenge

The general permissibility of ATF's regulatory enforcement guidance under the APA does not prevent successful as-applied challenges by FFLs. In general, in the context of a license denial or revocation action, FFLs will likely argue that: (1) their violation of state or local law does not constitute a violation of the GCA, and (2) their single repeat offense does not constitute "willfulness" under the GCA.

First, there is a reasonable basis to assert that violations of state and local law provide a justification for revocation. As noted above, the GCA expressly prohibits an FFL from failing to comply with state and local law: the GCA makes it unlawful for a "licensed dealer . . . to sell or deliver . . . any firearm to any person in any State where the purchase or possession by such person of such firearm would be in *violation of any State law or any published ordinance applicable* at the place of sale, delivery or other disposition" (emphasis added);[76] and the GCA requires FFLs to certify that "business will not be conducted under the license until the requirements of State and local law applicable to the business have been met."[77]

Furthermore, federal courts of appeals have agreed that it is reasonable for the ATF to expect FFLs to comply with the state and local laws it is subject to: "It is reasonable . . . for the federal government to expect that an FFL located in a state, and subject to state and local laws, can master and remain current on the firearm laws of that state."[78]

Second, the proposed policy statement's criteria for a finding of willfulness is consistent with existing precedent interpreting the GCA. A number of circuit court cases have directly

[74] *Id.*
[75] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020).
[76] 18 U.S.C. § 922(b)(2).
[77] 18 U.S.C. § 923(d)(F)(ii)(I).
[78] *Mance v. Sessions*, 896 F.3d 699, 708 (5th Cir. 2018), *cert. denied sub nom. Mance v. Barr*, No. 18-663, 2020 WL 3146838 (U.S. June 15, 2020); see also *Gen. Store, Inc. v. Van Loan*, 560 F.3d 920, 924 (9th Cir. 2009).

addressed this question and confirmed that “a single violation of the GCA is a sufficient basis for denying an application or revoking a firearms dealer's license.”[79] As a general matter, courts hold that “a dealer violates the statute when, with knowledge of what the law requires, it intentionally or knowingly violates the GCA’s requirements or acts with plain indifference to them (i.e. recklessly violates them).”[80] While willfulness is often currently demonstrated by a series of warnings over a period of years, the GCA does not require an extensive pattern of noncompliance to conclude that an FFL was breaking the law willfully. Instead, the law only requires that FFLs were aware of their obligations under the GCA, and nevertheless failed to comply with the law. In other words, evidence that an FFL committed the same violation a second time after being previously warned has always been sufficient to establish willfulness.

Finally, the ATF can argue that the proposed guidance simply articulates what is required by law. Courts have routinely acknowledged that an agency’s decision about whether to initiate an enforcement action is something that completely up to the agency in question.[81] Therefore, should a court find that the guidance is consistent with the GCA in the abstract, and the FFL in question has, in fact, willfully violated the law in a serious way, the ATF has a strong argument that an as-applied challenge should fail.

[79] *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 464 (6th Cir. 2004) (“[I]t has been recognized that a single violation of the GCA is a sufficient basis for denying an application or revoking a firearms dealer's license.”) (collecting cases); see also *Simpson v. Attorney Gen. United States of Am.*, 913 F.3d 110, 114 (3d Cir. 2019) (“A single willful violation [of the GCA] authorizes ATF to revoke the violator’s FFL”) (citation omitted); *Fairmont Cash Mgmt., L.L.C. v. James*, 858 F.3d 356, 363 (5th Cir. 2017) (“We need go no further; a single willful violation suffices to sustain ATF’s revocation decision.”); *Gen. Store, Inc. v. Van Loan*, 560 F.3d 920, 924 (9th Cir. 2009) (“Although we affirm the district court’s decision that both violations were willful, one willful violation would be sufficient, as a single willful violation is grounds for upholding the revocation.”).

[80] *Armalite, Inc. v. Lambert*, 544 F.3d 644, 647 (6th Cir. 2008).

[81] *See e.g., Heckler v. Chaney*, 470 U.S. 821 (1985) (finding that the FDA’s decision not to undertake certain enforcement actions is presumptively unreviewable because it is "committed to agency discretion by law" under § 701(a)(2) of the Administrative Procedure Act).

RECOMMENDED ACTION MEMO
Agency: Bureau of Alcohol, Tobacco, Firearm, & Explosives (ATF)
Topic: Expanding the use of demand letters to obtain crucial data about illegal gun trafficking
Date: November 2020

Recommendation: Expand the ATF's demand letter program to increase data collection regarding indicators of illegal gun trafficking.

I. Summary

Description of recommended executive action

Under current law, the attorney general (and by delegation the Bureau of Alcohol, Tobacco, Firearms and Explosives) is authorized to issue letters requiring licensed gun dealers, or federal firearms licensees (FFLs), to "submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter [of the Code]," a request known as a "demand letter." The agency describes its long-standing demand letter program as one that "collects FFL data vital to the success of the firearms tracing program."[1] The program started in 2000. The ATF currently has three open demand letters requiring some gun dealers to provide information related to gun sales that are relevant to identifying potential illegal gun trafficking patterns. The next administration should expand these demand letters to include the following information requests.

- Expand demand letter 2 to cover all dealers with 10 or more firearms with a "time to crime" of 3 years or less traced to them within the past year, so that used guns (which are difficult to trace) won't be as easily available from pawnbrokers and FFLs linked to gun trafficking. Demand letter 2 currently covers dealers with 25 or more firearms with a "time to crime" of 3 years or less traced to them within the past year.
- Expand demand letter 3, which is intended to address the trafficking of assault weapons to organized crime in Mexico and Central America, to cover dealers in Florida, Oklahoma, Nevada, Colorado, Washington, and Illinois, states in which such guns often originate. The current demand letter only covers dealers in Arizona, California, New Mexico and Texas.
- Issue a new proposed demand letter 4 to require all dealers covered by demand letters 1, 2, and 3 to provide records of all default sales to the ATF. Default sales occur when an FFL has initiated a background check for the sale of a firearm, has not been notified within three business days that the sale would violate federal or state law, and proceeds with the sale by "default."

Overview of process and time to enactment

[1] Bureau of Alcohol, Tobacco, Firearms, and Explosives, "National Tracing Center," accessed October 21, 2020, https://www.atf.gov/firearms/national-tracing-center.

To implement these proposed actions, the ATF will have to draft a proposal of each change and submit a notice of each proposed change for comment.[2] Because demand letters are considered a "collection of information" under the Paperwork Reduction Act of 1995, the agency must provide a 60-day notice of the proposed change.[3] The notice must solicit comments to (1) evaluate whether the proposed collection is necessary for the agency functions, (2) evaluate the accuracy of the agency's estimated burden from the collection, (3) enhance the quality, utility, and clarity of the information collected, and (4) minimize the burden of the collection for those required to respond. After the comment period, the agency will have to consider the comments to the extent necessary to avoid a court finding the final change "arbitrary and capricious," as discussed more below in Part IV. The decision to accept or reject relevant comments must be included in the agency's final notice.

Under 44 U.S.C. § 3506(c)(1), the ATF must also use its established process to (1) evaluate the need for the collection of information, (2) create a functional description of the information to be collected, (3) make a plan for the collection, (4) estimate, specifically and objectively, the burden on the agency, (5) test the collection through a pilot program, if appropriate, and (6) plan for the efficient and effective management and use of the information. The information collection must (1) be inventoried and display a control number, and, if appropriate, an expiration date; and (2) inform the person who receives the letter of the reasons why, the way the information will be used, the estimated burden of collection, whether the response is voluntary or mandatory, and the requirement for a control number before the recipient must respond.[4] Prior to implementing the program, the ATF will also have to certify to the director of the Office of Management and Budget that the program complies with the requirements in 44 U.S.C. § 3506(c)(3).

II. Current state

The ATF is authorized to issue demand letters under 18 U.S.C. § 923(g)(5). The statute authorizes the attorney general to issue letters requiring FFLs to "submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter [of the Code]." The attorney general delegated this power to the ATF, a section of the Department of Justice. The ATF currently issues the letters in three situations.[5] Each of these has been upheld by multiple federal appellate courts.

- Demand letter 1 is issued to FFLs that fail to respond to a trace request within 24 hours. FFLs that receive demand letter 1 must send their acquisition and disposition (A&D) records for the previous three years to the ATF, and must continue to send records on a

[2] For example, the notice for the latest change is located at: Bureau of Alcohol, Tobacco, Firearms, and Explosives, "Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection; Report of Multiple Sale or Other Disposition of Certain Rifles-ATF Form 3310.12," September 12, 2017, https://www.federalregister.gov/documents/2017/09/12/2017-19335/agency-information- collection-activities-proposed-ecollection-ecomments-requested-revision-of-a.

[3] 44 U.S.C. § 3506(c)(2).

[4] Id.

[5] ATF provides information on the demand letter program and NTC. *See* Bureau of Alcohol, Tobacco, Firearms, and Explosives, "National Tracing Center," accessed October 21, 2020, https://www.atf.gov/firearms/national-tracing-center.

monthly basis until told otherwise. This information allows the ATF to continue to trace firearms from the FFLs if they remain unresponsive to trace requests.

- Demand letter 2 is issued to FFLs that had 25 or more firearms with a "time to crime" of 3 years or less traced to them in the previous calendar year. "Time to crime" is measured from the sale of a firearm to the time the gun is used in a crime. A short time to crime is considered an indicator of gun trafficking, due to the increased likelihood that a firearm was purchased from the FFL with the intent to use it for criminal activity.

  An FFL that receives demand letter 2 must submit information regarding "used guns" acquired in the previous year, such as the manufacturer/importer, model, caliber or gauge, serial number, and acquisition date. This information must be submitted quarterly, until the FFL is informed otherwise. Because trace requests only identify the FFL that initially received the firearm from the manufacturer, used guns normally cannot be connected to FFLs that obtain the gun after its original sale. Information on used guns acquired by the FFL allows the ATF to trace those firearms to the dealer, if they are later used in a crime. The information is considered especially relevant for FFLs with a higher likelihood of sales to gun traffickers, as it is more likely used guns coming from those dealers will be used in crime.

- Demand letter 3 is sent monthly to FFLs that are licensed dealers or pawnbrokers in Arizona, California, New Mexico, and Texas. These FFLs must report all transactions in which an unlicensed person acquired, at the same time or within five consecutive business days, two or more semi-automatic rifles larger than .22 caliber with the ability to accept a detachable magazine.The purpose of demand letter 3 is to combat the trafficking of guns across the border into Mexico. From 2008 through 2010—prior to the implementation of demand letter 3—4,568 of the 5,799 (nearly 80%) rifles greater than .22 caliber found in Mexico were traced to retailers in Arizona, California, New Mexico, and Texas.[6] From 2004 to 2008, 70% of the firearms seized in Mexico and traced came from Texas, California, and Arizona. The sale of multiple firearms in a short time period is considered an indicator of firearms trafficking. The ATF is able to combat this in relation to handguns because FFLs must report all sales of two or more handguns to the ATF. However, because these reports are not required for long guns, demand letter 3 helps the ATF track the sale of the types of guns used more frequently in criminal activity in Mexico.

Demand letters 1 and 2 were initiated in 2000.[7] The Obama administration initiated demand letter 3 in 2011 to combat the rising issue of gun trafficking across the southern border.[8] This

[6] *See 10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013).

[7] Office of the Inspector General, "Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives," U.S. Department of Justice, July 2004, https://oig.justice.gov/reports/ATF/e0405/background.htm

[8] Bureau of Alcohol, Tobacco, Firearms, and Explosives, "Reporting Multiple Firearms Sales," accessed October 21, 2020, https://www.atf.gov/firearms/reporting-multiple-firearms-sales; Corbin Hiar, "Justice Department Enacts Rule For Reporting Of Rifle Sales Along The Southwest Border," Center for Public Integrity, updated May 19,

new demand letter was challenged in multiple federal courts, all of which upheld the program, as discussed in detail below. In 2017, the Trump administration amended demand letter 2 to raise the number of "time to crime" gun traces required to trigger the additional reporting requirements to from 15 to 25. As a result, the number of FFLs that are subject to this requirement decreased. The Trump administration has made no other changes to the program.

III. Proposed action

The next administration should expand these demand letters to include additional information requests that would bolster the ATF's efforts to effectively investigate and prosecute illegal gun trafficking in the following ways:

- expand existing demand letter 2 to cover all dealers with 10 or more firearms with a "time to crime" of 3 years or less traced to them within the past year, so that used guns (which are difficult to trace) do not continue to be easily available from pawnbrokers and FFLs linked to gun trafficking. Demand letter 2 currently covers dealers with 25 or more firearms with a "time to crime" of 3 years or less traced to them within the past year.
- expand existing demand letter 3, which is intended to address the trafficking of assault weapons to organized crime in Mexico and Central America, to cover dealers in Florida, Oklahoma, Nevada, Colorado, Washington, and Illinois, states in which such guns often originate. The current demand letter only covers dealers in Arizona, California, New Mexico, and Texas.
- issue a new proposed demand letter 4 to require all dealers covered by demand letters 1, 2, and 3 to provide records of all default sales to the ATF. Default sales occur when an FFL has initiated a background check for the sale of a firearm, has not been notified within three business days that the sale would violate federal or state law, and proceeds with the sale by "default."

IV. Legal justification

Relevant legal considerations regarding the scope of the ATF's demand letter authority

Each of the current demand letters has been reviewed and upheld by multiple federal circuit courts. Each case focused on three main considerations in evaluating the legality of the ATF's action in issuing a demand letter: (1) whether the ATF has the statutory power to issue the demand letter in question, (2) whether the ATF's action was arbitrary and capricious, and (3) whether the demand letter violates federal laws against consolidating and centralizing information on the sale of firearms. While each circuit that evaluated the existing demand letters found in favor of the ATF and upheld the use of these demand letters, the opinions provide some guidance on the potential limits of the agency's power.[9] In each situation, the court

2014, https://publicintegrity.org/national-security/justice-department-enacts-rule-for-reporting-of-rifle-sales-along-the-southwest-border/.

[9] *See, e.g., RSM, Inc. v. Buckles*, 254 F.3d 61 (4th Cir. 2001) (upholding the ATF's use of Demand Letter 1); *Blaustein & Reich, Inc. v. Buckles*, 365 F.3d 281 (4th Cir. 2004) (upholding the ATF's use of Demand Letter 2); *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043 (9th Cir. 2007) (same); *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711 (5th Cir. 2013) (upholding the ATF's use of Demand Letter 3); *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200 (D.C. Cir. 2013) (same).

evaluated the ATF's action under the test set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which asks (1) if Congress spoke directly on the issue in question, and (2) if not, whether the agency's interpretation was "based on a permissible construction of the statute." In each case the court determined that the statute was clear and unambiguous on its face, and therefore the inquiry has consistently ended at step one.

1. The ATF's power to issue demand letters

The ATF has a fairly broad power to issue demand letters that request from FFLs any records required to be kept under Chapter 44 of Title 18 of the United States Code. This power comes from 18 U.S.C. § 923(g)(5)(A), which reads: "Each licensee shall, when required by letter issued by the Attorney General, and until notified to the contrary in writing by the Attorney General, submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify." The record information required by the chapter is broad, and specific records required for the proposed letters are addressed below.

However, the most significant record requirement states that an FFL must "maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe."[10] The FFL must record firearms transactions with non-FFLs on Form 4473, including the "name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm." FFLs are required to keep these forms in "alphabetical (by name of purchaser), chronological (by date of disposition), or numerical (by transaction serial number) order."[11]

The FFL must also create an acquisitions and dispositions (A&D) record that includes the "date of receipt, the name and address or the name and license number of the person from whom received, the name of the manufacturer and importer (if any), the model, serial number, type, and the caliber or gauge."[12] It must also include "the date of the sale . . . the name and address of the [customer] . . . or the firearms transaction record, Form 4473, serial number if the licensed dealer transferring the firearm serially numbers the Forms 4473 and files them numerically."[13]

Courts have taken a fairly broad view of the ATF's statutory authority to request information from these records. For demand letter 1, courts have held that it is permissible for the ATF to request the entire collection of A&D records from the FFL when they are directly tied to the

[10] 18 U.S.C. § 923(g)(1)(A).
[11] 27 C.F.R. § 478.124.
[12] 27 CFR § 478.125(e).
[13] *Id.*

agency's statutory duties.[14] For demand letter 3, courts have held that because the letter only requires submission of record information—namely information about the buyer and the firearm required on Form 4473—the ATF may place a condition precedent to reporting that the sale be of a firearm with a specific characteristics not required to be kept in the FFL's records—such as the caliber and ability to accept a detachable magazine.[15]

Challenges to the demand letter program have consistently claimed that the program is limited by other portions of § 923. First, opponents of the program often cite § 923(g)(1)(A)–(B), which limits the ATF's power to inspect an FFL's premises to instances in which it has a warrant, and limits the ATF's power to inspect the inventory and records without a warrant or probable cause to a "bona fide criminal investigation."[16] They argue that because § 923(g)(1) states that FFLs shall not be required to submit information to the attorney general "except as expressly required by this section," that the limits of § 923(g)(1)(A)–(B) also limit the ATF's power to require FFLs to submit information and records.[17] However, the courts have distinguished this requirement as applying only to physical entry onto the FFL's premises, while § 923(g)(5)(A) does not involve such entry.[18] The courts have interpreted § 923(g)(5)(A) as an independent authorization to collect records, and have held that the criminal investigation requirement does not limit that authority.

Second, challengers similarly argue that § 923(g)(7)'s limit of trace requests to "bona fide criminal investigations" prevents the ATF from issuing demand letters outside of such investigations.[19] Legal challengers have argued that demand letters that request the same information as can be obtained from a trace request, allow the ATF to circumvent the criminal investigation requirements for trace requests.[20] However, courts have consistently held that § 923(g)(7) has no bearing on the ATF's demand letter power and is simply limited to trace requests.[21]

Third, challengers of the demand letter power often cite to the language of the legislative history of the statute, stating that Congress intended to limit the demand letter power to: (1) FFLs in violation of the law, and (2) criminal investigations.[22] Each court evaluating the issue has declined to consider the legislative history, stating that when a statute is clear on its face, the court need not look into the intent of Congress.[23]

[14] *See* RSM, 254 F.3d at 68.
[15] *See Nat'l Shooting Sports*, 716 F.3d at 208.
[16] *See Nat'l Shooting Sports*, 716 F.3d at 210; *Blaustein*, 365 F.3d at 287.
[17] *Nat'l Shooting Sports*, 716 F.3d at 210.
[18] *Id.*
[19] *See Nat'l Shooting Sports*, 716 F.3d at 210–11; *J & G Sales*, 473 F.3d at 1049–50.
[20] *Nat'l Shooting Sports*, 716 F.3d at 210–11.
[21] *See id.*; *J & G Sales*, 473 F.3d at 1049–50; *RSM*, 254 F. 3d at 66.
[22] *See Nat'l Shooting Sports,* 716 F.3d at 211–12; *J & G Sales*, 473 F.3d at 1050.
[23] *See, e.g., Nat'l Shooting Sports*, 716 F.3d at 211–12; *J & G Sales*, 473 F.3d at 1050.

Lastly, the final statutory challenge to the demand letter power is specific to demand letter 3. Challengers have cited to § 923(g)(3)(A), which requires an FFL to "prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totalling [sic] two or more." Because Congress specifically requires the reporting of multiple sales of handguns, challengers have argued that the law intentionally excludes the power to require FFLs to provide reports of multiple long guns under the theory of *expressio unius est exclusio alterius*.[24] The courts have consistently held that this interpretation disregards the more plausible interpretation that Congress' decision to impose specific reporting requirements on FFLs did not preclude further requirements, but rather left them up to the agency through § 923(g)(5)(A).[25]

2. Arbitrary and capricious consideration

The Administrative Procedure Act (APA) applies to actions by the ATF. Under the APA, a court will "set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[26] To survive review, an agency must "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" after analyzing relevant data.[27] The court requires support for the agency's decisions, but it is a fairly deferential standard under which a court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[28] When supporting its decision, the agency need only demonstrate that its action "stems from reasoned decision-making" in order to pass muster before the court.[29]

The question is fact specific to each demand letter; however, the courts are highly deferential to agency decisions. For example, the demand letter considered in *J&G Sales* was sent to a subset of FFLs that had a high volume of gun traces with short time-to-crime timeframes. The demand letter explained that a large number of traces of new crime guns may also mean that the FFL is selling a high number of secondhand guns that had been used in crime. J&G argued that this extrapolation was improper, and constituted arbitrary and capricious action. The court rejected this argument and found it to be a reasonable deduction by the ATF.[30]

The Plaintiff in *National Shooting Sports Foundation* similarly complained that the ATF acted arbitrarily in issuing demand letter 3 to certain FFLs in Arizona, California, New Mexico, and

[24] This theory is a common principle of statutory interpretation stating the explicit mention of one or more things of a class in a statute is evidence that other things in that class are intentionally excluded from coverage by the statute. *See Nat'l Shooting Sports*, 716 F.3d at 211; *10 Ring Precision*, 722 F.3d at 720–21.
[25] *See Nat'l Shooting Sports*, 716 F.3d at 211; *10 Ring Precision*, 722 F.3d at 720–21.
[26] 5 U.S.C. § 706(2)(A).
[27] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).
[28] *Id.*
[29] *J&G Sales*, 473 F.3d at 1052.
[30] *Id*. at 1046, 1052–53.

Texas. The court in that case rejected the argument that the ATF drew an improper line in determining which FFLs to target, based on the "wide discretion" an agency has in making such decisions. It found, based on evidence the ATF presented, that the majority of firearms seized in Mexico came from US states along the Mexico-US border. Therefore, targeting FFLs in these states bore a rational relationship to its underlying regulatory concerns. Though the ATF "could have narrowed the scope of the demand letter," its failure to do so did not qualify as arbitrary and capricious action.[31]

The other consideration in the arbitrary and capricious evaluation is whether the agency considered "reasonably obvious alternatives." This is a limited consideration that requires the agency to consider only "significant and viable" and "obvious" alternatives.[32] The court asks whether comments submitted "raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency." Such comments must provide the factual or policy basis behind the commenter's reasoning to be considered viable. If such comments exist, to survive the court's review, the agency must explain its reason for not adopting the proposed strategy.[33] Whether this consideration is relevant to the ATF's proposed demand letters will depend on the comments received by the agency for each proposed action.

3. Centralized federal database of firearms transactions

There are two laws prohibiting consolidation of FFL record information. The first is 18 U.S.C. § 926(a), which prohibits the ATF from promulgating a "rule or regulation" that requires FFL record information be "recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof" or that establishes a "system of registration of firearms, firearms owners, or firearms transactions or dispositions." In *National Shooting Sports Foundation*, the DC Circuit determined that this section does not apply because "section 926(b) explains that 'rule or regulation' refers to rules created after 'ninety days public notice' while giving 'interested parties opportunity for hearing.'"[34] The court concluded that a demand letter is therefore not a "rule or regulation" as considered by the statute. In contrast, the 5th Circuit has concluded that while a demand letter is not a "rule or regulation," Congress' intent would be lost if limitless demand letters could be used to circumvent the restrictions set forth in the statute.[35] However, that court determined that the demand letter in that case did not meet the level of creating a national registry, because it sought "a narrow subset of information relating to a specific set of transactions" from a "specific set of FFLs."[36]

[31] 716 F.3d at 215, 217.
[32] *Id*. at 215.
[33] *Id*.
[34] 716 F.3d at 212 (citing 18 U.S.C. §926(b)).
[35] *See 10 Ring Precision*, 722 F.3d at 722.
[36] *Id*.

The other relevant concern arises from the Consolidated and Continuing Appropriations Act of 2012 (the 2012 Act), which "prohibits ATF from using the allocated funds 'for salaries or administrative expenses in connection with consolidating or centralizing within the Department of Justice the records, or any portion thereof, of acquisition and disposition of firearms maintained by [FFLs].'"[37] The courts have interpreted "consolidating and centralizing" as contemplating a "large-scale enterprise relating to a substantial amount of information."[38] The 5th Circuit applied the same language as it did for § 926, stating that the act does not prohibit letters that seek "a narrow subset of information relating to a specific set of transactions" from a "specific set of FFLs."[39]

From these cases, it is clear that the legal analysis of the permissibility of certain demand letters is the same, regardless of whether § 926 is applied. Either way, the relevant considerations are: (1) the number of FFLs from which information is sought, and (2) the amount of information sought in the letter. In analyzing the number of FFLs, it appears that the court will focus mainly on the number of FFLs information is sought from. Courts tend to cite to the percentage of FFLs when analyzing whether the letter creates a national registry.[40] However, how the class of FFLs is defined will still be relevant when the court considers the justification for the action under the APA.

Application of legal questions to proposed demand letters

1. Expansion of demand letter 2

Currently, an FFL that receives demand letter 2 must submit information regarding "used guns" acquired in the previous year, such as the manufacturer/importer, model, caliber or gauge, serial number, and acquisition date. The demand letter is only sent to gun dealers with 25 or more traces in a year with a "time to crime" of 3 years or less. The proposed change would allow the ATF to send these letters to all FFLs with 10 or more firearms with a "time to crime" of 3 years or less traced to them within the past year.

The ATF has the power to issue the proposed demand letter. The ATF may require FFLs to submit any record information required under the United States Code. The statute itself does not place a limit on the number of FFLs from which the information can be sought. The proposed letter simply asks for the manufacturer and/or importer, model, caliber or gauge, and serial number of secondhand firearms acquired by the FFL, all of which is information the FFLs are required to keep. The 4th Circuit already upheld the proposed scheme in *Blaustein*, determining that sending the letter to all FFLs with 10 or more guns traced to them was within

[37] *10 Ring Precision*, 722 F.3d at 722 (citing Pub. L. No. 112-55, 125 Stat. 552, 609 (2011).
[38] *Id*. (citing *Blaustein*, 365 F.3d at 289).
[39] *Id.; see also Nat'l Shooting Sports Found.*, 716 F.3d at 213–14 (concluding that a demand letter seeking a limited amount of information from a small percentage of FFLs does not "come close to creating a 'national firearms registry'").
[40] *See J & G Sales*, 473 F.3d at 1046 (0.6% of nationwide FFLs); *RSM*, 254 F.3d at 63 (0.1% of nationwide FFLs); *Nat'l Shooting Sports Found.*, 716 F.3d at 214.

the ATF's authority under 18 U.S.C. § 923(g)(5)(A).[41] There is every reason to believe that this proposal is within the agency's authority.

Furthermore, this expansion would not be arbitrary and capricious, as the ATF likely has a factual basis for its decision to extend demand letter 2. If the first purchaser of a firearm sells or otherwise transfers it, it becomes "generally impossible" for the ATF to trace, because unlicensed sellers are not required to keep any records regarding transfers.[42] The ATF's only option is to conduct an "investigative trace," which involves lengthy interviews and the use of informants. Because these traces require extensive resources and still rarely succeed, the ATF rarely undertakes them. As a result, even though FFLs are required to maintain records regarding acquisition of secondhand firearms, the ATF fails to make these connections, because there is "no link" between the first transaction involving a firearm and any subsequent transactions.[43] By focusing only on those FFLs with evidence linking them to trafficking, the proposed expansion of this demand letter is narrowly focused enough that it is unlikely to be vulnerable for failing to choose a better alternative.

Finally, the proposed demand letter 2 likely complies with the restrictions on federal firearms databases. As stated above, the two major considerations are: (1) the number of FFLs records are sought from, and (2) the amount of information being sought. The original demand letter 2 program was sent to those FFLs with 10 or more trace requests, the same class of FFLs proposed here. This scheme has already been upheld in the past.[44] While the exact number of FFLs the letter will be sent to is likely different than it was in 2004, when *Blaustein* was decided, there is little reason to believe the number is so significant that it will no longer be acceptable. Additionally, there is no additional information being sought compared to the existing demand letter.

2. Expansion of demand letter 3

Currently, demand letter 3 requires certain FFLs in Arizona, California, New Mexico, and Texas to submit records of multiple sales of semi-automatic rifles greater than .22 caliber and with the capability to accept a detachable magazine. The proposed change would extend this requirement to FFLs in Florida, Oklahoma, Nevada, Colorado, Washington, and Illinois, states that have been identified as being primary suppliers of crime guns trafficked to Mexico. The ATF has the power to issue the proposed expansion to demand letter 3. The information sought would expand upon the existing letter by including additional FFLs in states with demonstrated links to international gun trafficking, but would not alter the type of information required. Because there is no change in the information being sought, the expansion of the demand letter to more FFLs will not move it outside the ATF's statutory power.

[41] 365 F.3d at 287.
[42] *J&G Sales* at 1046 (citing Bureau of Alcohol, Tobacco, and Firearms, Department of the Treasury, Commerce in Firearms in the United States 26 (2000)).
[43] *Id.*
[44] *See, e.g., Blaustein*, 365 F.3d at 287.

To avoid a successful challenge based on an argument that this expansion is arbitrary and capricious, the ATF will need to provide a rational connection to gun trafficking by the FFLs in the additional states. The arbitrary and capricious review in the *National Shooting Sports Foundation* focused on the total firearms recovered in Mexico, and evaluated the decision of the states chosen. Because of this, it is important to articulate a factual justification for the extension into any additional states. This basis can clearly be established, as a 2016 GAO report identified these states, in addition to the four already covered by demand letter 3, as being the top source states for crime guns with a US origin recovered in Mexico.[45]

Finally, this expansion of demand letter 3 would likely not run afoul of the centralized database restrictions. The proposal increases the number of FFLs receiving the letter, but the number is limited to six additional states. This expansion still seeks "a narrow subset of information relating to a specific set of transactions" from a "specific set of FFLs."[46] Under this language, there is a good defense for the expansion of the demand letter: the expansion is limited to a set of FFLs specifically linked to higher international gun trafficking. However, the expansion from 4 to 10 states will significantly increase the percentage of FFLs receiving the demand letter.[47] Because the courts have not provided much insight into how many FFLs would constitute too many, it is difficult to predict how the courts would react to the increase; however, there is a good faith basis to pursue this expansion.

3. New demand letter 4: records of "default proceed" sales

The proposed demand letter 4 would require all FFLs covered by demand letters 1, 2, and 3 to also submit records of all "default proceed" sales. The ATF has the power to require submission of records on default sales, so long as the information provided does not go beyond limited information about the buyer and the firearm, similar to what is required for demand letters 2 and 3. The only additional information required under the proposed letter is the default status of the sale. Form 4473, the record form FFLs are required to keep, requires the FFL to mark the response to a background check request, including if no response was provided within three

[45] Government Accountability Office, "U.S. Efforts to Combat Firearms Trafficking to Mexico Have Improved, but Some Collaboration Challenges Remain," January 2016, figure 5, https://www.gao.gov/assets/680/674570.pdf.
[46] *10 Ring Precision*, 722 F.3d at 722.
[47] The number of licensed dealers and pawnbrokers in each state as of July 2020 can be found at: Bureau Of Alcohol, Tobacco, Firearms and Explosives, "Report of Active Firearms Licenses - License Type by State Statistics," July 10, 2020, https://www.atf.gov/firearms/docs/undefined/ffltypebystate07-10-2020pdf/download. According to the chart, there are 9,683 licensed dealers and pawnbrokers—labeled as 01 and 02 in the chart—in the four current states. This accounts for about 7.5% of the total FFLs in the country, about the same as when the court reviewed the program in 2013. The additional states would add 8,751 licensed dealers and pawnbrokers, so the 10 states in total make up about 14.3% of total FFLs.

business days.[48] Therefore, information on the default nature of a sale is a required record, and requesting it from a subset of FFLs is not outside of the ATF's authority under § 923.

The ATF can probably justify its decision adequately, and pass the arbitrary and capricious test before a court. Default sales allow purchasers of firearms to get around the background check requirement. This means that people who would be disqualified by a background check can nonetheless obtain firearms. Preventing individuals who are not legally allowed to obtain firearms from obtaining them is clearly an appropriate goal for the ATF, and this proposed demand letter would further the ATF's ability to do so. However, the ATF does not know how often this occurs, or how much of an issue this is. There is a clear and rational connection between the desired goal of finding the prevalence of default sales and the proposed method of achieving that goal. Additionally, the proposal limits the recipients to those that have already caught the attention of the ATF through the other demand letters. These FFLs have already failed to provide requested information in the past or have a heightened potential for gun trafficking. They provide a stronger rationale for mapping sales to individuals who should be disqualified from purchasing firearms. Therefore, the agency has an articulable justification for its action that should be given deference.

The proposed demand letter may be vulnerable with respect to the restrictions on creation of a centralized database, depending on how much overlap there is among FFLs subject to the existing three demand letters. It requests a limited amount of information on a specific subset of sales; however, it may not be considered narrowly tailored to a small subset of FFLs. Even if demand letters 1, 2, and 3 are all narrowly tailored, if there is little overlap between the three, demand letter 4 would apply to a significantly larger group. Overall, the demand letter program would be receiving information from the same number of FFLs. However, in the past, courts have analyzed this issue based on the specific demand letter in question, rather than looking at the program as a whole, and may consider the combined group too large. Based on the existing precedent, it is difficult to predict how the court will approach this question.

[48] *See* Bureau of Alcohol, Tobacco, Firearms and Explosives, "Firearms Transaction Record [Form 4473]," accessed October 21, 2020, question 19.d, https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download.

RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF)
Topic: Expanding the Release of Gun Trace Data
Date: November 2020

Recommendation: Release more aggregate information about gun traces, including: (1) monthly trace data on recovered crime guns, (2) data about guns originating in the US that have been recovered in all foreign countries, and (3) data identifying the states in the US that are sources of guns used in crimes in each foreign country.

I. Summary

Description of recommended executive action

The Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) conducts gun traces on behalf of federal, state, tribal, local, and foreign law enforcement agencies to determine the sources of guns recovered after use in crime. The trace data in general is widely accessible to federal and state investigators, who may use the data to identify illegal firearms trafficking leads and trends. But the data is far less transparent to members of the public outside law enforcement. Legislators, policy makers, and researchers in particular need more information to identify and implement data-driven solutions to gun crimes and violence.

The ATF currently releases some aggregate statistical trace data annually. This data includes the number of crime guns recovered in each state that are traced to each other state in the relevant year. The ATF also releases the total number of guns recovered in Mexico, Central America, and the Caribbean and traced to the US each year, but does not specify to which state in the US these guns are traced. The ATF also does not release any numbers for guns traced to the US but recovered in countries outside these regions.

Under this proposal, the ATF would release full data on these topics on a monthly basis to allow the public to better address crime guns and violence in their communities.

Overview of process and time to enactment

The actions described above are currently within the ATF's authority, and as such, no further regulatory action would be needed. As discussed below, while a provision included in appropriations bills from 2004 through 2007 could have been interpreted to prohibit the release of some of this information, the provision was amended in 2008 to explicitly allow its release. As such, the ATF could simply begin releasing the aggregate trace data, including more detailed information about traces of guns recovered internationally, on a monthly basis, as opposed to the current annual basis. This information could be published on its website in a form similar to the trace data that is already published there.

II. Current state

The ATF is the lead federal agency charged with investigating and preventing gun violence. This role gives the agency unique insight into the larger nationwide trends that state and local law enforcement agencies cannot provide. Along with this role comes a responsibility to inform the public about these trends, so that policymakers and the public can properly focus their own efforts to reduce gun violence in their communities.

Firearm tracing involves the systematic tracking of firearms from manufacturer to purchaser for the purpose of aiding law enforcement in identifying firearm ownership and persons suspected of being involved in criminal activity. When tracing a firearm, as described in a report from the Government Accountability Office, the ATF "must take a number of steps to trace a crime gun, including, as applicable, contacting the importer, manufacturer, and wholesaler of the firearm in order to identify the … retailer who sold the firearm to the first retail purchaser."[1] Firearms tracing is dependent on the sales and acquisition records that federal firearms licensees (FFLs), including gun manufacturers, importers, and dealers, are required to keep. The ATF conducts gun traces by following the chain of distribution of a gun. FFLs must provide the ATF, upon request, with purchaser details from these transfer records within 24 hours of receipt, to assist in crime gun tracing.[2]

Obama administration action

Under the Obama administration, efforts to ensure the integrity and publication of gun trace data increased. On January 16, 2013, President Obama released a memorandum to federal agencies, requiring them to submit any firearm taken into their custody to the National Tracing Center to be traced.[3] As described below, the ATF is authorized to aggregate the results of these crime gun traces and release the aggregated statistical data, which can provide important information about the sources of crime guns and trends in gun trafficking. During the Obama administration, the ATF increased its publication of such data significantly by issuing annual reports disclosing certain information on crime gun recovery and source state data.[4]

Trump administration action

The Trump administration has not changed the ATF's practices related to the release of gun trace data initiated under the Obama administration.

[1] Government Accountability Office, "U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges," June 2009, https://www.gao.gov/assets/300/291223.pdf.

[2] 18 U.S.C. § 923(g)(7). See also 27 C.F.R. § 478.25a.

[3] Memorandum of January 16, 2013, Tracing of Firearms in Connection With Criminal Investigations, Memorandum for the Heads of Executive Departments and Agencies, 78 Fed. Reg. 4301 (The President January 22, 2013).

[4] *See e.g.,* Bureau of Alcohol, Tobacco, Firearms & Explosives, "Firearms Trace Data - 2014," accessed October 14, 2020, https://www.atf.gov/about/firearms-trace-data-2014.

Currently, the ATF releases data revealing the states where crime guns that are recovered in the US and traced originate on a yearly basis. For example, information readily available on the ATF's website indicates that, of the 7,689 firearms that were recovered and traced in New York State in calendar year 2018:

- 1,170 firearms were traced to firearms licensees (gun dealers, manufacturers and importers) in that state
- 582 firearms were traced to licensees in Georgia
- 473 firearms were traced to licensees in Virginia
- 388 firearms were traced to licensees in Florida
- 337 firearms were traced to licensees in Pennsylvania[5]

Similar information is provided for firearms recovered in each state of the US.

The information the ATF releases regarding traces of guns recovered in Canada, Mexico, Central America, and the Caribbean is nowhere near as detailed, however.[6] These reports break down the guns that were traced based on the countries where they are recovered, but not the source states in the US. where the firearms originated. For example, the calendar year 2019 report for Central America reveals that 592 firearms that were manufactured in the US were recovered in El Salvador in that year.[7] The report does not indicate where in the US they originated, however.

III. Proposed action

This proposal would change three elements of the ATF's practices regarding the public release of gun trace data on the ATF's website.

1. The ATF would release detailed gun trace data on a monthly basis, rather than on a yearly basis.

[5] Bureau of Alcohol, Tobacco, Firearms & Explosives, Office of Strategic Information and Intelligence, "New York: Data Source: Firearms Tracing System January 1, 2018 - December 31, 2018," accessed October 14, 2020, https://www.atf.gov/file/137211/download

[6] *See e.g.* Bureau of Alcohol, Tobacco, Firearms & Explosives, Office of Strategic Information and Intelligence, "Canada: Data Source: Firearms Tracing System, January 1, 2011-December 31, 2016," accessed October 14, 2020, https://www.atf.gov/firearms/docs/report/firearms-trace-data-canada-cy-11-16pdf/download (reporting on crime guns recovered in Canada in 2016); Bureau of Alcohol, Tobacco, Firearms & Explosives, "Mexico: Data Source: Firearms Tracing System, January 1, 2011-December 31, 2016," accessed October 14, 2020, https://www.atf.gov/firearms/docs/report/firearms-trace-data-mexico-cy-11-16pdf (reporting on crime guns recovered in Mexico in 2016); Bureau of Alcohol, Tobacco, Firearms & Explosives, "News Release: ATF Releases International Firearms Trace Data Report," August 9, 2017, https://www.atf.gov/news/pr/atf-releases-international-firearms-trace-data-report-0 (reporting on crime guns recovered in Central America in 2016).

[7] Bureau of Alcohol, Tobacco, Firearms & Explosives, Office of Strategic Information and Intelligence, "Central America: Data Source: Firearms Tracing System January 1, 2019 - December 31, 2019," accessed October 14, 2020, https://www.atf.gov/file/144881/download.

2. The ATF would expand the gun trace data it releases to include the number of guns recovered in each individual foreign country, not just Canada, Mexico, Central America, and the Caribbean.
3. In the ATF reports, the numbers of guns recovered in each foreign country would be broken down by the source state in the US to which they are traced.

IV. Legal justification

The ATF's authority to gather and release information to the public about its gun traces is clear, so long as it does not release information that would interfere with criminal investigations, such as the names and identities of suspects, informants, or other individuals involved. The ATF's lack of transparency and reticence to provide complete information may be due to: (A) a lack of confidence in the utility of the data, (B) the agency's interpretation of two appropriations riders (the Tiahrt Amendment and the centralization and consolidation rider), or (C) concerns regarding a potential impact on foreign affairs. None of these factors should prevent the ATF from releasing this data.

A. Utility of the data

State and local policymakers and the public lack the same access to crime gun trace data as law enforcement authorities, who may use real-time trace data to identify specific leads and detailed trafficking trends. Nonetheless, the public may greatly benefit from information about gun trafficking within and outside their state to better inform critical public safety decisions. For too long, however, the information the ATF publishes for the public has not been timely. For example, the 2019 data was published only on August 24, 2020.[8] Consequently, the public lacks timely data to measure gun trafficking trends and patterns effectively. In addition, because this data is released on a yearly, rather than monthly basis, the public is deprived of any real-time source of information about trends or changes in patterns of gun trafficking between the beginning and end of that year.

State and local policymakers and the public could use this information in multiple ways. Local gun violence prevention advocates, for example, might lobby law enforcement to monitor and inspect local gun dealers more frequently, if they know that gun trafficking from their locality has increased. State legislators might decide to impose more oversight of gun dealers if they discover that gun dealers in their state are a growing source of guns for crimes in other states. In sum, the public could use this data to better understand specific trafficking trends in their jurisdictions, and to create and implement enhanced data-driven policies to target gun crime.

The lack of full transparency and detailed information about traces of guns recovered abroad is particularly concerning because of the role of the US in international gun trafficking. Starting in

[8] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Firearms Trace Data - 2019," accessed October 14, 2020, https://www.atf.gov/resource-center/firearms-trace-data-2019.

2008, policymakers have become increasingly aware that guns originally sold by FFLs in the US are being trafficked to Mexico, Central America, and the Caribbean, and used in crimes.[9]

In order to help law enforcement deter and identify gun trafficking across the southern border, beginning in 2010, the ATF used trace data to issue Demand Letter 3. Demand Letter 3 is sent monthly to FFLs who are licensed dealers or pawnbrokers in Arizona, California, New Mexico and Texas. These FFLs must report all transactions in which an unlicensed person acquired, at the same time or within 5 consecutive business days, two or more semi-automatic rifles larger than .22 caliber with the ability to accept a detachable magazine.

The purpose of Demand Letter 3 is to combat the trafficking of guns across the border into Mexico. The ATF issued Demand Letter 3 only to FFLs in four states based on relevant trace data. For example, the ATF has stated that from 2008 through 2010, prior to the implementation of Demand Letter 3, 4,568 of the 5,799 (nearly 80%) rifles greater than .22 caliber recovered and traced in Mexico originated from retailers in these four states.[10] From 2004 to 2008, 70% of the firearms seized and traced in Mexico came from Texas, California and Arizona.[11]

Currently, the ATF publishes certain information on guns recovered and traced in Mexico, but does not publicly identify the US states where these guns originate.[12] Publishing detailed and monthly trace data on crime guns recovered in Mexico—for example, the types of guns recovered and traced, and source states where the guns originated—would further assist policymakers in identifying crime gun trends, and should be a critical component of any new ATF trace-data publication initiative.

Demand Letter 3 undoubtedly helps the ATF track the sale of the types of guns used more frequently in criminal activity in Mexico. Demand Letter 3 may also deter those who intend to smuggle guns across the southern border from seeking guns in the four states where it applies. It is not known publicly whether these four states continue to be the states where these gun traffickers primarily buy guns, however.

Lastly, the ATF releases no public data about guns originating from the US and recovered outside the Western Hemisphere. Yet, guns from the US are also trafficked to other countries. A recent article in *the New York Times*, entitled “How American Guns Are Fueling U.K. Crime,”

[9] *See e.g.,* PS Newswire, “ATF Releases Government Of Mexico Firearms Trace Data,” April 26, 2012, https://www.prnewswire.com/news-releases/atf-releases-government-of-mexico-firearms-trace-data-149098025.html (announcing release of trace data for US guns recovered in Mexico from 2007-2011); *see also* Bureau of Alcohol, Tobacco, Firearms & Explosives, “Mexico,” accessed October 14, 2020, https://www.atf.gov/file/2751/download (disclosing similar data for 2009-2014).
[10] *See 10 Ring Precision, Inc. v. Jones,* 722 F.3d 711, 723 (5th Cir. 2013).
[11] *See id.*; *see also* Bureau of Alcohol, Tobacco, Firearms & Explosives, “Mexico,” accessed October 14, 2020, https://www.atf.gov/file/2751/download.
[12] *See e.g.*, Bureau of Alcohol, Tobacco, Firearms & Explosives, “Mexico,” accessed October 14, 2020, https://www.atf.gov/file/2751/download.

noted that 782 American guns have been discovered by UK police since 2017.[13] This number is shocking, and should lead policymakers to consider the impact of our weak guns laws, not just here in the US, but abroad as well. Publication of trace data addressing US guns recovered and traced in other countries—outside the Western Hemisphere—would further benefit policy makers worldwide in their efforts to combat international firearms trafficking.

B. Appropriations riders

1. The Tiahrt amendment

The Tiahrt amendment, as enacted in 2003, was a response to successful litigation generally requiring the ATF to release trace data.[14] The general rule established by the Tiahrt amendment barring disclosure of trace data, including information about FFL gun sales and transfers, is as follows:

> .... no funds appropriated under this or any other Act may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section ...[15]

While in 2003 Tiahrt included limited exceptions to this bar on disclosure, in general, the bar was broad, far-reaching, and repeated in various iterations in subsequent years. Despite the limited nature of the Tiahrt amendment, it had a detrimental effect on the ATF public disclosures. Consequently, in 2005, Congress included a new exemption to the disclosure bar to allow publication of the number of firearms each licensed importer and manufacturer produced, imported, or exported. The legislative history for that amendment provides that:

> [T]he Committee is concerned that the previous language has been interpreted to prevent publication of a long-running series of statistical reports on products regulated by ATF. This was never the intention of the Committee, and the new language should also make clear that those reports may continue to be published in their usual form as they pose none of the concerns associated with law enforcement sensitive information.[16]

Then in 2008, the rider was again amended to include an exception for aggregate data:

[13] Jane Bradley, "How American Guns Are Fueling U.K. Crime," *N.Y. Times*, August 12, 2020, https://www.nytimes.com/2020/08/12/world/europe/handguns-smuggling-murder-us-uk.html.
[14] *See e.g., Chicago v. U.S. Department of Treasury,* 287 F.3d 628 (7th Cir. 2002); *NAACP v. AA Arms, et al.,* 210 F.R.D. 268 (E.D.N.Y. 2002); *City of New York v. B.L. Jennings et. al.,* 2004 U.S. Dist. LEXIS 3097 (E.D.N.Y. Mar. 2, 2004).
[15] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609-10 (2011). *See also* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 53 (2004) (very similar language).
[16] H.R. Rep. 108-576, at 30 (2004).

> ...except that this provision shall not be construed to prevent:... (C) the publication of … statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations…[17]

This language has been included in every iteration of the Tiahrt amendment since then, including the 2012 version that was made permanent through the use of futurity language.[18]

It is clear that Congress contemplated the publication of extensive statistical aggregate trace data when it amended the Tiahrt amendment in 2008. In fact, following the 2008 amendment, the ATF, in 2014, began to release annual data identifying the number of crime guns recovered and traced in each state that were traced to other states. The data requested by this memo would merely increase the frequency with which this data is released—that is, monthly as opposed to annually. Additionally, the data requested by this memo would increase the frequency and scope of the released data applicable to US-sourced guns traced in other countries, and also identify the source state of guns traced in those countries. Nothing in the Tiahrt amendment, as described above, precludes the increased frequency or expansion of these proposed data releases.

2. The Centralization and Consolidation rider

Another appropriations rider, which first appeared in 1978 and was made permanent in 2012, prohibits the ATF from using funds "in connection with consolidating or centralizing, within the Department of Justice, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees."[19] Any investigation into gun trafficking may necessarily involve gathering two or more records of firearm sales as evidence of trafficking by the same person or group of people. Nevertheless, this rider does not prevent the ATF from investigating gun trafficking, since bringing select records together, when they may indicate trafficking, does not constitute "consolidating or centralizing" such records. Multiple courts have reiterated, "The plain meaning of consolidating or centralizing does not prohibit the mere collection of some limited information. Both consolidating and centralizing connote a large-scale enterprise relating to a substantial amount of information."[20]

Furthermore, the consolidation and centralization rider does not prevent the publication of aggregate information derived from these records. Even though this rider has been included in appropriations laws since 1978, this rider did not prevent the ATF from the aggregate statistical

[17] Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1903-04 (2007).
[18] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609-10 (2011) (adding in the futurity language "during the current fiscal year and in each fiscal year thereafter"); Consolidated Appropriations Act, 2010. Pub. L. No. 111-117, 123 Stat. 3034, 3129 (2009); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 575 (2009).
[19] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 4 (2011).
[20] *Ron Peterson Firearms, LLC v. Jones,* 760 F.3d 1147, 1161 (10th Cir. 2014) (quoting *Blaustein & Reich, Inc. v. Buckles,* 365 F.3d 281, 289 (4th Cir. 2004). See also *Nat'l Shooting Sports Found., Inc. v. Jones,* 716 F.3d 200, 212-14 (D.C. Cir. 2013).

data the ATF currently provides. There is no reason why the rider on consolidating and centralizing gun sales records should be interpreted to prevent the ATF from issuing more such data more promptly.

The ATF clearly has the authority, if not the obligation, to publish expanded gun trace data on a regular basis as proposed herein. There are no legal obstacles to the publication of this information. Given the importance of this information for policymakers and ultimately for public safety, the ATF should expand its release of gun trace data as soon as possible.

C. Implications for foreign affairs

As described above, the data that the ATF currently releases regarding crime guns that originate in, but are recovered and traced outside the US, is significantly narrower than the data released on guns recovered inside the US. Perhaps as a matter of international comity, the ATF is being cautious with regards to the release of this information. However, there is no evidence that foreign law enforcement wishes to withhold this information. Public disclosure of this crime gun trace data presents clear advantages, since it allows policymakers, advocates, and the public to identify and propose data-driven solutions to international crime gun trafficking.

Next steps

The ATF's limited public disclosure of crime gun trace data lawfully may be expanded both in frequency and content. The public's understanding of gun trafficking worldwide would benefit, and policymakers would be better able to address the underlying sources of crime guns. The ATF should expand its release of trace data as soon as possible.

RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF)
Topic: Extending ATF's Retention and Use of Multiple-Sales Records
Date: November 2020

Recommendation: **Extend the retention of records of multiple sales of firearms so that they are deleted after ten years, instead of two years.**

I. Summary

Description of recommended executive action

A federally licensed firearms dealer is required to report to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) when the same individual purchased two or more handguns within five consecutive business days. The ATF also receives records of a more limited group of multiple long guns sales. These records are an important source of information that the ATF uses when it traces guns recovered after use in crime. Currently, the ATF deletes these records after two years. The ATF should extend the retention of these records so that they are not deleted until ten years have passed, to align with the average time before a gun is recovered after use in a crime.[1] As described below, retaining these records will help ensure the ATF has the tools it needs to effectively investigate firearms trafficking and other gun crime through ATF's unique tracing authorities.

Overview of process and time to enactment

The Privacy Act of 1974 sets out requirements for government databases containing records that can be retrieved by personal identifying information.[2] Under that act, the director must submit advance notice of the proposed policy change to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget (OMB) for an evaluation of the proposal's effect on individual's privacy and other rights.[3] After incorporating any OMB comments into the proposal,[4] the ATF may then publish a SORN in the Federal Register, providing the purpose and description of the internal

[1] See e.g., "Firearms Trace Data," accessed October 14, 2020, https://www.atf.gov/resource-center/firearms-trace-data-2018 (reporting on national averages for several years, which in 2014 included the highest average of 10.88 years).
[2] Privacy Act of 1974, 5 U.S.C. § 552a (2020); Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-108, Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act 15-17 (2017) [hereinafter "OMB Reporting Under the Privacy Act"].
[3] 5 U.S.C. § 552a(r) (2018).
[4] OMB Reporting Under the Privacy Act, *supra* note 28, at 14.

policy change,[5]and the policy could then be implemented.[6] It is not clear whether these procedural requirements would apply here. The DOJ's Office of Privacy and Civil Liberties is the entity best positioned to make that decision.

II. Current state

The ATF is charged with investigating crimes involving the illegal possession, use, transfer, or trafficking of firearms, among other things.[7] In pursuit of this objective, the ATF assists international, federal, state and local law enforcement with requests to trace firearms used in the commission of a crime.[8] As described below, the ATF's ability to trace firearms is dependent on the 25 firearms-related databases that it maintains.[9] This memo concerns one of them: the Multiple-Sales (MS) database.

Legislative landscape

Prompted by the assassinations of President John F. Kennedy, Attorney General Robert F. Kennedy, and Dr. Martin Luther King, Jr., President Lyndon B. Johnson signed the Gun Control Act of 1968 (GCA) into law.[10] The law was considered the most significant piece of gun control legislation passed in the United States at the time, imposing stricter licensing and regulation of the firearms industry.[11] Specifically, the law banned interstate shipments of firearms and ammunition to private individuals, sales to certain individuals including minors, and importantly, strengthened the licensing and record-keeping requirements for FFLs, who were previously subject to limited agency scrutiny.[12] FFLs are federally licensed retailers that import, manufacture, or sell firearms or ammunition.[13]

In 1986, Congress passed the Firearms Owners' Protections Act (FOPA), which rolled back some of the protections put in place by the Gun Control Act of 1968, including eliminating certain record-

[5] *Id.* at 5-6.

[6] *Id.* at 7.

[7] U.S. Gov't Accountability Office, "GAO-16-552, Firearms Data: ATF Did Not Always Comply with the Appropriations Act Restriction and Should Better Adhere to Its Policies," 2016, 1 [hereinafter "GAO Firearms Data 2016"].

[8] *Id*. at 7; ATF "National Tracing Center," June 15, 2020, https://www.atf.gov/firearms/national-tracing-center#:~:text=ATF%20processes%20crime%20gun%20trace,to%20ten%20days%20on%20average.

[9] GAO Firearms Data 2016, *supra* note 5, at 11.

[10] Pub. L. No. 90-618, 82 Stat. 1213 (Oct. 22, 1968); *see also* 18 U.S.C. §§ 921–31 (2020).

[11] Olivia B. Waxman, "How the Gun Control Act of 1968 Changed America's Approach to Firearms—And What People Get Wrong About that History," *Time,* October 30, 2018, https://time.com/5429002/gun-control-act-history-1968/.

[12] 18 U.S.C. §§ 922–23 (2020).

[13] *Id*.

keeping requirements for ammunition dealers and permitting specific interstate sales of rifles and shotguns.[14]

Under FOPA, FFLs are also required to submit records of multiple handgun sales to the ATF and state law enforcement in certain circumstances.[15] State law enforcement is required to destroy these records no later than 20 days after the day they are received. This provision does not mention the retention or destruction of these records by the ATF.

FOPA also authorizes the ATF to issue letters to FFLs requesting firearm sales information "for periods and at the times specified in such letter[s]." FFLs must provide information in response to these letters (known as "Demand Letters") to the ATF "until notified to the contrary in writing."[16] Like the provision regarding multiple handgun sales, this provision does not mention the retention or destruction of information the ATF receives in response. The ATF has used this demand letter authority to require specific FFLs to submit information on multiple sales of certain long guns.[17]

FOPA also mandates that the DOJ's rulemaking authority must not be used to establish "any system of registration of firearms, firearms owners, or firearms transactions or dispositions."[18]

A. Multiple sales records by FFLs

The GCA, as amended by FOPA, requires FFLs to record and maintain details of multiple sale transactions, *i.e*., sales of two or more handguns (pistols or revolvers) made to the same individual within five consecutive business days; the ATF also requires some FFLs to report multiple sales of certain semi-automatic rifles through a "demand letter" issued by the ATF, requesting specific information.[19] The ATF's regulations also explicitly require FFLs to file multiple-sales reports with the ATF.[20]

FFLs are required to generate and maintain "multiple-sales reports" upon the sale of:

1. two or more handguns (*i.e.* pistols or revolvers) to a non-FFL purchaser at the same time or within five consecutive business days[21]

[14] Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986); *see also* 18 U.S.C. §§ 922–23 (2020).

[15] 18 U.S.C. § 923(g)(3).

[16] 18 U.S.C. § 923(g)(5).

[17] 18 U.S.C. § 923(g)(5).

[18] 18 U.S.C. § 926(a)(3).

[19] *See* 18 U.S.C. § 923(g)(1)(a), (3), (5); 27 CFR § 478.126a; *see also* ATF Form 3310.4, *supra*; ATF Form 3310.12, *supra*; "Reporting Multiple Firearms Sales," accessed October 14, 2020, https://www.atf.gov/firearms/reporting-multiple-firearms-sales.

[20] 27 C.F.R. § 478.126a (implementing 18 U.S.C. § 923(g)(3).

[21] 18 U.S.C. § 923(g)(3).

2. two or more of certain semi-automatic rifles to a non-FFL purchaser in Arizona, California, New Mexico, or Texas at the same time or within five consecutive business days[22]

When preparing a multiple-sale report, the FFL must provide information regarding the transaction, including the type and description of the firearm(s) sold and details regarding the firearm purchaser.[23] Once complete, the FFL is required to retain a copy of the multiple-sale report for its records and submit a copy of the multiple-sale report to the ATF by close of business on the date of sale.[24]

An FFL must capture details of the firearm transaction by completing ATF Form No. 3310.4 (Report of Multiple Sale or Other Disposition of Pistols and Revolvers) or ATF Form No. 3310.12 (Report of Multiple Sale or Other Disposition of Certain Rifles).[25] The forms require an FFL to provide detailed information regarding the firearms sold, including whether the firearms are connected to another multiple sale, the location of the sale (e.g., at a gun show), the type of firearm, serial number, manufacturer, model, importer, caliber, transfer date, and personal information regarding the purchaser including name, residential address, sex, ethnicity, race, identification number and type, date and place of birth, and employer. Multiple-sales reports must be maintained at the FFL's business premises for at least five years.[26] Notably, if an FFL falls within the scope of Demand Letter 3, an FFL must file a copy of Form No. 3310.12 pertaining to the multiple sales of certain semi-automatic rifles, with ATF's National Training Center (NTC), no later than the close of business on the day the multiple sale occurred.

Form 3310.4 states that the information collected is "to determine if the buyer (transferee) is involved in an unlawful activity," and further, is "stored and retrieved in accordance with Justice/ATF-008 Regulatory Enforcement Record System 68 FR 3558 dated January 24, 2003."[27] This citation refers to a notice published in the Federal Register in 2003 and most recently updated in 2017[28] in compliance with the Privacy Act of 1974.

B. The ATF's inspection & storage of multiple-sales records

Computerization and storage policies. The ATF computerizes and stores data from both types of multiple-sales reports in the MS data system.[29] The MS data system is just one of the 25 firearms-

[22] *See* 18 U.S.C. § 923(g)(5); ATF "National Tracing Center," June 15, 2020, https://www.atf.gov/firearms/national-tracing-center#:~:text=ATF%20processes%20crime%20gun%20trace,to%20ten%20days%20on%20average.

[23] ATF Form 3310.12, *supra.*

[24] 18 U.S.C. § 923(g).

[25] ATF Form 3310.4, *supra;* ATF Form 3310.12, *supra.*

[26] 27 C.F.R. § 478.129.

[27] *See* ATF Form 3310.4

[28] *See e.g.*, "Federal Register," September 25, 2017, https://www.govinfo.gov/content/pkg/FR-2017-09-25/pdf/2017-20352.pdf (modifying ATF-008 regulatory records, under which MS is stored).

[29] GAO Firearms Data 2016, *supra* note 5, at 20, 41.

related data systems used by the ATF to track the sale of firearms to purchasers by computerizing firearm sales records provided to the ATF by FFLs.[30] The MS data system stores data collected from multiple-sales reports.

Prior to November 1995, the ATF stored multiple-sales reports as hard copies at its local field divisions' offices.[31] In 1995, the MS data system was developed to "computerize" information from multiple-sales records to better facilitate the firearms tracing process.[32] The process of inputting information into the MS data system is as follows.

1. The ATF receives the original multiple-sale report.[33]
2. The ATF scans the document in a non-searchable, TIFF image format.[34]
3. The document is tagged with a "transaction number."[35]
4. The document is stored as an image-only file in the database.[36]
5. If a firearm is not connected to a trace, the ATF deletes the purchaser's name from the system two years after the date of sale.[37]

As of fiscal year 2018, ATF's NTC recorded 1.1 million firearms as part of the multiple-sales reporting program, which was 3% more than the prior year, and a 180% increase in the last decade.[38]

Use of MS data system in firearms tracing. The ATF uses the information stored in the MS data system to assist law-enforcement agencies in criminal investigations. The ATF's firearms tracing process consists of several steps. First, a firearms trace is initiated when a law enforcement agency submits a trace request after recovering a firearm from a crime scene or from a suspect.[39] Second, the ATF tracks the weapon through the chain of distribution, starting with the initial manufacturer, distributor, FFL, and ultimately to the retail purchaser.[40] The ATF's ability to track the distribution chain participants is due, in part, to the information in the MS data system's database. Third, the ATF initiates a trace request to the FFL that facilitated the sale.[41] The FFL is obligated to provide the ATF with the purchaser's information, including name, address, and

[30] *Id*. at 11.
[31] GAO Firearms Data Restrictions 2016, *supra* note 5, at 20 n.42.
[32] *Id.* at 18.
[33] *Id.* at 20.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Bureau of Alcohol, Tobacco, Firearms and Explosives, "Congressional Budget Submission for Fiscal Year 2020," 2019, 16.
[39] *RSM, Inc. v. Buckles*, 254 F.3d 61, 63 (4th Cir. 2001)
[40] *Id.*
[41] *Id.*

federal firearms license number.[42] FFLs are required to respond to an ATF trace request within 24 hours.[43]

The ATF calculates the time between when a gun is sold by an FFL and when it is recovered after use in a crime. This number is called the "time-to-crime" for the gun. Information about average time-to-crime for guns recovered in the US. is available on the ATF's website, and discussed further below.[44]

Because of the number of requests that the ATF receives for firearms tracing, the ATF has consistently requested additional resources to assist the agency with its firearms tracing cases.

Congressional appropriations limitation. Although the ATF is charged with collecting information regarding firearms sold in certain circumstances, the ATF must also balance its law-enforcement responsibilities with the privacy concerns of firearm owners.[45] Consequently, Congress has passed several provisions restricting the ATF's handling of FFL records. In 1979, in response to a proposed ATF regulation that would have required FFLs to report their firearm transactions to the ATF on a quarterly basis, Congress passed an appropriations rider preventing the ATF from using federal funds to "consolidate or centralize" firearm records.[46] The relevant provision reads that "no funds appropriated herein or hereafter shall be available for salaries or administrative expenses in connection with consolidating or centralizing within the [DOJ], the records, or any portion thereof, of acquisition and disposition of firearms maintained by [FFLs]."[47] That provision was made permanent in 2012.[48]

MS data system two-year deletion policy. The information stored in the MS data system enables the ATF to assist law enforcement in their firearms tracing efforts.[49] However, in order to strike a balance with the privacy concerns of firearms purchasers, the ATF adopted a self-imposed requirement to delete the name of the firearms purchaser from the MS data system after two years from the date of the sale, if the firearm in question has not been connected to a trace request ("two-year deletion policy").[50] The remainder of the information in the MS data system,

[42] *Id.*

[43] 18 U.S.C. § 923(g)(7); *see also RSM*, 254 F.3d at 63.

[44] *See e.g.,* ATF "Firearms Trace Data–2018," accessed October 14, 2020, https://www.atf.gov/resource-center/firearms-trace-data-2018 (reflecting an average 8-10 year period before a gun is used in a crime).

[45] GAO Firearms Data 2016, *supra* note 5, at 1.

[46] Pub. L. No. 112-55, 125 Stat. 552, 609-610 (2011); *see also* Pub. L. No. 103-123, 1993 (107 Stat. 1226) 1229; Pub. L. No. 95-429, 92 Stat. 1001, 1002 (1978).

[47] Pub. L. No. 112-55, 609-610.

[48] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 4 (2011).

[49] *Id*. at 19.

[50] *Id*. at 20. Purchaser names stored in the MS data system are retrievable by ATF agents who have access to eTrace, unless deleted pursuant to the two-year deletion policy. *Id*. However, the purchaser name is preserved in the original image file of the FFL submission at ATF's NTC. *Id*. The file is accessible only by NTC officials. *Id*. If a firearm from an MS record that had the purchaser name deleted is later tagged in a trace, the purchaser name will be repopulated into the MS data system. *Id*. at 54 n.7

such as the firearms description, is preserved.[51] The statutory mandate authorizing the ATF to inspect and collect certain firearm-transaction information, juxtaposed with Congress's prohibition against the consolidation and centralization of firearms records, likely caused the ATF to adopt the two-year deletion policy, which has been consistent since 1995. The two-year deletion policy is an internal policy, not mandated by federal statute or regulation.[52]

III. Proposed action

The ATF should extend the MS data system's two-year deletion policy related to firearms purchaser information to ten years by issuing internal guidance, which may require publication of a System of Records Notice (SORN) in the Federal Register. This is the most effective and efficient way to ensure that multiple-sales data stored in the MS data system can be relied upon by the ATF for a longer period of time.

The DOJ's Office of Privacy and Civil Liberties is the entity that would most likely determine the proper vehicle to effect this internal agency policy change.[53] Notably, the form gun dealers use to report multiple handgun sales states that the information collected is "stored and retrieved in accordance with Justice/ATF-008 Regulatory Enforcement Record System 68 FR 3558 dated January 24, 2003."[54] A change in the ATF retention policy may therefore require an update to the systems of records notice in ATF-008.[55] The ATF may need to fulfill certain procedural requirements to extend the retention of the records in this system.

The ATF Director, through the DOJ, was granted authority under the GCA and DOJ regulations to maintain and operate the MS system.[56] Nevertheless, the ATF may need to fulfill certain procedural requirements to extend the retention of the records in this system. The Privacy Act of 1974 sets out requirements for government databases containing records that can be retrieved by personal identifying information.[57] Under that act, the director must submit advance notice of the proposed policy change to the Committee on Government Operations of the House of

[51] *Id.*

[52] GAO Firearms Data Restrictions 1996, *supra* note 23, at 4.

[53] Department of Justice, "Frequently Asked Questions," September 11, 2020, https://www.justice.gov/opcl/faq.

[54] *See* Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Dep't Justice, ATF E-Form 3310.4, OMB No. 1140-0003, "Report of Multiple Sale or Other Disposition of Pistols and Revolvers," 2019, https://www.atf.gov/file/61426/download (hereinafter "ATF Form 3310.4"); Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Dep't Justice, ATF E-Form 3310.12, OMB No. 1140-0100, "Report of Multiple Sale or Other Disposition of Certain Rifles," 2019, https://www.atf.gov/firearms/docs/form/report-multiple-sale-or-other-disposition-certain-rifles-atf-form-331012/download (hereinafter "ATF Form 3310.12"). It is unclear why the long gun form does not reflect the ATF-008 information collection.

[55] *See e.g.*, "Federal Register Vol. 82, No. 184," September 25, 2017, https://www.govinfo.gov/content/pkg/FR-2017-09-25/pdf/2017-20352.pdf (modifying ATF-008 regulatory records, under which MS is stored).

[56] 28 C.F.R. § 0.131 (2020).

[57] Privacy Act of 1974, 5 U.S.C. § 552a (2020); Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-108, Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act 15-17 (2017) [hereinafter "OMB Reporting Under the Privacy Act"].

Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget (OMB) for an evaluation of the proposal's effect on individuals' privacy and other rights.[58] After incorporating any OMB comments into the proposal,[59] the ATF may then publish a SORN in the Federal Register providing the purpose and description of the internal policy change,[60] and the policy could then be implemented.[61] It is not clear whether these procedural requirements would apply here. The DOJ's Office of Privacy and Civil Liberties is the entity best positioned to make that decision.

This proposal appropriately balances privacy and the needs of law enforcement

Extending the MS data system's current deletion policy would continue to protect firearms purchasers' privacy. Extending the deletion policy protects the privacy rights of firearm owners because the firearms purchaser information would continue to be deleted from the MS data system, albeit after ten years instead of two years.

In addition, any potential cost to firearms purchasers' privacy as a result of extending the deletion policy by additional years must be balanced against the significant benefit to the ATF in the execution of its law enforcement responsibilities. Importantly, extending the MS data system's deletion policy would better enable the ATF to trace a particular firearm as the information is available for a longer period of time, improving the ATF's firearms tracing process.

As mentioned above, the ATF calculates the "time-to-crime" for each gun recovered in the US by subtracting the date when the gun is sold by an FFL from the date when it is recovered after use in a crime. This is the period of time MS data would have to be retained in order to be helpful in tracing a gun. The vast majority of guns recovered in the US have a time-to-crime that exceeds two years. A gun's time-to-crime often extends far beyond this time. Overall, the average time-to-crime for all guns recovered and traced in the US in 2018, for example, was 8.8 years.[62] In some states the average time-to-crime was much longer. For all guns recovered in Hawaii, for example, it was 17.64 years, but these states are outliers.[63] The average time-to-crime for all guns recovered in 41 states and DC was less than ten years.[64] Consequently, retaining MS data for ten years, rather than two, would enable this data to be used in a large number of gun traces.

In addition, the ATF's National Tracing Center (NTC) is the only organization authorized to trace US and foreign-manufactured firearms for international, federal, state, and local law enforcement

[58] 5 U.S.C. § 552a(r) (2018).
[59] OMB Reporting Under the Privacy Act, *supra* note 28, at 14.
[60] *Id*. at 5-6.
[61] *Id*. at 7.
[62] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Firearms Trace Data - 2018," accessed October 14, 2020, https://www.atf.gov/resource-center/firearms-trace-data-2018. The relevant data is contained in the document labeled ATF, "Time-to-Crime – Firearms Recovered and Traced in the United States and Territories (xcl)," April 11, 2019, https://www.atf.gov/file/137346/download.
[63] *Id.*
[64] *Id.*

agencies in their efforts to solve firearms crimes, and to detect and prevent firearms trafficking.[65] Therefore, an extension of the MS data system's deletion policy would enable the ATF to: (1) better monitor and regulate FFLs, and prevent the unlawful sale of firearms to unauthorized, or straw, purchasers, and (2) better assist law enforcement with their firearms tracing efforts by retaining firearm purchaser information for an additional three years before the information is deleted from the MS data system.

Despite the strength of the arguments in favor of extending the deletion policy, there are certain vulnerabilities to doing so. Gun control is a politically contentious issue. Even politically neutral policies, such as the MS data system's deletion policy, could be perceived as violating the privacy rights of gun owners and could likely cause significant political and legal backlash. However, the strength of the plain language of the law, and the important policy interest in successfully tracing crime guns and combating gun violence support extending the MS deletion policy.

IV. Risk analysis

An agency action can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[66] Extending the retention of MS records may withstand all these challenges, however.

Arbitrary and capricious challenge under the APA

Under the Administrative Procedures Act, any agency action can be struck down if courts deem the agency action as "arbitrary, capricious or an abuse of discretion."[67] Arbitrary and capricious is a broad standard that arises in instances where the agency failed to provide a logical basis for how it made a specific determination.[68] A court may also strike the rule as an abuse of discretion, i.e., if the agency tried to act beyond what the statute authorized it to do.[69]

A court is not likely to hold that the proposed extension of the retention period for MS records is "arbitrary, capricious or an abuse of discretion." The MS data system is an essential component of the ATF's regulatory and enforcement system, and is pivotal in the enforcement of criminal statutes prohibiting violent crimes and gun trafficking. The MS data system provides great value in tracing firearms and preventing gun violence. Strengthening these efforts supports expanding the

[65] ATF, "Fact Sheet – Facts and Figures for Fiscal Year 2019," June 2020, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2019.
[66] 5 U.S.C. § 706.
[67] 5 U.S.C. § 706.
[68] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 56-57 (1983).
[69] 5 U.S.C. § 706.

two-year deletion policy to ten years, based on the average time-to-crime reflected in the ATF's annual tracing reports for the past several years.[70]

Extending the retention policy Is within the ATF's authority

The Gun Control Act of 1968 grants the ATF the authority to promulgate rules and regulations necessary to carry out its regulatory and enforcement responsibilities, including the right to inspect and obtain multiple-sales records.[71] The ATF's rules and regulations do not address, either explicitly or implicitly, the two-year deletion policy. The ATF has chosen to delete these records from the MS data system two years from the date of sale if the firearm is not connected to a trace. However, there is no provision of federal law that explicitly or implicitly requires the ATF to delete the information it receives from multiple-sales reports.[72] Accordingly, the MS data system's two-year deletion policy appears to be an internal policy adopted by the ATF in response to the congressional restriction against consolidating and centralizing firearm sales records.[73]

The MS data system, which only includes a limited subset of firearm purchaser information, does not constitute a federal firearms registry. The 5th Circuit Court of Appeals has concluded that Congress' intent would be lost if limitless demand letters could be used to circumvent the restrictions set forth in the statute.[74] However, that court also determined that the demand letter in that case did not meet the level of creating a national registry, because it sought "a narrow subset of information relating to a specific set of transactions" from a "specific set of FFLs."[75]

In fact, when Congress was considering the bill that became the Firearm Owners Protection Act, it considered placing constraints on the ATF's storage and use of multiple-sales records, but chose not to enact any restrictions.[76] Therefore, the FOPA does not require that firearm purchaser information be deleted from the MS data system two years from the date of sale.

The two-year deletion policy is also not mandated by the congressional appropriations rider.[77] Although the congressional appropriations rider conditions the ATF's receipt of federal funding for expenses and salaries on not centralizing or consolidating certain information, Congress has not specified a time limit on the information contained in the MS data system.[78] Although the federal statutes collectively permit the ATF to collect multiple-sales records from FFLs and

[70] *See e.g.,* ATF, "Firearms Trace Data - 2018," accessed October 14, 2020, https://www.atf.gov/resource-center/firearms-trace-data-2018 (reflecting an average 8-10 year period before a gun is used in a crime).
[71] 18 U.S.C. § 926.
[72] 18 U.S.C. § 923.
[73] GAO Firearms Data Restrictions 2016, *supra* note 5, at 20 n.42.
[74] *See 10 Ring Precision,* 722 F.3d at 722.
[75] *Id.*
[76] U.S. Gov't Accountability Office, "GAO/GGD- 96-174 ATF Compliance with Firearms Licensee Data Restrictions," September 11, 1996, 4.
[77] Pub. L. No. 112-55, 125 Stat. 552, 609-610 (2011).
[78] *Id.*

prohibit the consolidation and centralization of such records, the statutes are markedly silent as to the exact duration of their usage by the ATF.

These congressional restrictions have adversely impacted and hampered the ATF's gun tracing abilities.[79] However, courts have clearly held that the ATF's ability to request and use information from FFLs (either through the form of narrowly-tailored demand letters or other authorized means) does not violate the congressional prohibition against the centralization and consolidation of firearm records.[80] In focusing on the restrictions imposed by the congressional appropriations riders, courts analyzed the plain meaning of the terms "consolidate" and "centralize" and held that the terms "connote a large-scale enterprise relating to a substantial amount of information."[81] Extending the deletion policy would not constitute a "large-scale enterprise relating to a substantial amount of information."[82] Finally, even where Congress has imposed a spending restriction, courts have tended to interpret those restrictions narrowly and defer to the agency interpretation to avoid potential conflicts with an agency pursuing an action it is granted authority to pursue by Congress.[83]

Approval of two-year deletion policy

The US Government Accountability Office (GAO) has previously reviewed the MS data system in 1996 and 2016. It concluded in two separate reports that the two-year deletion policy does not violate the ATF's statutory limitations and is in accordance with the congressional appropriations limitations prohibiting the consolidation and centralization of firearms records.[84] The GAO determined that "there is no indication in the legislative history that the [appropriations] rider was intended to overturn ATF's existing practices concerning the acquisition or use of licensee information."[85] The legislative history indicated Congress considered and ultimately rejected placing constraints on the MS system.[86] Further, in its 2016 report, the GAO found that the ATF failed to delete certain records in the MS data system within the two-year time frame consistent with its internal policy. Importantly, the GAO determined that the ATF's failure to delete the

[79] Chelsea Parsons, "The Most Important Gun Violence Prevention Agency You've Never Heard Of," Center for American Progress, June 19, 2019, https://www.americanprogress.org/issues/guns-crime/news/2019/06/19/471232/important-gun-violence-prevention-agency-youve-never-heard/.
[80] *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1160 (10th Cir. 2014); *Blaustein & Reich, Inc. v. Buckles,* 365 F.3d 281, 289 (4th Cir. 2004).
[81] *Blaustein & Reich, Inc.,* 365 F.3d at 289.
[82] *Id.*
[83] *Sherley v. Sebelius*, 644 F.3d 388, 393-97 (D. C. Cir. 2011) (granting deference to the agency interpretation of its authority in response to an Executive Order and finding that such deference was reasonable in light of the ambiguity both in its authority to fund certain forms of research and the limitations of that authority imposed by a Congressional restriction on what types of research could be funded).
[84] See *id.* at 38; U.S. Gov't Accountability Office, "GAO/GGD- 96-174, ATF Compliance with Firearms Licensee Data Restrictions," September 11, 1996, 6.
[85] *Id*. at 4.
[86] *Id*. at 5. A version of FOPA containing a passage prohibiting the maintenance of MS reports in a centralized system was passed in 5S. 49, 99th Cong., 1st Sess. (1985), but ultimately this restriction was not included in the version of the bill adopted by Congress. *Id*. at 13.

records after two years did not constitute a violation of the congressional appropriations rider or FOPA.[87]

The ATF director can use the authority granted to the agency, pursuant to the GCA, to change the two-year deletion policy to ten years. Regulations give the director the power to "maintain and operate the National Tracing Center...and collect and analyze...multiple sales reports."[88] Therefore, the director has the power to revise internal policies such as the MS data system's two-year deletion policy.

Congress had multiple opportunities to enact explicit limits on the ATF's use and storage of multiple-sales records including mandating a deletion policy of firearms information and purchaser records. However, Congress pointedly chose not to do so.

Despite lacking any statutory or formal regulatory mandate to do so, the ATF has chosen to delete MS records that are unconnected to a firearms trace request within two years of a multiple-sales submission. Therefore, a moderate extension of the MS data system's deletion policy to ten years, for the purposes of improving the ATF's crime gun tracing abilities, is likely to overcome any potential challenges.

Procedural and constitutional challenges

As noted above, the procedures that the ATF should use to effectuate this change may depend on the application of the Privacy Act of 1974 and other laws. The ATF should rely on the DOJ's internal legal expertise to make these determinations.

There are no constitutional rights implicated in extending the retention of MS records. Courts have held that the government does not violate the Second Amendment by maintaining records of gun owners.[89] As a result, no court is likely to condemn the ATF for deciding to extend its retention of MS records.

V. Conclusion

Extending the MS data system's deletion policy to ten years would be an efficient and effective solution for the ATF to improve its firearms tracing efforts and law enforcement objectives. In light of the relative strengths and weaknesses associated with the options to extend the deletion policy, including potential political backlash and litigation exposure, we recommend pursuing the non-executive order route, and pursue an extension of the two-year deletion policy by having the director of the ATF issue an updated notice revising the internal policy. Extending the retention policy would have tangible benefits for the ATF and crime reduction generally.

[87] GAO Firearms Data Restrictions 2016, *supra* note 5, at 44.

[88] 28 C.F.R. § 0.131 (2020).

[89] *Justice v. Town of Cicero,* 577 F.3d 768, 774 (7th Cir. 2009) (finding that registration "merely regulated gun possession" rather than prohibiting it); *Heller v. District of Columbia ("Heller III"),* 801 F.3d 264 (D.C. Cir. 2015) (firearm registration generally does not violate the Second Amendment)

RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: ATF Domestic Violence Special Agents
Date: November 2020

Recommendation: Ensure there is a domestic violence special agent in each of ATF's 25 field divisions.

I. Summary

Description of recommended executive action

Every year, millions of Americans report intimate partner violence (IPV).[1] Firearm access makes this violence particularly deadly, posing a serious threat to victims: domestic violence assaults involving a gun are 12 times more likely to result in death than those involving other weapons or bodily force.[2] While domestic violence touches all groups, 85% of IPV victims are women.[3] An abuser's mere access to a firearm makes it five times more likely that a woman will be killed.[4]

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the main federal agency responsible for overseeing the gun industry, works to stem the flow of firearms to prohibited possessors, including those convicted of a felony[5] or qualifying misdemeanor domestic violence offense[6] and those subject to a qualifying protection order.[7]

In order to enhance ATF's law enforcement and regulatory efforts and focus agency resources on limiting the supply of firearms to domestic abusers, the next administration should ensure there is a domestic violence specialist in each of its 25 field divisions. This domestic violence specialist should be a special agent and would coordinate domestic violence enforcement efforts across the agency, serve as a point of contact for domestic violence advocacy organizations within their division, and work with local law enforcement to target gun traffickers and implement protocols that ensure the surrender of guns by prohibited abusers.

[1] Centers for Disease Control and Prevention, "Preventing Intimate Partner Violence," 2018, https://web.archive.org/web/20190804084444/https://www.cdc.gov/ViolencePrevention/pdf/IPV-FactSheet.pdf
[2] Linda E. Saltzman, "Weapon Involvement and Injury Outcomes in Family and Intimate Assaults," *JAMA* 267, no. 22 (1992): 3043–3047.
[3] Emory University School of Medicine, "Domestic Violence/Intimate Partner Violence Facts," accessed October 1, 2020, http://psychiatry.emory.edu/niaproject/resources/dv-facts.html.
[4] J.C. Campbell, "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study," *American Journal of Public Health* 93, no.7 (2003): 1089–1097.
[5] 18 U.S.C. 922(g)(1).
[6] 18 U.S.C. 922(g)(9).
[7] 18 U.S.C. 922(g)(8).

Overview of process and enactment

The attorney general is responsible for enforcing the Gun Control Act (GCA), including the law's domestic violence provisions.[8] The attorney general has delegated that responsibility to the director of the ATF, subject to the direction of the attorney general and the deputy attorney general.[9] Congress has provided the ATF budget authority to expend "necessary expenses of the Bureau of Alcohol, Tobacco, Firearms and Explosives"[10] in order to carry out its mission. As such, appointing domestic violence special agents is within the authority of ATF, and the agency may use existing funding to carry out such appointments.[11]

II. Current state

The intersection of domestic violence and firearms

In the US, more than 10 million adults experience domestic violence each year.[12] While domestic violence touches all groups, 85% of domestic violence victims are women,[13] and about one in four women in the US report experiencing some form of sexual or physical violence or stalking by an intimate partner in their lifetime.[14]

The biggest definable group of female murder victims consists of those killed by intimate partners: one study found that between 1976 and 2005, 30% of female murder victims were killed by intimate partners, while only 5% of male murder victims were killed by an intimate partner.[15] More recent data confirms this fact: between 2003 and 2012, 33.7% of homicides of women resulted from intimate partner violence.[16]

Firearm access makes domestic violence far more lethal. Domestic violence assaults involving a gun are 12 times more likely to result in death than those involving other weapons or bodily

[8] 18 U.S.C. § 44.
[9] 28 C.F.R. § 0.130(a).
[10] Consolidated Appropriations Act of 2020, Pub. L. No. 116-93.
[11] *See e.g.,* ATF, *"*FY19 Congressional Budget Submission,*"* February 2018, https://www.atf.gov/file/147951/download.
[12] National Coalition Against Domestic Violence, "Domestic Violence Fact Sheet," accessed October 1, 2020, https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457.
[13] Emory, *supra* note 3.
[14] Sharon G. Smith et al., "National Intimate Partner and Sexual Violence Survey 2015 Data Brief – Updated Release*,"* National Center for Injury Prevention and Control, November 2018, https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf.
[15] Jacqueline Campbell, et al., "Intimate Partner Homicide: Review and Implications of Research and Policy," *Trauma, Violence & Abuse* Vol 8, no. 3 (2007), 246.
[16] Arkadi Gerney and Chelsea Parsons, "Women Under the Gun," Center for American Progress, June 18, 2014, https://www.americanprogress.org/issues/guns-crime/reports/2014/06/18/91998/women-under-the-gun/.

force.[17] As a result, an abuser's mere access to a firearm makes it five times more likely that a woman will be killed.[18] The scope of this violence is enormous: nearly one million women alive today in the US have reported being shot or shot at by intimate partners, and 4.5 million women have reported being threatened with a gun.[19]

With our high rates of firearm-related domestic violence, the US is the most dangerous country in the developed world when it comes to women and guns. Women in the US are 21 times more likely to be killed with a gun than women in other high-income countries.[20]

The COVID-19 pandemic has accelerated these devastating trends. According to the Center for American Progress, "stay-at-home orders essential to slowing the spread of the virus, coupled with the economic and health stressors caused by the pandemic, have forced [domestic violence] survivors already at risk of domestic abuse into even more vulnerable and dangerous positions."[21] While the piecemeal nature of data reporting by states and localities makes it difficult to paint an accurate picture of the prevalence and severity of IPV overall, available fragmented data from counties across the country indicate that almost every state has reported increases in IPV.[22]

Federal and state law regarding armed domestic abusers

At the federal level, the GCA prohibits domestic abusers from possessing firearms. Amended in 1994 and 1996, the GCA makes it a federal crime to, *inter alia*:

- Possess a firearm and/or ammunition while subject to a qualifying protection order[23]
- Possess a firearm and/or ammunition after a conviction of a qualifying misdemeanor crime of domestic violence[24]
- Possess a firearm and/or ammunition after a conviction of a felony[25]

The GCA defines a "misdemeanor crime of domestic violence" as: (1) a federal, state, local, tribal or territorial offense that is a misdemeanor under federal, state or tribal law; (2) that has

[17] Linda E. Saltzman, et al., "Weapon Involvement and Injury Outcomes in Family and Intimate Assaults," *JAMA* 267, no. 22 (1992): 3043–3047.
[18] Campbell, *supra* note 4.
[19] Everytown for Gun Safety, "Guns and Violence Against Women," October 17, 2019, 4, https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/.
[20] Erin Grinshteyn and David Hemenway, "Violent Death Rates in the US Compared to Those of the Other High-income Countries," *Preventive Medicine* 123 (2019): 20–26.
[21] Osub Ahmed and Robin Bleiweis, "Ensuring Domestic Violence Survivors' Safety," Center for American Progress, August 10, 2020, https://www.americanprogress.org/issues/women/reports/2020/08/10/489068/ensuring-domestic-violence-survivors-safety/.
[22] *Id.*
[23] 18 U.S.C. 922(g)(8).
[24] 18 U.S.C. 922(g)(9).
[25] 18 U.S.C. 922(g)(1).

the element of the use or attempted use of physical force, or the threatened use of a deadly weapon; and at the time the offense was committed, the defendant was a current or former spouse, parent, or guardian of the victim, a person with whom the victim shared a child, a person who was cohabitating with the victim as a spouse, parent, or guardian, or a person who was similarly situated to a spouse, parents, or guardian of the victim.[26] Under the Lautenberg Amendment, 18 U.S.C. § 922(g)(9), violation of this prohibition is a federal offense punishable by up to ten years imprisonment.[27]

While the GCA sets out categories of prohibited possessors, it does not provide a standard mechanism regarding firearm surrender. The Violence Against Women Act of 2005 (VAWA), the other major federal law criminalizing domestic violence, also does not provide a standard mechanism regarding firearm surrender. While VAWA requires states and local governments to notify domestic violence offenders of federal firearm prohibitions and any applicable laws, it does not require them to establish a procedure for ensuring that abusers are required to surrender any firearms in their possession once they become prohibited under federal or state law.[28]

Most states expressly authorize law enforcement to remove firearms when they are discovered in the possession of a person who is prohibited from possessing them.[29] However, only seven states provide a statutory process for the relinquishment of firearms by all people convicted of firearm-prohibiting crimes,[30] while fifteen states require all individuals convicted of domestic violence crimes to relinquish their firearms after conviction.[31] Efforts to address the lack of relinquishment protocols have yielded positive results. For example, laws requiring abusers to turn in guns upon being prohibited from possessing them are linked to a 16% reduction in intimate partner gun homicides.[32]

ATF domestic violence enforcement

The ATF operates primarily through two components: criminal enforcement and industry operations. The criminal enforcement component is responsible for criminal law enforcement investigations and is composed of special agents and investigative support staff. The industry operations component is the ATF's regulatory enforcement component and is composed of industry operations investigators (IOIs) and support specialists.

[26] 18 U.S.C. § 921(a)(33)(A).
[27] ATF, "Misdemeanor Crimes of Domestic Violence and Federal Firearms Prohibitions," September 2011, https://www.atf.gov/file/58786/download.
[28] *Id*.
[29] *Id*.
[30] Giffords Law Center, "Firearm Relinquishment," accessed October 1, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/disarming-prohibited-people/.
[31] *Id.*
[32] Giffords Law Center, "Domestic Violence & Firearms," accessed October 1, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms.

The bulk of ATF resources are dedicated to its law enforcement work—specifically on its gun trafficking and drug trafficking efforts. ATF special agents outnumber IOIs who conduct gun dealer inspections by 3-to-1,[33] and roughly 80%[34] of the agency's budget is devoted to law enforcement operations. In 2018, the ATF initiated more than 35,000 criminal investigations related to guns and referred more than 16,000 individual defendants to prosecutors for potential prosecution.[35]

The vast majority of the ATF's criminal enforcement and industry operations are conducted through the agency's field divisions. The ATF has 25 field divisions across the country, with field staff making up approximately 70% of its workforce as of 2013.[36] These field divisions are overseen by the Office of Field Operations, which consists of an assistant director, three regional deputy assistant directors, one deputy assistant director for operations, and one deputy assistant director for programs.[37] As ATF's largest directorate, the Office of Field Operations is tasked with providing strategic direction for each field division and overseeing all criminal investigative activities across the bureau.[38]

Each field division is led by a special agent in charge and has a director of industry operations and an assistant special agent in charge to provide mission guidance in accordance with each jurisdiction's priorities.[39] Each of the 25 field divisions also include multiple criminal enforcement field offices and one Crime Gun Intelligence Center, led by a special agent referred to as a group supervisor, as well as several industry operations field offices led by a special IOI referred to as an area supervisor.[40]

ATF strategy for its field divisions is informed by an intelligence-driven model called "frontline," which uses evidence-based analysis to understand the realities of the violent crime environment for each field division's specific jurisdiction, and deploys resources accordingly to most effectively reduce violent crime in that geography.[41] Frontline data is sourced from the National Tracing Center, Violent Crime Analysis Branch; High Intensity Drug Trafficking Areas; state and

[33] ATF, "Fact Sheet - Staffing and Budget," May 2019, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-staffing-and-budget.
[34] ATF, "Congressional Budget Submission: Fiscal Year 2020," March 2019, https://www.justice.gov/jmd/page/file/1144651/download.
[35] ATF, "Fact Sheet - Facts and Figures for Fiscal Year 2019," June 2020, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2018.
[36] United States Government Accountability Office, "Bureau of Alcohol, Tobacco Firearms, and Explosives: Enhancing Data Collection Could Improve Management of Investigations," June 2014, https://www.gao.gov/assets/670/664514.pdf.
[37] Office of the Inspector General, "Review of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' Implementation of the Frontline Initiative," U.S. Department of Justice, February 2019, https://oig.justice.gov/reports/2019/e1902.pdf.
[38] GAO *supra* note 36.
[39] OIG *supra* note 37.
[40] *Id.*
[41] ATF, "Fact Sheet - Frontline," May 2018, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-frontline.

local agencies; criminal histories; and confidential informant debriefs, all of which can inform investigations and responses to crimes involving domestic violence.

One specific service offered at designated field divisions is the ATF Victim/Witness Assistance Program (VWAP). The VWAP helps ensure victims of federal crimes investigated by the ATF have access to service, assistance, and protections after suffering physical, financial, or emotional trauma.[42] Services offered as part of the program include:[43]

- Guidance and referrals for the best emergency medical and social services
- Guidance and referrals to counseling, treatment, and other support programs
- Legal and criminal case updates and
- Reasonable protection from a suspected offender or the accused

These services and protections are sanctioned by the Victim Rights and Restitution Act (VRRA),[44] the Crime Victims' Rights Act of 2004 (CVRA),[45] and the Victims of Crime Act of 1984.[46] VWAP specialists train ATF agents to better support victims, and regional victim/witness specialists (RVWS) are stationed at designated field divisions throughout the country to offer more focused, regional support.[47]

VWAP specialists field incoming calls from victims, but the efficacy of this service varies between field divisions. Some VWAP specialists are difficult to reach, and most can only provide general recommendations to help victims develop safety plans, or refer them to work with local law enforcement. VWAP specialists do not connect victims directly to ATF field division agents or local law enforcement officials; instead, they often serve as a firewall between victims and field divisions.

Trump administration efforts

In June 2019, Attorney General William Barr established a working group of US attorneys focused on prosecuting domestic abusers for illegal firearms possession.[48] The Domestic Violence Working Group consists of nine US attorneys from across the country.[49] The group shares best practices for prosecuting federal domestic violence crimes and provides guidance on how to collaborate with local law enforcement agencies and nonprofits.

[42] ATF, "Victim/Witness Assistance Program," May 2020, https://www.atf.gov/contact/victimwitness-assistance-program.

[43] *Id.*

[44] 34 U.S.C. § 20141 (formerly 42 U.S.C. § 10607).

[45] 18 U.S.C. § 3771.

[46] P.L. 98-473, Title II, Chapter XIV, Victims of Crime Act of 1984, October 12, 1984, 98 Stat. 2170. VOCA is codified at 34 U.S.C. § 20101 et seq.

[47] VWAP *supra* note 42.

[48] Kerry Shaw, "New DOJ Effort Targets Domestic Abusers," The Trace, June 11, 2019, https://www.thetrace.org/2019/06/doj-us-attorneys-domestic-violence-guns/.

[49] Id.

Erin Nealy Cox, US Attorney for the Northern District of Texas, chairs the working group. Her office leads the country in domestic violence prosecutions.[50] In 2018, Cox's office prosecuted 23 people with prior misdemeanor domestic violence convictions.[51] Just four years earlier, only 23 individuals in the entire country were prosecuted under the same federal statute.[52]

III. Proposed action

Substance of proposed action

In order to enhance the ATF's law enforcement and regulatory efforts and focus agency resources on limiting the supply of firearms to domestic abusers, the next administration should ensure there is a domestic violence specialist in each of the ATF's 25 field divisions. These domestic violence specialists should serve as ATF special agents and coordinate domestic violence enforcement efforts across the agency, serve as a point of contact for domestic violence advocacy organizations within their division, and work with the US Attorneys' Offices and local law enforcement to implement protocols that ensure the surrender of guns by prohibited abusers and the prosecution of those who violate the law by possessing guns despite a domestic violence conviction or restraining order. In particular, domestic violence special agents would be responsible for the following:

- Work with local law enforcement to improve states' existing firearm relinquishment protocols. Most states expressly authorize law enforcement to remove firearms discovered in the possession of a person who is prohibited from possessing them.[53] However, only seven states provide a statutory process for the relinquishment of firearms by all people convicted of firearm-prohibiting crimes,[54] while fifteen states require all individuals convicted of domestic violence crimes to relinquish their firearms after conviction.[55] Of these, three states expressly require all prohibited criminal defendants to provide proof of compliance to courts or law enforcement, verifying that they relinquished their guns after conviction: California, Connecticut, and Nevada.[56]

  Given this patchwork system of statutory processes and relinquishment requirements, an ATF domestic violence special agent should help develop rapid response teams with local agencies. These rapid response teams—in conjunction with the ATF domestic violence special agent—should be tasked with screening domestic violence cases more

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id*.
[54] Giffords Law Center *supra* note 30.
[55] *Id.*
[56] *Supra* note 4. *See also,* Katherine A. Vittes et al., "Removing Guns from Batterers: Findings from a Pilot Survey of Domestic Violence Restraining Order Recipients in California," Center for Gun Policy and Research, Johns Hopkins Bloomberg School of Public Health (2015), 603.

quickly, issuing warrants, and seizing weapons from abusers, in accordance with state and municipal laws. In order to protect victims or potential victims of domestic abuse more effectively, in accordance with local laws, these rapid response teams could be modeled similarly to a program developed by the Kings County police department in Washington State. This local program, called the Regional Domestic Violence Firearms Enforcement Unit, fast-tracks screening cases and responds to domestic violence protection orders and Extreme Risk Protection Orders (ERPOs) with greater levels of coordination. Since its establishment in 2017, police and prosecutors in Kings County have quadrupled the number of guns seized from accused abusers.[57]

- Improve NICS data compliance for DV-related issues in their jurisdiction. The Federal Bureau of Investigation (FBI) estimates that, on average, nearly 3,000 individuals pass a NICS background check when they would otherwise be prohibited from purchasing a firearm because of incomplete state-level data.[58] Because the NICS database receives state-level convictions, mental health adjudications, and other records on a voluntary basis, many states' records are incomplete, allowing some domestic abusers to slip through the cracks and purchase a firearm regardless of their history. ATF domestic violence special agents would work with local law enforcement officials and agencies to implement more robust record-keeping systems and ensure accurate reporting into the NICS database for all cases of domestic violence in their jurisdiction.

- Ensure all "delayed denial" referrals related to domestic violence are investigated. Though 90% of background checks conducted through the NICS provide an answer in under two minutes, about 10% of cases require further investigation and review by FBI agents. Many of these cases involve individuals prohibited from purchasing or possessing firearms because of a domestic violence misdemeanor conviction or restraining order.[59] Under federal law, if the FBI or state agency cannot complete that investigation and make a final determination within three days, the gun dealer may transfer the firearm, unless state law provides otherwise.[60] The FBI can continue to research a transaction for potentially prohibiting information for up to 90 days even after a gun sale proceeds without a completed background check. However, after 90 days, all information related to the transaction must be destroyed to comply with federal record retention requirements.[61] In practice, to ensure compliance with this destruction of records requirement, NICS is programmed to purge records of unresolved transactions

[57] Chirs Ingalis, "New Rapid Response Team Disarms Accused Abusers," King 5 NBC Affiliate, February 2018, https://www.king5.com/article/news/local/new-rapid-response-team-disarms-accused-abusers/281-515919133.
[58] Giffords Law Center, "NICS & Reporting Procedures," accessed October 1, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/nics-reporting-procedures/#footnote_3_5613.
[59] Giffords Law Center, "Fixing the Default Proceed Flaw," May 2018, https://giffords.org/wp-content/uploads/2018/05/lawcenter-Default-Proceeds-Factsheet-Giffords-Law-Center.pdf.
[60] 18 U.S.C. § 922(t)(1)(B)(ii). States can establish their own firearm laws, such as additional prohibiting categories or additional time frames for completing checks before a dealer may transfer the firearm.
[61] 28 C.F.R. § 25.9.

within 88 days. When the FBI makes a denial determination within this period (after three business days, but before 88 days), it is called a "delayed denial." In delayed denial cases, the FBI determines if the firearm dealer transferred the firearm to the individual and, if so, refers the case to the ATF. In 2013, 16% of ATF investigations were related to delayed denials.[62]

Project Guardian directs ATF members to coordinate with state and local law enforcement in the case of NICS denials related to mental health, but does not specify the need for increased coordination in the case of NICS denials related to cases of domestic abuse.[63] ATF domestic violence special agents would be charged with conducting more robust investigations and coordinating with local law enforcement in the case of delayed denials related to domestic violence.

- Serve as a dedicated point of contact to field VWAP calls related to domestic violence. The VWAP's victim service hotline provides important infrastructure for domestic violence reduction efforts, but the program lacks dedicated federal law enforcement support to follow-up on calls. As a result, VWAP specialists often refer victims to local law enforcement with little to no federal follow-up or support. To better leverage VWAP's infrastructure, ATF domestic violence special agents would serve as the point of contact for VWAP specialists in each of the ATF's 25 field divisions. In particular, these special agents would be responsible for responding to all VWAP calls from public agencies and state domestic violence coalitions, and would work to bridge federal assistance with local law enforcement support to investigate gun crimes and trafficking related to domestic violence.

- Coordinate domestic violence enforcement efforts across the agency. Domestic violence special agents would coordinate to prioritize domestic violence-related enforcement efforts across the ATF. Several violence reduction programs housed in the ATF would benefit from a designated point person with expertise and focus on domestic violence.

    - *National Crime Gun Intelligence Centers (CGICs):* CGICs support local, multidisciplinary efforts to identify, disrupt, investigate, and prosecute perpetrators and sources of gun crimes through the analysis of crime gun evidence.[64] These efforts rely heavily on robust collaboration between the ATF, local police department, local crime laboratories, probation and parole officers, local police units, prosecuting attorneys, the US Attorney's Office, crime analysts, community groups, and academic organizations. These efforts could be improved with an ATF specialist focused exclusively on domestic violence cases

[62] OIG Frontline *supra* note 37.
[63] ATF, "Press Release: Attorney General Announces Launch of Project Guardian," November 13, 2019, https://www.atf.gov/news/pr/attorney-general-announces-launch-project-guardian-nationwide-strategic-plan-reduce-gun.
[64] Crime Gun Intelligence Centers, "The National Crime Gun Intelligence Center Initiative," accessed October 1, 2020, https://crimegunintelcenters.org/.

involving firearms. The specialists would ensure best investigatory practices are followed, best victim services administered, and thorough records kept to increase the efficacy of domestic violence reduction efforts.

- *Enhanced Enforcement Initiatives (EEIs):* EEIs are used by the ATF to analyze criminal environments in areas experiencing disproportionately high levels of violent crimes, and to inform and implement an integrated law enforcement approach.[65] Domestic violence Special Agents would coordinate and lead on EEI efforts in each field division wherever high rates of domestic violence occur.

- Serve as a point of contact for domestic violence advocacy organizations. The domestic violence special agent should build strong relationships with domestic violence prevention advocates and service providers to develop a deep understanding of the particular needs and patterns related to domestic violence in their jurisdiction. Using this knowledge, the specialist should work with state and local agencies and ATF regional victim/witness specialists to identify federal resources that can fill service gaps for victims and provide greater levels of support for domestic violence investigations.

Process

As noted above, the ATF director has authority to appoint special agents as "necessary expenses of the Bureau of Alcohol, Tobacco, Firearms and Explosives."[66] As such, appointing domestic violence special agents to serve in each ATF field division is within the authority of the ATF, and the agency may use existing funding to carry out such appointments. To effectuate these appointments, the ATF director should direct all field divisions to designate a domestic violence specialist as a special agent. For those field divisions that do not currently employ a domestic violence specialist who can serve as a special agent, the ATF director should direct field divisions to identify existing budgetary authority and use it to hire a domestic violence specialist to fill a special agent position as available.

IV. Risk analysis

Legal vulnerability

There is little legal vulnerability in instituting this recommendation. Appointing a domestic violence specialist to serve as a special agent is within the ATF director's legal authority. The appointment of domestic violence specialists also complies with the Appointments Clause of the US Constitution, which permits Congress to vest the ATF director with power to appoint "inferior officers."

[65] ATF Frontline *supra* note 41.
[66] Consolidated Appropriations Act *supra* note 10.

RECOMMENDED ACTION MEMO
Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Reform NFA Determination Process
Date: November 2020

Recommendation: The ATF should reform the NFA determination process by (1) developing a new framework for reviewing NFA requests, (2) conducting a retroactive review of previous decision letters to determine compliance with the new framework, and (3) publishing the framework and all NFA decision letters on the ATF's website to increase transparency.

I. Summary

The ATF is currently employing a deferential approach to the gun industry when assessing whether firearms or firearm accessories fall within the parameters of the National Firearms Act (NFA), which makes them subject to heightened regulation. This imbalance between the ATF and the industry is enabling manufacturers to operate outside the parameters of the law, putting communities at risk for gun violence perpetrated by these uniquely dangerous firearms and accessories that have been subject to heightened regulation for nearly a century.

Description of recommended executive action

The next administration should direct the ATF to take the following steps to improve the NFA review process, provide better guidance to the gun industry, and increase transparency.

1. Develop a framework for reviewing NFA requests that involves an objective assessment of whether the firearm or accessory is intended to be used in a manner that would put it in one of the NFA categories that does not defer to the intended use stated by the manufacturer.
2. Conduct a retroactive review of NFA decision letters using the new framework, and provide revised guidance to manufacturers of firearms and accessories that qualify as NFA weapons upon secondary review.
3. Publish the framework and all NFA decision letters on the ATF's website to increase transparency and provide guidance to the industry.

Overview of process and time to enactment

To implement these changes, the ATF should publish the new NFA determination framework and open a notice-and-comment period, after which the ATF would finalize the framework, implement the new NFA determination framework, and publicize NFA decision letters. Similarly, the ATF should issue a public notice about the retroactive review process of NFA decision letters, and send communications about the retroactive review directly to manufacturers who may be impacted.

Finally, there are no statutory or regulatory limitations on the ATF's publishing NFA determinations on its website. Nothing in the NFA or ATF's regulations prevents the ATF from publishing its classification rulings or from seeking public input before issuing them. This change can be implemented as soon as the retroactive review has been completed and revised decision letters have been issued.

II. Current state

The National Firearms Act and the definition of covered firearms

The National Firearms Act, Pub. L. 73-474, was first enacted nearly a century ago, in 1934. It imposes registration requirements, manufacturing and transfer taxes, and other regulations on "firearms" that fall within the definition set forth in the act.[1] The NFA charges the ATF with administering and enforcing this law, and grants the ATF the authority to promulgate rules implementing the act.[2]

The NFA was not intended to provide comprehensive regulation of all firearms. Instead, Congress enacted the NFA to regulate certain firearms and accessories it perceived as posing the greatest danger to the public, and in particular the types of firearms frequently used at the time by criminal organizations.[3] As amended,[4] the NFA defines "firearm" as:

> (1) a shotgun having a barrel or barrels of less than 18 inches in length;
> (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length
> (3) a rifle having a barrel or barrels of less than 16 inches in length;
> (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length;
> (5) any other weapon [narrowly defined to mean, with certain exceptions:
> - any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive,
> - a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, and
> - weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading];
> (6) a machinegun;
> (7) any silencer [as defined by statute]; and
> (8) a destructive device.[5]

The terms "shotgun," "rifle," "any other weapon," "machine-gun," "silencer," and "destructive device," in turn, have precise (and somewhat complicated) statutory definitions.[6] It bears noting

[1] *See* 26 U.S.C. § 5841 (registration in the National Firearms Registration and Transfer Record); *id.* §§ 5811 & 5821 (taxes).

[2] *See id.* §§ 7801(a)(2) & 7805(a); 28 C.F.R. § 0.130. In 2002, Congress transferred authority to implement gun control laws, including the NFA, from the Secretary of the Treasury to the Attorney General, and transferred ATF from the Treasury Department to the Department of Justice. *See United States v. Atandi*, 376 F.3d 1186, 1189 n.6 (10th Cir. 2004). Thus, NFA provisions that refer to "the Secretary" now mean the "Attorney General," who in turn has subdelegated authority to ATF.

[3] *See* 73 Cong. Rec. 11,400 (1934) (statement of Rep. Robert L. Doughton) ("For some time this country has been at the mercy of gangsters, racketeers, and professional criminals. The rapidity with which they can go across state lines has become a real menace to the law-abiding people of this country.").

[4] The NFA was amended by Title II of the Gun Control Act of 1968, Pub. L. 90-618, and by the Firearm Owners' Protection Act of 1986, Pub. L. 99-308.

[5] 26 U.S.C. § 5845(a).

[6] *Id.* § 5845(a)–(f).

that, despite the fact that the NFA has been amended over the years, its definition of "firearm" is under-inclusive in relation to its purpose and has not kept pace with advancing gun technology.

ATF regulations and letter rulings on "NFA firearms"

Pursuant to its authority to administer and enforce the NFA, the ATF has issued regulations on the "procedural and substantive requirements" applicable to NFA firearms.[7] These regulations incorporate the statutory definition of "firearm," with limited elaboration.[8] The ATF has also issued a lengthy guidance document called the National Firearms Act Handbook, which offers a primer on the covered categories of NFA firearms in relatively plain English.[9] The ATF's Firearms Technology Industry Services Branch (FTISB) serves as the technical authority that determines how firearms should be classified under federal law.[10]

The ATF has also adopted a practice of issuing "rulings" stating its position on whether particular weapons or devices are NFA firearms. It issues such rulings in two different ways: as published rulings available on its website, and as unpublished letter rulings that are sent only to the entity that requested the ruling, generally the manufacturer of the weapon or device in question.[11] The ATF has not offered any public explanation of how it determines whether to publish a particular NFA ruling. The NFA Handbook (last revised in 2009) includes an appendix of published rulings, and a complete list of published firearms rulings is available on the ATF's website.[12]

To a limited extent, the ATF's practice of issuing rulings on whether particular devices are covered by the NFA is grounded in the statute itself and corresponding ATF regulations. The NFA grants the ATF broad discretion to determine the meaning of two significant exceptions to the NFA's definition of "firearm," and the ATF exercises this discretion (at least in part) by issuing NFA "rulings." In particular, the NFA specifies that the term "firearm" "shall not include an antique firearm or any device (other than a machine-gun or destructive device) which, although designed as a weapon, the [ATF Director] finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon."[13] And the NFA's definition of "destructive device" specifies that the term "shall not include . . . any other device which the [ATF director] finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes."[14] Consistent with these provisions, the ATF's regulations establish a procedure by which a "person" can request: (1) a "ruling" from the ATF on whether a given device "is excluded from the definition of a destructive device,"[15] or (2) a "determination" from the ATF that a firearm

[7] *See* 27 C.F.R. § 479.1 *et seq.*

[8] *See id.* § 479.11.

[9] *See* ATF, "National Firearms Act Handbook," July 9, 2019, www.atf.gov/firearms/national-firearms-act-handbook ("NFA Handbook").

[10] *See* Bureau of Alcohol, Tobacco, Firearms and Explosives, "Fact Sheet - Firearms and Ammunition Technology Division," June 2020, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-firearms-and-ammunition-technology-division.

[11] *See* NFA Handbook at 2–3 (discussing published rulings); *id.* at 41 (discussing unpublished letter rulings).

[12] *See* ATF, "Firearms Rulings," June 2020, https://www.atf.gov/rules-and-regulations/firearms-rulings.

[13] 26 U.S.C. § 5845(a).

[14] *Id.* § 5845(f).

[15] *Id.* § 479.24.

or device, although originally designed as a weapon, is "primarily a collector's item and is not likely to be used as a weapon."[16]

Outside of the context of these two statutory grants of discretion to the ATF, the NFA does not specifically authorize or require the ATF to issue standalone rulings about whether a particular product falls within the definition of an NFA firearm (for example, whether a given product is a "machine-gun").[17] The NFA does implicitly authorize the ATF to interpret the meaning of the NFA definition of "firearm" in the course of administering and enforcing the NFA. This authority permits the ATF to issue regulations interpreting the NFA definition, and specifying whether particular weapons fall within it, as it has done on a few occasions (discussed in the next section of this memo). But there is no specific statutory obligation to issue such rules, or any other kind of standalone "ruling" addressed to particular weapons. And apart from the two specific procedures described above, the ATF regulations likewise do not establish any procedural mechanism for a person to obtain a determination from the agency on whether a given weapon or device is an "NFA firearm."

Despite this regulatory silence, however, the ATF has a practice of providing NFA "rulings" to any manufacturer who inquires about a product it plans to manufacture. The ATF describes this practice in its NFA Handbook guidance document:[18]

> **7.2.4 Do you know how ATF would classify your product?** There is no requirement in the law or regulations for a manufacturer to seek an ATF classification of its product prior to manufacture. Nevertheless, a firearms manufacturer is well advised to seek an ATF classification before going to the trouble and expense of producing it. Perhaps the manufacturer intends to produce a GCA firearm but not an NFA firearm. Submitting a prototype of the item to ATF's Firearms Technology Branch (FTB) for classification in advance of manufacture is a good business practice to avoid unintended classification and violations of the law. . . .
>
> **7.2.4.1 ATF classification letters.** ATF letter rulings classifying firearms may generally be relied upon by their recipients as the agency's official position concerning the status of their firearms under Federal firearms laws. Nevertheless, classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations. To make sure their classifications are current, [parties] should stay informed by periodically checking the information published on ATF's website, particularly amendments to the law or regulations, published ATF rulings, and "open letters" to industry members.

[16] *Id.* § 479.25.

[17] Congress did recognize the existence of ATF "rulings and interpretations" when it transferred authority to implement gun control laws, including the NFA, from the Secretary of the Treasury to the Attorney General, and transferred ATF from the Treasury Department to the Department of Justice. *See* 26 U.S.C. § 7801(a)(2)(B) ("Nothing in the Homeland Security Act of 2002 alters or repeals the rulings and interpretations of the Bureau of Alcohol, Tobacco, and Firearms in effect on the effective date of such Act, which concern the provisions of [the NFA].").

[18] "NFA Handbook," p. 41.

The recipients of these unpublished letter rulings sometimes publicize them,[19] but the agency itself does not make them available to the public.

The ATF has also, in rare instances, used its NFA-rulemaking authority to issue an actual rule, with the force of law, addressing whether certain types of products are "NFA firearms."[20] The ATF has issued such a rule only three times since 1998, but it is free to do so to specify—with the force of law—whether certain types of products are "NFA firearms."[21] Most recently, in the aftermath of the 2017 mass shooting in Las Vegas, the ATF revised its definitional rule to establish that "bump stock"-type devices are "machine-guns" as defined by the NFA, because they allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of a trigger.[22] Notably, before promulgating this rule, the ATF had issued several "private letter" determinations classifying bump stocks as unregulated firearms parts not subject to the NFA.[23] There are currently a few cases pending in the federal courts challenging this new rule.[24]

The ATF's current approach to making NFA determinations

The ATF's current approach to implementing the NFA gives far too much deference to gun manufacturers, and does not enable ATF to serve as a legitimate check on the gun industry. Instead, the ATF deploys a deferential approach to manufacturers when determining if a particular firearm or device should be classified under the NFA. This deferential approach creates an imbalance between the ATF and the industry that puts public safety at risk, and undermines both the text and the intent of the law.

For example, one common determination the ATF is asked to make relates to whether a new firearm design qualifies as a short-barreled shotgun or rifle, which are more stringently regulated under the NFA than regular shotguns and rifles. The impetus for enhanced regulation and restrictions of short-barreled long guns is tied both to the ease with which these weapons are concealable, and to the extent of damage these weapons are capable of inflicting when used to perpetrate a crime, given that they fire large-caliber ammunition capable of piercing the soft-body armor commonly worn by law enforcement officers.[25] Under federal law, both shotguns and rifles are, by definition, designed to be fired from the shoulder using two hands, and are not easily concealable; they are subject to minimum barrel length and overall length requirements.[26]

[19] *See e.g.*, Violence Policy Center, "ATF Opinion Letters on Devices to Increase the Rate of Fire of Semiautomatic Firearms," accessed October 27, 2020, https://vpc.org/regulating-the-gun-industry/bump-fires-and-similar-devices/ (collecting publicized ATF letter rulings on bump-fire devices); Violence Policy Center, "Read ATF Approval Letters for Pistol Braces," accessed October 27, 2020. https://vpc.org/regulating-the-gun-industry/pistol-braces-that-evade-federal-restrictions-on-short-barreled-rifles/ (collecting publicized ATF letter rulings for stabilizing brace devices).

[20] *See* 26 U.S.C. §§ 7801(a)(2) & 7805(a); 28 C.F.R. § 0.130.

[21] *See* 27 C.F.R. § 479.11 (rule addressing ATF's construction of "NFA firearms").

[22] *See id.* ("The term 'machine gun' includes a bump-stock-type device . . . ."); Final Rule: Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (December 26, 2018).

[23] *See* Proposed Rule: Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 82 Fed. Reg. 60,929, 60,930 (December 26, 2017).

[24] *See Gun Owners of Amer. v. Barr* (6th. Cir. No. 19-1298); *Modern Sportsman et al. v. United States* (Fed. Cir. No. 20-1107); companion case *McCutchen v. United States* (Fed. Cir. No. 20-1188).

[25] Giffords Law Center to Prevent Gun Violence, "Legal and Lethal: 9 Products that Could Be the Next Bump Stock" September 28, 2020, https://giffords.org/wp-content/uploads/2018/09/18.09-FACT-Legal-Lethal_Reboot_R4.pdf.

[26] Rifles must have a barrel length of at least 16 inches, shotguns must be 18 inches, and both must be at least 26 inches overall. Weapons with shorter barrels or overall lengths are subject to regulation under the National Firearms Act of 1934. *See* Bureau of

Example: Mossberg short-barreled shotguns

Despite the vital importance of ensuring that these dangerous weapons are not freely available in US communities, recent user-based classification decisions by the FTISB raise serious concerns about how the ATF is approaching this responsibility. An excellent example of the FTISB's failure to dutifully enforce the NFA is the line of Mossberg short-barreled shotguns. On March 2, 2017, the FTISB issued a letter to Mossberg regarding its new 12-gauge pump action firearm, model 590 "Shockwave." The letter specifically notes that the sample submitted by Mossberg has a 12-gauge, smooth-bore barrel that is approximately 14.4375 inches long, with a total length of 26.5 inches.[27] The FTISB determined that this firearm did not qualify as a short-barreled shotgun under the NFA, because it had a shotgun-style receiver but did not have a shoulder stock; instead, it had a "bird's head grip."[28] As a result, this gun can be purchased and possessed without any of the additional restrictions imposed by the NFA on short-barreled shotguns. However, the FTISB's determination came with a vital caveat. The FTISB letter stated, "Please note that if the subject firearm is concealed on a person, the classification with regard to the NFA may change."[29]

This caveat from the FTISB is deeply problematic, as it essentially notes that the NFA classification of the firearm is dependent on the actual use of the firearm in each specific instance, rather than the fact that the firearm's dimensions make it concealable, and thus a short-barreled shotgun, as defined by current ATF regulations. The FTISB's letter to Mossberg implies that as long as users do not conceal this firearm, it does not require registration as an NFA firearm. That is patently at odds with the ATF's responsibility to enforce the NFA, which requires determining whether firearms based on their design and dimensions could, in any circumstances, be classified as NFA firearms. The determination should not be reliant on the use of the firearm in specific circumstances but on the technical specifications of the firearm itself, regardless of any particular user's intent. Some in the gun enthusiast community responded with both surprise and delight at this apparent new workaround to the NFA.[30]

Example: pistol braces

The gun industry has also found another NFA dodge to create the functional equivalent of a short-barreled rifle that is not subject to heightened regulation or transfer tax: the pistol brace. Pistol braces are common firearms accessories, first produced in 2013. Their manufacturers claim that the intent was to help wounded and disabled veterans shoot AR-style pistols easier and more safely by enabling a user to rely only on one hand to control and stabilize the firearm

Alcohol, Tobacco, Firearms, and Explosives, "National Firearms Act," April 7, 2020, https://www.atf.gov/rules-and-regulations/national-firearms-act.

[27] Michael R. Curtis., "Letter to O.F. Mossberg & Sons Inc.," Bureau of Alcohol, Tobacco, Firearms and Explosives, March 2, 2017, https://www.mossberg.com/wp-content/uploads/2017/03/Shockwave-Letter-from-ATF-3-2-17.pdf.

[28] Id.

[29] Id.

[30] GunsAmerica Digest, a website used by gun enthusiasts to review firearms and firearm accessories, shared a review of the firearm shortly following the Firearms Technology Industry Services Branch's determination, detailing how Mossberg's firearm was able to circumvent NFA classification. GunsAmerica Digest, "A Non-NFA 14" Shotgun? The Mossberg Shockwave 12 Ga. – Full Review." April 19, 2020, https://www.gunsamerica.com/digest/non-nfa-14-shotgun-mossberg-shockwave-12-ga-full-review. A 2017 post on The Truth About Guns website highlights how Mossberg was able to evade NFA classification for "these pistol-gripped smoothbore self-defense basters." The Truth About Guns, "Mossberg 590 Shockwave, 'Non-NFA Firearms' Legal in Texas Beginning September 1," August 23, 2017, https://www.thetruthaboutguns.com/mossberg-590-shockwave-weapons-legal-texas-beginning-september-1.

when using the brace, rather than on both hands.[31] In 2011, the company Shockwave Technologies submitted a new model of pistol brace to the FTISB for a determination of whether it would require registration under the NFA. The ATF reviewed the Shockwave Blade AR pistol brace, and determined that the brace would not turn a firearm into an NFA-classified firearm when used as a forearm brace, and was therefore not subject to the requirements of the NFA. However, the letter of determination also included a crucial caveat, noting the brace "is not a 'firearm' as defined by the NFA provided the Blade AR Pistol Stabilizer is used as originally designed and NOT used as a shoulder stock.[emphasis in source]"[32] Again, the ATF grounded its determination in the specific use of the accessory in each individual instance, rather than the potential uses based on its design, given that the brace can be used to "convert a complete weapon into … an NFA firearm."[33] The FTISB's decision was so unorthodox that it seemed to take gun enthusiasts by surprise, with *The Truth About Guns* blog posting an article on the decision stating, "The astute among you will notice that this device looks strikingly similar to a stock," as well as linking to the determination letter with the words, "The reply was a bit surprising."[34]

This decision led to a proliferation of pistol braces that received similar decision letters from ATF, indicating that the industry seized on the opportunity to innovate around the NFA using the reasoning provided by the ATF in the Shockwave letter.[35] However, the FTISB's decisions on stabilizing braces were so unusual that the agency began to receive multiple inquiries from gun owners seeking clarification.[36] On January 16, 2015, the ATF issued an open letter specifically on the "proper use of devices recently marketed as 'stabilizing braces'." In the letter, the ATF advised that the agency's determination that these devices are not subject to the NFA "is based upon the use of the device as designed," and that if a pistol brace "is redesigned for use as a shoulder stock on a handgun with a rifled barrel under 16 inches in length," the resulting firearm does constitute an NFA weapon.[37] The open letter advised that "any person who intends to use a handgun stabilizing brace as a shoulder stock on a pistol (having a rifled barrel under 16

[31] Jacki Billings, "How Pistol Stabilizing Braces Differ From Short-Barreled Rifles," Guns.com, March 20, 2017, https://www.guns.com/news/2017/03/20/how-pistol-stabilizing-braces-differ-from-sbrs.

[32] Shockwave Technologies, "Shockwave Blade is ATF Approved," accessed October 27, 2020, http://shockwavetechnologies.com/shockwave-blade-is-atf-approved.

[33] Bureau of Alcohol, Tobacco, Firearms, and Explosives, "ATF Rul. 2011-4," July 25, 2011, https://www.atf.gov/file/55526/download.

[34] Nick Leghorn, "ATF Rules on 'Shockwave Blade' AR Pistol Brace…But Adds a Warning," The Truth About Guns, December 22, 2014, https://www.thetruthaboutguns.com/atf-rules-on-shockwave-blade-ar-pistol-brace-but-adds-a-warning.

[35] SB Tactical, "BATFE Approval Letter: Pistol Stabilizing Brace," accessed May 2020, https://www.sb-tactical.com/resources/batfe-approval-letter-pistol-stabilizing-brace; Michael R. Curtis, "Letter to Paul Reavis," Bureau of Alcohol, Tobacco, Firearms and Explosives, January 1, 2017, https://gearheadworks.com/wp-content/uploads/2018/12/Mod-1-Approval-Letter.pdf; Michael R. Curtis, "Letter to Paul Reavis," Bureau of Alcohol, Tobacco, Firearms and Explosives, October 3, 2016, https://gearheadworks.com/wp-content/uploads/2018/12/Mod-2-Approval-Letter.pdf; Maxim Defense, "Maxim CQB Pistol: PDW Brace for AR15," accessed October 27, 2020, https://www.maximdefense.com/product/maxim-cqb-pistol-pdw-brace-for-ar15; Laura Burgess, "Micro Roni Stabilizer Brace Conversion Kit Now Perfectly Legal," Ammoland, May 1, 2017, https://www.ammoland.com/2017/05/micro-roni-stabilizer-brace-conversion-kit-perfectly-legal/#axzz600Q52B4I; Brownells, "Command Arms ACC – Roni Recon Stock w/Stabilizer Brace for Glock 17,19, 22, 23," accessed May 15, 2020, https://www.brownells.com/handgun-parts/grip-parts/grips/roni-recon-stock-w-stabilizer-brace-for-glock-17-19-22-23-prod87358.aspx?avad=avant&aid=7645&cm_mmc=affiliate-_-Itwine-Avantlink-_-app&utm_medium=affiliate&utm_source=Avantlink&utm_content=NA&utm_campaign=Itwine; Jacki Billings, "How Pistol Stabilizing Braces Differ From Short-Barreled Rifles." Guns.com, March 20, 2017, https://www.guns.com/news/2017/03/20/how-pistol-stabilizing-braces-differ-from-sbrs.

[36] Nick Leghorn, "YES, It Is Legal to Shoulder an AR-15 Pistol Equipped with an Arm Brace," The Truth About Guns, April 24, 2017, https://www.thetruthaboutguns.com/atf-its-legal-to-shoulder-an-ar-15-pistol-equipped-with-an-sb-tactical-arm-brace.

[37] Max M. Kingery, "Open Letter on the Redesign of 'Stabilizing Braces," Bureau of Alcohol, Tobacco, Firearms and Explosives, accessed May 15, 2020, http://vpc.org/wp-content/uploads/2019/08/Pistol-brace-ATF-Open-Letter-2015.pdf.

inches in length or a smooth bore firearm with a barrel under 18 inches in length) must first file an ATF Form 1 and pay the applicable tax because the resulting firearm will be subject to all provisions of the NFA."[38]

The open letter appears to have caused confusion among people who were purchasing pistol braces, with many questioning whether the use of a brace required formal licensing under the NFA.[39] SB Tactical, the creator of the original pistol brace, challenged the open letter's claims that using the brace and firing from the shoulder would create an NFA-classified firearm.[40] The FTISB responded by reiterating that the agency deemed these braces to be legal provided they are used as forearm braces and not used as a shoulder stock.[41] Alarmingly, the letter actually went further, stating, "ATF has concluded that attaching the brace to a handgun as a forearm brace does not 'make' a short-barreled rifle because in the configuration as submitted to and approved by FATD [ATF's Firearms and Ammunition Technology Division in which the FTISB sits], it is not intended to be and cannot comfortably be fired from the shoulder." Additionally, according to the letter, if a user of a firearm equipped with a stabilizing brace does fire the weapon from the shoulder, it still doesn't constitute creating an NFA firearm unless the user explicitly "redesigned the firearm for purposes of the NFA."[42] Therefore, the ATF's official determination on pistol braces is that AR-15 pistols can in fact be equipped with a brace and fired from the shoulder without creating an NFA-classified short-barrel rifle, unless the brace is deliberately redesigned to become a stock, a clarification that was relished by gun forums, with The Truth About Guns writing a post detailing the decision with the title "YES, It is Legal to Shoulder an AR-15 Pistol Equipped with an Arm Brace."[43]

Honey Badger pistols

A recent NFA determination by the ATF suggests that the agency may be reconsidering how it approaches these firearms. In August 2020, the ATF issued a cease-and-desist letter to the manufacturer of the Honey Badger pistol, alerting the manufacturer that the ATF determined that this model is a "firearm" under the NFA because it meets the definition of a short-barreled rifle.[44] In this letter, the ATF explained: "The Honey Badger Pistol is equipped with a proprietary 'pistol stabilizing brace" accessory made by SB Tactical. The firearm has an overall length of approximately 20–25 inches and a barrel length of approximately seven inches. The objective design features of the Honey Badger firearm, configured with the subject stabilizing brace, indicate the firearm is designed and intended to be fired from the shoulder. Since this firearm also contains a rifled barrel, it meets the definition of a 'rifle.' Further, since it has a barrel of less than 16 inches in length, this firearm also meets the definition of a 'short-barreled rifle" under the GCA and NFA."[45] The ATF warned the manufacturer that two additional models advertised on

[38] *Id.*

[39] Leghorn, "YES, It Is Legal to Shoulder an AR-15 Pistol Equipped with an Arm Brace."

[40] Marvin G. Richardson, "Letter to Mark Barnes," Bureau of Alcohol, Tobacco, Firearms and Explosives, March 21, 2017, https://www.sigsauer.com/wp-content/uploads/2017/04/atf-letter-march-21-2017.pdf.

[41] *Id.*

[42] Marvin Richardson, Assistant Director of Enforcement Programs and Services, ATF, "Re: Reversal of ATF Open Letter on the Redesign of 'Stabilizing Braces'," March 21, 2017, https://cdn0.thetruthaboutguns.com/wp-content/uploads/2017/04/Barnes-Stabilizing-Brace-Letter-Final-3.21.17.pdf.

[43] Leghorn, "YES, It Is Legal to Shoulder an AR-15 Pistol Equipped with an Arm Brace."

[44] Kelly Brady, Special Agent in Charge, Boston Field Division, ATF, "In Re: Cease and Desist – "Honey Badger" Firearm," August 3, 2020, https://mcusercontent.com/557cc802f23161a8ffe100a66/files/dd6aa903-36c2-4d14-9de5-91aa62215cd2/Q_LLC_6_02_02814_Cease_Desist_Letter.pdf.

[45] *Id.*

its website may receive a similar classification, and directed the manufacturer to provide samples of these models for official review.[46] The ATF directed the manufacturer to either cease manufacturing and selling the Honey Badger pistol, or come into compliance with the NFA requirements; and to develop a plan for addressing those firearms already distributed.[47]

However, following pushback by the manufacturer and others in the gun industry that raised both substantive and procedural concerns,[48] on October 9, 2020, the ATF's chief counsel sent another letter to the manufacturer, stating that it was imposing a 60-day suspension on the cease-and-desist letter "to allow the United States Department of Justice to further review the applicability of the National Firearms Act to the manufacture and transfer" of the Honey Badger pistol.[49]

III. Proposed action

A. Substance of proposed action

The next administration should direct the ATF to take the following steps to improve the NFA review process, provide better guidance to the gun industry, and increase transparency.

1. Develop a framework for reviewing NFA requests that involves an objective assessment of whether the firearm or accessory is intended to be used in a manner that would put it in one of the NFA categories that does not defer to the intended use stated by the manufacturer.
2. Conduct a retroactive review of NFA decision letters using the new framework, and provide revised guidance to manufacturers of firearms and accessories that qualify as NFA weapons upon secondary review.
3. Publish the framework and all NFA decision letters on the ATF's website to increase transparency and provide guidance to the industry.

One crucial aspect of the new framework must be a retreat from the deference that the ATF has given to gun manufacturers' explanation of the intended use of a particular firearm or device. The ATF is required to consider a weapon's "intended" use only to the extent that the concept is incorporated into the statutory definitions:

- Both "shotgun" and "rifle" are defined as "a weapon designed or redesigned, made or remade, and *intended* to be fired from the shoulder," among other limitations that do not refer to "intent."[50]
- By regulation, the ATF has also defined "pistol" (a term used within the statutory definition of "any other weapon") as "[a] weapon originally designed, made, and *intended* to fire a projectile (bullet) from one or more barrels when held in one hand."[51]

[46] *Id.*

[47] *Id.*

[48] Megan L. Brown, Wiley Rein LLP, "Re: In Response to "Cease and Desist–'Honey Badger' Firearm," September 2, 2020, https://mcusercontent.com/557cc802f23161a8ffe100a66/files/68d5e173-ad14-44dd-86f5-7ee60ff78d3a/Q_C_D_Response_9_2_20_1_.pdf.

[49] Max Slowik, "Honey Badger SBR Decision Put on Pause, A Possible Reason for Classification," October 15, 2020, https://www.gunsamerica.com/digest/honey-badger-sbr-decision-put-on-pause-a-possible-reason-for-classification/.

[50] 26 U.S.C. § 5845(c)–(d) (emphasis added).

[51] 27 C.F.R. § 479.11 (emphasis added).

- The definition of "machine-gun" also includes an "intent"-based component: it is defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger," but "shall also include the frame or receiver of any such weapon, any part designed *and intended* solely and exclusively, or combination of parts designed and intended, *for use in converting a weapon into a machinegun*, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."[52]
- Finally, one of the exceptions built into the definition of "any other weapon" includes an "intent" component. The term "any other weapon" means, among other things, "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive," but "shall not include . . . weapons designed, made, or *intended* to be fired from the shoulder and not capable of firing fixed ammunition."[53]

In situations where the statute requires the ATF to consider "intended" use because of the statutory language, it is not necessarily required to simply accept a manufacturer's representations about how the manufacturer intends a weapon to be used. In determining whether a weapon is "intended" for a certain use, the ATF may consider other relevant sources in addition to the manufacturer's assertions made to the agency.[54] It is an open question whether the word "intended" must refer to the manufacturer's subjective intent, an objective inquiry into likely use, or, rather, is ambiguous.[55]

A revised approach to "intended use" would enable the ATF to determine whether the firearm or device could reasonably be used by a person to create a firearm as defined under the NFA. For example, rather than relying solely on what the manufacturer states the intended use for a pistol brace is, assessing whether it is feasible and reasonable to think a user might attach the brace to a handgun to create a shoulder stock, thereby creating a short-barrel rifle, should be considered by the ATF. Similarly, when considering whether the design of a firearm qualifies as a short-barreled rifle, the ATF should consider both the design of the firearm as well as whether it is possible for a user to reasonably and easily conceal the firearm on their person.

[52] *Id.* § 5845(b) (emphasis added).

[53] *Id.* § 5845(e) (emphasis added). By regulation, ATF defines "fixed ammunition" as "[t]hat self-contained unit consisting of the case, primer, propellant charge, and projectile or projectiles."" 27 C.F.R.§ 479.11. This definition appears to accord with ordinary usage, as essentially all modern firearms fire "fixed ammunition" (that is, ammunition in which the projectile and the propellant are packaged together as a single cartridge), as opposed to using separately-loaded charges. Because this "intent"-based exception is limited to weapons that are not capable of firing fixed ammunition, it is unlikely that it would apply to a weapon being manufactured today. If, however, ATF were presented with a weapon that was "capable of being concealed on the person" but was also, in ATF's judgment, "intended to be fired from the shoulder and not capable of firing fixed ammunition," then the weapon would not fall within the category of "any other weapon."

[54] *See e.g., United States v. Article of 216 Cartoned Bottles,* 409 F.2d 734, 739 (2d Cir. 1969) ("It is well settled that the intended use of a product may be determined from its label, accompanying labeling, promotional material, advertising and any other relevant source."); *United States v. Undetermined Quantities of Articles of Drug,* 145 F. Supp. 2d 692, 698-99 (D. Md. 2001) (collecting cases supporting the significance of "objective evidence disseminated by the vendor" in determining the intended use of a product).

[55] *See e.g., Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 519 (1994) (the similar term "primarily intended . . . for use" "might be understood to refer to the state of mind of the [seller]" but the better reading is that it refers to "a product's likely use"); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 160 (4th Cir. 1998) (rejecting agency's conclusion that tobacco products were "intended to affect the structure of any function of the body" without evidence of claims to that effect by tobacco manufacturers); *United States v. Articles of Banned Hazardous Substances,* 614 F. Supp. 226, 231 (E.D.N.Y. 1985) (term "toys intended to be used by children" cannot "rational[ly]" refer to a purely subjective inquiry into the manufacturer's intent).

Notably, the ATF has in the past declined to classify weapons as "firearm[s]" under the NFA without considering whether the weapon was capable of being concealed (instead noting that the NFA classification could change if the weapon *was* concealed).[56] However, that approach appears to be inconsistent with the statutory text, which encompasses weapons "*capable of being concealed* on the person."[57] The ATF's current narrow approach to classifying firearms under the NFA enables the unregulated manufacture and sale of short-barreled firearms on the commercial market. Under a revised NFA determination framework, the ATF should be required to consider both the design of and intended use of the firearm, and consider what the firearm can be used for under the NFA.

One additional component of the new framework could be the solicitation of expert opinions by firearms experts, similar to the submission of amicus briefs in legal proceedings. The ATF would benefit from the perspective of experts who do not have a financial stake in the particular firearm or device being considered, and the solicitation of such opinions would enhance the public transparency of the NFA determination process.

B. Legal justification and process

As noted above, the NFA's definition of "firearm" expressly incorporates two limited grants of discretion to the ATF to carve out certain devices or firearms from the NFA's ambit. The NFA expressly contemplates that the ATF director can "find[]" that a certain type of weapon is a "firearm" under the NFA because it is "primarily a collector's item and...not likely to be used as a weapon;"[58] that a particular device is not a "destructive device" because it is "not likely to be used as a weapon, or is an antique or a rifle which the owner intends to use solely for sporting purposes."[59] As also noted above, ATF regulations provide that a person can "request" such a "ruling" or "determination," and that, in response to such a request, the ATF "shall" make the determination.[60] Because an agency must abide by its own regulations,[61] the ATF is required to make these particular determinations if a request is properly made.

Outside the context of the two statutory carve-outs, the text of the NFA's definition controls what firearms are covered by the act, and the ATF has no specific statutory obligation to issue "rulings" specifying in advance whether particular firearms are covered or not. To be sure, as noted earlier, the ATF has implicit authority (and an implicit obligation) to interpret the NFA's definition of "firearm," by virtue of its general authority (and obligation) to administer and enforce the statute.[62] Pursuant to this authority, the ATF has promulgated a definitional regulation that largely reproduces the definition in the statute, and issued a handful of binding rules interpreting the NFA definitions as to certain particular weapons. For the most part, however, the ATF has chosen to provide specific guidance on the NFA's definition of "firearm" through its NFA classification rulings. Again, the ATF has no obligation to issue such rulings; they are simply a way the ATF has chosen to provide guidance about its understanding of the scope of the statute. In administrative law terms, these rulings are "interpretive rules" or "guidance

[56] U.S. Department of Justice, "Letter from Michael R. Curtis, Chief, Firearms Tech. Indus. Serv. Branch, ATF, to O.F. Mossberg & Sons, Inc.," March 2, 2017, 2, www.mossberg.com/wp-content/uploads/2017/03/Shockwave-Letter-from-ATF-3-2-17.pdf.

[57] *Id.* (emphasis added).

[58] 26 U.S.C. § 5845(a).

[59] *Id.* § 5845(f).

[60] 27 C.F.R. §§ 479.24 & 479.25.

[61] *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954).

[62] *See* 26 U.S.C. §§ 7801(a)(2) & 7805(a); 28 C.F.R. § 0.130.

documents." They are not binding on the agency or on regulated parties;[63] and they are lawful so long as they do not "determin[e] the extent of substantive rights and liabilities."[64] As discussed further below, although it is an open question, interpretations contained in this form—like internal agency guidelines—would likely not receive *Chevron* deference from courts.[65]

Administrative law considerations relevant to NFA classification rulings

Four important consequences stem from the fact that NFA classification rulings are "guidance documents" that lack force of law. First, as just noted, the interpretations contained in these rulings are not assured *Chevron* deference. In *Mead*, the Supreme Court considered whether an analogous "classification ruling" made in a letter to a regulated party was owed deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Because nothing in the statute "indicat[ed] that Congress meant to delegate authority to [the agency] to issue classification rulings with the force of law," the Court concluded that *Chevron* deference was not appropriate.[66] The Court also observed that the agency did "not generally engage in notice-and-comment practice when issuing them" or treat them as binding on third parties.[67] Subsequently, in *Barnhart*, the Supreme Court characterized *Mead* as using a multifactor analysis to decide whether *Chevron* deference was appropriate.[68] The Court clarified that "the interstitial nature of the legal question, the related expertise of the agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" are considerations that support the use of *Chevron* deference.[69]

When a court declines to apply *Chevron* deference to an agency's interpretation, it applies *Skidmore* deference, meaning that the interpretation is "entitled to respect" to the extent that it has the "power to persuade."[70] There does not appear to be any circuit precedent addressing *Chevron*'s applicability to the ATF's NFA classification rulings (either published or unpublished); district court decisions are mixed, but the better-reasoned view seems to be that *Chevron* does not apply, at least to unpublished letter rulings.[71] That said, a new administration could strive to

[63] *See, e.g., Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996) ("Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement.")

[64] *Tax Analysts & Advocates v. Internal Revenue Serv.*, 505 F.2d 350 (D.C. Cir. 1974); *see also Amergen Energy Co., LLC ex rel. Exelon Gen. Co., LLC v. United States*, 94 Fed. Cl. 413, 422 (Fed. Cl. 2010) (private letter rulings issued by IRS bind neither the agency or a court).

[65] *See United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) (where there is "no indication that Congress intended [a tariff classification letter] ruling to carry the force of law," ruling was not entitled to *Chevron* deference); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (agency's "interpretation contained in an opinion letter" did "not warrant *Chevron*-style deference"); but *see Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004) (applying *Chevron* deference to an interpretation contained in an FDA letter ruling based on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time") (citing *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

[66] *Mead Corp.*, 533 U.S. at 231–32.

[67] *Id.* at 233.

[68] *Barnhart*, 535 U.S. at 222.

[69] *Id.*; *see also Fox v. Clinton*, 684 F.3d 67, 77 (D.C. Cir. 2012).

[70] *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

[71] *See Innovator Enters., Inc. v. Jones*, 28 F. Supp. 3d 14, 22 (D.D.C. 2014) (applying *Skidmore* deference); *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 294 F. Supp. 2d 896, 900 (E.D. Ky. 2003) (without deciding whether *Chevron* applied, concluding that ATF classification rulings are "entitled to at least the highest level of *Skidmore* respect"); *Freedom Ordnance Mfg., Inc. v. Brandon*, No. 3:16-cv-00243, 2018 WL 7142127, *5 (S.D. Ind. Mar. 27, 2018) (describing the question as "difficult"

issue NFA classification rulings in a way that would increase the chances of a reviewing court applying *Chevron* deference by issuing published rulings that, tracking the *Barnhart* factors, show how the ATF had given "careful consideration" to the question, and explain why it is important to the NFA's administration, and the product of the ATF's relevant technical expertise.

A new interim final rule issued by the Department of Justice, of which ATF is a component, also may have consequences for deference. This rule provides that a guidance document "shall not represent the Department's interpretation of a statute or regulation"—and so cannot be owed judicial deference—"unless and until it is publicly available on the Guidance Portal," a new online database of guidance documents.[72] So long as this rule remains in effect, the ATF must publish any NFA classification ruling on the Guidance Portal as a prerequisite for seeking deference to that interpretation.

Second, the ATF is free to revise its interpretations so that weapons or devices previously deemed outside the scope of the NFA would be considered "NFA firearms."[73] In so doing, the ATF would of course be constrained by the language of the statute, against which any interpretation it offered would be judged in court. Further, to the extent that a new statutory interpretation leads to a change in policy, an agency must provide a "reasoned explanation" for the policy change and "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[74] Particularly because a product's status as an "NFA firearm" has criminal consequences,[75] it would likely be prudent for the ATF to undertake at least a transparent and deliberative process (if not a full APA rulemaking with notice and comment, following the procedures of 5 U.S.C. § 553) if it were to change any interpretation to expand the scope of NFA firearms.[76]

Third, under current Department of Justice policy, which has recently been codified into an interim final rule, guidance documents cannot be used "for the purpose of coercing persons or entities . . . into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation" or relied on in civil or criminal enforcement actions.[77] Guidance documents may still be used in enforcement proceedings (e.g., to establish

and assuming without deciding that *Skidmore* applies); but *see Modern Muzzleloading, Inc. v. Magaw*, 18 F. Supp. 2d 29, 36 (D.D.C. 1998) (applying *Chevron* to ATF classification letter interpreting the Gun Control Act).

[72] Dep't of Justice, "Processes and Procedures for Issuance and Use of Guidance Documents," August 21, 2020, 13, www.justice.gov/file/1308736/download.

[73] *See Dickman v. C.I.R.*, 465 U.S. 330, 343 (1984) ("[I]t is well established that [an agency] may change an earlier interpretation of the law . . . even though [a regulated party] may have relied to [its] detriment upon the [agency's] prior position."); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) ("[I]t is well understood that [a]n agency is free to discard precedents or practices it no longer believes correct. . . . If an agency decides to change course, however, we require it to supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

[74] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–13 (2020).

[75] *See* 26 U.S.C. §§ 5861 (unlawful acts) & 5871 (criminal penalties).

[76] *See* Proposed Bump-Stock Rule, 82 Fed. Reg. at 60,930; Final Bump-Stock Rule, 83 Fed. Reg. at 66,523, 66,530 (providing persons currently in possession of a bump-stock-type device 90 days to destroy or abandon those devices to avoid criminal liability); *see generally Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (affirming denial of preliminary injunction in APA challenge to the bump-stock rule).

[77] Dep't of Justice, Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department, 85 Fed. Reg. 50,951, 50,953 (August 19, 2020). *See also* Letter from Jeff Sessions, Att'y Gen., *Prohibition on Improper Guidance Documents* (November 16, 2017); Letter from Rachel Brand, Assoc. Att'y Gen., *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (January 25, 2018); Justice Manual § 1-20.000 ("Criminal and civil enforcement actions . . . must be based on violations of applicable legal requirements, not mere noncompliance with guidance documents issued by federal agencies.").

scienter or notice), but a new administration's NFA classification rulings would not necessarily deter savvy and motivated regulated parties while those policies remain in effect.

Finally, one of the new interim final rules concerning the issuance and use of guidance documents by the Department of Justice establishes substantial procedural hurdles—including review by the White House's Office of Information and Regulatory Affairs, and notice and an opportunity for public comment—before any agency within the Department of Justice issues "significant guidance documents."[78] Importantly, these procedures are *not* required for significant guidance made through a "pre-enforcement ruling,"[79] which is defined as "a formal written communication by an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person," including "letter rulings."[80] This means that the ATF's NFA classification rulings would be exempted from the new requirements. However, unless the interim final rule is amended or repealed by a new administration, any significant guidance on the meanings of the NFA definitions that is *not* published in response to an inquiry would be subject to these procedural requirements.

Based on these considerations, the most prudent course would be for the ATF to publish the new NFA determination framework and open a notice-and-comment period. The ATF should publicly issue a special advisory of a proposed NFA determination framework, as well as information about the publication of NFA decision letters on the ATF's website. The notice would include information about an open comment period of 30 days, after which the ATF would finalize the framework, implement the new NFA determination framework, and publicize NFA decision letters. It is imperative that during the comment period, the ATF ensures the framework enables them to implement the NFA properly. Similarly, the ATF should issue both a public notice about the retroactive review process of NFA decision letters, and send communications about the retroactive review directly to manufacturers.

Finally, there are no statutory or regulatory limitations on the ATF's publication of its NFA determinations. Nothing in the NFA or ATF's regulations prevents the ATF from publishing its classification rulings or from seeking public input before issuing them. As explained above, the ATF already does publish some of its classification rulings. Because publishing *all* classification rulings would represent a change of practice, the ATF should be prepared to take the straightforward step of explaining its shift toward a more transparent approach (and should consider revising the NFA Handbook to explain that classification rulings issued in response to manufacturers' inquires will be published). One possible reason for this change, for instance, might be to avoid having "private law" that is known only to particular manufacturers. Another reason would be the new Department of Justice rule, which makes the publication of a guidance document a prerequisite for seeking *Chevron* deference to the guidance document's interpretation of a statute.

[78] "Processes and Procedures for Issuance and Use of Guidance Documents," *supra*, at 11-13.

[79] *Id.* at 11.

[80] *Id.* at 8.

RECOMMENDED ACTION MEMO
Agency: Bureau of Alcohol, Tobacco, Firearms & Explosives
Topic: Ban on Armor Piercing Ammunition
Date: November 2020

Recommendation: Finalize an Obama-era proposal by issuing a framework to fully ban armor-piercing ammunition.

I. Summary

Description of recommended executive action

Armor-piercing ammunition is made of specific metals and is capable of piercing soft body armor when fired from a handgun—creating substantial risks for law enforcement officers. This type of ammunition is banned under the Law Enforcement Officers Protection Act of 1986 (LEOPA); however, the law includes an exemption for ammunition that meets the armor-piercing design criteria if the ammunition is "primarily used for sporting purposes."[1]

ATF is responsible for evaluating different types of ammunition to determine whether it qualifies as armor-piercing under current law and, if so, whether it falls into the sporting purposes exemption. For the first two decades of the ban, ATF received a limited number of requests to make this determination; however, as firearm and ammunition technology has evolved, there has been a substantial increase in the number of semi-automatic handguns that are capable of firing rifle rounds, meaning that many more types of ammunition potentially meet the definition of armor-piercing and should be banned under LEOPA. Despite the new risks of this highly dangerous ammunition, ATF has largely failed to implement a meaningful approach that would ensure that LEOPA is being faithfully enforced. This failure has resulted in a wide variety of armor-piercing ammunition being available for sale in the civilian market.

ATF should implement a framework, first proposed in 2015, to better regulate armor-piercing ammunition and help ensure the safety of law enforcement officers and the community at large. This framework would provide much-needed structure over these determinations and provide additional guidance to the gun industry regarding what types of ammunition may be made available for sale in consumer markets.

Overview of process and time to enactment

Implementing the Armor Piercing Ammunition Exemption Framework[2] would be an interpretative rule under the Administrative Procedure Act,[3] because while it will be applicable generally across ammunition designs and will have a future effect on the meaning of what qualifies under the "sporting purposes" exemption, it does not create a new rule. Notably, this framework will not repeal or amend any existing ATF regulations; rather, this framework clarifies the existing regulation, creating a more transparent rationale for what ammunition qualifies as "primarily

[1] 18 U.S. Code § 921.
[2] ATF, "Armor Piercing Ammunition Exemption Framework," February 27, 2015, https://www.atf.gov/news/pr/armor-piercing-ammunition-exemption-framework.
[3] 5 U.S. Code § 551.

used for sporting purposes." The framework would inform how ATF implements its authority to regulate armor-piercing ammunition.[4]

This change in ATF policy would not require notice and comment rulemaking under the Administrative Procedure Act. However, for consistency with past actions and to reduce the risk of possible litigation, ATF should consider the following steps: the proposed framework should be published on the ATF website as a special advisory, and ATF should open a second public comment period. Following the closure of the comment period, ATF should finalize the framework, publishing the final rule online in accordance to past practice. Implementation of the framework should then begin.

II. Current State

Regulatory background

Currently, the ban on armor-piercing ammunition is unevenly implemented, with certain rounds of ammunition continuing to be sold on the commercial market, despite meeting the "armor piercing" criteria under federal law. The Gun Control Act of 1968 (GCA or "Act"), as amended, prohibits the import, manufacture, and distribution of "armor piercing ammunition."[5] The statute defines "armor piercing ammunition" as:

> (i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or
>
> (ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile,
>
> [except that] [t]he term 'armor piercing ammunition' does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projection designed for target shooting, ***a projectile which the Attorney General finds is primarily intended to be used for sporting purposes***, or any other projectile or projectile core which the Attorney General finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.[6]

As this definition makes clear, "armor piercing ammunition" covers two independent categories of ammunition. The first is defined by its material composition and whether it "may be used" in a handgun; the second is defined by its size, jacket weight, and whether it is "designed and intended for use in a handgun." For purposes of this definition, "handgun" is defined as "any firearm including a pistol or revolver designed to be fired by the use of a single hand."[7]

[4] *Guardian Fed. Sav. & Loans Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978); *see also,*
e.g., *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015)

[5] 18 U.S.C. § 922(a)(7)-(8).

[6] *Id.* § 921(a)(17)(B)-(C) (emphasis added).

[7] § 10, Pub. L. 99-408, 100 Stat. 920 (1986)

The ability for this specific type of ammunition to pierce through soft body armor poses particular risks to law enforcement officers and threatens the safety of the public. The use of these bullets in an active shooting setting, for example, would hinder the effectivness of officers responding to the scene if they are hit by armor-piercing bullets. On July 18, 1984, for example, the nation witnessed the worst mass shooting at that point in its history at the San Ysidro McDonalds. A man armed with multiple firearms and hundreds of rounds of ammunition, including armor-piercing ammunition, opened fire inside the McDonalds, killing 21 people and injuring 19 others.[8] The statutory provisions that define and govern "armor piercing ammunition" were originally enacted in the Law Enforcement Officers Protection Act of 1986 (LEOPA).[9] The purpose of this law was to protect police officers from the criminal use of handgun ammunition capable of penetrating bullet-resistant soft body armor.[10] The members of Congress who introduced and championed the subsequent Law Enforcement Officers Protection Act of 1986 noted that the lives of police responding to the scene of the shooting in San Ysidro were at considerably higher risk than if conventional ammunition were being fired.[11]

When the 1986 ban on armor-piercing ammunition was first implemented, ATF did not see a large number of requests for review of ammunition design. However, since the early 2000s, the agency has seen a significant increase in classification requests from the gun industry seeking exemption from the ban under the "sporting purpose" exemption. There appear to be two primary reasons for this increase. First, the firearms industry has developed commercially available handguns that are designed to use conventional rifle ammunition (such as AR-15 pistols).[12] As a result, some ammunition that previously could be used only in rifles now may be used in certain handguns as well. Second, pressure on the ammunition industry to develop suitable alternatives to lead ammunition has increased due to the problem of environmental lead contamination attributable to hunting. Lead ammunition cannot be "armor piercing" under the first definitional category, but many of the available substitute metals, such as steel or tungsten, are included in the definition.

Obama administration efforts

The influx of exemption requests led ATF, starting in 2012, to seek input from industry, law enforcement, and the public regarding how it should apply the "sporting purposes" exemption. In 2015, in an effort to address the issue of armor-piercing ammunition classification and to effectively determine whether a specific type of ammunition meets the "sporting purpose" exemption, ATF released a draft framework to evaluate ammunition. Under this framework, the "sporting purpose" exemption would only apply to rifle ammunition capable of being fired only by single-shot handguns. Any rifle ammunition capable of being fired from a semi-automatic handgun would be classified as armor-piercing and banned. The framework would apply not

[8] "21 die in San Ysidro massacre," *The San Diego Union-Tribune*, July 19, 1984, https://www.sandiegouniontribune.com/sdut-21-die-san-ysidro-massacre-1984jul19-story.html.

[9] *See* Pub. L. 99-408.

[10] *See* H. Rep. 98-996 at 1-2.

[11] Margasak, "House Hears Debate Over Armor-Piercing Bullets"; Law Enforcement Officers Protection Act of 1985, H.R. 3132, 99th Cong., 2nd sess. (August 28, 1986), https://www.govtrack.us/congress/bills/99/hr3132;
"President Gets Bill Banning Most Armor-Piercing Bullets," *The New York Times,* August 16, 1986, https://www.nytimes.com/1986/08/16/us/president-gets-bill-banning-most-armor-piercing-bullets.html.

[12] *See* ATF, "Framework for Determining Whether Certain Projectiles Are "Primarily Intended for Sporting Purposes" Within the Meaning of 18 U.S.C. 921(a)(17)(C)," accessed October 1, 2020, 5, https://www.atf.gov/resource-center/docs-0/download. ("Framework").

only to new ammunition designs but would have also applied retroactively to ammunition previously approved for sale on the commercial market. For example, under the proposed framework, M855 or "green tip" rifle ammunition, a popular rifle round compatible with the AR-15 rifle as well as semi-automatic pistols, would be banned under the framework because of its use in semi-automatic style handguns.

ATF's proposed framework represented its first attempt to provide significant guidance on its understanding of the "sporting purposes" exemption. In its announcement, ATF explained that its guiding principle in creating the new framework was that the "sporting purposes" exemption should apply when the attorney general "determine[s] that a specific type of armor piercing projectile does not pose a significant threat to law enforcement officers because the projectile at issue is 'primarily intended' for use in shooting sports, and is therefore unlikely to be encountered by law enforcement officers on the streets."[13] ATF further noted that, in applying this guiding principle and interpreting the statute's reference to ammunition "primarily intended" for sporting purposes, a key question is "*whose* intent should control the analysis."[14] Rejecting the notion that the analysis should focus solely on the intent of the ammunition manufacturer, ATF proposed that the relevant inquiry "must primarily be based on objective criteria, not the subjective intentions of any particular group."[15] In other words, whether a particular ammunition is "primarily intended" for sporting use should focus on its likely use in the general community. According to ATF, this question in turn "necessarily involves examination of the cartridges in which the armor piercing projectiles can be loaded, and the handguns that are readily available to accept those cartridges."[16] Specifically, "the characteristics of the handgun or handguns in which a specific armor piercing projectile may be used will generally determine that projectile's 'likely use' in the general community."[17] When a handgun's "objective design is not limited to primarily sporting purposes, such as handguns designed to be carried and concealed, it may be reasonably inferred that ammunition capable of use in such handguns is unlikely to be used primarily for sporting purposes."[18]

ATF's proposal was not published in the Federal Register. The Administrative Procedure Act (APA) normally requires agencies to follow certain procedures when they engage in rulemaking: publication of a notice of proposed rulemaking in the Federal Register, followed by an opportunity for public comment.[19] In particular, a "legislative rule"—that is, a rule that carries the force and effect of law—must be promulgated through the APA's rulemaking procedures.[20] Other types of rules, including "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," are exempt from these procedural requirements under 5 U.S.C. § 553(b)(A). ATF did not explain why it considered the proposed framework to be exempt from the APA's notice and comment procedures. But it can be surmised that ATF must have concluded that the proposed framework was a non-legislative rule that fell within the § 553(b)(A) exception.

[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 5 U.S.C. § 553.
[20] *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

ATF published the draft framework online and opened a comment period for feedback. The framework received strong opposition from the gun lobby,[21] with coordinated campaigns resulting in ATF receiving over 80,000 comments largely pushing against the framework.[22] As a result, ATF announced that it would not implement any final framework until it had "further evaluate[d]" the issues raised in the comments and provided "additional open and transparent process."[23]

III. Proposed action

ATF should implement the Armor Piercing Ammunition Exemption Framework and limit the "sporting purpose" exemption to rifle ammunition that is only capable of being fired from single-shot handguns. Implementing this framework would enable ATF to evaluate ammunition currently on the commercial market as well as future designs to determine whether they qualify as armor-piercing under federal law.

The framework would require ATF to specifically classify which kinds of rifle ammunition qualify as armor-piercing ammunition, and therefore are banned under federal law, by determining whether the rifle ammunition is capable of being fired from a semi-automatic handgun; these specific handguns are not considered primarily for sporting purposes. According to ATF, although "the design of most single shot handguns shows that they are *primarily* intended to be used for sporting purposes, this is not necessarily the case [for] handguns with larger ammunition capacities."[24]

The proposed framework divides armor piercing ammunition into two categories:

- The first category, encompassing .22 caliber projectiles that weigh 40 grains or less and are loaded into rimfire cartridges, would presumptively fall within the "sporting purposes" exemption. Such ammunition, ATF explained, is "generally suitable only for use against small game and at short distances," and ATF has long recognized that .22 rimfire firearms and ammunition are primarily intended for sporting use.[25]
- All other projectiles would presumptively fall within the "sporting purposes" exemption *only* "if the projectile is loaded into a cartridge for which the only handgun that is readily available in the ordinary channels of commercial trade is a single shot handgun."[26]

According to ATF, although "the design of most single shot handguns shows that they are *primarily* intended to be used for sporting purposes, this is not necessarily the case [for] handguns with larger ammunition capacities."[27] Because "[t]he likely use of revolvers and semi-automatic handguns in the community varies, and the projectiles they use are, in many cases, interchangeable among models designed to use the same or similar calibers," ATF posited that

[21] NRA-ILA, "BAFTE To Ban Common AR-15 Ammo," February 14, 2015, https://www.nraila.org/articles/20150213/batfe-to-ban-common-ar-15-ammo.

[22] ATF, "Notice to those Commenting on the Armor Piercing Ammunition Exemption Framework," March 10, 2015, https://www.atf.gov/news/pr/notice-those-commenting-armor-piercing-ammunition-exemption-framework. [23] *Id.*

[24] ATF, "Armor Piercing Ammunition Exemption Framework."

[25] *Id.*

[26] *Id.*

[27] *Id.*

"it is not possible to conclude that revolvers and semi-automatic handguns as a class are 'primarily intended' for use in sporting purposes."[28]

IV. Legal justification

The GCA expressly gives the attorney general the discretion to "find" whether a projectile is primarily intended for sporting purposes.[29] The attorney general has, in turn, delegated this authority to ATF.[30] To the extent that the meaning of the statutory exception "primarily intended to be used for sporting purposes" is ambiguous, a court would conclude that Congress delegated authority to interpret that term to the attorney general (and therefore ATF).[31] Agencies are free to issue "interpretative rules" to advise the public of the agency's construction of a statute that it administers.[32] Agencies are likewise free to issue "general statements of policy" to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.[33] ATF's issuance of a "framework" explaining how it interprets this "sporting purposes" exemption and how it intends to exercise its discretion in granting exemptions based on that interpretation are therefore legally justified. Assuming that the framework is a final agency action reviewable under the APA, a court could not set it aside unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[34]

As an initial matter, the "sporting purposes" framework is likely a "rule" as defined by the APA. The APA defines "rule" broadly, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy describing the organization, procedure, or practice requirements of an agency."[35] The "sporting purposes" framework is a statement of "general" applicability and "future effect" that "interpret[s]" the meaning of the statutory "sporting purposes" exemption, and explains the substantive bases on which ATF will, going forward, "implement" its responsibility to administer that exemption and process requests for determinations whether particular ammunition qualifies for the exemption.[36]

The APA establishes a procedure for agency rulemaking (publication of a notice of proposed rulemaking in the Federal Register, followed by an opportunity for public comment; collectively, "§ 553 procedures") that agencies must follow, unless the rule in question falls within certain exceptions, including an exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[37] The proposed framework interprets the statutory "sporting purposes" exemption and specifies how ATF will exercise its discretion in implementing that exception. It does not repeal or amend any of ATF's existing regulations,

[28] *Id.*
[29] 18 U.S.C. § 921.
[30] 28 C.F.R. § 0.130(a).
[31] *See Chevron*, 467 U.S. at 843-44.
[32] *See Perez*, 135 S. Ct. at 1204.
[33] *See Guardian Fed. Sav. & Loans Ass'n*, 589 F.2d at 666.
[34] 5 U.S.C. § 706(2).
[35] 5 U.S.C. § 551(4).
[36] ATF, *Armor Piercing Ammunition Exemption Framework.*
[37] 5 U.S.C. § 553(b)(A).

which, as relevant, simply state: "The Director may exempt certain armor piercing ammunition from the requirements of this part."[38] Rather, it explains and clarifies how ATF will exercise its existing authority, including by setting forth presumptions that certain categories of ammunition will receive a "sporting purposes" exemption. There is thus a credible argument that the "sporting purposes" framework is merely an interpretive rule or general statement of policy issued to "advise the public prospectively of the manner in which [it] proposes to exercise a discretionary power," and is therefore exempt from the APA's procedural rulemaking requirements.[39]

Because ATF opened a 30-day comment period when proposing this framework in 2015 and indicated that it would further evaluate the issues raised in the comments that had been submitted, the agency needs to consider whether to reopen the proposal for additional comments before finalizing it. As noted above, the agency has already committed to "process[ing] the comments received" and providing "additional open and transparent process (for example, through additional proposals and opportunities for comment) before proceeding with any framework." Although ATF is free to change course and finalize the framework without taking these steps, it would likely need to explain why its decision to abandon the promise of additional procedures was not arbitrary or capricious.[40] In other words, while ATF may reduce its litigation risk by following the open process to which it previously committed, it is not bound to do so as long as it can articulate a reason why part or all of that process should be dispensed with. That said, a reviewing court might understandably raise an eyebrow at a choice to proceed with *less* transparency or input from interested parties; and regulated parties might be understandably upset that the agency went back on its word.

[38] 27 C.F.R. § 478.148.

[39] *Guardian Fed. Sav. & Loans Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978); *see also,*

e.g., *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015) ("the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers'" (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

[40] *See, e.g.*, *Am. Wild Horse Preservation Campaign v. Purdue*, 873 F.3d 914, 928 (D.C. Cir. 2017) (an agency is free to change a policy if doing so is reasonable, but "it must acknowledge that it is actually changing course and explain its reasons for doing so") (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *Standing Rock Sioux Tribe v. U.S. Army Corps. of Eng'rs*, 255 F. Supp. 3d 101, 142 (D.D.C. 2017) (collecting cases suggesting that this standard applies whenever the agency changes an "official policy," even if the original policy was not articulated in a final agency action).

RECOMMENDED ACTION MEMO
Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Require FFLs to Video Record Gun Sales
Date: November 2020

Recommendation: Issue a new regulation requiring federal firearm licensees to video record all gun sales in order to deter straw purchases and the use of false identification.

I. Summary

Description of recommended executive action

Federally licensed firearms dealers (FFLs) are currently required to submit paper and electronic records of all firearms sales to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Despite these requirements, the prevalence of straw purchases and the use of false identification remain prominent safety issues in firearm sales and contribute significantly to violent crime and firearm trafficking.

In order to combat straw purchases and deter the use of false identification in firearms purchases, the next administration should issue a regulation requiring FFLs to maintain video recordings of each gun sale, in addition to the paper and electronic sale records they are currently required to maintain. Not only would this deter bad-faith purchasers, it would equip law enforcement and ATF industry operations inspectors (IOIs) with the proper tools to investigate gun trafficking crimes and enforce ATF regulations against FFLs.

Overview of process and time to enactment

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the notice and comment rulemaking (NCRM) process.[1] To finalize a new rule under the Gun Control Act of 1968 (GCA), the ATF will be required to issue a notice of proposed rulemaking (NPRM), provide a 90-day period for receiving public comments,[2] respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the *Federal Register*. A rule generally goes into effect thirty days after it is published.[3] In total, the multi-phase NCRM process generally extends for a year.

II. Current state

The GCA requires FFLs to identify and sell firearms only to buyers who are eligible to possess firearms.[4] People who are prohibited from possessing firearms under the GCA include those with felony records, illegal substance addictions, and severe mental illness.[5] These safeguards

[1] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[2] The GCA explicitly requires a 90 day comment period. 18 U.S.C. § 926(b).
[3] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.
[4] 18 U.S.C. §§ 922(d), (g).
[5] 18 U.S.C. §§ 922(g), (n)

are designed "to prevent guns from falling into the wrong hands."[6] The GCA prohibits FFLs from selling to anyone whom they know or have reason to believe is a prohibited buyer,[7] and "establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun."[8] This scheme requires a purchaser to actually appear at the dealer's "business premises" to buy a gun,[9] and requires a dealer to verify the purchaser's identity,[10] collect the buyer's "name, age, and place of residence,"[11] and run a background check through the National Instant Criminal Background Check System (NICS).[12]

In addition, the GCA stipulates that FFLs must keep "such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe."[13]

The ATF's current regulations require FFLs to maintain records of all gun sales by filling out Form 4473, and to promptly send to the ATF reports of sales of multiple firearms to the same purchaser within a certain time period.[14] Form 4473 asks for a variety of information, including whether the individual filling out the form is "the actual transferee/buyer of the firearm(s) listed on this form."[15] These reports may be cross-referenced with crime gun trace information to further criminal investigations, including investigations into illegal firearms trafficking.[16]

Under the GCA, it is a criminal offense for either the purchaser or the firearms dealer to provide false information on these mandated records.[17] Thus, it is a crime for a customer to state on Form 4473 that they are the actual buyer when they are in fact purchasing the firearm for someone else–even if that other person is legally eligible to purchase a firearm.[18]

Despite these provisions, straw purchases remain a serious problem. A straw purchase is any purchase in which someone with a clean background agrees to buy a firearm from a licensed dealer on behalf of someone who is ineligible to purchase that firearm for themselves.

Straw purchases are the most common way for illegal firearms to enter the trafficking trade, accounting for 41.3% of gun trafficking investigations by the ATF.[19] Research on the behavior of

[6] *Abramski* v. *United States*, 573 U.S. 169, 172 (2014) (citing 18 U.S.C. § 922(g)).
[7] 18 U.S.C. § 922(d).
[8] *Abramski*, 573 U.S. at 172.
[9] Subject to certain exceptions. 18 U.S.C. § 922(c).
[10] 18 U.S.C. § 922(t)(1)(C).
[11] 18 U.S.C. § 922(b)(5).
[12] 18 U.S.C. § 922(t)(1)(A)–(B).
[13] 18 U.S.C. § 923(g)(1)(A).
[14] ATF, "ATF Form 4473 - Firearms Transaction Record," updated September 8, 2020, https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions; ATF, "Reporting Multiple Firearms Sales," updated July 2, 2020, https://www.atf.gov/firearms/reporting-multiple-firearms-sales.
[15] *Abramski*, 573 U.S. at 173 (quoting Form 4473); *see Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1155 (10th Cir. 2014) (discussing Form 4473).
[16] ATF, "Reporting Multiple Firearms Sales," July 2, 2020, https://www.atf.gov/firearms/reporting-multiple-firearms-sales.
[17] 18 U.S.C. §§ 922(a)(6),(m).
[18] 18 U.S.C. § 922(a)(6); *Abramski*, 573 U.S. at 175, 177–93.
[19] Anthony A. Braga, et al., "Interpreting the Empirical Evidence on Illegal Gun Market Dynamics," *Journal of Urban Health* 89 no. 5 (2012): 779–793, Table 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3462834/.

FFLs underscores the widespread nature of the issue: more than two-thirds of dealers experience at least one attempted straw purchase per year,[20] dealers regularly show a willingness to ignore warning signs that suggest straw purchases,[21] and 20% of gun dealers are willing to sell even when the customer explicitly states they plan to buy firearms on behalf of someone else.[22]

The use of false identification documents similarly interferes with the effectiveness of the background check process. According to a testimony submitted on behalf of the Government Accountability Office in 2003:

> ...counterfeit driver's licenses can be used to purchase firearms. Between October, 2000, and February, 2001, used counterfeit driver's licenses with fictitious identifiers to purchase firearms from license dealers in five states—Virginia, West Virginia, Montana, New Mexico, and Arizona. When we purchased the firearms, the majority of the firearms dealers we dealt with complied with laws governing such purchases, including instant background checks required by federal law. However, an instant background check only discloses whether the prospective purchaser is a person whose possession of a firearm would be unlawful. Consequently, if the prospective purchaser is using a fictitious identity, as we did, an instant background check is not effective.[23]

Requiring FFLs to video-record sales will deter straw purchases and the use of false identification, and support law enforcement efforts to investigate gun crimes, including firearm trafficking. The federal government has not previously imposed or considered this type of regulation. However, such a rule is supported by public opinion and other precedential examples:

- A 2008 survey found that 74% of Americans support requiring gun dealers to video-record all gun sales.[24]

- That same year, Wal-Mart voluntarily began videotaping all gun sales.[25]

[20] Garen J. Wintemute, "Frequency of and Responses to Illegal Activity Related to Commerce in Firearms: findings from the Firearms Licensee Survey," *Injury Prevention* 19 no. 6 (2013): 412–20, https://pubmed.ncbi.nlm.nih.gov/23478404/.
[21] Susan B. Sorenson, Katherine Vittes, "Buying a Handgun for Someone Else: Firearm Dealer Willingness to Sell," *Injury Prevention* 9 no. 2 (2003): 147–50, https://injuryprevention.bmj.com/content/9/2/147.
[22] Garen Wintemute, "Firearm Retailers' Willingness to Participate in an Illegal Gun Purchase," *Journal of Urban Health* 87 no. 5 (2010): 865–78, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2937134/.
[23] Statement of Ronald D. Malfi Director, Office of Special Investigations, Government Accountability Office before the Committee on Homeland Security, October 1, 2003, https://www.gao.gov/assets/120/110403.html
[24] Greenberg Quinlan Rosner Research & The Tarrance Group for Mayors Against Illegal Guns, "Americans Support Common Sense Measures to Cut Down on Illegal Guns," April 10, 2008: 3-6, https://web.archive.org/web/20091128023131/http://www.mayorsagainstillegalguns.org/downloads/pdf/polling_memo.pdf.
[25] Jeremy W. Peters, "Mayors and Wal-Mart Back Gun Sales Plan," *New York Times*, April 15, 2008, https://www.nytimes.com/2008/04/15/nyregion/15bloomberg.html.

- Also in 2008, New York City reached a settlement agreement in a public nuisance suit that charged 27 gun dealers with regularly making sales that violated federal law.[26] As part of the settlement, the dealers agreed to video all firearm sales and maintain video records for six months "to deter illegal purchases and monitor employees."[27] Notably, researchers determined that the odds of a NYPD recovery of a firearm by one of these dealers was 84.2% lower during the post-lawsuit sales period than the pre-lawsuit period.[28]

- In 2021, Illinois will become the first state to require gun retailers to video-record sales.[29] Under the new law, retailers are required to video all store areas where guns are sold, handled, and transferred, as well as all of the store entrances and exits, and to keep these video records for at least 90 days.[30]

Video-recording sales of other commodities is not atypical in today's streaming world. The National Association of Boards of Pharmacies recommends video surveillance, for example.[31] According to the US Pharmacist, addressing security for prescription drug sales:

> "The use of high-resolution cameras supporting facial recognition, including video and hidden cameras, is critical for security. Video cameras must cover entrances, exits, high-risk areas such as the pharmacy counter, and dispensing areas. Cameras must be correctly positioned to record full-face views; cameras mounted near the ceiling may capture only the top of a hat. Data-storage devices can be housed in secured cabinets or at an off-site location."[32]

III. Proposed action

In order to combat straw purchases and deter the use of false identification in firearms purchases, and to equip law enforcement and ATF IOIs inspectors with the proper tools to investigate gun crimes and enforce federal regulations, the next administration should issue a rule requiring all FFLs to video-record gun sales and maintain those records for a certain amount of time.

A. Substance of proposed rule

[26] Office of the Mayor, "Mayor Bloomberg Announces Final Settlement in Groundbreaking Litigation Against Gun Dealers Caught Selling in Apparent Violation of Federal Law," NYC.gov, September 23, 2008, https://www1.nyc.gov/office-of-the-mayor/news/374-08/mayor-bloomberg-final-settlement-groundbreaking-litigation-against-gun-dealers-caught.
[27] *Id.*
[28] Daniel W. Webster and Jon S. Vernick, "Spurring Responsible Firearms Sales Practices through Litigation," in *Reducing Gun Violence in America* (2013), 128, https://jhupress.files.wordpress.com/2013/01/1421411113_updf.pdf.
[29] 430 Ill. Comp. Stat. Ann. 68/5-50.
[30] *Id.*
[31] "Model Pharmacy Act/Rules," National Association of Boards of Pharmacy, accessed October 13, 2020, https://nabp.pharmacy/publications-reports/resource-documents/model-pharmacy-act-rules/.
[32] Helen L. Figge, "Pharmacy Security: Know the Options," U.S. Pharmacist, August 18, 2015, https://www.uspharmacist.com/article/pharmacy-security-know-the-options.

To successfully withstand a legal challenge, an agency issuing a new rule must consider all relevant factors to the new regulation.[33] Providing this analysis from the beginning of the rulemaking process will ensure that the final rule is the "logical outgrowth" of the NPRM, such that stakeholders could reasonably anticipate the final rule.[34] The NPRM should include as much detail about the new requirements as possible. Among other things, the rule should:

- Specify that all portions of a sale must be recorded (i.e., while the buyer fills out Form 4473, pays for the gun, particularly when the buyer returns after a waiting period).
- Require the video to capture the transaction in such a way that the facial features of the purchaser or transferee are clearly visible. The rule may include a minimum video resolution, or specify how large the image of the sale has to be in relation to the screen. The rule may also require sound capture to a specific standard of quality.
- Dictate a certain time period for maintaining records. We would suggest five years.

Additionally, the NPRM should include a well-developed and supported cost-benefit analysis of the rule's impact. The costs analysis should include the costs to the ATF of ensuring compliance with the new rule. However, the primary costs to account for are related to FFL compliance, such as the costs to:

- **Install video surveillance systems and other required technology**
  - Factors include the rule's proposed standards for resolution, features, sound capture, etc.
  - Estimates should reflect likely variation according to the size and type of the business. For example: gun shops with one cash register vs. multiple cash registers, and specialty gun stores that only sell firearms vs. stores that sell a wide variety of merchandise in addition to firearms.
  - Extensive files may be cumbersome in criminal investigations. Hence, the rule should specify the scope of the required recording of the sale.
  - Many FFLs might already have compliant video recording systems. The ATF may wish to consider the existence of these systems in determining the additional cost.

- **Maintain and replace video equipment**
  - FFLs should be required to maintain the equipment so that it functions as required.

- **Store video data securely for the required period of time**
  - Storage must be secure, especially in light of privacy concerns.
  - The size of these files (and thus the cost of storage) will depend on the required resolution, and the length and scope of the interaction for which the rule mandates recording.

The benefits discussion should focus on the ways in which the new rule would further the purpose of the GCA and be in accordance with existing requirements. The agency should also explain what alternatives were considered but assessed as less effective. The ATF should

[33] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[34] *See, e.g., CSX Transp., Inc.* v. *STB*, 584 F.3d 1076, 1079-81 (D.C. Cir. 2009).

specifically enumerate why a video recording requirement is likely to further deter straw purchases and the use of false identification, and why current reporting requirements are not sufficient.

This discussion will likely preempt many comments and criticisms of the proposed rule and will facilitate a smoother revision process for the final rule.

B. Process

To issue this new rule, the ATF must go through the NCRM process under the APA.[35] First, an agency must provide notice that it intends to promulgate a rule by publishing a NPRM in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Next, the agency must accept written public comments on the proposed rule for a period of at least 90 days, as specified by the GCA.[36] An oral hearing is not required.[37] Received comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting those proposals or by modifying the proposed rule to reflect their input.

Because this regulation is novel, the ATF should anticipate a significant influx of comments from the public and industry stakeholders. Consequently, after the comments period has closed, it may take several months for the ATF to draft a final rule that meaningfully responds to and/or incorporates all of the significant comments.

Once the revision process is complete, the final rule will be published in the *Federal Register,* along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

C. Legal justification

The attorney general has the power to prescribe "such rules and regulations as are necessary to carry out the provisions of" the GCA.[38] In turn, the attorney general has delegated authority to issue rules and regulations related to the GCA to the ATF.[39] In addition, 18 U.S.C. § 923(g)(1)(A) states that FFLs must keep "such records of...sale...for such period, and in such form, as the Attorney General may by regulations prescribe."[40] Thus, the ATF has statutory authority to promulgate regulations for gun dealers that dictate the required form and duration of recordkeeping.

IV. Risk analysis

Legal vulnerability

[35] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[36] 18 U.S.C. § 926(b).
[37] *See Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990).
[38] 18 U.S.C. § 926(a).
[39] 28 C.F.R. §§ 0.130, 0.131.
[40] 18 U.S.C. § 923(g)(1)(A).

Agency rulemaking is generally subject to two types of challenges: procedural challenges and substantive challenges. Procedural challenges center on whether the agency promulgated the final rule in accordance with the requirements outlined by § 553 of the APA.[41] The procedural requirements of the APA and the GCA are discussed in Section III of this memorandum. So long as the ATF is careful to observe these requirements, the new rule is likely to withstand procedural challenges.

Relevant here, substantive challenges may argue either that: (1) the rule is "in excess of [the agency's] statutory jurisdiction, authority or limitations,"[42] (2) the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,"[43] or (3) the rule is unconstitutional. A court will address the first two categories using the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, a court will defer to an agency rule's reasonable statutory interpretation if it determines "that Congress delegated authority to the agency generally to make rules carrying the force of law," and that the agency rule "was promulgated in the exercise of that authority."[44]

Challengers could potentially raise arguments spanning these categories. But the ATF would have reasonable responses.

A. Statutory authority

A challenger could argue the ATF lacks statutory authority to impose a video recording requirement on FFLs because Congress did not contemplate *video* records when it enacted the GCA in 1986. Certain sections of the GCA could be used to argue that Congress was thinking only of written records—those that can be expressed through "forms."[45]

Because video records cannot be provided on "forms," the challenger might argue, the GCA does not provide for video records to be sent to the ATF directly. The new rule provides that the ATF will inspect the videotapes in the FFLs' premises (instead of requiring FFLs to send to the ATF), but the challenger may argue that the GCA does not permit the ATF to require dealers to keep records that they may not, under the GCA's plain language, have sent to the agency directly.

However, the ATF could argue that the word "records" in the GCA is meant to be read broadly, and reasonably includes video records. It may be true that Congress did not specifically envision *video* records when it enacted the GCA in 1986, "[b]ut none of [those] contentions about what the [challengers] think the law was meant to do, or should do, allow [a court] to ignore the law as it is."[46] At worst, the term "records" is ambiguous; in which case, ATF's interpretation receives *Chevron* deference and is reasonable.

[41] 5 U.S.C. § 553.
[42] 5 U.S.C. § 706(2)(C).
[43] 5 U.S.C. § 706(2)(A).
[44] *United States v. Mead*, 533 U.S. 218, 226-27 (2001); *Guedes*, 920 F.3d at 20-22.
[45] *See, e.g.,* 18 U.S.C. § 923(g)(3)(A) ("The report shall be prepared on a form specified by the Attorney General…."); 18 U.S.C. § 923(g)(5)(A) ("licensee shall…submit on a form specified by the Attorney General…."); 18 U.S.C. § 923(g)(7) ("the requested information shall be provided orally or in writing, as the Attorney General may require….").
[46] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1745 (2020).

Courts have consistently afforded ATF *Chevron* deference for its interpretations of the recordkeeping requirement in 18 U.S.C. § 923.[47] Under *Chevron*, courts ask first "whether Congress has directly spoken to the precise question at issue," in which case both the agency and courts "must give effect to the unambiguously expressed intent of Congress."[48] However, if the "statute is silent or ambiguous with respect to the specific issue," courts move to the second step of the analysis and defer to the agency's interpretation, so long as it is "based on a permissible construction of the statute."[49]

The GCA does not explicitly say whether it allows agency regulations requiring FFLs to video record sales. But imposing such a requirement is a reasonable interpretation of the GCA, especially if the agency provides a detailed analysis of the rule's anticipated significant impact on a serious problem.

The GCA expressly delegates authority to determine the form of sales records that FFLs must maintain, stating that: "[e]ach licensed importer, licensed manufacturer, and licensed dealer shall maintain **such records** of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business **for such period, and in such form, as the Attorney General may by regulations prescribe**" (emphasis added).[50]

Nothing in the GCA's text or structure suggests that such "records" may not take the form of videos. The plain language of the word "records" includes video records; indeed, the term "video-recording" refers to the process of creating a video record. Additionally, ATF can point to references to "records" throughout § 923 to show that the word extends beyond paper documentation. For instance:

- The GCA states that, with an appropriate court order, the attorney general may go to an FFL's premises and examine "any records *or documents* required to be kept" by law (emphasis added).[51] This implies that "records" may be broader than, or at least different from "documents."

- The GCA requires licensed collectors to "maintain *in a bound volume*[,] the nature of which the Attorney General may by regulations prescribe, records of the receipt, sale, or other disposition of firearms" (emphasis added).[52] This supports the argument that Congress knows how to narrow the type of record required when it wants to.[53]

[47] *See, e.g., Ron Peterson Firearms v. Jones*, 760 F.3d 1147, 1155 (10th Cir. 2014) ("We review ATF's interpretation of § 923 under the standards set forth in Chevron."); *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 207 (D.C. Cir. 2013) (same); *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 717–18 (5th Cir. 2013) (quoting *Nat'l Shooting Sports Found.*, 716 F.3d at 207); *Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 479 (4th Cir. 1990) (explaining that *Chevron* applies to litigation about ATF regulations).
[48] *Chevron*, 467 U.S. at 842–43.
[49] *Id.*
[50] 18 U.S.C. § 923(g)(1)(A).
[51] 18 U.S.C. § 923(g)(1)(A)(i).
[52] 18 U.S.C. § 923(g)(2).
[53] *See, e.g., Russello v. United States*, 464 U.S. 16 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (1972) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

In addition, the ATF could argue that its new rule hardly thwarts the GCA's purpose—it directly serves the GCA's broad purpose of "prevent[ing] guns from falling into the wrong hands.[54]

The GCA conditions the general grant of rulemaking authority by stipulating that "[t]he Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of [the statute]" (emphases added).[55] A challenger might rely on this language to argue that a video recording requirement is not *necessary*—the current system of reports is sufficient. However, the enormous toll of gun violence in the US demonstrates that the current system is not sufficient.

Furthermore, in *National Rifle Ass'n v. Brady*, the Fourth Circuit rejected the National Rifle Association's (NRA) argument that Congress meant to "dispense with the deference that courts would customarily accord [ATF] regulations" by including the word "necessary" in § 926(a).[56] The court explained that the ATF "is better equipped than the courts" to determine how "to carry out the purposes of the [GCA]" because it has "the technical expertise essential to determinations of statutory enforcement."[57] "Because § 926 authorizes [the attorney general] to promulgate those regulations which are 'necessary,'" the court continued, "it almost inevitably confers some measure of discretion to determine what regulations are in fact 'necessary.'"[58]

The court further found that "specific grants of rulemaking authority in a number of areas"—including § 923—bolstered its conclusion.[59] The court also noted that the GCA's legislative history supported its reading, observing that § 926(a) was amended in 1986 from "reasonably necessary" to the current "necessary," and that this change "was merely meant to remove redundant language" and not "to install the courts as primary arbiters of regulatory necessity" or to imply that "the principles of *Chevron* do not apply."[60]

A court reviewing this type of challenge to the new video recording requirement would likely come to similar conclusions as the Fourth Circuit. *Brady* is a well-reasoned case, and has been followed by several district courts.[61]

Additionally, the GCA is just one of numerous statutes that use similarly qualified language to confer rulemaking authority on agencies.[62] And courts have not hesitated to apply *Chevron* deference to uphold agency rules enacted under statutes that only permit "necessary" regulations, generally without even pausing to make anything of the "necessary" language.

For example, in 2013, the Supreme Court held that the FCC's interpretation of its own jurisdiction was entitled to *Chevron* deference.[63] The Court noted that the statute at issue gave the agency authority to "prescribe such rules and regulations as may be necessary in the public

[54] *Abramski* v. *United States*, 573 U.S. 169, 172 (2014) (citing 18 U.S.C. § 922(g)).
[55] 18 U.S.C. § 926(a).
[56] 914 F.2d 475, 478–89 (1990).
[57] *Id.* at 479.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *See, e.g.*, *Armalite, Inc.* v. *Lambert*, 512 F. Supp. 2d 1070, 1073–74 (N.D. Ohio 2007), *aff'd*, 544 F.3d 644 (6th Cir. 2008).
[62] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 471 & n.8 (2002) (providing examples).
[63] *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013).

interest to carry out [the act's] provisions," but did not separately discuss or dwell upon the "necessary" limitation.[64]

These principles would likely apply here. The GCA expressly authorizes the attorney general to "maintain such records of...sale...in such form[] as [they] may by regulations prescribe."[65] Given this "specific grant of rulemaking authority,"[66] a court will likely find that the ATF is best suited to determine whether a video recording requirement is "necessary" to "combat violations of [ ] firearms laws."[67] The court will look at whether the ATF has reasonably determined that it is necessary to add video record requirements to current recordkeeping regulations.

B. Arbitrary and capricious

A challenger could claim the new rule is arbitrary and capricious by arguing the ATF failed to examine the relevant data and articulate a satisfactory explanation for the rule.

An agency decision is arbitrary and capricious if it: (1) failed to consider all relevant factors, (2) failed to consider an important aspect of the problem, (3) relied on factors Congress did not intend, or (4) made a clear error of judgment.[68] A court may not "substitute [its] judgment for that of the agency,"[69] and will be deferential towards policy decisions that are based on the agency's "authoritative and considered judgments."[70] Therefore, the agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[71]

A court will be more likely to accept arguments about the reasonableness of the new rule if it is accompanied by a detailed analysis showing the benefits of a video recording requirement are commensurate with the costs. The APA does not expressly require a cost-benefit analysis; however, a rule will be struck down as arbitrary and capricious during judicial review if the court finds that the agency failed to "consider an important aspect of the problem" or "examine the relevant data and articulate a satisfactory explanation for [the] action."[72]

The Supreme Court has also emphasized that agencies promulgating "appropriate and necessary" regulations must "consider cost—including, most importantly, cost of compliance."[73] The Court added that it is "up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost," and that there need not always be "a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value."[74] Courts

[64] *Id.* at 293 (quoting 47 U.S.C. § 201(b)).
[65] 18 U.S.C. § 923(g)(1)(A).
[66] *Brady*, 914 F.2d at 479.
[67] *NAt'l Shooting Sports Found.*, 716 F.3d at 203 (internal citations omitted).
[68] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[69] *Id.*
[70] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (internal citations omitted).
[71] *State Farm*, 463 U.S. at 43 (quotation marks omitted).
[72] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[73] *Michigan* v. *EPA*, 135 S. Ct. 2699, 2706-08, 2711 (2015).
[74] *Id.* at 2711; *see, e.g., Nicopure Labs, LLC* v. *FDA*, 266 F. Supp. 3d 360, 406 (D.D.C. 2017) ("*Michigan* v. *EPA* does not require that the benefits be quantified in any particular way when compared to the costs."), *aff'd*, 944 F.3d 267 (D.C. Cir. 2019); *cf., e.g.*, Bump Stock Rule, 83 Fed. Reg. at 55,539, 66,544, 66,551 (finding it impossible to quantify benefits of bump stock rule but listing unquantified benefits like potentially reducing casualties in mass shootings).

also acknowledge the difficulty of prediction, especially when the rule is entirely new. Courts require "only that the agency acknowledge factual uncertainties and identify the considerations it found persuasive."[75]

Thus, the ATF should cogently explain why, notwithstanding the costs, the proposed rule is "necessary to carry out the provisions"[76] of the GCA by ensuring that fewer criminals are able to use straw purchasers or false identification to evade the law.[77] The rule should quantify costs and benefits where possible; describe them qualitatively; identify why other alternatives are inferior; and explain the insufficiency of existing recordkeeping requirements. The ATF's responses to significant comments—some of which will undoubtedly raise cost-benefit issues—and incorporation of their input into the final rule will also help to demonstrate that the new rule was "based on a consideration of the relevant factors."[78]

C. Constitutional

A challenger may argue that a video-recording requirement infringes on the privacy rights of gun buyers and dealers.

The Second Amendment may confer a right to own firearms in the home for self-defense, but it does not confer a right to *secretly* do so. Indeed, the entire scheme of the GCA makes this clear.[79]

The Fourth Amendment protects "reasonable expectation[s] of privacy," but there is no reasonable expectation of privacy when undertaking a commercial transaction in a store open to the public.[80] The Supreme Court has rejected a Fourth Amendment challenge to on-site inspections of FFLs under § 923(g), stating that "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."[81]

Even if there were some constitutional privacy interest at stake, the Fourth Amendment's touchstone is reasonableness.[82] The "federal interest" in preventing violent crime is "urgent," while "the threat to privacy [is] not of impressive dimensions."[83]

Additionally, the GCA imposes strict limits on the government's collection of FFL records, and the new rule would not alter those restrictions.[84] Consequently, under the new rule, FFLs would be responsible for video-recording gun sales and maintaining those records, but the government

[75] *Rural Cellular Ass'n* v. *FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009); *see FCC* v. *Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978).
[76] 18 U.S.C. § 926(a).
[77] *Abramski*, 573 U.S. at 183.
[78] *Mozilla Corp. v. FCC*, 940 F.3d 1, 69 (D.C. Cir. 2019) (per curiam).
[79] *Cf. District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("[T]he right secured by the Second Amendment is not unlimited. … [T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."). Note the difference between carrying a weapon in secret and owning a weapon in secret.
[80] *Carpenter v. U.S.*, 138 S. Ct. 2206, 2219 (2018).
[81] *U.S. v. Biswell*, 406 U.S. 311, 316 (1972).
[82] *Carpenter*, 138 S. Ct. at 2221.
[83] *Biswell*, 406 U.S. at 315–17.
[84] *See supra* note 32; 18 U.S.C. § 926(a).

could only ask to “inspect or examine” the video recordings in connection with a criminal investigation, or to “ensure[] compliance with the record keeping requirements.”[85]

[85] 18 U.S.C. § 923(g)(B)(i)–(iii).

RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)
Topic: Safety Information for Purchasers
Date: November 2020

Recommendation: Update and strengthen ATF regulations on safety information that federal firearms licensees are required to post and distribute in their stores.

I. Summary

Description of recommended executive action

In 1998, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) promulgated a regulation—at the direction of a 1997 Presidential Memorandum—which currently requires federal firearms licensees (FFLs) to post on premises, and to distribute to gun buyers, specific information about the dangers of allowing juveniles access to firearms.[1]

Under this proposal, the ATF would engage in notice-and-comment rulemaking to update and expand this regulation. Specifically, this executive action would eliminate FFLs' current posting and distribution requirements, and replace each with a new FFL requirement to both post and distribute on-premises, and make available to gun buyers via a webpage, consumer safety information addressing the following:

(1) dangers of allowing prohibited individuals, in addition to juveniles, access to firearms
(2) illegality of straw purchases
(3) importance of safe-storage practices to deter theft and access by children
(4) reporting lost or stolen firearms to law enforcement

As the primary agency that regulates the firearms industry, the ATF is the best agency to require the gun industry to provide additional safety information to consumers.

Overview of process and time to enactment

It may take some time for the ATF to design the updated brochure and the new webpage proposed in this memorandum. Thereafter, the ATF may proceed quickly. The Administrative Procedure Act (APA) requires federal agencies to issue certain rules through the notice-and-

[1] *See* Administration of William J. Clinton, "Memorandum on Enforcing the Youth Handgun Safety Act," June 11, 1997, https://www.govinfo.gov/content/pkg/WCPD-1997-06-16/pdf/WCPD-1997-06-16-Pg856.pdf; Posting of Signs and Written Notification to Purchasers of Handguns, 62 Fed. Reg. 45364 (proposed August 27, 1997) (to be codified at 27 C.F.R. pt. 178); Posting of Signs and Written Notification to Purchasers of Handguns, 63 Fed. Reg. 37740 (July 13, 1998) (to be codified at 27 C.F.R. pt. 178).

comment rulemaking (NCRM) process.[2] To implement this proposal, the ATF will be required to issue a notice of proposed rulemaking (NPRM); provide a 90-day period for receiving public comments; respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly); and publish the final rule in the Federal Register. A rule generally goes into effect 30 days after it is published.[3] This multi-phase process generally extends for a year.

II. Current state

Gun violence and gun sales in America

Gun violence in America is a public health crisis. In 2018, 39,740 people in the US died from gun-related deaths.[4] This number represents an increase of 15% from 2014, and means that, on average, over 100 Americans died each day from gun violence in 2018.[5] Gun violence takes various forms, including suicides, domestic violence, gun homicides (which impact underserved communities of color disproportionately), and unintentional injuries and deaths. One thing many of these forms of gun violence have in common, however, is that they are often enabled by gun purchasers who are poorly informed about the laws regarding prohibited persons' access to firearms, straw purchasing, safe storage, and reporting lost or stolen firearms, as well as the rationale for these laws.

Transfers to prohibited individuals. The Gun Control Act of 1968 (GCA) lists categories of individuals who are generally prohibited from possessing firearms, including people convicted of domestic violence or felony-level crimes, people with certain histories of involuntary mental health treatment, and minors.[6] The GCA also generally prohibits the transfer of firearms to these individuals.[7] Far too often, however, these individuals are still able to obtain firearms, which are then used to commit crimes, attempt or cause death by suicide, or unintentionally injure or cause the death of an individual.[8]

Straw purchases. A related problem exists with regards to straw purchasing—transactions in which a purchaser buys a gun on behalf of someone else. Federal law requires federal firearms licensees (FFLs), including gun dealers, manufacturers, and importers, to conduct background

[2] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[3] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.
[4] Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), "Fatal Injury Reports," accessed February 20, 2019, https://www.cdc.gov/injury/wisqars.
[5] *See id.*
[6] 18 U.S.C. § 922(g), (n).
[7] 18 U.S.C. § 922(d).
[8] *See* Giffords Law Center to Prevent Gun Violence, "For the Record: NICS and Public Safety, Essential Improvements to the National Instant Criminal Background Check System," December 2016, https://giffords.org/wp-content/uploads/2019/06/Giffords-Law-Center-For-The-Record-NICS-and-Public-Safety.pdf; Giffords Law Center to Prevent Gun Violence, "Trafficking & Straw Purchasing," accessed October 19, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/#footnote_8_5599.

checks on gun purchasers to ensure they are not prohibited from possessing guns, as described above.[9] Straw purchases, in which a person other than the actual gun buyer undergoes the background check, evade this requirement. These transactions are common[10] but illegal. While there is not currently a federal crime of straw purchasing, federal law does prohibit the straw purchasing of firearms, because federal law prohibits making a false statement on the firearms transaction form,[11] and the firearm transaction form requires the person to certify that they are the "actual buyer" of the gun.[12] More specifically, ATF Form 4473, the form prospective firearms purchasers have to complete, currently includes an explanation of the term:

> **Question 21.a. Actual Transferee/Buyer:** For purposes of this form, a person is the actual transferee/buyer if he/she is purchasing the firearm for him/herself or otherwise acquiring the firearm for him/herself...A person is also the actual transferee/buyer if he/she is legitimately purchasing the firearm as a bona fide gift for a third party. A gift is not bona fide if another person offered or gave the person completing this form money, service(s), or item(s) of value to acquire the firearm for him/her, or if the other person is prohibited by law from receiving or possessing the firearm.[13]

Notably, the ATF and the industry's National Sports and Shooting Foundation (NSSF) have a long-standing public safety campaign, "Don't Lie for the Other Guy," which includes postcards and posters warning consumers about the dangers of straw purchasing.[14] However, this information misleadingly indicates that a straw purchase is only illegal if the actual buyer is prohibited from possessing guns.

The Supreme Court held in *Abramski v. U.S.* that a straw purchase is illegal regardless of whether the actual buyer is eligible to buy the gun themselves.[15] In that case, the petitioner had purchased a firearm in Virginia on behalf of his uncle, who lived in Pennsylvania. The petitioner was convicted under 18 U.S.C.§ 922(a)(6) (which criminalizes knowingly making false statements "with respect to any fact material to the lawfulness of the sale" of a gun) and § 924(a)(1)(A) (which criminalizes making a false statement "with respect to the information required . . . to be kept" in the gun dealer's records). In a 5-4 decision, the majority rejected the

[9] 18 U.S.C. § 922(t).
[10] Giffords Law Center to Prevent Gun Violence, "Trafficking & Straw Purchasing," accessed October 19, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/#footnote_8_5599 (explaining that data from a national survey suggests there are more than 30,000 attempted straw purchases each year).
[11] 18 U.S.C. § 922(a)(6).
[12] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF Form 4473 - Firearms Transaction Record," revised May 2020, https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download (Question 21a asking "Are you the actual transferee/buyer of the firearm(s) listed on this form…?).
[13] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF Form 4473 - Firearms Transaction Record Revisions," revised May 2020, https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions.
[14] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Don't Lie for the Other Guy," accessed October 16, 2020, https://www.atf.gov/firearms/dont-lie-other-guy.
[15] *Abramski v. U.S.,* 573 U.S. 169 (2014).

argument that these federal laws were not intended to apply to straw purchases, and held that the misstatement was material, even though the uncle was eligible to own a gun.[16]

Safe storage to prevent unauthorized access. Federal law, specifically the Youth Handgun Safety Act (YHSA), which was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, prohibits anyone from transferring a handgun to someone under age 18, with limited exceptions.[17] In addition to the provisions of the YHSA, federal law encourages the safe storage of firearms to prevent children and teenagers from having access to them, by ensuring that gun dealers transfer safety devices alongside handguns.[18]

Despite these provisions, young people continue to commit gun offenses in high numbers. In 2017, 36,024 young people between the ages of 10 and 21 were arrested for weapons offenses, such as illegally carrying or possessing a firearm.[19] This group made up 28% of all arrests for weapons offenses that year.[20] Household guns, often the most easily accessible firearms for youth, are a major source of weapons used in school shootings, youth suicides, and unintentional shooting deaths among children.[21] A modest increase in the number of American homes safely storing firearms could prevent about a third of gun suicides and unintentional shooting deaths among young people.[22]

Lost and stolen guns. One gun is stolen from a private gun owner every two minutes.[23] That's some 380,000 stolen guns each year, many of which are later trafficked or used in violent crime.[24] The law recognizes that stolen guns can be diverted to the illegal gun market, where they are used to fuel crime across the country.[25]

[16] *Id*.
[17] Pub. L. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 922(x)).
[18] 18 U.S.C. § 922(z).
[19] US Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting Program, "2017 Crime in the United States: Table 38," accessed October 26, 2020, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-38.
[20] *Id.*
[21] Deborah Azrael et al., "Firearm Storage in Gun–owning Households with Children: Results of a 2015 National Survey," *Journal of Urban Health* 95, no. 3 (May 2018): 295–304, doi: 10.1007/s11524-018-0261-7.
[22] Michael C. Monuteaux et al., "Association of Increased Safe Household Firearm Storage With Firearm Suicide and Unintentional Death Among US Youths," *JAMA Pediatrics* 173, no. 3 (July 2019), doi: 10.1001/jamapediatrics.2019.1078.
[23] Chelsea Parsons and Eugenio Weigend Vargas, "Stolen Guns in America," Center for American Progress, July 25, 2017, https://www.americanprogress.org/issues/guns-crime/reports/2017/07/25/436533/stolen-guns-america/.
[24] David Hemenway et al., "Whose Guns are Stolen? The Epidemiology of Gun Theft Victims," *Injury Epidemiology* 4, no. 1 (2017), doi: 10.1186/s40621-017-0109-8.
[25] 18 U.S.C. § 922(i), (j) (specifically prohibiting anyone from receiving, possessing, shipping, transporting, selling, concealing, and disposing of stolen guns).

Federal law allows law enforcement to trace guns recovered after use in crime to their original owners by requesting gun sales information from FFLs.[26] This information can lead to the arrest of individuals who have used these guns in violent crimes. Lost and stolen guns, however, significantly disrupt the gun tracing process, since the gun purchaser is no longer in possession of the gun that is traced to him or her. Reporting of lost or stolen firearms, therefore, plays a crucial role in law enforcement efforts to stop violent crime.

While no federal law requires gun owners to report lost or stolen guns, several states have enacted reporting laws that have assisted in reducing gun trafficking and straw purchasing, as well as recovering and returning lost or stolen guns to their owners.[27] In states which do not require non-FFLs to report lost or stolen guns, the ATF nevertheless already recommends contacting the FFL that sold the gun, the local police department, or state firearms registration office for assistance.[28]

The role of gun dealers

The GCA gives the ATF the responsibility of ensuring FFLs comply with applicable laws and regulations.[29] Firearms initially enter the consumer market through FFLs, who are the critical link between manufacturers or distributors and the general public. According to the ATF, as of October 2020, over 52,700 individuals currently have Type 1 federal firearms licenses, which allow them to act as firearms dealers, and over 7,000 individuals have Type 2 licenses, which allow them to buy and sell guns as pawnbrokers.[30] About 67,313 individuals have other types of federal firearms licenses.[31] These FFLs ran approximately 4.9 million background checks via the National Instant Criminal Background Check System (NICS) on gun purchasers between January 1, 2020, and September 30, 2020.[32] The rule proposed in this memo would be applicable to any FFL premises where guns are sold to non-licensees.[33]

[26] 18 U.S.C. § 923(g)(7). *See* US Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, "National Tracing Center," accessed October 20, 2020, https://www.atf.gov/firearms/national-tracing-center.
[27] Giffords Law Center to Prevent Gun Violence, "Reporting Lost & Stolen Guns," accessed October 21, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/owner-responsibilities/reporting-lost-stolen-guns/.
[28] *See* US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Report Firearms Theft or Loss," accessed October 16, 2020, https://www.atf.gov/firearms/report-firearms-theft-or-loss.
[29] 18 U.S.C. Chapter 44, §921 et seq.
[30] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Report of Active Firearm Licenses - License Type by State Statistics," accessed October 13, 2020, https://www.atf.gov/firearms/docs/undefined/ffltypebystate10-13-2020pdf/download.
[31] *Id*.
[32] US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Month/Year by State/Type," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state_type.pdf/view.
[33] *See* Giffords Law Center to Prevent Gun Violence, "Gun Dealers," accessed October 15, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/gun-dealers/#footnote_2_5597 (citing to US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Listing of Federal Firearms Licensees (FFLs) - 2015," accessed October 15, 2020, http://www.atf.gov/about/foia/ffl-list.html).

The current regulation

In 1997, President Clinton issued a memorandum directing the ATF to issue a rule requiring FFLs to post and distribute safety information addressing the risks and consequences of juvenile handgun possession,[34] and enforcing the recently enacted YHSA.[35] The memorandum included critical data, indicating that in 1997:

- guns were responsible for 12% of juvenile fatalities
- gun homicides committed by juveniles quadrupled in the past 10 years
- guns were the fourth leading cause of accidental juvenile deaths, and the primary method used to commit juvenile suicide
- over half of privately owned guns were stored unlocked, and more than a third were stored loaded and unlocked[36]

The memorandum ordered that the regulation require FFLs to post signs on premises and issue written notification with each handgun sold to non-licensees with the following warnings.

> (1) Federal law prohibits, except in certain limited circumstances, anyone under 18 years of age from knowingly possessing a handgun, or any adult from transferring a handgun to such a minor;
> (2) violation of the prohibition of transferring a handgun to a minor is… punishable by up to 10 years in prison;
> (3) handguns are a leading contributor to juvenile violence and fatalities; and
> (4) safely storing and locking handguns away from children can help ensure compliance with federal law.[37]

The president's memorandum determined that the ATF's "implementation of this directive would help inform gun purchasers about their responsibility under Federal law to keep handguns from our children… [i]t also will ensure that gun purchasers are warned about the frequency with which handguns kill or injure our kids." Lastly, the memorandum directed the ATF to provide the president with a status report within 60 days of the directive. As such, the ATF timely issued an

[34] *See* Administration of William J. Clinton, "Memorandum on Enforcing the Youth Handgun Safety Act," June 11, 1997, https://www.govinfo.gov/content/pkg/WCPD-1997-06-16/pdf/WCPD-1997-06-16-Pg856.pdf.
[35] 18 U.S.C. § 922(x).
[36] *See id.*
[37] Administration of William J. Clinton, "Memorandum on Enforcing the Youth Handgun Safety Act," June 11, 1997, https://www.govinfo.gov/content/pkg/WCPD-1997-06-16/pdf/WCPD-1997-06-16-Pg856.pdf.

NPRM on August 11, 1997,[38] and after the requisite notice and comment period, promulgated the final rule on September 11, 1998.[39]

Both the NPRM and final rule cited to 18 U.S.C. § 922(x), the president's memorandum, and legislative history as a basis for the regulation:

> The Youth Handgun Safety Act (YHSA), 18 U.S.C. § 922(x), generally makes it unlawful for a person to transfer a handgun to anyone under 18 years of age or for anyone under 18 years of age to knowingly possess a handgun. Certain exceptions are set forth in the statute.
>
> In enacting the YHSA in 1994, Congress found that criminal misuse of firearms often starts with the easy availability of guns to juvenile gang members. In addition, Congress found that individual States and localities may find it difficult to control this problem by themselves. Therefore, Congress found it necessary and appropriate to assist the States in controlling violent crime by stopping the commerce in handguns with juveniles nationwide and allowing the possession of handguns by juveniles only when handguns are possessed and used under certain limited circumstances.[40]

Pursuant to this rule, promulgated in 27 C.F.R. § 478.103, FFLs today must post on their premises ATF Information 5300.1 ("ATF I 5300.1"), which states the following.

> (1) The misuse of handguns is a leading contributor to juvenile violence and fatalities.
> (2) Safely storing and securing firearms away from children will help prevent the unlawful possession of handguns by juveniles, stop accidents, and save lives.
> (3) Federal law prohibits, except in certain limited circumstances, anyone under 18 years of age from knowingly possessing a handgun, or any person from transferring a handgun to a person under 18.
> (4) A knowing violation of the prohibition against selling, delivering, or otherwise transferring a handgun to a person under the age of 18 is, under certain circumstances, punishable by up to 10 years in prison.
>
> Note: ATF I 5300.2 provides the complete language of the statutory prohibitions and exceptions provided in 18 U.S.C. 922(x) and the penalty provisions of 18 U.S.C. 924(a)(6). The Federal firearms license posting this sign will provide you with a copy of this publication upon request. Requests for additional copies of ATF I 5300.2 should be

[38] Posting of Signs and Written Notification to Purchasers of Handguns, 62 Fed. Reg. 45364 (proposed August 27, 1997) (to be codified at 27 C.F.R. pt. 178).
[39] *See* Posting of Signs and Written Notification to Purchasers of Handguns, 63 Fed. Reg. 37740 (July 13, 1998) (to be codified at 27 C.F.R. pt. 178).
[40] *See id.*

> submitted to the ATF Distribution Center (http://www.atf.gov) or made by calling (202) 648-6420.[41]

As promulgated in the final rule and set forth in ATF Information 5300.1, the language in the required posting at FFL premises is similar to the language in the presidential memorandum, with changes in part a direct result of the requisite NCRM process.

Additionally, the final rule required FFLs to provide to handgun purchasers ATF Information 5300.2 (ATF I 5300.2), which recites the exact language in the presidential memorandum, as well as complete provisions, exceptions, and applicable penalties of federal law governing juvenile possession of handguns.[42]

Opponents to the NPRM voiced specific objections during the comment process, to which the ATF responded as follows in the preamble to the final rule, and which provide instructive guidance for future similar rulemaking.

- First, one congressional representative complained that the ATF was exceeding its statutory authority in requiring FFLs to issue safety information. The ATF rejected this claim, finding that not only was the ATF well within its statutory authority, but precedent for such action included the extensive notices provided to consumers on ATF Form 4473, the form completed by prospective firearms purchasers.[43]

  In fact, the ATF continues to provide important notices to firearms purchasers in ATF Form 4473, and general information in additional ATF publications addressing, among other things, consumer warnings addressing guns and misdemeanor crimes of violence,[44] mental health prohibitors,[45] and straw purchasing.[46] This proposal—like its

[41] 27 C.F.R. § 478.103(e); US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF I 5300.1," revised April 2004, https://regulations.atf.gov/static/atf_eregs/5300_1.pdf.
[42] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF I 5300.2 - Youth Handgun Safety Act Notice," revised July 2017, https://www.atf.gov/firearms/docs/guide/atf-i-53002-—-youth-handgun-safety-act-notice/download.
[43] *See* Posting of Signs and Written Notification to Purchasers of Handguns, 63 Fed. Reg. 37740 (July 13, 1998) (to be codified at 27 C.F.R. pt. 178); US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF Form 4473 - Firearms Transaction Record Revisions," revised May 2020, https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions.
[44] US Department of Justice, "Information Needed to Enforce the Firearm Prohibition: Misdemeanor Crimes of Domestic Violence," November 2007, http://www.ncdsv.org/images/MCDV_Info%20needed%20to%20enforce%20the%20firearm%20prohibition.pdf.
[45] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF I-3310.4 — Federal Firearms Prohibition under 18 U.S.C. § 922(g)(4) - Persons Adjudicated as a Mental Defective or Committed to a Mental Institution," revised May 2009, https://www.atf.gov/resource-center/docs/guide/atf-i-33104-—-federal-firearms-prohibitions-under-18-usc-§-922g4-–/download.
[46] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Don't Lie for the Other Guy," accessed October 16, 2020, https://www.atf.gov/firearms/dont-lie-other-guy.

predecessor—would mandate that FFLs post and make available critical safety information to provide critical notice of the risks and responsibilities of gun ownership.

- Second, other commenters complained about the president's memorandum and the NPRM language that proposes to warn that "***[H]andguns* are a leading** contributor to juvenile violence and fatalities." The commenters argued "that it was the "perpetrators of the shooting, not the handguns used in the shooting, that contributed to juvenile violence and fatalities." The ATF responded by changing the language to qualify "handguns" as follows: "***The misuse of handguns*** is a leading contributor to juvenile violence and fatalities**.**" This change is particularly instructive in crafting future consumer protection language.

- Lastly, another commenter complained that the posting did not adequately address the exemptions in section 922(x) to the general prohibition on juvenile handgun possession. The ATF's response was to recite the complete and lengthy statutory provisions addressing juvenile exemptions in the consumer brochure ATF I 5300.2.[47]

In sum, the June 11, 1997 Clinton memorandum provides a highly instructive model—applicable to a modern executive memorandum—directing the ATF to issue similar regulations requiring broader safety information about the risks and responsibilities attendant to firearms purchases.

Obama administration action

In 2013, the Bureau of Justice Assistance (BJA) awarded $1 million to the National Crime Prevention Council (NCPC) to support the development of a national public education campaign on the subject of responsible gun ownership and safe gun storage.[48] A 2017 government accountability report surveyed this and other programs aimed at increasing public awareness about the safe storage of guns.[49] It found that such programs had not been extensively studied. The programs studied focused on the distribution efforts of locking devices and physician consultations of firearm storage with patients.

Trump administration action

[47] *See* US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF I 5300.2 - Youth Handgun Safety Act Notice," revised July 2017, https://www.atf.gov/firearms/docs/guide/atf-i-53002-—-youth-handgun-safety-act-notice/download.
[48] Dep't of Justice, "Department of Justice Awards $1 Million to the National Crime Prevention Council to Support Gun Safety Campaign," March 7, 2013, https://www.justice.gov/opa/pr/department-justice-awards-1-million-national-crime-prevention-council-support-gun-safety.
[49] Government Accountability Office, "Personal Firearms: Programs that Promote Safe Storage and Research on Their Effectiveness," September 2017, https://www.gao.gov/assets/690/687239.pdf.

The Trump administration has taken no specific action with respect to this issue, other than the routine reissuance of documents to include the 2017 revision of ATF I 5300.2, the information provided to gun purchasers on juvenile handgun possession.[50]

The past year has seen a surge in NICS background checks. The highest number of NICS firearm background checks in a single day and the highest number in a single week since November 30, 1998 (when NICS became operational), both occurred in March 2020, at the beginning of the COVID-19 pandemic.[51] Indeed, five of the 10 highest days and eight of the 10 highest weeks of NICS background checks occurred in 2020.[52] Even in January and February 2020, there were 19% and 18% increases, respectively, in the number of NICS background checks on gun purchases, compared to January and February 2019.[53] In March 2020, however, there was an 85% increase in the number of NICS background checks on gun purchases compared to March 2019. And, astoundingly, in June and July 2020, there were 148% and 135% increases, respectively, in the number of NICS background checks on gun purchases, compared to June and July 2019. Although the increase in NICS background checks on gun purchases has decreased substantially in August and September, September 2020 still had a 66% increase compared to September 2019. In total, 14,848,326 NICS background checks on gun purchasers were conducted from January 1, 2020, through September 30, 2020, which represents a 95% increase compared to the previous year.[54]

One preliminary study found that, in California, first-time buyers made up more than 40% of gun sales since the start of the pandemic.[55] These new gun owners may be uninformed about their responsibilities as gun owners, increasing the risk of gun violence.

III. Proposed action

The next administration should issue an NPRM amending the ATF's rule, which requires FFLs to post certain safety information clearly in their stores and distribute it to consumers in an updated brochure. Among other things, the new safety information should include a link to a new page on the ATF's website containing more extensive explanatory information.

[50] *Id*.
[51] US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Top 10 Highest Days/Weeks," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_top_10_highest_days_weeks.pdf/view.
[52] *Id*. Eight of the 10 highest days of NICS background checks since NICS became operational in November 1998 have occurred during the Trump administration (2017 to present).
[53] US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Month/Year by State/Type," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state_type.pdf/view. Calculations include any NICS check conducted by an FFL in relation to the application to purchase a firearm.
[54] *Id.*
[55] Nicole Kravitz-Wirtz et al., "Violence, firearms, and the coronavirus pandemic: Findings from the 2020 California Safety and Wellbeing Survey," (2020), doi: https://doi.org/10.1101/2020.10.03.20206367 (This article is in preprint and has not been peer-reviewed).

This executive action is a logical expansion of current law requiring FFLs to provide consumer product safety information on juvenile handgun possession and would increase compliance with the GCA. This action would have a broader scope than the prior rule, in that it would address a wider range of the dangers of the misuse of purchased guns, and, consequently, a greater number of gun owner responsibilities. Lastly, it would update the posting and distribution requirements that currently only address youth possession of guns.

A. Substance of the new rule

The new regulation should provide clear, precise language for FFL postings and distributions addressing the risks and responsibilities of gun ownership. While other ATF safety information in large part details the statutory prohibitions and legal requirements applicable to gun possession, the proposed FFL posts should provide commonsense language to consumers outlining the attendant risks and responsibilities.

> **YOUR OBLIGATION TO PREVENT THE DEADLY MISUSE OF GUNS**
>
> **You cannot buy a gun for someone else.** Straw purchasing is illegal. Don't buy a gun for someone else—your gun may be traced to a violent crime.
>
> **You should properly secure your gun.** Safer storage of firearms could prevent 30% of youth suicides and unintentional deaths. You can help prevent suicides, school shootings, and other tragedies through safe gun storage.
>
> **You cannot give your gun to anyone under the age of 18.** Young people commit gun crimes in high numbers. Don't give your gun to a teen unless clearly permitted by law.
>
> **You cannot give your gun to a domestic abuser or other prohibited person.** When an abusive partner has access to a gun, a woman is five times more likely to die. Don't give your gun to a domestic violence offender or any other person prohibited from having a gun.
>
> **You should report lost or stolen guns.** One gun is stolen from a private gun owner every two minutes—many of which are later trafficked or used in violent crime.
>
> **SEE ATF.GOV [insert QR code and/or specific url] FOR MORE DETAILED INFORMATION ABOUT THE RESPONSIBILITIES OF GUN OWNERSHIP.**

This proposal recommends requiring FFLs to post this information and an updated version of ATF I 5300.2 at their premises. Both the posted sign and the updated brochure should include a QR code or url to a new page on the ATF's website with background material explaining these warnings in greater detail.

This proposal would replace the current posting and distribution requirements under the 1998 rule. Notably, the 1998 rule required FFLs to *distribute* to each consumer a document different than that which was posted; specifically, one that provided a complete recitation of section 922(x), to include the statutory exceptions to unlawful youth possession.[56] The ATF required this consumer distribution in response to NPRM commenters' complaints that the store posting did not enumerate each of the particular exceptions.

In 1997, however, when the current regulation was proposed, the internet did not allow for relatively easy public access to statutory provisions, penalties, exemptions, and similar information. Today, expanded internet availability allows consumers ready access to atf.gov for detailed information about the exceptions to unlawful youth gun possession, and to a host of other applicable provisions. This ready internet access obviates the need for the extensive material in the current printed brochure, which recites the section 922(x) provisions, penalties, and exceptions. Instead, the ATF should update and simplify this brochure so it is similar to the posted sign described above.

In addition, the ATF's current website is noticeably devoid of information about the responsibilities of gun ownership; instead, it focuses on services for the gun industry. The ATF should create a new webpage with detailed, clearly accessible information explaining the legal requirements applicable to gun owners, including obligations regarding gun sales and transfers; and people prohibited under federal law from possessing firearms. The webpage may also make recommendations about gun storage and provide the reasoning for the warnings listed above. We suggest that the NPRM should require the new signage and printed brochure to include a QR code that directs consumers to this new ATF webpage.

The consumer warnings proposed above are crafted so that they are clear, concise, and well-grounded in the specific risks and responsibilities they seek to convey. For example, the warnings are based on decades of studies and research assessing the risks and consequences of firearms misuse, and evidence-based findings regarding critical firearm owner responsibilities.

Information provided to consumers on the ATF's website would provide more specific data about the risks and responsibilities of gun ownership, to include the dangers of giving a gun to a domestic abuser or juvenile. For example, the new webpage might mention that young people commit gun offenses in high numbers: youth ages 10 to 21 made up 28% of all arrests for weapons offenses in 2017.[57]

[56] *See* US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF I 5300.2 - Youth Handgun Safety Act Notice," revised July 2017, https://www.atf.gov/firearms/docs/guide/atf-i-53002-—-youth-handgun-safety-act-notice/download.

[57] Giffords Law Center to Prevent Gun Violence, "Minimum Age to Purchase & Possess," accessed October 16, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/#footnote_4_5627 (citing Federal Bureau of Investigation's 2017 data on arrests by age and offense charged).

As noted above, straw purchases are illegal, but this fact is often disregarded. A required public posting at FFL premises, along with the distribution of an updated brochure and a detailed explanation on ATF's website, would provide vetted, concrete consumer safety data to gun buyers on the prevalence and consequences of straw purchasing, including the applicable criminal penalties, and the real-life consequences of gun violence.[58]

When President Clinton issued his 1997 Memorandum, Congress had not yet enacted a federal safe storage law. Today, 18 U.S.C. § 922(z) requires FFLs to provide a secure gun storage or safety device to consumers purchasing a handgun. Still, as indicated above, safe storage practices and gun theft continue to pose serious public safety concerns, and consumers should be warned about the grave consequences of their failure to implement safe storage practices; the consequences include school shootings, youth suicides, and unintentional deaths among children, as described above.

One of the gun owners' most important responsibilities is to ensure against the loss or theft of their guns. Putting gun owners on notice that their guns may be lost or stolen and that this situation requires law enforcement involvement, would strengthen the existing legal system's approach to preventing the use of lost or stolen guns in crime. Requiring FFLs to post the warning described above, and ensuring that the ATF includes information regarding lost and stolen guns on its website are, therefore, appropriate steps the ATF should take to improve public safety.

B. Process

The administration must go through the NCRM process under the APA to promulgate rules requiring FFLs to post notices and distribute information regarding gun risks and responsibilities.[59]

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then, the agency must accept public comments on the proposed rule for a period of at least 90 days.[60] Comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting proposals, or by modifying the proposed rule to reflect the input.

[58] *See e.g.,* Giffords Law Center to Prevent Gun Violence, "Trafficking & Straw Purchasing," accessed October 16, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/.
[59] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[60] 18 U.S.C. § 926(b) (requiring a 90-day comment period for ATF rule-making).

Once this process is complete, the final rule may be published in the Federal Register along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

C. Legal justification

The attorney general has the power to prescribe "such rules and regulations as are necessary to carry out the provisions of" the GCA.[61] In turn, the attorney general has delegated authority to issue rules and regulations to the ATF related to the GCA.[62] In order for the provisions of the GCA to be effectively enforced, gun owners must be aware of them and understand their rationale. The safety warnings that would be required by the proposed rule are necessary for the full enforcement of the GCA. In addition, the 1997 presidential memorandum and 1997–1998 rulemaking provide clear precedent for the ATF's authority to issue an NPRM proposing to update these safety warnings.

IV. Risk analysis

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency's statutory authority; violating a constitutional right; not following rulemaking procedures; or arbitrary or capricious agency action.[63] The Supreme Court has made clear that laws that impose conditions and qualifications on the commercial sale of firearms are presumptively lawful.[64] Therefore, constitutional challenges are unlikely to succeed. Other challenges are discussed in further detail below.

ATF's statutory authority

ATF regulations already require FFLs to post warnings on their business premises and distribute associated information to consumers. This regulation would only change the content of these warnings. As noted above, there is clear precedent for these warnings. In addition to the current regulation, the ATF has provided similar warnings about other prohibited persons in the past. Below are two examples.

- The ATF and the Department of Justice issued guidance on firearms and misdemeanor crimes of domestic violence (MCDVs) in a November 2007 pamphlet.[65]

[61] 18 U.S.C. § 926(a).
[62] 28 C.F.R. §§ 0.130, 0.131.
[63] 5 U.S.C. § 706.
[64] *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[65] US Department of Justice, "Information Needed to Enforce the Firearm Prohibition: Misdemeanor Crimes of Domestic Violence," November 2007, http://www.ncdsv.org/images/MCDV_Info%20needed%20to%20enforce%20the%20firearm%20prohibition.pdf.

- The ATF issued guidance on prohibited persons subject to disqualifying mental-health issues in ATF Information 3310.4.[66]

Adding similar warnings to the posted sign and printed brochure would build directly off the GCA's prohibitions against transferring a gun to a person in a prohibited category.[67] Notably, the GCA only imposes criminal penalties on people who "knowingly" violate this provision.[68] Ensuring that gun purchasers have some knowledge of these requirements is essential to enforcing them. While requiring a universal background check is the most important way to address this problem,[69] ensuring that gun purchasers know that they cannot legally transfer guns to people if they have "reasonable cause to believe" they are prohibited from possessing guns,[70] would help deter transactions that might fuel gun violence.

Informing gun purchasers that straw purchases is illegal serves a similar purpose. As noted above, the form that gun purchasers must fill out already informs them of this fact. Far from being redundant, however, the proposed regulation would correct existing confusion regarding the issue of whether a straw purchase is legal when the actual buyer is eligible to purchase firearms. The Supreme Court directly addressed this issue in the *Abramski v. U.S.* decision.[71] Consequently, the time is ripe for the ATF to take the necessary action to increase public awareness of this legal requirement.

As noted above, federal law generally prohibits anyone from transferring a handgun to someone under the age of 18.[72] Federal law also encourages the safe storage of firearms, to prevent children and teenagers from having access to firearms by ensuring that gun dealers transfer safety devices alongside handguns.[73] Informing gun purchasers that they should keep their guns properly stored is the missing piece necessary to make these legal provisions effective.

Similarly, informing gun purchasers that they should report lost or stolen guns to law enforcement is essential to the GCA's approach to stolen guns and the ATF's gun tracing abilities, as described above. The ATF already has a webpage describing the actions a gun owner should take in case his or her gun is lost or stolen.[74] Reminding gun purchasers of this

[66] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF I-3310.4 — Federal Firearms Prohibition under 18 U.S.C. § 922(g)(4) - Persons Adjudicated as a Mental Defective or Committed to a Mental Institution," revised May 2009, https://www.atf.gov/resource-center/docs/guide/atf-i-33104-—-federal-firearms-prohibitions-under-18-usc-§-922g4-–/download.
[67] 18 U.S.C. § 922(d), (g), (n).
[68] 18 U.S.C. § 924(a)(2).
[69] Giffords Law Center to Prevent Gun Violence, "Universal Background Checks," accessed October 20, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/universal-background-checks/.
[70] 18 U.S.C. § 922(d).
[71] *Abramski v. U.S.,* 573 U.S. 169 (2014).
[72] Pub. L. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 922(x)).
[73] 18 U.S.C. § 922(z).
[74] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Report Firearms Theft or Loss," accessed October 16, 2020, https://www.atf.gov/firearms/report-firearms-theft-or-loss.

recommendation via a concise sign and brochure is a crucial step the ATF can take to ensure that the ATF's gun tracing can yield effective results.

The ATF already requires FFLs to post notices on their business premises and provide a printed brochure to consumers. The notices proposed here are necessary for the ATF to effectively enforce our federal gun laws. A court is therefore not likely to strike down a regulation requiring FFLs to provide these notices as outside the ATF's statutory authority.

Procedural challenges

By following the NCRM process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.[75]

In particular, the ATF should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.[76] The agency must address the concerns raised in all non-frivolous and significant comments.[77] The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.[78] By reviewing the comments submitted to the 1997 proposal, the next administration can produce a proposed rule that anticipates the types of comments a new NPRM may receive.

For example, the commenters to the 1997 rule complained that the president's memorandum language, "*Handguns are a leading contributor to juvenile violence and fatalities,*" constituted an

[75] *See* Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," *N.C.L. Rev.* 92 (2014): 721, 737-38 (describing "first" and "second" order inquiries into an agency's decision making). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

[76] 5 U.S.C. § 553(c).

[77] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).

[78] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).

inappropriate “value judgement[], and argued that it was the perpetrators of the shooting, not the handguns used in the shooting, that contributed to juvenile violence and fatalities.”[79]

While the ATF objected to the premise of the commenter’s objections, the ATF did agree with a commenter “who suggested that this provision could be clarified... For example, Sturm, Ruger & Company suggested that the language be modified to refer to the misuse of illegally possessed firearms.”[80] As a result, the ATF modified the final language to read as follows: “*The misuse of handguns is a leading contributor to juvenile violence and fatalities*."[81]

In sum, the NPRM must choose its words—warning firearms consumers about gun risks and responsibilities—carefully to reduce the likely inevitable challenges, such as those made in 1997.

Arbitrary or capricious challenge under the APA

A court may invalidate an agency action or conclusion if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”[82]

The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, thus establishing a nexus between the facts and the agency’s choice.[83] Further, when a challenged rule reverses or rescinds an existing rule, an agency must provide a “reasoned analysis” in which it acknowledges a change in policy and provides a “good reason” for the proposed change.[84] However, the additional “reasoned analysis” requirement does not automatically subject rule reversals to a higher level of scrutiny.[85]

Therefore, to withstand a potential judicial challenge that the proposed rule is an arbitrary and capricious action by the ATF, the agency must be able to demonstrate that it considered all factors pertinent to the issue in its decision-making and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy based on sound evidence, empirical or otherwise. Second, it should explain thoroughly why any anticipated industry concerns are outweighed by the public safety factors outlined above.

[79] Posting of Signs and Written Notification to Purchasers of Handguns, 63 Fed. Reg. 37740, 37741 (July 13, 1998) (to be codified at 27 C.F.R. pt. 178).
[80] *Id*.
[81] *Id*.
[82] 5 U.S.C. § 706(2)(A).
[83] *See Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).
[84] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[85] *Id.* at 515.

A. Facts and data rationale

The first component of the framework, which is applicable to all rulemaking, is the requirement to consider all relevant factors and data, and to articulate a satisfactory explanation that gives "a rational connection" between the findings and the decision.[86] There are three primary factors implicated in the policy at issue: public health and safety, administrative burden, and regulatory consistency.

i. Public health and safety

The ATF can easily establish a rational connection between the required consumer product safety warnings, and public health and safety. According to a 2014 Law Center and Americans for Responsible Solutions report:

> Many consumer products are sold with warning labels or other forms of safety information in order to reduce the risk that consumers will be injured or killed through the use of these products. Warning labels and accompanying safety information have been shown to increase safe behaviors by consumers who are handling the products. Yet, federal law does not require or even encourage the gun industry to include sufficient safety information with firearms.
>
> More specifically, firearms and ammunition are some of the only products specifically exempted from the requirements of the federal Consumer Product Safety Act, which imposes health and safety standards on consumer products. As a result, the Consumer Product Safety Commission lacks the jurisdiction to require firearms and ammunition to be accompanied by safety information.[87]

Under this proposal, the ATF would update and expand its safety rule to require FFLs to warn gun buyers about the wide range of risks and responsibilities of purchased firearms.

Firearms misuse poses clear and present dangers, as demonstrated by the cited studies, research, and any additional background material that the ATF may provide on the new webpage. Gun owners face certain responsibilities to mitigate these dangers, and the point-of-sale is a crucial moment in ensuring that gun owners are aware of these responsibilities.

ii. Administrative burden

This proposal would require the ATF to (1) ensure that FFLs have access to the required sign and brochure, and (2) create the new webpage. The costs would be clearly outweighed by the actual savings in public health and safety of the change in policy.

[86] *State Farm*, 463 U.S. at 43.
[87] *See* Americans for Responsible Solutions & Law Center to Prevent Gun Violence, "Commonsense Solutions: State Gun Laws to Protect Kids from Unintended Shootings," June 2015, https://giffords.org/lawcenter/toolkit/law-center-and-americans-for-responsible-solutions-release-commonsense-solutions-toolkit-on-protecting-kids-from-unintended-shootings/.

iii. Regulatory consistency

This proposal is consistent with the 1997–1998 regulations described above. The undeniable prevalence of today's gun crime and violence is at a minimum a reasonable basis to compel the expansion of consumer warnings.

B. Reasoned analysis

The second component of this framework is the "reasoned analysis" requirement. There is no burden on the agency to persuade the court that a new policy is superior, but only to acknowledge the change in policy direction, and to point to rational policy justifications for doing so.[88] Here, the expanded requirement for consumer safety warnings at FFLs for gun consumers is widely supported by a host of data and studies, which clearly provide a rational basis for the proposal.

[88] *Fox*, 556 U.S. at 515.

RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Ban the Importation of Certain Semi-Automatic Weapons
Date: November 2020

Recommendation: Issue new criteria to enforce the sporting-purposes requirement under the Gun Control Act and ban the importation of semi-automatic assault rifles and handguns.

I. Summary

Description of recommended executive action

The Gun Control Act of 1968 (GCA) gives the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) the authority to control the importation of firearms into the United States.[1] Specifically, the GCA provides that the ATF "shall" authorize an application for firearm importation if the firearm model is "generally recognized as particularly suitable for or readily adaptable to sporting purposes."[2] Known as the sporting purposes test, this requirement tasks the ATF with periodically evaluating firearm models for their potential uses. The GCA provides little explicit guidance about what constitutes a "sporting purpose." Instead, the law delegates this definitional task to the ATF.[3]

Despite the rapid development of new firearms, the ATF has not conducted a comprehensive review of semi-automatic assault rifles and handguns under the sporting purposes test since the Clinton administration examined the question over 20 years ago. According to a 2011 report by three US Senators, "Since the Clinton Administration's efforts, the Gun Control Act of 1968's prohibition against non-sporting firearms has not been aggressively enforced, and many military-style, non-sporting rifles have flowed into the US civilian market."[4]

In order to update guidance on semi-automatic assault rifles and handguns, the next administration should conduct an updated examination of the sporting purposes test and issue new criteria to enforce the sporting purposes requirement. As with similar examinations in the

[1] This authority has been delegated to the Director of the ATF by the Attorney General. Prior to ATF's transfer from the Department of the Treasury to the Department of Justice on January 24, 2003, the authority resided with the Treasury Secretary. *See Springfield, Inc. v. Buckles*, 292 F.3d 813, 815 (D.C. Cir. 2002).

[2] 18 U.S.C. § 925(d)(3).

[3] *See* S. Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968) (stating that the GCA affords the Secretary of the Treasury "fairly broad discretion in defining and administering the import prohibition.").

[4] Senators Dianne Feinstein, Charles Schumer & Sheldon Whitehouse, "Halting U.S. Firearms Trafficking to Mexico," Report to the U.S. Senate Caucus on Int'l Narcotics Control, June 2011, https://www.feinstein.senate.gov/public/_cache/files/b/e/beaff893-63c1-4941-9903-67a0dc739b9d/E735381490CD5962A57DE3BB6DDBBE6C.061011firearmstraffickingreport.pdf.

past, the administration should order that all pending and future applications for importation of these rifles and handguns not be acted upon until completion of the review, and that outstanding permits for importation of the rifles be suspended for the duration of the review period.

Overview of process and time to enactment

As in the past, the ATF should establish a working group to conduct the evaluation. The study should take roughly 90–120 days, during which time importation of the rifles being evaluated should be suspended. Neither the temporary suspension nor the issuance of new criteria would constitute a rulemaking, and as such, the ATF will not need to go through the Administrative Procedure Act's (APA) notice-and-comment rulemaking (NCRM) proceedings.

To comply with best practices for agency guidance, the ATF should acknowledge that such criteria does not have legislative authority, and should include details on how the public may submit a complaint seeking the rescission or modification of the guidance. Once finalized, the document should be published on the ATF's website.

II. Current state

The sporting purposes test and early ATF applications

The sporting purposes test was created as part of the GCA of 1968.[5] The test provides that the ATF "shall" authorize an application for firearm importation into the United States if the firearm model is "generally recognized as particularly suitable for or readily adaptable to sporting purposes."[6] The purpose of this provision was to allow for the importation of quality sporting firearms, while banning the importation of firearms that were the "greatest aggravation to big city crime."[7]

The GCA did not provide a definition of what constitutes a sporting purpose; instead, it gave the secretary of the treasury (now the attorney general) broad discretion to determine what firearms have such a purpose.[8]

Following enactment of the GCA, the Treasury secretary established a firearms evaluation panel to provide guidelines for implementation of the sporting purposes test. This panel was composed of representatives from the military, law enforcement, and the firearms industry. The panel focused its attention on handguns and recommended the adoption of factoring criteria to evaluate the various types of handguns. These factoring criteria are based upon such considerations as overall length of the firearm, caliber, safety features, and frame construction.

[5] Gun Control Act of 1968 (P.L. 90-618, 82 Stat. 1213).
[6] 18 U.S.C. § 925(d)(3).
[7] S. Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968).
[8] *Id.*

An evaluation sheet (ATF Form 4590) was developed thereafter by the ATF and put into use for evaluating handguns pursuant to the "sporting purposes" test.[9]

The 1968 Firearms Evaluation Panel did not propose criteria for evaluating rifles and shotguns. Other than surplus military firearms, which Congress addressed separately, long guns being imported prior to 1968 were generally conventional rifles and shotguns specifically intended for sporting purposes. Thus, in 1968, there was no cause to develop criteria for evaluating the sporting purposes of rifles and shotguns.

The first time the ATF undertook a meaningful analysis under the sporting purposes test was in 1984. At that time, the ATF was faced with a new breed of imported shotgun. It was clear that the historical assumption that all shotguns were sporting was no longer viable. Specifically, the ATF sought to determine whether the Striker-12 shotgun was suitable for sporting purposes. This shotgun is a military/law enforcement weapon initially designed and manufactured in South Africa for riot control. When the importer was asked to provide evidence of sporting purposes for the weapon, the ATF was provided information that the weapon was suitable for police/combat style competitions. The ATF determined that this type of competition did not constitute sporting purposes under the statute, and that this shotgun was not suitable for traditional sporting purposes, such as hunting, and trap and skeet shooting. Accordingly, importation was denied.[10]

Thereafter, in 1986, the Gilbert Equipment Company requested the USAS-12 shotgun be classified as a sporting firearm. After examination and testing of the weapon, the ATF found it was a semi-automatic version of a selective-fire military-type assault shotgun. In this case, the ATF determined that, due to its weight, size, bulk, designed magazine capacity, configuration, and other factors, the USAS-12 was not particularly suitable for or readily adaptable to sporting purposes. Again, the ATF refused to recognize police/combat competitions as sporting purposes. The shotgun was reviewed on the basis of its suitability for traditional shotgun sports of hunting, and trap and skeet shooting, and its importation was denied. This decision was upheld in federal court.[11]

1989 ATF study

In 1989, following the killing of five children in a California schoolyard by a gunman with a semi-automatic weapon, President George H. W. Bush announced he would conduct a review to determine whether "semiautomatic assault rifles" met the sporting-purposes test.[12]

Before conducting the review, on March 14, 1989, the ATF announced it was "suspending, effective immediately, the importation of several makes of assault-type rifles, pending a decision as to whether these weapons meet the statutory test that they are of a type generally

[9] Daniel Black, "Report and Recommendation on the Importability of Certain Semiautomatic Rifles," ATF, July 6, 1989, https://www.atf.gov/file/61761/download.

[10] *Id.*

[11] *Gilbert Equipment Company, Inc. v. Higgins,* 709 F. Supp. 1071 (S.D. Ala. 1989).

[12] ATF 1989 report supra note 9.

recognized as particularly suitable for or readily adaptable to sporting purposes."[13] The announcement stated the ATF would not approve, until further notice, the importation of AKS-type weapons, Uzi carbines, FN/FAL-type weapons, FN/FNC-type weapons and Steyr Aug semi-automatic weapons. On April 5, 1989, the suspension was expanded to include all similar assault-type rifles.[14]

On July 6, 1989, the ATF completed its study of semi-automatic assault rifles and determined that:

> [S]emiautomatic assault rifles were designed and intended to be particularly suitable for combat rather than sporting applications. While these weapons can be used, and indeed may be used by some, for hunting and target shooting, we believe it is clear that they are not generally recognized as particularly suitable for these purposes...Therefore, it is the finding of the working group that the semiautomatic assault rifle is not a type of firearm generally recognized as particularly suitable for or readily adaptable to sporting purposes and that importation of these rifles should not be authorized under 18 U.S.C. § 925(d)(3).[15]

In the study, the ATF deemed eight physical features "military configurations":

- folding/telescoping stocks
- separate pistol grips
- ability to accept a bayonet
- flash suppressors
- bipods
- grenade launchers
- night sights
- detachable magazines

The ATF took the position that any of these military configuration features, other than the ability to accept a detachable magazine, would make a semiautomatic rifle not importable. Based on this finding, President Bush permanently banned importation of the 43 guns analyzed by the ATF.

1998 ATF study

In response to the report, gun manufacturers removed many of the military-style features from the weapons examined in 1989 (except for the ability to accept detachable magazines).[16] Once

[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] ATF, "Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles," April 1998, https://www.atf.gov/resource-center/docs/guide/department-treasury-study-sporting-suitability-modified-semiautomatic/download.

these designs were modified, the ATF allowed for the importation of these rifles.[17] Significantly, most of the modified rifles not only still had the ability to accept a detachable magazine but, more specifically, still had the ability to accept a detachable large capacity magazine that was originally designed and produced for the military assault rifles from which they were derived.

In 1998, in response to gun manufacturers increasingly exploiting these loopholes, the Clinton administration examined 58 semi-automatic assault rifles under the sporting purposes test—this time focusing on the modified rifles that were a product of the 1989 report.[18]

While the study was conducted, the ATF put in place a 120-day temporary suspension on the importation of modified semi-automatic rifles. The 1998 study affirmed the findings of the 1989 study in agreeing with the seven disqualifying features the ATF had previously identified. However, the review also found that "the ability to accept a detachable large capacity magazine originally designed and produced for a military assault weapon should be added to the list of disqualifying military configuration features identified in 1989."[19] Based on these updated criteria, the Clinton administration banned the import of additional firearms.

2011 ATF study

In 2011, the ATF conducted another study to assess whether certain shotguns were importable under the sporting purposes test.[20] Past studies focused primarily on automatic rifles, and as a result, there was relatively limited guidance available to the public about which shotguns could not be imported under the GCA. The 2011 report aimed to fill that gap.[21]

The 2011 report first affirmed the 1998 and 1989 reports' long-standing conclusion that *sporting purposes* should be interpreted narrowly.[22] As the report noted:

> Firearms are prohibited from importation (section 922(l)), with four specific exceptions (section 925(d)). A broad interpretation permitting a firearm to be imported because someone may wish to use it in some lawful shooting activity would render the general prohibition of section 922(l) meaningless.[23]

The 2011 report then identified 10 firearm features that would render a shotgun not importable:

- folding, telescoping, or collapsible stocks
- bayonet lugs

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] ATF, "Study on the Importability of Certain Shotguns," U.S. Department of Justice, January 2011, https://www.atf.gov/resource-center/docs/january-2011-importability-certain-shotgunspdf/download.
[21] *Id.*
[22] *Id.*
[23] *Id.*

- flash suppressors
- magazines over five rounds or a drum magazine
- grenade-launcher mounts
- integrated rail systems (other than on top of the receiver or barrel)
- light-enhancing devices
- excessive weight (greater than 10 pounds for 12 gauge or smaller)
- excessive bulk (greater than three inches in width and/or greater than four inches in depth)
- forward pistol grips or other protruding parts designed or used for gripping the shotgun with the shooter's extended hand[24]

These features, while not exhaustive, were singled out because the report concluded they were most appropriate for law enforcement or military use, and therefore not particularly suitable for nor readily adaptable to generally recognized sporting purposes.[25]

Enactment of the shotgun rider

In response to the 2011 study, Congress included a rider in its yearly appropriations bill to nullify the 2011 report and enable the importation of various military-style shotguns that the 2011 report prohibited.[26] The rider provided that:

> None of the funds made available by this Act may be used to pay the salaries or expenses of personnel to deny, or fail to act on, an application for the importation of any model of shotgun if: (1) all other requirements of law with respect to the proposed importation are met; and (2) no application for the importation of such model of shotgun, in the same configuration, had been denied by the Attorney General prior to January 1, 2011, on the basis that the shotgun was not particularly suitable for or readily adaptable to sporting purposes.[27]

Since the rider was first introduced, it has been added to appropriations bills in subsequent years. It can be read as preventing the ATF from using the sporting purposes test to prohibit the importation of military-style shotguns.[28] However, the limitation does not apply to rifles or handguns.

III. Proposed action

[24] *Id.*
[25] *Id.*
[26] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 541, 125 Stat. 552, 639 (2011).
[27] *Id.*
[28] *See e.g.,* Consolidated Appropriations Act, 2020, Public Law 116–93 (2020), tit. V, § 539. Future budgets should attempt to remove this dangerous rider.

Despite the rapid development of new firearms, the ATF has not conducted a comprehensive review of semi-automatic assault rifles or handguns under the sporting purposes test since the Clinton administration examined the question over 20 years ago. According to a 2011 report by three US Senators, "Since the Clinton Administration's efforts, the Gun Control Act of 1968's prohibition against non-sporting firearms has not been aggressively enforced, and many military-style, non-sporting rifles have flowed into the U.S. civilian market."[29]

In order to update guidance on semi-automatic assault rifles and handguns, the next administration should conduct an updated examination of the sporting purposes test and issue new criteria to enforce the sporting purposes requirement. As with similar examinations in the past, the administration should order that all pending and future applications for importation of these rifles and handguns not be acted upon until completion of the review, and that outstanding permits for importation of the firearms be suspended for the duration of the review period.

A. Substance and scope of review

The ATF should identify updated criteria for determining whether semi-automatic assault rifles and handguns have a "sporting purpose" and apply these criteria to the firearms under examination. In conducting such a study, there are several important foundational questions the ATF must first address.

- **Meaning of "sporting purpose"*:*** The meaning of the term "sporting purpose" will necessarily impact the "sporting" classification of any rifle features. For example, military rifles, or rifles with common military features that are unsuitable for traditional shooting sports, may be considered "particularly suitable for or readily adaptable to sporting purposes" if military shooting competitions are considered a generally recognized sporting purpose. As such, the ATF must first examine the meaning of the term. In doing so, the ATF should consider the historical context of "sporting purpose" and that Congress originally intended a narrow interpretation of sporting purpose under § 925(d)(3).

- **Types of weapons:** The ATF should consider all semi-automatic assault rifles and handguns in determining which firearms to study. At the very least, the study should examine all semi-automatic firearms based on the AK47, FN-FAL, HK 91 and 93, Uzi, and SIG SG550 designs, as was the case in 1998.[30]

- **New criteria:** The ATF should update the criteria that would render a semi-automatic assault rifle or handgun not importable. The criteria should consist of the following:

[29] Senators Dianne Feinstein, Charles Schumer & Sheldon Whitehouse, "Halting U.S. Firearms Trafficking to Mexico," Report to the U.S. Senate Caucus on Int'l Narcotics Control, June 2011, https://www.feinstein.senate.gov/public/_cache/files/b/e/beaff893-63c1-4941-9903-67a0dc739b9d/E735381490CD5962A57DE3BB6DDBBE6C.061011firearmstraffickingreport.pdf.
[30] ATF 1998 Report supra note 16.

- originally designed for military combat or law enforcement
- commonly used in the deadliest mass shootings in America[31]
- customizable to accommodate military features, including forward trigger grips
- functionally equivalent to weapons that have failed the sporting purposes test
- closely associated with gun and drug trafficking and other serious crimes, as reflected in ATF trace data, including international trace data
- marketed as equivalent or virtually equivalent to makes and models suitable for military and/or law enforcement

Crafted this way, rather than as a feature-focused list from previous reports, the proposed new criteria should be less circumventable by the gun industry. Following the 1989 report, many of the problematic military-style features identified were removed from the design of the firearms.[32] This, however, did not make the firearms fit for sporting purposes, and nine years later, the ATF again had to prohibit the importation of the modified firearms.[33] The new criteria outlined above are framed in purpose-based language to try to avoid these problems from recurring in this iteration of the sporting purposes test.

B. Process

Temporary suspension

A court is likely to uphold a temporary suspension of firearm imports while the ATF reassesses its sporting purpose test. In the past, courts have held this temporary suspension does not constitute a rulemaking, and as such, the NCRM process is not necessary.[34]

However, it is possible that the length of the suspension could raise issues if it is too long. In other contexts, courts have found that while an agency can reconsider a prior decision, it must do so within a "reasonable time."[35] In the present context, the Eleventh Circuit in *Gun South*

[31] An analysis of public mass shootings resulting in four or more deaths found that more than 85 percent of such fatalities were caused by assault rifles. *See* Charles DiMaggio et al., "Changes in US Mass Shooting Deaths Associated with the 1994–2004 Federal Assault Weapons Ban: Analysis of Open–source Data," *Journal of Trauma and Acute Care Surgery* 86, no. 1 (2019).

[32] ATF 1998 Report supra note 16.

[33] *Id.*

[34] *See Gun S., Inc. v. Brady,* 877 F.2d 858, 865 (11th Cir. 1989).

[35] *See e.g., Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193–94 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions . . . . [H]owever, an agency may undertake such reconsideration only if it does so within a reasonable time period . . . ."); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) ("Quite consistently, we have held that absent contrary legislative intent or other affirmative evidence, this court will sustain the reconsidered decision of an agency, as long as the administrative action is conducted within a short and reasonable time period."); *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 612–13 (N.D. Cal. 1992) ("The determination of "a short and reasonable period of time" depends on the balancing the desirability of finality in an agency's decision against the public interest in reaching a proper result. What is a short and reasonable period will vary with each case, but absent unusual circumstances, the time period would be measured in weeks, not years.").

found a 90-day temporary suspension acceptable.[36] Further, in November 1997, President Clinton directed the secretary of the Treasury to conduct an expedited review of certain modified semi-automatic assault-type rifles, and temporarily suspend licenses for such firearms for a period of 120 days while doing so. Based on our review, there were no challenges to this 120-day temporary suspension. Given these precedents, it is likely that a court will uphold a temporary suspension of at least 90 to 120 days.

Permanent suspension

Similarly, the issuance of new criteria to implement the sporting purposes test in the context of semi-automatic assault rifles and handguns may appropriately be considered an interpretive rule, because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[37] The APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" unless another statute provides otherwise.[38]

Unlike notice-and-comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[39] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, and the process by which the public may petition the agency to modify or remove the guidance.

Agencies should also consider the recommendations of the administrative conference, most recently updated on June 13, 2019.[40] The most relevant recommendations concern transparency and public participation. These include: (1) providing "members of the public a fair

[36] *Gun S., Inc. v. Brady,* 877 F.2d 858, 859 (11th Cir. 1989).
[37] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).
[38] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[39] Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents.
[40] Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

opportunity to argue for modification, rescission, or waiver of an interpretive rule," (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint, and (3) avoiding the use of mandatory language (such as "shall" or "must") to accurately reflect the non-legislative nature of the guidance.[41]

C. Legal justification

Pursuant to 18 U.S.C. § 925(d), the GCA creates four narrow categories of firearms that the attorney general must authorize for importation. Under one such category, subsection 925(d)(3), the attorney general shall approve applications for importation when the firearms are generally recognized as particularly suitable for or readily adaptable to sporting purposes.

Recognizing the difficulty in implementing this section, Congress gave the secretary of the Treasury (now the attorney general) the discretion to determine a weapon's suitability for sporting purposes. This authority was ultimately delegated to what is now the ATF.[42] As explained in the 1968 Senate report for the GCA, "[t]he difficulty of defining weapons characteristics to meet this target [of eliminating the importation of weapons used in crime], without discriminating against sporting quality firearms, was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition."[43]

Indeed, Congress granted this discretion to the secretary, even though some expressed concern with its breadth:

> [t]he proposed import restrictions of Title IV would give the Secretary of the Treasury unusually broad discretion to decide whether a particular type of firearm is generally recognized as particularly suitable for, or readily adaptable to, sporting purposes. If this authority means anything, it permits Federal officials to differ with the judgment of sportsmen expressed through consumer preference in the marketplace…"[44]

IV. Risk analysis

Both the ATF's temporary suspension of certain firearms imports and the agency's issuance of new criteria can be judicially challenged for not following rulemaking procedures, or constituting arbitrary or capricious agency action.[45] As in the past, such challenges will likely fail.

[41] *Id.* at 7.
[42] *See Springfield, Inc. v. Buckles*, 292 F.3d 813, 815 (D.C. Cir. 2002).
[43] S. Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968).
[44] S. Rep. No. 1097, 90th Cong. 2d. Sess. 2155 (1968) (views of Senators Dirksen, Hruska, Thurmond, and Burdick). In *Gun South, Inc. v. Brady,* 877 F.2d 858, 863 (11th Cir. 1989), the court, based on legislative history, found that the GCA gives the Secretary "unusually broad discretion in applying section 925(d)(3)."
[45] 5 U.S.C. § 706.

A. Procedural challenges

As noted above, the APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" unless another statute provides otherwise.[46] However, the NCRM requirement does apply to legislative rules. Courts are commonly asked to determine whether interpretive rules, such as guidance documents, are legislative rules in disguise, and the gun industry will likely challenge the ATF's new criteria under this theory.

An interpretive rule "describes the agency's view of the meaning of an existing statute or regulation."[47] A court's inquiry is "whether the new rule effects a substantive regulatory change to the statutory or regulatory regime."[48] Interpretive rules "are those that clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required."[49] In other words, to be interpretive, a rule "must derive a proposition from an existing document whose meaning compels or logically justifies the proposition."[50] By contrast, a rule is legislative "if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy."[51]

Temporary suspension

As noted above, a court will likely find the temporary suspension of certain firearm imports does not constitute a legislative rule under the APA. As the 11th Circuit held in *Gun South* when evaluating the ATF's temporary suspension of firearm imports:

> The Bureau has not engaged in rulemaking, but has merely suspended certain firearms from importation while it individually reassesses several permit determinations. These activities which involve applying the law to the facts of an individual case, do not approach the function of rulemaking...Such a determination is more analogous to making a licensing decision which the APA classifies as an "order" rather than a "rule."[52]

Permanent denial

[46] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[47] *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).
[48] *Id*.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Gun S., Inc. v. Brady*, 877 F.2d 858, 863 (11th Cir. 1989).

The gun industry may also attempt to challenge the new criteria as being a legislative rule that must go through NCRM. The ATF has a strong argument in response: that the guidance is interpretive in nature.

In the preceding three decades, the DC Circuit has focused its inquiry on whether a rule has "binding effects," in which case it is legislative.[53] There are multiple indicia of "binding effects."

- A rule is more likely to be legislative if it repeatedly includes mandatory language[54] or characterizes itself as a regulation,[55] notwithstanding boilerplate disclaimers to the contrary.[56] Conversely, a rule is less likely to be legislative if it is "replete with words of suggestion," such as speculation that an agency "may" or "might" act in a particular fashion depending on specific facts.[57]

- Regardless of the rule's text, "[t]he most important factor" [58] in identifying legislative rules is its actual legal effects, [59] e.g., the creation of new substantive law and/or consistent on-the-ground application in permitting or enforcement decisions.[60] A rule is not legislative merely because it is *cited* in downstream adjudications, though dispositive *reliance* on the rule in those adjudications may reveal the rule to be legislative.[61]

- A rule is less likely to be legislative if its author has no statutory or regulatory authority (including delegated authority) to bind the agency.[62]

- A rule is likely to be legislative if it is explicitly contemplated by the organic statute.[63]

[53] *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017).
[54] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).
[55] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).
[56] *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019).
[57] *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007) (crediting statements in guidance that regulators "retain their discretion" based on "specific conditions"). *See also Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015); *cf. The Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (government duties described in guidance were unenforceable because, though they occasionally used mandatory language, they were generally "imprecise").
[58] *Nat'l Min. Ass'n*, 758 at 252 (no legal effect where EPA merely recommended that state agencies entrusted with administration of the Clean Water Act pay closer attention to water quality, such that "state permitting authorities and permit applicants [could] ignore EPA's Final Guidance without facing any legal consequences").
[59] *Appalachian Power Co.*, 208 F.3d at 1028 (guidance imposing testing requirements for power plants under the Clean Air Act was legislative rule where it delegated authority to states in ways not explicitly contemplated in underlying rulemaking); *Mendoza*, 754 F.3d at 1009 (D.C. Cir. 2014) (letters explaining visa requirements were legislative where they "impose[d] different minimum wage requirements and provide[d] lower standards for employer-provided housing" than underlying regulations).
[60] *Gen. Elec.*, 290 F.3d at 385 (rejecting EPA's argument that guidance was not binding as a practical matter where EPA did not identify examples of deviation from the guidance); *cf. Sierra Club v. EPA*, 955 at 65 (warning, in finality context, of guidance that "impose[s] obligations by chicanery") (citation omitted).
[61] *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005) (Roberts, J.).
[62] *Id.*; *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d at 1256 (D.C. Cir. 1996).
[63] *Am. Min. Cong.*, 995 F.2d at 1109.

In the context of the sporting purposes test, the ATF will not be bound by the new criteria established by the study outlined above. Rather, the criteria will serve as guidance to the public and the ATF in making future decisions regarding applications for firearms important.

B. Arbitrary or Capricious challenge

On substantive grounds, the temporary suspension and the ATF's new criteria will likely be challenged on the basis that they are both arbitrary and capricious under the APA. This is especially true in situations where the ATF reverses a previous position, either by temporarily denying importation of a firearm previously allowed to be imported into the United States, or by establishing new criteria that was previously rejected by the ATF.

If faced with such challenges, the ATF has a strong counter argument, provided that any such determination is thoroughly explained in the administrative record. When the ATF has revised its sporting purposes test in the past, courts have dismissed claims that the change in position was arbitrary and capricious in both the temporary suspension and the permanent denial contexts.

Temporary suspension

In *Gun South, Inc. v. Brady*, the Eleventh Circuit was asked to consider whether the ATF can temporarily suspend the ability of gun manufacturers to import firearms while the agency reevaluates its sporting purposes criteria. In that case, the ATF gave Gun South permission to import AUG-SA rifles. But shortly thereafter, the agency decided it would reevaluate its definition of the sporting purposes test, and began the inquiry that produced the 1989 report. While the report was being prepared, the ATF temporarily suspended Gun South's ability to import AUG-SA rifles for 90 days. Gun South then challenged this suspension as being arbitrary and capricious in violation of the APA.

The Eleventh Circuit concluded that the temporary suspension was permissible. The court found it was within the powers of the ATF to establish criteria to apply the sporting-purposes test to firearms, and that it was reasonable for the agency to periodically review the application of its test to firearms. While Gun South argued the suspension was arbitrary because the rifle itself had not changed, the court explained the sporting purpose inquiry requires an examination of the firearm's actual use, which may change over time. Moreover, the court emphasized that it was clearly within the agency's authority to review determinations and correct any errors:

> [W]e conclude that the Bureau must necessarily retain the power to correct the erroneous approval of firearms import applications. As discussed above, the Act strictly limits the importation of firearms to those that satisfy one of the four exceptions. To accomplish this task, the Bureau inherently must possess the corollary power to temporarily suspend the importation of firearms under permits that the Bureau may have erroneously granted. Otherwise, gun companies could legally inundate the country with

> rifles that Congress intended to forbid from entering our borders. We decline to interpret the Act in a way, which produces such a nonsensical result.[64]

As long as the ATF is appropriately justifying its temporary suspension of a given importation license and is reviewing the importation applications in an efficient manner,[65] it is within the ATF's discretion to temporarily suspend the importation of certain firearms while it reviews the sporting purposes determinations. As a result, the ATF has a strong response, should a gun manufacturer challenge the temporary suspension under the APA.

Permanent denial

Gun manufacturers may also argue the new criteria are arbitrary and capricious, particularly given the ATF would be changing its criteria. However, agencies can shift their policies so long as certain conditions are met according to *FCC v. Fox Television Stations, Inc.,* in which the Supreme Court stated that:

> While [a]n agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books . . . it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is [1] permissible under the statute, [2] that there are good reasons for it, and [3] that the agency believes it to be better, which the conscious change of course adequately indicates.[66]

In this situation, the new criteria would satisfy the Supreme Court's test. It is well-established that the ATF director can define what it means for a firearm to have a sporting purpose under the GCA.[67] And there are good reasons for it, including the lack of uniform guidance for industry and the prevalence of gun violence associated with military-style firearms.

The DC Circuit reached the same conclusion when a gun manufacturer challenged the ATF's decision to revoke its importation license following the 1998 report. In *Springfield, Inc. v. Buckles*, the ATF changed its position on the importability of Springfield's SAR8 Sporter and SAR4800 Sporter rifles. Prior to the 1998 report, the ATF allowed the modified, high-capacity, semi-automatic rifle to be imported into the United States. However, following the 1998 report's conclusion that rifles that have the ability to accept large, military-style magazines have no sporting purpose (arguably a reversal from its position in 1989), the ATF refused to allow Springfield to import those rifles into the country. Springfield argued that this change in position was arbitrary and capricious, and therefore violated the APA.

[64] *Gun S., Inc. v. Brady*, 877 F.2d 858, 863 (11th Cir. 1989).
[65] The *Gun S.* court found that a 90-day suspension was appropriate. While the 1998 report was being prepared, the ATF suspended importation licenses for 120 days. As a result, a two- to three-month suspension is likely what a court would consider a reasonable length for a temporary suspension.
[66] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[67] *See* Part II.

The DC Circuit rejected this argument, explaining that the ATF can change its views as long as it fully explains why it did so in the administrative record. In the case, the court concluded the ATF "fully explained why it has now decided that this particular military feature found in Springfield's rifles is of considerable significance."

V. Other considerations

As previously discussed, Congress has consistently passed appropriations bills with a provision that limits the enforceability of the sporting purposes test in the context of shotguns:

> None of the funds made available by this Act may be used to pay the salaries or expenses of personnel to deny, or fail to act on, an application for the importation of any model of shotgun if: (1) all other requirements of law with respect to the proposed importation are met; and (2) no application for the importation of such model of shotgun, in the same configuration, had been denied by the Attorney General prior to January 1, 2011, on the basis that the shotgun was not particularly suitable for or readily adaptable to sporting purposes.[68]

This rider only applies to shotguns, not rifles or other forms of firearms. Therefore, the new criteria outlined above would be effective at preventing the importation of firearms that are not shotguns and have no legitimate sporting purpose.

[68] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 541, 125 Stat. 552, 639 (2011).

RECOMMENDED ACTION MEMO
Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Require FFLs to Sell Safety Devices
Date: November 2020

Recommendation: Finalize a rule proposed by the Obama administration to close regulatory loopholes that undermine the statutory requirement that federal firearms licensees sell compatible gun safety devices.

I. Summary

Description of recommended executive action

Under 18 U.S.C. § 923, applicants for a federal firearm license (FFL) must certify they will have gun storage and safety devices "available [for purchase] at any place in which firearms are sold."[1] Regulations implementing this statutory requirement currently leave three important loopholes:

(1) Regulations do not explicitly require that safety devices made available by federal firearm licensees (FFLs) be compatible with the actual firearms sold on the premises (herein the "compatibility requirement").

(2) Regulations only explicitly apply to gun *dealers* and do not mention gun manufacturers or importers, even those who sell directly to customers (herein the "application to manufacturers and importers loophole").

(3) Regulations do not explicitly grant the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) the ability to deny or revoke an FFL's license for noncompliance with the safety device requirement.

In May 2016, the ATF proposed a rule to close these three loopholes.[2] The 2016 Proposed Rule sought to amend ATF regulations to reflect the agency's interpretation that § 923 requires compatible safety devices, applies to manufacturers and importers if they have premises where firearms are sold, and grants the ATF the ability to use evidence of noncompliance in licensing proceedings.[3]

However, before the 2016 Proposed Rule could be finalized, President Trump took office and froze all pending regulatory actions by promulgating Executive Order 13771, which mandated that "the total incremental cost of all new regulations...to be finalized this year shall be no greater than zero" and required agencies proposing new regulations to identify at least two prior

[1] 18 U.S.C. § 923(d)(1)(G).
[2] 81 Fed. Reg. 33448, "Commerce in Firearms and Explosives; Secure Gun Storage, Amended Definition of Antique Firearm, and Miscellaneous Amendments," May 26, 2016, https://www.federalregister.gov/d/2016-12364.
[3] *Id*.

regulations that could be eliminated to offset the cost of the new ones.[4] This effectively made it impossible for new regulations to be finalized, and stalled the ATF's proposed rule to close the § 923 loopholes.

In order to effectuate the intent of Congress and help keep families safe, the next administration should issue a new rule to finish the work the Obama administration started, closing regulatory loopholes that undermine the statutory requirement that FFLs sell compatible gun safety devices.

Overview of process and time to enactment

Although the next administration's rule would likely be substantially similar to the 2016 Proposed Rule—for which the notice and comment rulemaking (NCRM) process was already well underway—it would be most prudent to begin the NCRM process from the beginning, rather than restart the process with the 2016 Proposed Rule. This would ensure the rule is in full compliance with procedural rulemaking requirements and mitigate potential legal challenges.

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the NCRM process.[5] To finalize a new rule, the ATF will be required to issue a notice of proposed rulemaking (NPRM), provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the *Federal Register*. A rule generally goes into effect thirty days after it is published.[6]

This multi-phase process generally extends for a year; however, because the 2016 Proposed Rule already provides a significant foundation for the new rule, the process may be more expedient in this case.

II. Current state

The 1998 Omnibus Consolidated and Emergency Supplemental Appropriations Act (the "1998 Act") amended the Gun Control Act of 1968 (GCA) such that § 923(d)(1)(G) of the GCA requires that in order to apply for an FFL, applicants must certify they have secure gun storage or safety devices available for purchase.[7]

The safety lock requirement

The 1998 Act defines "secure gun storage or safety device" as:

> (a) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device

[4] Executive Order 13771, "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs," January 30, 2017, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/.
[5] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[6] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.
[7] 18 U.S.C. § 923(d)(1)(G).

> (b) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device
>
> (c) a safe, gun safe, gun case, lockbox, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.[8]

The wording of the statute does not explicitly include a compatibility requirement. Therefore, gun sellers are currently able to comply with the statute only by offering safety devices that are compatible with *some* of the firearms they sell.

In addition, the section that requires certification of the storage and safety requirements only explicitly applies to gun *dealers*, and does not mention gun manufacturers or importers.[9] The statute requires that:

> ...in the case of an application to be licensed as a dealer, the applicant certifies that secure gun storage or safety devices will be available at any place in which firearms are sold under the license to persons who are not licensees…[10]

Other sections in the statute appear to distinguish between dealers, manufacturers, and importers. For example, the section on record-keeping begins by stating that "[e]ach licensed importer, licensed manufacturer, and licensed dealer shall maintain such records…."[11]

However, the subsequently enacted Child Safety Lock Act of 2005 (the "2005 Act") created 18 U.S.C. § 922(z), which makes it a federal crime, with certain exceptions:

> for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

Finally, there is a need to clarify the enforcement mechanism of § 923. The 1998 Act explicitly authorized the attorney general to revoke the FFL of a firearms seller who fails to make secure gun storage or safety devices available.[12] However, a portion of the 1998 Act provides:

> ...notwithstanding any other provision of law, evidence regarding compliance or noncompliance [with the secure gun storage or safety device requirement] shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity.[13]

ATF regulations currently do not reflect the interpretation that this provision of the 1998 Act applies to civil liability actions and not proceedings regarding FFL denials or revocations.[14]

[8] 18 U.S.C. § 921(a)(34).
[9] *Id.*
[10] 18 U.S.C. § 923(d)(1)(G).
[11] 18 U.S.C. § 923(g)(1)(A).
[12] 18 U.S.C. § 923(e).
[13] Pub. L. 105–277, div. A, § 101(b) (October 21, 1998), 112 Stat. 2681–50, 2681–70, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section923&num=0&edition=prelim.
[14] Supra note 2.

However, any other interpretation would strip § 923(d) and (e) of appropriate enforcement mechanisms and render them meaningless.

Obama administration action

In May 2016, the ATF issued an NPRM to close these three loopholes and invited members of the public to comment on the 2016 Proposed Rule.[15] The public comment period ended on August 24, 2016.[16] The 2016 Proposed Rule received four comments total, including a detailed comment in opposition to the proposed rule, issued by Gun Owners of America (GOA) and the Gun Owners Foundation (GOF), calling the proposal "burdensome and expensive."[17]

Trump administration action

Upon taking office, Trump moved the 2016 Proposed Rule to the long-term regulatory agenda, and issued two executive orders that required agencies to maintain net-zero new costs and issue two significant deregulations for every new regulation promulgated.[18] These developments effectively led to the 2016 Proposed Rule stalling after the NPRM phase, and no further updates on the rule have been given.

III. Proposed action

In order to mitigate potential firearm accidents, the next administration should issue a new rule to close regulatory loopholes that undermine the statutory requirement that federal firearms licensees sell compatible gun safety devices.

A. Substance of the new rule

In all likelihood, the new rule's form and justifications will be very similar to the 2016 Proposed Rule, and the next administration may freely utilize the language and analysis present in the 2016 proposal. However, the next administration should consider whether any changes should be made to the language before issuing an NPRM.

Incorporating responses to 2016 public comments

The administration should review the four comments submitted during the 2016 comment period and include language that incorporates or responds to arguments raised by the public. In particular:

- The new NPRM should clearly outline why the ATF interprets § 923 to require FFLs to have available gun storage and safety devices that are **compatible** with the firearms they sell, even though the statute does not say so explicitly.

[15] *Id.*
[16] *Id.*
[17] Gun Owners of America and Gun Owners Foundation, "Comment Letter on Proposed Rule - Commerce in Firearms and Explosives; Secure Gun Storage, Amended Definition of Antique Firearm, and Miscellaneous Amendments," August 24, 2016, https://beta.regulations.gov/document/ATF-2016-0002-0005.
[18] Brookings Institute, "Tracking Deregulation in the Trump Era," August 6, 2020, https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/.

In their joint comment, the GOA and GOF noted that § 923 does not contain any language specifying that the required gun storage and safety devices be "compatible" with the firearms offered for sale, concluding that, "ATF may wish that the statute went further, but it does not, and ATF is not at liberty to enact through regulation what Congress did not require by statute."[19]

The statute explicitly requires FFLs to have secure gun storage or safety devices available for customers to purchase. The purpose of this requirement is to prevent gun-related accidents by ensuring gun buyers are readily able to purchase proper storage for their firearms.[20] In order to be effective, these devices have to be compatible with the guns sold by FFLs. A device that is incompatible, broken, or outdated will do little to prevent unauthorized users, including minors, from improperly accessing guns. Therefore, without the compatibility requirement interpretation, the statute's purpose is frustrated, and its plain language holds little meaning.

In addition, the 2005 Act, as codified at § 922(z), specifically mandated that each handgun be sold "with a secure gun storage or safety device ... *for that handgun*." (Italics added.) In order for these two provisions to be interpreted in a consistent manner, the secure gun storage and safety devices available on an FFL's premises must be compatible with the firearms sold by the FFL.

In addition to codifying this requirement in the NPRM, the ATF should also update Form 7 to make the compatibility requirement explicit.[21]

- The new NPRM should clearly outline why the ATF interprets the § 923 certification requirement to apply to gun manufacturers and importers, even though that provision does not say so explicitly.

The GOA and GOF comment argued the ATF's interpretation of § 923's certification requirement as applying to manufacturers and importers violates basic principles of statutory interpretation: if Congress meant § 923's certification requirement to apply to licensees other than dealers, it would have explicitly written the statute to include manufacturers and importers.[22]

The 2016 Proposed Rule explicitly supported its interpretation of this issue by noting that "[f]ederal regulations provide that a licensed importer or a licensed manufacturer may engage in the business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured."[23] The new proposed rule should similarly outline the support for such an interpretation.

Section 923(e)'s authorization for the ATF to revoke the licenses of noncompliant FFLs, in contrast with the certification requirement, also explicitly gives the ATF the authority to revoke the license of any FFL who fails to make secure gun storage and safety devices available at locations where they sell guns to members of the public. To be consistent with this provision, the certification requirement should also apply to all FFLs.

[19] Supra note 17.
[20] Giffords Law Center to Prevent Gun Violence, "Safe Storage," accessed October 13, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/safe-storage/.
[21] *See*, ATF Form 7, "Application for Federal Firearms License," accessed October 13, 2020, https://www.atf.gov/file/61506/download.
[22] Supra note 17.
[23] Supra note 2.

Furthermore, the 2005 Act explicitly imposed on manufacturers, importers, and dealers the requirement that handguns be sold or transferred with secure gun storage and safety devices. In order for manufacturers and importers to comply with this requirement, they must have such devices available in locations where they sell firearms directly to consumers. Notably, section 923(e) only requires these devices to be available at such locations.[24]

- The new NPRM should clearly outline why the ATF interprets § 923's evidentiary limitation to permit the use of evidence of noncompliance in FFL denial or revocation proceedings.

The GOA and GOF comment argued this interpretation amounts to ATF "ignor[ing] those provisions of federal law of which it disapproves," and recommended instead that the ATF "present its proposal to Congress and ask for legislation to amend the statute."[25]

The 2016 Proposed Rule explained how the ATF arrived at its interpretation, noting that:

> A basic tenet of statutory construction is that each provision in a law is intended to have some effect. To interpret [the Act's evidentiary limitation] as applying to license denial and revocation proceedings would result in the amendments to sections 923(d)(1) and (e) having no effective enforcement mechanism. To give meaning to the secure gun storage or safety device requirement...ATF reads this evidentiary limitation as not applying to license denial and revocation proceedings.[26]

The new proposed rule should similarly provide detailed support for the agency's interpretation of the § 923's evidentiary limitation.

Including a reference to § 923(e) in the regulation regarding revocations would conform the regulation to the changes made by the 1998 Act. It would also dramatically strengthen the ATF's ability to enforce § 922(z)'s closely related requirement that FFLs sell and transfer handguns only with secure gun storage or safety devices. The ATF may conduct inspections of FFLs to ensure compliance with record-keeping requirements. During these inspections, it may become apparent that an FFL does not have compatible secure gun storage and safety devices available. It may be more difficult for the ATF to prove that the FFL is selling or transferring handguns without these devices, than it is for the ATF to prove that the FFL does not have them available. However, if an FFL does not have them available, the ATF would have a strong reason to believe the FFL is not complying with § 922(z)'s requirement that FFLs sell and transfer handguns only with secure gun storage or safety devices.

- The new NPRM should clarify that the certification requirement does not apply to firearms (including deconstructed firearms) before the point of sale.

The GOA and GOF comment interpreted the 2016 Proposed Rule to require manufacturers and importers to use safety devices by locking up firearms in safes every night. The comment

[24] 18 U.S.C. § 923(e) ("at any place in which firearms are sold under the license to persons who are not licensees.")
[25] *Id.* at 4.
[26] Supra note 2.

claimed this requirement would be time-consuming and cost-prohibitive, and force some manufacturers and importers to shut down their on-site storefronts altogether.[27]

This claim misinterprets the statute and the proposed regulation, which required the secure gun and safety devices to be available for *purchase* by individual consumers. To avoid future litigation, the new proposed rule should explicitly state that this requirement does not apply to firearms (including deconstructed firearms) before the point of sale.

Additional revisions to the 2016 Proposed Rule

In addition to the comments received in 2016, the new rule should avoid ambiguity as much as possible to avoid a potential legal challenge. Based on this principle, we suggest a small number of revisions to the 2016 Proposed Rule, including:

- The new NPRM should add the word "functioning" to the definition of "secure gun storage or safety device."

The 2016 Proposed Rule sought to amend 27 C.F.R. 478.11(c) to define "secure gun storage or safety device" as:

> A safe, gun safe, gun case, lockbox, or other device that is designed to be or can be used --to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.[28]

The new rule should include the word "functioning" so that the amendment would read: "[a] safe, gun safe, gun case, lockbox, or other **functioning** device…". The addition of "functioning" would prevent individuals from circumventing the rule and flouting the purpose of the statute. It avoids the circumstance in which a device that is designed to store a gun securely—but does not actually secure the gun, because it is broken, for example—is compliant with the regulation implementing the statute.

- The new NPRM should add language to ensure the compatibility requirement is effective.

The new rule should update the compatibility requirement language in the 2016 Proposed Rule to emphasize more forcefully that FFLs must have a compatible safety device available for *each* model of firearm they sell. Proposed edits to the 2016 Proposed Rule language are provided below in emphasized language:

> (a) "that ~~**compatible**~~ secure gun storage or safety devices **compatible with each model/type of firearm available for purchase** will be available for purchase at any place where firearms are sold under the license…"
> (c) "Each licensee described in this section must have compatible secure gun storage or safety devices **for each model/type of firearm available for purchase** available at any place in which firearms are sold…"

Without specifying that the storage devices must be compatible with *each* model of firearm sold—a low burden, given the broad definition of secure gun storage and safety device—and

[27] *Id.* at 3.
[28] Supra note 2.

that the device must be available for purchase (not just testing), it will still be possible for sellers to get around the rule.

- The new NPRM should clarify that failure to provide gun storage devices that are compatible with each handgun sold will not only result in revocation, but would also violate § 922(z)'s criminal provision.

For clarity purposes, the NPRM should explicitly note that failure to provide gun storage devices that are compatible with each handgun sold is a federal crime under 18 U.S.C. § 922(z).

B. Process

Although the next administration will rely on the 2016 Proposed Rule to inform its new rule, the administration should begin the rulemaking process again to ensure full compliance with procedural requirements. The new proposed rule must go through the NCRM process under the APA.[29]

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule. The NPRM published in the *Federal Register* for the 2016 Proposed Rule already provides a detailed analysis of how the proposed rule complies with the APA, as well as the executive orders that relate to agency rulemaking.[30]

Then the agency must accept public comments on the proposed rule for a period of at least 90 days. Received comments must be reviewed, and the ATF must respond to significant comments either by explaining why it is not adopting proposals, or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the *Federal Register* along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

C. Legal justification

The attorney general has the power to prescribe "such rules and regulations as are necessary to carry out the provisions of" the GCA.[31] In turn, the attorney general has delegated authority to issue rules and regulations related to the GCA to the ATF. Additionally, 18 U.S.C. § 923(a) states that the application for an FFL "shall be in such form and contain only that information necessary to determine eligibility for licensing as the Attorney General shall by regulation prescribe." These provisions are "general conferral[s] of rulemaking authority" that would lead a court to defer to the agency's interpretation.[32]

The ATF's interpretation of the compatibility requirement, the safety device requirement's application to manufacturers and importers, and the evidentiary limitation are in the exercise of

[29] 5 U.S.C. § 553.
[30] This analysis assumes Executive Order 13771 will be rescinded.
[31] 18 U.S.C. § 926(a).
[32] *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013); *Guedes*, at 20-21.

its general rulemaking authority.[33] The compatibility requirement represents the agency's clarification of the certification required by § 923(d)(1)(G). The requirement is directly relevant to the approval of license applications by the attorney general under § 923(a). The ATF's interpretation of whether the gun safety device requirement applies to manufacturers and importers is similarly relevant to the approval of license applications by the attorney general under § 923(a). Finally, the ATF's interpretation of the evidentiary limitation is directly related to its ability to defend its revocations or denial of license applications under § 923(a) and carry out the provisions of the statute under § 926(a).

IV. Risk analysis

Agency rulemaking is generally subject to two types of challenges: procedural challenges and substantive challenges. Procedural challenges center on whether the agency promulgated the final rule in accordance with the requirements outlined by § 553 of the APA.[34] Substantive challenges may argue either that the agency rule is "in excess of [the agency's] statutory jurisdiction, authority or limitations,"[35] or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[36]

Procedural challenges

By restarting the NCRM process with a new rule based on the 2016 Proposed Rule, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.[37]

Litigation brought against a December 2018 rule provides an example of the creative claims the next administration may face. The rule sought to clarify the classification of bump stock devices under a different provision of 18 U.S.C. § 923.[38] The rule was challenged, in part, on the grounds that Acting Attorney General Matthew G. Whitaker "was not validly serving as the Acting Attorney General, as either a statutory or constitutional matter," when he signed the rule on December 18, 2018.[39] The challenge was ultimately unsuccessful, but there was no final decision on the question the case raised on the authority of the acting attorney general.[40]

[33] *Id.*

[34] 5 U.S.C. § 553.

[35] 5 U.S.C. § 706(2)(C).

[36] 5 U.S.C. § 706(2)(A).

[37] *See* Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," 92 N.C.L. Rev. 721, 737-38 (2014) (describing "first" and "second" order inquiries into an agency's decision making). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

[38] 83 Fed. Reg. 66514 (December 18, 2018) (codified as 27 C.F.R. §§ 447.11, 478.11, 479.11).

[39] 84 Fed. Reg. 9239, 9240 (March 11, 2019); *Guedes v. Bureau of Alcohol Tobacco Firearms and Explosives*, 920 F.3d 1, 28-29, 31-32 (D.C. Cir.), judgment entered, 762 F. App'x 7 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 789 (2020).

[40] *See Guedes*, 920 F.3d at 11 ("Whether or not those arguments would otherwise have had merit (something we do not decide), [plaintiff] has no likelihood of success on this claim because the rule has

Careful attention to each step of the APA's rulemaking process is an important safeguard against such novel procedural challenges.

In particular, the ATF should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.[41] The agency must address the concerns raised in all non-frivolous and significant comments.[42] The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.[43] By reviewing the comments submitted to the 2016 Proposed Rule, the next administration can produce a new draft rule that anticipates the types of comments the new proposed rule may receive.

Substantive challenges

Substantive challenges will argue either that the rule is "in excess of [the agency's] statutory jurisdiction, authority or limitations,"[44] or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[45]

When a court reviews an agency's interpretation of a statute that the agency is charged with administering, the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[46] Pursuant to that rubric, at step one, courts examine "whether Congress has directly spoken to the precise question at issue."[47] If so, "that is the end of the matter" and courts must enforce the "unambiguously expressed intent of Congress."[48] In the case of statutory silence or ambiguity, however, step two requires courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.[49] This reflects the fact that "*Chevron* recognized that [t]he power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[50]

been independently ratified by Attorney General William Barr, whose valid appointment and authority to ratify is unquestioned.").

[41] 5 U.S.C. § 553(c).

[42] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).

[43] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).

[44] 5 U.S.C. § 706(2)(C).

[45] 5 U.S.C. § 706(2)(A).

[46] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

[47] *Id.* at 842.

[48] *Id.* at 842-43.

[49] *Id.* at 843.

[50] *Id.* at 55–56 (internal quotation marks and citation omitted).

A. Compatibility requirement

A legal challenge is unlikely to show successfully that FFLs, already required by law to have secure gun storage or safety devices available, should not also be required to match those safety devices to the actual guns they sell.[51] Without the compatibility requirement, it is unclear what the existing requirement would accomplish. At *Chevron* step one, a court will likely find § 923 unambiguous and rule in favor of the ATF, even without deference, since a contrary reading leads to an absurd result[52] and undermines the statutory purpose of keeping firearms away from those who do not have permission to use them, including minors. This issue is especially prescient in the accidental gun-related deaths that occur far more frequently in the US than other comparable high-income nations.[53]

In addition to the absurdity of a contrary interpretation, the breadth of definitional possibilities for "secure gun storage and safety devices" also supports the reasonableness of the agency's interpretation.[54] The new rule would not demand that each seller make accessible a form-fitted lock for its individual owner. It demands, at a minimum, that sellers of guns also sell lockboxes in which people can safely and properly store their guns. A single model of secure gun storage or safety device that fits many different types of firearms could achieve compliance. As in the 2016 Proposed Rule, the new rule should clearly explain the minimal burden that this additional requirement places on dealers, manufacturers, and importers.[55]

B. Application of the statute to manufacturers and importers

A court is likely to find the plain text of the statute unambiguous on the question of whether the ATF can apply the certification requirement to manufacturers and importers.

Dissenters of the Proposed Rule could argue that the ATF misinterpreted the statute based on *expressio unius est exclusio alterius, a* canon of statutory interpretation that dictates that the express inclusion of one or more things of a class signals the exclusion of others of the same class. Indeed, the GOA and GOF's 2016 comment asserted that the ATF lacks the authority to require the safety devices' certification on anything other than "an application to be licensed as a dealer."[56]

However, the *expressio unius* argument is weak: manufacturers and importers who sell firearms fall squarely within the definition of "dealer." 18 U.S.C. § 921(11) defines "dealer" as:

> (a) any person engaged in the business of selling firearms at wholesale or retail

[51] 18 U.S.C. 923(d).
[52] *See* Laura R. Dove, "Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine," 19 Nev. L. J. 741, 758-762 (2019). "The absurdity doctrine is a canon of statutory interpretation holding that a statute's apparent ordinary meaning may be disregarded if the results of its application are (in some sense) absurd." *Id.* at 742.
[53] Giffords Center to Prevent Gun Violence, "Gun Violence Statistics," accessed October 13, 2020, https://lawcenter.giffords.org/facts/gun-violence-statistics/#unintentional; Mamie Buoy, "Deputies say 2-year-old boy dies after accidentally shooting himself," Eyewitness News WCHCS, July 23, 2020, https://wchstv.com/news/local/deputies-say-two-year-old-child-dies-after-accidentally-shooting-himself.
[54] Supra note 2.
[55] Supra note 2.
[56] 18 U.S.C.§ 923(d)(1)(G).

(b) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms
(c) any person who is a pawnbroker[57]

The definitions of "manufacturer" and "importer" consider the sale of firearms and do not preclude manufacturers and importers from being considered "dealers" if they "engage in the business of selling firearms."[58]

Additionally, in the event of a substantive legal challenge, the ATF can argue that the attorney general's application of the certification requirement to manufacturers and importers is reasonable, given § 923's authorization for the ATF to revoke the licenses of all noncompliant FFLs (not just dealers) and § 922(z)'s requirement that they only sell or transfer handguns with secure gun storage or safety devices. The ATF's application of the requirement to manufacturers and importers is also supported by the ATF's broad authority to determine licensing requirements.[59] The ATF has discretion in this area, and the statute notably lacks explicit language that prevents the ATF from applying the same requirements to all those who engage in the business of selling firearms, regardless of whether they also produce or import them.

The Tenth Circuit addressed a similar issue in a challenge to the ATF's July 2011 demand letter, which required dealers to report "whenever, at one time or during any five consecutive business days, [they] sell or otherwise dispose of two or more semi-automatic rifles capable of accepting a detachable magazine and with a caliber greater than .22… to an unlicensed person."[60] The plaintiffs claimed that Congress intended to "limit mandatory reporting of multiple gun sales to handguns (i.e. pistols and revolvers) only" under 18 U.S.C.§ 923(g)(3)(A).[61]

The statute at issue explicitly required multiple sale reporting for "pistols and revolvers," as opposed to "firearms" in general.[62] The plaintiffs used this to argue that the ATF could not require the same reporting for semi-automatic rifles as it did for pistols and revolvers.[63] The Court rejected this argument, emphasizing the contextual nature of statutory interpretation and the lack of language expressly limiting the ATF's authority to seek similar information for different firearms.[64]

i. <u>As applied challenge</u>

The general permissibility of the ATF's extension of the certification requirement to manufacturers and importers does not prevent successful as-applied challenges. Manufacturers and importers are likely to challenge enforcement actions arising from violations of the certification requirement. They will argue that they are not "engaged in the business of being a

[57] 18 U.S.C. § 921(11).
[58] *See* 18 U.S.C.§§ 921 (9), (10); *Broughman v. Carver*, No. 7:08-cv-00548, 2009 WL 2511949, at *2 (W.D. Va. Aug. 14, 2009), aff'd, 624 F.3d 670 (4th Cir. 2010).
[59] 18 U.S.C. § 923(a). *See Guedes*, at 20-21.
[60] *Ron Peterson Firearms LLC v. Jones*, 760 F.3d 1147, 1153-54 (10th Cir. 2014).
[61] *Id.* at 1157–58.
[62] *Id.*
[63] *Id.*
[64] *Id.* ("simply because Congress imposes a duty in one circumstance does not mean that it has necessarily foreclosed the agency from imposing another duty in a different circumstance.") (internal quotation marks and citations omitted).

dealer."[65] These as-applied challenges will depend on the facts and circumstances of each case and will have to be dealt with on a case-by-case basis.[66] To prevent its determinations from being overturned, the ATF should carefully and thoroughly document and record its process. The court will not—or should not—base its reasoning on whether it agrees with the agency's policy, but rather on the rationality and strength of the agency's reasoning.[67]

ii. Arbitrary and capricious challenge

The inclusion of manufacturers and importers is final agency action subject to arbitrary and capricious review under 5 U.S.C. § 706(2)(A).

An agency decision is arbitrary and capricious if it: (1) failed to consider all relevant factors, (2) failed to consider an important aspect of the problem, (3) relied on factors Congress did not intend, or (4) made a clear error of judgment.[68] A court may not "substitute [its] judgment for that of the agency,"[69] and will be deferential towards policy decisions that are based on the agency's "authoritative and considered judgments."[70] Therefore, the agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[71]

The arguments addressed above, relating to the ability of the attorney general and the ATF to carry out its statutory mandate, are relevant to the arbitrary and capricious analysis. Thus, for those same reasons, a successful challenge is unlikely. However, in order to meet the requirement that the agency "consider all relevant factors," the agency should address all comments to the 2016 Proposed Rule and all comments to the new rule when it is proposed by the next administration.[72]

The ATF should also consider the implication of the rule being proposed for a second time. It may investigate if and how manufacturers and importers changed their practices in response to the 2016 Proposed Rule. The fact that there was a prior rulemaking, and that it was not entirely

[65] The 2016 Proposed Rule requires that the manufacturers and importers "be engaged in business… as a dealer." 81 Fed. Reg. 33448, 33453 (May 26, 2016). "Engaged in the business" is a technical term in the law. As applied to a dealer (which, as stated, plainly encompasses manufacturers and importers), "engaged in the business" means to "devote[] 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.§ 921(21)(C). The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. 18 U.S.C. § 921(22).

[66] *See, e.g.*, *U.S. v. Gross*, 451 F. 2d. 1355, 1357-58 (7th Cir. 1971) (concluding that "the statute [] is not impermissibly vague and that the defendant's sale of eleven separate weapons within a reasonably short space of time clearly made him a dealer under the statutory definition.").

[67] *Long Island Care at Home, Ltd. v. Coke*, 551 US 158, 170 (2007).

[68] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[69] *Id.*

[70] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (internal citations omitted).

[71] *State Farm*, 463 U.S. at 43 (quotation marks omitted).

[72] *Nova Scotia Food Prods. Corp*., at 240.

revoked by the preceding administration, may reduce the ability of challengers to claim "unfair surprise" or detrimental reliance.[73]

Similar to challenges based on statutory interpretation, manufacturers and importers will argue that the application of the certification requirement is arbitrary and capricious in their case, should their licenses be revoked or applications denied. To prevent its determinations from being overturned, the agency should carefully and thoroughly document and record its process.

C. Evidentiary limitation

Interpreting the 1998 Act's evidentiary limitation to apply to the ATF's license denials or revocations (and subsequent appeals) would prevent the ATF from properly supporting its decision to revoke a license with the very information that influenced that decision in the first place.[74] This is contrary to administrative law principles set forth by the Supreme Court.[75]

The absurdity of this result is easily understood when put in concrete terms. For example, if the attorney general revokes or denies a license to an individual who has stolen firearms and transported them across state lines in violation of § 922(a)(1), the individual is entitled to a hearing.[76] If the attorney general cannot present evidence at the hearing, the government cannot make its case and cannot revoke or deny the license. If the individual's license is somehow ultimately revoked or denied and they appeal, the district court will not be able to "consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph [f](2)."[77]

The 2016 proposed rule uses essential principles of statutory interpretation to conclude that this limitation would "result in the amendments to sections § 923(d)(1) and (e) having no effective enforcement mechanism."[78] This is an effective and reasonable argument that supports the ATF's interpretation, since "each provision in a law is intended to have some effect."[79]

[73] *Long Island Care at Home, Ltd. v. Coke*, 551 US 158, 170 (2007).
[74] *See* 18 U.S.C.§ 923(e).
[75] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).
[76] 18 U.S.C.§923(f)(2).
[77] 18 U.S.C.§ 923(g)(1).
[78] Supra note 2.
[79] *Id.*

RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Clarify Facilitating Gun Sales for Profit Is a Form of "Dealing in Firearms"
Date: November 2020

Recommendation: Issue a regulation clarifying that facilitating gun sales for profit online is a form of "dealing in firearms."

I. Summary

Description of recommended executive action

Under the Gun Control Act of 1968 (GCA), any person who is engaged "in the business" of selling guns is a firearms dealer and must obtain a federal firearms license (FFL).[1] This distinction triggers certain federal laws and regulations that federal firearm licensees (FFLs) must follow, including the statutory requirement that they conduct a background check on potential purchasers. Gun sellers who do not qualify as firearms dealers are considered private sellers and are not required to obtain an FFL, and thus, are not required by federal law to conduct background checks.

The GCA is vague as to the level of sales activity that distinguishes someone who sells guns occasionally—and is not subject to federal licensing requirements—from someone who is "engaged in the business" of firearm sales and qualifies as a firearms dealer. According to a report issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the federal definition of "engaged in the business" often frustrates the prosecution of "unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons."[2]

Because of this vagueness, individuals prohibited from purchasing or possessing firearms under federal law can easily buy them from unlicensed sellers with no background check in most states. In fact, an estimated 22% of US gun owners acquired their most recent firearm without a background check—which translates to millions of Americans acquiring millions of guns, no questions asked, each year.[3]

[1] 18 U.S.C. § 923(a).
[2] ATF, "Gun Shows: Brady Checks and Crime Gun Traces," January 1999, 1, http://www.atf.gov/files/publications/download/treas/treas-gun-shows-brady-checks-and-crime-gun-traces.pdf.
[3] Matthew Miller, Lisa Hepburn & Deborah Azrael, "Firearm Acquisition Without Background Checks," *Annals of Internal Medicine* 166, no. 4 (2017): 233–239.

Websites such as Armslist.com, which serves as an online marketplace devoted entirely to the sale of firearms and firearm paraphernalia,[4] allow their users to exploit the private sale loophole with little to no safeguards, and facilitate a large number of illegal gun transactions online.[5] Because the GCA does not explicitly include "facilitation" in its definition of being "engaged in the business of dealing in firearms," Armslist is currently able to avoid federal firearms regulation. According to a study of Armslist by Everytown for Gun Safety, there were nearly 1.2 million ads for firearm sales on the website that would not require a background check in 2018 alone.[6] While this memo will only specifically address Armslist and lawsuits against the company, there are many other websites that facilitate gun sales online, including GunBroker and GunsAmerica.[7]

To hold these websites accountable and increase the number of gun sales subject to a background check, the next administration, through the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), should issue a new rule clarifying that one is "dealing in firearms" under the GCA when one facilitates private gun sales for profit. The practical effect of such a rule would be to require a website such as Armslist to either: (1) obtain an FFL and conduct background checks itself for all private sales on its platform, or (2) obtain an FFL and only allow federally licensed gun dealers to post sales on its platform.

Overview of process and time to enactment

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the notice and comment rulemaking (NCRM) process.[8] To finalize a new rule under the GCA, the ATF will be required to issue a notice of proposed rulemaking (NPRM), provide a 90-day period for receiving public comments,[9] respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the Federal Register. A rule generally goes into effect 30 days after it is published.[10] In total, the multi-phase NCRM process generally extends for a year.

II. Current state

Armslist and similar gun sale facilitation websites

[4] *See,* Armslist Firearms Marketplace, "About Armslist," accessed August 24, 2020, https://www.armslist.com/info/about.

[5] Mayors Against Illegal Guns, "In the Business, Outside the Law," December 2013, http://www.ncdsv.org/images/EFGS_In-The-Business-outside-the-law_12-2013.pdf.

[6] Everytown for Gun Safety, "Unchecked: Over 1 Million Online Firearm Ads," January 3, 2019, https://everytownresearch.org/report/over-1-million-online-firearm-ads-no-background-checks-required/.

[7] *See* Becky Dobyns, "How to Sell Guns Online," Qualbe, accessed August 23, 2020, https://qualbe.com/blog/sell-guns-online/.

[8] 5 U.S.C. § 553.

[9] The GCA explicitly requires a 90 day comment period. 18 U.S.C. § 926(b).

[10] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.

In the last six months, Armslist.com has been visited by over 8.2 million Americans[11] and is one of the largest free websites for gun classified ads in the country. It was launched in 2009 after Craigslist banned the sale of firearms on its website.[12] Armslist represents itself as a "firearms marketplace" and calls its users "Armslist customers" in advertisements that offer a discount on an associated FFL's website.

Upon visiting Armslist.com, Armslist requires users to agree to a series of fourteen terms, including confirmation that users: (1) are 18 years or older, (2) understand that Armislist does "not become involved in transactions between parties and does not certify, investigate, or in any way guarantee the legal capacity of any party to transact," (3) are responsible for obeying "all applicable enforcement mechanisms" under the law, including licensing requirements, (4) will contact the ATF if there is uncertainty with any firearm sale or transfer, (5) understand that Armslist is a Second Amendment "champion," but will comply with all laws pursuant to the Constitution of the United States and due process of law, and (6) take responsibility for their own actions and the actions and consequences "related to or resulting from" their use of Armslist.[13]

After agreeing to these terms, users are prompted to create an Armslist account and are asked to provide an email address and telephone number, although providing a telephone number is optional. Although Armslist claims that all "major functions" of the site can be used without an account,[14] an email address is required to create a firearms listing or to contact a seller through the website's internal messaging platform.

Once an account is created, prospective sellers can post new firearms listings on the site by confirming their email, providing the city and state where the firearm is located, describing the model of the firearm they are selling, and once again agreeing to Armslist's terms and conditions. After this information is processed, Armslist verifies the email address attached to each listing and publishes the classified within a matter of minutes. If a buyer is interested in purchasing a firearm from an Armslist classified, they can contact the seller using Armslist's internal email system, which provides relative anonymity, because the exchanges are housed entirely within Armslist's infrastructure,[15] allowing buyers and sellers to contact one another without any public record.[16] Prospective sellers can also view all listings from a particular seller at once, which allows site users to see a seller's full catalog of available firearms for sale.

As stated on its website, Armslist is a service provider facilitating the postings of the classifieds of firearms for sale and "*can not* and *will not* be a party in transactions" enabled by its own site.

[11] SimilarWeb, "Armslist.com," accessed August 2020, https://www.similarweb.com/website/armslist.com/. [12] Colin Lecher and Sean Campbell, "The Craigslist of Guns," The Verge, January 16, 2020, https://www.theverge.com/2020/1/16/21067793/guns-online-armslist-marketplace-craigslist-sales-buy-crime-investigation.

[13] Armslist, "Terms of Use", accessed October 26, 2020, https://www.armslist.com/info/terms.

[14] *Id.*

[15] *Id.*

[16] Mayors Against Illegal Guns, "In the Business, Outside the Law," December 2013, http://www.ncdsv.org/images/EFGS_In-The-Business-outside-the-law_12-2013.pdf

As such, Armslist claims it is the responsibility of the buyer and seller "to conduct safe and legal transactions."[17] Armslist does not play a role in the physical transfer of firearms sold or monies exchanged between buyers and sellers, but does play the role of a facilitator to connect buyers and sellers on its platform.

Although federal law currently requires licensed gun dealers to conduct in-person background checks on gun purchasers and to maintain records of their sales,[18] it does not extend these requirements to unlicensed sellers. This means that a person can acquire a gun online from an unlicensed seller who resides in the same state without any background check or sale record, unless the buyer and seller reside in a state that has closed this dangerous loophole by requiring background checks on all gun sales.[19]

This helps explain why online "private" gun sales on websites like Armslists are a major source of guns trafficked on the black market and sold to people who could not pass a background check otherwise.[20] In 2018, approximately 1.2 million firearm sales listings were posted on Armslist that would not require a background check, and one in nine prospective online buyers would not have passed a background check if administered.[21] The level of anonymity provided by websites like Armslist allows prospective buyers to purchase firearms unchecked at alarming levels.

Federal regulatory scheme

The GCA makes it unlawful for any person except a licensed dealer to "engage in the business" of dealing in firearms.[22] By contrast, a so-called "private seller" (one who is not "engaged in the business") is exempt from federal licensing requirements.[23] Thus, private sellers are not subject to the myriad of federal requirements imposed on dealers under the GCA, such as mandatory background checks on prospective buyers, keeping firearms transaction records so that crime guns can be traced to their first retail purchaser, and ensuring safety locks are provided with every handgun and available in any location where firearms are sold.[24]

Individuals who sell guns on online platforms and the online platforms themselves take advantage of the GCA's vague definition of "engaged in the business" to sell and facilitate the sale of high volumes of firearms without a license, without conducting background checks, and

[17] Armslist, "Frequently Asked Questions," accessed October 16, 2020, https://www.armslist.com/info/faqs.

[18] 18 U.S.C. § 923.

[19] Giffords Law Center, "Interstate and Online Gun Sales," accessed October 16, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/interstate-online-gun-sales/#footnote_10_5619.

[20] *Id.*

[21] Everytown for Gun Safety, "Unchecked: Over 1 Million Online Firearm Ads," January 3, 2019, https://everytownresearch.org/report/over-1-million-online-firearm-ads-no-background-checks-required/.

[22] 18 U.S.C. § 922(a)(1)(A).

[23] *Id.*

[24] 18 U.S.C. § 922(t)(1)(A)–(B).

without oversight from the ATF. These unregulated sales are a significant threat to public safety; unlicensed sellers regularly provide firearms to people who go on to commit violent crimes or engage in illegal firearms trafficking.[25]

As applied to a firearms dealer, the term "engaged in the business" is defined as:

> [A] 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[26] 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.[27]

The GCA fails to define the term "dealing in firearms." This lack of clarity means that websites that facilitate the sale of firearms for profit—and thus "devot[e] time, attention, and labor" to such facilitation with the "principal objective of livelihood and profit through the repetitive purchase and resale of firearms"—are not currently required under ATF guidance to apply for an FFL.[28]

Obama administration efforts

In January 2016, in response to the shooting at Sandy Hook Elementary School, the Obama administration undertook a series of executive actions designed to reduce gun violence.[29] One such action sought to clarify that it "doesn't matter where you conduct your business—from a store, at gun shows, or over the Internet: If you're *in the business* of selling firearms, you must get a license and conduct background checks" (emphasis added).[30] In particular, the ATF clarified the following principles via guidance:

> A person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted. For example, a person can be

[25] *See, e.g.,* Scott Glover, "Unlicensed dealers provide a flow of weapons to those who shouldn't have them, CNN investigation finds," CNN, March 25, 2019, https://www.cnn.com/2019/03/25/.us/unlicensed-gundealers-law-invs/index.html.
[26] 18 U.S.C. § 921(a)(22) states that "[t]he term 'with the principal objective of livelihood and profit' means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection."
[27] 18 U.S.C. § 921(a)(21)(C).
[28] ATF, "Do I Need a License to Buy and Sell Firearms? - Guidance to help you understand when a Federal Firearms License is required under federal law," January 2016, https://www.atf.gov/file/100871/download.
[29] Executive Office of the President, "Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer," White House Archives, January 4, 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.
[30] *Id.*

> engaged in the business of dealing in firearms even if the person only conducts firearm transactions at gun shows or through the Internet….
>
> [T]here is no specific threshold number of firearms purchased or sold that triggers the licensure requirement. Similarly, there is no "magic number" related to the frequency of transactions that indicates whether a person is "engaged in the business" of dealing in firearms. It is important to note, however, that even a few firearms transactions, when combined with other evidence, can be sufficient to establish that a person is "engaged in the business" of dealing in firearms. For example, courts have upheld convictions for dealing without a license when as few as two firearms were sold, or when only one or two transactions took place….
>
> Perhaps the clearest indication of whether a person is "engaged in the business" of dealing in firearms can be found in what he or she represents to others. Some factors that may demonstrate that you intend to engage in the business of dealing in firearms include: representing yourself as a source of firearms for customers...[31]

A rule explicitly clarifying that *facilitating* transactions of gun sales for profit through the Internet—and not just transacting in gun sales for profit through the Internet—is a method of being "engaged in the business" of dealing in firearms would build on this guidance from the ATF.

Pending litigation

While the federal government has failed to address the issue of illegal gun sales online successfully, legal organizations have been actively trying to hold websites like Armslist accountable for the illegal sales facilitated by their platforms. One case currently pending in the District of Wisconsin, *Bauer v. Armslist, LLC*, was filed by the Brady Campaign to Prevent Gun Violence on behalf of the family and estate of a Chicago police officer who was shot and killed by a four-time felon who purchased a gun from a seller found on Armslist.[32] The complaint "seeks to hold the Armslist Defendants responsible for the foreseeable consequences of intentionally, recklessly and/or negligently designing and administering Armslist.com as a platform that does not merely enable but actively encourages and assists in the completion of illegal transactions supplying the criminal firearms market."[33] The case is currently pending.

Similar lawsuits have been filed by Brady and other legal organizations in past years, but no cases have successfully held Armslist or other websites accountable for illegal gun sales facilitated on their platforms. The reason for the lack of success will be explained in greater detail in Section IV below, but, in brief, Section 230 of the Communications Decency Act (CDA) prevents internet service providers (such as Armslist) from being held accountable for illegal posts on their platforms. The *Bauer* complaint attempts to frame the claim in a way that

[31] ATF guidance *supra* note 28.
[32] Civ. No. 2:20-cv-00215 (D. Wisc. Feb. 12, 2020).
[33] Complaint, *Bauer v. Armslist, LLC*, Civ. No. 2:20-cv-00215 (D. Wisc. Feb. 12, 2020), ¶ 19.

circumvents the CDA, but it remains to be seen whether such framing will be successful.[34] Other cases have attempted to frame their arguments to work around the CDA without success.[35]

However, as explained below, it's important to note that the fact that civil litigation has been unsuccessful in piercing the CDA does not mean the federal government can not impose licensing requirements on online firearms marketplaces.

III. Proposed action

In order to effectuate the purpose of the GCA and ensure websites like Armslist are required to comply with federal law, the next administration should promulgate a rule to clarify that facilitating gun sales for profit is a method of being "engaged in the business" of dealing in firearms, and require such facilitators to obtain an FFL to operate.

A. Substance of proposed rule

As noted above, under 18 U.S.C. § 921(a)(21)(C), an individual or entity "engaged in the business" of selling firearms is defined as "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."[36] The NPRM should clarify that any individual or entity that serves as the facilitator of gun sales with the intent to profit is covered by this definition. In particular, the NPRM should clarify the following:

- Facilitation of gun sales is a form of "dealing in firearms." Just because websites like Armslist are not directly transferring guns from buyers to sellers does not mean they are not devoting time, attention, and labor to that transfer. Indeed, such entities—by connecting gun buyers and sellers, providing the platform for these gun buyers and sellers to communicate, and indirectly profiting off of gun sales through advertisements and fees paid by premium users—are solely devoted to dealing in firearms by facilitating firearm sales. As such, the NPRM should clarify that "facilitating gun sales" is a form of "dealing in firearms." The NPRM should also codify several factors to help identify whether the entity at issue is facilitating gun sales, including:
    - whether the entity holds itself out publicly as a facilitator of guns sales, including on its website or via advertisements
    - whether the entity's name implies that it facilitates gun sales
    - whether a substantial portion of the entity's revenue is directly related to its facilitation of gun sales

[34] "This suit does not seek to treat the Armslist Defendants as publishers or speakers of third-party content, or to impose liability on the Armslist Defendants for simply publishing content solely produced by third-party users. The Armslist Defendants are liable because they acted negligently and intentionally, and took an active role in the production and proliferation of the content on Armslist.com." *Id*. at ¶ 20.
[35] *See, e.g., Daniel v. Armslist, LLC*, 386 Wis.2d 449 (2019).
[36] 18 U.S.C. § 921(21)(C).

- Only those who facilitate gun sales "as a regular course of trade or business" will be deemed "engaged in the business." The GCA is vague as to the level of activity that distinguishes someone who deals in guns occasionally—and is not subject to federal licensing requirements—from someone who is "engaged in the business" of dealing in firearms and qualifies as a firearms dealer. The next administration should clarify the level of activity sufficient to trigger FFL licensing requirements by setting a numerical threshold on the number of guns sold or offered for sale.[37] Such a clarification would apply to a facilitator of gun sales just as it would to a seller of guns.

- Only those who facilitate gun sales "with the principal objective of livelihood and profit" would be deemed "engaged in the business." The GCA is more explicit as to the motivation that must inform an entity's dealings in firearms. For an entity to be considered "in the business," it must have "the principal objective of livelihood and profit through the repetitive purchase and resale of firearms," which the GCA defines as "predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection."[38] The NPRM should clarify that facilitation of gun sales for profit fits within this definition because the profit facilitators derived from advertising and user fees depend entirely on the "repetitive purchase and resale of firearms."

B. Process

To issue a new rule, the ATF must go through the NCRM process under the APA.[39] First, an agency must provide notice that it intends to promulgate a rule by publishing a NPRM in the Federal Register. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Next, the agency must accept written public comments on the proposed rule for a period of at least 90 days, as specified by the GCA.[40] An oral hearing is not required.[41] Received comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting the proposals, or by modifying the proposed rule to reflect their input.

In order to prevail in a substantive legal challenge to the rule, the ATF should confirm that the definition of "facilitators" is consistent with the statutory language and reasonable, in light of the

[37] *See,* "Promulgate a regulation providing that a person who sells five guns or more for profit per calendar year is considered "in the business" of selling firearms," https://giffords.org/wp-content/uploads/2020/11/Promulgate-a-regulation-providing-that-a-person-who-sells-five-guns-or-more-for-profit-per-calendar-year-is-considered-"in-the-business"-of-selling-firearms.pdf.
[38] 18 U.S.C. § 921(a)(22)
[39] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[40] 18 U.S.C. § 926(b).
[41] *See Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990).

statute's purposes, agency experience enforcing the statute, and the comments submitted on the NPRM.

Because this regulation is novel, the ATF should anticipate a significant influx of comments from the public and industry stakeholders. Consequently, it may take several months after the comments period has closed for the ATF to draft a final rule that meaningfully responds to and/or incorporates all of the significant comments.

Once the revision process is complete, the final rule will be published in the Federal Register along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

C. Legal justification

The attorney general has the power to prescribe "such rules and regulations as are necessary to carry out the provisions of" the GCA.[42] In turn, the attorney general has delegated authority to issue rules and regulations related to the GCA to the ATF.[43] These provisions are "general conferral[s] of rulemaking authority" that would lead a court to defer to the agency's interpretation.[44] The ATF's interpretation of who qualifies as a dealer is in the exercise of its general rulemaking authority.[45] Indeed, the definition of dealer is central to the regulatory regime established by the GCA, including the enforcement of the licensing requirement under § 923(a).

IV. Risk analysis

Agency rulemaking is generally subject to two types of challenges: procedural challenges and substantive challenges. Procedural challenges center on whether the agency promulgated the final rule in accordance with the requirements outlined by § 553 of the APA.[46] The procedural requirements of the APA and the GCA are discussed in Section III of this memorandum. So long as the ATF is careful to observe these requirements, the new rule is likely to withstand procedural challenges.

Relevant here, substantive challenges will likely be mounted on the basis of the APA and Section 230 of the CDA.

A. APA

[42] 18 U.S.C. § 926(a).
[43] 28 C.F.R. §§ 0.130, 0.131.
[44] *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013); *Guedes*, at 20-21.
[45] *Id.*
[46] 5 U.S.C. § 553.

APA challenges will argue either that the rule is "in excess of [the agency's] statutory jurisdiction, authority or limitations,"[47] or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[48]

When a court reviews an agency's interpretation of a statute it is charged with administering, the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[49] Pursuant to that rubric, at step one, courts examine "whether Congress has directly spoken to the precise question at issue."[50] If so, "that is the end of the matter" and courts must enforce the "unambiguously expressed intent of Congress."[51]

However, step two requires courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.[52] This reflects the fact that "*Chevron* recognized that [t]he power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[53]

Here, at *Chevron* step two, the ATF has evidence to support the reasonableness of its interpretation of "dealing in firearms," including the text of the GCA and the statute's purpose.

First, a plain reading of the text of the GCA suggests facilitating sales is a form of "dealing in firearms." The text itself does not explicitly say an entity must physically conduct a transaction to "deal in firearms." If Congress had intended to limit the regulatory regime to just those who physically sell firearms, the statutory text would not contain the word "in"—it simply would have defined "in the business" to include those who "sell or transfer firearms." Instead, the text says an entity must devote "time, attention, and labor to ***dealing in*** firearms" (emphasis added).

It is a widely accepted canon of statutory interpretation that statutes should be construed "so as to avoid rendering superfluous" any statutory language: "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...."[54] The ATF could reasonably argue that by using the phrase "dealing in firearms"

[47] 5 U.S.C. § 706(2)(C).
[48] 5 U.S.C. § 706(2)(A).
[49] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).
[50] *Id.* at 842.
[51] *Id.* at 842-43.
[52] *Id.* at 843.
[53] *Id.* at 55–56 (internal quotation marks and citation omitted).
[54] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoted in Corley v. United States, 556 U.S. 303, 314 (2009)); *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003) (interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation"). *See also Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense). In a case analyzing the significance of the adjective "applicable" in a provision of the Bankruptcy Code,

as opposed to the phrase “dealing firearms,” or “selling or transferring firearms,” Congress meant the definition of “in the business” to encompass activities directly related to the sale in addition to the actual transfer itself.

In addition to the text of the GCA, the purpose of the Brady Handgun Violence Prevention Act (Brady Bill) would also support the ATF’s new rule. In creating a national background check system for firearms at the point of sale, Congress sought to regulate commercial entities responsible for the sale of large numbers of firearms. When the current language allowing unlicensed people to make “occasional sales” and sell guns from their “personal collections” was passed in 1986 as part of the Firearm Owners’ Protection Act (FOPA), the standard was discussed in legislative hearings at that time. According to an analysis conducted by Everytown for Gun Safety, the testimony indicates that the goal of the legislation was to create a clear definition for what constitutes “engaged in the business” and to protect people who sell guns in very small numbers.[55]

For example, Senator James McClure (R-ID), the sponsor of FOPA, said that the legislation would address the problem wherein sellers were prosecuted for transferring “two, three, or four guns from their collection.”[56] Senator Orrin Hatch (R-UT) said that the new definition would protect people from selling “two or three weapons from their personal collections and thus unwittingly violating” the law.[57] The head of the National Rifle Association’s Institute for Legislative Action described the problem as “prosecutions on the basis of as few as two sales.”[58]

In the last six months, Armslist.com has been visited by over 8.2 million Americans,[59] and in 2018 alone, approximately 1.2 million firearm sales listings were posted on Armslist that would not have required a background check.[60] By facilitating large numbers of firearm sales outside the view of federal regulation, websites like Armslist have co-opted the narrow private sales exception to contravene the purpose of the Brady Bill. By requiring the large commercial entity

the majority opinion relied on the presumption against superfluity to hold that “applicable” had a limiting effect, whereas Justice Scalia, in dissent, observed that “[t]he canon against superfluity is not a canon against verbosity. When a thought could have been expressed more concisely, one does not always have to cast about for some additional meaning to the word or phrase that could have been dispensed with.” Compare *Ransom v. FIA Card Services*, 562 U.S. ___, No. 09-907, slip op. at 7-8 (January 11, 2011) with *Ransom v. FIA Card Services*, 562 U.S. ___, No. 09-907, slip op. at 2 (January 11, 2011) (Scalia, J., dissenting).

[55] Everytown for Gun Safety, “Business as Usual,“ November 12, 2015, https://everytownresearch.org/report/business-as-usual/#intro.

[56] The Firearms Owner Protection Act, Hearing Before the S. Comm. On the Judiciary, 97th Cong. 47(1981) (statement of Sen. James McClure).

[57] The Federal Firearms Owner Protection Act, Hearing Before the S. Comm. on the Judiciary, 98th Cong. 5 (1983) (Statement of Senator Orrin Hatch).

[58] The Firearms Owner Protection Act, Hearing Before the S. Comm. On the Judiciary, 97th Cong. 47 (1981) (Statement of Neal Knox, Exec. Dir. NRA-ILA).

[59] SimilarWeb, “Armslist.com,” August 2020, https://www.similarweb.com/website/armslist.com/.

[60] Everytown for Gun Safety, “Unchecked: Over 1 Million Online Firearm Ads,” January 2, 2019, https://everytownresearch.org/report/over-1-million-online-firearm-ads-no-background-checks-required/.

responsible for these sales to take responsibility for the safety of the transactions they facilitate, the ATF would be effectivating the purpose of the Brady Bill.

B. CDA Section 230

Even if the new rule did not violate the APA, a court could find that the rule contravenes Section 230 of the CDA. The section states that, "[n]o provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[61] The practical effect of Section 230 is that an internet service provider like Armslist cannot be held liable for illegal content posted on its platform by a user. As applied to the context of gun sales, this means that Armslist cannot be found liable for illegal gun sale postings made on its website, or for illegal gun sales facilitated by the website. However, Section 230 of the CDA would not act as a barrier to the ATF implementing the proposed rule.

Courts have used Section 230 of the CDA as a basis to dismiss suits brought against Armslist for the company's facilitation of illegal gun sales in the past.[62] One example is *Daniel vs. Armslist LLC*, in which a man illegally purchased a gun after responding to an Armslist posting and then shot and killed four people.[63] The daughter of one of the victims brought suit against Armslist for negligence and related torts for its involvement in the shooting,[64] and the case was brought to the Wisconsin Supreme Court, which held that the CDA barred all of Daniel's claims against Armslist[65] because "all of Daniel's claims against Armslist require the court to treat Armslist as the publisher or speaker of third-party content," which was disallowed under the CDA.[66]

Although the CDA would act as a barrier against holding a website like Armslist liable for gun violence that occurs from illegal sales on its platform, as *Daniel vs. Armslist LLC* shows, it would not necessarily act as a barrier to ATF implementing the proposed rule. The rule does not seek to treat these websites as publishers of information on their websites after the fact; it seeks to require that the websites obtain FFLs before the illegal sales occur. It could be argued that this places an affirmative obligation on the websites to prevent illegal activity, in violation of the CDA.

However, it is also possible that the rule could avoid conflicting with the CDA by virtue of the difference between online posts that are clear "speech," and gun transactions that could be seen as more than just "speech." As one Cornell professor pointed out to *The Verge* in an article about the CDA and Armslist, requiring a license for each tweet on Twitter would make it

[61] 47 U.S.C. § 230(c)(1).
[62] *See, e.g., Vesely v. Armslist* LLC, 762 F.3d 661 (7th Cir. 2014) (holding that the CDA barred plaintiff's claim against Armslist for the website's facilitation of illegal gun sale that resulted in a homicide); *Daniel v. Armslist*, LLC, 386 Wis.2d 449, 457 (2019) (same); *Stokinger v. Armslist*, LLC, 1884CV03236F, 2020 WL 2617168 (Sup. Ct. Mass. Apr. 28, 2020).
[63] *Daniel v. Armslist, LLC*, 386 Wis.2d 449, 457 (2019).
[64] *Id.* at 461.
[65] *Id.* at 484.
[66] Id. at 481.

impossible for the social media website to function; however, requiring a license for each sale on Armslist "doesn't make firearm sales impossible."[67] Moreover, if the proposed rule requires Armslist to obtain an FFL itself—as opposed to only allowing licensed sellers on the platform—then it arguably doesn't conflict with the CDA, because it imposes a requirement on the platform itself to be able to operate, rather than requiring the platform to police content by users.[68]

Perhaps most importantly, the text of Section 230 explicitly provides:

> No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, ***or any other Federal criminal statute.***[69] (Emphasis added).

The proposed rule outlined above is exactly that: an attempt by the ATF to enforce a criminal statute, namely 18 U.S.C. § 923(a).[70]

[67] Colin Lecher and Sean Campbell, "The Craigslist of Guns: Inside Armslist, the Online 'Gun Show that Never Ends'," The Verge, January 16, 2020, https://www.theverge.com/2020/1/16/21067793/guns-online-armslistmarketplace-craigslist-sales-buy-crime-investigation.

[68] The CDA does not prevent any and all regulation of websites; for example, many courts have found that websites are required to be accessible to all users under the Americans with Disabilities Act. Kris Rivenburgh, "The ADA Checklist: Website Compliance Guidance for 2019 in Plain English," Medium, November 7, 2018, https://medium.com/@krisrivenburgh/the-ada-checklist-website-compliance-guidelines-for-2019-in-plain-english-123c1d58fad9; Jason P. Brown & Robert T. Quackenboss, "The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019," Hunton Andrews Kurth LLP January 3, 2019, https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/ ("Courts within the First, Second, and Seventh Circuit Courts of Appeals have found that a website can be a place of public accommodation independent of any connection to a physical space," which subjects them to accessibility requirements under Title III of the Americans with Disabilities Act.).

[69] 47 U.S.C. § 230(e)(1).

[70] *Doe v. Bates,* No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) ("section 230(e)(1) exemption permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves actually violate federal criminal laws.").

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Federal Bureau of Investigation
Topic: N-DEx Rule
Date: November 2020

Recommendation: Promulgate a regulation allowing the NICS section access to the National Data Exchange (N-DEx) System.

I. Summary

Description of recommended executive action

A September 2016 audit by the DOJ Office of the Inspector General found that the FBI National Instant Criminal Background Check System (NICS) section—the branch of the FBI responsible for operating the firearm background check system—does not currently have access to N-DEx. The Office of the Inspector General found that had N-DEx been available to the NICS section, it would have identified the Charleston, South Carolina, gunman as a prohibited purchaser because of a previous drug-related arrest, and he would have failed a background check and been unable to buy a gun from a licensed gun dealer.

The FBI is currently working to implement use of N-DEx as a *secondary* search database that would be searched only if a prospective firearm purchaser is flagged in the existing primary databases during a NICS check. Under this proposal, we recommend the DOJ issue a rule amending the NICS implementing regulations to add N-DEx as a primary database during a NICS check.

Overview of process and time to enactment

The US Department of Justice (DOJ) originally promulgated regulations to implement NICS in 1998 and has since amended those regulations multiple times, the last one occurring in 2014. This proposal, recommending that the DOJ once again amend the NICS implementing regulations, would follow the same notice-and-comment rulemaking procedure, as previously followed, pursuant to Section 553 of the Administrative Procedure Act. The DOJ should begin the process by issuing a Notice of Proposed Rulemaking to this effect within the first 100 days of the next administration.

II. Current state

National Instant Criminal Background Check System

The National Instant Criminal Background Check System (NICS) was established through the passage of the Brady Act and launched by the FBI in 1998.[1] The act established that such a

[1] *See* 34 U.S.C. §§ 40901 *et seq.* Federal law prohibit the following persons from receiving firearms: (1) persons under indictment for or convicted of a crime punishable by imprisonment for a term exceeding 1 year; (2) fugitives from justice; (3) unlawful users and/or addicts of any controlled substances; (4) persons

system would determine "whether receipt of a firearm by a prospective transferee would violate [Federal] or State law."[2]

NICS comprises three separate databases: the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Index. NCIC contains information on protective orders and active felony or misdemeanor warrants; III contains individual criminal history records; and the NICS Index contains information provided by federal, state, and local agencies on other prohibited persons such as undocumented persons, and persons who have renounced their citizenship, been adjudicated mentally defective, been dishonorably discharged from the military, or deemed controlled-substance abusers.[3]

The FBI maintains and operates NICS, which is implemented by the regulations found at 28 CFR Part 25. In 2008, in the wake of the mass shooting at Virginia Tech, Congress addressed NICS again, through the NICS Improvement Amendments Act of 2007 (NIAA).[4] The NIAA addresses certain information gaps regarding "prohibiting mental health adjudications and commitments and other prohibiting backgrounds."[5]

The NICS process

A federal firearms licensee (FFL) "may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act."[6] The background check process is initiated when an FFL receives a firearms transaction record, more commonly referred to as

adjudicated as mentally defective or who have been committed to any mental institution; (5) illegal aliens or aliens admitted to the United States under a nonimmigrant visa; (6) persons dishonorably discharged from the U.S. Armed Forces; (7) those who have renounced their U.S. citizenship; (8) subjects of a protective court order; and (9) persons convicted of a misdemeanor crime of domestic violence. *See* 18 U.S.C. § 922(d), (g).

[2] *Id*.

[3] US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, https://oig.justice.gov/reports/2016/a1632.pdf; *see also* US Department of Justice, Federal Bureau of Investigation, "National Instant Criminal Background Check System Posts NICS Index Data," March 18, 2016, https://www.fbi.gov/news/pressrel/press-releases/national-instant-criminal-background-check-system-posts-nics-index-data ("The NICS Index was created specifically for use by the NICS and contains descriptive information on persons determined to be disqualified from possessing a firearm based upon state or federal law. Local, state, federal, and tribal entities voluntarily contribute information to the NICS Index. This information contains prohibiting information that may not be found in the III or the NCIC.").

[4] *See* Pub. Law 110-180.

[5] US Department of Justice, Bureau of Justice Statistics, "The NICS Improvement Amendments Act of 2007," accessed August 19, 2020, https://www.bjs.gov/index.cfm?ty=tp&tid=49.

[6] 28 C.F.R. § 25.6(a).

ATF Form 4473, from a prospective purchaser, and contacts the FBI NICS Operations Center or their state's point of contact (POC),[7] if one exists.[8]

Access to NICS through the FBI NICS Operations Center

In non-POC states, when an FFL contacts the FBI NICS Operations Center and provides the requisite information from the ATF Form 4473, NICS is searched to determine whether the purchaser matches any records in the three databases (NICS Index, NCIC, III).[9] If no matches are found, the FFL is instructed to proceed with the transfer of the firearm. If a match, or "hit", is found, a NICS examiner may conduct a quick review and evaluation of the records and then provide one of three possible responses to the FFL:

> (A) "Proceed" if there is no disqualifying record in the NICS Index, NCIC, or III.
>
> (B) "Deny" if there is a match with a record indicating the transferee is prohibited under federal or state law
>
> (C) "Delay" if the NICS search finds a match that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by federal or state law. A "delay" response to the FFL indicates that the firearm transfer should not proceed until a "proceed" response is received from NICS, or the expiration of three business days (unless prohibited by local law), whichever occurs first.[10]

Access to NICS through POCs

The FBI has given each state the option of having a state or local agency act as a point-of-contact (POC) for NICS.[11] If the state chooses to have a state or local agency act as a POC, FFLs contact the state or local agency, rather than the FBI, for the background check of any gun purchaser. If the state chooses not to have a state or local agency act as a POC, FFLs in

[7] A "point-of-contact" or "POC" is as "a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check. A POC will be an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order." *Id.* § 25.2

[8] States determine whether they will serve as a POC.

[9] The FBI will, on behalf of the FFL: "(1) Verify the FFL Number and code word; (ii) Assign a NICS Transaction Number (NTN) to a valid inquiry and provide the NTN to the FFL; (iii) Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records; and (iv) Provide [one of three possible] NICS responses based upon the consolidated NICS search results to the FFL that requested the background check." 28 C.F.R. § 25.6(c)(1)(i) - (iv).

[10] *Id.* § 25.6(c)(1)(iv)(A) - (C). The three responses do not "contain any of the underlying information in the records checked by the system." *Id.* § 25.6(c)(2).

[11] *See* Federal Bureau of Investigation, "1998-1999 NICS Operations Report," 5, https://www.fbi.gov/file-repository/operations_report_98_99.pdf/view; 28 C.F.R. § 25.2.

the state contact the FBI directly for the background check.[12] POCs have electronic access to NICS "virtually 24 hours each day through the NCIC communication network."[13] The POC "transmit[s] the request for a background check via the NCIC interface to the NICS."[14] Upon receipt of the request, "POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems."[15]

Similar to non-POC states, when NICS receives the POC request, NICS searches the relevant databases for any matching record(s). If no matches are found, the POC instructs the FFL to proceed with the transfer of the firearm. If a match, or "hit", is found, the POC may conduct a quick review and evaluation of the records and then provide the FFL with one of the three responses described above—proceed, deny, delay.[16] If the FFL receives a "delay" response, the POC conducts further research to determine whether the prospective transferee is disqualified from possessing a firearm by Federal or state law.[17]

N-DEx

The FBI's National Data Exchange (N-DEx) system is "an unclassified national information sharing system that enables criminal justice agencies to search, link, analyze, and share local, state, tribal, and federal records."[18] N-DEx enables users to link investigations and investigators by connecting seemingly unrelated data on people, places, and things. According to the FBI, N-DEx "complements" NCIC and III (two of the three databases checked in a NICS check).[19]

The N-DEx system is not enumerated in the NICS implementing regulations as one of the databases to be checked prior to an FFL transaction; however, the N-DEx contains information that is not included in the three named databases, including "incident, arrest, and booking reports; pretrial investigations; supervised released reports; calls for service; photos; and field contact/identification records."[20] The N-DEx system is currently used by criminal justice professionals, including corrections personnel, detectives, patrol officers, probation and parole officers, and regional dispatchers.[21]

[12] 28 C.F.R. § 25.6.
[13] *Id.* § 25.6(d).
[14] *Id.* § 25.6(d)(1)–(2).
[15] *Id.* § 25.6(e).
[16] US Department of Justice, Federal Bureau of Investigation, "About NICS," accessed August 19, 2020, https://www.fbi.gov/services/cjis/nics/about-nics; Owen Greenspan & Richard Schauffler, "State Progress in Record Reporting for Firearm-Related Background Checks: Fingerprint Processing Advances Improve Background Checks," September 2016, https://www.ncjrs.gov/pdffiles1/bjs/grants/250275.pdf.
[17] *Id.*
[18] US Department of Justice, Federal Bureau of Investigation, "National Data Exchange (N-DEx) System," accessed June 30, 2020, https://www.fbi.gov/services/cjis/ndex.
[19] *Id*.
[20] *Id*. (The N-DEx System "fills information gaps and provides situational awareness." It also "complements other well-known FBI systems, such as" NCIC, III, and Next Generation Identification.).
[21] *Id*. Although we could not confirm in any publicly available research, we believe that dealers that used state-based NICS programs could also obtain access to N-DEx.

N-DEx as a "secondary" search database

As described in further detail below, the Charleston shooter was able to pass a background check to obtain a gun, because NICS failed to contain sufficient information to determine that he was prohibited from possessing firearms. In response to the Charleston shooting, a pilot program was conducted using N-DEx that demonstrated how N-DEx can improve the system's ability to identify ineligible purchasers. Based on the pilot program's results, the FBI began working to implement use of N-DEx as a "secondary search database," meaning that it would be searched only if a prospective firearm purchaser is flagged in the existing primary databases during a NICS check.

III. Proposed action

To "improve the "efficacy and effectiveness"[22] of NICS background checks and to avert potential consequences associated with missing a record that may be available in federal datasets, the FBI should amend the NICS implementing regulation (28 CFR Part 25) to **add the N-DEx system as the fourth database searched as a part of a NICS check, making the N-DEx system a primary search database.**

Specifically, the FBI should add:

- the following to the definitions at 28 C.F.R. § 25.2: "N-DEx system (National Data Exchange System) means the unclassified national information sharing system that enables criminal justice agencies to search, link, analyze, and share local, state, tribal, and federal records."
- the following sentence at the end of 28 C.F.R. § 25.4: "Information in the N-DEx system that will be searched during a background check has been or will be contributed voluntarily by federal, tribal, state, and local, criminal justice agencies."
- "N-DEx" in the subsections in § 25.6 that list the relevant databases (NICS Index, NCIC, III).\[23]
- "N-DEx" in the last sentence, after "III" of § 25.9(a)

As discussed above (see section National Instant Criminal Background Check System), when a NICS background check is initiated, NCIC, III, and the NICS Index are the primary databases searched for records that might prohibit the transferee from purchasing firearms.[24] However,

[22] US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, https://oig.justice.gov/reports/2016/a1632.pdf (recommending that the FBI "implement the FBI Inspection Division report's recommendation that the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI, potentially including the N-DEX database.").
[23] *E.g.*, 28 C.F.R. §§ 25.6(c)(iii), (iv)(A), (iv)(C); (f), (f)(2).
[24] US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, "National Instant Criminal Background Check System (NICS) Operations," May 3, 2017, https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view (2016 NICS

the N-DEx system contains records not included in the three primary NICS databases, records that can serve to complement the primary databases.

IV. Legal justification

An agency is "free to change their existing policies as long as they provide a reasoned explanation for the change."[25] When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate."[26] However, an agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy."[27]

In addition, "[i]n explaining its changed position, an agency must also be cognizant that long-standing policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[28] "[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" and that "an arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference."[29]

Accordingly, in its explanation for the Proposed Rule, the ATF should explain the addition of N-DEx as a primary search database by reference to the public safety danger associated with failures of the system to identify ineligible gun purchasers. As described below, the Charleston shooting demonstrated the horrific results when a background check fails to identify a person prohibited from possessing firearms, allowing the person to purchase weapons. In addition, the pilot program that was conducted in response to the shooting using N-DEx, demonstrated how N-DEx can improve the system's ability to identify ineligible purchasers. The ATF can point to the results of this pilot program in explaining this change.

Danger when background checks fail to identify ineligible purchasers

A 2016 DOJ inspector general audit acknowledged the "potential consequences associated with missing even a single record that may be available in existing federal datasets" and recommended that "the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI, potentially including the N-DEX

operations report explaining that While only NCIC, III, and the NICS Index are explicitly identified as "relevant databases" in the background check regulations, U.S. Immigration and Customs Enforcement databases also are searched by the NICS for non-US citizens who attempt to receive firearms in the US).

[25] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs*., 545 U.S. 967, 981–982 & *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, Inc., 467 U.S. 837, 863-864 (1984)).

[26] *Encino*, 136 S. Ct. at 2125 (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

[27] *Encino*, 136 S. Ct. at 2126.

[28] *Id*.

[29] *Id.* (internal quotations and citations omitted).

database."[30] That audit was the result of the June 2015 mass shooting at Emanuel AME Church in Charleston, South Carolina. According to that audit, the shooting "demonstrate[d] that even a single firearm background check error can contribute to tragic results."[31] In the wake of the shooting, the FBI discovered that the gunman "should not have been allowed to purchase the gun" used in the shooting.[32] The NICS background check revealed a felony arrest for a drug charge, but without documentation of a conviction or admission, the background check did not result in an automatic denial.[33] Rather, approval was delayed while NICS examiners pursued additional documentation to assist in the determination; however, because of paperwork errors and difficulty finding the proper authorities to confirm whether the gunman had been convicted,[34] the gunman was subject to a "default proceed" after three business days and was able to obtain the firearm.

While several mistakes were made during that background check process,[35] the DOJ inspector general cited the inability of NICS examiners to access N-DEx as a particular hindrance to denying the gunman's purchase.

> N-DEX contained data that would have revealed the prohibiting incident report for the alleged shooter in the Charleston shooting. However, the N-DEX database is not included as a NICS dataset. . . . FBI officials told us that as of August 2016, the NICS Section was unable to access N-DEX in order to conduct firearm background checks . . . .[36]

[30] US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, 23, https://oig.justice.gov/reports/2016/a1632.pdf.
[31] US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, 8, https://oig.justice.gov/reports/2016/a1632.pdf.
[32] US Department of Justice, Federal Bureau of Investigation, "Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase," July 10, 2015, https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-comey- regarding-dylann-roof-gun-purchase.
[33] *See* US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, 22, https://oig.justice.gov/reports/2016/a1632.pdf (explaining that the gunman had admitted that he had possessed a controlled substance without a prescription, but this information was included in an incident report not contained in NICS, NCIC, or III). *See* ECF No. 93, United States' Local Civ. Rule 26.03 (D.S.C.) Statement, at 1, 3, *Sanders v. United States*, 2:16-cv-2356-RMG (D.S.C. Dec. 16, 2019).
[34] For example, the arrest record incorrectly indicated that the Lexington County Sheriff's Office was the arresting authority. US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, 22, https://oig.justice.gov/reports/2016/a1632.pdf.
[35] *See, e.g.*, ECF Nos. 50-1 to 50-3, Inspector's Report, Sanders v. United States, 2:16-cv-2356- RMG (D.S.C. Jan. 26, 2018) (describing issues including "[t]he lack of timely responses and/or incomplete records," "outdated and inefficient means of communication with various state and local agencies," "prioritiz[ation of] volume over resolution," and increased demand within the NICS section while "resources remained essentially the same" over the past decade).
[36] US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, 22-23, https://oig.justice.gov/reports/2016/a1632.pdf. At the time of a CJIS manager's deposition in October

The results of the pilot program

Largely in response to the Charleston shooting, the NICS section conducted a pilot program designed to study the usefulness of incorporating N-DEx into the NICS background check system.[37] The pilot program lasted 42 days, during which NICS searched N- DEx on 67,554 records.[38] NICS reviewed 6,980 "hits" out of 11,417.[39] The program found no prohibitors for 5,982 of the records, and possible prohibitors on 655 records.[40] NICS made final decisions on 59 transactions: 31 denials and 28 proceeds.[41] Importantly, the pilot study demonstrated that a large majority of the ultimate denials, 24 of 31, "would have been given an immediate "proceed" if the N-DEx had not been searched as a primary search."[42] While these 24 denials represent a small number of the overall records searched in N-DEx for the pilot study, they emphasize a significant weakness of the current background check system, a weakness that N-DEx could help address.

The following examples from the NICS Section 2016 pilot study demonstrate a significant weakness in NICS that can have significant consequences, and show the criticality of using N-DEx.[43] In one case, an individual with a mental health adjudication had been approved for a firearm purchase, because the current search databases revealed only one driving under the influence (DUI) charge.[44] Yet, several other DUI arrests were revealed in N- DEx, along with information that the individual "had been found to be a danger to himself or others and had received court-ordered treatment because of the alcohol abuse."[45] Therefore, the individual met the mental adjudication criteria and should have been prohibited from purchasing a gun.

In another case, only a primary search of N-DEx would have identified the prospective purchaser, because no issues had been found in NICS, III, or NCIC.[46] Only N-DEx "documented the person was under indictment for a felony theft of property offense.[47] He had an indictment by the grand jury, and there was no evidence of that within III."[48] That individual had already been transferred a gun, and "ATF was notified to submit for a firearm retrieval

2017 in litigation against the government by survivors and relatives of victims of the Charleston shooting, NICS did not have N-DEx access. *See* ECF No. 43-20, Excerpt of Oct. 12, 2017 Dep. Tr. Of Christopher Alan Nicholas, at 135:22–136:8, *Sanders v. United States*, 2:16-cv-2356-RMG (D.S.C. Nov. 30, 2017).

[37] US Department of Justice, Federal Bureau of Investigation, "Criminal Justice Information Services Division Advisory Policy Board Meeting Minutes," December 7-8, 2016, Phoenix, Arizona, 11.

[38] *Id.*

[39] *Id*. Federal law required NICS to purge any records not reviewed within 24 hours.

[40] *Id*.

[41] *Id*.

[42] *Id*. at Appendix H, PowerPoint slide 19.

[43] See *id*. at 12.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

referral."[49] Thus, while it is a promising first step to use N-DEx as a secondary search database, doing so will still fail to capture prohibited individuals whose information is only in N-DEx.

While NCIC, III, and the NICS Index contain a variety of information, records exist outside these databases that can fill gaps and provide a more complete overview of an individual's history.

Impact on the system

NICS is an already overburdened system. The addition of N-DEx may cause additional purchasers, who might otherwise have been immediately approved, to have their purchases delayed. However, the NICS section's 2016 pilot program, which studied the usefulness of incorporating N-DEx into NICS, identified 24 of 31 denials in a 42-day period that would have been given an immediate "proceed" if the N-DEx had not been searched as a primary database.[50] Separately, a 2016 OIG report recommended that the FBI identify and review additional databases because of the "potential consequences associated with missing even a single record that may be available in existing federal datasets."[51] While further delays are possible, the consequence of not using the available systems are horrific.[52]

The potential for further delays could be eliminated through additional NICS examiners. The NICS Section 2016 pilot study estimated the number of additional staff members who would be needed to accommodate the use of N-DEx as either a primary or secondary search database: "60 Full-Time Equivalents (FTEs) would be required to perform the additional 107,074.24 work hours if N-DEx was used as a primary search and 50 FTEs would be required to perform the additional 88,429.10 work hours if N-DEx was used as a secondary search."[53] It is not clear how these numbers were calculated.

The department may wish to address these staffing needs by hiring more employees, reassigning employees, or a combination of the two. It is unclear how many, if any, employees have been hired to assist with N-DEx searches, or how many, if any, existing employees' duties have changed to account for using N-DEx as a secondary search database. As demonstrated by the pilot study, using N-DEx may mean following up on more leads with law enforcement. Currently, 72% of background checks identify no problem and the purchaser is quickly approved.[54] It can be expected that the percentage of automatic approvals will decrease with the use of N-DEx, and the number of prospective purchasers who may require further

[49] *Id*.

[50] CJIS Advisory Policy Board Meeting Minutes, December 7-8, 2016, Phoenix, Arizona, 11.

[51] US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, 23, https://oig.justice.gov/reports/2016/a1632.pdf.

[52] *See* Ann Givens & Andrew Knapp, "FBI to Add Major Law Enforcement Database to Gun Background Check System," *The Trace*, July 10, 2018, https://www.thetrace.org/2018/07/fbi-background-check-system-nics-ndex-charleston/.

[53] CJIS Advisory Policy Board Meeting Minutes, December 7-8, 2016, Phoenix, Arizona, 13.

[54] US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, 4, https://oig.justice.gov/reports/2016/a1632.pdf.

investigation may increase. Critically, however, N-DEx records are supplied by individual "record-owning agencies" and may require independent verification, because they are "limited to duplicates and summaries of records obtained and separately managed" by said agencies.[55] These duplicates and summaries may in fact speed the process, rather than slow it down, since they may help NICS examiners complete their analyses. Consequently, it is not clear how many, if any, additional staff should assist with these cases.

Notably, the need for additional staff may also be mitigated by legislation. Current law allows for the approval of a firearm purchase by default if a NICS determination is not made within three business days of the initial request.[56] Coupled with understaffing, the result is that hundreds of thousands of guns are sold to individuals, not because they have been affirmatively approved, but because they have been approved by default, i.e. were issued a "default proceed."[57]

However, in February 2019, the House of Representatives passed H.R. 1112 (Clyburn), which would extend the three-business day deadline for the background check process to be completed before a firearm sale can proceed by default. If such a bill were to become law, NICS examiners (and their equivalents in POCs) would have additional time to complete their evaluation of the records included in NICS searches. Consequently, the addition of N-DEx as a primary search database might not increase the need for additional staff all that much, as existing staff will have more time to complete the checks.

Privacy

If N-DEx is added to the NICS, an increased number of individuals who are currently unable to access the personal information, such as NICS examiners and state POCs, will have access to personal information in N-DEx. This raises privacy concerns.

However, N-DEx privacy safeguards will still apply. For example, pursuant to the N-DEx policy and operating manual, the record-owning agency retains responsibility, control, and ownership of N-DEx records.[58] N-DEx allows the agency to "protect their data in accordance with the

[55] US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, "Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System Policy and Operating Manual," September 21, 2018, Section 2.5.3, https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view.

[56] *See, e.g.*, 18 U.S.C. § 922(t)(1)(B) (no licensee shall transfer a firearm unless "3 business days . . . have elapsed since the licensee contacted the [NICS background check] system").

[57] *See, e.g.*, Ann Givens, "The Gun Background Check System Is Overburdened and Understaffed, DOJ Budget Request Shows," *The Trace*, March 21, 2018, https://www.thetrace.org/2018/03/gun-background-check-staff-shortage-justice-department-budget/ ("NICS checkers are often so overloaded that they don't even have time to start a check until they are nearing the end of the 72-hour window"); *see also* Kevin Johnson, "FBI official: 'Perfect storm' imperiling gun background checks," *USA Today*, January 19, 2016, https://www.usatoday.com/story/news/nation/2016/01/19/fbi-guns-background- checks/78752774/ ("new positions are desperately needed, authorities said, to support the seriously stressed NICS system").

[58] *See, e.g.*, US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, "Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System Policy and Operating Manual," September 21, 2018, Section 1.4.2, https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view.

laws and policies which govern dissemination and privacy for their jurisdictions."[59] Access to the N-DEx must be through secure internet connections or the FBI's Criminal Justice Information Services (CJIS) Wide Area Network.[60] Additionally, the NICS privacy safeguards and the retention and destruction policies applicable to the three current databases will apply to the N-DEx as a primary database.[61]

Procedural question

Adding N-DEx as a fourth database in a NICS check through the rulemaking process could be viewed as an unnecessary burden. The district court in the Charleston litigation rejected the government's conclusion that for the NICS Section to access N-DEx, CJIS Advisory Policy Board approval (which has now been granted) and a change in the regulation are required.[62] The court found that "the Director of the FBI has full authority to allow NICS examiners to access N-DEx" and "could do so today."[63] Likewise, "FBI's Office of General Counsel has already determined that background checkers can start to access N-DEx without the FBI changing any regulations."[64]

Even though the FBI director may direct NICS examiners to access N-DEx for NICS checks, the installation of a new director or administration could reverse that directive. A regulation, on the other hand, has the force and effect of law, creating a mandate resulting in consistent use of N-

[59] US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, "Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System Policy and Operating Manual," September 21, 2018, Section 1.4.3, https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view.

[60] *See, e.g.*, US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, "Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System Policy and Operating Manual," September 21, 2018, Section 1.4.5, https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view.

[61] 28 C.F.R. Subpart A. *See also* National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58303, 58303 (Oct. 30, 1998) ("The FBI will not establish a federal firearms registry. The FBI is expressly barred from doing so by section 103(i) of the Brady Act.").

[62] US Department of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," September 28, 2016, ii, https://oig.justice.gov/reports/2016/a1632.pdf. The December 2016 CJIS APB meeting minutes do note that as part of the expansion of the NICS background checks to include N-DEx, the "FBI's Office of the General Counsel [is] to develop a modification to the current federal regulation for the NICS" that will "allow for the inclusion of the query of the N-DEx." CJIS Advisory Policy Board Meeting Minutes, December 7-8, 2016, Phoenix, Arizona, Appendix D, 10. The NICS Section recommended that "the revised regulation encompass future information systems managed by the FBI." *Id*. This suggests that, beyond the textual changes advised in Section III. A of this memorandum specific to N-DEx, an updated regulation would be broader and provide more opportunity to query additional search databases as appropriate.

[63] *Sanders v. United States*, 324 F. Supp. 3d 636, 648–49 (D.S.C. 2018) (rejecting government's argument), rev'd on other grounds, 937 F.3d 316 (4th Cir. 2019).

[64] *See* Ann Givens & Andrew Knapp, "FBI to Add Major Law Enforcement Database to Gun Background Check System," *The Trace*, July 10, 2018, (citing June 2018 CJIS APB meeting minutes).

DEx for NICS checks.[65] Any attempt to reverse the regulation by another administration would require their adherence to the notice-and-comment procedures.

V. Next steps and additional action

Steps that could be taken in 2020

There are several actions that can be taken now to advance the proposal. First, Ann Givens, a journalist at *The Trace*, recommended reaching out to primary sources who would likely be able to provide important information about the background check system and the FBI's consideration of N-DEx as a primary or secondary search database—including Frank Campbell, one of the original NICS designers and former Department of Justice attorney, and Ross Loder, former vice chair of the CJIS Advisory Policy Board NICS Subcommittee and former bureau chief for weapon permits of the Iowa Department of Public Safety. Their insight would be particularly useful to understand concerns about adding N-DEx as a primary search database. Second, the proposed text of a draft rule that includes N-DEx in the current NICS regulation should be developed. To the extent the FBI's Office of General Counsel has drafted a modified rule already, it can be evaluated for comment during the public comment process.

Related areas of advocacy for executive action

The NICS section needs more resources, both human and economic. A significant unanswered question, also discussed above (*see* section Legal Justification), is whether the addition of N-DEx as a primary search database (or even as a secondary search database) will create a net benefit if Congress does not provide NICS with additional resources, or provides NICS with more time to make these determinations. Thus, efforts to increase capacity of the NICS section would address the limiting factor of finite—and overburdened—staff and resources, and should also be a focus of the administration.

[65] *See* Sanders, 937 F.3d at 332–34 (rejecting argument that failure to check N-DEx violated a mandatory directive where N-DEx is not identified as a "relevant database" in 28 C.F.R. § 25.6 and is not included in the definition of "NICS Index" in 28 C.F.R. § 25.2).

RECOMMENDED ACTION MEMO

Agency: Federal Bureau of Investigation
Topic: NICS Denial Notifications in Domestic Violence Cases
Date: November 2020

Recommendation: Establish an alert system for failed background checks, so that various state and local officials are notified when a person in their community who is prohibited from gun possession due to domestic violence has tried to buy a gun.

I. Summary

Description of recommended executive action

Under federal law, it is a crime to knowingly provide false information to a gun dealer when attempting to purchase a firearm. When an individual violates this law by providing false information on the form used to complete background checks—ATF Form 4473—and subsequently fails the background check, federal law enforcement is notified. However, current law does not ensure that state or local law enforcement is made aware of these situations. Promptly notifying local law enforcement of these background check denials can help ensure that the prohibited purchaser does not attempt to access firearms in other ways, such as through an unregulated private sale or over the internet. Increasing transparency by notifying state and local law enforcement provides more time to help prevent prohibited buyers from getting their hands on a gun to commit violent crimes. Under this proposal, the FBI would establish an alert system for failed background checks in cases involving individuals prohibited because of prior domestic violence, so that various state and local officials are notified when an ineligible person in their community has tried to buy a gun.

Overview of process and time to enactment

The FBI can operationalize this recommendation administratively without the need for any type of formal rulemaking process. Because this proposal builds upon an effort begun under the Obama administration, it is likely that progress is already underway to meet this goal, and it could be completed early in the next administration.

II. Current state

Federal denials

When an individual attempts to buy a gun from a licensed dealer, they are required to complete ATF Form 4473, a form that asks for certain identifying information about the individual, and

specific questions to ascertain whether the individual is prohibited from buying a gun.[1] The form includes a series of checkboxes asking the purchaser to answer "yes" or "no" with respect to each prohibiting category under federal law. Lying on this form is a federal crime, punishable by up to 10 years in prison, a fact which is clearly stated on the 4473 form itself.[2] One clear indication that an individual may have lied on the 4473 is when they check all of the boxes indicating that they are not prohibited from buying guns under federal law, yet fail the background check when the dealer contacts the National Instant Criminal Background Check System (NICS). In 2019, 10,948 individuals failed a background check, because they had either been convicted of a misdemeanor crime of domestic violence, or were subject to a domestic violence restraining order.[3]

When a prospective purchaser is denied a gun transfer in a state that relies on the federal background check system to determine gun eligibility, the NICS section relays this information to the ATF Denial Enforcement and NICS Intelligence (DENI) Branch. There, the DENI branch reviews the transaction to determine if it should be referred to one of ATF's 25 field divisions for further investigation and potential prosecution for lying on the 4473. In cases where a gun has been transferred before the denial determination was made, known as a "delayed denial," ATF field officers must retrieve the firearm and contact the individual with a notice warning them not to try to obtain a gun again. For standard denials, in which a gun has not been transferred, the ATF can prioritize which cases should be investigated and referred to a United States Attorney's Office (USAO) for prosecution.

These investigations are resource intensive and must meet stringent criteria to be prosecuted. As a result, the ATF generally only refers cases to USAOs where "aggravating circumstances exist," such as a history of violent felonies or frequent offenses.[4] In one analysis, the GAO found that most USAOs actively require the ATF to refer denial cases that involve convictions of domestic violence.[5] However, because cases proving a prohibited person knowingly lied on a Form 4473 can be difficult to build and are often deemed not a priority for federal prosecutors, prosecution of even these cases is rare. In Fiscal Year 2017, 112,090 federal denials were made, of which 12,710 were investigated by ATF field offices, and only 12 prosecuted by USAOs.[6]

State denials

[1] Bureau of Alcohol, Tobacco, Firearms and Explosives, "Firearms Transaction Record," U.S. Department of Justice, revised May 2020, https://www.atf.gov/file/61446/download.
[2] 18 U.S.C. § 922((a)(6); 18 U.S.C. § 924(a)(2).
[3] U.S. Department of Justice, "2019 Operations Report," accessed October 15, 2020, https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view.
[4] Government Accountability Office, "LAW ENFORCEMENT Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions," September 2020, https://www.gao.gov/assets/700/694290.pdf.
[5] *Id.*
[6] *Id.*

In addition to being a violation of federal law, providing false information to a gun dealer in connection with a prospective purchase may also violate state laws regarding making false statements. The fact that an individual who is prohibited from gun possession even attempted to buy a gun can be a crucial piece of information for local law enforcement about the potential risk that person poses to public safety in the community. Some states have begun to take these lie-and-try-to-buy cases more seriously by investigating and, when appropriate, prosecuting offenders for this illegal conduct.

In 2014, Oregon implemented new statewide protocols for police on how to investigate denials: when an individual fails a background check at a gun store, the state police are alerted through the state's Firearm Instant Check System, and state troopers are dispatched immediately to the dealer to investigate.[7] In the first six months of the program,1,071 firearm denial investigations were initiated, and 462 cases were referred to the district attorney for prosecution.[8] Virginia state police have aggressively investigated individuals who fail background checks too. Since 2000, the state police notifies local law enforcement when a resident of its jurisdiction fails a background check and the local police conduct further investigation. This process has resulted in a number of criminal prosecutions.[9] In Pennsylvania, the State Police Firearms Division initiates investigations when a denial is issued as well. Between 1999 and 2013, a total of 1,627 prohibited individuals were convicted for illegally attempting to buy firearms in the state.[10]

More recently, Washington, Hawaii, and Tennessee have enacted so-called lie-and-try laws. Washington state's lie-and-try law was implemented in 2017, and requires FFLs to notify the Washington Association of Sheriffs and Police Chiefs (WASPC) when a prohibited person attempts to buy a gun; WASPC then notifies local law enforcement to investigate. In its first year of enactment, more than 3,200 transactions were denied and 669 were referred to law enforcement for investigation.[11] Recognizing the threat of an armed abuser, Washington also created an automated protected person notification system allowing a person to register to receive notification if an individual subject to a domestic violence order attempts to purchase a firearm. Legislation passed in 2020 made Washington a full point-of-contact state, requiring the

[7] Oregon State Police Training Bulletin, "Handling Denied Firearms Transactions" June 16, 2014, http://www.oregonfirearms.org/wp-content/uploads/2014/06/FICS-Bulletin-.pdf.
[8] Oregon State Police, "Oregon State Police Firearms Instant Check System (FICS) Denied Firearm Transactions & Investigations" 2015, https://web.archive.org/web/20170619205239/http://www.oregon.gov/osp/ID/docs/FICS%20DENIAL%20REPOTS/201406_12%20FICS%20Denial%20Report%20-%202014.pdf.
[9] Virginia State Police, "Facts and Figures Report" 2013, http://www.vsp.state.va.us/downloads/Annual_Report_Facts_Figures/Update-%202013%20Facts%20and%20Figures1.pdf; Mark Bowes, "Stats Show Background Checks are Effective," *Richmond Times-Dispatch*, February 17, 2013, https://richmond.com/news/virginia/stats-show-background-checks-are-effective/article_ac6626fd-8bf5-55d7-83cf-d464e379000a.html.
[10] Pennsylvania State Police, "2013 Firearms Annual Report" 2013, http://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania_State_Police_2013_Firearms_Annual_Report.pdf.
[11] "Letter from Steven D. Strachan, Washington Association of Sheriffs and Police Chiefs Executive Director, to Governor Inslee, Lieutenant Governor Habib and Speaker Chopp," November 8, 2018, https://assets.documentcloud.org/documents/5348030/2018-Denied-Firearms-Transactions-Annual-Report.pdf.

creation of its own background check system. Thirty days after the Washington State Patrol issues a notification to dealers that the state firearms background check system has been established, the state patrol is required to report each denial to the local law enforcement agency in the jurisdiction where the attempted purchase or transfer took place. The reported information will include the identifying information of the applicant, the date of the application and denial of the application, the basis for the denial of the application, and other information deemed appropriate by the Washington State Patrol.[12]

In 2017, Hawaii also enacted a law requiring the chief of police to report individuals whose permit applications are denied because the applicants are prohibited from purchasing or possessing a firearm under state or federal law. This law requires the chief of police to report denied individuals to the prosecuting attorney in the county where the permit was denied, the state attorney general, the United States attorney for the District of Hawaii, and the state director of public safety. If the permit to acquire was denied because the applicant is subject to a domestic violence order, the chief of police must, within three business days from the date of denial, send written notice to the court that issued the order. When the director of public safety receives notice that an applicant has been denied a permit because of a prior criminal conviction, the director of public safety must determine whether the applicant is currently serving a term of probation or parole. If so, the director must send a written notice of the denial to the applicant's probation or parole officer.[13]

Under Tennessee law, if a person who has been adjudicated as a "mental defective" or judicially committed to a mental institution attempts to purchase a firearm and is denied through the Tennessee Bureau of Investigation (TBI), the TBI must contact the chief law enforcement officer of the jurisdiction where the attempted purchase occurred within 24 hours to initiate an investigation into a possible violation of law.[14]

Attempts to establish a federal alert system

More must be done at the federal level to prevent prohibited individuals who have actively attempted to obtain a firearm from gaining access to one through another avenue. In recent years, the ATF DENI branch has increased the number of denials referred to field offices for investigation: from Fiscal Year 2011 to Fiscal Year 2017, standard denial referrals increased more than 200%.[15] However, the ATF has not received corresponding increases in staffing or resources to investigate these cases in the swift manner needed to keep communities safe. By

[12] Giffords Law Center to Prevent Gun Violence, "Background Check Procedures in Washington," accessed October 15, 2020, https://giffords.org/lawcenter/state-laws/background-check-procedures-in-washington/.
[13] Giffords Law Center to Prevent Gun Violence, "Background Check Procedures in Hawaii," accessed October 15, 2020, https://giffords.org/lawcenter/state-laws/background-check-procedures-in-hawaii/.
[14] Giffords Law Center to Prevent Gun Violence, "Background Check Procedures in Tennessee," accessed October 15, 2020, https://giffords.org/lawcenter/state-laws/background-check-procedures-in-tennessee/.
[15] Government Accountability Office, "LAW ENFORCEMENT Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions," September 2018, https://www.gao.gov/assets/700/694290.pdf.

incorporating state and local law enforcement into this process, the ATF can share this investigative burden. State and local law enforcement may already be aware of particularly dangerous individuals, and may be able to offer additional insight into a case's threat level.

In 2016, as part of a comprehensive set of executive actions to address gun violence announced by the Obama-Biden administration, President Obama announced that the FBI would partner with the US Digital Service to improve the background check system, including by "improving notification of local authorities when certain prohibited persons unlawfully attempt to purchase a firearm."[16] In the Senate's Fiscal Year 2019 Commerce, Justice, Science and Related Agencies Appropriations Bill, language was included that stated "The Committee encourages the ATF to, when possible, notify local law enforcement when a felon in their jurisdiction tries to buy a firearm. If the NICS check is not completed within three days and a felon obtains a firearm, the Committee encourages the ATF to notify and utilize the help of local law enforcement in retrieving the firearm."[17] Similarly, bicameral bipartisan legislation has been introduced in recent Congresses to require notification of state and local law enforcement within 24 hours of a background check denial.

As of 2020, the agencies have not established a system to accomplish this goal, but certain attempts to better connect NICS with state and local law enforcement have been made. The FBI has begun the process of integrating NICS with the National Data Exchange (N-DEx)—a repository of local, state, tribal, and federal records designed to share those records across jurisdictions. In its Fiscal year 2021 budget request to Congress, the FBI requested an increase in staff to allow examiners the opportunity to search N-DEx when performing a NICS check, which might—as it did in the case of the 2015 Charleston shooter's background check—contain prohibiting information not otherwise contained in the NICS system.[18] Because N-DEx can be used to connect federal law enforcement with their local counterparts, this system could be used to operationalize a denial notification system.

The same could be said for the National Crime Information Center (NCIC), one of the three databases searched by NICS during a background check. All law enforcement agencies have access to NCIC, which houses millions of crime records in 21 different files. Among those files is one solely dedicated to denied NICS transactions. Currently, law enforcement agencies can search this file at their discretion as a shared clearinghouse among many levels of law enforcement. Adding a notification for state and local law enforcement when this file gains a denial from their jurisdiction would ensure appropriate cases gain local attention.

[16] The White House Office of the Press Secretary, "FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer," January 4, 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.
[17] Mr. Moran, "Report accompanying S. 2584," Senate Committee on Appropriations, https://www.congress.gov/116/crpt/srpt127/CRPT-116srpt127.pdf#page=104.
[18] U.S. Department of Justice, "FY 2021 Authorization and Budget Request to Congress," February 2020, https://www.justice.gov/doj/page/file/1246311/download.

Armed abusers increase risk

While federal law enforcement may have previously believed individuals who lie-and-try represent a minimal threat to public safety, a 2006 internal ATF report shows that over a seven year period, 10 to 21% of individuals in denial cases referred to field offices for investigation were later arrested for gun crimes.[19] Today, that number is likely higher given the easy availability of guns through the internet and the rise of build-it-yourself ghost guns. Of the nearly 36,000 standard denials referred to ATF field divisions from Fiscal Year 2011 to Fiscal Year 2017, 46% were denied for domestic violence-related reasons.

By focusing notification on individuals prohibited for domestic violence reasons, law enforcement will prioritize individuals who pose a particularly time-sensitive threat. People with prior histories of domestic violence are likely to re-abuse in the short term, and even more likely to re-abuse in the long term.[20] One long-term study of males arrested for abusing female intimate partners in Massachusetts found that 60% of the men were rearrested for a new domestic assault, or had a protective order taken out against them within the 10-year follow up period.[21] Allowing these individuals to be armed greatly increases risk for victims of domestic abuse: the presence of a gun in a situation of domestic violence increases the likelihood of death by 500%. But these individuals present a threat to public safety outside the home as well, as a significant correlation exists between mass shooters and individuals with histories of domestic violence; an analysis of 749 mass shootings over a six-year period found that approximately 60% of those shootings were either domestic incidents or perpetrated by men who had previously committed acts of domestic violence.[22]

III. Proposed action

The next administration should build upon the progress made during the Obama administration by operationalizing an automatic alert system, through which local law enforcement will be notified when an individual in their jurisdiction fails a background check because they are prohibited from gun possession due to a domestic violence disqualifier. Such an alert system would not only allow federal law enforcement to continue to investigate and prosecute these cases when appropriate, but would also ensure that local law enforcement agencies are aware of potential threats in their communities, and are equipped with relevant information to determine if a state prosecution for this conduct is warranted.

[19] Jose Pagliery, “Gun form liars may go un to commit gun crimes, internal ATF research suggests,” CNN Investigates, December 21, 2018, https://www.cnn.com/2018/12/21/us/gun-form-liars-atf-invs/index.html.
[20] Andrew R. Klein, “Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges,” U.S. Department of Justice, June 2009, https://www.ncjrs.gov/pdffiles1/nij/225722.pdf.
[21] Andrew R. Klein and Terri Tobin, “A longitudinal Study of Arrested Batterers, 1995-2005: Career Criminals,” *Violence Against Women* Vol. 14, no. 2, (2008), https://journals.sagepub.com/doi/abs/10.1177/1077801207312396.
[22] Jackie Gu, “Deadliest Mass Shootings Are Often Preceded by Violence at Home,” *Bloomberg*, June 30, 2020, https://www.bloomberg.com/graphics/2020-mass-shootings-domestic-violence-connection/.

The attorney general should work with the FBI and ATF to determine the most appropriate way to operationalize this alert system. As discussed above, either N-DEx or NCIC may be appropriate systems to use for this purpose.

IV. Legal justification

There is nothing in the laws or regulations governing the National Instant Criminal Background Check System (NICS) that prohibits the creation of this type of alert system. Notifying local law enforcement of background checks denials related to domestic violence would not implicate any of the prohibited activities enumerated in the regulations,[23] nor would it result in the creation of a registry of gun owners, which is also prohibited.[24] While the regulations require that all identifying information pertaining to background checks that are allowed must be purged from the system after 24 hours, the FBI is permitted to retain data pertaining to background checks that are denied indefinitely.[25] This type of alert system also does not implicate regulations restricting access to NICS, since it would not require gun dealers or local law enforcement to access the system proactively, but rather would involve the FBI communicating this information out.[26]

[23] 28 C.F.R. §25.11.
[24] 28 C.F.R. § 25.9(b)(3).
[25] 28 C.F.R. § 25.9.
[26] 28 C.F.R. § 25.6 - 25.8.

RECOMMENDED ACTION MEMO

Agency: Federal Bureau of Investigation (FBI)
Topic: Retaining Records of Default Proceeds
Date: November 2020

Recommendation: **Require records of unresolved background checks on gun buyers to be retained.**

I. Summary

Description of recommended executive action

Every year, the FBI is unable to complete hundreds of thousands of background checks on gun purchasers. Federal law requires the destruction of background check records within 24 hours if the background check has been completed and the purchaser has been approved,[1] but no statutory provision applies to records when the background check has not been completed. Nevertheless, an FBI regulation requires records of incomplete background checks to be destroyed after no more than 90 days.[2] Meanwhile, the FBI maintains and preserves records of all background checks when gun purchasers are affirmatively found to be ineligible and the gun sales are denied.[3]

The failure of the FBI to retain records of incomplete background checks endangers public safety for two reasons. First, federal law allows a gun dealer to transfer a gun to a purchaser after three business days, even if the background check has not yet been completed.[4] If this background check is still not completed after 90 days, there continues to be a risk that the purchaser is ineligible to possess the gun that he or she may now possess. The destruction of the background check record deprives the FBI of any opportunity to discover that the purchaser was ineligible and to retrieve illegally possessed weapons. Second, the destruction of these records prevents the FBI from properly auditing the background check system, identifying patterns among incomplete background checks, and improving the system's ability to make accurate determinations in a timely fashion. These problems are exacerbated when gun sales increase, as has been the case in 2020.

The FBI should promulgate a regulation allowing for the maintenance of records of gun-purchaser background checks until a determination is made that the gun purchaser does not fall within one of the categories of people prohibited by federal or state law from purchasing or possessing guns. Under this proposal, the FBI would be better able to complete its background

[1] Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, § 511, 125 Stat. 552 (2011); see also 18 U.S.C. § 922(t)(c)(2).
[2] 28 C.F.R. § 25.9(b)(1)(ii), (c), (d).
[3] 28 C.F.R. § 25.9(b)(1)(i).
[4] 18 U.S.C. § 922(t)(1)(B)(ii).

check, based on information it might receive after the 90-day cutoff, and would be able to properly improve the background check system.

Overview of process and time to enactment

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the notice and comment rulemaking (NCRM) process.[5] To amend the regulation, the FBI will be required to issue a notice of proposed rulemaking (NPRM), provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the Federal Register. A rule generally goes into effect thirty days after it is published.[6] This multi-phase process generally extends for a year.

In addition, the Privacy Act of 1974 sets out requirements for government databases containing records that can be retrieved by personal identifying information.[7]It is not clear whether these procedural requirements would apply here. The DOJ's Office of Privacy and Civil Liberties ensures DOJ's compliance with the Privacy Act and is the entity best positioned to make that decision.

II. Current state

Gun purchaser background checks

The Brady Handgun Violence Prevention Act of 1993 (the Brady Act) requires any federally licensed firearms dealer (FFL) to perform a background check before selling a firearm.[8] Background checks are currently the most effective way of preventing guns from falling into the wrong hands. The National Instant Criminal Background Check System (NICS) was created by the FBI to implement the background checks required by the Brady Act.[9] From its inception on November 30, 1998, until December 31, 2019, NICS processed 333,004,066 background checks. The system undertook 28,369,750 checks in 2019 alone.[10] Because of these background checks, NICS denied 103,592 firearms transactions in 2019, bringing the total number of denied transactions to 1,700,558 since the system's inception.[11]

[5] 5 U.S.C. § 553.
[6] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.
[7] Privacy Act of 1974, 5 U.S.C. § 552a (2020); Office of Mgmt. & Budget, Exec. Office of the President, "Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act," OMB Circular No. A-108 (2017):15-17 [hereinafter "OMB Reporting Under the Privacy Act"].
[8] Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, § 102(b) (codified at 18 U.S.C. § 922(t)).
[9] See 34 U.S.C. § 40901.
[10] Federal Bureau of Investigation, "2019 NICS Operations Report," accessed October 19, 2020, https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view (hereafter "2019 NICS Operations Report").
[11] *Id.*

Under the regulations governing NICS, states have been given the option to either to assign state or local officials as points of contact (POCs) for NICS to complete a check; or have the FBI's NICS examiners complete the check.[12] When a person tries to buy a gun from an FFL, the FFL must contact the NICS, either through the FBI or a state-designated official, to conduct the background check.[13] The NICS check determines whether the purchaser matches any records in the NICS database of people identified as prohibited from possessing firearms under federal law (specifically under 18 U.S.C. § 922(g) or (n)) or state law. If no matches are found, the sale may proceed. If a match or "hit" is found, the NICS examiner or state-designated official conducts a more thorough search of the records, and then instructs the FFL to either proceed with, deny, or delay the transaction.

Most NICS background checks are completed very quickly.[14] However, when there is a match in the system, NICS will require the transaction to be delayed while further investigation is undertaken. From January 1, 2019, through December 31, 2019, approximately 11% of all transactions were given an initial "delay" status, following referral to NICS.[15] After three business days, if no final response is received from NICS, federal law allows the FFL (at its discretion) to proceed with the sale of the firearm—even if the background check is not complete.[16] This is known as a "default proceed" transaction. In 2019, there were 261,312 transactions handled by the NICS that could not be resolved within three business days.[17]

If a background check is not complete within three business days, NICS will continue to work on, and attempt to complete the check.[18] If, in pursuing further investigation as part of the background check, a firearms purchaser is found to be prohibited (and, consequently, the original sale should not have occurred) , the FBI or state official contacts the relevant FFL to ascertain whether a sale did indeed occur following the three business day "delayed transfer" period.[19] If such a sale has occurred in a state that relies on the FBI to process NICS checks, the FBI refers the case to the ATF, which is supposed to undertake a firearm retrieval process.[20] It is not clear how often the guns subject to a retrieval order are actually recovered.

Of course, not every transaction that proceeds after the expiry of the three business days will involve a prohibited purchaser, and some prospective gun purchasers decide not to move forward with the purchase, regardless of whether the sale is allowed. However, some FFLs do move forward and complete sales to purchasers who have not been affirmatively approved by NICS, and sometimes these purchasers are later determined to have been prohibited from

[12] 28 C.F.R. § 25.2 (defining "POC (Point of Contact) ") , 25.6 (explaining the system) .
[13] *See* 28 C.F.R. § 25.6.
[14] On average, from 2016-2019, over 89% of checks were dealt with and determined "immediately" (i.e. either to the NICS) . *See* 2019 NICS Operations Report p.14.
[15] *Id.* at 21.
[16] 18 U.S.C. § 922(t) (1) (B) (ii) .
[17] 2019 NICS Operations Report p.22.
[18] *Id.*; 28 C.F.R. § 25.2 (defining "open" transactions) .
[19] 2019 NICS Operations Report p.22; 28 C.F.R. § 25.2 (defining "delayed" transfer) .
[20] 2019 NICS Operations Report p.22.

purchasing or possessing guns. In fact, this “default proceed” provision allowed at least 2,989 prohibited purchasers to buy guns in 2019 before a background check was cleared.[21]

Record-keeping regulations

The Brady Act provides that “[i]f receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall…. destroy all records of the system with respect to the call ...and all records of the system relating to the person or the transfer.” The act does not specify the time period in which these records must be destroyed.[22]

The Brady Act does not mention the possibility that a background check may be inconclusive or unresolved because the system is unable to determine whether the purchaser falls within one of these categories, and does not specify whether records of such unresolved background checks may be retained or destroyed.

The Brady Act does include the following provision.

> No department, agency, officer, or employee of the United States may—
> (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or
> (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922(g) or (n) of title 18 or State law, from receiving a firearm.[23]

Litigation over the timeline

After the Brady Act became law, the DOJ proposed a regulation that allowed records of approved transactions (including those affirmatively approved by NICS) to be kept for 18 months.[24] Then, in the final regulation issued in 1998, the FBI reduced this time period to six months, presumably due to gun lobby pressure.[25] The National Rifle Association still sued, claiming that temporary retention of NICS records of allowed transfers violates three provisions of the Brady Act: (1) the requirement that the system "destroy" records of approved transactions, (2) the prohibition against the government "requiring that any [NICS] record… be recorded at or transferred to a [government] facility," and (3) the prohibition against the

[21] *Id.*
[22] 18 U.S.C. § 922(t)(2)(C).
[23] Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, § 103(i) (codified at 34 U.S.C. § 40901(i)).
[24] National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 30,430, 30,432 (proposed June 4, 1998).
[25] National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303, 58,304 (October 30, 1998).

government "using the [NICS] system … to establish any system for the registration of firearms."[26]

The DC Circuit Court of Appeals rejected these claims in *NRA of Am., Inc. v. Reno*,[27] but the DOJ weakened the requirement anyway, reducing the retention period to 90 days for approved transactions.[28] Then in 2004, Congress included a rider in an appropriations act that required the destruction of these records within 24 hours.[29]

FBI rules addressing unresolved transactions

Subsequently, the FBI weakened its rules even further. In addition to requiring the destruction of approved transaction records within 24 hours, it specifically addressed unresolved background checks, recognizing that it was creating a new category, not explicitly covered by the Brady Act, and "not covered by the Omnibus 24-hour destruction provision." The FBI explained:

> ''Open'' transactions are those non-canceled transactions where the FFL has not yet been notified of the final determination. In such cases, additional information is needed before the NICS examiner can verify whether a ''hit'' in the database demonstrates that the prospective purchaser is disqualified from receiving a firearm under state or federal law.[30]

The new regulation set the deadline for the destruction of unresolved ("open") background checks at 90 days, but did not explain why these records needed to be destroyed or why this time period was chosen.[31]

Appropriations rider and current regulations

In 2012, the rider regarding the destruction of approved background check records was included in the appropriations act in a form that made it permanent. The rider states:

> Hereafter, none of the funds appropriated pursuant to this Act or any other provision of law may be used for … (2) any system to implement subsection 922(t) of title 18, United States Code, that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from possessing or receiving a firearm no more than 24 hours after the system advises a Federal firearms licensee that possession or receipt of a firearm by the

[26] *NRA of Am., Inc. v. Reno*, 216 F.3d 122, 126 (2000).
[27] *Id*.
[28] National Instant Criminal Background Check System Regulation, 66 Fed. Reg. 6,470 (January 22, 2001).
[29] Consolidated and Further Continuing Appropriations Act 2004, Pub. L. No. 108-199, § 617, 118 Stat. 95 (2004).
[30] National Instant Criminal Background Check System Regulation, 69 Fed. Reg. 43,892, 43,897 (July 23, 2004).
[31] *Id.*

prospective transferee would not violate subsection (g) or (n) of section 922 of title 18, United States Code, or State law.[32]

Under the current regulations, records of background checks exist in the form of the NICS audit log.[33] Furthermore:

- When a purchaser passes a NICS background check and a firearm sale is affirmatively approved, federal law requires the FBI to destroy the record of the NICS search within 24 hours.[34]
- Where a transaction is denied—either immediately or following investigation by a NICS examiner—the FBI retains the records of the applicable background check indefinitely.[35]
- Under current federal regulations, when a background check is not complete within three business days, NICS has up to 90 days to complete the background check before all pending records are purged from its system.[36]

In fact, an unresolved background check will drop out of the NICS examiner's queue after 30 days, and the records are purged after 88 days to ensure compliance with this federal regulation.[37] As a result, each year, hundreds of thousands of background checks are never completed. In 2018, 201,323 transactions were purged—unresolved—from the FBI's system after 88 days.[38] Similar numbers were recorded for 2017 (212,617) and 2016 (216,744).[39] All told, the FBI did not complete more than 1.1 million background checks from 2014 through July 2019, reflecting a trend stretching back many years.[40] Since the records are purged, it becomes impossible to know how many people purchased a firearm without a completed background check. More seriously, it is unknown how many purchases would have been blocked if the background checks had been completed.

The purging of these records also prevents the FBI from using them to improve the effectiveness of the background check system. This demonstrates the need not only to lengthen the three business day "delay transfer" period described above, but also the need to give the FBI more time to complete background checks and retain information until those checks are completed.

[32] Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, § 511, 125 Stat. 552 (2011).
[33] 28 C.F.R. § 25.9.
[34] 28 C.F.R. § 25.9(b)(1)(iii), (c), (d). Subsection (c) and (d) refer to the destruction of "allowed" transactions, meaning both those that are affirmatively approved and those that remain unresolved.
[35] 28 C.F.R. § 25.9(b)(1)(i).
[36] 28 C.F.R. § 25.9(b)(1)(ii), (c), (d).
[37] Congressional Research Service, "Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation," October 17, 2019, https://fas.org/sgp/crs/misc/R45970.pdf.
[38] US Department of Justice, Federal Bureau of Investigation, "Letter to Joshua Eaton, CQ Roll Call," November 20, 2019, https://www.documentcloud.org/documents/6564864-SKM-C25819120207490.html.
[39] *Id*.
[40] *Id*.

The FBI needs accurate information from other law enforcement agencies to complete a background check, but faces a lack of relevant information in the NICS automated system. While the FBI provides its own records of those who commit federal crimes, the only way NICS receives records of state-level convictions and other records is through voluntary submissions from individual state agencies. As a result, NICS has limited access to information, because not all states report all of their data in the time necessary to complete a full background check. Therefore, a NICS examiner has to spend time contacting various reporting agencies or sourcing relevant information elsewhere.

The database faces particular challenges when it comes to records relating to domestic violence and mental health, which are often grossly underreported to NICS.[41] There are various reasons for the underreporting, including the fact that many agencies are not available 24/7 for orders to be validated; the process required to submit orders is time-consuming; and, in certain circumstances, the relevant agency lacks awareness that the record should be sent to the appropriate database in the first place.[42] Furthermore, there are wide discrepancies between varying state laws related to the requirements for reporting mental health records. Other challenges arise in connection with the reporting of criminal records due to lack of a final disposition; a lack of fingerprints; or a failure to submit the conditions of a prisoner's release or details of active warrants regarding a person's fugitive status to the NICS databases.[43]

Background checks under the Obama administration

In 2015, the nation witnessed the tragic consequences of an unresolved background check when a man shot and killed nine worshipers at the Emanuel AME Church in Charleston, South Carolina. Although he should have failed a background check because of his history of unlawful controlled substance use, his background check was not processed within three days. In this case, the dealer proceeded to transfer the gun after the three days elapsed. Approximately two months later, the shooter used that gun to murder the churchgoers.

In response to this shooting, the background check system has come under increased scrutiny, but neither Congress nor the FBI has made any significant changes to the system.[44]

Background check under the Trump administration

The past year has seen a surge in NICS background checks. The highest number of NICS firearm background checks in a single day and the highest number in a single week since

[41] Giffords Law Center to Prevent Gun Violence, "For the Record: NICS and Public Safety," December 2016, https://giffords.org/wp-content/uploads/2019/06/Giffords-Law-Center-For-The-Record-NICS-and-Public-Safety.pdf.
[42] *Id*.
[43] *Id*.
[44] The only relevant change to the system involves the use of the National Data Exchange (N-DEx), an additional database containing information about ineligible people. *See* Ann Givens and Andrew Knapp, "FBI to Add Major Law Enforcement Database to Gun Background Check System," The Trace, July 10, 2018, https://www.thetrace.org/2018/07/fbi-background-check-system-nics-ndex-charleston/.

November 30, 1998, (when NICS became operational), both occurred in March 2020, at the beginning of the COVID-19 pandemic.[45] Indeed, five of the 10 highest days and eight of the 10 highest weeks of NICS background checks occurred in 2020.[46] Even in January and February 2020, there were 19% and 18% increases, respectively, in the number of NICS background checks on gun purchases, compared to January and February 2019.[47] March 2020, however, saw an 85% increase in the number of NICS background checks on gun purchases, compared to March 2019. And, astoundingly, June and July 2020 saw 148% and 135% increases, respectively, in the number of NICS background checks on gun purchases compared to June and July 2019. Although the increase in NICS background checks on gun purchases has decreased substantially in August and September, September 2020 still saw a 66% increase compared to September 2019. In total, 14,848,326 NICS background checks on gun purchasers were conducted from January 1, 2020, through September 30, 2020, which represents a 95% increase compared to the previous year.[48]

Such a spike in NICS checks and accompanying purchases poses a threat on a number of fronts. In particular, a concentrated surge of attempted firearm purchases in a short timeframe puts additional strain on the NICS background check system, and increases the risk that a greater number of background checks will not be completed fully, or that crucial information will be missed. Ensuring that records remain available beyond the 90 day cut-off point, and until a background check is complete, would go a long way to relieve pressure on the NICS examiners, and ensuring that firearms are not transferred to people who may ultimately turn out to be prohibited persons.

III. Proposed action

A. Substance

The next administration should promulgate a regulation amending 28 C.F.R. § 25.9(b)(1)(ii), to require the maintenance of records of gun purchaser background checks until a determination is made that the gun purchaser does not fall within one of the categories of people prohibited by federal law from purchasing or possessing guns. (Conforming amendments may also need to be made to other provisions in the regulations, such as 28 C.F.R. § 25.9(c)'s reference to the destruction of records of "allowed" transactions.)

Retaining incomplete background check records would enable NICS to identify additional purchasers who unlawfully purchased or possessed firearms. Retaining incomplete background

[45] US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Top 10 Highest Days/Weeks," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_top_10_highest_days_weeks.pdf/view.
[46] *Id*.
[47] US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Month/Year by State/Type," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state_type.pdf/view. Calculations include any NICS check conducted by an FFL in relation to the application to purchase a firearm.
[48] *Id.*

check records would be also invaluable to help identify shortfalls in the reporting process. Preserving the records means the FBI will continue to have access to the data that can be used to improve the system. If a large number of transactions remain open at the 88-day mark for a particular reason (for example, because a record could not be confirmed because the relevant agency was unavailable; a criminal history record lacked sufficient detail for a NICS operator to make a final determination; or an arrest record lacked a final disposition), the continued existence of the records will enable the FBI to focus its efforts on improving these kinds of records. If, for example, mental health records from certain states were noticeably under-reported compared to those from the majority of other states, the FBI would be able to spend more time on improving the "reporting performance" of these jurisdictions.

B. Process

In order to amend this regulation, the DOJ must put the new version of the rule through the notice and comment rulemaking process, as specified in the Administrative Procedure Act.[49]

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must explain the nature of the rulemaking, the reason for the change, and the legal authority under which the rule is proposed.

Then, the agency must accept public comments on the proposed rule for a period of at least 30 days. Received comments must be reviewed, and the DOJ must respond to significant comments, either by explaining why it is not adopting proposals, or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the Federal Register, along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

In order to extend the retention of incomplete background check records, the FBI may also be required to amend its System of Records Notice (SORN) regarding this information.[50] This may require publication of an updated SORN in the Federal Register. The DOJ's Office of Privacy and Civil Liberties is the entity that would most likely determine whether this is necessary.[51]

IV. Legal justification and vulnerabilities:

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or being arbitrary or capricious agency action.[52] While the regulation proposed above would likely face judicial challenges, there is a reasonable likelihood that a court would uphold the

[49] 5 U.S.C. § 553.
[50] *See* 28 C.F.R. § 16.96(p); Privacy Act of 1974; System of Records; 84 Fed. Reg. 54175 (Oct. 19, 2019) (amending the Privacy Act notice for NICS).
[51] United States Department of Justice, Office of Privacy and Civil Liberties, "Frequently Asked Questions," accessed October 19, 2020, https://www.justice.gov/opcl/faq.
[52] 5 U.S.C. § 706.

regulation.

DOJ's authority to promulgate the new regulation

As described above, the DOJ's authority over the NICS regulations stems from the Brady Act's requirement that the attorney general create NICS and promulgate regulations to ensure the privacy and security of the information of the system.[53] In addition, the DOJ has authority to fill in ambiguities in the law.

In promulgating regulations required by statute, federal agencies often fill in the gaps between the statutory language and practicable regulations. Moreover, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," although the measure of deference will vary depending on "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[54]

When an agency, such as the FBI, promulgates a regulation interpreting a statute it enforces, such interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue."[55] If the intent of Congress is clear, that is the end of the matter.[56] But "if the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute."[57]

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change and demonstrate an awareness of the new policy.[58] It would therefore be acceptable for the FBI to propose changes to the regulations to require the retention of background check records (beyond 90 days), as long as the agency provides good reasons for such change, and an explanation of why such change may ignore or disregard any "facts and circumstances that underlay or were engendered by the prior policy."[59] In turn, whether the agency's interpretation is permissible depends on whether it is a "reasonable interpretation" of the enacted text, and is not "arbitrary or capricious."[60]

A court would likely find federal law to be ambiguous as to whether the FBI may retain records of incomplete NICS checks. The law explicitly states that records of approved NICS checks

[53] 34 U.S.C. § 40901(h).
[54] *United States v. Mead Corp.,* 533 U.S. 218, 228 (2001).
[55] *City of Arlington, Tex. v. F.C.C.,* 569 U.S. 290, 296 (2013).
[56] *Id*.
[57] *Id*.
[58] *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009).
[59] *Id.*
[60] *Mayo Found. for Med. Educ. & Research v. United States,* 562 U.S. 44, 53 (2011).

must be destroyed. That language, however, does not apply to records of NICS checks where the FBI has not been able to determine whether the purchaser is eligible to possess guns. As described below, with respect to an "arbitrary and capricious challenge," the DOJ can reasonably interpret the Brady Act and appropriations rider to allow for the retention of unresolved background checks records.

Differences between NICS data and a gun registry

Opponents may argue that retaining background check data amounts to the creation of a central gun registry. As described above, in *NRA of Am., Inc. v. Reno,* the NRA argued that temporary retention of audit log data, specifically NICS records of allowed transfers, violates three provisions of the Brady Act: (1) the requirement that the system "destroy" records of approved transactions, (2) the prohibition against the government "requiring that any [NICS] record … be recorded at or transferred to a [government] facility," and (3) the prohibition against the government "using the [NICS] system … to establish any system for the registration of firearms."[61] However, the lower court and the appellate court dismissed the NRA's complaint "finding nothing in the Brady Act to require immediate destruction" of NICS records.[62] The courts also found the attorney general's interpretation reasonable, that the Brady Act does not prohibit the temporary retention of NICS records for up to six months, to "audit the background check system to ensure its accuracy and privacy,"[63] and "that the Audit Log is not a 'system for … registration' within the meaning of section 103(i)(2)."[64]

In *NRA of Am., Inc. v. Reno,* the Attorney General illustrated the difference between the Audit Log and the central registry of machine guns:

> "The machine gun registry contains information on all machine guns not possessed by the United States, including data on the weapons themselves, dates of registration, and the names and addresses of persons entitled to posses them. Far less comprehensive, the Audit Log includes no addresses of persons approved to buy firearms, nor any information on specific weapons, nor even whether approved gun purchasers actually completed a transaction. And unlike the machine gun registry, information in the Audit Log is routinely purged after six months. The Audit Log therefore represents only a tiny fraction of the universe of firearm owners."[65]

The appellate court concluded the "Log's deficiencies as a system for registering firearms make it unlikely that it would be used for that purpose" and that simply containing the "names of persons approved to buy firearms in the past six months" was not enough to "convert the Log into a 'system for the registration' of firearm owners."[66]

[61] 216 F.3d at 126.
[62] *Id*.
[63] *Id*. at 124.
[64] *Id*. at 126.
[65] *Id*. at 131 (internal citation omitted).
[66] *Id. at 131-32.*

Courts have also determined that a firearm registry is not created in violation of 18 U.S.C. § 926(a)[67] or the Consolidated and Continuing Appropriations Act of 2012 (the 2012 Act),[68] when "a narrow subset of information relating to a specific set of transactions" is sought from a "specific set of FFLs."[69] Further, the courts have interpreted "consolidating and centralizing" in the 2012 Act as contemplating a "large-scale enterprise relating to a substantial amount of information," not the "mere collection of some limited information."[70]

Notably, even records of approved gun sales can exist in some form. Federal law requires FFLs to retain records of gun sales for at least 20 years (including details of the firearm purchased and the purchaser),[71] and this does not constitute a "registry".[72]

More importantly, the FBI already retains records of background checks where a transaction is denied indefinitely.[73] Background checks of people who "might" or "could" be denied a firearm purchase (because the NICS has been unable to make a determination one way or another) should also be maintained indefinitely, or at least until the check is complete.

Likely constitutional arguments

The NRA believes the ability to purchase a gun without a completed background check after three business days is "a critical safety valve" in federal law that "ensures that Americans' rights to acquire firearms are not arbitrarily denied because of bureaucratic delays, inefficiencies, or mistakes in identity".[74] While acknowledging that the three business days are a necessary safety check, the NRA believes that anything longer would contradict the principle that the government may not arbitrarily deprive a person of their rights without making a case against that person. The intent of the proposed regulation, of course, is not to deny Americans their right to own guns, but merely to ensure that guns are only sold to those people who are entitled to

[67] 18 U.S.C. § 926(a) prohibits DOJ from promulgating a "rule or regulation" that requires FFL record information be "recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof" or that establishes a "system of registration of firearms, firearms owners, or firearms transactions or dispositions."
[68] The Consolidated and Continuing Appropriations Act of 2012 "prohibits ATF from using the allocated funds 'for salaries or administrative expenses in connection with consolidating or centralizing within the Department of Justice the records, or any portion thereof, of acquisition and disposition of firearms maintained by [FFLs],'" 10 Ring Precision, 722 F.3d at 722 (citing Pub. L. No. 112-55, 125 Stat. 552, 609 (2011).
[69] *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 722 (2013)(citing Pub. L. No. 112-55, 125 Stat. 552, 609 (2011); *see also National Shooting Sports Foundation*, 716 F.3d 200 (D.C. Cir. 2013).
[70] Id. (citing Blaustein, 365 F.3d at 289).
[71] 18 U.S.C. § 923(g)(1)(A). *See also* 27 C.F.R. § 478.129 (stating that such records must be maintained for at least 20 years).
[72] 18 U.S.C. § 923(g)(1)(A). *See also* 27 C.F.R. § 478.129 (stating that such records must be maintained for at least 5 years).
[73] 28 C.F.R. § 25.9(b)(1)(i).
[74] "Background Check Bill Seeks to Create Backdoor Gun Prohibition, While Bloomberg Group Piles On", NRA-Institute for Legislative Action, July 17, 2015 (https://www.nraila.org/articles/20150717/background-check-bill-seeks-to-create-backdoor-gun-prohibition-while-bloomberg-group-piles-on).

own them. In addition, the proposed regulation does not directly affect the sale or transfer of firearms in these cases, but rather allows the FBI to retain records of instances where these transactions may have occurred.

Furthermore, even gun registries have been upheld against constitutional challenges.[75] Consequently, constitutional challenges against the proposed regulation are not likely to succeed.

Rulemaking procedures

By following the NCRM process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence-reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.[76]

In particular, the ATF should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.[77] The agency must address the concerns raised in all non-frivolous and significant comments.[78] The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.[79]

[75] *Justice v. Town of Cicero,* 577 F.3d 768, 774 (7th Cir. 2009) (finding that registration "merely regulated gun possession" rather than prohibiting it); *Heller v. District of Columbia ("Heller III")*, 801 F.3d 264 (D.C. Cir. 2015) (firearm registration generally does not violate the Second Amendment, but certain aspects of registration do not survive review, such as knowledge of the law testing, re-registration requirements, limiting registration to one handgun per month, and requirement to bring the firearm in person to register).
[76] *See* Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," 92 N.C.L. Rev. 721, 737-38 (2014) (describing "first" and "second" order inquiries into an agency's decision making). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).
[77] 5 U.S.C. § 553(c).
[78] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).
[79] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).

Arbitrary and capricious challenge under the APA

A court will invalidate the regulation if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[80] The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, establishing a nexus between the facts and the agency's choice.[81]

Therefore, to withstand a potential judicial challenge that the new regulation is an arbitrary and capricious action by the FBI, the agency must acknowledge that it is changing its policy, demonstrate that it considered all factors pertinent to the issue in its decision-making, and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy based on sound evidence, empirical or otherwise. Second, it should contain an acknowledgment of reliance interests, and address why those interests are outweighed by public safety factors.

1. Evidence supporting a new policy

The threat posed by guns in the hands of people who are not eligible to possess them is clear. Federal law prohibits certain categories of persons from purchasing firearms, laws which have protected many Americans from gun violence. However, persons prohibited can bypass this prohibition if NICS is not able to identify them before the background check records are destroyed. The tragic consequences of this loophole were demonstrated in the shooting at Emanuel AME Church in Charleston in 2015. The FBI's current practice of destroying incomplete background check records deprives the FBI of any chance to identify similar transfers before they enable similar tragedies. The data provided above regarding the number of default proceeds and the surge in background checks in 2020, also underscores the importance of changing this regulation.

2. Public safety factors outweigh reliance interests

People who purchase firearms after default proceeds (after the three business day deadline passes) may assume that records of their background check have been destroyed. If this regulation is finalized, that assumption would be incorrect. However, this reliance interest, to the extent that it exists, is outweighed by the positive benefits of the proposed regulation as described above. These records are also subject to strict privacy protections. "Access to data stored in the NICS is restricted to duly authorized agencies."[82] The information in the audit log is only directly accessible to the FBI, and solely "for the purpose of conducting audits of the use

[80] 5 U.S.C. § 706(2)(A).
[81] *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).
[82] 28 C.F.R. § 25.8(b).

and performance of the NICS, except that" information related to a potential violation of law or regulation may be shared with "appropriate authorities," and only the NICS transaction number and date of an allowed transaction may be shared with the ATF in the form of an Individual FFL audit log for the inspection of individual FFLs.[83] The audit log may not be used for any other reason or by any other individual not explicitly identified.[84] To ensure compliance, the audit log is "monitored and reviewed on a regular basis to detect any possible misuse of NICS data."[85] Further, an individual who misuses, or is unauthorized to use the audit log, may be fined and subject to "cancellation of NICS inquiry privileges."[86] These provisions guard against improper use of these records.

[83] 28 C.F.R. § 25.9(b)(2), (4). The ATF may not have access to "more than 60 days worth of allowed or open transaction records originating at the FFL."
[84] 28 C.F.R. § 25.9(b)(3).
[85] 28 C.F.R. § 25.9(b)(3).
[86] 28 C.F.R. § 25.11.

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Federal Bureau of Investigation
Topic: Fugitive from Justice
Date: November 2020

<u>Recommendation:</u> Issue new guidance overturning the Trump administration's dangerous narrowing of the "fugitive from justice" prohibitor.

<u>I. Summary:</u>

Description of recommended executive action

The Gun Control Act of 1968 (GCA) places limits on who can purchase or possess a firearm under federal law.[1] Included in the GCA is a prohibition on gun possession by or transfer to a fugitive from justice (FFJ).[2] The GCA defines fugitive from justice as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding."[3]

In 2017, the Trump administration released new guidance narrowing the Federal Bureau of Investigation's (FBI) interpretation of FFJ under the GCA.[4] The new guidance (2017 guidance memo) narrowed the FBI's long-standing interpretation of FFJ by adding a heightened *mens rea* requirement that is difficult to prove with the limited data available within the National Instant Criminal Background Check System (NICS), the system used to conduct background checks on gun purchasers.

Specifically, the 2017 Guidance Memo states that an individual qualifies as an FFJ if they: (1) have an outstanding arrest warrant, (2) fled the state of prosecution, and (3) did so ***with the purpose*** of avoiding prosecution or to avoid giving testimony in a criminal proceeding.[5] The 2017 guidance memo does not say how the NICS Section of the Criminal Justice Information Services (CJIS) division, the FBI subunit responsible for conducting background checks, can prove this *mens rea* requirement. Prior to this change, the FBI interpreted "fugitive from justice" to mean, simply, individuals with an outstanding arrest warrant.

NICS contains criminal history and other relevant records to determine whether or not the person is disqualified by law from receiving or possessing firearms. The system is not designed

[1] 18 U.S.C. § 921 et seq.
[2] 18 U.S.C. § 922(d)(2), (g)(2).
[3] 18 U.S.C. § 922(a)(1).
[4] Letter from Robin A. Stark-Nutter, "New Guidance Regarding Persons who are Fugitives from Justice," FBI, NICS Section, CJIS Division, February 15, 2017, https://www.documentcloud.org/documents/3493269-Fugitive-From- Justice-Guidance-State.html.
[5] *Id*.

to collect facts that aid in drawing inferences of specific mental states. As a result, following the Trump administration's change, NICS saw the number of federal denials under the FFJ prohibitor drop by over 70% in the first year, despite the number of total NICS checks increasing.[6]

In addition to narrowing the FFJ definition, the FBI's 2017 guidance memo also ordered the NICS Section to "immediately remove" all FFJ records. According to the memo, "[a]s a temporary measure, to ensure the accuracy of new submissions to the NICS Index, entries will not be permitted under the … 'fugitive from justice' category until further notice."[7] As a result, all 500,000 records were removed from the FBI database as of the spring of 2020, undermining the quality of the database in the future.[8]

To overturn the Trump administration's dangerous narrowing of the FFJ prohibitor and restore all appropriate records to the NICS system, the next administration should do the following.

(1) **Rescind the 2017 guidance memo by issuing new guidance via the FBI that clarifies the definition of FFJ.** Specifically, the new guidance should clarify that an individual qualifies as an FFJ if they: (1) have an outstanding arrest warrant, (2) fled the state of prosecution, and (3) have ***exhibited some indicia*** they did so intentionally. Critically, the new guidance should provide a non-exhaustive list of indicia that would satisfy this lower *mens rea* requirement, including: (i) the individual knew misdemeanor or felony charges were pending against him or her, or (ii) the individual attempted to purchase a gun in a state that is not the warrant-issuing state.

(2) **Restore all NICS records purged by the Trump administration. I**deally, this would result in approximately 500,000 records being restored to NICS, which would help identify individuals who cannot legally possess firearms and prevent them from obtaining them in the future.

The memorandum should make clear that this guidance only affects the administration of NICS, and should not alter the enforcement of the gun prohibitor through criminal prosecutions, which has a different *mens rea* requirement.

Overview of process and time to enactment

Issuing agency guidance is an expedient and discretionary process, and the next administration should take this step immediately upon assuming office. Because the guidance will be released

[6] Comparing 2016 and 2016 NICS numbers. Federal Bureau of Investigation, "2017 NICS Operations Report," accessed October 26, 2020, https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view; Federal Bureau of Investigation, "2016 NICS Operations Report," accessed October 26, 2020, https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view;
[7] 2017 Guidance Memo *supra* note 4.
[8] Federal Bureau of Investigation, "Active Records in the NICS Indices," updated September 30, 2020, https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view.

in the form of a non-binding policy statement, rather than through a new rule, the policy statement does not need to go through the Administrative Procedure Act's (APA's) notice-and-comment-rulemaking (NCRM) proceedings.

To comply with best practices for agency guidance, the document should acknowledge that such guidance does not have legislative authority; provide details on how the public may submit a complaint seeking the rescission or modification of the guidance; and provide an explanation for the change. Once finalized, the document should be published on the FBI's website.

II. Current state

FFJ prohibitor

Under the Brady Handgun Violence Prevention Act (Brady Act), before a firearm dealer can transfer a firearm to an unlicensed individual, the dealer must initiate a background check through NICS to determine whether the prospective firearm transfer would violate federal or state law.[9] Federal law contains nine prohibitors, including a prohibition outlawing the purchase or possession of firearms by a "fugitive from justice," defined as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding."[10]

The NICS system is run by the NICS Section of CJIS, a subcomponent of the FBI.[11] During a NICS check, descriptive data provided by an individual, such as name and date of birth, are used to search three national databases—managed by the FBI—which contain criminal history and other relevant records, to determine whether or not the person is disqualified by law from receiving or possessing firearms.

While the FBI maintains NICS and administers the background check provisions of the GCA, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has several duties related to NICS and the GCA, including investigating whether denied persons made false statements in connection with a firearms transfer and firearms retrieval whenever delayed transactions and incomplete background checks possibly result in prohibited persons acquiring firearms.[12]

As a result, both the FBI and the ATF must interpret the GCA to carry out their duties, including the FFJ prohibitor. However, the two agencies have long disagreed about how to interpret "fugitive from justice" under the GCA. Prior to 2017, the FBI interpreted "fugitive from justice" to mean, simply, individuals with an outstanding arrest warrant. This interpretation was not codified by FBI regulations. By contrast, the ATF's definition of FFJ is codified by regulations:

[9] 18 U.S.C. § 922(t)(1).
[10] 18 U.S.C. § 921(a)(15), 922(g)(2).
[11] 18 U.S.C. §922(t) and 28 C.F.R. Part 25.
[12] Congressional Research Service, "Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation," October 17, 2019, https://fas.org/sgp/crs/misc/R45970.pdf.

> Fugitive from justice. Any person who has fled from any State to avoid prosecution for a felony or a misdemeanor; or any person who leaves the State to avoid giving testimony in any criminal proceeding. The term also includes any person who knows that misdemeanor or felony charges are pending against such person and who leaves the State of prosecution.[13]

In effect, this definition means the ATF requires a more exhaustive set of requirements before an individual is considered a "fugitive from justice," including that the individual: (1) has an outstanding arrest warrant, (2) fled the state of prosecution, and (3) has done so to avoid prosecution for a crime or to avoid giving testimony in a criminal proceeding, which can be established by showing the individual knows that misdemeanor or felony charges are pending against such person, and leaves the state of prosecution.

The ATF has also published informal guidelines for interpreting FFJ, which includes a "variety of factors [which] may be utilized to establish the element of knowledge."[14] These may include, but are not limited to:

> Before leaving the state, the person was aware of pending/potential criminal charges, current criminal charges, or a criminal testimonial obligation (e.g., expert witness, material witness, victim, or informant) relative to the warrant.
>
> The person was aware of the warrant before they left the state.
>
> Before leaving the state, the person was aware of an underlying criminal obligation with which he/she later failed to comply.[15]

In 2016, the inspector general of the Department of Justice (DOJ) conducted an audit of NICS and urged the DOJ's Office of Legal Counsel to issue guidance in order to resolve this disagreement.[16] The audit noted the disagreement had been particularly disruptive in the context of delayed denials, since the ATF has frequently declined to retrieve a firearm because it disagreed with the NICS Section's application of the FFJ prohibitor.[17] From November 1999 through May 2015, there were 2,183 instances in which the ATF declined to retrieve a firearm from an individual identified by the NICS Section as a "fugitive from justice."[18]

[13] 27 C.F.R. § 478.11.
[14] ATF, "Guidelines for Establishing Title 18, United States Code (U.S.C.), Section 922(g)(2)—Fugitive from Justice," updated November 17, 2017, https://wilenet.org/html/cib/news-fbi/Guidance%20for%20922(g)(2)%20Fugitive%20from%20Justice%20Federal%20Firearm%20Prohibition.pdf.
[15] *Id.*
[16] Office of the Inspector General, Dept. of Justice, "Audit of the Handling of Firearms Purchase Denials," September 2016, https://oig.justice.gov/reports/2016/a1632.pdf#page=1.
[17] *Id.*
[18] *Id.*

In late 2016, according to public reporting, the Office of Legal Counsel was set to strike a balance between the two definitions and clarify that gun purchases could be denied under the FFJ prohibitor if an individual: (1) has an outstanding arrest warrant, and (2) fled the state of prosecution.[19] This change was never announced or published publicly before President Trump took office.

Trump administration's narrowing of FFJ definition

On February 15, 2017, in a memorandum (the 2017 guidance memo), which was not released publicly, the FBI announced it was narrowing its interpretation of the FFJ prohibitor to be *less inclusive than both* the Office of Legal Counsel compromise position and the ATF definition:

> The Department of Justice recently reviewed the "fugitive from justice" prohibitor and the application of the prohibitor in NICS background checks. The Department determined that the GCA does not authorize the denial of firearm transfers under the "fugitive from justice" prohibitor based on the mere existence of an outstanding arrest warrant. To comply with the Department's determination, the FBI will implement a new policy for applying the "fugitive from justice" prohibitor. This policy will require NICS to establish that the prospective purchaser: 1) has fled the state; 2) has done so to avoid prosecution for a crime or to avoid giving testimony in a criminal proceeding; and 3) is subject to a current or imminent criminal prosecution or testimonial obligation.[20]

The FBI's revised FFJ definition is similar to the ATF definition but has a significant difference. While the ATF requires some knowledge on the part of the individual, it requires only that they know that misdemeanor or felony charges are pending against him or her.[21] The ATF definition does not require the NICS Section to establish the individual left *for the purpose of avoiding those charges*, a state of mind which is difficult to prove. Rather, the ATF definition allows the NICS Section to infer that purpose by establishing that an individual "knows that misdemeanor or felony charges are pending against [them]."[22]

The current FBI definition, on the other hand, requires the NICS Section to bear the burden of establishing an individual's mental state—that he or she fled a state *with the purpose* of avoiding criminal prosecution or testimonial obligation. It does not explicitly allow for an inference of that purpose to be established by knowledge of pending charges. As such, the 2017 guidance memo increases the risk that individuals who are prohibited from possessing firearms under federal law are able to gain access to firearms.

[19] Sari Horwitz, "Tens of thousands with outstanding warrants purged from background check database for gun purchases," *Washington Post*, November 22, 2017, https://www.washingtonpost.com/world/national-security/tens-of-%20thousands-with-outstanding-warrants-purged-from-background-check-database-for-gun-%20purchases/2017/11/22/b890643c-ced1-11e7-9d3a-bcbe2af58c3a_story.html.

[20] 2017 Guidance Memo *supra* note 4.

[21] 27 C.F.R. § 478.11.

[22] *Id.*

As a result, following the Trump administration's change, NICS saw the number of federal denials under the FFJ prohibitor drop by over 70% in the first year, despite the number of total NICS checks increasing.[23]

Trump administration purging FFJ records

In addition to narrowing the FFJ definition, the FBI's 2017 guidance memo also ordered that NICS "immediately remove" all FFJ records and "[a]s a temporary measure, to ensure the accuracy of new submissions to the NICS Index, entries will not be permitted under the … 'fugitive from justice' category until further notice."[24]

This decision resulted in the removal of 500,000 records from NICS, including records that were still relevant under the FBI's revised definition of FFJ. To date, of the 500,000 that were purged, only 2,500 entries have been restored.[25]

III. Proposed action

To overturn the Trump administration's dangerous narrowing of the FFJ prohibitor and restore all appropriate records to the NICS system, the FBI, under the next administration, should issue new guidance clarifying the definition of FFJ, and restore all records to NICS that were purged by the Trump administration.

A. Substance of guidance

Upon taking office, the FBI should rescind the 2017 guidance memo, and issue new guidance to NICS officers and state points of contact for how to interpret the FFJ prohibitor. In particular, the guidance should provide that the following three elements are sufficient to create a presumption that a person falls within the prohibitor for purposes of the background check system.

- **Element 1.** The person is subject to a current or pending/potential criminal prosecution or testimonial obligation.
    - As in the case of ATF guidance, this could be established by showing: the individual has an active warrant for a felony or misdemeanor arrestable offense, or a criminal testimonial obligation (e.g., expert witness, material witness, victim, or informant).

[23] Comparing 2016 and 2016 NICS numbers. Federal Bureau of Investigation, "2017 NICS Operations Report," accessed October 26, 2020, https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view; Federal Bureau of Investigation, "2016 NICS Operations Report," accessed October 26, 2020, https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view.
[24] *Supra* note 3.
[25] Federal Bureau of Investigation, "Active Records in the NICS Indices," updated September 30, 2020, https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view.

- **Element 2.** The person has left the issuing state. As in the case of ATF guidance, this could be established in several ways, including by showing:
    - The prospective buyer's state of purchase (SOP) is not the same as the warrant-issuing state.
    - The prospective buyer's state of residence (SOR) is not the same as the warrant-issuing state.
    - If the prospective buyer's SOP and SOR are the same as the warrant-issuing state, any other information indicating the person has, at some point, left the warrant issuing state, including:
        - information from the agency which demonstrates the subject has left the warrant-issuing state
        - a date of arrest from a state other than the state of warrant which occurred after the date of warrant or underlying criminal obligation
        - a previous, related NICS transaction initiated after the date of warrant or underlying criminal obligation in a state other than the state of the warrant

- **Element 3.** Some indication of intent.
    - The guidance should explicitly say this could be established in several ways, including by showing:
        - The individual knew misdemeanor or felony charges were pending against him or her.
        - The person was aware of the warrant or the underlying criminal charge or testimonial obligation before they left the state.
        - The prospective buyer's state of purchase (SOP) or state of residence (SOR) is not the same as the warrant-issuing state.

In addition to providing guidelines for establishing an FFJ prohibitor, the new guidance memo should also do the following.

- **Instruct NICS officials to restore all NICS records related to the FFJ prohibitor that were purged by the Trump administration.** This ideally would result in approximately 500,000 records being restored to NICS, which would help identify individuals who cannot legally possess firearms, and prevent them from obtaining them.

- **Clarify the guidance applies to establishing FFJ for purposes of a NICS background check, not a criminal prosecution under the GCA or application of the sentencing guidelines.** Importantly, the GCA imposes a higher *mens rea* requirement for criminal prosecution for prohibited possession of a firearm than for denying a firearm sale. Specifically, 18 U.S.C. § 924(2) states: "Whoever ***knowingly*** violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." (emphasis added).[26] Given this additional

[26] Relevant here, this includes violations related to the FFJ prohibitor. *See*, 18 U.S.C. § 922(d)(2), (g)(2).

mens rea requirement in the criminal context, the FBI should explicitly confine the new guidance as applicable to establishing FFJ for purposes of a NICS background check, not a criminal prosecution or sentencing. This is particularly relevant for establishing "element three" outlined above.

B. Process

This type of guidance may appropriately be considered an interpretive rule because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[27] The APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another statute provides otherwise.[28]

Unlike notice and comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[29] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, and the process by which the public may petition the agency to modify or remove the guidance.

Agencies should also consider the recommendations of the administrative conference, most recently updated on June 13, 2019.[30] The most relevant recommendations concern transparency and public participation. These include: (1) providing "members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule," (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint, and (3) avoiding the

[27] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

[28] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

[29] Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents.

[30] Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

use of mandatory language (such as “shall” or “must”) to reflect the non-legislative nature of the guidance accurately.[31]

C. Legal justification

The attorney general has the power to prescribe “such rules and regulations as are necessary to carry out the provisions of” the GCA.[32] This includes policy statements, interpretive rules, and rules of agency procedure. Operation of the NICS system has been delegated to the FBI.[33]

Using this authority, the FBI has repeatedly released guidance to clarify terms within the GCA in order to provide guidance to NICS officers and state points of contact, including guidance related to the FFJ prohibitor.[34]

IV. Risk analysis

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components: first, the action must mark the “consummation” of the agency’s decision-making process—it cannot be of a tentative or intermediate nature. Second, the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.”[35] Consequently, the guidance document proposed by this memorandum may not qualify as a final agency action.

If a court determines the guidance document is a final agency action, however, it can be judicially challenged for being beyond the agency’s statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[36] The FBI's authority to interpret and provide guidance on the definition of FFJ is clear, as demonstrated by its history of doing so.[37] The Supreme Court has also made clear that laws that impose conditions and qualifications on the commercial sale of firearms are presumptively lawful,[38] therefore constitutional challenges are unlikely to succeed. As a result, the two most likely challenges against the new guidance memo are those claiming the FBI has not properly complied with procedural requirements, and the FBI’s new guidance is arbitrary or capricious agency action.

A. Procedural challenges

[31] *Id.*
[32] 18 U.S.C. § 926(a).
[33] 28 CFR § 25.1 et al.
[34] 2017 Guidance Memo *supra* note 4.
[35] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).
[36] 5 U.S.C. § 706.
[37] 2017 Guidance Memo *supra* note 4.
[38] *District of Columbia v. Heller,* 554 U.S. 570 (2008).

As noted above, the APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" unless another statute provides otherwise.[39] However, the NCRM requirement does apply to legislative rules. Courts are commonly asked to determine whether interpretive rules such as guidance documents are legislative rules in disguise, and the gun industry will likely challenge the FBI's guidance under this theory.

In the preceding three decades, the DC Circuit has focused its inquiry on whether a rule has "binding effects," in which case it is legislative.[40] There are multiple indicia of "binding effects."

- A rule is more likely to be legislative if it repeatedly includes mandatory language[41] or characterizes itself as a regulation,[42] notwithstanding boilerplate disclaimers to the contrary.[43] Conversely, a rule is less likely to be legislative if it is "replete with words of suggestion," such as speculation that an agency "may" or "might" act in a particular fashion depending on specific facts.[44]

- Regardless of the rule's text, "[t]he most important factor" [45] in identifying legislative rules is its actual legal effects, [46] e.g., the creation of new substantive law and/or consistent on-the-ground application in permitting or enforcement decisions.[47] A rule is not

[39] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[40] *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017).
[41] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).
[42] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).
[43] *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019).
[44] *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007) (crediting statements in guidance that regulators "retain their discretion" based on "specific conditions"). *See also Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015); *cf. The Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (government duties described in guidance were unenforceable because, though they occasionally used mandatory language, they were generally "imprecise").
[45] *Nat'l Min. Ass'n*, 758 at 252 (no legal effect where EPA merely recommended that state agencies entrusted with administration of the Clean Water Act pay closer attention to water quality, such that "state permitting authorities and permit applicants [could] ignore EPA's Final Guidance without facing any legal consequences").
[46] *Appalachian Power Co.*, 208 F.3d at 1028 (guidance imposing testing requirements for power plants under the Clean Air Act was legislative rule where it delegated authority to states in ways not explicitly contemplated in underlying rulemaking); *Mendoza*, 754 F.3d at 1009 (D.C. Cir. 2014) (letters explaining visa requirements were legislative where they "impose[d] different minimum wage requirements and provide[d] lower standards for employer-provided housing" than underlying regulations).
[47] *Gen. Elec.*, 290 F.3d at 385 (rejecting EPA's argument that guidance was not binding as a practical matter where EPA did not identify examples of deviation from the guidance); *cf. Sierra Club v. EPA*, 955 at 65 (warning, in finality context, of guidance that "impose[s] obligations by chicanery") (citation omitted).

legislative merely because it is *cited* in downstream adjudications, though dispositive *reliance* on the rule in those adjudications may reveal the rule to be legislative.[48]

- A rule is likely to be legislative if it is explicitly contemplated by the organic statute.[49]

While the gun industry will likely challenge the proposed guidance as being a legislative rule that needed to go through NCRM, the FBI has a strong argument in response that the guidance is just interpretive in nature. The guidance memo wouldn't significantly restrict a NICS reviewer's discretion. While the guidance memo would entitle NICS reviewers to make a presumption about an individual's mental state given a particular evidentiary record, it doesn't require the NICS reviewer to do so if the individual's record suggests that presumption would not be appropriate. Therefore, the guidance memo retains the NICS reviewers' ability to apply the FFJ prohibitor on a case-by-case basis. Courts are less likely to characterize a statement as a legislative rule if it permits agency staff to make case-by-case determinations.[50]

B. Substantive challenges

Assuming a plaintiff is successful in arguing the new guidance is "final agency action," a court will invalidate the guidance if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[51]

Here, the gun industry will likely argue the guidance is "not in accordance with law" by claiming that the GCA definition of FFJ requires a *mens rea* of intent to be established before a gun sale can be denied under the prohibitor. By allowing an inference of intent with such little evidence, such an argument might follow, the new guidance is not in accordance with the GCA definition of FFJ.

When a court reviews an agency's interpretation of a statute it is charged with administering, the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[52] Pursuant to that rubric, at step one, courts examine "whether Congress has directly spoken to the precise question at issue."[53] If so, "that is the end of the matter" and courts must enforce the "unambiguously expressed intent of Congress."[54] In the case of statutory silence or ambiguity, however, step two requires courts to defer to a reasonable-agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.[55] This reflects the fact that "*Chevron* recognized that

[48] *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005) (Roberts, J.).
[49] *Am. Min. Cong.*, 995 F.2d at 1109.
[50] Jared P. Cole & Todd Garvey, "General Policy Statements: Legal Overview," Congressional Research Service, April 14, 2016, https://fas.org/sgp/crs/misc/R44468.pdf.
[51] 5 U.S.C. § 706(2)(A).
[52] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).
[53] *Id.* at 842.
[54] *Id.* at 842-43.
[55] *Id.* at 843.

[t]he power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[56]

Here, a court is likely to find the plain text of "fugitive from justice" sufficiently ambiguous to move on to step two of the *Chevron* analysis, where it will defer to the FBI's reasonable interpretation of the FFJ prohibitor's *mens rea* requirement. In the context of criminal prosecutions, where the GCA explicitly includes a *mens rea* requirement of "knowingly," circuit courts that have considered the FFJ definition agree that it contains some *mens rea* element, though even they disagree on what that *mens rea* is. As noted by the Fifth Circuit:

> The Ninth and Eleventh Circuits have held that, to establish that a defendant is a fugitive from justice, the government must show that the defendant fled with the intent to avoid prosecution. The Fourth and Seventh Circuits, however, have rejected this approach. But these latter two circuits do require that, to qualify as a fugitive from justice, a defendant must have had knowledge that charges against him are pending.[57]

All of these cases, however, arose in the context of a criminal prosecution or sentencing, rather than a challenge to a denial of a gun based on a background check. Given the disagreement among circuit courts in the context of an even more clearly established *mens rea* requirement, a court will likely find the FBI's guidance on establishing that requirement in the context of NICS background checks reasonable.

[56] *Id.* at 55–56 (internal quotation marks and citation omitted).
[57] *United States v. Soza*, 874 F.3d 884, 891 (2017).

RECOMMENDED ACTION MEMO
Agency: Federal Bureau of Investigation
Topic: Expanding the Release of NICS Operations Data
Date: November 2020

Recommendation: Expand the public release of data regarding the operations of NICS, including the release of data related to background checks for firearms sales that have taken longer than three business days to complete.

I. Summary

Description of recommended executive action

Each year, the NICS section of the Criminal Justice Information Services (CJIS) division, a subcomponent of the Federal Bureau of Investigation (FBI), publicly releases data regarding the National Instant Criminal Background Check System (NICS), the system used to conduct background checks on gun purchasers. This data—which includes the number of background checks conducted by NICS, the number of firearms transactions denied under NICS, and the system's Immediate Determination Rate—provide critical insights into the functioning of the nation's background check system and the state of gun sales in America. In turn, this information helps to inform the development of smart policies and programs to address gun violence at the local, state, and federal level.

While the public release of this data is critical, it fails to provide a full picture of NICS operations. In particular, the NICS section does not currently publish enough data regarding NICS checks that took longer than three business days. Because federal law allows gun sales to proceed if a NICS background check is not completed within three days, these "default proceed" sales pose a significant risk to public safety.

To ensure policymakers, researchers, and advocates have a full understanding of these sales, and federal action is taken to limit the harms they pose, the next administration should expand the public release of NICS data regarding default proceed sales.

Overview of process and time to enactment

Releasing additional NICS data is currently within the NICS section's authority, and as such, no further regulatory or sub-regulatory action would be needed. As discussed below, while gun activists could argue a provision included in appropriations bills since 2004 can be interpreted to require the destruction of some information by the FBI, the rider is explicitly limited to "identifying information" about individual gun transactions, such as the names of potential purchasers. It does not restrict the FBI's ability to release aggregate data on NICS operations. As such, the

NICS section should be able to include additional data in both its bi-annual release of NICS data in the fall of 2021 and in its annual operations report for the 2021 calendar year.

II. Current state

NICS background checks

Under the Brady Handgun Violence Prevention Act (Bady Act), before a firearm dealer can transfer a firearm to an unlicensed individual, the dealer must initiate a background check through NICS to determine whether the prospective firearm transfer would violate federal or state law.[1] The system is run by the NICS section of CJIS, a subcomponent of the FBI. During a NICS check, descriptive data provided by an individual, such as name and date of birth, are used to search three national databases—managed by the FBI—containing criminal history and other relevant records, to determine whether or not the person is disqualified by law from receiving or possessing firearms.

States may choose among three options for performing NICS checks: (1) the state can conduct all of its own background checks, referred to as point-of-contact (POC) states, (2) the state and the FBI's NICS section can share responsibility for background checks, referred to as partial-POC states, or (3) the NICS section can conduct all background checks for a state.

According to the FBI, in 2019, NICS experienced the highest volume in its history, as 28,369,750 firearm background checks were processed.[2] Of these, the FBI's NICS section processed 8,177,732 transactions and designated state and local criminal justice agencies processed 20,192,018.[3]

The Charleston Loophole

Though 90% of background checks conducted through NICS provide an answer in under two minutes (the system's "immediate determination rate"), about 10% of cases require further investigation and review by FBI agents.[4] Under federal law, if the FBI or state agency cannot complete that investigation and make a final determination within three days (i.e., a determination of proceed or deny), the gun dealer may transfer the firearm, unless state law provides otherwise.[5] Roughly 3% of sales take longer than three days to complete, allowing thousands of individuals to purchase firearms without a completed background check.[6] These

[1] 18 U.S.C. § 922(t)(1).
[2] FBI, "2019 NICS Operations Report," accessed October 21, 2020, https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view.
[3] *Id.*
[4] Giffords Law Center, "Fixing the Default Proceed Flaw," May 2018, https://giffords.org/wp-content/uploads/2018/05/lawcenter-Default-Proceeds-Factsheet-Giffords-Law-Center.pdf.
[5] 18 U.S.C. § 922(t)(1)(B)(ii). States can establish their own firearm laws, such as additional prohibiting categories or additional time frames for completing checks before a dealer may transfer the firearm.
[6] Joshua Eaton, "FBI Never Completes Hundreds of Thousands of Gun Checks," Roll Call, December 3, 2019, https://www.rollcall.com/2019/12/03/fbi-never-completes-hundreds-of-thousands-of-gun-checks/.

"default proceed sales" are commonly referred to as the "Charleston Loophole," because the provision allowed the shooter who gunned down nine people at Emanuel AME Church in Charleston, South Carolina, to purchase his weapon despite being barred by federal law.

Due to the Charleston Loophole, between 2014 and 2018, an average of 3,963 firearms were transferred to people who are prohibited purchasers *each year.*[7]

The FBI can continue to research a transaction for potentially prohibiting information for up to 90 days even after a gun sale proceeds without a completed background check. However, after 90 days, all information related to the transaction must be destroyed, to comply with federal record-retention requirements.[8] In practice, to ensure compliance with this destruction of records requirement, NICS is programmed to purge records of unresolved transactions within 88 days.

When the FBI makes a denial determination within this period (after three business days, but before 88 days), it is called a "delayed denial." In delayed denial cases, the FBI determines if the firearm dealer transferred the firearm to the individual and, if so, refers these cases to the Department of Justice's (DOJ) Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for possible retrieval of the firearm.

Recent surge in gun sales and impact on "default proceed"

According to FBI data, March 2020 set the all-time record for the number NICS background checks conducted since the creation of the system over 20 years ago.[9] According to an analysis by Everytown, each of the five days that followed the announcement of federal social distancing guidelines in mid-March made the top-10 list for most background checks ever conducted in a single day.[10] No other year has had more than one day in the top 10 since NICS was first created, let alone five in one week.[11] By the end of March 2020, NICS saw 3.7 million background check requests, 1.1 million more than the same month last year.[12]

This surge in gun sales exacerbated the Charleston loophole. According to historical trends, pandemic panic-buying in March likely resulted in at least 35,000 potential "default proceeds."[13] At least 523 were transferred to prohibited persons and, of those, close to one quarter went to prohibited domestic abusers.[14] Likely, due to social-distancing requirements and the strain put on government resources by COVID-19, these numbers were much higher.

[7] Everytown, "How COVID-19 Has Made a Federal Background Check Loophole Even Deadlier," April 13, 2020, https://everytownresearch.org/report/covid-default-proceed/.
[8] 28 C.F.R. § 25.9.
[9] FBI, "NICS Firearm Checks: Month/Year," accessed October 21, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year.pdf/view.
[10] Supra note 7.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

NICS data publication

Since NICS first became operational in 1998, the NICS section has published an annual NICS operations report.[15] These reports have traditionally included a message from the NICS section chief and an analysis of data related to the previous calendar year's NICS operations. For example, the 2018 NICS operations report included the following data:[16]

- Transactions
  - the number of background checks conducted by NICS
- Records
  - the total number of records held within NICS indices
- Denials
  - the number of firearms transactions denied under NICS
  - the number of firearms transactions denied under NICS broken down by category of prohibition (e.g. felony conviction)
  - the number of denial challenge requests
- Processing time
  - the system's immediate determination rate
- "Default proceed"
  - the number of background check denials forwarded to the ATF for firearm retrieval[17]

The 2019 NICS operations report included expanded data on default proceed sales. In addition to the data outlined above, the report included the following data:[18]

- Default Proceed
  - the number of NICS checks that took longer than three business days;
  - the number of NICS checks that took longer than three business days but were purged after the 88 day window expired

Along with publishing an annual report, the NICS section publishes bi-annual data on its website, including:[19]

[15] CJIS, "National Instant Criminal Background Check System (NICS): Reports & Statistics," accessed October 21, 2020, https://www.fbi.gov/services/cjis/nics.
[16] FBI, "2018 NICS Operations Report," October 21, 2020, https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view.
[17] This only includes instances where final determination results in a deny decision and the NICS Section is advised by the federal firearms licensee ("FFL") that the firearm was transferred.
[18] Supra note 2.
[19] Supra note 15.

- Transactions
    - the number of background checks conducted by NICS per month
    - the number of background checks conducted by NICS per day
    - the number of background checks conducted by NICS per month by state
    - the ten days with the highest number of NICS checks

- Records
    - the total number of records held within NICS indices
    - the total number of records held within NICS indices by state

- Denials
    - the number of firearms transactions denied under NICS

III. Proposed action

To help policymakers better understand the impact the Charleston Loophole has on gun violence, the FBI, under the next administration, should expand the public release of data regarding the operations of NICS. In particular, the FBI's NICS section should include additional data in both its annual operations reports and in its bi-annual public data releases.

As noted above, since 2019, the NICS operations report has included some data on default proceed sales. While this additional data disclosure is helpful, it fails to provide a full picture of the potential danger these sales pose to the public. In particular, while the data provides a window into the scope of potentially dangerous sales (i.e. the number of delayed denials forwarded to ATF for firearm retrieval, plus the number of NICS checks that took longer than three business days but were purged after the 88 day window expired), it does not provide insight into federal action to limit the potential harm associated with these sales.
To correct for this shortcoming, future NICS operations reports should include the following data.

- The number of NICS checks that took longer than three business days but were resolved and denied before the 88 day window expired (the 2019 operations report only included data on sales where the NICS section was advised by the FFL that the firearm was transferred).

- Of these checks, the number of sales where either: (1) the NICS section was advised by the FFL that the firearm was transferred (included in the 2019 operations report) or (2) the NICS section did not receive a response from the FFL confirming the firearm had not been transferred.

- The number of successful retrieval actions taken by the ATF.

In addition to publishing additional data in NICS operations reports, the NICS section should begin publishing default proceed data in its bi-annual data releases. In particular, the NICS section should publish the following, broken down by state and month of purchase:

- the number of NICS checks that took longer than three business days
- the number of NICS checks that took longer than three business days but were purged after the 88 day window expired
- the number of NICS checks that took longer than three business days but were resolved and denied before the 88 day window expired
- the number of background check denials forwarded to ATF for firearm retrieval

IV. Risk analysis

Some might argue the Tiahrt amendment restricts the FBI's ability to release additional NICS statistics. Such arguments would fail.

The two riders within the Tiahrt amendment that are arguably relevant here are: (1) a rider on the release of gun tracing information and the information that gun dealers retain and report, and (2) a rider on the destruction of approved gun purchaser records. The one on the release of gun tracing information and the information gun dealers retain and report has an explicit exception for aggregate data. Hence, the FBI has released aggregate NICS data every year since the Tiahrt amendment was first passed. Indeed, the term "aggregate data" is used generally in the law to refer to statistical information that does not disclose any individual person involved.[20]

The second rider only limits the FBI's ability to release "identifying information" about individual gun transactions, such as the names of potential purchasers. It does not restrict the FBI's ability to release aggregate data on NICS operations.

In relevant part, the Tiahrt amendment requires the FBI to destroy all approved gun purchaser records within 24 hours of the official NICS response to the dealer.[21] A version of this requirement has been included in appropriations bills funding DOJ since 2004, including the 2012 version that was made permanent through the use of futurity language.[22]

[20] *See, e.g.,* 7 U.S.C. § 2276.
[21] Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, § 511, 125 Stat. 552 (2011).
[22] *See* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 617, 118 Stat. 3 (2004); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 615, 118 Stat. 2809, 2915 (2005); Science, State, Justice, Commerce, and Related Appropriations Act of 2006, Pub. L. No. 109-108, § 611, 119 Stat. 2290, 2336 (2005); Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8 (2007); Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844 § 512 (2007); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 511, 123 Stat. 524 (2008), Consolidated

The language of the rider is explicitly limited to "identifying information":

> Hereafter, none of the funds appropriated pursuant to this Act or any other provision of law may be used for… (2) any system to implement subsection 922(t) of title 18, United States Code, that does not require and result in the ***destruction of any identifying information*** submitted by or on behalf of any person who has been determined not to be prohibited from possessing or receiving a firearm no more than 24 hours after the system advises a Federal firearms licensee that possession or receipt of a firearm by the prospective transferee would not violate subsection (g) or (n) of section 922 of title 18, United States Code, or State law.[23] (emphasis added).

As such, aggregate data regarding NICS transactions, such as the number of background checks conducted by NICS and the number of successful retrieval actions taken by the ATF, does not fall within the Tiahrt amendment's destruction of records requirement.

Appropriations Act 2010, Pub. L. No. 111–117, 123 Stat. 3128-3129 (2009); Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, § 511, 125 Stat. 552 (2011). This language includes "futurity language" making these restrictions permanent until Congress makes an affirmative effort to remove them.

[23] Supra note 20.

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Federal Bureau of Investigation
Topic: State and Local Government Access to NICS for Ammunition Checks
Date: November 2020

Recommendation: Amend the NICS regulations to allow state, tribal, and local criminal justice agencies to use NICS for ammunition purchaser background checks if such background checks are required by state, tribal, or local law.

I. Summary

Description of recommended executive action

A small number of states, including New York and California, have enacted laws requiring gun dealers to run background checks on ammunition purchasers. The FBI has refused to allow the National Instant Background Check System (NICS) to be used for this purpose, based on a regulation that restricts use of NICS, even though NICS is the best source of information for these checks. However, studies indicate that background checks at the time of transaction would have largely eliminated retail sales of ammunition to prohibited individuals.[1]

Under this proposal, the FBI would amend the regulation implementing the Brady Act to allow state, tribal, and local law enforcement agencies to access NICS for ammunition purchaser background checks if a state or tribal law requires the background checks, and the entity using NICS for this purpose is a state, tribal, or local law enforcement agency, rather than a private entity (in other words only if a governmental entity acts as a point of contact for this purpose, so few, if any, additional funds are spent by the FBI for these searches).

Overview of process and time to enactment

The US Department of Justice (DOJ) originally promulgated regulations to implement NICS in 1998, and has since amended those regulations multiple times, most recently in 2014. The proposal described in this memo, recommending that the DOJ once again amend the NICS implementing regulations, would follow the same notice-and-comment rulemaking procedure as previously followed, pursuant to the Administrative Procedure Act (APA).[2] The DOJ should begin the process by issuing a Notice of Proposed Rulemaking (NPRM) to this effect within the first year of the next administration. The DOJ is then required to provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the Federal Register. A rule generally goes into effect 30 days after it is published.[3]

[1] *Id*. at 7.
[2] 5 U.S.C. § 553.
[3] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.

The Privacy Act of 1974 sets out requirements for government databases containing records that can be retrieved by personal identifying information.[4] It is not clear whether these procedural requirements would apply here. The DOJ's Office of Privacy and Civil Liberties ensures DOJ's compliance with the Privacy Act and is the entity best positioned to make that decision.

II. Current state

The Gun Control Act

Under the Gun Control Act of 1968 (GCA), as amended, a person is generally prohibited from acquiring or possessing firearms or ammunition if, among other things, the person has been convicted of certain crimes, or become subject to certain court orders related to domestic violence or adjudications regarding serious mental conditions. The federal standard of eligibility is the same for both firearms and ammunition.[5] The GCA also prohibits any person from selling or otherwise disposing of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person does not meet this standard of eligibility.[6]

The Brady Handgun Violence Prevention Act

The Brady Handgun Violence Prevention Act (Brady Act), signed into law in 1993, provides for the creation of a background check system and mandates that federal firearms licensees (FFLs), including federally licensed firearms manufacturers, importers, and dealers, request criminal history background checks from this system on firearms transferees before transfers to those individuals.[7] The Brady Act also required the attorney general to "establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18...."[8] The Brady Act further specified the following.

- The Attorney General shall develop such computer software, design and obtain such telecommunications and computer hardware, and employ such personnel, as are necessary to establish and operate the system ...."[9]
- The database could not be used to create a permanent registry of individuals banned from purchasing firearms.[10]
- "After 90 days' notice to the public and an opportunity for hearing by interested parties,

[4] Privacy Act of 1974, 5 U.S.C. § 552a (2020); Office of Mgmt. & Budget, Exec. Office of the President, "Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act," OMB Circular No. A-108, 2017, 15-17 [hereinafter "OMB Reporting Under the Privacy Act"].
[5] 18 U.S.C. § 922(g).
[6] 18 U.S.C. § 922(d).
[7] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102 (1993) (hereafter the "Brady Act").
[8] Brady Act § 103.
[9] *Id.*
[10] *See id.*

> the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system ...."[11]

Importantly, although the Brady Act only requires background checks for transfers of firearms, this background check requirement was written to be incorporated into Section 922 of Title 18, which expressly regulates ammunition in addition to firearms.[12] Section 922(g) makes it unlawful for members of certain groups (fugitives, felons, those who have been dishonorably discharged from the Armed Forces, etc.) "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or *ammunition*; or to receive any firearm or *ammunition* which has been shipped or transported in interstate or foreign commerce."[13] And the Brady Act refers to Section 922(g) multiple times, specifically providing that firearm dealers must first request a NICS background check to ensure that receipt of a firearm would not violate section 922(g).[14]

The attorney general first promulgated a regulation in accordance with the Brady Act's requirement in 1998.[15] The regulation, which is codified as 28 C.F.R. § 25.6, created NICS, and specified that FFLs were to "initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act."[16]

However, the regulation also specifically allows the use of NICS for two additional purposes, which it conceded are "unrelated to NICS background checks required by the Brady Act."[17] The first purpose is for "[p]roviding information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license…"[18] The regulation explicitly notes that such permits include "permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives." The second purpose is for "[r]esponding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the [GCA] or the National Firearms Act (26 U.S.C. Chapter 53)."[19]

State and local agencies, FFLs, and individuals who violate the FBI's regulations regarding NICS, including " using the system to perform a check for unauthorized purposes," are subject to a fine up to $10,000 and cancellation of NICS-inquiry privileges.[20]

Obama administration efforts

[11] *Id.*
[12] Brady Act § 102(a)(1).
[13] 18 U.S.C. § 922(g) (emphasis added).
[14] Brady Act § 102(b)(9).
[15] National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303 (October 30, 1998) (codified at 28 C.F.R. § 25.6).
[16] 28 C.F.R. § 25.6(a) (emphasis added).
[17] 28 C.F.R. § 25.6(j).
[18] *Id.*
[19] *Id.*
[20] 28 C.F.R. § 25.11.

In 2014, the regulation was amended to expand access to NICS in two ways. First, the regulation was amended to allow tribal criminal justice agencies to use NICS in connection with firearms and explosives related permits. Second, the new regulation allows NICS to be accessed in connection with the disposition of firearms in the possession of criminal justice agencies. Neither of these changes were expressly contemplated in the text of the Brady Act.[21]

Trump administration efforts

The Trump administration has not proposed any changes to the relevant regulation. Accordingly, the current regulation allows access to NICS for the following purposes:

1) providing information to federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm; carry a concealed firearm; or import, manufacture, deal in, or purchase explosives

2) responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53)

3) disposing of firearms in the possession of a federal, state, tribal, or local criminal justice agency[22]

The current regulation thus does not expressly allow federal, state, tribal, or local criminal justice agencies to run NICS checks for purposes outside of firearm transfers or one of the other exceptions listed above.

State access to NICS

The procedures that FFLs use to comply with the background check requirement differs among the states, depending on whether a state government has designated an agency or agencies to serve as “points of contact” (POC) for NICS. In most states, FFLs initiate a background check by directly contacting the FBI, which then conducts the NICS check.[23] In states that have chosen to designate POCs, however, FFLs initiate a background check by contacting their state’s

[21] National Instant Criminal Background Check System Regulation, 79 Fed. Reg. 69,047 (explaining introduction of amendment to authorize tribal criminal justice agencies to access NICS and to authorize criminal justice agencies to access NICS for purposes of disposing of firearms in their possession).
[22] National Instant Criminal Background Check System Regulation, 79 Fed. Reg. 69,047, 69,051 (November 20, 2014) (codified at 28 C.F.R. § 25.6(j).
[23] 28 C.F.R. § 25.6.

POC,[24] which then accesses the NICS databases to run the background check.[25] "POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems."[26] For example, if a buyer wants to purchase a handgun at a gun shop in Colorado, a POC state, the gun shop (the FFL) contacts the Colorado Bureau of Investigation (CBI), who then transmits a request for a background check to NICS and may search other databases; the CBI then relays the results back to the gun shop.[27]

Currently, 20 states have designated POCs. In the remaining 36 states/territories (including the District of Columbia and five US territories), FFLs contact the FBI directly for NICS background checks.[28]

State action on ammunition background checks

As described below, two states—New York and California—have passed legislation requiring background checks before ammunition can be sold, though both have faced challenges in implementation.[29] Four states—Connecticut, Illinois, Massachusettts, and New Jersey—require individuals to obtain a license to purchase or possess at least some types of ammunition, and require license applicants to pass a background check in order to qualify for the license. The District of Columbia generally prohibits the possession of ammunition, unless the person is at a firearm safety class, or possesses a registration certificate for a firearm.

New York

In January 2013, New York's state legislature passed the Secure Ammunition and Firearm Enforcement (SAFE) Act, requiring ammunition sellers to conduct background checks on potential purchasers.[30] However, Governor Cuomo suspended the requirement in 2015 due to the state's purported inability to create a robust database to enable the checks. According to the memorandum of understanding signed by the governor and the Republican Senate majority

[24] A "point of contact" or "POC" is as "a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check. A POC will be an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order." 28 C.F.R. § 25.2.
[25] US Department of Justice, Federal Bureau of Investigation, "NICS Participation Map," accessed June 30, 2020, https://www.fbi.gov/services/cjis/nics/about-nics.
[26] 28 C.F.R. § 25.6(e).
[27] Colo. Rev. Stat. § 24-33.5-424(3)(a).
[28] The list of 20 POC states includes seven "partial POC" states, where FFLs contact the FBI for long gun purchases but the states act as POC states for handgun purchases (four states conducted handgun background checks and three states issued handgun permits used for handgun background checks). US Department of Justice, Federal Bureau of Investigation, "NICS Participation Map," accessed August 18, 2020, https://www.fbi.gov/services/cjis/nics/about-nics.
[29] Giffords Law Center, "Ammunition Regulation," accessed June 30, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/ammunition-regulation/. Four states have passed laws requiring permits for the purchase of certain kinds of ammunition.
[30] NY Secure Ammunition and Firearm Enforcement (SAFE) Act, S. 2230, 2013 Leg., (N.Y. 2013).

leader, the database could not "be established and/or function in the manner originally intended" given "the lack of adequate technology."[31] Notably, New York has not assigned a POC for the NICS.

California

In 2016, California voters passed Proposition 63, which required ammunition sellers to obtain an "ammunition vendor license" from the California Department of Justice (Cal DOJ) and, beginning in 2019, to run background checks through the Cal DOJ records system before selling ammunition, and to record and report to the Cal DOJ any subsequent sales.[32] Cal DOJ acts as a POC for NICS background checks on firearm purchasers.[33] However, because ammunition sellers do not have the authority to initiate a NICS background check for the sale of ammunition, California's law specifically refers ammunition sellers to the existing Cal DOJ Armed and Prohibited Persons System, which gathers information from a variety of sources, rather than referring them to NICS.[34]

Connecticut, Illinois, Massachusetts, and New Jersey

Connecticut authorizes a state agency to issue "ammunition certificates," and prohibits the sale or transfer of ammunition unless the transferee presents a firearms purchase, carry permit, or ammunition certificate. Ammunition certificates are issued by the state after a background check, and must be renewed every five years.[35] Illinois requires residents to obtain a valid Firearm Owner's Identification (FOID) card before they can lawfully purchase or possess firearms or ammunition.[36] Massachusetts requires a firearm permit or license to purchase or possess ammunition, with different types of licenses entitling the holder to purchase and possess different kinds of ammunition.[37] New Jersey generally prohibits any person from acquiring any handgun ammunition unless the person presents a valid firearms purchaser identification card or a permit to purchase a handgun.[38] While the Connecticut law requires ammunition certificates specifically for ammunition purchases, the licenses in Illinois, Massachusetts, and New Jersey are also required for the purchase of firearms. Consequently, these three states are already allowed to access NICS to conduct background checks on

[31] Thomas Kaplan, "Plan to Require Background Checks for Ammunition Sales is Suspended in New York," *New York Times*, July 10, 2015, https://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html. In addition, Republican state senators claimed that the database could not be created because it would be too expensive. *See, e.g.*, Former New York State Senator Catharine Young, "SAFE Act Ammunition Database Suspended," news release, July 10, 2015, https://www.nysenate.gov/newsroom/press-releases/catharine-young/safe-act-ammunition-database-suspended (stating that establishing a database "would have cost the state up to $100 million").

[32] Cal. Penal Code §§ 30312; 30352; 30380-95.

[33] *See* Cal. Penal Code § 28220.

[34] Cal. Penal Code § 30370. *See* California Department of Justice, Office of the Attorney General, "Ammunition Purchase Authorization Program," accessed July 1, 2020, https://oag.ca.gov/firearms/apap.

[35] Conn. Gen. Stat. §§ 29-38n – 29-38p.

[36] 430 Ill. Comp. Stat. 65/2(a)(2), (b) 65/4, 65/8.

[37] Mass. Gen. Laws ch. 140, §§ 129B, 129C, 131, 131A, 131E.

[38] N.J. Stat. Ann. § 2C:58-3.3.

applicants for these licenses.[39] Connecticut, however, relies on other databases in issuing ammunition certificates.

III. Proposed action

A. Substance of the proposed rulemaking

To enable the use of the NICS background check system for ammunition sales, the DOJ should consider amending 28 C.F.R. § 25.6 to read:

> "(a) FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act, and a proposed ammunition transfer as required by state, tribal, or local law, if the NICS background check is conducted by a POC. FFLs are strictly prohibited from initiating a NICS background check for any other purpose. The process of accessing NICS for the purpose of conducting a NICS background check is initiated by an FFL, who contacts the FBI NICS Operations Center (by telephone or electronic dial-up access), or a POC. FFLs in each state will be advised by the ATF whether they are required to initiate NICS background checks with the NICS Operations Center or a POC, and how they are to do so.
>
> ...(j) Access to the NICS Index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) shall be limited to uses for the purposes of:
>
> (1) providing information to federal, state, tribal, or local criminal justice agencies in connection with:
>
> (i) the issuance of a firearm-related, ammunition-related, or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm or ammunition, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives
> (ii) the state, tribal, or local criminal justice agency's background check of a prospective ammunition purchaser or transferee, where such background check is required by state, tribal, or local law; ..."

Three features of this proposed language are worth noting. First, this language would authorize state, tribal, or local criminal justice agencies to access NICS for the purposes of background checks on prospective ammunition purchasers and transferees only if those background checks are required by state, tribal, or local laws. This provision would also ensure the privacy and security of the system by ensuring that criminal justice agencies who access NICS for this purpose are acting pursuant to state, tribal, or local laws.

Second, this language would authorize FFLs to initiate a NICS background check in connection with a proposed ammunition transfer only in limited circumstances. More specifically, the FFL may initiate a check in connection with the transfer of ammunition only if the NICS background

[39] Similarly, in D.C., licensed dealers may generally transfer ammunition only to the registered owner of a firearm of the same caliber or gauge as the ammunition, or to a nonresident of the District who provides proof that the weapon is lawfully possessed and is of the same gauge or caliber as the ammunition to be purchased. D.C. Code Ann. §§ 7-2505.02, 7-2506.01.

check is required by state, tribal, or local law. In addition, the check must be conducted by a POC; in other words, the state must have designated a state or local agency to conduct the background check. This provision would ensure that the FBI is not involved in the process and these additional background checks will not impact the FBI's budget. This provision would also ensure the privacy and security of the system by ensuring that FFL's access to the NICS databases is dependent on POCs that already have access to those databases.

Finally, the proposed regulation would clarify the current regulation's provision which allows criminal justice agencies to use NICS in connection with the issuance of firearms-related permits. Arguably, that provision should already allow criminal justice agencies to use NICS when issuing permits to purchase ammunition, such as Connecticut's ammunition certificates, since these permits are "firearms-related." However, that is not how the FBI has interpreted its current regulation. The proposed regulation would resolve this ambiguity by explicitly authorizing the use of NICS for this purpose. This authority is a natural and logical extension of the current regulation, and would provide states flexibility in how they choose to ensure that ammunition purchasers are legally eligible to purchase ammunition.

B. Rulemaking process

In order to amend this regulation, the DOJ will have to put the new version of the rule through the notice-and-comment rulemaking process, as specified in the Administrative Procedure Act.[40]

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then the agency must accept public comments on the proposed rule for a period of at least 30 days. Any comments received must be reviewed, and the DOJ must respond to significant comments, either by explaining why it is not adopting the recommended input, or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the Federal Register along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

For the FBI to amend the permitted uses for NICS, it may also be required to amend its System of Records Notice (SORN) regarding this information.[41] This may require publication of an updated SORN in the Federal Register. The DOJ's Office of Privacy and Civil Liberties is the entity that would most likely determine whether this is necessary.[42]

[40] 5 U.S.C. § 553.
[41] *See* 28 C.F.R. § 16.96(p); Privacy Act of 1974; System of Records; 84 Fed. Reg. 54175 (Oct. 19, 2019) (amending the Privacy Act notice for NICS).
[42] U.S. Department of Justice, "Frequently Asked Questions," accessed October 26, 2020, https://www.justice.gov/opcl/faq.

IV. Legal justification and vulnerabilities:

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency's statutory authority, arbitrary or capricious agency action, violating a constitutional right, or not following rulemaking procedures.[43]

The DOJ's Authority to promulgate the new regulation

As described above, the DOJ's authority over the NICS regulations stems from the Brady Act's requirement that the attorney general create NICS and promulgate regulations to ensure the privacy and security of the information of the system.

In promulgating regulations required by statute, federal agencies often fill in the gaps between the statutory language and practicable regulations. After all, administering a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[44] Thus, an agency may fill in any ambiguities as long as the agency's regulation is "based on a permissible construction of the statute" and does not contradict Congress's answer to the specific question at hand.[45] Moreover, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," although the measure of deference will vary depending on "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[46]

Pursuant to these principles, the Supreme Court has established a two-step process to analyze an agency's construction of a statute it administers. First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue."[47] If the intent of Congress is clear, that is the end of the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[48] But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[49] This is the second step in the analysis. Notably, in making the threshold determination—whether the statute is ambiguous—a court must look to the surrounding text and the overall statutory scheme to ensure that Congress has not expressed a particular intent on the question at issue.[50] For the second step, whether the agency's interpretation is permissible depends on whether it is a "reasonable interpretation" of the enacted text and is not "arbitrary or

[43] 5 U.S.C. § 706.
[44] *Morton v. Ruiz,* 415 U.S. 199, 231, (1974); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).
[45] *Chevron,* 467 U.S. at 843.
[46] *United States v. Mead Corp.,* 533 U.S. 218, 228 (2001).
[47] *City of Arlington, Tex. v. F.C.C.,* 569 U.S. 290, 296 (2013).
[48] *Id*.
[49] *Id*.
[50] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644, 666 (2007); *see also Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997) (explaining that the ambiguity of statutory language is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").

capricious."[51]

Step One: Is the Brady Act "ambiguous" on the use of NICS in connection with ammunition sales?

Here, the DOJ could argue that the Brady Act is silent or ambiguous on whether it allows NICS to be used in connection with ammunition sales: after all, it does not expressly limit the use of the NICS database to firearms sales alone. In other words, the language in the current regulation stating "FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act," goes further than the statute's language, which contained no such restriction expressly limiting the use of NICS to firearm transfers.[52] Instead, the act only asks the attorney general to "establish a national instant criminal background check system that any licensee may contact ... for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee" violates state or federal law, and to "prescribe regulations to ensure the privacy and security of the information of the system."[53] The Brady Act also does not provide much detail regarding its requirement that the attorney general "prescribe regulations to ensure the privacy and security of the information" in NICS.

The current regulation has previously been amended to expand NICS access to additional entities (tribal criminal justice agencies) and for additional purposes (disposing of firearms in the possession of criminal justice agencies)—notwithstanding that neither of these expansions were expressly authorized by the text of the Brady Act[54]— which supports the argument that Congress granted the DOJ broad discretion in establishing how NICS would be used. What's more, although Congress specifically prohibited the use of the database to create a registration system,[55] it did not specify any other restrictions on the use of the database. That Congress was explicit in barring certain uses, but did *not* restrict NICS's use in connection with ammunition sales, may suggest that it did not intend to prohibit this use.[56]

Step Two: Is the proposed regulation a "reasonable" interpretation of the Brady Act?

If the DOJ succeeds in establishing that the Brady Act is silent or ambiguous, it must next show that its new regulation is a "reasonable" interpretation of the statute, and not

[51] *Mayo Found. for Med. Educ. & Research v. United States,* 562 U.S. 44, 53 (2011).
[52] Brady Act § 103(b) (stating that the background check system may be contacted "for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18").
[53] Brady Act § 103(b).
[54] National Instant Criminal Background Check System Regulation, 79 Fed. Reg. 69,047 (explaining introduction of amendment to authorize tribal criminal justice agencies to access NICS and to authorize criminal justice agencies to access NICS for purposes of disposing of firearms in their possession).
[55] Brady Act § 103(j).
[56] *See, e.g., Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616–17 (1980) (to express or include one thing implies the exclusion of the other).

"arbitrary and capricious."[57] A regulation is arbitrary and capricious if the agency fails to demonstrate a "rational connection between the facts found and the choice made."[58] In determining whether a regulation is arbitrary and capricious, courts may consider factors including whether "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[59]

The overall statutory scheme provides some support for the theory that using NICS for ammunition sales is in line with—or at least does not contravene—legislative intent. Specifically, the Brady Act's background check requirement was written to be incorporated into Section 922 of Title 18, which expressly regulates ammunition in addition to firearms, as described above.[60] Thus, the DOJ may argue that expanding the use of NICS to encompass ammunition background checks is consistent with the broader statutory scheme, which focused on prohibiting the possession of firearms *and* ammunition by certain groups.

The proposed regulation would not alter the privacy and security of the information in NICS. The proposed regulation would strictly limit access to NICS for ammunition purchaser background checks only when such a background check is required by state, tribal, or local law, and where a state, tribal, or local law enforcement agency conducts the check as a POC. Current regulation will continue to impose strict safeguards to ensure the privacy and security of the system.[61] Among other things, unauthorized use of NICS would continue to be subject to a fine up to $10,000 and cancellation of NICS inquiry privileges.[62] Consequently, the new interpretation is entirely consistent with the Brady Act's requirement that the regulations ensure the privacy and security of the system.

Constitutional challenges

The new regulation would likely prompt *indirect* Second Amendment challenges. Specifically, to the extent that the regulation prompts states to enact their own laws requiring ammunition background checks (for purposes of accessing NICS under the amended regulation), Second Amendment challenges would likely target these state laws, not the federal regulation.[63]

[57] *Mayo,* 562 U.S. at 53.
[58] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).
[59] *See id*.
[60] Brady Act § 102(a)(1).
[61] See 28 C.F.R. § 25.8.
[62] 28 C.F.R. § 25.11.
[63] Indeed, it is unlikely that merely making NICS available to states for ammunition background checks, as the proposed regulations does, would constitute a Second Amendment violation, given the absence of any successful Second Amendment challenges to the current regulation, which already makes NICS available to states for firearm background checks. (In fact, the most direct challenge to the Brady Act—an

As noted above, in 2016, California voters approved Proposition 63, a ballot measure that, among other things, required in-person sales and background checks for ammunition. In 2018, opponents of Prop. 63, including out-of-state ammunition sellers who wish to sell ammunition online to Californians without a background check, filed a lawsuit claiming that the new background check law violates the Second Amendment and the Dormant Commerce Clause. The district court agreed with the sellers that their businesses were disadvantaged and issued a preliminary injunction, blocking the law.[64] The case is now on appeal before the Ninth Circuit, which has stayed the district court's injunction, allowing ammunition background checks to continue in California.[65]

Those who wish to challenge the proposed regulation may seek to follow the reasoning in *Rhode*, arguing that administrative errors and delays in processing background checks in NICS constitute a Second Amendment violation.[66] (The Dormant Commerce Clause is a limit on state and local regulations, and not relevant to a federal law.) However, such challenges are unlikely to be successful, because the systemic administrative errors that formed the basis of the *Rhode* opinion do not seem to be applicable to NICS: "Californians purchasing firearms using the federal NICS background system fail background checks ***at a much lower rate of approximately 1.1%***."[67]

Further, at least one district court recently rejected a Second Amendment challenge to NICS, brought by a plaintiff who had been improperly flagged by NICS as a person prohibited from possessing a firearm.[68] The court explained that, although the error resulted in a delay before the plaintiff could purchase a firearm, that delay did not violate his constitutional rights because he was ultimately able to receive a firearm.[69] Given that the new regulation would simply expand the use of NICS, rather than create a new system, any Second Amendment challenges based on administrative issues arising from the use of NICS—i.e., errors or delays—would likely be resolved similarly.

Procedural challenges

By following the notice-and-comment rulemaking process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence-reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement

ultimately successful challenge to the Act's interim provisions requiring state sheriffs to perform the background checks—was based on the Tenth Amendment, not the Second. *See Printz v. United States,* 521 U.S. 898, 935 (1997).)

[64] *Rhode v. Becerra,* 445 F. Supp. 3d 902 (S.D. Cal. 2020).

[65] *Rhode v. Becerra,* 2020 U.S. App. LEXIS 15525 (9th Cir.).

[66] *Rhode,* 445 F. Supp. 3d 902, 923-26, 947-48 (holding that ammunition background check violated the Second Amendment by erroneously blocking over 16% of applicants from purchasing ammunition).

[67] *Id*. at *923 (emphasis added).

[68] *Snyder v. United States,* No. 18-5504 RJB, 2019 WL 5592948, at *1 (W.D. Wash. Oct. 30, 2019).

[69] *Id*.

with each phase of the process.[70]

In particular, the DOJ should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in comments.[71] The agency must address the concerns raised in all non-frivolous and significant comments.[72] The final rule must be the "logical outgrowth" of the proposed rule and the feedback elicited.[73]

Arbitrary or capricious challenge under the APA

If there is a judicial challenge brought regarding a new regulation as being arbitrary or capricious, a court will invalidate the regulation if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[74] The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, establishing a nexus between the facts and the agency's choice.[75] When an agency fails to consider important facts, or where its explanation is either unsupported or contradicted by the facts, the court has grounds to find the rule "arbitrary or capricious."[76]

As the Supreme Court has explained, an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis ... for example, in response to changed factual circumstances, or a change in administrations."[77] The agency must still provide a "reasoned

[70] *See* Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," *N.C.L. Rev*. 92 (2014): 721, 737-38, (describing "first" and "second" order inquiries into an agency's decision making). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

[71] 5 U.S.C. § 553(c).

[72] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).

[73] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).

[74] 5 U.S.C. § 706(2)(A).

[75] *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[76] *Id.* at 43.

[77] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981–82, (2005); *see also F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 514 (2009) ("We find no basis in the Administrative

explanation for its action," which would "ordinarily demand that it display awareness that it is changing position."[78] But "it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates."[79] Thus, an agency need not provide a more detailed justification for the agency's new policy, unless "its prior policy has engendered serious reliance interests that must be taken into account."[80]

Therefore, to withstand a potential judicial challenge that the new regulation is an arbitrary and capricious action by the ATF, the agency must be able to demonstrate that it considered all factors pertinent to the issue in its decision-making, and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy, based on sound evidence, empirical, or otherwise. Second, it should contain an acknowledgment of reliance interests, and address why those interests are outweighed by public safety factors.

Here, the Department of Justice has already established a course of action through its prior regulation and has continued to reinforce that course of action through further amendments to the regulation. (For example, in 2014, the regulation was amended to give tribal criminal justice agencies access to the NICS database, as noted above.) These amendments demonstrate that FBI decision-making regarding access to NICS is not static and inflexible, but rather has responded to the needs of state policymakers and criminal justice agencies that implement state laws. These changes indicate the new regulation would not threaten any existing reliance interests.[81]

In establishing that there is a "rational connection between the facts found and the choice made," the DOJ may rely on the kind of data and reasoning put forth by proponents of California's Proposition 63 in *Rhode v. Becerra*.[82] Namely, as Brady explained in its amicus brief before the Ninth Circuit in *Rhode*:

- Ammunition sales to prohibited persons contribute to crime. In California, in the two years immediately preceding the implementation of Proposition 63, police investigations recovered "nearly 1,000,000 rounds of illegally owned ammunition."[83] One study found that ten retail outlets "sold over 10,000 rounds to individuals convicted of felonies and

Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.")

[78] *F.C.C. v. Fox,* 556 U.S. 502, 515–16 (2009).

[79] *Id*.

[80] *See id*. at 516.

[81] This is because section 922(g) already barred the sale of ammunition to the same group of individuals that would be affected by the current regulation.

[82] *Rhode v. Becerra,* No. 18-CV-802-BEN (S.D. Cal. Apr. 23, 2020).

[83] California Department of Justice, Office of the Attorney General, "SB 140 Supplemental Report of the 2015-16 Budget Package, Armed Prohibited Persons System," January 1, 2016, 22, http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/sb-140-supp-budget-report.pdf.

other illegal purchasers" in Los Angeles in only two months.[84]

- Ammunition sales to "prohibited persons" also contribute to crime because, as the legislature previously concluded in enacting the Gun Control Act of 1968, such persons are much more likely than others to engage in crime, including violence.[85] And the easier it is for prohibited persons to acquire ammunition, the graver these problems will be.[86]

- Studies indicate that, in the absence of a background check, prohibited persons make up about 3% of ammunition customers in ordinary retail channels.[87]

- Studies also indicate that background checks at the time of transaction would have largely eliminated retail sales of ammunition to prohibited individuals.[88] In California's case, in seven months of operation, the ammunition background checks prevented 760 prohibited persons from buying ammunition from licensed vendors, and likely deterred many more from attempting to do so.[89]

In addition, the DOJ may be able to cite research showing the efficacy of background checks on firearm purchases in reducing gun violence to justify the expansion of background checks to ammunition purchases.[90]

Congress also clearly anticipated that states would have their own laws regulating firearms and ammunition and did not mean to preempt them. Federal law provides:

> No provision of this chapter [the Gun Control Act (18 U.S.C. Chapter 44), which includes section 922's background check requirement] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.[91]

Federal law on these topics is therefore a "floor" and not a "ceiling." Through this provision,

[84] G.E. Tita, et al., "The Criminal Purchase of Firearm Ammunition," *Injury Prevention* 12, no. 5 (October 2006): 308, 310, doi: 10.1136/ip.2006.013052 (noting that background check at time of transaction would have largely eliminated retail sales to these prohibited individuals).
[85] Gun Control Act of 1968, Pub. L. No. 90-618, § 101 ("[T]he purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence. . . ."); *see also* 1968 U.S.C.C.A.N. 2112, 2114 (explaining that categories of prohibited individuals "account for some 49 percent of the arrests for serious crimes in the United States").
[86] Brief of Amicus Curiae Brady in Support of Appellant Xavier Becerra and Reversal, Emergency, *Rhode v. Becerra*, No. 20-55437, Dkt. No. 23 (9th Cir., Jun. 23, 2020).
[87] *Id*. at 11.
[88] *Id*. at 7.
[89] *Id*. at 4.
[90] *See, e.g.,* Kara E. Rudolph, Elizabeth A. Stuart, Jon S. Vernick, and Daniel W. Webster, "Association Between Connecticut's Permit–to–purchase Handgun Law and Homicides," *American Journal of Public Health* 105, no. 8 (2015): e49–e54; *see also* Daniel Webster, Cassandra Kercher Crifasi, and Jon S. Vernick, "Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides," *Journal of Urban Health* 91, no. 2 (2014): 293–302.
[91] 18 U.S.C. § 927.

Congress intended to establish a policy of cooperation, rather than competition, among the different levels of government with respect to laws regulating guns and ammunition. Allowing states (and local governments that derive their authority from states) to use NICS for ammunition purchaser background checks is consistent with this policy.

RECOMMENDED ACTION MEMO

Agency: Federal Bureau of Investigation
Topic: Strengthening the National Instant Criminal Background Check System (NICS) in Point of Contact (POC) States
Date: November 2020

Recommendation: **Ensure, through training, auditing, and accountability measures, that POCs properly:**

- **conduct proper background checks in response to requests from FFLs in their jurisdictions, including requests related to interstate transfers of long guns, and proceed only with transfers to lawful possessors**
- **report delays and denials of gun purchases and transfers to NICS**
- **publish yearly statistical reports summarizing their operations for the year, similar to what the FBI's NICS section does.**

I. Summary

Description of recommended executive action

The Federal Bureau of Investigation (FBI) administers the National Instant Criminal Background Check System (NICS), which is used to conduct background checks on gun purchasers. Some states have chosen to appoint state or local agencies to act as "points of contact" (POCs) for the system, meaning that gun dealers contact these agencies for the background checks instead of the FBI directly. These agencies then administer background checks on gun purchasers using the NICS system. In order to ensure that these agencies properly administer federal law, however, the FBI must provide oversight. Under this proposal, the FBI would strengthen the training it provides these agencies, more frequently audit these agencies to ensure they are properly administering the law, and impose accountability measures on those agencies that do not. In some circumstances, this may involve removing the agencies' authority to act as POCs.

Overview of process and time to enactment

Within the first year of the next administration, the FBI should announce requirements for annual training to ensure that all individuals administering background checks on behalf of POCs are competent to do so. During that time period, the FBI should also begin requiring states that have appointed POCs to issue yearly statistical reports summarizing their operations for the year. The first such reports should be published by the end of 2023. The FBI should also audit each state's POCs at least every three years, and the results of these audits should be made public. If an audit reveals significant issues with a POC's administration of NICS, the FBI should conduct a follow-up audit within the next year. If the issues continue, the FBI may choose to withdraw its authorization for the agency to act as a POC.

II. Current state

NICS is the federal government's most important tool in ensuring that prohibited people are not able to obtain guns. The Brady Handgun Violence Prevention Act (the Brady Act) requires federal firearms licensees (FFLs), including gun dealers, to conduct background checks on prospective gun purchasers.[1] The act required the attorney general to establish NICS for this purpose.[2]

The Brady Act also required the attorney general to determine the means by which FFLs would contact NICS.[3] The attorney general has delegated this responsibility to the FBI, and the FBI has given each state the option to have a state or local agency act as a POC for NICS.[4] If the state chooses to have a state or local agency act as a POC, the FFLs contact the state or local agency, rather than the FBI for the background check of any gun purchaser. If the state chooses not to have a state or local agency act as a POC, the FFLs in the state contact the FBI directly for the background check.[5] The rationale for providing states with the option of having a state or local agency act as a POC is that, because the information available to the FBI is limited, the POCs are sometimes able to search additional databases besides NICS, and therefore have the potential to identify prohibiting records that the FBI may lack, such as mental health or final disposition records.[6]

According to FBI regulations:

> POC (Point of Contact) means a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check. A POC will be an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order.[7]

The following 13 states are known as "full-POC states" and use a POC for all gun sales or permits that require a background check: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Nevada, New Jersey, Oregon, Pennsylvania, Tennessee, Utah, Virginia.

[1] Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, § 102(b) (codified at 18 U.S.C. § 922(t)).

[2] *Id*. § 103(b) (codified at 34 U.S.C. § 40901(b)) .

[3] *Id*. § 103(a)(1) (codified at 34 U.S.C. § 40901(a)(1)).

[4] *See* Federal Bureau of Investigation, "1998-1999 NICS Operations Report," 5, March 1, 2000, https://www.fbi.gov/file-repository/operations_report_98_99.pdf/view; 28 C.F.R. § 25.2.

[5] 28 C.F.R. § 25.6.

[6] *See* Notice of Proposed Rule, National Instant Criminal Background Check System Regulations, 63 Fed. Reg. 30430, 30431 (June 4, 1998).

[7] 28 C.F.R. § 25.2.

In addition, the following seven states act as "partial-POC states," which means that state or local agencies conduct background checks for handgun, but not long gun sales. In partial POC states, FFLs contact the FBI directly for long gun (rifle and shotgun) sales: Iowa, Maryland, Nebraska, New Hampshire, North Carolina, Washington, Wisconsin.

The remaining 30 states and the District of Columbia are non-POC states and run all of their firearm background checks through the FBI.[8]

In conducting a background check on a prospective gun purchaser, a POC must determine whether "receipt of a firearm by a prospective transferee would violate section 922 of title 18 [of the United States Code] or State law." Consequently, a POC must be familiar with the applicable provisions of section 922 and state laws.

One factor that complicates the job of POCs is that firearm purchasers are not always residents of the state where they are purchasing a gun. Federal law allows an FFL to sell or transfer a long gun (rifle or shotgun) to a resident of another state only if the transfer complies with the laws of both states.[9] This provision means that when a POC conducts a background check at the request of an FFL who is selling a rifle or shotgun to a resident of another state, the POC is called upon to enforce not just federal law and the law of its own state, but also the law of the state of residence of the purchaser. As described below, POC states have not always succeeded in doing that.

When a prospective gun purchaser fails a background check run by a POC, federal regulations require the POC to report the failed gun sale to the FBI. Similarly, a POC must also report to the FBI when a background check run by the POC is delayed. When the FBI promulgated these requirements in 2004, it explained the change:

> Receiving information about POC denials will enable the FBI to refer all denials, not just those made by the FBI NICS Operations Center, to ATF for investigation. Receiving notification of open POC transactions will allow the FBI to retain information about the POC transaction for up to 90 days, or until the transaction's status is changed to proceed before the expiration of 90 days, in the same way the FBI will retain information about open transactions handled by the FBI NICS Section.[10]

[8] FBI, "NICS Participation Map," accessed October 14, 2020, https://www.fbi.gov/file-repository/nics-participation-map.pdf/view

[9] Federal law prohibits the transfer of a handgun from an FFL in one state to a resident of another state. However, federal law allows an FFL to transfer a long gun (rifle or shotgun) to a resident of another state provided that: "the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States)..." 18 U.S.C. § 922(b)(3).

[10] Final Rule, National Instant Criminal Background Check Regulation, 69 Fed. Reg. 43892, 43898 (July 23, 2004). Until that time, it had been optional for POCs to report NICS denials to the FBI, and the regulations did not mention the reporting of open transactions (those that are delayed and neither

In addition, when a POC denies a gun sale and reports the denial to the FBI, the FBI is able to add that record to the NICS Index, one of the databases searched when a person tries to buy a gun. If the person who was denied tries to buy a gun again, the existence of this record within the NICS Index may allow the purchase to be denied more readily, especially if the person is trying to buy a gun in a different state. In some cases, a denial is authorized only after extensive research of criminal history records. The failure of POCs to enter these denials in the NICS Index may make that critical denial record unavailable to other jurisdictions.

Every year since NICS was established, the FBI's NICS section has published a report detailing its operations for the year. These reports provide statistical data about background checks, including numbers regarding approvals, denials, and delays; the availability of the system; the proportion of checks processed via "E-Check"; the answer speed, immediate determination, and abandonment rates; the days and weeks with the highest number of checks; and the number of denials broken down by the eligibility criteria that led to those denials. For example, the 2018 operations report states that 44,806 of the 99,252 denials that the NICS section issued in 2018 were due to felony convictions, and that ultimately, the NICS section denies 1.21 of every 100 background checks. The reports also describe the number of denials referred to the ATF in situations where a firearm may have been transferred to a prohibited person because the background check was not completed fast enough.

Some, but not all states that serve as POCs have provided similar reports. Pennsylvania, for example, publishes annual reports similar in scope and detail to the NICS operations reports.[11] Certain states that have appointed a POC produce less comprehensive reports.[12] Other states that have appointed a POC or POCs publish no information about the operations of these POCs. As a result, policymakers, advocates, and the public are left in the dark as to the accuracy and effectiveness of gun purchaser background checks in these states.

III. Proposed action

The FBI should strengthen its oversight of POCs. More particularly, the FBI must ensure through training, auditing, and accountability measures, that POCs properly:

1. conduct proper background checks in response to requests from FFLs in their jurisdictions, including requests related to interstate transfers of long guns, and proceed only those transfers to lawful possessors
2. report denials of gun purchases and transfers to NICS

immediately approved or denied). The new regulation mandates that POCs report all denials, open transactions, and approvals of open transactions to NICS.

[11] *See, e.g.,* Pennsylvania State Police, "Firearms Annual Report 2019," accessed October 14, 2020, https://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania_State_Police_2019_Firearms_Annual_Report.pdf.

[12] *See, e.g,* Colorado Bureau of Investigation, Department of Public Safety, "Current Year Statistics," accessed October 14, 2020, https://www.colorado.gov/pacific/cbi/currentyearstatistics,

3. publish yearly statistical reports summarizing their operations for the year, similar to what the FBI's NICS section does.

IV. Legal justification

1. Conducting background checks

As described above, POCs play a major role in administering NICS. In 2018, states processed 17,946,594 background checks while the FBI processed 8,235,342.[13] Of the background checks processed by states, at least 5,293,391 were associated with firearm transactions (presumably processed by POCs); the remaining 12,653,203 were run by state agencies issuing firearms- or explosives-related permits. (State and local agencies can use NICS to issue these permits, even if they are not related to the sale or transfer of a firearm.)

Unfortunately, there are indications that POCs struggle to apply federal law properly while conducting their background checks, thereby increasing the risk that firearms will fall into the hands of prohibited people. A 2018 Government Accountability Office report found that states report denials at approximately one-third the rate the FBI reports denials.[14] There are a variety of potential explanations for the discrepancy, but an evident and alarming one is that POCs are improperly approving a significant number of transactions.

In order to protect public safety against the threat that POCs might approve a gun sale or transfer to a prohibited person, the FBI must ensure that all POCs are properly trained to conduct background checks and identify records that demonstrate that a person is prohibited from purchasing or possessing firearms. As noted above, an out-of-state prospective purchaser increases the risk that a POC may improperly approve a gun sale or transfer.

The risk in this situation was demonstrated in April 2019, when many schools in Colorado were forced to close after an 18-year-old woman from Florida, who was reportedly "infatuated" with the Columbine massacre, flew to Denver and purchased a shotgun from a gun dealer.[15] The sale should not have been allowed, because Florida requires residents to be 21 or older to purchase any firearm. Colorado is a full-POC state. It remains unclear why neither the dealer nor the state agency tasked with running background checks flagged that the sale was illegal.

[13] FBI, "2018 NICS Operations Report," accessed October 14, 2020, https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view.

[14] Government Accountability Office, "LAW ENFORCEMENT Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions," September 2018, 8, https://www.gao.gov/assets/700/694290.pdf.

[15] Paul Murphy Holly Yan, Ralph Ellis and Madeline Holcombe, "Website thought connected to woman 'infatuated' with Columbine massacre draws FBI attention," CNN, April 17, 2019, https://www.cnn.com/2019/04/17/us/columbine-threat-search-for-woman/index.html.

The incident prompted a bipartisan group of members of Congress from Colorado to send a letter to the DOJ OIG, requesting an investigation of FBI audits into POC background checks.[16] The FBI is responsible for conducting audits of POC systems, but these audits have never been made public.[17] In January 2020, the OIG responded to the letter saying, "we anticipate continuing our oversight of [FBI's administration of NICS] by initiating an audit of selected aspects of it, including whether the FBI appropriately evaluates Point of Contact state compliance with firearm background checks."[18]

During the ongoing coronavirus pandemic, the demand on POCs and the FBI to conduct background checks on gun sales has reached an unprecedented level. Between March and June of this year, background checks were up 95% compared to the same period in 2019, including a 148% increase in June alone. This surge in background checks makes it even more important that POCs are correctly administering the law and denying potential sales to prohibited people.

2. Reporting denials and open transactions to the FBI

FBI regulations require POCs to report NICS transaction determination messages electronically to the FBI for all transactions that are denied or not resolved before the end of the day. These electronic messages must be provided to NICS immediately when the POC communicates the determination to the FFL.[19] A 2016 report by the Department of Justice Office of Inspector General (OIG) found that POCs do a poor job of reporting delayed or denied background checks to NICS, as required by law.[20] That report stated:

> From 2008 through 2014, states handled about 68 million of the more than 119 million NICS transactions. To help ensure the completeness of the NICS database, states are required to update it with supporting documents when a prospective purchaser attempts to buy a firearm and is approved, denied, or delayed. We reviewed a judgmental sample of 631 state processed transactions and determined that in 630 of them the states did not fully update the NICS database or inform the FBI of the transaction's outcome.

[16] "REPRESENTATIVE NEGUSE LEADS BIPARTISAN INQUIRY LETTER REQUESTING ANSWERS FROM FBI REGARDING RECENT COLORADO INCIDENT & POINT OF CONTACT SYSTEM," July 23, 2019, https://neguse.house.gov/media/press-releases/representative-neguse-leads-bipartisan-inquiry-letter-requesting-answers-fbi.

[17] FBI, "National Instant Criminal Background Check System Audit Methodology," accessed October 14, 2020, https://www.fbi.gov/file-repository/nics-audit.pdf/view (delineating audit standards but not identifying any specific POC audit)

[18] "DOJ INSPECTOR GENERAL ACKNOWLEDGES NEED FOR OVERSIGHT IN RESPONSE TO CONGRESSMAN NEGUSE'S BIPARTISAN REQUEST FOR INVESTIGATION INTO SOL PAIS GUN VIOLENCE INCIDENT," January 23, 2020, https://neguse.house.gov/media/press-releases/doj-inspector-general-acknowledges-need-for-oversight-in-response-to-congressman-neguses-bipartisan-request-for-investigation-into-sol-pais-gun-violence-incident.

[19] 28 C.F.R. § 25.6(h).

[20] Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System," U.S. Department of Justice, September 2016, 23, https://oig.justice.gov/reports/2016/a1632.pdf.

> These failures mean the NICS database is incomplete, and increases the risk that individuals found by states to be prohibited purchasers could be able to purchase firearms in the future.

As noted above, POCs must report delayed and denied background checks to NICS so that the ATF has an opportunity to follow up with the prospective gun purchaser to ensure they do not otherwise seek out a gun.

In addition, reporting these checks to NICS ensures that these purchasers are not able to pass a background check at another time. When a POC fails to provide this information to NICS, this increases the risk of an inconsistent response from NICS and the likelihood that the system will approve someone who has previously been denied. During a background check, states often provide information necessary to determine whether a person is eligible to possess a gun. For example, in some cases, NICS may be able to identify that a person was arrested and charged with a particular crime but the disposition of the case was not properly recorded; in such cases, the records in NICS do not immediately reveal whether the person was convicted of that crime or not. When this happens, the system will seek further information from the court or law enforcement agency associated with the arrest. If the person was in fact convicted, the sale will be denied. If that person seeks to buy another firearm from a different FFL, the process will occur again, unless the system already has a record that the person is prohibited. For that reason, the records of POCs records that identify people who have been denied can make NICS more efficient and consistent in its determinations.

As the FBI explained in proposing the 2004 update to the regulation:

> Unfortunately, most POC states currently do not transmit this information to the NICS system. This means that a potential purchaser could be prohibited under state or federal law (based upon information available to a state from records available to that state only), yet the NICS system would not have access to that determination. If the prohibited purchaser then traveled to another state and again attempted to purchase a firearm, the NICS system would be unable to stop the prohibited purchase.[21]

In order to avoid these dangerous situations, the FBI must ensure that POCs properly report denials and delayed transactions to NICS.

3. Publishing yearly statistical reports summarizing their operations

Policymakers, advocates, and the public are less informed about the operations of POCs than about the FBI's NICS operations. This information provided in NICS operations reports is crucial for policymakers, advocates, and appropriators. Without such data, policymakers cannot determine the efficacy of POC background checks or the funding needs of POCs.

[21] Notice of Proposed Rule, National Instant Criminal Background Check System Regulation, 66 Fed. Reg. 35567, 35569 (July 6, 2001).

As noted above, the Brady Act gave the attorney general the authority to determine the means by which the FFLs would contact NICS. The attorney general has delegated this responsibility to the FBI, and the FBI has given each state the option of having a state or local agency act as a POC. The FBI, therefore, has full discretion to determine the terms and conditions under which a state can use this option. Since data about the operations of POCs would be helpful, the FBI should require that states that have appointed POCs gather and provide it.

4. The FBI must enforce these requirements through training, auditing, and accountability measures

The three duties of a POC mentioned above are not self-enforcing. The FBI must regularly provide training to POCs to ensure the individuals administering the system have the necessary knowledge and expertise to fulfill these responsibilities. The FBI already conducts some training for POCs. The 2018 NICS operations report noted:

> The NICS training instructors conducted approximately 40 training sessions to over 340 agencies hosting over 800 attendees in 2018. Agencies receiving training included POC state agencies, ATF-Qualified Alternate Permit state agencies, state-designated trainers, agencies performing disposition of firearm checks, and two U.S. territories.[22]

Nevertheless, as described above, it is clear that these training sessions have not been sufficient to ensure that POCs properly conduct background checks so that prohibited purchasers are not approved to buy guns, particularly when prospective purchasers do not reside in the state. The FBI should do more to ensure that this training occurs.

The FBI must also regularly audit POCs to ensure that they continue to fulfill their responsibilities. Although the FBI has established a process for auditing POCs,[23] it is not clear how frequently these audits are conducted and what the results of these audits are.The FBI does not release any significant public information about these audits. This lack of transparency leaves policymakers and the public in the dark regarding the effectiveness of POC background checks.

Finally, the Brady Act gives the attorney general sufficient discretion over the operation of the background check system to impose accountability on POCs that fail to comply with their obligations. At first, this accountability may involve more frequent or thorough audits, or additional mandatory training. The FBI may also choose to appoint an employee to provide continuous oversight for a POC. Ultimately, the FBI can withdraw authorization for a state or local agency to act as a POC. Because of the lack of transparency regarding the FBI's

[22] Criminal Justice Information Services Division, Federal Bureau of Investigations, "National Instant Criminal Background Check Section 2018 Operations Report," accessed October 14, 2020, 28, https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view. According to the NICS Operations Reports, these trainings have been conducted annually since at least 2000.
[23] FBI, "National Instant Criminal Background Check System Audit Methodology," accessed October 14, 2020, https://www.fbi.gov/file-repository/nics-audit.pdf/view.

management of POCs, it is not known whether the FBI has done this in the past. Withdrawing authorization from a POC would also require the FBI's NICS section's funding to be increased proportional to the number of additional background checks it would be required to conduct. Nevertheless, when the FBI determines that a POC is unable to administer the background check system properly, as required by federal law, it should no longer operate as a POC, and the FBI should resume conducting background checks for gun purchases in that state.

Opposition arguments and responses

1. Burden on POCs and overall impact on public safety

Those who oppose stronger enforcement of the requirements for state and local agencies that act as POCs may argue that the requirements overburden these agencies, and that this burden may cause states to withdraw their decision to have those agencies act as POCs. They may also argue that this burden will discourage other states from choosing to appoint POCs in their states. The federal government does not provide funding to states or local agencies specifically so that they can act as POCs for NICS. Whether or not a state chooses to appoint a state or local agency as a POC, has always been a matter within the state's discretion. As a result, a state that does not wish to comply with the requirements described above may simply choose to disallow its agency or agencies to act as POCs.

How a state's decision to disallow a state or local agency to act as a POC would affect public safety may depend on several factors, including whether the POC has been more or less effective than the FBI in identifying prospective gun purchasers who are prohibited from purchasers or possessing firearms. As noted above, the primary benefit of a state or local agency acting as a POC is that the state or local agency may have immediate access to information that the FBI does not.[24] Over the last decade, however, states have significantly improved their reporting to NICS, meaning that the FBI now has direct access to much more of the information needed to identify whether prospective gun purchasers are eligible. Notably, in 2012, NICS began accepting files from states that identify people who are prohibited from possessing guns under state law, even if those people are not prohibited under federal law, enabling a NICS check to be used to identify those people.[25] As a result, the benefits of a state appointing a POC may be less than they once were, since the records that a state or local agency could search are now also available to the FBI directly.

However, at least one study has found that the practice of conducting firearm purchaser background checks through state or local agencies, as opposed to through the FBI, is

[24] *See also* James M. Tien, et al., "Cost-Benefit of Point-of-Contact (POC) Versus Non-POC Firearm Eligibility Background Checks," Research report submitted to the Department of Justice (May 2008), https://www.ncjrs.gov/pdffiles1/bjs/grants/222674.pdf.
[25] Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, "National Instant Criminal Background Check System (NICS) Operations 2012," accessed October 14, 2020, http://www.fbi.gov/about-us/cjis/nics/reports/2012-operations-report

associated with reduced firearm death rates, especially with respect to suicides.[26] The authors of the study speculated that the reduced firearm suicide rates may arise from other factors besides the availability of records. This reduction in firearm suicide rates shows a measurable benefit for states that choose to appoint state or local agencies to act as POCs, a strong reason why states should continue to allow those agencies to do so, even if the FBI chooses to conduct better oversight, as this memo suggests.

2. Privacy concerns

Those who are wary of federal information collection efforts may also object to the forwarding of "delay" and "denial" determinations to the FBI. In particular, the gathering of information, including names and identifying information of people who attempt to buy guns, may raise privacy concerns. However, the FBI already retains this information for individuals who attempt to buy guns in non-POC states, and these concerns should be no greater based on whether the state has chosen to appoint POCs or not.

Furthermore, people who are denied guns through background checks have often lied on the firearm transaction form, falsely stating that they do not fall within a prohibited category. Since making a false statement on this form is a crime, this information can lead to federal criminal charges against the person. Consequently, information about gun purchaser denials rightfully belongs in the hands of the FBI.

Finally, NICS information is subject to stringent data restrictions and privacy regulations, and there is no evidence that this information has been used improperly. For example, NICS regulations strictly limit authorized law enforcement access to, and use of, the NICS Index.[27] Consequently, privacy concerns should not prevent the FBI from gathering this important information from POCs.

Conclusion

State and local agencies that act as POCs play an important role in administering the gun purchaser background check system. The FBI should not hesitate to provide proper oversight of these agencies to ensure that guns don't fall into the wrong hands. The public also deserves proper transparency regarding the operations of these agencies. The training, auditing, and accountability measures described above are responsible steps the FBI should take to ensure that POCs fulfill their responsibilities to ensure public safety.

[26] Steven Sumner et al., "Firearm Death Rates and Association with Level of Firearm Purchase Background Check," *Am. J. Prev. Med.* 35, no. 1, July 2008, http://www.ajpmonline.org/article/S0749-3797(08)00310-3/fulltext.
[27] 28 CFR 25.6.

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Office of Justice Programs (OJP)
Topic: Community Violence Intervention (CVI) Task Force within the OJP
Date: November 2020

Recommendation: Establish a Community Violence Intervention Task Force to create and support evidence-based community violence intervention programs in areas disproportionately impacted by gun violence.

I. Summary

Description of recommended executive action

Everyday gun violence interrupts the lives of persons living in underserved communities of color. The violence extends past those who have perpetrated acts of gun violence and their victims because the trauma the community is left to deal with in the wake of gun violence can be debilitating. Gun violence does not function in a silo; rather, there are many contributing factors, or root causes, that must be addressed in order to reduce gun violence in underserved communities of color. Community Violence Intervention (CVI) programs work to address not only gun violence but some of those root causes. However, CVI programs need funding, other resources, and a government supporting their establishment in communities disproportionately impacted by gun violence.

The Office of Justice Programs (OJP) oversees the grant-making agencies within the DOJ, and part of its mission is to coordinate these grant-making activities. Various agencies within the OJP have occasionally funded CVI programs, but these efforts have not been coordinated. Many of the communities hit hardest by gun homicides have not received the support they need to implement effective CVI programs.

Therefore, the DOJ should establish a CVI Task Force within the OJP to support and enhance community-based violence intervention efforts in areas disproportionately impacted by shootings and gun homicides, coordinate these efforts across federal agencies and with state and local stakeholders, and serve as a technical-assistance resource for best practices.

Overview of process and time to enactment

Immediately upon taking office, the administration should announce the creation of the CVI Task Force. Within three months of the announcement, the attorney general should establish the task force using representatives from OJP's constituent offices. The task force should then begin offering assistance to governmental and non-governmental organizations that request it—in the form of both technical assistance and assistance in finding funding; begin electing sites for the task force's proactive work; convene working groups at each of these sites; and by September 2021, have chosen community violence intervention strategies to address the violence. Within the same time frame, the task force should ensure that technical assistance providers that can

help implement these strategies receive sufficient federal funding and should help match CVI working groups with technical assistance providers. In the 2022 fiscal year and beyond, the CVI task force should fund the programs that will implement the CVI strategies selected by the working groups at each site for the task force's work. This quick timeline appropriately reflects the urgency of the needs of communities disproportionately impacted by gun homicides and shootings.

Ideally, the CVI Task Force's work would be funded through a new appropriation by Congress. Even without such an appropriation, however, the task force could begin these important efforts. The administration should act quickly to get started.

II. Current state

Community violence

In our underserved communities of color, the gun homicide rate often reaches 10 times the national average.[1] Young Black men are especially vulnerable—the chance of a Black American family losing a son to a bullet is 62% greater than losing him to a car crash. Black men constitute 6% of the US population but account for 50% of all gun homicides each year. The rate of gun injuries is 10 times higher for Black children and teens than it is for white children and teens.[2]

This high concentration of violence creates a vicious cycle.[3] A study of adolescents participating in an urban violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence.[4] The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—doubles the probability that a young person will commit a violent act within two years.[5] In other words, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue, absent an intervention.

In city after city, a small subset of individuals and groups are both responsible for, and the victims of, a hugely disproportionate share of gun violence. People likely to be involved in

[1] Giffords, "Community Violence," accessed July 15, 2020, https://giffords.org/issues/community-violence/.
[2] The rate of non-fatal shootings is 51.1 per 100,000 people for young black Americans versus 5.0 per 100,000 people for young whites. Arthur R. Kamm, Violence Policy Center, and Amnesty International, "African-American Gun Violence Victimization in the United States, Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," June 30, 2014, http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17803_E.pdf.
[3] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed September 24, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.
[4] Jonathan Purtle et al., "Scared safe? Abandoning the Use of Fear in Urban Violence Prevention Programmes," *Injury Prevention* 21, no. 2 (2015): 140–141.
[5] Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, "Firearm Violence, Exposure and Serious Violent Behavior," *Science* 308 (2005): 1323–1326.

interpersonal gun violence can be identified through the use of risk factors, such as prior involvement in shootings as victims or perpetrators.

However, overreliance on the criminal justice system to deal with perpetrators of gun violence does little to address the violence and trauma in communities most impacted.[6] Over-reliance on the criminal justice system is not only costly to taxpayers but diverts resources from the community that could be used to address some of the root causes of gun violence and the trauma experienced in the community.[7] Hefty sentences disproportionately given to persons of color[8] have only a minimal effect on improving public safety.[9] The criminal justice system is overburdened, resulting in a system that cannot function to provide justice.[10] The disparate treatment of Black men and boys, specifically, at the hands of law enforcement, exacerbates community distrust, resulting in individuals' being less willing to report violence and cooperate with law enforcement.[11] Similarly, the disproportionate prosecution and incarceration of Black men specifically not only impacts community distrust, but causes damage to families (financially and emotionally) and the community as a whole, among other impacts.[12]

CVI programs

Research and case studies have shown that through a combination of low-cost, community violence intervention (CVI) programs and much-needed firearms policy reforms, gun violence rates in communities of color can be cut in half in as little as two years.[13] CVI programs are coordinated violence reduction initiatives that use evidence-based, community-focused strategies such as hospital-based violence intervention, evidence-based street outreach, and

[6] *See* Giffords Law Center to Prevent Gun Violence, PICO National Network, and the Community Justice Reform Coalition, "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence/.

[7] *See* Ed Chung, Betsy Pearl & Lea Hunter, "The 1994 Crime Bill Continues to Undercut Justice Reform--Here's How to Stop It," Center for American Progress, March 26, 2019, https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/.

[8] *See* Weihua Li, "The Growing Racial Disparity in Prison Time," The Marshall Project, December 3, 2019, https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time.

[9] Ed Chung, Betsy Pearl & Lea Hunter, "The 1994 Crime Bill Continues to Undercut Justice Reform--Here's How to Stop It," Center for American Progress, March 26, 2019, https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/.

[10] *See* Ed Chung, Betsy Pearl & Lea Hunter, "The 1994 Crime Bill Continues to Undercut Justice Reform—Here's How to Stop It," Center for American Progress, March 26, 2019, https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/.

[11] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.

[12] *See* Dorothy E. Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," *Stanford Law Review* 56 (2004): 1281-1297.

[13] Jake Flanagin, "President Obama applauds revolutionary community policing in Camden, New Jersey," Quartz, May 19, 2015, https://qz.com/407763/president-obama-applauds-revolutionary-community-policing-in-camden-new-jersey/.

group violence intervention to reduce gun violence.[14] Each of these three strategies is described briefly below. CVI programs provide services that will help prevent reinjury and recidivism by intervening in the cycle of violence.

1. **Hospital-based violence intervention programs (HVIPs)** focus on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury. The HVIP strategy calls for screening patients based on predetermined criteria to identify those individuals most at risk for re-injury, and then connecting qualifying candidates with trained, culturally competent case managers who provide their clients with intense oversight and assistance, both in the hospital and in the crucial months following the patient's release.
2. **Evidence-based street outreach** is focused on targeting the individuals most at risk for perpetrating or becoming the victims of violence, at which point it is possible to interrupt and slow the spread of violence within the community. Evidence-based street outreach is built around three strategies: (1) the detection and peaceful resolution of potentially violent conflicts, (2) the identification and "treatment" of the highest risk individuals by connecting them with available services, and (3) the mobilization of the local community in order to change social norms surrounding the use of violence.
3. **Group violence intervention (GVI)** is a form of problem-oriented policing based on the insight that an incredibly small and readily identifiable segment of a given community is responsible for the vast majority of gun violence**.** There are four steps in the GVI model, which are repeated until the intervention population understands that, at the request of the community, future shootings will bring strong law enforcement attention to any responsible groups. The steps include: (1) assembling respected and credible community members, faith leaders, social service providers, researchers, and law enforcement officials into a working partnership, (2) the partnership identifying the individuals in the community most at risk for committing or becoming the victims of gun violence, (3) the partnership conducting a series of in-person meetings with this small segment of the population to communicate a strong message that the shooting must stop and connecting those individuals with social service providers, and (4) law enforcement representatives delivering a message, in the most respectful terms possible, that if the community's plea is ignored, then swift and sure legal action will be taken against any group responsible for a new act of lethal violence.[15]

These strategies are often most effective when local officials and dedicated staff work to coordinate stakeholders, relevant public agencies, and service providers to ensure cross-agency collaboration and information sharing. Mayors in cities like Los Angeles and New York have established city departments that are primarily dedicated to violence prevention, and their

[14] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed September 24, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.
[15] *Id.*

offices have played a critical role in ensuring this kind of collaboration and information exchange.[16]

CVI efforts often begin with a "problem analysis," an in-depth qualitative and quantitative analysis of local community violence dynamics through a review of incidents and data-driven research to identify the small number of individuals at highest risk of being victims and/or perpetrators of community violence, and the patterns and risk factors that those individuals have in common.[17] This analysis can then inform the selection and implementation of the community's CVI strategies.

These strategies are also most effective when they receive consistent funding. For example, large cuts in funding for violence prevention programs in Chicago in 2007, 2011, 2015, and 2016 corresponded with large spikes in homicides in those years.[18] Similarly, the city of Stockton, California, saw an increase in homicides after discontinuing funding for its highly successful GVI program. When Stockton's funding was restored, homicides decreased, according to a 2018 report.[19]

The Office of Justice Programs

The Office of Justice Programs (OJP) was established by the Justice Assistance Act of 1984 to provide federal leadership in the prevention and control of crime, administration of justice through the strengthening of the criminal and juvenile justice systems, and assistance to crime victims.[20] The OJP's mission is to "increase public safety and improve the fair administration of justice across America through innovative leadership and programs."[21] According to DOJ's

[16] *See* Los Angeles County Office of Violence Prevention, "Overview," accessed September 24, 2020, http://www.publichealth.lacounty.gov/ovp/; NYC Office to Prevent Gun Violence, "About," accessed September 14, 2020, https://www1.nyc.gov/site/peacenyc/about/about.page.
[17] For a comprehensive understanding of what can be gained from a problem analysis, *see* Giffords Law Center to Prevent Gun Violence, "A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence," April 23, 2019, https://giffords.org/lawcenter/report/a-case-study-in-hope-lessons-from-oaklands-remarkable-reduction-in-gun-violence/.
[18] Charles Ransford, "The Relationship Between Cure Violence (CeaseFire) and the Increase in Shootings and Killings in Chicago," September 2016, https://1vp6u534z5kr2qmr0w11t7ub-wpengine.netdna-ssl.com/wp-content/uploads/2019/10/08-2015-CV-Chicago-Memo.pdf.
[19] National Network for Safe Communities, "Stockton," December 2018, https://nnscommunities.org/wp-content/uploads/2019/09/National_Initiative_2018_Interim_Status_Report_Stockton.pdf.
[20] US Department of Justice, "Organization, Mission and Functions Manual: Office of Justice Programs," accessed August 27, 2020, https://www.justice.gov/jmd/organization-mission-and-functions-manual-office-justice-programs#:~:text=The%20Office%20of%20Justice%20Programs,justice%2C%20and%20assist%20crime%20victims; Office of Justice Programs, "About Us," US Department of Justice, accessed August 27, 2020, https://www.ojp.gov/about.
[21] US Department of Justice, "Organizations, Mission and Functions Manual: Office of Justice Programs," accessed August 28, 2020, https://www.justice.gov/jmd/organization-mission-and-functions-manual-office-justice-programs#:~:text=The%20Office%20of%20Justice%20Programs,justice%2C%20and%20assist%20crime%20victims.

Organizations, Functions, and Missions Manual, some of the ways the OJP accomplishes this goal are by:

- "[i]mplement[ing] national and multi-state programs,
- provid[ing] training and technical assistance, and establish[ing] demonstration programs to assist state, local, and tribal governments and community groups in reducing crime,
- [e]nhanc[ing] the nation's capacity to assist crime victims and provide leadership in changing attitudes, policies, and practices to promote justice and healing for all victims of crime, and
- [p]rovid[ing] targeted assistance to state, local, and tribal governments to advance and sustain public safety at the local level through the leveraging of both technical and financial resources and the development and implementation of community-based strategies."[22]

The OJP has six programs offices through which it coordinates and provides staff support to conduct its activities—the Bureau of Justice Assistance; Bureau of Justice Statistics; National Institute of Justice; Office of Juvenile Justice and Delinquency Prevention; Office for Victims of Crime; and Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking.[23] Each of these offices is represented in appropriations bills, and five are detailed here:

- The Bureau of Justice Assistance (BJA), provides support to state and local law enforcement through grants, training, technical assistance, and policy development. Its mission is to make American communities safer by strengthening the criminal justice system to reduce and prevent violent and drug-related crime.[24]
- The National Institute of Justice (NIJ) is the research, development, and evaluation arm of the DOJ. Its mission involves improving knowledge and understanding of crime and justice issues through scientific research. The NIJ maintains an online database of crime prevention strategies and associated research, and evidence-based violence prevention programs, available at crimesolutions.gov.[25]
- The Bureau of Justice Statistics (BJS) collects, analyzes, and publishes statistical information about crime, criminal offenders, victims, and the justice system at the local, state, and national levels. This information helps policymakers combat crime and ensure that the justice system is efficient and equitable.[26]
- The Office for Victims of Crime (OVC) administers the Crime Victims Fund, which supports programs and services that help victims in the aftermath of crime and provides them with support to rebuild their lives. These services include victim compensation and technical assistance for service providers.[27]

[22] *Id*.
[23] 34 U.S.C. 10102(a)(5). Each program office was established by statute.
[24] Bureau of Justice Assistance, "About," accessed September 18, 2020, https://bja.ojp.gov/about.
[25] National Institute of Justice, "About NIJ," accessed September 18, 2020, https://nij.ojp.gov/about-nij.
[26] Bureau of Justice Statistics, "About the Bureau of Justice Statistics," accessed September 18, 2020, https://www.bjs.gov/index.cfm?ty=abu.
[27] Office for Victims of Crime, "About OVC," accessed September 18, 2020, https://ovc.ojp.gov/about-ovc.

- The Office of Juvenile Justice and Delinquency Prevention (OJJDP) supports state and local efforts to improve the juvenile justice system, prevent delinquency, and protect children. It supports state and local entities to develop and implement programs for minors, both through the juvenile justice system and through services for youth and their families. The OJJDP sponsors research, program, and training initiatives, and awards funds to states to support local programming.[28]

The assistant attorney general is responsible for the overall management and oversight of the OJP. This includes setting policy and ensuring that OJP policies and programs reflect the priorities of the president, the attorney general, and the Congress.[29] For the purposes of this memorandum, it is most important to note that the assistant attorney general must "coordinate and provide staff support to coordinate the activities of" the OJP, BJA, NIJ, BJS, OVC, and OJJDP.[30]

Among other things, the OJP and its program offices offer a wide variety of training and technical assistance (TTA), covering grant writing; financial management; and a host of topics of interest to criminal and juvenile justice professionals and victim service providers.[31]

As described below, some of the programs and initiatives of the OJP, including the Violence Reduction Network and the National Public Safety Partnership, have involved coordinated efforts across several of the OJP agencies listed above.

Obama administration action

Both the Obama and Trump administrations established programs using OJP resources to address violence in the most impacted areas. These programs, however, focused on efforts led by law enforcement rather than community violence intervention strategies.

OJP launched the Violence Reduction Network (VRN) on September 29, 2014, as the result of a mayoral meeting convened by President Obama to discuss youth violence-reduction strategies and a meeting of the attorney general with mayors and police chiefs to discuss how the federal government could support local violence reduction efforts.[32] Led by the BJA, the VRN consulted with US attorneys and DOJ law enforcement partners to select VRN sites each year, based on rigorous selection criteria: principally, violent crime rates that are well above the national average, jurisdictions from diverse geographic regions with distinct characteristics, and

[28] Office Of Juvenile Justice and Delinquency Prevention, "About OJJDP," accessed September 18, 2020, https://ojjdp.ojp.gov/about.
[29] *See* 34 U.S.C. 10101-10102.
[30] 34 U.S.C. 10102(a)(5). However, "[n]otwithstanding any other provision of law," the Attorney General has "final authority over all functions, including any grants, cooperative agreements, and contracts made, or entered into, for [OJP] and the component organizations of [OJP]." 34 U.S.C. 10110(2).
[31] Office of Justice Programs, "Training and Technical Assistance," accessed October 27, 2020, https://www.ojp.gov/training-and-technical-assistance.
[32] Office of Public Affairs, "Department of Justice Launches National Violence Reduction Network," US Department of Justice, September 29, 2014, https://www.justice.gov/opa/pr/department-justice-launches-national-violence-reduction-network.

readiness to participate in the collaborative initiative.[33] Eventually, 15 sites participated in the VRN, which provided each city chosen for the program with "pooled resources [from various DOJ agencies], peer-to-peer exchanges, federal site analyses and a variety of regular newsletters, webinars, and other training resources."[34]

The VRN focused on the use of law enforcement-based strategies and "*help[ed] localities access a broad spectrum of Justice Department resources* – empower[ing] the federal government to strengthen partnerships and collaboratively tackle persistent challenges caused by violent crime."[35] The BJA provided no direct grant funding through the VRN, but resources were provided to local agencies through existing training and technical assistance (TTA) programs.[36]

The VRN focused on the following objectives:

- Re-engineer federal-to-federal and federal-to-local relationships and implement a resources delivery model with data-driven strategies to target sites' most urgent violent crime needs (focusing on homicides and shootings).
- Collectively assess site-related needs and specific drivers of violent crime, and collaboratively develop sustainable strategies.
- Improve knowledge of what works through information sharing and network building with an aim of creating a community of practice, and demonstrate changes in local policing in line with best practices.

An assessment found that the VRN delivered on these objectives and identified several factors, summarized below, that would ensure the VRN's continued successful implementation.[37]

- DOJ leaders provided immediate feedback and positive support to the participating sites, including the prioritization of OJP and BJA resources, and facilitation of communication with DOJ leadership.
- A co-director and partnership structure encouraged buy-in, collaboration, and communication within federal law enforcement. Across agencies, law enforcement had

[33] Basia E. Lopez, "U.S. DOJ Violence Reduction Network Shows Promise in Early Stages," December 14, 2017, https://nij.ojp.gov/topics/articles/us-doj-violence-reduction-network-shows-promise-early-stages.
[34] Office of Public Affairs, "Justice Department Expands Violence Reduction Network to Jackson, Mississippi and Nashville, Tennessee," US Department of Justice, September 26, 2016, https://www.justice.gov/opa/pr/justice-department-expands-violence-reduction-network-jackson-mississippi-and-nashville.
[35] Office of Public Affairs, "Department of Justice Launches National Violence Reduction Network," US Department of Justice, September 29, 2014, https://www.justice.gov/opa/pr/department-justice-launches-national-violence-reduction-network (emphasis added); *see* Office of Public Affairs, "Remarks by Attorney General Eric Holder at the Violence Reduction Network Inaugural Summit," US Department of Justice, September 29, 2014, https://www.justice.gov/opa/speech/remarks-attorney-general-eric-holder-violence-reduction-network-inaugural-summit.
[36] Office of Justice Programs, National Institute of Justice, "US DOJ Violence Reduction Network Shows Promise in Early Stages," US Department of Justice, December 14, 2017, https://nij.ojp.gov/topics/articles/us-doj-violence-reduction-network-shows-promise-early-stages.
[37] *Id.*

an equal share in the VRN oversight and decision-making process, including one co-director from federal law enforcement and the other from a program/grant agency.
- Each site had a liaison, who had "knowledge of the local sitem experience with evidence-based violence reduction practices, familiarity with local-state-federal law enforcement relationships and operations, and an in-depth understanding of organizational innovation, police cultures, data systems, and research."
- An analyst was appointed to provide "logistics and other support to strategic site liaisons, help plan and execute on-site TTA, coordinate meetings, and produce event summaries."
- Extensive and regular communication between VRN management and the sites allowed all parties to remain up to date with VRN developments, problem-solve quickly, and set future goals and objectives easily.
- Capable, competent, and committed TTAs who were experienced in managing OJP grant programs were engaged and able to delineate tasks and assignments clearly, communicate effectively, and facilitate meetings efficiently.[38]

Trump administration action

In June 2017, the DOJ established the National Public Safety Partnership (PSP) in response to President Trump's Executive Order creating a Task Force on Crime Reduction and Public Safety, which emphasized the role of the DOJ in combating violent crime. That order charged the DOJ with "tak[ing] the lead on Federal actions to support law enforcement efforts nationwide and to collaborate with State, tribal, and local jurisdictions to restore public safety to all of our communities."[39] The PSP is a "DOJ-wide program that enables cities to consult with and receive coordinated training and technical assistance and an array of resources from the DOJ to enhance local violence reduction strategies."[40] The PSP directs DOJ resources to high-crime cities to assist law enforcement arrest and prosecute criminals in an effort to reduce crime. However, sites that participate in PSP develop their own violence reduction strategies, and the DOJ provides them with specialized TTA to help them implement their strategies.[41] The PSP purportedly built on lessons learned from the VRN, and provides a customized training symposium; assistance in federal partnerships, crime analysis, technology, gun violence, criminal justice collaboration, community engagement, and investigations; and peer learning and exposure to a community of practice to the sites chosen for the program.[42]

[38] *Id.*
[39] Executive Order 13776, "Task Force on Crime Reduction and Public Safety," February 9, 2017, https://www.federalregister.gov/documents/2017/02/14/2017-03118/task-force-on-crime-reduction-and-public-safety.
[40] US Department of Justice, "National Public Safety Partnership," accessed August 27, 2020, https://www.nationalpublicsafetypartnership.org/#about (emphasis added).
[41] Congressional Research Service, "Recent Violence Crime Trends in the United States," June 20, 2018, 19, https://crsreports.congress.gov/product/pdf/R/R45236/4#:~:text.
[42] "National Public Safety Partnership," US Department of Justice, accessed August 31, 2020, https://www.nationalpublicsafetypartnership.org/#about.

The PSP has been criticized on the grounds that the cities in which the DOJ implemented the PSP were not the cities with the greatest need for assistance.[43] Also, while the DOJ provides TTA through the PSP, cities selected to participate in the program do not receive additional funding to help implement their violence reduction strategies.[44]

More than 30 cities have participated in the PSP. The primary participating Justice Department components include the Office of Justice Programs; the Office on Violence Against Women; the Office of Community Oriented Policing Services; the Bureau of Alcohol, Tobacco, Firearms and Explosives; the Federal Bureau of Investigation; the US Drug Enforcement Administration; and the US Marshals Service.[45]

Past DOJ funding for CVI programs

A national strategy for reducing gun violence must include substantial and targeted federal efforts. However, unlike previous efforts, these efforts should focus on CVI strategies rather than prosecution. At present, these strategies are implemented in only a handful of cities and the federal funding they receive is an unreliable patchwork of discretionary grant programs. Various agencies within the OJP have funded CVI programs, but these efforts have not been coordinated. This scattered approach has left some of the communities hit hardest by community violence without an effective response.[46]

In the past, the BJA has provided funding through the Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG) for some of these violence intervention programs. Byrne JAG is a formula grant program administered by the BJA that provides the largest portion of criminal justice funding to states and local governments. Notably, 2016 Byrne JAG funds in New York supported the state's SNUG program, an evidence-based street outreach program based on the Cure Violence model. The New York State SNUG program utilizes a public health approach to gun violence, treating it like a disease by identifying its causes and interrupting its transmission. The state administrator administers state funding for 11 local SNUG programs across the state, and provides training, technical assistance and general program oversight. Byrne JAG funding was utilized to employ a statewide SNUG program coordinator and a statewide training director.[47]

The BJA has also funded a number of CVI programs through its discretionary funding programs. Through the Community Based Crime Reduction (CBCR) program, (formerly the Byrne Criminal Justice Innovation program), Detroit saw a 20% reduction in violent crime in the target area in

[43] Congressional Research Service, "Recent Violence Crime Trends in the United States," June 20, 2018, 19, https://crsreports.congress.gov/product/pdf/R/R45236/4#:~:text.
[44] *Id.*
[45] Office of Public Affairs, "Justice Department Announces Addition of 10 Cities and Counties as Part of the National Public Safety Partnership to Combat Violent Crime," Department of Justice, June 3, 2019, https://www.justice.gov/opa/pr/justice-department-announces-addition-10-cities-and-counties-part-national-public-safety.
[46] Giffords Law Center to Prevent Gun Violence, Federal Funding Report [forthcoming].
[47] National Criminal Justice Association, "How States Invest Byrne JAG in Crime Prevention Programs," accessed September 24, 2020, https://370377fc-459c-47ec-b9a9-c25f410f7f94.filesusr.com/ugd/cda224_8c33dbd525e14bf7ad96e8fc82284a95.pdf?index=true.

2014;[48] Milwaukee saw a 24% reduction in violent crime in hot spots from 2013 to 2014;[49] and Buffalo saw a 19% reduction in violent crime in the target area from 2013 to 2014.[50] CBCR's emphasis on geographic "hot spots" lines up with the reality that a very small percentage of a city's population is typically responsible for most violence, and that targeted approaches to reduce violence among this population subset are most effective (though should not be used to justify a more militarized police presence). Unfortunately, the Trump administration has linked this program with Project Guardian, the administration's effort focused on prosecutions.[51]

The OJJDP has funded CVI programs focused on working with young people at high risk for violence. One such funding opportunity is the Comprehensive Anti-Gang Strategies and Programs grant. In 2016, the OJJDP awarded Massachusetts' Safe and Successful Youth Initiative (SSYI) Project East over $325,000 to "bolster Worcester's Comprehensive Gang Model to direct outreach work and case management to up to 50 high-risk youth."[52] Massachusetts' SSYI works directly with young people at the highest risk of shooting or being shot, and is modeled after OJJDP's Comprehensive Gang Model, a "multistrategy, multidisciplinary approach," proven effective at reducing gang activity. The OJJDP's FY20 Comprehensive Anti-Gang Programs for Youth program was a part of Project Safe Neighborhoods' suite of programs to "enhance collaboration and strengthen commitment to reducing violent crime."[53] The OJJDP has also funded community-based violence prevention demonstration projects, which included "a comprehensive public health intervention addressing the 'shooters' and their families," and strengthening Boston's Ceasefire model.[54]

[48] "Byrne Criminal Justice Innovation Program. Concept Intro: Crime Hot Spots," The Local Initiatives Support Corporation, accessed September 24, 2020, https://www.lisc.org/media/filer_public/ae/97/ae97d282-26e3-40cb-8a58-0b838e29f05d/bcji_crime_hot_spot.pdf.
[49] The Local Initiatives Support Corporation, "Byrne Criminal Justice Innovation Program," Bureau of Justice Assistance, accessed September 24, 2020, https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/BCJI_Spring-2015-Update.pdf.
[50] *Id*.
[51] *See* U.S. Department of Justice, "Innovations in Community-Based Crime Reduction (CBCR) Program FY 2020 Competitive Grant Solicitation," March 13, 2020, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/bja-2020-17118.pdf.
[52] Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, "Safe and Successful Youth Initiative, Project East (aka SSYI East)," US Department of Justice, accessed September 22, 2020, https://ojjdp.ojp.gov/funding/awards/2016-jv-fx-0001.
[53] Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, "OJJDP FY 2020 Comprehensive Anti-Gang Programs for Youth," US Department of Justice, accessed September 22, 2020, https://ojjdp.ojp.gov/funding/opportunities/ojjdp-2020-17092.
[54] Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, "FY2011 Boston Community-Based Violence Prevention Demonstration Project," US Department of Justice, accessed September 22, 2020, https://ojjdp.ojp.gov/funding/awards/2011-pb-fx-k003. The Demonstration project received supplemental awards in 2014 and 2015 to continue its work. *See also* Office of Juvenile Justice and Delinquency Prevention, "Community-Based Violence Prevention Program," accessed September 24, 2020, https://juvenilecouncil.ojp.gov/sites/g/files/xyckuh301/files/media/document/handout_community_based_violence_prevention_one_pager.pdf (describing funding provided to 16 cities).

The OVC has funded hospital-based violence intervention programs through both VOCA victim assistance and discretionary grants. In 2018, Congress encouraged states to use VOCA victim assistance funds toward hospital-based violence intervention programs, noting that "hospital-based violence intervention programs have produced effective results in preventing injury recidivism for victims of violent injury."[55] In 2019, New Jersey invested $20 million in VOCA victim assistance funds to establish nine hospital-based violence intervention programs across the state, requiring that each site partner with a community organization. Additionally, the OVC developed the Advancing Hospital-Based Victim Services grant program, separate from its VOCA victim assistance program, and funded eight medical facilities that proposed to increase support to victims of crime, improve their outcomes, and reduce future victimizations.[56]

The OJP has also funded TTA in the area of CVI. For example, the National Network for Safe Communities at John Jay College received one million dollars from the Bureau of Justice Assistance for FY12, in part to support jurisdictions implementing GVI.[57] However, as of the summer 2020, none of the organizations listed in BJA's Training and Technical Assistance Grantee Directory focuses specifically on CVI strategies.[58]

Component agencies within the Department of Health and Human Services have also occasionally funded CVI programs. For example, the Minority Youth Violence Prevention program (2014-2017) was a partnership between the Department of Health and Human Services' Office of Minority Health and the DOJ's Office of Community Oriented Policing Services that supported a national initiative to integrate public health and violence prevention approaches.[59] This program no longer exists, but it may be within the authority of the relevant agencies to restart it.

III. Proposed action

We expect a significant portion of OJP's resources in the near future will be directed to efforts to oversee and reform police departments and build police–community trust and partnerships. We

[55] 115th Congress (2017-2018), "House Report 115-704—Commerce, Justice, Science, and Related Agencies Appropriations Bill," May 24, 2018, https://www.congress.gov/congressional-report/115th-congress/house-report/704/1.
[56] US Department of Justice, Office of Justice Programs, Office for Victims of Crime "OVC FY 2019 VOCA Victim Assistance," May 23, 2019, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/OVC-2019-15204.pdf. *See* US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "OVC FY 2018 Advancing Hospital-Based Victim Services," May 30, 2018, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/OVC-2018-14048.pdf
[57] *See* Bureau of Justice Assistance, "National Network for Safe Communities: Ceasefire University and Violence Reduction Strategies Initiative," accessed September 24, 2020, https://bja.ojp.gov/funding/awards/2012-mu-mu-k014.
[58] Bureau of Justice Assistance, "Training and Technical Assistance Grantee Directory," Summer 2020, https://bjatta.bja.ojp.gov/system/files/attachments/BJA_NTTAC_Grantee_Directory.08.10.2020.pdf.
[59] Office of Minority Health, "Minority Youth Violence Prevention: Integrating Public Health and Community Policing Approaches (MYVP)," updated October 2, 2018, https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=2&lvlid=52.

strongly support these efforts and believe they are critical to addressing gun and community violence.

In conjunction with these efforts, the new administration should establish a Community Violence Intervention Task Force within OJP to: (a) provide assistance to jurisdictions and community groups interested or engaged in CVI efforts, (b) conduct outreach to communities experiencing high rates of gun violence and convene working groups with state and local stakeholders, (c) coordinate community-based violence intervention efforts by ensuring that these working groups leverage federal resources to implement CVI programs, and (d) serve as a technical assistance resource for best practices.

The task force should address the need for and success of evidence-based intervention strategies in communities of color with high rates of gun violence. The task force's work should use two approaches. The first approach should be to make assistance regarding CVI strategies available to state and local jurisdictions and community groups that request it. The second approach should involve outreach and the creation of working groups in areas where CVI is most needed. Both approaches would be fundamentally different from the earlier efforts of the VRN and PSP, and would serve the ultimate goal of reducing community violence while also reducing the reliance on prosecutions and incarceration as a means to achieve this end.

The first approach: help those who request it

The task force must offer assistance to both governmental and non-governmental organizations interested in CVI strategies upon request. This assistance may take the form of TTA, assistance in finding funding, grant writing, and financial management assistance.[60]

- **Training and technical assistance.** The TTA provided by the task force may involve conducting a problem analysis as described above, or may involve advice and training on implementing a CVI strategy. In order to do this, the task force should first ensure that TTA providers with experience and expertise in conducting problem analyses and implementing CVI strategies receive the funding they need to be available for this work. These technical assistance providers will also assist the CVI working groups described below. The CVI should also be listed as a "specialized topic" on the OJP's website listing OJP's TTA resources.[61]
- **Funding.** The task force can also direct jurisdictions and community groups requesting assistance towards funding sources that match their CVI needs from within the grant programs inside OJP and other known sources, such as grants provided by states.[62]

[60] *See* Office of Justice Programs, "Training and Technical Assistance," accessed October 27, 2020, https://www.ojp.gov/training-and-technical-assistance (offering assistance in grant writing, financial management, and a host of specialized topics).
[61] *See id.*
[62] *See* Giffords Law Center to Prevent Gun Violence, PICO National Network, and the Community Justice Reform Coalition, "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence/.

- **Varying levels of assistance.** The assistance the task force should provide to a jurisdiction or community group may depend on the level of gun violence in the communities represented by the jurisdictions or community group. The form and extent of this assistance may also depend on the work that has already been done in these communities to establish CVI programs.
- **Online resource center.** The task force should also create an online portal that may serve as a resource center for jurisdictions, community groups, and all members of the public interested in CVI strategies and DOJ programs that support them. Among other things, this website could link to selected CVI programs' "Practice Profiles" on crimesolutions.gov, and to solicitations from agencies within the DOJ, and other governmental agencies like the HHS that offer funding to CVI programs. This website should also serve as a network for organizations, agencies, and researchers to share research and best practices, and should include a centralized database to track the effectiveness of these interventions.

The second approach: OJP as convener and coordinator

The second approach for the CVI Task Force could be modeled after the VRN and PSP. Under this approach, the CVI Task Force should take the lead as initial convener and coordinator. However, unlike these earlier efforts, the CVI Task Force should focus on bringing together working groups consisting of representatives from within the OJP (rather than other DOJ agencies) and a broad range of local community stakeholders beyond just law enforcement. These working groups should focus on selecting and implementing evidence-based CVI strategies and should utilize technical assistance providers with expertise in those strategies. To implement this approach, the following steps should be taken.

1. **Identify sites.** First, the CVI Task Force must identify the communities suffering the most from shootings and gun homicides using data from the BJS, FBI, and HHS to make those determinations. The task force should identify cities that have each experienced at least 30 homicides and had a homicide rate five and a half times the national average in the last year for which data is available as its selected sites. If the task force uses this metric, between 10 and 15 cities would be eligible. Based on 2018 data, those cities would include St. Louis; Gary, Indiana; Baltimore; Jackson, Mississippi; Birmingham; Detroit; New Orleans; Baton Rouge; Flint; Memphis; and Kansas City, Missouri.
2. **Narrow down the focus.** The task force should then work with local law enforcement to narrow down each site to encompass only the neighborhoods or districts with the highest rates of shootings.[63] As described above, research shows that gun violence in American

[63] Office of Public Affairs, "Department of Justice Launches National Violence Reduction Network," US Department of Justice, September 29, 2014, https://nij.ojp.gov/topics/articles/us-doj-violence-reduction-network-shows-promise-early-stages ("One key lesson that VRN management learned in working with large agencies was that future VRN applications should be restricted to one or two police precincts or districts (i.e., high violent crime locations) and not the entire city. Such an approach could be more efficient not only because implementing change on a large-scale is often time-consuming and might require numerous attempts, but also makes it easier to promote community-wide engagement in violent crime reduction strategies at a smaller jurisdiction level. In addition, there is a potential for VRN sites to

cities is highly concentrated within specific neighborhoods and that only a very small percentage of any given population is at high risk for involvement with serious violence.[64] Because serious violence can be traced to a few small pockets in any given city, spreading resources out evenly over the entire city is not the most effective use of limited resources.[65]

3. **Convene working groups.** The task force should then convene working groups at those sites. The OJP representatives may include grantmakers, technical experts, data analysts, and training personnel, but the focus of these working groups should be state and local community stakeholders. First, the task force should identify existing CVI practitioners at these sites and bring them to the table. The local community stakeholders should also include the leaders of community groups, social service providers, local law enforcement, and state and local public health personnel. Buy-in from key local stakeholders, such as the city's mayor and chief of police, is crucial.[66] Other DOJ agencies outside of the OJP, such as the FBI, DEA, ATF, and US attorneys, may offer assistance to these working groups if it is requested by the other members of the working group.
4. **Conduct a problem analysis.** Each of these working groups should then conduct a problem analysis. As described above, this will involve an in-depth qualitative and quantitative analysis of local community violence dynamics aimed at identifying the small number of individuals at highest risk of being victims and/or perpetrators of community violence, and the patterns and risk factors that those individuals have in common.[67]
5. **Select a CVI strategy.** This analysis should then inform the working group's selection and implementation of evidence-based violence intervention strategies, such as those described above. The working group may choose to enhance programs that already exist in the relevant neighborhoods, or it may choose new ones. There are a number of resources the task force and the working group can use in selecting its strategy, including the NIJ's database at crimesolutions.gov. In 2016, researchers working for USAID completed a meta-review of more than 1,400 studies of various violence-prevention programs and identified a small number of strategies that have a particularly strong evidence base—another resource which can be helpful in selecting a CVI

become overwhelmed with the amount of data, technology, and related training that the program provides.")

[64] *See* Giffords Law Center to Prevent Gun Violence et al., "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, 54, https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence.

[65] *Id.* at 56.

[66] *See* Giffords Law Center to Prevent Gun Violence et al., "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, 61, https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence.

[67] For a comprehensive understanding of what can be gained from a problem analysis, *see* Giffords Law Center to Prevent Gun Violence, "A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence," April 23, 2019, https://giffords.org/lawcenter/report/a-case-study-in-hope-lessons-from-oaklands-remarkable-reduction-in-gun-violence/.

strategy.[68] The researchers also found several programs that have either no effects or else an unintended increase in rates of violence.[69] The task force must ensure that the working group chooses from among the growing list of evidence-based interventions proven to be effective in reducing gun violence. Resources should be invested only in violence reduction strategies with a proven track record of obtaining results.

6. **Ensure funding, training, and technical assistance.** The task force should help the working group obtain sustained funding by matching the strategies chosen by the working group with appropriate OJP funding sources, including those described above. The task force should also offer the members of the working group the necessary TTA to implement their chosen strategies.
7. **Evaluate.** Objective program evaluations are of tremendous value and can help confirm that a program is having its intended effect. These evaluations can also lead to the fine-tuning of the CVI program to ensure its effectiveness.[70] Evaluations work best if they are based on a data collection process established at the beginning of the program.[71] All too often, organizations that implement violence prevention and intervention strategies must find ways to fund evaluations of their own work. It's asking too much of front-line practitioners to bear the burden of doing demanding, lifesaving work, while also taking on the responsibilities of conducting in-depth evaluations. This is an area where the task force can play a critical role by bringing the NIJ to the table to foster and fund research partnerships and spreading best practices to other sites.[72]

Law enforcement data, particularly local law enforcement data, may be crucial to identifying the highest risk individuals through the problem analysis (step four). Consequently, it is critical for law enforcement to share criminal justice information and shooting data with the working group and technical experts for the purposes of the problem analysis. However, law enforcement involvement in the working group must be predicated upon a commitment to using the results of the problem analysis in a manner that is consistent with the objectives of the task force, including the objective to reduce the reliance on prosecutions and incarceration as a means to reduce community violence. Law enforcement should also avoid using the identification of an individual as a person of high-risk through the problem analysis in any way that is not consistent with the evidence-based strategy or strategies that are chosen by the working group. Whenever possible, law enforcement should then take a back seat in the decision-making and strategic planning process, allowing other members of the working group to lead in the choice and implementation of a strategy to address the community's violence.

[68] Thomas Abt and Christopher Winship, "What Works in Reducing Community Violence: A Meta-Review and Field Study for the Northern Triangle," United States Agency for International Development, February 2016, 27, https://www.usaid.gov/sites/default/files/USAID-2016-What-Works-in-Reducing-CommunityViolence-Final-Report.pdf.
[69] *Id.*
[70] *See* Giffords Law Center to Prevent Gun Violence et al., "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, 66-69, https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence.
[71] *Id.* at 69-70.
[72] *See* 34 U.S.C. § 10201 (describing how NIJ selects programs for review).

Funding for the task force

The current level of federal funding to support the scaling of CVI strategies is inadequate. However, intentional and sustained investments in evidence-based violence reduction strategies can reverse recent crime trends, help to heal impacted communities, and reduce the enormous human and financial costs of violence without contributing to mass incarceration. OJP and its component agencies receive a substantial amount of discretionary funding, as evidenced by the use of this funding in initiatives such as the VRN and PSP.

In addition, recent appropriations acts specifically authorize the use of funds for TTA. The Consolidated Appropriations Act, 2020, for example, provides that:

> At the discretion of the Attorney General, and in addition to any amounts that otherwise may be available ... by law, with respect to funds appropriated by this title under the headings [for NIJ, BJS, BJA, and OJJDP] —
>
> > (1) up to 2 percent of funds made available to [OJP] for grant or reimbursement programs may be used by such Office to provide training and technical assistance; and
> >
> > (2) up to 2 percent of funds made available for grant or reimbursement programs under such headings, except for amounts appropriated specifically for research, evaluation, or statistical programs administered by [NIJ and BJS], shall be transferred to and merged with funds provided to [NIJ and BJS], to be used by them for research, evaluation, or statistical purposes, without regard to the authorizations for such grant or reimbursement programs.[73]

If the OJP uses this funding wisely, the CVI Task Force may begin to serve as a hub for technical assistance, best practices, and grant programs dedicated to a coordinated federal response to community gun violence that focuses on CVI strategies.

IV. Legal justification:

An agency action can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[74] In the unlikely event that the OJP's actions in creating and implementing a CVI Task Force are challenged in court, the challengers would most likely claim that these actions are beyond the OJP's statutory authority. However, such a challenge is likely to fail.

The assistant attorney general has the legal authority to create a CVI Task Force and fund its work through the OJP's discretionary funds. As noted above, the assistant attorney general, as head of the OJP, must "coordinate and provide staff support to coordinate the activities of" the

[73] Consolidated Appropriations Act, 2020, Pub. L. 116-93, 133 Stat. 2317, 2414 (2019).
[74] 5 U.S.C. § 706.

OJP, BJA, NIJ, BJS, OVC, and OJJDP.[75] Federal law also directs the assistant attorney general to "provide information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice"[76] and "maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice,"[77] among other things.

The CVI Task Force would accomplish the goal of the OJP, to "increase public safety and improve the fair administration of justice across America through innovative leadership and programs."[78] The task force would do this through many of the activities listed in the DOJ's Organizations, Functions, and Missions Manual as appropriate for the OJP. The CVI Task Force would "[i]mplement national and multi-state programs, provide training and technical assistance, and establish demonstration programs to assist state, local, and tribal governments and community groups in reducing crime;" "[e]nhance the nation's capacity to assist crime victims and provide leadership in changing attitudes, policies, and practices to promote justice and healing for all victims of crime;" and "[p]rovide targeted assistance to state, local, and tribal governments to advance and sustain public safety at the local level through the leveraging of both technical and financial resources and the development and implementation of community-based strategies."[79]

Federal law gives the attorney general explicit authority to carry out the activities of the DOJ, including any component agency of the DOJ, "through any means, including

- through the Department's own personnel, acting within, from, or through the Department itself;
- by sending or receiving details of personnel to other branches or agencies of the Federal Government, on a reimbursable, partially-reimbursable, or non reimbursable basis;
- through reimbursable agreements with other Federal agencies for work, materials, or equipment;

[75] 34 U.S.C. § 10102(a)(5).
[76] 34 U.S.C. § 10102(a)(3). Criminal justice is defined as "activities pertaining to *crime prevention, control, or reduction*, or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control, or reduce crime or to apprehend criminals, including juveniles, activities of courts having criminal jurisdiction, and related agencies (including but not limited to prosecutorial and defender services, juvenile delinquency agencies and pretrial service or release agencies), activities of corrections, probation, or parole authorities and related agencies assisting in the rehabilitation, supervision, and care of criminal offenders, and programs relating to the prevention, control, or reduction of narcotic addiction and juvenile delinquency." 34 U.S.C. § 10251(a)(1) (emphasis added).
[77] 34 U.S.C. § 10102(a)(4).
[78] US Department of Justice, "Organizations, Mission and Functions Manual: Office of Justice Programs," accessed August 28, 2020, https://www.justice.gov/jmd/organization-mission-and-functions-manual-office-justice-programs#:~:text=The%20Office%20of%20Justice%20Programs,justice%2C%20and%20assist%20crime%20victims..
[79] US Department of Justice, "Organizations, Mission and Functions Manual: Office of Justice Programs," accessed August 28, 2020, https://www.justice.gov/jmd/organization-mission-and-functions-manual-office-justice-programs#:~:text=The%20Office%20of%20Justice%20Programs,justice%2C%20and%20assist%20crime%20victims..

- through contracts, grants, or cooperative agreements with non-Federal parties."[80]

Federal law also allows the attorney general access to all funds available to carry out the activities of the DOJ "without limitation" for certain purposes, including the services of experts and consultants.[81]

The OJP has access to a myriad of resources within the DOJ, many of which should be used by the task force to support evidence-based CVI programs in underserved communities of color. Particular statutory provisions give the attorney general significant discretionary authority over the use of funds managed by the OJP. For example, federal law allows the attorney general to reserve up to 5% of the funds appropriated for Byrne JAG for particular states or local government if he or she determines that it is necessary "to combat, address, or otherwise respond to precipitous or extraordinary increases in crime, or in a type or types of crime."[82]

The OJP has used these funds in PSP, including to provide TTA to cities that were chosen as PSP sites before.[83] Although the majority of efforts coming from the PSP have been focused on prosecuting offenders, CVI programs have played a role. As part of PSP's efforts in Memphis, Tennessee, for example, the Shelby County District Attorney launched a focused deterrence program named Operation Comeback. Beginning in February 2018, it has provided ten high-risk offenders a wide array of social services to help them change their criminal lifestyles.[84] The CVI Task Force would engage in similar efforts.

V. Conclusion

Gun violence in communities of color does not receive the same media attention as mass shootings; yet it impacts entire communities daily. Black men account for a disproportionate percentage of gun homicides, with the leading cause of death among Black youth being gun violence.[85] Establishing a CVI Task Force that coordinates community-based violence prevention and intervention efforts across federal agencies, improves coordination of violence reduction initiatives with state and local stakeholders, conducts outreach to communities experiencing high rates of gun violence, and serves as a technical assistance resource for best practices will help save the countless Black American lives from gun violence in their community.

[80] 28 U.S.C. § 530C(a).
[81] 28 U.S.C. § 530C(b).
[82] 34 U.S.C. 10157(b)(1).
[83] Office of Justice Programs, "FY 2020 Program Summaries," U.S. Department of Justice, March 2019, 112-113, https://www.justice.gov/jmd/page/file/1160581/download.
[84] Bureau of Justice Assistance, "Public Safety Partnership Supports Memphis' Fight Against Violent Crime," October 12, 2018, https://bja.ojp.gov/feature/public-safety-partnership-supports-memphis-fight-against-violent-crime.
[85] Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), "Fatal Injury Reports," accessed February 20, 2019, https://www.cdc.gov/injury/wisqars. Calculations include children ages 0–17 and were based on the most recent available data: 2017.

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Bureau of Justice Assistance
Topic: Use of Byrne JAG Funds for Community Violence Intervention Programs
Date: November 2020

Recommendation: Encourage states and local governments to use Byrne JAG funding to implement community violence intervention programs and provide training and technical assistance for these programs.

I. Summary

Description of recommended executive action:

The Edward Byrne Memorial Justice Assistance Grant (JAG) program (Byrne JAG) is the primary provider of federal criminal justice funding to states and local governments. Byrne JAG is administered by the Bureau of Justice Assistance (BJA) within the Office of Justice Programs inside the Department of Justice (DOJ). While JAG funding has historically been used mainly for law enforcement, JAG funding has occasionally been used for evidence-based violence prevention and intervention programs like group violence intervention, focused deterrence, street outreach, and hospital-based violence intervention programs. These evidence-based programs are extremely effective. Under the next administration, BJA should encourage the use of JAG funds for these programs through: (1) a letter to JAG grantees highlighting these programs as a cost-effective use for this funding and calling on states to consider these programs in the Byrne JAG strategic planning process, (2) labeling these programs as an "area of emphasis" in its state and local formula grant solicitations, and (3) ensuring that Byrne JAG applicants and grantees have access to training and technical assistance regarding these programs.

Overview of process and time to enactment

A letter from BJA to Byrne JAG grantees may be viewed as a formal guidance document. Publication of formal guidance documents is a common practice of federal agencies seeking to clarify or interpret the laws to which they are subject. It is an expedient process that the next administration should take immediately. This process involves the internal development of the guidance's substance in accordance with the DOJ's written procedures. To comply with best practices for agency guidance, the document should acknowledge that such guidance is not binding.

The exact procedures and timeline that the DOJ should follow will depend on whether the guidance is determined to be "significant" in accordance with DOJ regulations. Once finalized, the document should be published on BJA's website. BJA should then update other documents regarding Byrne JAG to reflect the substance of this guidance. The guidance should be reflected in BJA's solicitations for Byrne JAG applications, where community violence intervention

programs should be labeled as an area of emphasis, and throughout the grant making process. The guidance should also be reflected in the provision of training and technical assistance to grantees.

II. Current state

The Byrne JAG Program is the primary provider of federal criminal justice funding to states and local governments. Byrne JAG was created by the Violence Against Women and Department of Justice Reauthorization Act of 2005 (the act), which combined the Edward Byrne Memorial Formula (Byrne Formula) Grant and the Local Law Enforcement Block Grant (LLEBG) into a single program.[1] As created through that act, the basic purpose of Byrne JAG is "to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice." Under the act, Byrne JAG may be used for seven kinds of programs:

- law enforcement
- prosecution and courts
- prevention and education
- corrections and community corrections
- drug treatment
- planning, evaluation, and technology improvement
- crime victim and witness assistance (other than compensation)[2]

In 2016, the Byrne JAG authorizing statute was amended to add an additional authorized program area for "mental health and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams."[3]

Each state's allocation of funding from Byrne JAG is based on a formula that depends on the state's proportion of the country's population and the state's proportion of the total number of reported violent crimes (homicide, rape, robbery, and aggravated assault).[4] Sixty percent of each state's Byrne JAG allocation is awarded to the state criminal justice planning agency (known as the State Administering Agency, or SAA), which, in turn, awards the funding to local governments and non-profit service providers; the remaining 40% goes directly from the BJA to local communities based on population and crime data.[5]

[1] P.L. 109-162, 119 Stat. 2960 (2006).
[2] 34 U.S.C. § 10152 (a)(1).
[3] 21st Century Cures Act, Pub. L. 114–255, div. B, title XIV, § 14001(a), December 13, 2016, 130 Stat. 1287.
[4] 34 U.S.C. § 10156.
[5] *Id.*

Obama administration

The BJA has typically listed and explained "areas of emphasis" in its solicitations for Byrne JAG grant applications. Under the Obama administration, from 2010 to 2016, the top areas of emphasis in these solicitations were: justice system reform, reentry assistance, and recidivism reduction; public defense, particularly for indigent populations; evidence-based "smart" programs (these programs were prioritized more often in early years); and gun violence reduction.[6]

In 2016, the National Criminal Justice Association conducted a study to determine how Byrne JAG funds were used. The study found that 58% of JAG funds were used to support law enforcement and corrections functions, and more than one-quarter of all JAG funds were used to operate drug task forces. Only 6% of JAG funds went to crime prevention.[7] According to an analysis by the Center for American Progress, in 14 states, "more than $9 out of every $10 in JAG funds went to police departments and prosecutors' offices. Four states—Maine, Montana, West Virginia, and Wyoming—devoted a full 100% of JAG funds to law enforcement. In 22 states, crime prevention efforts went completely unfunded."[8]

The Justice for All Act

Through the Justice for All Act of 2016 (the 2016 act), Congress reauthorized the Byrne JAG Program and added a strategic planning requirement for states. An applicant for a Byrne JAG grant must now submit a statewide strategic plan showing how the funding will be used.[9] These strategic plans must be designed in consultation with "representatives of all segments of the criminal justice system" and must be updated every five years. Byrne JAG applicants must also

[6] U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2010 State Solicitation," April 26, 2010, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2010-2486.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2011 State Solicitation," May 23, 2011, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2011-3029.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2012 State Solicitation," March 28, 2012, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2012-3255.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2013 State Solicitation," April 15, 2013, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2013-3600.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2014 State Solicitation," April 17, 2014, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2014-3849.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2015 State Solicitation," April 30, 2015, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2015-4165.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2016 Local Solicitation," May 16, 2016, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2016-9020.PDF.

[7] National Criminal Justice Association, "Looking at the Data: How States Invest Byrne JAG," accessed October 27, 2020, https://www.ncja.org/data-on-how-states-invest-byrne-jag.

[8] Center for American Progress, "The 1994 Crime Bill Continues to Undercut Justice Reform—Here's How to Stop It," March 26, 2019, https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/.

[9] Pub.L. 114-324, 130 Stat. 1948 § 14 (2016) (codified at 34 U.S.C. § 10153(a)(6)).

provide annual reports "reflect[ing] how the plan influenced funding decisions in the previous year."[10]

The 2016 act also requires the DOJ to provide technical assistance to states and local governments that request support to develop and implement these strategic plans.[11] The 2016 act specifically authorized the DOJ to enter into agreements with non-governmental organizations to provide this training and technical assistance.[12]

Trump administration

The Trump administration shifted some of the focus of Byrne JAG towards border security and immigration enforcement. In particular, for fiscal year 2017, the DOJ imposed new conditions for Byrne JAG funding requiring grantees to cooperate and assist federal law enforcement in the enforcement of federal immigration laws. These conditions have engendered significant court challenges from local jurisdictions ("sanctuary cities" including Los Angeles, San Francisco, and New York), which have refused to comply with these conditions.[13] Litigation regarding these conditions is ongoing.

In fiscal year 2019, there was $263.8 million available under Byrne JAG (approximately $181.1 million to states and territories and $82.7 million to local units of government), and there were 1,138 eligible local applications and 56 states or territories eligible applications for funding.[14]

In accordance with the Justice for All Act's amendments to the Byrne JAG statute, BJA has offered funding to training and technical assistance providers to assist Byrne JAG applicants in the development of their strategic plans.[15] Notably, recipients are allowed to propose subrecipients who may have specialized expertise.

In addition to funding training and technical assistance providers, the BJA also operates the National Training and Technical Assistance Center (NTTAC), established in 2008, which provides specialized assistance and a library of resources on various justice-related training and technical assistance topics. At present there are nine "justice topics" the BJA NTTAC focuses on: adjudication/courts, corrections, crime prevention, justice information sharing, law

[10] *Id.*
[11] 34 U.S.C. § 10153(a)(6)(E), (b)(1).
[12] 34 U.S.C. § 10153(b)(1).
[13] *See e.g., City & Cty. of San Francisco v. Barr,* 965 F.3d 753 (2020), *City of Los Angeles v. Barr,* 941 F.3d 931 (9th Cir. 2019) (striking down the challenged conditions); *Cf. New York v. United States DOJ,* 951 F.3d 84 (2020) (upholding the challenged conditions)
[14] Bureau of Justice Assistance, "Edward Byrne Justice Assistance Grant (JAG) Program Fact Sheet," May 18, 2020, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jag-fact-sheet-5-2020.pdf.
[15] *See e.g.* U.S. Department of Justice, "Justice For All: Effective Administration of Criminal Justice Training and Technical Assistance Program FY 2019 Competitive Announcement," March 13, 2019, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15252.PDF.

enforcement, mental health, substance abuse, tribal justice, and capacity building.[16]

Community violence intervention

Social science research has brought to light the fact that, in city after city, an incredibly small and readily identifiable segment of a given community is responsible for the vast majority of gun violence.[17] Shootings and homicides in America are highly concentrated in our cities, particularly within city neighborhoods marked by high levels of racial segregation, severe concentrated poverty, and estrangement from law enforcement. An analysis by *The Guardian* observed that more than a quarter of the nation's gun homicides occurred in city neighborhoods containing just 1.5% of the US population.[18] In 2019, research from the National Network for Safe Communities, based on data from nearly two dozen cities, confirmed that at least half of homicides and nonfatal shootings involve people—as victims and/or perpetrators—known by law enforcement to be affiliated with "street groups" involved in violence. These groups were found to constitute, on average, less than 0.6% of a city's population, and among that number, an even smaller percentage actually commit violent crime.[19]

However, reliance on the criminal justice system to deal with perpetrators of gun violence does little to address the violence and trauma in communities most impacted.[20] Over-reliance on the criminal justice system is not only costly to taxpayers but diverts resources from the community that could be used to address some of the root causes of gun violence and the trauma experienced in the community.[21] The hefty sentences, disproportionately given to persons of

[16] US Department of Justice, Office of Justice Programs, Bureau of Justice Assistance National Training and Technical Assistance Center, "Justice Topics," accessed September 25, 2020, https://bjatta.bja.ojp.gov/justice-topics.
[17] David M. Kennedy et al., "Reducing Gun Violence: The Boston Gun Project's Operation Ceasefire," US Department of Justice, September 2001, https://www.ncjrs.gov/pdffiles1/nij/188741.pdf.
[18] Aliza Aufrichtig, et al., "Want to fix gun violence in America? Go local," *The Guardian*, January 9, 2017, https://www.theguardian.com/us-news/nginteractive/2017/jan/09/special-report-fixing-gun-violence-in-america.
[19] *See* Stephen Lurie, et al., "The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities (forthcoming); Stephen Lurie, Alexis Acevedo, and Kyle Ott, "Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/nnsc_gmi_concentration_asc_v1.91.pdf; Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 2020, 31-32, https://lawcenter.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf.
[20] *See* Giffords Law Center to Prevent Gun Violence, PICO National Network, and the Community Justice Reform Coalition, "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence/.
[21] *See* Ed Chung, Betsy Pearl & Lea Hunter, "The 1994 Crime Bill Continues to Undercut Justice Reform--Here's How to Stop It," Center for American Progress, March 26, 2019, https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/.

color,[22] have only a minimal effect on improving public safety.[23] The criminal justice system is overburdened, resulting in a system that cannot function to provide justice.[24] The disparate treatment of Black men and boys, specifically, at the hands of law enforcement, exacerbate community distrust, resulting in individuals being less willing to report violence and cooperate with law enforcement.[25] Similarly, the disproportionate prosecution and incarceration of Black men not only impacts community distrust but causes damage to families (including financially and emotionally) and the community as a whole, among other impacts.[26]

Community violence intervention (CVI) programs, on the other hand, provide services that help to prevent reinjury and recidivism by intervening in the cycle of violence, and target those individuals at highest risk of violence. CVI programs are coordinated violence reduction initiatives that use evidence-based strategies such as group violence intervention, hospital-based violence intervention, and evidence-based street outreach to reduce gun violence.[27] Each of these strategies is briefly described below. Research and case studies have shown that through a combination of low-cost CVI programs and much-needed firearms policy reforms, gun violence rates in communities of color can be cut in half in as little as two years.[28]

- **Group violence intervention (GVI)** is a form of problem-oriented policing based on the insight that an incredibly small and readily identifiable segment of a given community is responsible for the vast majority of gun violence**.** There are four steps in the GVI model which are repeated until the intervention population understands that, at the request of the community, future shootings will bring strong law enforcement attention to any responsible groups: (1) assemble respected and credible community members, faith leaders, social service providers, researchers, and law enforcement officials into a working partnership, (2) the partnership identifies the individuals in the community most at risk for committing or becoming the victims of gun violence, (3) the partnership conducts a series of in-person meetings with this small segment of the population to communicate a strong message that the shooting must stop and connect those

[22] *See* Weihua Li, "The Growing Racial Disparity in Prison Time," The Marshall Project, December 3, 2019, https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time.
[23] Ed Chung, Betsy Pearl & Lea Hunter, "The 1994 Crime Bill Continues to Undercut Justice Reform--Here's How to Stop It," Center for American Progress, March 26, 2019, https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/.
[24] *Id.*
[25] Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 17, 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.
[26] *See* Dorothy E. Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," *Stanford Law Review* 56 (2004): 1281-1297, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1582&context=faculty_scholarship.
[27] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed July 15, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.
[28] Jake Flanagin, "President Obama applauds revolutionary community policing in Camden, New Jersey," Quartz, May 19, 2015, https://qz.com/407763/president-obama-applauds-revolutionary-community-policing-in-camden-new-jersey/.

individuals with social service providers, and (4) law enforcement representatives deliver a message, in the most respectful terms possible, that if the community's plea is ignored, swift and sure legal action will be taken against any group responsible for a new act of lethal violence.

- **Hospital-based violence intervention programs (HVIPs)** focus on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury. HVIPs call for screening patients based on predetermined criteria to identify those individuals most at risk for re-injury, and then connecting qualifying candidates with trained case managers. These case managers provide clients with intense oversight and assistance, both in the hospital and in the crucial months following the patient's release.[29] During this time, case managers help connect high-risk individuals to a variety of community-based organizations in order to give them access to critical resources, such as mental health services, tattoo removal, GED programs, employment, court advocacy, and housing.

- **The evidence-based street outreach approach** is exemplified by the Chicago-based Cure Violence (CV) program.[30] The first element of the CV model is to detect and resolve potentially violent conflicts through the use of culturally competent individuals known as "Violence Interrupters," whose role is to serve as street-level conflict mediators.[31] The second element of the CV approach is the identification and treatment of high-risk individuals, which is accomplished through outreach workers, who connect clients with services designed to bring about positive changes. The third element of the CV model focuses on changing community-level social norms by encouraging community members to speak out in favor of peaceful conflict resolution. These efforts target key stakeholders in the community, including residents, clergy members, school leaders, directors of community-based organizations, and local political leaders.

These intervention programs are data-driven and evidence-based. In fact, evidence shows that these programs are remarkably effective. Oakland, California cut its shootings and homicides nearly in half over six years by incorporating GVI into its city-wide response to crime.[32] San Francisco General Hospital's Wraparound Project introduced the HVIP strategy in 2005 and in its first six years of operation was associated with a 400% decrease in the rate of injury

[29] Rochelle A. Dicker et. al., "Where Do We Go From Here? Interim Analysis to Forge Ahead in Violence Prevention," *J. Trauma* 67, no. 6 (2009): 1169–1175, http://violenceprevention.surgery.ucsf.edu/media/1691926/where.pdf.
[30] Wesley G. Skogan et al., "Evaluation of CeaseFire-Chicago," 2009, http://www.ipr.northwestern.edu/publications/papers/urban-policy-and-community-development/docs/ceasefire-pdfs/mainreport.pdf.
[31] Chris Melde et. al., "On the Efficacy of Targeted Gang Interventions: Can We Identify Those Most At Risk?," *Youth Violence and Juvenile Justice* 9 (2011): 279–94, http://yvj.sagepub.com/content/9/4/279.
[32] Giffords Law Center to Prevent Gun Violence et al., "A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence," April 2019, https://lawcenter.giffords.org/wp-content/uploads/2019/05/Giffords-Law-Center-A-Case-Study-in-Hope.pdf.

recidivism.[33] A 2014 quantitative evaluation of four Chicago police districts where Cure Violence was implemented found a 31% reduction in homicide, a 7% reduction in total violent crime, and a 19% reduction in shootings in targeted districts.[34]

These programs are also remarkably cost effective. In addition to the overwhelming moral cost of loss of life, gun violence is expensive. Researchers estimate that gun violence costs the American economy at least $229 billion every year, including $8.6 billion in direct expenses.[35] A recent report found that each fatal shooting in Stockton, California, costs taxpayers $2.5 million, which includes the cost of crime scene response, criminal justice expenses, incarceration, victim support, and lost tax revenue.[36] If Stockton reduced its gun violence rate by 20%, the government would save an estimated $50 million a year.

These savings can be realized through the implementation of CVI programs. From 2012 to 2013, a $2 million violence reduction program in Boston and Springfield, Massachusetts generated close to $15 million in savings from decreases in crime.[37] In Connecticut, a state-funded violence intervention program that cost less than $1 million per year, prevented shootings and generated an annual saving of $7 million. And in New York State, where gun violence rates continue to decrease, the state's $20 million investment in evidence-based violence reduction programs does not compare to its estimated cost of gun violence at $5.6 billion per year.

In the past, Byrne JAG funding has been used for some of these violence intervention programs, and the eligibility of these programs for this funding seems well-established.[38]

[33] Randi Smith et al., "Hospital-based Violence Intervention: Risk Reduction Resources That Are Essential for Success," *J. Trauma Acute Care Surg.* 74, no. 4 (2013): 976–980.

[34] David B. Henry et al, "The Effect of Intensive CeaseFire Intervention on Crime in Four Chicago Police Beats: Quantitative Assessment," Institute for Health Research and Policy, University of Illinois at Chicago, 2014, http://cureviolence.org/wp-content/uploads/2015/01/McCormick-CeaseFire-Evaluation-Quantitative.pdf. *See also* "Remarks of Laurie Robinson, Assistant Att'y Gen., Off. of Just. Programs," 2010 Project Safe Neighborhoods National Conference, Wednesday, July 14, 2010, https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/speeches/2010/10_0714lrobinson.htm.

[35] Mark Follman, Julia Lurie, Jaeah Lee, and James West, "The True Cost of Gun Violence in America," *Mother Jones*, April 15, 2015, https://www.motherjones.com/politics/2015/04/true-cost-of-gun-violence-in-america/.

[36] National Institute for Criminal Justice Reform, "Stockton California, The Cost of Gun Violence: The Direct Cost to Tax Payers," accessed September 22, 2020, https://nicjr.org/wp-content/themes/nicjr-child/assets/Stockton.pdf.

[37] Giffords Law Center to Prevent Gun Violence et al., "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, https://giffords.org/wp-content/uploads/2018/02/Investing-in-Intervention-02.14.18.pdf.

[38] *See e.g.,* Office of Governor Ralph S. Northam, "Governor Northam Announces Grant Funding for Community-Based Violence Intervention Programs," July 8, 2019, https://www.governor.virginia.gov/newsroom/all-releases/2019/july/headline841499-en.html. Further, on May 22, 2020, a group of Senators wrote to Senate leadership requesting they designate $100 million in Byrne JAG Program funding specifically for community violence intervention programs. "Duckworth, Booker Urge Senate Leadership to Include Resources for Communities Plagued by Gun Violence in Next Covid-19 Relief Package," May 22, 2020, https://www.duckworth.senate.gov/news/press-releases/duckworth-booker-urge-senate-leadership-to-include-resources-for-communities-plagued-by-gun-violence-in-next-covid-19-relief-package.

Notably, in 2016, in New York, Byrne JAG funds supported the state's SNUG program, an evidence-based, street outreach program based on the Cure Violence model. The New York State SNUG program utilizes a public health approach to gun violence, treating it like a disease by identifying its causes and interrupting its transmission. The state administers state funding for 11 local SNUG programs across the state, and provides training, technical assistance, and general program oversight. Byrne JAG funding was utilized to employ a statewide SNUG program coordinator and a statewide training director.[39]

III. Proposed action

We expect a significant focus for Byrne JAG in the near future will be directed to efforts to reform police departments and build police–community trust and partnerships. We strongly support these efforts and believe they are critical to addressing gun and community violence. In addition, the BJA should take the following steps to encourage the use of Byrne JAG funding to support CVI programs.

1. Issue a letter to all Byrne JAG grantees regarding CVI[40]

The BJA should send a letter to Byrne JAG grantees highlighting that CVI programs are a cost-effective use for Byrne JAG grants. Much of the information in the above section under "community violence intervention" could be included in this letter, which may also take the form of formal guidance, a toolkit, program guide, or memorandum. In addition, this letter should highlight that Byrne JAG grantees are specifically authorized to "use all or a portion of that grant to contract with or make one or more subawards to one or more...neighborhood or community-based organizations that are private and nonprofit,"[41] including organizations running CVI programs. This letter also should encourage states to consider these programs in their Byrne JAG strategic plans and consult with existing CVI program representatives in the development of those plans. Strategic plans must be designed in consultation with "representatives of all segments of the criminal justice system,"[42] and CVI programs are important segments of this system.

The letter proposed here could take the form of a guidance document, policy statement, memorandum, agency directive, or other document. Regardless of the title on the document, guidance of the type contemplated here is likely considered a guidance document or an "interpretive rule" because it is "issued by an agency to advise the public of the agency's

[39] National Criminal Justice Association, "How States Invest Byrne JAG in Crime Prevention Programs," accessed October 27, 2020, https://370377fc-459c-47ec-b9a9-c25f410f7f94.filesusr.com/ugd/cda224_8c33dbd525e14bf7ad96e8fc82284a95.pdf?index=true.

[40] BJA has communicated with Byrne JAG grantees in letter form before. *See e.g.*, Bureau of Justice Assistance, Letter to Commissioner Thomas Anderson, Vermont Dep't of Public Safety, "RE: Document request for Grant Award Number 2016-DJ-BX-0406, Vermont Department of Public Safety," April 12, 2018, https://www.justice.gov/opa/press-release/file/1052771/download.

[41] 34 U.S.C. § 10152(b).

[42] 34 U.S.C. § 10153(a)(6).

construction of the statutes and rules which it administers."[43] Extensive procedural requirements do not apply to interpretative rules unless another statute provides otherwise. As the Supreme Court observed in *Perez*, issuing interpretive rules is "comparatively easier" than issuing legislative rules.[44] However, "that convenience comes at a price: Interpretive rules do not generally have the force and effect of law."[45]

Executive Order 13891, issued by the Trump administration in October of 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[46] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, unless expressly authorized by statute or expressly incorporated into a contract, grant, or cooperative agreement.[47]

In August 2020, the DOJ amended its regulations regarding guidance documents in an interim final rule, *Processes and Procedures for Issuance and Use of Guidance Documents (*the interim rule).[48] The interim rule codifies the requirements of Executive Order 13891 that limits the use of guidance documents and implements department-wide procedures governing the review, clearance, and issuance of guidance documents.

Given the importance of Byrne JAG and the guidance contemplated here, there is a possibility that any letter the DOJ issues with respect to Byrne JAG would qualify as a "significant guidance document," as Executive Order 13891 and DOJ's interim rule define that term, based on OMB's own guidance.[49] Under Executive Order 13891, guidance documents that qualify as "significant" under this definition must meet certain procedural requirements, including a 30-day notice-and-comment period.[50] So in the event that the guidance issued pursuant to this memorandum is deemed to be a significant guidance document, the interim rule would provide the framework for the process that should be followed.[51]

[43] *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).
[44] *Id.* at 97.
[45] *Id.* (citing *Guernsey*, 514 U.S. at 99). *See also* 5 U.S.C. § 553(b)(A); Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[46] Exec. Order 13,891, 84 Fed. Reg. 55235 (October 15, 2019).
[47] *Id.*
[48] Department of Justice, Office of the Attorney General, "Processes and Procedures for Issuance and Use of Guidance Documents," accessed October 27, 2020, https://www.justice.gov/file/1308736/download. This is the text of the interim final rule as signed by the Attorney General, but the official version of the interim final rule will be as it is published in the Federal Register.
[49] *Id.,* Exec. Order 13,891, 84 Fed. Reg. 55235 (October 15, 2019).
[50] *Id.*
[51] Specifically, a significant guidance document is one that "may reasonably be anticipated to ... Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and

The BJA should then incorporate the substance of the letter in all program documents, including the solicitations for applications.[52] In the solicitations, "Community Violence Intervention" should be labeled as an area of emphasis with an adequate explanation and links to additional resources.

2. Make CVI an area of emphasis for Byrne JAG

The BJA should make Community Violence Intervention an area of emphasis for Byrne JAG grants. The BJA's areas of emphasis feature predominantly in its solicitations for these grants, ensuring that grant applicants know that BJA encourages grant applications that focus on these areas.

We would suggest the following language for this area of emphasis:

> **Community Violence Intervention.** The BJA encourages state and local jurisdictions to use JAG funds to support "Community Violence Intervention" (CVI) programs, especially in the neighborhoods in their jurisdictions experiencing high rates of shootings and gun homicides. CVI programs use hospital-based violence intervention strategies, group violence intervention strategies using focused deterrence, and evidence-based street outreach, to interrupt cycles of violence among individuals at highest risk. When properly implemented and consistently funded, CVI programs can produce lifesaving and cost-saving results in a short period of time. These strategies are often most effective when local officials and dedicated staff work to coordinate stakeholders, relevant public agencies, and service providers.

3. CVI training and technical assistance

The BJA should ensure that CVI training and technical assistance is available to Byrne JAG applicants in the strategic planning process, and for Byrne JAG grantees seeking to implement CVI programs. The BJA should do this by encouraging training and technical assistance providers that receive Byrne JAG funds to grow their expertise in CVI, or work with already established CVI experts; and funding new providers who specialize in this area. The BJA may also do this by making CVI the BJA National Training and Technical Assistance Center's tenth "justice topic" on which it provides specialized assistance and technical assistance.

IV. Risk analysis

An agency action can be judicially challenged for being beyond the agency's statutory authority,

obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities…" Guidance issued pursuant to the approach recommended here may be deemed to be "significant" for this reason.

[52] See 31 U.S.C. § 6304 (regarding grant agreements).

violating a constitutional right, not following rulemaking procedures, or being arbitrary or capricious.[53] The actions described above, including sending a letter to Byrne JAG grantees, identifying areas of emphasis, and providing training and technical assistance, are not likely to be successfully challenged.

BJA's statutory authority

Providing guidance, in the form of a letter to grantees or otherwise, is clearly within the BJA's statutory authority. A guidance document would have no binding effect, but would inform Byrne JAG grantees about an authorized use of Byrne JAG funds. The associate attorney general, who heads the Office of Justice Programs, of which the BJA is a constituent agency, is specifically authorized to, among other things, "maintain liaison with ... State governments in matters relating to criminal justice," "provide information to ...State and local governments, and the general public relating to criminal justice," and "maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice."[54] In addition to providing Byrne JAG funds, the director of the BJA also has the following duties, among others:

- "cooperating with and providing technical assistance to States, units of local government, and other public and private organizations or international agencies involved in criminal justice activities"
- "providing for the development of technical assistance and training programs for State and local criminal justice agencies and fostering local participation in such activities"
- "establishing and carrying on a specific and continuing program of cooperation with the States and units of local government designed to encourage and promote consultation and coordination concerning decisions made by the Bureau affecting State and local ... criminal justice priorities"[55]

The proposed actions described above are clearly within the scope of these duties. In addition, CVI programs fall squarely into two categories of Byrne JAG Program funding outlined by statute: "prevention and education programs," and "crime victim and witness programs."[56]

Constitutional challenges

An agency's decisions regarding formula grants to states and local government, such as the BJA's decisions regarding Byrne JAG funding, may face claims that they violate: (1) the principle of separation of powers between the legislative, judicial, and executive branches, (2) the Spending Clause of the Constitution, and (3) the Tenth Amendment's reservation of power to the states.[57] However, none of these claims is likely to succeed. Notably, the proposed

[53] 5 U.S.C. § 706.
[54] 34 U.S.C. § 10102(a)(2), (3), (4).
[55] 34 U.S.C. § 10142(3), (4), (6).
[56] 34 U.S.C. § 10152.
[57] See *New York v. United States DOJ,* 951 F.3d 84 (2020) (addressing these sorts of claims).

actions described here are fundamentally different from the actions of the Trump administration with regards to "sanctuary cities," which have engendered litigation. While the Trump administration has attempted to condition Byrne grants on state and local law enforcement's cooperation with federal immigration authorities,[58] the proposed actions described above do not mandate that jurisdictions use their Byrne JAG funding for any particular purpose. In this way, these actions are consistent with the flexibility that Congress contemplated in the Byrne JAG statute for the use of these federal funds by states and local jurisdictions. Consequently, constitutional challenges to these proposed actions are not likely to succeed.

Procedural challenges

The BJA may avoid a challenge based on procedural concerns by carefully following the particular procedures applicable to the particular kind of document BJA creates. These procedures may depend on the formality and significance of the document, and whether it is publicly available or binding on relevant stakeholders.

Arbitrary and capricious agency action

A court might invalidate an agency action if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[59] However, in implementing the law, federal agencies often fill in the gaps between the statutory language and practicable regulations. After all, administering a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[60] Thus, an agency may fill in any ambiguities as long as the agency's regulation is "based on a permissible construction of the statute" and does not contradict Congress's answer to the specific question at hand.[61]

There is nothing in federal law that suggests Congress did not intend Byrne JAG funds to be available for CVI programs. Consequently, the letter to Byrne JAG grantees described here is not "arbitrary and capricious" within the meaning of the law.

The director of the BJA is charged with "providing for the development of technical assistance and training programs for State and local criminal justice agencies and fostering local participation in such activities."[62] This is a broad grant of authority that could be considered to cover training for CVI programs. As further evidence of this broad grant of authority to the director of the BJA to develop trainings, there do not appear to be any cases challenging a BJA

[58] See *City & Cty. of San Francisco v. Barr,* 965 F.3d 753 (2020), *City of Los Angeles v. Barr,* 941 F.3d 931 (9th Cir. 2019) (striking down the challenged conditions). *Cf. New York v. United States DOJ,* 951 F.3d 84 (2020) (upholding the challenged conditions).
[59] 5 U.S.C. § 706.
[60] *Morton v. Ruiz,* 415 U.S. 199, 231, (1974); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).
[61] *Chevron,* 467 U.S. at 843.
[62] 34 U.S.C. § 10142(4).

training program as an improper use of BJA funds. Therefore, it is unlikely that there would be a successful legal challenge to the actions proposed above with respect to training and technical assistance.

Similarly, past BJA solicitations for Byrne JAG show that Byrne JAG areas of emphasis can change significantly from administration to administration. Under the Obama administration, from 2010 to 2016, the top areas of emphasis in application solicitations for Byrne JAG funding were:[63]

- justice system reform, reentry assistance, and recidivism reduction
- public defense, particularly for indigent populations
- evidence-based "smart" programs (these programs were prioritized more often in early years)
- gun violence reduction[64]

Under the Trump administration, areas of emphasis in application solicitations varied from year to year, but there were several consistent topics.[65] Reduction of violent crime and/or gun

[63] U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2010 State Solicitation," April 26, 2010, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2010-2486.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2011 State Solicitation," May 23, 2011, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2011-3029.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2012 State Solicitation," March 28, 2012, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2012-3255.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2013 State Solicitation," April 15, 2013, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2013-3600.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2014 State Solicitation," April 17, 2014, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2014-3849.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2015 State Solicitation," April 30, 2015, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2015-4165.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2016 Local Solicitation," May 16, 2016, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2016-9020.PDF.

[64] Improving mental health services for people in the justice system was a priority in three of these solicitations, including two from more recent years. Each of the following areas were priorities for two of the above years: body-worn camera programs, counterterrorism, economic crime (in response to the 2008 recession), and responding to child exposure to violence. Officer safety and wellness, statewide criminal justice planning, DOJ accreditation of forensic science providers, and implementation of the National Incident-Based Reporting System were each a priority during one of the above years. *Id.*

[65] U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2017 State Solicitation," July 25, 2017, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2017-11360.pdf; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2018 State Solicitation," July 20, 2018, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2018-13625.PDF; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2019 State Solicitation," June 18, 2019, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15142.PDF; U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2020 State Solicitation," May 28, 2020, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/bja-2020-17277.pdf.

violence was a top priority each year, along with officer safety and wellness. Three-quarters of the solicitations included border security as an area of emphasis, and the two most recent solicitations place emphasis on combating the opioid crisis.

The BJA sets areas of emphasis for Byrne JAG funding as a way to "encourage" jurisdictions to focus in these areas.[66] The BJA's decision to establish an area of emphasis has none of the coercive power that setting forth conditions for Byrne JAG funding does. As a result, the BJA's decision to alter the Byrne JAG areas of emphasis is not likely to be challenged in court.

In addition, the Violence Against Women and Department of Justice Reauthorization Act of 2005 expanded the assistant AG's authority over DOJ grants, specifically authorizing the assistant attorney general to "plac[e] special conditions on all grants, and determin[e] priority purposes for formula grants."[67] To the extent that the proposed letter would identify a priority purpose, and BJA's "areas of emphasis" function as "priority purposes" for these grants, this provision specifically authorizes them.

Finally, as noted above, Byrne JAG funding has occasionally been used in the past to support CVI programs. This use of this funding has not given rise to judicial challenges. Consequently, the actions proposed in this memorandum are not "arbitrary and capricious" within the meaning of the law.

[66] *See* Bureau of Justice Assistance, "Fiscal Year (FY) 2020 State JAG Information," accessed October 27, 2020, https://bja.ojp.gov/program/jag/fy-2020-state-jag-information#3bw09f.
[67] 34 U.S.C. § 10102(a)(6).

RECOMMENDED ACTION MEMO
Agency: Department of Justice, Bureau of Justice Assistance (BJA)
Topic: Use of Project Safe Neighborhoods (PSN) Funding
Date: November 2020

Recommendation: Redirect PSN funding towards evidence-based initiatives concentrating on the small subset of individuals responsible for community violence, as required by law.

I. Summary

Description of recommended executive action

Project Safe Neighborhoods (PSN is a nationwide grant program administered by the Bureau of Justice Assistance (BJA), which is a constituent office within the Department of Justice (DOJ). US attorneys are the recipients of this funding, which they must use to lead efforts to reduce violence in their districts. In 2018, Congress reauthorized the program in the Project Safe Neighborhoods Grant Program Authorization Act of 2018 (the PSN Act). This authorization expires after fiscal year 2021. This act provides explicit instructions about the use of appropriated funds and requires the DOJ to issue guidance for the program.[1] The Trump these funds mainly to prosecute illegal gun possession cases, with little regard for the statutory language. Accordingly, under the next administration, the DOJ should issue guidance regarding the use of these funds, redirecting the funding so it is used in accordance with the language of the PSN Act.[2] In particular, the guidance should:

- de-emphasize prosecution efforts under PSN (the program), and instead call for the concentration of PSN efforts on the small subsets of individuals responsible for violence in particular communities
- prioritize evidence-based intervention and prevention initiatives, such as street-level outreach, conflict mediation, provision of treatment and social services, and the changing of community norms
- instruct that all funded programs should collect data on outcomes achieved through the program, including the effect on the violent crime rate, incarceration rate, and recidivism rate of the jurisdiction
- make clear that PSN funding can be used for the additional purpose areas listed in the statute, and clarify the role of Gang Task Forces and US attorneys
- contextualize the act's requirement that grant funding be used to prioritize the investigation and prosecution of certain individuals

[1] Project Safe Neighborhoods Grant Program Authorization Act of 2018, 115 P.L. 185, 132 Stat. 1485, (2018) (codified at 34 U.S.C. § 60701–60705.)
[2] The next administration should also consider how to address PSN in DOJ's next budget.

This guidance is the focus of this memorandum and should become the basis under which the BJA and US attorneys administer the prrogram.

Overview of process and time to enactment

Publication of formal guidance documents is a common practice of federal agencies seeking to clarify or interpret the laws to which they are subject. It is an expedient process that the next administration should adopt immediately. This process involves the internal development of the guidance's substance in accordance with the DOJ's written procedures. To comply with best practices for agency guidance, the document should acknowledge that such guidance is not binding, unless it is included in a grant agreement. The exact procedures and timeline that the DOJ should follow will depend on whether the guidance is determined to be "significant" in accordance with DOJ regulations, or should take the form of a memorandum to US attorneys. Once finalized, the document should be published on the BJA's website. The BJA should then update other documents regarding the program to reflect the substance of this guidance.

II. Current state

Gun violence in underserved communities of color

Nowhere is the gun violence crisis more evident than in our underserved communities of color, where homicide rates often reach 10 times the national average.[3] Young Black men are especially vulnerable—the chance of a Black family losing a son to a bullet is 62% greater than losing him to a car accident in the US. Black men, an often underserved population, constitute 6% of the US population but account for 50% of all gun homicides each year. The rate of gun injuries is 10 times higher for Black children and teens than it is for white children and teens.[4]

This high concentration of violence creates a vicious cycle.[5] A study of adolescents participating in an urban violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence.[6] The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—doubles the probability that a young person will commit a violent act within two

[3] Giffords, "Community Violence," accessed July 15, 2020, https://giffords.org/issues/community-violence/.
[4] The rate of non-fatal shootings is 51.1 per 100,000 people for young black Americans versus 5.0 per 100,000 people for young whites. Arthur R. Kamm, Violence Policy Center, and Amnesty International, "African-American Gun Violence Victimization in the United States, Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," June 30, 2014, http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17803_E.pdf.
[5] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed July 15, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.
[6] Jonathan Purtle et al., "Scared safe? Abandoning the Use of Fear in Urban Violence Prevention Programmes," *Injury Prevention* 21, no. 2 (2015): 140–141, doi: 10.1136/injuryprev-2014-041530.

years.[7] In other words, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue absent an intervention.

The establishment of PSN under the Bush (W) administration

Established by President George W. Bush in 2001, PSN was originally conceived as "a network of law enforcement and community initiatives targeted at gun violence."[8] President Bush launched the initiative through a letter to the US attorneys, seeking enforcement of gun laws.[9] Attorney General John Ashcroft followed up with a letter directing the US attorneys to establish task forces that would create strategic plans to reduce gun violence, and promising funding for this initiative.[10] This letter emphasized the involvement of community leaders and insisted that "rivalries and competing agendas among law enforcement agencies" must give way to strategic partnerships. The letter cited Project Exile in Richmond, Virginia, and Operation Ceasefire in Boston, Massachusetts, as good examples of strong, coordinated partnerships. These letters were accompanied by a letter from the Bureau of Alcohol, Tobacco, and Firearms (ATF), offering to help law enforcement by tracing firearms and providing training.[11]

Then, in 2002, Congress enacted, and President Bush signed, the 21st Century Department of Justice Appropriations Authorization Act, authorizing various programs within the DOJ. That act established PSN as "a program for each United States Attorney to provide for coordination with State and local law enforcement officials in the identification and prosecution of violations of Federal firearms laws including school gun violence and juvenile gun offenses." The act also authorized the hiring of additional Assistant US attorneys for this purpose.[12]

PSN under the Obama administration

In its first term, the Obama administration maintained the PSN funding mechanisms that had existed in the Bush administration. Starting in 2012, however, the presidential budget requests for the DOJ began turning away from funding programs that emphasized high-prosecution and enforcement for gun-related crimes to programs that incentivized "evidence-based, competitive programs designed to encourage data-driven, smart-on-crime strategies."[13] As a result, the DOJ transitioned the PSN from a formula-based allocation of funding to a competitive grant

[7] Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, "Firearm Violence, Exposure and Serious Violent Behavior," *Science* 308 (2005): 1323–1326.
[8] *See* Bureau of Justice Assistance, "Project Safe Neighborhoods Toolkit," accessed October 27, 2020, 1-3, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/psn_toolkit.pdf.
[9] *Id.*
[10] *See id.* at 1-5 - 1-6.
[11] *Id.* at 1-7.
[12] 107 P.L. 273, 116 Stat. 1758 § 104 (2002).
[13] "Remarks of Laurie Robinson, Assistant Att'y Gen.," 2010 Project Safe Neighborhoods National Conference, July 14, 2010, https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/speeches/2010/10_0714lrobinson.htm.

application program.[14] Thus, a district's "need" and use of more effective, intelligence- and data-driven strategies were key factors for funding selections, combined with performance results and other factors.[15]

This new approach was implemented via the FY 2012 Competitive Grant Announcement for PSN.[16] In FY 2012, the BJA gave thirteen awards totaling $3,949,423.[17] For example, the City of Memphis was awarded $150,000 to enact a "suppression strategy in selected micro-places" in two Memphis communities. The strategy "[identifies] and closely track[s] individuals" that constitute Memphis' "most chronic, violent offenders," with the goal to create collaborative partnerships between law enforcement and community partners to "develop a working analytical framework focused on data sharing."[18]

The Obama administration continued issuing competitive grants up until the end of President Obama's second term in 2016, with total award amounts between $4 and $7 million each year.[19] The overall effect of the Obama administration's targeted, data-driven policy—including its PSN strategy—resulted in a steady decline of federal weapons convictions,[20] and violent crime steadily decreased from 458.6 to 386.6 per 100,000 residents.[21]

Trump administration action and the PSN Act

A. Initial approach to PSN

The Trump administration immediately began reversing the Obama-era PSN policies and reverted to a non-competitive, formula-based grant system that focused less on violent crime and more on charging individuals with felony convictions for illegal firearms possession—regardless of whether the individual's criminal history was violent. This reversal was initially announced in March 2017 via a memorandum from then-Attorney General Jeff Sessions, in

[14] Bureau of Just. Assistance, "Violent Gang and Gun Crime Reduction Program [Project Safe Neighborhoods] FY 2012 Competitive Grant Announcement," April 17, 2012, 2, 14, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/12PSNsol.pdf.

[15] *Id.*

[16] *See generally id.*

[17] Bureau of Justice Assistance, "BJA FY 2012 Violent Gang and Gun Crime Reduction Program (Project Safe Neighborhoods): Category 2: 2 million-4,999,999," accessed August 27, 2020, https://bja.ojp.gov/funding/opportunities/bja-2012-3302.

[18] Office of Justice Programs, "Detailed information for award 2013-GP-BX-0014: Western District of Tennessee JAG Project," accessed August 27, 2020, https://external.ojp.usdoj.gov/selector/awardDetail?awardNumber=2013-GP-BX-0014&fiscalYear=2013&applicationNumber=2013-H0742-TN-GP&programOffice=BJA&po=BJA.

[19] Bureau of Just. Assistance, "Violent Gang and Gun Crime Reduction Program (Project Safe Neighborhoods) FY 2016 Competitive Grant Announcement," February 16, 2016, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2016-9202.pdf; Bureau of Just. Assistance, "Violent Gang and Gun Crime Reduction Program (PSN)," August 27, 2020, https://bja.ojp.gov/funding/opportunities/bja-2016-9202.

[20] Syracuse University, "Ten Year Decline in Federal Weapons Convictions," TRAC Reports, October 27, 2015, https://trac.syr.edu/tracreports/crim/409/.

[21] Federal Bureau of Investigation, "Crime in the U.S. 1998–2017," accessed August 27, 2020, table 1, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-1.

which Attorney General Sessions ordered all federal prosecutors to prioritize firearm prosecutions, especially for illegal possession of firearms.[22] In the first three months after that initial memo, the number of defendants charged with unlawful possession of a firearm increased 23%.[23]

In October 2017, Attorney General Sessions called for the reinvigoration of PSN, stating that all U.S. prosecutors would be evaluated based on the amount of illegal firearm possession cases prosecuted in each US attorney's district.[24] In issuing memoranda to the US attorneys to this effect, Attorney General Sessions did not focus efforts on those driving the violence.[25] As a result, districts have implemented PSN models that are "less targeted due to the absence of an important factor: there is no indication that the types of cases will be constrained to violent crimes."[26] This de-emphasis on cases involving violent crimes has resulted in prosecutions for even the most minor illegal possession cases—including 15-year mandatory minimums for possessing a single round of ammunition.[27] In the first half of 2018, federal attorneys prosecuted more firearms cases than any previous administration in the same time period.[28]

The 2018 solicitation for grants under the program demonstrates that the administration's approach centered on the creation of PSN task forces in each judicial district, stating that "enforcement is a cornerstone of violence reduction" and enforcement efforts must ensure "offenders are prosecuted."[29]

Approximately 75% of these gun charges were against persons of color, with Black defendants in the majority. Specifically, of the over 7,600 illegal firearm possession charges brought in fiscal year 2019, 55% of the defendants were Black and 17% were Hispanic.[30] In certain districts that prosecuted the highest number of illegal firearm cases, only a small fraction of cases were brought to the court due to gun offenses indicating serious violent intentions.[31]

[22] Office of the Attorney General, "Memorandum on Commitment to Targeting Violent Crime," March 17, 2017, https://www.justice.gov/opa/press-release/file/946771/download.
[23] DOJ, Office of Public Affairs, "Federal Gun Prosecutions Up 23 Percent After Sessions Memo," July 28, 2017, https://www.justice.gov/opa/pr/federal-gun-prosecutions-23-percent-after-sessions-memo.
[24] Office of the Attorney General, "Memorandum on Project Safe Neighborhoods," October 4, 2017, https://www.justice.gov/opa/press-release/file/1001581/download.
[25] Edward K. Chung, "Project Safe Neighborhoods: A Targeted and Comprehensive Approach?" 30 *Fed. Sentencing Rep.* (2018): 192, 193.
[26] *Id.* at 193-–94.
[27] *Id.*
[28] Syracuse University, "Federal Weapons Prosecutions Rise for Third Consecutive Year," TRAC Reports, November 29, 2017, https://trac.syr.edu/tracreports/crim/492/.
[29] U.S. Department of Justice, "The Project Safe Neighborhoods FY 2018 Grant Announcement," June 4, 2018, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2009-2018.PDF.
[30] U.S. Sentencing Commission, "Quick Facts: Felon in Possession of Firearm," 2017, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf.
[31] Carol Robinson, "'Their profession is violent crime': Alabama police operation seizes 140 guns, indicts 71 suspects," Al.com, updated January 30, 2019,

B. The PSN Act

Congress attempted to redirect the course of PSN in 2018 via the PSN Act, which President Trump signed into law. The PSN Act states that it establishes a PSN "Block Grant Program,"[32] but does not provide much detail about the way the funds should be allocated or used. The act specifies that the purpose of the program is to:

> foster and improve existing partnerships between Federal, State, and local agencies, including the United States Attorney in each Federal judicial district, entities representing members of the community affected by increased violence, victims' advocates, and researchers to create safer neighborhoods through sustained reductions in violent crimes...[33]

The act laid out three main strategies these partnerships may use to accomplish this goal:

> "(1) developing and executing comprehensive strategic plans to reduce violent crimes, including the enforcement of gun laws, and prioritizing efforts focused on identified subsets of individuals or organizations responsible for increasing violence in a particular geographic area;
>
> (2) developing evidence-based and data-driven intervention and prevention initiatives, including juvenile justice projects and activities which may include street-level outreach, conflict mediation, provision of treatment and social services, and the changing of community norms, in order to reduce violence; and
>
> (3) collecting data on outcomes achieved through the Program, including the effect on the violent crime rate, incarceration rate, and recidivism rate of the jurisdiction."[34]

The act also listed four "additional purposes areas" that the attorney general may use PSN funds for:

- competitive and evidence-based programs to reduce gun crime and gang violence
- the Edward Byrne criminal justice innovation program
- community-based violence prevention initiatives
- gang and youth violence education, prevention and intervention, and related activities.[35]

While specifying these strategies and purpose areas, the act also contained language about PSN task forces:

https://www.al.com/news/birmingham/2018/05/their_profession_is_violent_cr.html (few of the listed indicted suspects were committing violent crimes upon arrest).

[32] 34 U.S.C. § 60703(a).

[33] *Id.*

[34] *Id.*

[35] 34 U.S.C. § 60703(b).

- Section 5(c) of the act sets aside 30% "of the amounts made available as grants" under the program for "Gang Task Forces in regions experiencing a significant or increased presence of criminal or transnational organizations engaging in high levels of violent crime, firearms offenses, human trafficking, and drug trafficking."[36]
- Section 5(d) of the act specified that "[a]mounts made in grants under the Program shall be used to prioritize the investigation and prosecution of individuals who have an aggravating or leadership role in criminal or transnational organizations described in subsection (c)."[37]
- The act contains few definitions, the most notable of which is the one for "transnational organized crime group," a term not directly used in the act.[38]

The act requires the DOJ to issue guidance "to create, carry out, and administer the program in accordance with this section."[39] The act authorized $50,000,000 to be appropriated to the attorney general to carry out the PSN program from 2019 through 2021.[40]

The legislative history of the act revealed some of the tension that went into the creation of this language. When the bill was debated in the House of Representatives, Congresswoman Barbara Comstock spoke about MS-13, an international criminal group.[41] However, the language that was eventually enacted into law differed significantly from the language initially passed by the House. The Senate amended the bill to:

- focus less on "gang crime" and "criminal street gangs," removing definitions of both of those terms
- mention "entities representing members of the community affected by increased violence, victims' advocates" or "the provision of social services"
- mention "researchers" and "collecting data on outcomes achieved through the Program…"
- contain the statement in section 5(d) regarding the prioritization of prosecutions
- authorize the use of PSN funding for the four "additional purpose areas" listed above (The House-passed bill would have explicitly prohibited this use of PSN funding.[42])

As described below, these changes indicate the significance of this language. In addition, the House Judiciary Committee's Report on the bill included additional views that specifically objected to the provision that would have prevented funding for the programs that became the additional purpose areas in the act.[43]

[36] 34 U.S.C. § 60704(d).
[37] 34 U.S.C. § 60704(d).
[38] 34 U.S.C. § 60701.
[39] 34 U.S.C.§ 60704(a).
[40] *Id.* at § 60705.
[41] "Project Safe Neighborhoods Grant Program Authorization Act of 2017, Congressional Record Vol. 164, No. 93," House of Representatives, June 6, 2018, https://www.congress.gov/congressional-record/2018/06/06/house-section/article/H4793-2.
[42] H.R. 3249, 115th Cong. (as passed by House, March 14, 2018).
[43] H.R. Rep No. 115-597 (2018).

C. PSN after the act

Even after the PSN Act became law, federal weapons prosecutions continued to increase.[44] In 2019, there were 11,309 federal weapons charges filed and prosecuted.[45] While the data is still incomplete, violent crime statistics have not shown a significant enough decrease to justify the amount of arrests for non-violent crimes (such as simple gun possession) under the Trump administration.[46]

The 2020 solicitation for the program includes almost the exact same language as the 2018 solicitation emphasizing the creation of task forces and the prosecutions of offenders.[47] Nevertheless, former Deputy Attorney General Rod J. Rosenstein declared in December 2018 that the goal of PSN was "not to maximize the number of criminal defendants," but "minimize the number of crime victims."[48]

Since its founding, approximately $2 billion in federal funds have flowed to PSN,[49] but what these funds are used for, and in what form they are provided are critical aspects of increasing the effectiveness of the PSN program.

Despite the PSN Act's requirement that the DOJ issue guidance for the program, the only formal guidance that the DOJ currently applies is the Uniform Guidance (UG) for federal agency grant programs, promulgated by the Office of Management and Budget (OMB).[50] The UG is a government-wide framework for grants management. Documents on the PSN website do, however, support the Trump administration's approach to PSN, especially its emphasis on gun prosecutions.[51]

[44] Syracuse University, "Federal Weapons Prosecutions Continue to Climb in 2019," TRAC Reports, June 9, 2019, https://trac.syr.edu/tracreports/crim/560/.

[45] *Id.*

[46] *See* Federal Bureau of Investigation, "Crime in the U.S. 1998–2018," accessed September 2, 2020, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-1 Notably, a spike in violent crime occurred in 2016, ostensibly related to the 2016 election cycle. This high volume of crime stagnated and then diminished in 2018. *See* U.S. Department of Justice (hereinafter, "DOJ"), "Project Safe Neighborhoods, One Year Progress Report," March 2019, https://www.justice.gov/file/1149381/download (claiming PSN is responsible for decreasing in crimes in PSN target areas). Although the violent crime rate between 2017 and 2018 decreased by 3.3 per 100,000, the same metric for the period spanning 2014 to 2018 actually increased by 4.7 percent—thus showing an overall increase in violent crime as presidential administrations changed during this time.

[47] U.S. Department of Justice, "The Project Safe Neighborhoods FY 2020 Formula Grant Solicitation," March 31, 2020, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/bja-2020-17027.pdf.

[48] DOJ, "Project Safe Neighborhoods, One Year Progress Report," March 2019, https://www.justice.gov/file/1149381/download.

[49] *Id.*

[50] Uniform Guidance for Federal Grants, 2 C.F.R. Part 200.

[51] *See e.g.,* Bureau of Justice Assistance, "Common Components of Successful PSN Strategies," accessed October 27, 2020, https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Common-Components-of-Successful-PSN-Strategies.pdf.

The Senate Committee on Appropriations included the following language in its report on the appropriations bill that led to $20 million in funding for PSN for fiscal year 2020:

> Project Safe Neighborhoods [PSN].–The Committee's recommendation includes $20,000,000 for PSN. The Committee encourages OJP to use PSN funds to support evidence-based and data-driven focused intervention, deterrence, and prevention initiatives that aim to reduce violence. These initiatives should be trauma-informed, recognizing that people who are at risk of committing violence often themselves have been victims of violent trauma or have witnessed traumatic experiences in the past.
>
> Group Violence Intervention [GVI].–The Committee recognizes that GVI is a strategy the Department should consider in its efforts to reduce violent crime. The Committee encourages the Department, in conjunction with the Project Safe Neighborhood program, to fund GVI initiatives in cities where GVI programs have proven to reduce gun violence.[52]

Notably, the Trump administration's OJP FY 2021 budget specifically allows for "amounts designated for the project safe neighborhoods program be used for successful or promising efforts that may not fall precisely within the scope of the PSN Act of 2018."[53]

II. Proposed action

A. Substance of the proposed guidance

PSN has always involved a tension between community-based intervention programs and prosecutorial efforts. In the 2018 PSN Act, Congress struck a balance between these two, but the Trump administration's focus on increasing the number of prosecutions for illegal gun possession is not consistent with this balance. Consequently, a new administration should formally issue a new guidance document, through the DOJ, interpreting the PSN Act in accordance with the statutory language. This guidance document would provide the US attorneys who are administering the program and other stakeholders with much-needed advice on its proper focus. This kind of guiding document would refocus the program on cooperative partnerships among federal, state, and local agencies; entities representing members of the community affected by increased violence; victims' advocates; and researchers.

In particular, the guidance should do the following.

(1) De-emphasize prosecution efforts under the program, and instead call for the concentration of PSN efforts on the small subsets of individuals responsible for violence in particular communities—the first strategy identified in the statute.

[52] S. Rept. 116-127 (reporting on S.2584) (Sept. 26, 2019).
[53] Office of Management & Budget, Executive Office of the President, Office of Justice Programs, "FY 2021 Performance Budget," February 2020, 33, https://www.justice.gov/doj/page/file/1246736/download.

PSN's first strategy is "developing and executing comprehensive strategic plans to reduce violent crimes, including the enforcement of gun laws, and prioritizing efforts focused on identified subsets of individuals or organizations responsible for increasing violence in a particular geographic area."[54] A new administration's updated guidance should emphasize the statute's explicit goal of reducing violent crimes, rather than prosecuting offenders.

The first strategy correctly suggests that the best way to reduce violent crime is to focus on the "identified subsets of individuals or organizations responsible for increasing violence in a particular geographic area." Social science research has brought to light the fact that, in city after city, an incredibly small and readily identifiable segment of a given community is responsible for the vast majority of gun violence.[55] Shootings and homicides in America are highly concentrated in our cities, particularly within city neighborhoods marked by high levels of racial segregation, severe concentrated poverty, and estrangement from law enforcement. An analysis by *The Guardian* observed that more than a quarter of the nation's gun homicides occurred in city neighborhoods containing just 1.5% of the US population.[56] In 2019, research from the National Network for Safe Communities, based on data from nearly two dozen cities, confirmed that at least half of homicides and nonfatal shootings involve people—as victims and/or perpetrators—known by law enforcement to be affiliated with "street groups" involved in violence. These groups were found to constitute, on average, less than 0.6% of a city's population, and among that number, an even smaller percentage actually commit violent crime.[57]

Social science research also demonstrates the effectiveness of programs that intervene directly with these individuals. One of these programs directly inspired the creation of PSN in the first place. As mentioned above, in his letter regarding the creation of PSN, Attorney General Ashcroft cited Operation Ceasefire in Boston, Massachusetts. That program pioneered the use of Group Violence Intervention (GVI), a form of problem-oriented policing (as opposed to traditional "incident-driven" policing), which has now been implemented in a wide variety of American cities, with consistently impressive results. To implement the GVI strategy, police departments must partner closely with community leaders and service providers to jointly convene "call-ins" with a relatively small number of individuals at the highest risk of involvement

[54] 34 U.S.C. § 60703(a).
[55] David M. Kennedy et al., "Reducing Gun Violence: The Boston Gun Project's Operation Ceasefire," US Department of Justice, September 2001, https://www.ncjrs.gov/pdffiles1/nij/188741.pdf.
[56] Aliza Aufrichtig, et al., "Want to fix gun violence in America? Go local," *The Guardian*, January 9, 2017, https://www.theguardian.com/us-news/nginteractive/2017/jan/09/special-report-fixing-gun-violence-in-america.
[57] *See* Stephen Lurie, et al., "The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities (forthcoming); Stephen Lurie, Alexis Acevedo, and Kyle Ott, "Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/nnsc_gmi_concentration_asc_v1.91.pdf; Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 2020, 31-32, https://lawcenter.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf.

in violence in the near future. At the call-ins, community leaders communicate a strong demand for the shooting to stop. Social service providers then present plans to connect high-risk individuals with services, ranging from trauma counseling, mediation, and peer coaching to job training and relocation assistance. Finally, law enforcement officers often deliver a respectful notification regarding the legal risks individuals may face if the community's plea for peace is ignored. This notification or promise of accountability can have a new focused deterrent effect.

The GVI model has a remarkably strong track record, featuring a documented association with homicide reductions of 30–60%.[58] When violence intervention experts compared more than 1,400 individual studies of crime-reduction strategies in 2016, they identified group violence intervention as having "the strongest and most consistent anti-violence effects."[59] Additionally, the Department of Justice compiled a review of known crime prevention strategies, in which it gave the GVI approach its highest rating, noting the existence of multiple studies confirming GVI's efficacy.[60]

The GVI strategy demonstrates an effective approach to the subset of individuals that the PSN Act's first strategy identifies. The Trump administration seems to have interpreted the first strategy to authorize a solely prosecutorial approach to these individuals, with little regard for whether these prosecutions serve the goal of reducing violent crime. In reality, the best way to achieve this goal may be not through prosecutions, but through intervening with these individuals so that they do not commit further violent crimes.

(2) Prioritize evidence-based "intervention and prevention" initiatives, such as "street-level outreach, conflict mediation, provision of treatment and social services, and the changing of community norms"—the second strategy identified in the statute.

The guidance should also elucidate the second strategy named by the act: "developing evidence-based and data-driven intervention and prevention initiatives, including juvenile justice projects and activities which may include street-level outreach, conflict mediation, provision of treatment and social services, and the changing of community norms, in order to reduce

[58] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed October 27, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.
[59] Thomas Abt, "We Can't End Inequality Until We Stop Urban Gun Violence," The Trace, July 12, 2019, https://www.thetrace.org/2019/07/we-cant-endinequality-until-we-stop-urban-gun-violence/; "What Works in Reducing Community Violence: A Meta-review and Field Study for the Northern Triangle," US Agency for International Development, February 2016, https://www.usaid.gov/sites/default/files/USAID-2016-What-Works-in-Reducing-CommunityViolence-Final-Report.pdf; National Academies of Sciences, Engineering, and Medicine, *Proactive Policing: Effects on Crime and Communities* (Washington: The National Academies Press, 2018), https://www.nap.edu/catalog/24928/proactive-policing-effects-on-crime-and-communities.
[60] Office of Justice Programs, "Crime & Crime Prevention," National Institute of Justice, accessed February 22, 2016, https://www.crimesolutions.gov/TopicDetails.aspx?ID=13; *see also* Office of Justice Programs, "Community Crime Prevention Strategies," US Department of Justice, accessed February 22, 2016, https://www.crimesolutions.gov/TopicDetails/.

violence."[61] The Trump administration has largely ignored this strategy. Yet, these initiatives are remarkably effective. One of these kinds of initiatives is the GVI strategy described above. Another kind of initiative that fulfills this strategy is hospital-based violence intervention.

Hospital-based violence intervention programs (HVIPs) focus on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury. HVIPs call for screening patients based on predetermined criteria to identify those individuals most at risk for re-injury, and then connecting qualifying candidates with trained case managers. These case managers provide clients with intense oversight and assistance both in the hospital and in the crucial months following the patient's release.[62] During this time, case managers help connect high-risk individuals to a variety of community-based organizations in order to give them access to critical resources, such as mental health services, tattoo removal, GED programs, employment, court advocacy, and housing.

Another approach that fits the act's second strategy is the Chicago-based Cure Violence (CV) program.[63] This approach is clearly what Congress had in mind through the act's reference to "street-level outreach," and "conflict mediation." The first element of the CV model is to detect and resolve potentially violent conflicts through the use of culturally competent individuals known as "violence interrupters," whose role is to serve as street-level conflict mediators.[64] The second element of the CV approach is the identification and treatment of high-risk individuals, which is accomplished through outreach workers (OWs), who connect clients with services designed to bring about positive changes. The third element of the CV model focuses on changing community-level social norms by encouraging community members to speak out in favor of peaceful conflict resolution. These efforts target key stakeholders in the community, including residents, clergy members, school leaders, directors of community-based organizations, and local political leaders.

As the PSN Act requires, these intervention programs are data-driven and evidence-based. In fact, evidence shows that these programs are remarkably effective. Oakland, California, cut its shootings and homicides nearly in half over six years by incorporating GVI into its city-wide response to crime.[65] San Francisco General Hospital's Wraparound Project introduced the HVIP strategy in 2005, and in its first six years of operation, the project was associated with a 400%

[61] 34 U.S.C. § 60703(a).
[62] Rochelle A. Dicker et. al., "Where Do We Go From Here? Interim Analysis to Forge Ahead in Violence Prevention," *J. Trauma* 67, no. 6 (2009): 1169–1175, http://violenceprevention.surgery.ucsf.edu/media/1691926/where.pdf.
[63] Wesley G. Skogan et al., "Evaluation of CeaseFire-Chicago," March 20, 2008, https://www.ncjrs.gov/pdffiles1/nij/grants/227181.pdf.
[64] Chris Melde et. al., "On the Efficacy of Targeted Gang Interventions: Can We Identify Those Most At Risk?," *Youth Violence and Juvenile Justice* 9 (2011): 279–94, http://yvj.sagepub.com/content/9/4/279.
[65] Giffords Law Center to Prevent Gun Violence et al., "A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence," April 2019, https://lawcenter.giffords.org/wp-content/uploads/2019/05/Giffords-Law-Center-A-Case-Study-in-Hope.pdf

decrease in the rate of injury recidivism.[66] A 2014 quantitative evaluation of four Chicago police districts where Cure Violence was implemented found a 31% reduction in homicide, a 7% reduction in total violent crime, and a 19% reduction in shootings in targeted districts.[67]

Community members might prefer one or more of a number of other programs or actions that could be used to curb violence beyond the three discussed above.[68] Provided that these programs are evidence-based, PSN funding should be used to support them.

(3) Instruct that all programs funded should collect "data on outcomes achieved through the Program, including the effect on the violent crime rate, incarceration rate, and recidivism rate of the jurisdiction"—the third strategy identified in the statute.

The PSN Act's third strategy is "collecting data on outcomes achieved through the program, including the effect on the violent crime rate, incarceration rate, and recidivism rate of the jurisdiction."[69] While solicitations for PSN funding under the Trump administration have mentioned a requirement that grantees collect data on "outcomes," including violent crime, and the number of investigations and prosecutions, they have said nothing about incarceration or recidivism rates. As described above, the DOJ's recent instructions to US attorneys administering the program have focused on rates of prosecution and conviction, especially convictions for illegal gun possession. Consequently, the guidance should clarify that the BJA and the US attorneys must take into account the effect of their activities on incarceration and recidivism, and collect data to demonstrate these effects.

The BJA should also insist on the collection of data regarding the racial disparities under the program, to ensure the program is being administered equitably. The incoming administration should fund or undertake rigorous studies to better understand the demographics of those arrested for illegal gun possession under the previous administration, and whether those arrests were made in connection with the commission of violent crime. Doing so may support the new administration's PSN policy because it may evidence the disproportionate effect a sweeping prosecution policy can have on racial minorities—as these federal weapons charges typically carry five-year mandatory minimum sentences.[70]

[66] Randi Smith et al., "Hospital-based Violence Intervention: Risk Reduction Resources That Are Essential for Success," *J. Trauma Acute Care Surg.* 74, no. 4 (2013): 976–980.
[67] David B. Henry et al, "The Effect of Intensive CeaseFire Intervention on Crime in Four Chicago Police Beats: Quantitative Assessment," Institute for Health Research and Policy, University of Illinois at Chicago, 2014, http://cureviolence.org/wp-content/uploads/2015/01/McCormick-CeaseFire-Evaluation-Quantitative.pdf. *See also* "Remarks of Laurie Robinson, Assistant Attorney General, Office of Justice Programs," 2010 Project Safe Neighborhoods National Conference, https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/speeches/2010/10_0714lrobinson.htm.
[68] *See, e.g.,* City of Milwaukee Health Department, Office of Violence Prevention, "Milwaukee Blueprint for Peace," (2017) https://www.preventioninstitute.org/sites/default/files/publications/Milwaukee%20Blueprint%20for%20Peace.pdf.
[69] 34 U.S.C. § 60703(a).
[70] See 18 U.S.C. § 924.

(4) Make clear that PSN funding can be used for the additional purpose areas listed in the statute, and clarify the role of Gang Task Forces and US attorneys.

Additional purposes

The act also listed four "additional purposes areas" that the Attorney General may use PSN funds for:

- competitive and evidence-based programs to reduce gun crime and gang violence
- the Edward Byrne criminal justice innovation program
- community-based violence prevention initiatives
- gang and youth violence education, prevention and intervention, and related activities.[71]

This language allows PSN funding to be redirected to certain programs that have existed alongside PSN and use primarily non-prosecutorial approaches.[72] Although the act labels PSN a "block grant," the inclusion of these additional purpose areas indicates that at least some of the funding may be distributed on a competitive basis. Notably, the act does not require the US attorneys to play a role in the administration of funds to these programs. As a result, the BJA may disburse PSN funds to these programs directly.

The proper role of US attorneys

As noted above, President Bush launched PSN through a letter to the US attorneys, and in 2002, Congress officially established the program as "a program for each United States Attorney to provide for coordination with State and local law enforcement officials in the identification and prosecution of violations of Federal firearms laws..." This language conflicts significantly with the more recent PSN Act.

Traditionally, all PSN funding has been directed through the US attorneys' Offices. The PSN Act, however, re-established the program within the OJP, and mentioned the US attorneys only as one of the federal, state, and local agencies who must, in partnership with "entities representing members of the community affected by increased violence, victims' advocates, and researchers," aim to "create safer neighborhoods through sustained reductions in violent crimes."[73]

There is no statutory requirement that all PSN funding be directed through the US attorneys' Offices. The strategies described in the act do not require the leadership of US attorneys, and the "additional purposes areas" listed in the act all refer to certain programs that are not led by

[71] 34 U.S.C. § 60703(b).
[72] *See e.g.,* Bureau of Just. Assistance, Innovations in Community-Based Crime Reduction (CBCR) Program FY 2019 Competitive Grant Announcement (May 2019), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15364.pdf.
[73] 34 U.S.C. § 60703(a).

US attorneys. Consequently, the OJP may choose to award PSN funding in accordance with the act directly to other organizations or entities to further the act's goal.

The PSN Act does, however, require US attorneys to have some role in the partnerships formed to implement the program. The guidance document should specify the nature of this role, with an emphasis on building relationships between US attorneys' offices and the communities they serve.[74]

The proper role of "gang task forces"

The guidance should also clarify the role of "gang task forces." The Trump administration has focused most PSN efforts requiring US attorneys to create gang task forces in every judicial district, even though the act calls for only 30% of the funding available in the form of grants to be provided to these task forces, and only calls for their existence "in regions experiencing a significant or increased presence of criminal or transnational organizations engaging in high levels of violent crime, firearms offenses, human trafficking, and drug trafficking."[75] Furthermore, under the Trump administration, these task forces have not properly focused on individuals with leadership or aggravating roles in criminal organizations, but instead have focused on maximizing prosecutions for illegal gun possession.[76]

As described above, high levels of violent crime tend to be concentrated in specific neighborhoods; vast areas of the country do not experience these high levels of crime. Even where high levels of crime exists, this crime does not necessarily indicate a "significant or increased presence of criminal or transnational organizations." The phrase "criminal or transnational organizations" indicates a level of organization and sophistication that is often lacking from the loose affiliations of young men that actually drive large portions of gun violence, especially in communities of color.

The act defines the term "transnational organized crime group," even though that term is not explicitly used in the act. It is unclear why Congress chose to include this definition. The best possible explanation is that this definition is intended to help explain the phrase "criminal or transnational organizations." By cross-reference, the act defines "transnational organized crime group" as "a group of persons that includes one or more citizens of a foreign country, exists for a period of time, and acts in concert with the aim of engaging in transnational organized crime."[77] Transnational organized crime is:

[74] See Kenneth L. Alexander, "32 Black federal prosecutors in Washington have a plan to make the criminal justice system more fair," *Wash. Post,* Sept. 5, 2020, https://www.washingtonpost.com/local/public-safety/32-black-federal-prosecutors-in-washington-have-a-plan-to-make-the-criminal-justice-system-more-fair/2020/09/05/1774d646-ed4b-11ea-ab4e-581edb849379_story.html.
[75] 34 U.S.C. § 60704(c).
[76] *See* 34 U.S.C. § 60704(d).
[77] 34 U.S.C. § 60701(3) (cross-referencing 22 U.S.C. § 2708(k)(6).

> (i) racketeering activity ...that involves at least one jurisdiction outside the United States; or (ii) any other criminal offense punishable by a term of imprisonment of at least four years under Federal, State, or local law that involves at least one jurisdiction outside the United States and that is intended to obtain, directly or indirectly, a financial or other material benefit; and (B) includes wildlife trafficking …. and severe forms of trafficking in persons …. involving at least 1 jurisdiction outside of the United States.[78]

Thus, a transnational organization (or transnational organized crime group) engages or intends to engage in: high-level, international criminal activity with an intent to obtain a financial or material benefit; and wildlife or human trafficking. While not defining a "criminal organization," the definition of "transnational organization" suggests that the term "criminal organization" is akin, however, without the international relationships. The definition also suggests the sophistication of criminal and transnational organizations: wildlife or trafficking in persons have both been found by Congress to be "increasingly perpetrated by organized, sophisticated criminal enterprises."[79]

Taken together, the term "criminal or transnational organizations" in the act likely does not refer to the kind of groups that drive street-level gun violence in most of the US. Violent acts within these street-level groups are often committed not for financial or material benefit, but as a way of getting vengeance for a prior act of violence that goes unresolved by formal, legal systems of justice. By and large, these acts of day-to-day interpersonal gun violence are not conspiratorial acts designed to further more elaborate criminal enterprises.

As a result, the gang task forces required by the PSN Act should not attempt to address the kind of violence that plagues many communities of color. Instead, the act requires these task forces to be used to address organized crime and to use only 30% of PSN funding to do so. The investigation and prosecution of individuals who have an aggravating or leadership role in these criminal and transnational organizations must remain a priority in accordance with section 5(d) of the act. Beyond these individuals and this 30%, however, PSN funding must be used in accordance with the other provisions of the act, and, as described above, must serve the goal of reducing violent crimes.

The statute does not require every judicial district to have its own gang task force. On the contrary, the act requires them only in "regions experiencing a significant or increased presence of criminal or transnational organizations engaging in high levels of violent crime, firearms offenses, human trafficking, and drug trafficking." To comply with the act, the BJA must first identify these regions. These regions may constitute only a small area within the US and may cross several judicial districts. Thirty percent of PSN funding must be directed to these areas, and gang task forces must be formed to address them.

This approach to PSN funding is required by the act. However, it will differ dramatically from the Trump administration's approach. For one thing, the BJA may lead the creation of these task

[78] 22 U.S.C. § 2708(k)(5).
[79] VERDAD Act, Pub. L. No. 116-94, 133 Stat. 3069; TARGET Act, Pub. L. No. 115-141, 132 Stat. 1123.

forces directly, rather than delegating this role to the US attorneys. In this way, the BJA will have greater control over the work of these task forces to ensure they properly serve the purposes of the act.

(5) Contextualize section 5(d)'s requirement that grant funding under the act be used to prioritize the investigation and prosecution of certain individuals.

As noted above, the act contains language about how PSN grant funding should be prioritized. This language appears inconsistent with the act's strategies. Specifically, section 5(d) of the act states that "[a]mounts made in grants under the Program shall be used to prioritize the investigation and prosecution of individuals who have an aggravating or leadership role in criminal or transnational organizations described in subsection (c)."[80] While this language appears to apply to all grants under the program, it can only apply to the extent there are identifiable individuals who have such a role. Where these leaders exist, section 5(d) requires PSN funding to be used to investigate and prosecute them.

In addition, this restriction does not apply to any amounts made in forms other than grants. An alternative form of federal funding under which federal assistance can flow to PSN is that of a "cooperative agreement."[81] Under the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA), cooperative agreements are distinguished from grants.[82] Consequently, if BJA or a US attorney uses a cooperative agreement to spend PSN funds, section 5(d)'s requirement to prioritize investigations and prosecutions does not apply. That amount of funding can be removed from the calculation accounting for the 30% of funding that must be used for gang task Forces.

The FGCAA's definition of a cooperative agreement differs from its definition of a grant agreement only with respect to whether "substantial involvement" between the executive agency and the recipient of the funding assistance is anticipated during performance of the contemplated activity.[83] In the case of a grant agreement, "no substantial involvement" is expected.[84] Providing PSN funding in the form of cooperative agreements would therefore have the added benefit of enabling the BJA or the US attorney to have substantial involvement in carrying out the activities funded by cooperative agreement awards. That substantial involvement, in turn, is likely to help ensure that local and state recipients use their federal funding effectively—in contrast with grants, which observers criticize as being amenable to

[80] 34 U.S.C. § 60704(d).
[81] Other OJP offices have established cooperative agreements for non-prosecutorial activities under PSN in the past. The guidance recommended here would emphasize the priority of such agreements. *See e.g.*, National Institute of Justice "PSN Academy: Proposal to Provide Technical Assistance," accessed October 27, 2020, https://nij.ojp.gov/funding/awards/2002-gp-cx-1003#supplimental-award-0-1.
[82] 41 U.S.C. § 501 et seq.,
[83] 41 U.S.C. 501, § 6 (emphasis added).
[84] *Id.*, § 5.

redistribution away from "individuals or communities with the greatest need toward those with greater political influence."[85]

B. Process

The guidance proposed here could take the form of a policy statement, memorandum, agency directive, or other document. Regardless of its title, the guidance document, as described in this memorandum, would be considered an "interpretive rule" because it would be "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[86] Extensive procedural requirements do not apply to interpretative rules unless another statute provides otherwise. As the Supreme Court observed in *Perez*, issuing interpretive rules is "comparatively easier" than issuing legislative rules.[87] However, "that convenience comes at a price: Interpretive rules do not generally have the force and effect of law."[88]

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[89] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, unless expressly authorized by statute, or expressly incorporated into a contract, grant, or cooperative agreement.[90] Importantly, part or all of the guidance contemplated in this memorandum is likely to be incorporated into grant agreements.

In August 2020, the DOJ amended its regulations regarding guidance documents in an interim final rule, Processes and Procedures for Issuance and Use of Guidance Documents *(*the interim rule).[91] The interim rule codifies the requirements of Executive Order 13891 that limits the use of guidance documents and implements department-wide procedures governing the review, clearance, and issuance of guidance documents.

[85] Congressional Research Service, "Block Grants: Perspectives and Controversies," updated February 21, 2020, 9, https://fas.org/sgp/crs/misc/R40486.pdf (discussing block grant critics' argument that such grants can undermine the achievement of national objectives).
[86] *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).
[87] *Id.* at 97. *See also* 5 U.S.C. § 553(b)(A); Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[88] *Id.* (citing *Guernsey*, 514 U.S. at 99).
[89] Exec. Order 13,891, 84 Fed. Reg. 55235 (October 15, 2019).
[90] *Id.*
[91] Department of Justice, "Processes and Procedures for Issuance and Use of Guidance Documents," accessed October 27, 2020, https://www.justice.gov/file/1308736/download. This is the text of the interim final rule as signed by the Attorney General, but the official version of the interim final rule will be as it is published in the Federal Register.

Given the importance of PSN and the guidance discussed here, there is a possibility that any guidance the DOJ issues with respect to its interpretation of the PSN Act would qualify as a "significant guidance document," as Executive Order 13891 and DOJ's interim rule define that term, based on OMB's own guidance.[92] Guidance documents that qualify as "significant" under this definition must meet certain procedural requirements, including a 30-day notice-and-comment period.[93] Although the likelihood of such a finding cannot be determined with certainty, in the event that the guidance issued pursuant to this memorandum is deemed to be a significant guidance document, the interim rule would provide the framework for the process that should be followed.[94]

The BJA should then incorporate the substance of the guidance in all program documents, and, most importantly, the grant agreements that govern the obligations of the US attorneys and subrecipients who receive these grants.[95] Issuing such guidance through memoranda would substantially change the language in the grant solicitation as well, which currently uses Attorney General Sessions's 2017 memorandum as one of the major frameworks for how each PSN should apply for grants. Additionally, issuing guidance through proposed appropriations language in the incoming administration's OJP budget would also significantly impact how grants are solicited and spent—as this appropriations language is the other major framework from which the solicitations are drafted and spent.

Finally, as the current language of the PSN Act expires on September 30, 2021, the guidance recommended here would similarly influence any future rewrite of the language appropriating funds for the PSN program.[96] Should Congress seek to reauthorize PSN, the goal should be to rewrite the PSN Act once the current appropriation bill expires, in order to have an impact on non-prosecutorial funding through PSN beyond 2021. However, should Congress seek to end PSN, other options exist to reroute this funding altogether.

IV. Risk analysis

Timing of review

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components: first, the action must mark the "consummation" of the agency's decision-making process—it cannot be of a tentative or intermediate nature. Second,

[92] *Id.,* Exec. Order 13,891, 84 Fed. Reg. 55235 (October 15, 2019).
[93] *Id.*
[94] Specifically, a significant guidance document is one that may reasonably be anticipated to ... Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities…" Guidance issued pursuant to the approach recommended here may be deemed to be "significant" for this reason.
[95] *See* 31 U.S.C. § 6304 (regarding grant agreements).
[96] *See* Congressional Budget Office, "Expired and Expiring Authorizations of Appropriations: Fiscal Year 2020," February 5, 2020, Supplemental Data, https://www.cbo.gov/system/files/2020-02/56082-CBO-supplemental-data.xlsx.

the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.”[97] Consequently, the guidance document proposed by this memorandum may not qualify as a final agency action. The BJA’s actions with regards to PSN grants may not be considered final and reviewable until grant applications have been approved or denied. In some cases, however, potential grantees have been able to seek preliminary injunctions earlier on in the funding process to prevent the administration of grant programs in accordance with certain guidance.

Agency action committed to discretion by law

The DOJ may argue that challenges to PSN guidance fail as a matter of law because such decisions are committed to agency discretion by law. The Administrative Procedures Act withdraws judicial review where "an agency action is committed to agency discretion by law."[98] "[I]f the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," then it is unreviewable.[99]

In addition, the DOJ may argue that, pursuant to federal law, the attorney general possesses "final authority over all functions, including any grants, cooperative agreements, and contracts made, or entered into, for the Office of Justice Programs,"[100] which is headed by an assistant attorney general;[101] in turn, the assistant attorney general overseeing the Office of Justice Programs is authorized by law to "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants."[102] Thus, the DOJ has significant authority over the administration of these grants. These threshold arguments may or may not prevent judicial review of the guidance document proposed here.

Judicial challenges to the guidance document

If challengers are able to overcome the threshold issues mentioned above—such as finality and the extent of agency discretion—they may challenge the guidance document as being beyond the agency’s statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[103]

The administration of PSN grants is clearly within the BJA’s statutory authority, and the PSN Act explicitly requires the creation of guidance to implement the program. There are no constitutional issues involved in the administering of PSN grants as proposed here. In addition,

[97] *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997).
[98] 5 U.S.C. § 701(a)(2).
[99] *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).
[100] 34 U.S.C. § 10110(2).
[101] 34 U.S.C. § 10101.
[102] 34 U.S.C. § 10102(a)(6).
[103] 5 U.S.C. § 706.

the BJA may avoid a challenge based on procedural concerns by carefully following the particular procedures applicable to the particular kind of document BJA creates. As described above, these procedures will depend on the formality of the document, whether it is publicly available (or merely an internal directive for US attorneys), and whether the DOJ determines that it is a "significant guidance document" in accordance with the interim rule.

Arbitrary and capricious challenge under the APA

If there is a judicial challenge brought regarding the new guidance being arbitrary or capricious, a court will invalidate it if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[104]

One potential challenge of the approach described above is the de-emphasis on gang task forces. State and local law enforcement agencies have historically been involved in these task forces and may object to decreases in their funding. As noted above, however, the act only requires 30% of PSN funding to be used for these task forces. In addition, even though the Trump administration has required these task forces to be created in every federal judicial district, the act only requires them to be created in specific regions "experiencing a significant or increased presence of criminal or transnational organizations engaging in high levels of violent crime, firearms offenses, human trafficking, and drug trafficking." Consequently, a court would probably find that the explicit language of the act supports this de-emphasis on these task forces.

A challenge claiming that a funding decision is arbitrary and capricious may focus on the allocation of this funding among different grantees. On this point, the PSN Act represents a compromise between the Obama and Trump administrations' approaches to the program. While the Obama administration used the funding for competitive grants, limiting the judicial districts that received the funding, the act refers to the funding as "Block Grants" meant to foster partnerships in "each Federal judicial district." Accordingly, the Trump administration has used a formula to make PSN funding available to every judicial district, but also prioritizing funding for those districts with a high level of violent crime.[105] This formula appears to be modeled on the formula set by statute for a different program.[106] The PSN Act does not explicitly provide a formula for the distribution of PSN funding, however, so courts are not likely to find that changes to this approach are arbitrary and capricious.

A challenger may claim that the guidance document is not "in accordance with law" if it conflicts with the language of the PSN Act. In implementing the law, federal agencies often fill in the gaps

[104] 5 U.S.C. § 706(2)(A).

[105] *See* U.S. Department of Justice, "The Project Safe Neighborhoods FY 2019 Grant Announcement," April 23, 2019, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15125.PDF; "Revised FY 2018 Project Safe Neighborhoods Funding Allocation Amounts," accessed October 17, 2020, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/FY-2018-Project-Safe-Neighborhoods-Funding-Allocation-Amounts-rev.pdf.

[106] The formula is remarkably similar to the formula under which states receive Byrne JAG funding. *See* 34 U.S.C. § 10156.

between the statutory language and practicable regulations. After all, administering a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[107] Thus, an agency may fill in any ambiguities as long as the agency's regulation is "based on a permissible construction of the statute" and does not contradict Congress's answer to the specific question at hand.[108] Moreover, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," although the measure of deference will vary depending on "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[109]

Pursuant to these principles, the Supreme Court has established a two-step process to analyze an agency's construction of a statute it administers. First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue."[110] If the intent of Congress is clear, that is the end of the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[111] But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[112] Notably, in making the threshold determination—whether the statute is ambiguous—a court must look to the surrounding text and the overall statutory scheme to ensure that Congress has not expressed a particular intent on the question at issue.[113] In turn, whether the agency's interpretation is permissible depends on whether it is a "reasonable interpretation" of the enacted text, i.e, is not "arbitrary or capricious."[114]

In some respects, the PSN Act is not ambiguous. It lists the three strategies that partners may use to accomplish the goal of the program and specifically authorizes PSN funding to be used for the four additional purposes. The act also clearly specifies the overall goal of the program to "create safer neighborhoods through sustained reductions in violent crimes." The Trump administration has largely ignored these strategies and focused exclusively on increasing the number of prosecutions for firearms offenses, without regard for whether it serves this goal. This approach is contrary to the clear text of the PSN Act. In contrast, the approach contemplated in the guidance document described above is consistent with the language of the act.

In other respects, the PSN Act is ambiguous. The act does not specify the way funds must be allocated, the role of gang task forces, the role of US attorneys, or the scope of the requirement

[107] *Morton v. Ruiz,* 415 U.S. 199, 231, (1974); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).
[108] Chevron, 467 U.S. at 843.
[109] *United States v. Mead Corp.,* 533 U.S. 218, 228 (2001).
[110] *City of Arlington, Tex. v. F.C.C.,* 569 U.S. 290, 296 (2013).
[111] *Id*.
[112] *Id*.
[113] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644, 666 (2007); *see also Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997) (explaining that the ambiguity of statutory language is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").
[114] *Mayo Found. for Med. Educ. & Research v. United States,* 562 U.S. 44, 53 (2011).

that certain prosecutions be prioritized under section 5(d). Having determined that the PSN Act is ambiguous, a court would turn to whether the guidance document proposed here is based on a permissible interpretation of the act. As described above, there are strong arguments for the interpretation in the guidance document proposed above.

In addition, the relationship between the PSN Act and the provision regarding PSN in the 21st Century Department of Justice Appropriations Authorization Act is unclear. That provision in the 21st Century Department of Justice Appropriations Authorization Act focuses on "the identification and prosecution of violations of Federal firearms laws" and appears to support the Trump administration's approach.[115] However, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[116] As described above, Congress intended the PSN Act, as subsequent legislation, to redirect the course of the program away from the earlier statute's emphasis on prosecutions. Thus, a court is not likely to find the guidance document "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[115] 107 P.L. 273, 116 Stat. 1758 § 104 (2002).
[116] *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 380-81 (1969).

RECOMMENDED ACTION MEMO
Agency: Department of Justice, Office for Victims of Crime
Topic: Use of VOCA Funds for Community Violence Intervention
Date: November 2020

Recommendation: Amend the Victims of Crime (VOCA) Rule to:

(1) ensure that a higher percentage of VOCA funds are used for underserved populations

(2) frame community violence intervention programs as a direct service for which VOCA victim assistance funds may be used

(3) clarify the definition of "crime victim and victim of crime" to include victims who have also perpetrated crimes

I. Summary

Description of recommended executive action:

In 2016, the Obama administration promulgated a regulation designed to codify Victims of Crime Act (VOCA) Victim Assistance Program guidelines and implement statutory directives. One directive requires VOCA state administering agencies to make VOCA victim assistance funds available for "programs which serve previously underserved populations of victims of violent crime,"[1] among other things. That regulation ensures that at least 10% of each year's VOCA victim assistance grants received by states and eligible territories be used for this purpose.[2] While this regulation was a step in the right direction, the percentage of each grant allocated to services that assist underserved victims of violent crime should be increased to reflect the extent to which violent crime, and gun violence in particular, disproportionately affects communities of color.

The regulation also codified the program guidelines' list of allowable direct service costs, most of which are substantially similar to those in the Guidelines with the inclusion of a few additional services. While the regulation does not frame the list of direct service costs as exhaustive, community violence intervention (CVI) programs, programs that address the needs of gun violence victims in underserved communities of color most impacted by gun violence, should be included in the list of direct services for which VOCA victim assistance funds may be used.

Finally, the regulation also codified the definition of "crime victim and victim of crime," leaving the definition "broad."[3] This definition should be revised to clarify that victims of crime may also perpetrate crimes, and services provided to them shall be eligible for victim assistance funding.

[1] 42 U.S.C. § 10603 (re-codified at 34 U.S.C. § 20103); 28 C.F.R. § 94.101 - 122 (2019).
[2] 28 C.F.R. § 94.104 (2019).
[3] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,518 (July 8, 2016).

While more provisions were included in the regulation, the three discussed above are the focus of the recommendation expanded upon throughout this memo.

Overview of process and time to enactment

The VOCA Victim Assistance Program is administered by the Office for Victims of Crime (OVC) of the US Department of Justice's Office of Justice Programs. The OVC director is granted rulemaking authority pursuant to 34 USC § 20110(a) to "carry out any function of the Director" related to the VOCA Victim Assistance Program.[4] As such, the OVC would follow the notice-and-comment rulemaking process, pursuant to Section 553 of the Administrative Procedure Act (APA), to increase the percentage of each year's grant allocated to previously underserved victims of violent crime, list CVI programs as a direct service for which victim assistance funds may be used, and expand the definition of "crime victim."[5]

The APA requires that federal agencies issue rules through the notice-and-comment rulemaking (NCRM) process.[6] To amend the current VOCA victim assistance rule, the OVC will be required to issue a notice of proposed rulemaking (NPRM), provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the Federal Register. A rule generally goes into effect 30 days after it is published.[7] This multi-phase process generally extends for a year.

II. Current state

The Victims of Crime Act authorizes OVC to provide grants from the Crime Victims Fund (CVF) to states and eligible territories for crime victims through crime victim assistance programs.[8] VOCA victim assistance funds may be used for services, including but not limited to efforts that respond to the immediate emotional, psychological, and physical needs of crime victims; assist victims to stabilize their life after victimization; facilitate crime victims' participation in the criminal justice system and other public proceedings related to the crime; and restore a measure of security and safety for the victim.[9]

[4] *See* 42 U.S.C. § 10605 (re-codified at 34 U.S.C. § 20111). *See also* 28 C.F.R. 94.101(b) (2019); 42 U.S.C. § 10603 (re-codified at 34 U.S.C. § 20103).

[5] There may be additional amendments to the 2016 Final Rule for which the Administration may want to seek guidance through an Advanced NPRM.

[6] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

[7] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.

[8] 34 U.S.C. § 20103(c)(1). The funds available in the Crime Victims Fund come from criminal fines, forfeited bonds, penalties, and special assessments. Additionally, gifts, bequests, and donations from private entities may also be deposited. Congressional Research Service, "The Crime Victims Fund: Federal Support for Victims of Crime," April 2, 2020, https://crsreports.congress.gov/product/pdf/R/R42672.

[9] 34 U.S.C. § 20103(d)(2); 28 C.F.R. § 94.102, 94.119 (2019).

Prior to the 2016 regulation, the OVC published program guidelines in the Federal Register to help states distribute their VOCA victim assistance funds. [10]

Relevant Obama administration action

The Obama administration promulgated the 2016 regulation codifying and updating the VOCA Victim Assistance Program guidelines (guidelines). Relevant to the recommendations herein, the 2016 regulation codified the guidelines' allocation of 10% of each year's VOCA victim assistance grant to "underserved victims of violent crimes,"[11] but declined to increase the percentage of funding allocated to underserved victims of violent crimes, reasoning that the 10% allocation "balances the need for stability in state victim assistance funding with the need to ensure State victim assistance programs are responsive to emerging needs."[12]

Notably, the 2016 regulation expanded the criteria for identifying previously underserved populations, requiring states to consider the type of crime the victim experiences, or demographic characteristics of the victim, or both,[13] as opposed to solely the type of crime, which had been the criteria in the guidelines (though states were "encouraged to also identify gaps in available services by victims' demographic characteristics"[14]). The regulation, however, removed the examples of potential previously underserved victim populations that were in the guidelines[15] because such populations in jurisdictions "may change over time. . . ."[16] While not listed in the regulation, examples of victim populations often underserved in 2016 were provided by the OVC, including survivors of homicide victims, victims of hate and bias crimes, victims of gang violence, and victims of violent crime in high crime urban areas (who the OVC has identified as underserved by type of crime they experience and demographic characteristics of victims),[17] among others.[18]

The regulation also codified the list of direct services for which victim assistance funds may be used, while explicitly stating the list was not comprehensive. Most of the services were retained from the guidelines; however, a few services were added or expanded upon, including adding forensic interviews, transitional housing, and relocation expenses (which had been expressly prohibited in the guidelines) as allowable services, and expanding the proceedings for which funds can be used to facilitate participation to include any public proceedings arising from the

[10] Victims of Crime Act Victim Assistance Grant Program, 62 Fed. Reg. 19,607, 19,614 (April 22, 1997); Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,518, 44,519, 44,523 (July 8, 2016). *See also* US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Side-by-Side Comparison of the VOCA Victim Assistance Guidelines and Rule," accessed October 27, 2020, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/comparison-VOCA-victim-assistance-guidelines-and-final-rule.pdf.
[11] 28 C.F.R. § 94.104(c) (2019).
[12] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).
[13] 28 C.F.R. § 94.104(c) (2019).
[14] Victims of Crime Act Victim Assistance Grant Program, 62 Fed. Reg. 19,607, 19,614 (April 22, 1997).
[15] Victims of Crime Act Victim Assistance Grant Program, 62 Fed. Reg. 19,607, 19,614 (April 22, 1997).
[16] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).
[17] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).
[18] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).

crime (e.g. juvenile justice hearings and civil commitment proceedings), as opposed to solely criminal justice proceedings.

Finally, the 2016 regulation codified the guidelines' definition of "crime victim and victim of crime," rejecting commenters' request to provide examples to illustrate coverage of a broad range of harms, stating that the "definition has been sufficiently broad to encompass the harm from various crimes on a wide and diverse range of individuals."[19]

VOCA Victim Assistance Program under the Trump administration

The OVC has not published any guidelines, notices of proposed rulemaking, proposed rules, or final rules for the VOCA Victim Assistance Program since 2016. However, related to the recommendation herein to increase the percentage of funding allocated for previously underserved victims of violent crimes, a 2019 audit by the US Office of the Inspector General found that as of February 2018, "many States had substantial balances remaining from their [fiscal year] 2015" VOCA victim assistance grant.[20] Collectively, states had approximately $599 million in unused VOCA victim assistance funds,[21] funding that could go to more eligible crime victim assistance programs. (Funding not used within four years is returned to the Crime Victim Fund from which it was withdrawn.)

Gun violence in underserved communities of color

Nowhere is the gun violence crisis more evident than in our underserved communities of color, where homicide rates often reach 10 times the national average.[22] Young Black men are especially vulnerable—the chance of a Black American family losing a son to a bullet is 62% greater than losing him to a car accident. Black men, an often underserved population, constitute 6% of the US population but account for 50% of all gun homicides, which are violent crimes, each year. The rate of gun injuries is 10 times higher for Black children and teens than it is for white children and teens.[23]

[19] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,518 (July 8, 2016).
[20] US Department of Justice, Office of the Inspector General, "Review of the Office of Justice Programs' Efforts to Address Challenges in Administering the Crime Victims Fund Programs," July 2019, https://www.oversight.gov/sites/default/files/oig-reports/a1934.pdf.
[21] US Department of Justice, Office of the Inspector General, "Review of the Office of Justice Programs' Efforts to Address Challenges in Administering the Crime Victims Fund Programs," July 2019, https://www.oversight.gov/sites/default/files/oig-reports/a1934.pdf.
[22] Giffords, "Community Violence," accessed July 15, 2020, https://giffords.org/issues/community-violence/.
[23] The rate of non-fatal shootings is 51.1 per 100,000 people for young black Americans versus 5.0 per 100,000 people for young whites. Arthur R. Kamm, Violence Policy Center, and Amnesty International, "African-American Gun Violence Victimization in the United States, Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," June 30, 2014, http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17803_E.pdf.

This high concentration of violence creates a vicious cycle.[24] A study of adolescents participating in a community violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence.[25] The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—doubles the probability that a young person will commit a violent act within two years.[26] In other words, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue, absent an intervention.

Research and case studies have shown that through a combination of low-cost, CVI programs and much-needed firearms policy reforms, gun violence rates in communities of color can be cut in half in as little as two years. VOCA victim assistance funding can supplement funds available for those CVI programs. VOCA funds have been directed toward such programs in the past, indicating that this is an area that has the OVC's support and has been considered within its ambit.[27]

Community violence intervention programs

Community violence intervention programs are coordinated violence reduction initiatives that use evidence-based strategies such as hospital-based violence intervention, evidence-based street outreach, and group violence intervention to reduce gun violence.[28] Our recommendation focuses on the use of VOCA funds for the first two programs. As such, hospital-based violence intervention and evidence-based street outreach are briefly described below. CVI programs provide services that will help to prevent reinjury and recidivism by intervening in the cycle of violence.

1. **Hospital-based violence intervention programs (HVIPs)** focus on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury. The HVIP strategy calls for screening patients based on predetermined criteria to identify those individuals most at risk for re-injury, and then connecting qualifying candidates with trained, culturally competent case managers who provide their clients with intense oversight and assistance, both in the hospital and in the crucial months following the patient's release. In 2018, Congress encouraged states to use

[24] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed July 15, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.
[25] Jonathan Purtle et al., "Scared safe? Abandoning the Use of Fear in Urban Violence Prevention Programmes," *Injury Prevention,* 21, no. 2 (2015): 140–141, doi: 10.1136/injuryprev-2014-041530.
[26] Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, "Firearm Violence, Exposure and Serious Violent Behavior," *Science* 308 (2005): 1323–1326.
[27] *See* US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Hidden Victims: Providing and Accessing Victim Services for Young Men of Color," accessed July 15, 2020, https://ovc.ojp.gov/funding/awards/2011-vf-gx-k027 (describing the original award OVC granted a violence interruption program in Crown Heights, Brooklyn, New York in 2011).
[28] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed July 15, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.

VOCA funds toward hospital-based violence intervention programs[29] and "OVC developed a program and funded nine medical facilities that proposed to increase support to victims of crime, improve their outcomes, and reduce future victimizations."[30]

2. **Evidence-based street outreach** targets the individuals most at risk for perpetrating or becoming the victims of violence, at which point it is possible to interrupt and slow the spread of violence within the community. Evidence-based street outreach is built around three strategies: (1) the detection and peaceful resolution of potentially violent conflicts, (2) the identification and "treatment" of the highest risk individuals by connecting them with available services, and (3) mobilization of the local community in order to change social norms surrounding the use of violence.

III. Proposed action(s)

The OVC has noted that "victims of gang violence," "victims of violent crime in high crime areas," "victims of physical assault," and "survivors of homicide victims," are all "often underserved."[31] But many states have typically not used VOCA victim assistance funds to meaningfully invest in CVI programs working with victims of violence.[32] To ensure VOCA victim assistance funds are available for CVI programs, programs that address the needs of gun violence victims in communities of color most impacted by gun violence, the incoming administration should draft and publish a NPRM, followed by a final rule that:

(1) increases the percentage of funding allocated for services that assist previously underserved victims of violent crimes

The OVC should increase the minimum percentage of funding allocated for services assisting previously underserved victims of violent crimes to 15%. Presently, VOCA state administering agencies are required to allocate a minimum of 10% of each year's VOCA victim assistance grant to programs and projects specifically serving this population.[33] Increasing the percentage allocated for such programs will help direct funds to community programs serving victims of gun violence, which disproportionately impacts communities of color. As stated above, in 2018 there was nearly $599 million in untouched VOCA victim assistance funding from the 2015 distribution, suggesting that funds exist for use by states, which could be directed to CVI

[29] 115th Congress (2017-2018), "House Report 115-704—Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2019," May 24, 2018, https://www.congress.gov/congressional-report/115th-congress/house-report/704/1.
[30] US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "OVC FY 2019 VOCA Victim Assistance" Grant Solicitation, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/OVC-2019-15204.pdf. *See* US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "OVC FY 2018 Advancing Hospital-Based Victim Services" Grant Solicitation, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/OVC-2018-14048.pdf
[31] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).
[32] Giffords, "MEMO: Protecting Americans from Community Violence during the COVID-19 Pandemic," April 23, 2020, https://giffords.org/press-release/2020/04/community-violence-covid/.
[33] 28 C.F.R. § 94.104(c) (2019).

programs without taking funds away from crime victim assistance programs currently eligible for funding.[34]

(2) add "community violence intervention programs" to 28 CFR § 94.119

The OVC should add "community violence intervention programs" to the list of direct services for which VOCA victim assistance funds may be used at 28 CFR § 94.119. Specifically, the OVC should add:

> "(m) *Community violence intervention programs*: coordinated violence reduction initiatives that provide direct services to victims of violence who are most at risk of violence in order to reduce future [gun] violence. Initiatives use evidence-based strategies and include, but are not limited to:
>
> (1) hospital-based violence intervention that focuses on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury and connects these patients with trained, culturally competent case managers, who provide intense oversight and assistance both in the hospital and in the crucial months following the patient's release
>
> (2) evidence-based street outreach that focuses on the detection and peaceful resolution of potentially violent conflicts; the identification and "treatment" of the individuals most at risk for perpetrating or becoming the victims of violence by connecting them with available services; and the mobilization of the local community in order to change social norms surrounding the use of violence."[35]

(3) clarifies that the definition of "crime victim or victim of crime" includes persons who have perpetrated a crime

The OVC should add at the end of the definition of "crime victim or victim of crime" at 28 CFR 94.102: "In addition, for purposes of this program, crime victim or victim of a crime may include persons who are victims of a crime who have also perpetrated a crime." By including perpetrators in the "crime victim" definition, the regulation acknowledges that exposure to violence perpetuates further violent behavior; in other words, persons who have been exposed to violence (e.g., as a victim, directly or indirectly) are likely to perpetuate violence in the future. As such, persons who perpetrate a crime should be eligible recipients of victims' services.

A. Process: notice-and-comment rulemaking

To amend a regulation, first an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must provide the time, place, and

[34] US Department of Justice, Office of the Inspector General, "Review of the Office of Justice Programs' Efforts to Address Challenges in Administering the Crime Victims Fund Programs," July 2019, https://www.oversight.gov/sites/default/files/oig-reports/a1934.pdf.
[35] *See* Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed July 15, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/#gvi.

nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then, the agency must accept public comments on the proposed rule for a period of at least 30 days. Received comments must be reviewed, and the OVC must respond to significant comments, either by explaining why it is not adopting proposals or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the Federal Register along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

IV. Legal justification

The changes proposed in the section above are within the OVC director's statutory authority. The OVC director may establish any rules, regulations, guidelines, or procedures necessary to carry out any function of the director related to the VOCA Victim Assistance Program.[36] As such, the OVC director may establish rules and regulations amending the percentage of funding allocated to the priority crime victim categories and previously underserved populations, and include additional direct services for which victim assistance funds may be used as established through guidelines prior to 2016 and the 2016 regulation.[37] Additionally, the OVC director may add and amend terms and definitions to clarify terms used in the regulation, removing ambiguity that may exist.[38]

After an administrative regulation is finalized it can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action. Amending the VOCA rule is clearly within the OVC's statutory authority, does not implicate any constitutional rights, and is unlikely to be challenged on such grounds. If the new rule is judicially challenged, it will likely be challenged for improperly following procedural rulemaking or arbitrary and capricious agency action.

Procedural challenges

The administration can ensure procedural compliance by following the NCRM process pursuant to Section 553 of the APA.

For example, the OVC should review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.[39] The agency must address the concerns raised in

[36] 34 U.S.C. § 20110(a).
[37] *See* 28 C.F.R. § 94.104 (2019).
[38] *See* 28 C.F.R. § 94.102 (2019).
[39] 5 U.S.C. § 553(c).

all non-frivolous and significant comments.[40] The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.[41]

Arbitrary-or-capricious challenge

If there is a judicial challenge brought regarding the proposed action, or new rule, being arbitrary or capricious, a court will invalidate the regulation if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42]

The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, establishing a nexus between the facts and the agency's choice.[43]

When an agency fails to consider important facts, or when its explanation is either unsupported or contradicted by the facts, the court has grounds to find the rule "arbitrary or capricious."[44]

Reasoned explanation

Admittedly, the changes proposed in the section above would diverge from the OVC's prior regulations. However, an agency is "free to change their existing policies as long as they provide a reasoned explanation for the change."[45] When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate."[46] However, an agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy."[47]

In addition, "[i]n explaining its changed position, an agency must also be cognizant that long-standing policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances

[40] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).
[41] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).
[42] 5 U.S.C. § 706(2)(A).
[43] *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).
[44] *Id.* at 43.
[45] *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.,* 545 U.S. 967, 981–982 & *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 863-864 (1984)).
[46] *Encino,* 136 S. Ct. at 2125 (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).
[47] *Encino,* 136 S. Ct. at 2126.

that underlay or were engendered by the prior policy."[48] "[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" and that "an arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference."[49]

As described above, communities of color that experience very high rates of violence, created by pervasive cycles of violence, have been underserved for centuries. These communities have large victim populations, many of whom would benefit from programs funded by VOCA victim assistance grants. For example, so many members of these communities are unable to access the criminal justice system, which VOCA seeks to assist with, because of a failure by police to arrest and hold accountable those responsible in the majority of shootings and murders occurring in these communities.[50] This need in underserved communities of color is sufficient to justify increasing the percentage of funding allocated for previously underserved victims of violent crimes; the increase will address centuries of neglect and injustice.

Adding "community violence intervention programs" to the list of direct services for which VOCA victim assistance funds may be used explicitly affirms the funding eligibility of these programs and any activities in support of these programs.[51] The explicitly stated eligibility of these programs for VOCA victim assistance funds may increase the number of applications from CVI programs for funding and the number of subgrants awarded to CVI programs.[52]

While members of the public may object to using funds to assist perpetrators of crime, such use is consistent with the DOJ's current interpretation of the statute: "[a] state considering funding a batterer intervention program must determine if the program is using funding to provide services to victims of crime who are also batterers. If the state determines that the program is providing services to victims of crime (who are also batterers), then the program may be supported with

[48] *Encino,* 136 S. Ct. at 2126.

[49] *Id.* (internal quotations and citations omitted).

[50] Gun homicides in communities of color with high crime rates are often unsolved. Researchers for The Trace found that across 22 cities, 65% of fatal shootings involving a Black or Hispanic victim never led to an arrest. Police also failed to make an arrest in nearly 80% of nonfatal shooting incidents involving Black victims. These are citywide averages; in the poorest and most disadvantaged communities within those cities, accountability for shootings and murder is even rarer still. *See* Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building the Police-Community Trust to Break the Cycle of Violence," January 2020, https://lawcenter.giffords.org/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/; Sarah Ryley, Jeremy Singer-Vine, and Sean Campbell, "Shoot Someone In a Major U.S. City, and Odds Are You'll Get Away With It," The Trace, January 24, 2019, https://www.thetrace.org/features/murder-solve-rate-gun-violence-baltimore-shootings/.

[51] *See* 28 CFR §§ 94.119, 120.

[52] Ideally, the amount of VOCA victim assistance funding going to community violence intervention programs would increase, however increasing the percentage of funding allocated to services assisting previously underserved victims will not guarantee that states will allocate any of that funding to programs serving victims of gun violence. States have discretion in "determining the populations of victims of violent crimes that may be underserved in their respective States." In order to ensure projects serving victims of gun violence are allocated a percentage of funding, the VOCA victim assistance statute would need amending--for example, "gun violence" would need to be added as a priority category under 34 USC § 20103(a)(2)(A) or a category, generally, under 34 USC § 20103(a)(2)--something the Administration is unable to do on its own. 34 U.S.C. § 20103(a)(2)(B). *See also* 28 C.F.R. § 94.103(b) (2019).

VOCA Victim Assistance funding."[53] As such, if a CVI program proposes to use VOCA victim assistance funding to provide services to victims of crimes (e.g. connecting victims with social service providers,[54] assisting victims to stabilize their lives after victimization, and restore a measure of security and safety for the victim[55]) who have also perpetrated crime, then the CVI program may be supported with VOCA victim assistance funding.[56]

Increasing the allocation for the underserved category

There are strong arguments for increasing the allocation for the underserved category. The OVC has claimed that the current allocation "balances the need for stability in state victim assistance funding with the need to ensure State victim assistance programs are responsive to emerging needs."[57] However, there is no shortage of needs in underserved populations, whether those populations are underserved communities of color experiencing gun violence, where homicide rates often reach 10 times the national average;[58] Non-Hispanic Black and American Indian/Alaska Native women, who experience the highest rates of homicide, with over half being intimate partner-related;[59] or older adults in our communities, victimized by their community or caregivers.[60]

Opponents may also argue that allocating more funding for underserved populations decreases the funding available for the other priority categories—victims of sexual assault, spousal abuse, and child abuse—as well as the other programs and projects that may not fit these four categories. However, the VOCA statute and the regulation require states to allocate funding toward the priority categories—victims of sexual assualt, spousal abuse, and child abuse. The regulation specifies that at least 10% of the state's grant go toward each of these individual categories. Increasing the funding allocated to underserved populations does not change the required allocation toward the three priority categories. Further, if funding allocated to underserved populations increases to 15% and the priority categories retain the required 10% allocation, 55% of a state's VOCA victim assistance funding remains available to be used at the

[53] US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Victims of Crime Act (VOCA) Administrators: VOCApedia," accessed October 27, 2020, https://ovc.ojp.gov/program/victims-crime-act-voca-administrators/vocapedia#DirectServices.

[54] 28 C.F.R. § 94.119(b) (2019).

[55] 28 C.F.R. § 94.102 (2019).

[56] "A state considering funding a batterer intervention program must determine if the program is using funding to provide services to victims of crime who are also batterers. If the state determines that the program is providing services to victims of crime (who are also batterers), then the program may be supported with VOCA Victim Assistance funding." US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Victims of Crime Act (VOCA) Administrators: VOCApedia," accessed October 27, 2020, https://ovc.ojp.gov/program/victims-crime-act-voca-administrators/vocapedia#DirectServices.

[57] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).

[58] Giffords, "Community Violence," accessed July 29, 2020, https://giffords.org/issues/community-violence/.

[59] Emiko Petrosky et al.,"Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014," *MMWR and Morbidity and Mortality Weekly Report*, July 21, 2017, https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm.

[60] US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Elder Justice," accessed July 29, 2020, https://ovc.ojp.gov/topics/elder-justice.

state's discretion. This could mean further funding to programs supporting victims of sexual assault, spousal and child abuse, and other programs eligible for victim assistance funding.

Deposits into the Crime Victims Fund (from which VOCA victim assistance grants are funded) are decreasing; thus, the obligation cap set by Congress (which sets the amount of CVF funds available for distribution) continues to decrease. However, deposits into the CVF fluctuate each year as a result of how the CVF receives funds.[61] The amounts deposited into the CVF in FY 2018 and 2019 were the lowest since 2003—$444.8 million and $524 million, respectively. Between 2004 and 2017, the deposited amounts ranged from $641.8 million (in 2006) to $6.584 billion (in 2017, as the result of two very large settlements that accounted for about 86% of the amount collected to CVF[62]).[63] The fluctuation is an issue Congress would need to review. However, even with fewer funds available, requiring a greater allocation to underserved populations diversifies the populations[64]—including populations of individuals who are less advantaged based on their race, sex, age, ethnicity, ability, sexual orientation, religion, and nationality—and victimization types served by VOCA victim assistance funds.

Community violence intervention programs as direct services

Opponents of the proposed rule change may argue that the individuals served by community violence intervention programs are predominantly perpetrators of crime, not victims. However, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue absent an intervention.[65] While not every perpetrator is a crime victim, we know that being shot, being shot at, or witnessing a shooting doubles the probability that a young person will commit a violent act within two years.[66] The likelihood that a CVI program is not serving a victim of a crime is quite low. However, to appease this concern states awarding sub-grants could require, as a part of the application, that programs provide victimization data on the individuals currently served by the program or target data.

[61] The funds available in the Crime Victims Fund come from criminal fines, forfeited bonds, penalties, and special assessments. Additionally, gifts, bequests, and donations from private entities may also be deposited. Congress does not appropriate funding for the Crime Victims Fund. Congressional Research Service, "The Crime Victims Fund: Federal Support for Victims of Crime," April 2, 2020, https://crsreports.congress.gov/product/pdf/R/R42672.

[62] Doug Sword, "Shrinking victims fund signals tough times for appropriators," Roll Call, March 21, 2019, https://www.rollcall.com/2019/03/21/shrinking-victims-fund-signals-tough-times-for-appropriators/.

[63] Congressional Research Service, "The Crime Victims Fund: Federal Support for Victims of Crime," April 2, 2020, https://crsreports.congress.gov/product/pdf/R/R42672.

[64] In 2018, of those reporting, 70.5% of victims served were female, 52% were white, 5% were a part of the LGBTQ community and 42% of victims served were receiving services following domestic and/or family violence victimization. US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Victims of Crime Act Victim Assistance Formula Grant Program, Fiscal Year 2018 Data Analysis Report," 2018, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/2018-voca-annual-assistance-performance-report.pdf.

[65] Research and case studies have shown that through a combination of low-cost, violence intervention programs and much-needed firearms policy reforms, gun violence rates in communities of color can be cut in half in as little as two years.

[66] Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, "Firearm Violence, Exposure and Serious Violent Behavior," *Science* 308 (2005): 1323–1326.

Admittedly, community violence intervention programs may not serve victims immediately following their victimization. Some "victims" may not be served by a CVI program until years after their victimization. However, the 2016 regulation defines "direct services or services to victims of crimes" to include "efforts that . . . [a]ssist victims to stabilize their lives after victimization . . . or [r]estore a measure of security and safety for the victim."[67] "The phrase "after victimization" is given no timeframe. Of the 12 direct services listed for which funds may be used, only one requires that the service respond to the immediate needs of the victim—"immediate emotional, psychological, and physical health and safety."[68] Further, the regulation currently includes direct services that may not serve victims immediately following their victimization, including mental health counseling and care, peer-support, and public awareness.[69]

Perpetrators of crime may receive assistance

The proposed change to the definition of "crime victim or victim of crime" may stir up claims that aim to draw a thick line between perpetrators and victims of crimes. However, the proposed change would explicitly limit the definition to include "persons who are victims of a crime who have also perpetrated a crime," not anyone who has perpetrated a crime. The wording of this definition aligns with the DOJ's interpretation of the statute: a state may fund, for example, a batterer intervention program "if the state determines that the program is providing services to victims of crime (who are also batterers)."[70] Gun violence in communities of color with high crime rates creates a vicious cycle, where the exposure to violence, especially at a young age, increases the chance that the victim will commit a violent act. This is yet another example of a community of victims who may also perpetrate the violence they have fallen victim to. These victims of gun violence are in no less need of services than someone who has not taken that additional step to perpetrate violence.

Opponents may also argue that victim assistance funding should not be used for programs serving perpetrators of crime (even if they are victims), since there are other funding sources for those programs. However, the pre-2016 Guidelines explicitly prohibited VOCA victim assistance funds to be used "to offer rehabilitative services to offenders" and "support services to incarcerated individuals, even when the service pertains to the victimization of that individual."[71] However, the 2016 regulation removed the prohibition, recognizing that the prohibition "unnecessarily prevent[ed] States and communities from fully leveraging all available resources to provide services to these victims, who have been shown to have a great need for such services."[72]

[67] 28 C.F.R. § 94.102.
[68] 28 C.F.R. § 94.119(a).
[69] *See e.g.*, 28 C.F.R. § 94.119(c), (d), (j).
[70] US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Victims of Crime Act (VOCA) Administrators: VOCApedia," accessed October 27, 2020, https://ovc.ojp.gov/program/victims-crime-act-voca-administrators/vocapedia#DirectServices.
[71] Victims of Crime Act Victim Assistance Grant Program, 62 Fed. Reg. 19,607, 19,619 (April 22, 1997).
[72] Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,524 (July 8, 2016).

V. For consideration

While outside of the role of the administration in promulgating a regulation, it is worth noting the eligibility requirements that CVI programs will need to meet to obtain funding. For example, CVI programs that are eligible crime victim assistance programs, and not solely projects that another eligible crime victim assistance program is using VOCA funds toward, will need to (1) demonstrate the breadth and depth of financial support from sources other than the CVF,[73] in some instances demonstrating that at least 25% of the program's funding comes from sources other than the CVF,[74] and (2) assist potential recipients with seeking crime victim compensation benefits.[75] In promulgating this rule, the OVC should make clear that these programs will have to meet these eligibility requirements.

[73] 28 C.F.R. § 94.112(b) (2019).
[74] 28 C.F.R. § 94.112(b)(2) (2019).
[75] 34 U.S.C. § 20103(b)(1)(E). *See* 28 C.F.R. 94.113(d) (2019) . Assistance includes "referring such potential recipients to an organization that can so assist, identifying crime victims and advising them of the availability of such benefits, assisting such potential recipients with application forms and procedures, obtaining necessary documentation, monitoring claim status, and intervening on behalf of such potential recipients with the crime victims' compensation program."

RECOMMENDED ACTION MEMO
Agency: Department of Justice, Office for Victims of Crime (OVC)
Topic: Make Community Violence a Special Focus Area within OVC
Date: November 2020

Recommendation: Make community violence a special focus area of the Office for Victims of Crime Training and Technical Assistance Center.

I. Summary

Description of recommended executive action

Several community violence intervention (CVI) programs have proven effective at reducing gun violence in neighborhoods that are disproportionately impacted by the issue. Research has shown these interventions—including group violence intervention, evidenced-based street outreach, and hospital-based violence intervention—reduce violence without increasing the footprint of law enforcement officers. To support community organizations and public agencies in implementing and scaling CVI programs, the next administration should make community violence a special focus area of the Department of Justice (DOJ) Office for Victims of Crime's Training and Technical Assistance Center (OVC TTAC). This CVI "focus area" would provide training materials, technical assistance, and, where possible, grant funding to help scale evidenced-based gun violence interventions.

Overview of process

Every year, the director of DOJ's Office for Victims of Crime (OVC) is empowered to spend up to 5% of funding available for distribution within the Crime Victims Fund (CVF) to support programs that provide assistance to victims of crime.[1] Currently, the OVC director allocates some of these funds to support special focus areas within the OVC TTAC dedicated to combatting certain types of crimes, including human trafficking, terrorism, and tribal victim assistance. These focus areas provide valuable resources for organizations and agencies that work to prevent these crimes and support victims. Given the flexibility of the language in the statutory authorization of the CVF, the OVC director currently has the authority to immediately establish community violence as a special focus area of the OVC TTAC.

II. Current state

Gun violence is concentrated in a few centralized areas

On average, nearly 40,000 Americans are killed by guns each year—an average of 100 per day—and an additional 100,000 people are injured.[2] While these figures tell a tragic story nationally, their impact is felt most profoundly in certain communities. As with homicide in general, gun homicide (which makes up the vast majority of murders in America) tends to

[1] 34 U.S.C. §§ 20101(d)(4)(C); 20103(c). Each year Congress, as a part of appropriation for the DOJ, sets the obligation cap for the Crime Victims Fund, which limits the CVF funds available for distribution.

[2] CDC, Web-based Injury Statistics Query and Reporting System (WISQARS), "Fatal Injury Reports," https://www.cdc.gov/injury/wisqars. Figures represent an average of five years: 2013 to 2017.

cluster disproportionately in dense urban areas, particularly within impoverished communities of color. In 2015, half of all gun homicides in the US took place in just 127 cities; together, these cities contained less than a quarter of the country's population.[3] In American cities with significant populations of communities of color, such as New Orleans, Detroit, and Baltimore, the homicide rate rises up to 10 times higher than the national average.[4]

Black Americans in particular are disproportionately impacted by the gun violence epidemic, as they experience nearly 10 times the gun homicides, 15 times the gun assaults, and three times the fatal police shootings of white Americans.[5] In Chicago, for example, although Black residents comprise about one-third of the city's population, they made up almost 80% of homicide victims in both 2015 and 2016.[6] This phenomenon is even more acute among young Black men aged 15 to 34, who made up over half of the city's homicide victims, despite accounting for just 4% of the city's population. In contrast, white Chicagoans comprised about one-third of the city's population but made up approximately 5% of the city's homicide victims.[7]

Large concentrations of gun violence are also seen in particular neighborhoods within a single city. For example, in one area of Rochester, NY, a study found that young Black men experienced a murder rate of 520 per 100,000—over 100 times higher than the national average.[8] In Boston, 53% of the city's gun violence occurs in less than 3% of the city's intersections and streets.[9]

This high concentration of violence creates a vicious cycle,[10] and children who grow up in these neighborhoods are often exposed to the consequences of gun violence. A study of adolescents participating in an urban violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence.[11] The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—doubles the probability that a young person will commit a violent act within two years.[12] In other words, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue, absent an intervention.

CVI programs are proven to reduce gun violence

[3] Everytown for Gun Safety, "City Gun Violence," accessed September 1, 2020, https://everytown.org/issues/city-gun-violence/.

[4] Ted Heinrich, "Problem Management: The Federal Role in Reducing Urban Violence," accessed October 27, 2020, https://perma.cc/TTM8-QTLB.

[5] Everytown for Gun Safety, "Impact of Gun Violence on Black Americans," accessed September 1, 2020, https://everytown.org/issues/gun-violence-black-americans/#learn-more.

[6] The University of Chicago Crime Lab, "Gun Violence in Chicago, 2016," January 2017, 13. https://urbanlabs.uchicago.edu/attachments/c5b0b0b86b6b6a9309ed88a9f5bbe5bd892d4077/store/82f93d3e7c7cc4c5a29abca0d8bf5892b3a35c0c3253d1d24b3b9d1fa7b8/UChicagoCrimeLab%2BGun%2BViolence%2Bin%2BChicago%2B2016.pdf

[7] *Id.*

[8] David M. Kennedy, *Don't Shoot: One Man, A Street Fellowship, and the End of Violence in Inner-City America* (Bloomsbury USA, 2011): 14.

[9] Anthony A. Braga, Andrew V. Papachristos, & David M. Hureau, "The Concentration and Stability of Gun Violence at Micro Places in Boston, 1980–2008," *Journal of Quantitative Criminology* 26, no. 1, (2010): 33–53.

[10] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed September 1, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.

[11] Jonathan Purtle et al., "Scared safe? Abandoning the Use of Fear in Urban Violence Prevention Programmes," *Injury Prevention*, 21, no. 2 (2015), https://injuryprevention.bmj.com/content/21/2/140.

[12] Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, "Firearm Violence, Exposure and Serious Violent Behavior," *Science* 308 (2005): 1323–1326.

Research and case studies have shown that through a combination of low-cost, CVI programs and much-needed firearms policy reforms, gun violence rates in communities of color can be cut in half in as little as two years. These CVI programs provide comprehensive support to individuals who are at greatest risk of gunshot victimization. There are three main categories of CVI programs: group violence intervention programs, evidenced-based street outreach programs, and hospital-based violence intervention programs.

A. Group violence intervention (GVI) programs

GVI programs are structured around the fact that gun violence often impacts a very small and identifiable segment of a community. These programs seek to reach those individuals most at risk of gun violence and provide them with support to avoid future violent interactions. GVI programs have a few basic components:[13]

- *Form the team*: assemble a team of leaders from law enforcement, social service agencies, and organizations who have roots and connections to the community.
- *Gather the data*: identify the individuals most at risk for either committing or becoming victims of gun violence.
- *Communicate the message*: the team meets with the individuals and lets them know that the community cares about their wellbeing and safety, but that the shooting must stop.
- *Provide support*: the team provides resources to the individuals, including job and health supports. The team also supplies a single phone number that individuals can call to connect them to needed services in the future.
- *Follow through*: if a homicide occurs, the team follows through. Legal action is taken against responsible parties, but the program continues to support the individuals it has connected with.

A literature review of GVI-related programs, conducted in 2012, found that nine of the 10 eligible studies on GVI reported strong and statistically significant crime reductions due to the intervention.[14] Additional studies of specific programs include:

- Chicago. The city's Group Violence Reduction Strategy was associated with a 23% reduction in overall shooting behavior and a 32% reduction in gunshot victimization for target groups compared to similar groups that did not experience GVI.[15]

[13] Giffords Law Center, "Healing Communities in Crisis," March 10, 2016, 19-21, https://giffords.org/lawcenter/report/healing-communities-in-crisis-lifesaving-solutions-to-the-urban-gun-violence-epidemic/.
[14] Anthony A. Braga & David L. Weisburd, "The Effects of 'Pulling Levers' Focused Deterrence Strategies on Crime," 8 *Campbell Systematic Reviews* 6 (2012).
[15] Andrew V. Papachristos and David S. Kirk, "Changing the Street Dynamic: Evaluating Chicago's Group Violence Reduction Strategy," *Criminology & Public Policy* 14 (2015): 525–58.

- Cincinnati. The Cincinnati Initiative to Reduce Violence was associated with a 35% reduction in monthly group-related homicides and a 21% reduction in monthly total shootings.[16]

- New Haven. Project Longevity created a significant reduction of nearly five group-related shootings and homicides per month.[17]

- New Orleans. In 2012, New Orleans instituted a Group Violence Reduction Strategy, which led to a 17% reduction in overall homicides, 32% reduction in group-related homicides, 26% reduction in homicides that involved young Black male victims, and 16% reduction in both lethal and nonlethal firearms violence.[18]

B. Evidenced-based street outreach programs

Based on research that shows exposure to violence begets violence, street outreach programs treat gun violence as a communicable disease and try to interrupt its spread among the community. Specifically, these programs employ two groups of individuals—violence interrupters and outreach workers—to try to prevent the occurrence of violence.

Violence interrupters are part of the community and understand the dynamics of a particular neighborhood. They connect with individuals most at-risk to being exposed to or participating in gun violence, and try to mediate conflicts before they become violent. Meanwhile, outreach workers connect at-risk individuals to social support services.

Street outreach programs have been shown to be successful in reducing homicides and shootings.

- Chicago: CeaseFire-Chicago, a street outreach program implemented in several neighborhoods, was associated with statistically significant declines—ranging from 16% to 28%—in actual and attempted shootings.[19]

- Crown Heights, Brooklyn: An analysis of the Crown Heights Save Our Streets program showed that gun violence in Crown Heights was 20% lower than what it would have been relative to adjacent neighborhoods; the study also showed more than 100 potentially deadly conflicts involving 1,000 people were mediated through the program.[20]

C. Hospital-based violence intervention programs (HVIPs)

[16] Robin S. Engel, Nicholas Corsaro, & Marie Skubak Tillyer, "Evaluation of the Cincinnati Initiative to Reduce Violence (CIRV)," University of Cincinnati Policing Institute (2010).
[17] Michael Sierra-Arevalo, Yanick Charette, & Andrew V. Papachristos, "Evaluating the Effect of Project Longevity on Group-Involved Shootings and Homicides in New Haven, CT," Institution for Social and Policy Studies (2015).
[18] Nicholas Corsaro & Robin S. Engel, "Most Challenging of Contexts Assessing the Impact of Focused Deterrence on Serious Violence in New Orleans," *Criminology & Public Policy* 14, no. 3, (2015): 471–505.
[19] Wesley G. Skogan et al., "Evaluation of CeaseFire-Chicago," March 20, 2008, https://www.ncjrs.gov/pdffiles1/nij/grants/227181.pdf.
[20] Sarah Picard-Fritsche & Lenore Cerniglia, "Testing a Public Health Approach to Gun Violence: An Evaluation of Crown Heights Save Our Streets, a Replication of the Cure Violence Model," (2013), http://www.courtinnovation.org/sites/default/files/documents/SOS_Evaluation.pdf.

HVIPs focus services on young adults who are in the hospital due to a gunshot injury. These individuals are at an especially high risk for being involved in another gun violence incident in the future. HVIPs connect these young adults to caseworkers, who can identify the patients' needs and the necessary resources to help.

HVIPs have been associated with both a decrease in gun injury recidivism and a decrease in associated health care costs.

- San Francisco. Over a six-year period, the San Francisco Wraparound Project, an HVIP, was associated with a 400% decrease in repeat gun injuries.[21]

- Baltimore. A study of HVIPs in Baltimore found that these interventions reduced the injury recidivism rate by roughly 20%, which produced an estimated savings of $598,000 in health care costs.[22]

- Indianapolis. Project Prescription for Hope had a one-year gun injury recidivism rate of 0% relative to 8.7% for a historical control group.[23]

The OVC can be a resource for community violence intervention programs

Communities that face the most significant threat from gun violence often lack resources to start and scale new CVI programs.[24] Therefore, while CVI programs are organized and staffed at the community level, support from the federal government via funding and technical assistance could help the organizations running these programs on the ground.

Congress must step up and provide additional funding to scale CVI programs.[25] However, in the interim, the OVC could use existing funding and authority to begin to provide these supports.

The OVC was formally established within the DOJ in 1988 and currently resides within the DOJ's Office of Justice Programs (OJP). The OVC's primary mission is to support victims of crime, and to improve attitudes, policies, and practices that promote justice through grants funded by the CVF.[26] According to the OVC, this mission is accomplished by: (1) administering the CVF, which was established by the Victims of Crime Act (VOCA) to provide funding for state victim compensation and assistance programs, (2) supporting direct services for victims, (3) providing training programs for service providers, (4) sponsoring the

[21] Randi Smith et al., "Hospital-based Violence Intervention: Risk Reduction Resources That Are Essential for Success," *J. Trauma Acute Care Surg* 74, no. 4 (2013): 976–80.

[22] T.L. Cheng, et al., "Effectiveness of a Mentor-Implemented, Violence Prevention Intervention for Assault-injured Youths Presenting to the Emergency Department: Results of a Randomized Trial," *Pediatrics* 122 (2008): 938–46.

[23] G. Gomez et. al., "Project Prescription for Hope (RxH): Trauma Surgeons and Community Aligned to Reduce Injury Recidivism Caused by Violence," *Am. Surg*. 78 (2012): 1000–04.

[24] HUD Office of Policy Development & Research, "Neighborhoods and Violent Crime," Summer 2016, https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html.

[25] *See*, "Recommendations for the President's FY 2022 Budget Request."

[26] P.L. 98-473, Title II, Chapter XIV, Victims of Crime Act of 1984, October 12, 1984, 98 Stat. 2170. VOCA is codified at 34 U.S.C. §20101 et seq.

development of best practices for service providers, and (5) producing reports on best practices.[27]

The OVC administers the CVF funding available for distribution. The CVF does not receive appropriated funding. Rather, deposits to the CVF come from a number of sources, including criminal fines, forfeited bail bonds, penalties, and special assessments collected by the US attorneys' offices, federal courts, and the Federal Bureau of Prisons.[28] Each year Congress, as a part of appropriation for the DOJ, sets the obligation cap for the CVF, which limits funds available for distribution.

Most of CVF funding is statutorily directed to specific sources, including state agencies, US attorneys offices, and the Federal Bureau of Investigation (FBI). However, 5% of CVF funds are statutorily directed to grants made at the OVC director's discretion.[29] According to VOCA, discretionary grants must be distributed for: (1) demonstration projects, program evaluation, compliance efforts, and training and technical assistance services to crime victim assistance programs, (2) financial support of services to victims of federal crime, and (3) nonprofit victim service organizations and coalitions to improve outreach and services to victims of crime.[30]

In FY20, these discretionary grants totaled $94.85 million, down from $126.56 million in FY16, $103.80 in FY17, $178.84 in FY18, and $125.90 in FY19.[31] The allocations reflect the funds allocated for, but not necessarily committed to, discretionary grants. For example, in FY16, $125.27 million was committed for discretionary grants ($1.29 million less than the annual allocation).

Currently, the OVC director uses some of its discretionary funds to support dedicated training in "special focus areas," including human trafficking, mass violence and terrorism, and tribal victim assistance.

III. Proposed action

To increase support to community organizations and public agencies to implement CVI programs effectively, and thereby increase their prevalence and scope, the next administration should make community violence a special focus area of OVC TTAC. This CVI focus area would provide training materials, technical assistance, and, where possible, grant funding to help scale evidenced-based gun violence interventions.

A. Functions of the CVI focus area

Modeled after the existing human trafficking focus area within OVC TTAC,[32] the CVI focus area would:

[27] OVC, "What We Do," accessed September 1, 2020, https://ovc.ojp.gov/about/what-we-do.
[28] 34 U.S.C. § 20101.
[29] 34 U.S.C. § 20101(4).
[30] 34 U.S.C. § 20103(c).
[31] Congressional Research Service, "The Crime Victims Fund: Federal Support for Victims of Crime," April 2, 2020, https://crsreports.congress.gov/product/pdf/R/R42672.
[32] OVC TTAC, "Human Trafficking," accessed September 1, 2020, https://www.ovcttac.gov/views/HowWeCanHelp/dspHumanTrafficking.cfm.

- Provide technical assistance to CVI programs across the country. The CVI focus area would provide specialized training to DOJ grantees, provide instructions and advice for starting CVI programs, and share the latest evidence-based best practices to continuously improve CVI programs around the country. The TTAC already does this important work on other issues: TTAC's human trafficking team sent trainers to support a multidisciplinary group interested in forming a human trafficking task force in Ohio;[33] sent trainers to South Carolina to train 200 mental health care providers, legislators, law enforcement officers, and hotel staff on how to identify human trafficking victims;[34] and regularly offers personalized training on topics like "best fiscal practices in grant management," "ethics and confidentiality in victim services," and "program evaluation."[35]

- Offer professional development grants to CVI providers so that they can visit and learn from each other. The CVI focus area would provide small grants ranging from $1,000-$5,000 to allow CVI professionals to visit existing CVI programs and learn from them.[36] The TTAC currently offers similar assistance to human trafficking professionals: the TTAC helped facilitate and pay for a group of Texas human trafficking task force members to visit and shadow a human trafficking victim service organization in Georgia, so that Texas would be better equipped to design a statewide protocol for the provision of services to victims of human trafficking.[37]

- Where possible, provide programming grants to communities to create CVI programs. The OVC occasionally provides funding to communities and organizations that wish to start or grow CVI programs.[38] The CVI focus area could continue to provide support for these programs through discretionary grants.

- Establish a centralized database to track the effectiveness of these interventions. One of the most valuable contributions of a federal training focus area will be its ability to collect data on the effectiveness of these programs. Currently, the OVC does this for its human trafficking grant recipients: the Trafficking Information Management System (TIMS) serves as a centralized repository for grant-required performance metrics for all of OVC's human trafficking grant programs.[39]

- Provide a national network for CVI providers. The CVI focus area would provide a centralized place for organizations, agencies, and researchers to share research and

[33] OVC TTAC, "Human Trafficking: How We Can Help," accessed September 1, 2020, https://www.ovcttac.gov/views/HowWeCanHelp/dspHumanTrafficking.cfm.
[34] *Id.*
[35] *See e.g.*, OVC TTAC, "How We Can Help: Training," accessed September 1, 2020, https://www.ovcttac.gov/views/TrainingMaterials/dspTrainingByRequest.cfm; OVC TTAC, "How We Can Help: Training Technical Assistance," accessed September 1, 2020, https://www.ovcttac.gov/views/HowWeCanHelp/dspTrainingTechnicalAssistance.cfm.
[36] OVC TTAC, "Professional Development Scholarships," accessed September 1, 2020, https://www.ovcttac.gov/views/HowWeCanHelp/dspPDScholarship.cfm.
[37] *Supra* note 35.
[38] *See e.g.*, "Make it Happen: Addressing Trauma Among Young Men of Color," Grant awarded 2015, accessed October 27, 2020, https://ovc.ojp.gov/funding/awards/2015-vf-gx-k037.
[39] OVC TTAC, "TIMS Snapshot Report: Services for Victims of Human Trafficking," July 2018–June 2019, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/tims-snapshot-report-2018-2019.pdf.

best practices. In the context of human trafficking, the TTAC has set up an online portal, where grantees and others who have worked with the TTAC can share resources.[40]

B. CVI focus area funding

Funding for the CVI focus area would come from the OVC director's existing discretionary authority over 5% of CVF funds.[41] While the exact funding level available changes every year depending on where the distribution cap for the CVF is set, $311,010,988 was available in FY2019 for the OVC director to use at her discretion.[42]

IV. Legal justification

The OVC has the legal authority to create a focus area for CVI programs and fund it through the OVC director's discretionary funds. As previously discussed, the OVC receives funding from the CVF every year. These funds are statutorily allocated.

- $10 million is allocated for child abuse prevention and treatment.[43]
- Additional funds are directed to the US Attorneys' Offices and the FBI to support both agencies' provision of services for victims of federal crimes and to create a Victim Notification System.[44]
- Remaining funds are divided into three parts: 47.5% is allocated to crime victim compensation; 47.5% becomes grants for crime victim assistance that are allocated to state agencies by a formula; and 5% is made available for allocation pursuant to the OVC director's discretion.[45]

When determining how to spend the discretionary allocation, the OVC director must comply with several statutory mandates. At least 50% of the director's grants must fall into two categories: grants for "victim services, demonstration projects, program evaluation, compliance efforts, and training and technical assistance services to eligible crime victim assistance programs"; and grants for "nonprofit neighborhood and community-based victim service organizations and coalitions to improve outreach and services to victims of crime."[46] Any OVC director grants that are not directed to either of these two categories must be directed to "the financial support of services to victims of Federal crime by eligible crime victim assistance programs."[47]

The OVC director has flexibility in determining exactly how to meet these statutory requirements when spending discretionary funds. The director of the OVC is permitted to use CVF funds made available to him or her "to carry out programs of training and special workshops for the presentation and dissemination of information resulting from demonstrations, surveys, and

[40] OVC TTAC, "Human Trafficking Grantees Learning Community," accessed September 1, 2020, https://www.ovcttac.gov/views/LearningCommunities/Trafficking/dspLC_HumanTrafficking.cfm.
[41] 34 U.S.C. § 20101(4).
[42] OVC, "OVC Fiscal Year 2019 Awards," accessed October 27, 2020, https://ovc.ojp.gov/media/image/3356.
[43] 34 U.S.C. § 20101(d)(2).
[44] 34 U.S.C. § 20101(3).
[45] 34 U.S.C. § 20101(4).
[46] 34 U.S.C. § 20103(c).
[47] *Id.*

special projects."[48] There are no additional requirements restricting the topics of these trainings, workshops, demonstrations, surveys, or special projects. Moreover, nothing in the language of VOCA or its accompanying regulations appear to prevent the OVC director from designating community violence intervention as a special topic, akin to human trafficking or mass violence, under OVC TTAC. Therefore, while the vast majority of CVF funds are distributed to federal or state agencies, the OVC has the statutory authority and the ability to create a resource and training center that is dedicated to CVI programs.

CVI programs provide services to victims of gun violence. When allocating these funds, the OVC should be mindful of VOCA's definition of a "victim". While there do not appear to have been legal challenges to how the OVC has allocated CVF grant funding in the past, it is conceivable that a party could argue that grants to community programs are not sufficiently directed to individual victims.

However, this argument is not likely to succeed. Significantly, VOCA's definition of victim is intentionally general to encompass many forms of victims: "Crime victim or victim of crime means a person who has suffered physical, sexual, financial, or emotional harm as a result of the commission of a crime."[49] Under this definition, all people in neighborhoods that experience high levels of violence would likely be considered "victims," due to the psychological and emotional (if not physical) harm they endure. This, paired with the research showing perpetrators of gun violence and victims of gun violence are often the same people, lends credence to the position that even if CVI programs operate by first identifying perpetrators, these perpetrators are likely also future victims of violent crime, if they have not already been victims of violent crime.

[48] 34 U.S.C. § 20103(c)(3)(E)(ii).
[49] 28 C.F.R. § 94.102.

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Community Oriented Policing Services (COPS) Office
Topic: Addressing Gun Violence and Homicide through COPS Grant Funding
Date: November 2020

Recommendation: Re-establish gun violence and homicide prevention as priority problem/focus areas for COPS Office grants, and specifically encourage use of COPS grant funding to promote effective implementation of laws and strategies aimed at preventing gun violence and homicides through community-oriented approaches.

I. Summary

Description of recommended executive action

The Office of Community Oriented Policing Services (COPS Office), a component of the US Department of Justice (DOJ), advances the practice of community policing by providing information assistance and grant resources. The COPS Office awards grants to law enforcement agencies to hire community policing professionals; develop and test innovative policing strategies; and provide training and technical assistance to community members, local government leaders, and all levels of law enforcement.

The Obama administration expressly named gun violence and homicide among its priority focus areas in awarding COPS Hiring Program (CHP) grants, but the Trump administration significantly reoriented the program toward immigration enforcement and prosecutorial responses to violent crime generally. The new administration should therefore restore gun violence and homicide prevention as priority focus areas for COPS grants, in addition to community trust building and reform efforts. Through the scoring system it uses to select grant recipients, the administration should specifically prioritize the use of COPS grant funding to support state and local efforts, in communities disproportionately impacted by gun violence and/or homicide, to:

> (1) implement extreme risk protection order (ERPO), firearm relinquishment, and other laws specifically aimed at proactively preventing gun violence and homicides before they occur
>
> (2) work with federal law enforcement agencies and community members to detect and prevent gun trafficking
>
> (3) significantly expand utilization of strategies, such as Group Violence Intervention (GVI), that interrupt cycles of community violence through partnerships between law enforcement and community stakeholders

(4) effectively improve law enforcement clearance rates for shootings and homicides.

Overview of process and time to enactment

The Cops Hiring Program solicitation for 2020 grants opened on January 9, 2020, and applications were accepted through March 11, 2020.[1] If the COPS Office follows a similar timeline in 2021, it will have to work quickly to ensure that gun violence and homicide are identified as priority focus areas for 2021 CHP grants.

II. Current state

Background on COPS

The COPS program was created through the Violent Crime Control and Law Enforcement Act of 1994, codified at 34 U.S.C. §§ 10381-10389. The act directs the attorney general to make grants to states, units of local and tribal government, other public and private entities, and multi-jurisdictional or regional consortia for purposes set forth in the act.[2] This authorizing statute expressly gives "broad discretion" to the DOJ to allocate grants to promote 23 specified purposes, which are all generally linked to the goal of enhancing the crime prevention function of state and local law enforcement through community-policing and partnerships with community residents and stakeholders.[3]

The authorizing statute specifies numerous COPS grant purposes related to gun violence and homicide prevention, including, among others:

- developing and implementing innovative programs to permit members of the community to assist state, tribal, and local law enforcement agencies in the prevention of crime in the community
- increasing the number of law enforcement officers involved in activities that are focused on interaction with members of the community on proactive crime control and prevention
- establishing innovative programs to increase and enhance proactive crime control and prevention programs involving law enforcement officers and young people in the community
- increasing police participation in multidisciplinary early intervention teams

[1] Community Oriented Policing Service, US Department of Justice, "FY 2020 COPS Hiring Program (CHP) - Methodology," accessed October 27, 2020, https://cops.usdoj.gov/pdf/2020AwardDocs/chp/Methodology.pdf.

[2] 34 U.S.C. § 10381(a).

[3] *Id.*

- establishing, implementing, and coordinating crime prevention and control programs (involving law enforcement officers working with community members) with other federal programs that serve the community to better address the comprehensive needs of the community and its members

- providing specialized training to law enforcement officers to enhance their conflict resolution, mediation, problem solving, service, and other skills they need to work in partnership with members of the community

- developing new technologies to assist state, tribal, and local law enforcement agencies in reorienting the emphasis of their activities from reacting to crime to preventing crime, and training law enforcement officers to use such technologies

- participating in nationally recognized active shooter training programs

Federal law specifies that grant applications must, among other things, reflect consultation with community groups and demonstrate a specific public safety need. The applicant must identify related governmental and community initiatives that complement or will be coordinated with the proposal, certify that there has been appropriate coordination with all affected agencies, and demonstrate ongoing community support.[4]

Grants may be renewed and last up to three years.[5] All grant activities under the program are subject to DOJ monitoring, and may be required to submit to outcome evaluations and periodic reviews and reports.[6]

The term "community-oriented policing" is not defined by statute or regulation, and has been criticized as vague.[7] Under the Obama administration, the COPS Office interpreted this term to encompass three key components: (1) collaborative partnerships between law enforcement and the people they serve, (2) proactive and systematic examination of identified problems, and (3) organizational transformation to support these partnerships and problem-solving.[8]

At the start of the Obama administration, the COPS account in federal appropriations acts had shifted to non-hiring programs. However, as the result of the recession and state and local budget cuts to law enforcement agencies, Congress began once again directing COPS funding toward efforts to help agencies retain officers, and subsequent federal appropriations have

[4] 34 U.S.C. § 10382(c).
[5] 34 U.S.C. § 10383.
[6] 34 U.S.C. § 10385.
[7] *See* Nathan James et al., "Public Trust and Law Enforcement -- A Discussion for Policymakers," Congressional Research Service, updated July 13, 2020, https://crsreports.congress.gov/product/pdf/R/R43904.
[8] *See* Community Oriented Policing Service, US Department of Justice, "Community Policing Defined," revised 2014, https://cops.usdoj.gov/RIC/Publications/cops-p157-pub.pdf.

continued to prioritize the use of COPS funding for law enforcement hiring and retention support.[9]

Although there was a significant drop in funding during the Obama administration, the CHP continues to be the largest grant program administered by the COPS Office. COPS grants are competitive, and congressional appropriations have been historically insufficient to fund all grant requests.[10] Accordingly, each year, the COPS Office scores and ranks each submitted application to determine which applications to fund. The electronic CHP application system assigns a specific (and undisclosed) number of points for each answer an applicant jurisdiction provides.[11]

Consistent with the statutory criteria, the DOJ gives points to applicants that best demonstrate "a specific public safety need" and show an "inability to address the need without Federal assistance,"[12] and to applicants that best "explain how the grant will be utilized to reorient the affected law enforcement agency's mission toward community-oriented policing or enhance its involvement in or commitment to community-oriented policing."[13] The DOJ also gives points to applicants in jurisdictions with higher crime rates and comparatively lower fiscal health. Additionally, the DOJ scores applicants on how their proposals relate to that year's federal goals. In various years, the DOJ has awarded points for applicants that gave work to military veterans; adopted specified management practices (such as making regular assessments of employee satisfaction; operated an early intervention system to identify officers with specified personal risks); or experienced certain catastrophic events, such as a terror attack or school shooting.[14]

Importantly, since the fiscal year 2011 application cycle, the COPS Office has determined priority focus areas for CHP, and awarded bonus points to applications that seek funding to address one of that year's priority areas in their community. The bonus points give a competitive advantage to applicants advancing community-oriented policing work in the program's focus areas.[15]

COPS under the Obama administration

Under the Obama administration, the COPS Office played a significant role in a number of initiatives to build police–community trust, including the President's Task Force on 21st Century Policing and the promising Collaborative Reform Initiative.[16]

[9] Congressional Research Service, "In Focus: Community Oriented Policing Services (COPS) Program," updated January 30, 2020, https://crsreports.congress.gov/product/pdf/IF/IF10922.

[10] *Id.*

[11] *See City of Los Angeles v. Barr,* 929 F.3d 1163 (9th Cir. 2019).

[12] 34 U.S.C. §§ 10382(c)(2), (c)(3).

[13] *Id.* § 10382(c)(10).

[14] *Barr,* 929 F.3d at 1171.

[15] *Id.* at 1172.

[16] Office of Public Affairs, US Department of Justice, "Department of Justice Awards $12 Million to Advance Community Policing Efforts and Collaborative Reform," October 6, 2016,

The Obama administration also repeatedly identified "homicide" and "gun violence" prevention as other priority areas for COPS grants. In FY 2013, the CHP funded 48 agencies that had selected either "homicide" or "gun violence" as their jurisdiction's problem area, and committed to hire 319 officers to address these problems.[17] Similarly, in FY 2014, 46 funded agencies selected either "homicide" or "gun violence" as the jurisdiction's problem area, and committed to hire 400 officers to address these problems.[18]

The focus areas for CHP in 2016 were: (1) building trust, (2) homeland security, (3) homicide and gun violence, and (4) school resource officers.[19] For FY 2016, 24 funded agencies selected either "homicide" or "gun violence" as their jurisdiction's problem area, and committed to hire 225 officers to address these problems.[20] Cities that received COPs hiring grants that year to focus specifically on gun violence included: Camden, New Jersey; Hartford, Connecticut; Vallejo, California; and Miami, Florida.[21]

COPS under the Trump administration

Under the Trump administration, gun violence and homicide prevention ceased to be a priority focus area for CHP grantmaking, and the initiatives described above were altered to focus on immigration enforcement and prosecutorial approaches to violent crime generally, such as Operation Relentless Pursuit.[22] In 2020, the administration required applicants to identify specific crime and disorder problem/focus areas, and gave preferential consideration to those who chose the focus areas of (1) violent crime, (2) "homeland & border security problems," and (3) school-based policing.[23]

As part of its focus on immigration enforcement, the Trump administration chose to withhold CHP funding from sanctuary cities. This led the Ninth Circuit Court of Appeals in *City of Los*

https://www.justice.gov/opa/pr/department-justice-awards-12-million-advance-community-policing-efforts-and-collaborative.

[17] Community Oriented Policing Service, US Department of Justice, "COPS Hiring Program Award Selection Methodology," 2013, https://cops.usdoj.gov/pdf/2013AwardDocs/CHP/2013-CHP-Methodology.pdf.

[18] Community Oriented Policing Service, US Department of Justice, "FY 2014 COPS Hiring Program Selection Methodology," 2014, https://cops.usdoj.gov/pdf/2014AwardDocs/CHP/2014CHP-Methodology.pdf.

[19] Community Oriented Policing Service, US Department of Justice, "COPS Hiring Program Selection (CHP) Methodology," 2016, https://cops.usdoj.gov/pdf/2016AwardDocs/chp/2016_CHP_Methodology.pdf.

[20] *Id.*

[21] Community Oriented Policing Service, US Department of Justice, "2016 Award List by Problem Area," accessed October 27, 2020, https://cops.usdoj.gov/pdf/2016AwardDocs/chp/Award_List_by_Problem%20Area.pdf.

[22] US Department of Justice, "Justice Department Releases $61 Million in Awards to Support Efforts to Combat Violent Crime in Seven U.S. Cities," May 11, 2020, https://www.justice.gov/opa/pr/justice-department-releases-61-million-awards-support-efforts-combat-violent-crime-seven-us.

[23] Community Oriented Policing Service, US Department of Justice, "COPS Hiring Program," accessed October 27, 2020, https://cops.usdoj.gov/chp. *See also* Community Oriented Policing Service, US Department of Justice, "2017 COPS Hiring Program (CHP) Methodology," 2017, https://cops.usdoj.gov/pdf/2017AwardDocs/chp/Methodology.pdf (establishing similar focus areas for fiscal year 2017).

Angeles v. Barr to consider the scope of the DOJ's discretion in interpreting the COPS authorizing statute's purpose in administering the CHP program.[24] The municipal plaintiffs in that case specifically challenged two of the many factors the DOJ used to determine the scores for each applicant in 2017: (1) whether the application focused on control of illegal immigration, and (2) whether the applicant would certify that it would cooperate with federal law enforcement agencies regarding certain immigration matters. The court upheld the DOJ's administration of the program, holding that the DOJ did not exceed its statutory authority in awarding bonus points to applicants that selected the illegal immigration focus area, or provided the requested certification. Notably, the majority found that the COPS Office was authorized to fund programs in support of any of the purpose areas listed in the statute.[25]

This ruling helps establish that the new administration will have a significant degree of discretion and flexibility to award COPS grants for select priorities, including implementation of state and local gun safety laws, investment in community-based violence intervention strategies, and efforts to improve clearance rates for shootings and homicides.

III. Proposed action

We expect a significant proportion of COPS funding in the near future will be directed to efforts to oversee and reform police departments, and build police-community trust and partnerships.[26] We strongly support these efforts and believe they are critical to addressing gun and community violence.

The next administration should also once again make gun violence and homicide prevention priority focus areas for the CHP, and encourage use of CHP grant funding to support state and local efforts in communities disproportionately impacted by gun violence and/or homicide, to:

> (1) implement extreme risk protection order (ERPO), firearm relinquishment, and other laws specifically aimed at proactively preventing gun violence and homicides
>
> (2) work with federal law enforcement agencies and community members to detect and prevent gun trafficking
>
> (3) significantly expand the utilization of strategies, such as Group Violence Intervention (GVI), that interrupt the cycles of community violence through partnerships between law enforcement and community stakeholders

[24] 929 F.3d 1163 (9th Cir. 2019).
[25] 929 F.3d at 1170, n. 2 ("Congress has set aside funds that could be expended for any of § 10381's purposes. Appropriations bills have directed funds "for community policing development activities in furtherance of [§ 10381's purposes]" and "for the collaborative reform model of technical assistance in furtherance of [§ 10381's purposes]," ...as well as for the hiring and rehiring of additional career law enforcement officers.").
[26] *See* President's Task Force on 21st Century Policing, "Final Report of the President's Task Force on 21st Century Policing," Office of Community Oriented Policing Services, May 2015, https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

(4) effectively improve law enforcement clearance rates for shootings and homicides

The DOJ should adjust the scoring system used to choose recipients for CHP funding to prioritize grant applications which propose to dedicate COPS funding for these purposes.

Making gun violence and homicide prevention priority problem/focus areas

As mentioned above, gun violence and homicide were already recognized as priority focus areas for CHP grants from 2012 through 2016. Gun violence and homicide have remained at intolerably high levels, and preliminary data indicates that gun violence spiked significantly in 2020. A strong body of research has also demonstrated that law enforcement agencies' failure to protect communities from epidemic levels of gun violence and homicide is both a significant cause and effect of community distrust and estrangement from law enforcement.[27] Effective investment in proactive, preventative measures to keep and remove firearms from individuals found to pose a significant danger to self or others, and to refocus law enforcement resources on prevention of and accountability for shootings and homicides can lead to significant reductions in violence and reinforce gains in community trust and partnership.

(1) Use of COPS funding to support implementation of extreme risk laws and other state and local gun safety laws

A growing number of states and local governments have enacted gun safety laws that call upon law enforcement to proactively address gun violence and homicide through preventative community-oriented strategies. As described below, these strategies include extreme risk protection orders, firearm relinquishment requirements, gun dealer oversight, lost and stolen firearm reporting requirements, and firearm purchaser permitting. COPS funding should be used to support implementation of these and similar laws at the state and local level.

A. Extreme risk protection orders

In September 2019, the House Judiciary Committee reported a bill that would create a new grant program, to be administered by the COPS Office, that would provide funding assistance to support states' implementation of extreme risk protection order laws.[28] However, existing COPS Office programs, including the CHP, could support these same purposes without new legislation.

Extreme risk laws provide a strategy for intervening in a civil capacity with individuals who may be experiencing a mental health crisis or who are otherwise a significant danger to themselves or others. Nineteen states and DC have enacted extreme risk protection order (ERPO) laws authorizing law enforcement officers, and in some states, families, household members, and

[27] See Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 2020, https://lawcenter.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf.
[28] H.R. 1236, 116th Cong. (2019).

other specified individuals, to petition courts directly for a civil protection order that temporarily restricts a person's access to guns when they are found by a judge to present a significant risk of harm to self or others in the near future.[29] This civil remedy is vital to preventing gun violence by allowing the people who are most likely to observe warning signs of violence to take concrete steps to prevent shootings before they occur. In most cases, ERPO petitions are filed by law enforcement agencies, or officers who work closely with family members and other members of the community to gather and present necessary evidence, and prevent violent tragedy before it occurs.[30]

Properly implemented and utilized extreme risk laws help to prevent mass shootings and gun homicides.[31] States are already using these laws to temporarily disarm individuals who have made significant and credible threats of violence. Extreme risk laws also save lives from suicide by creating a tool to intervene proactively and keep those at risk of hurting themselves from accessing the most lethal means of suicide during temporary periods of crisis.[32]

Law enforcement officers participate in petitions for extreme risk protection orders in a way that fundamentally differs from traditional approaches. Typically, law enforcement reacts to crimes by arresting and prosecuting offenders. Extreme risk laws are different and innovative because they work primarily through a civil, rather than criminal, process. Extreme risk laws call on law enforcement officers to bear witness to threats to the community; partner with community residents to gather necessary evidence to present in civil court; and proactively participate in a civil judicial process to reduce these threats through the removal of firearms from high-risk individuals. In this way, extreme risk laws exemplify all three elements of community policing: partnership with the community, transformational change, and problem solving. The DOJ should therefore prioritize the use of CHP funding to support robust, effective, and equitable implementation of ERPO laws in communities that identify gun violence and homicide as key problem areas.

Law enforcement officers may be able to implement and utilize these laws most effectively if they are trained to recognize and proactively respond to individuals who exhibit clear warning

[29] *Id.*

[30] See, e.g., Garen J. Wintemute, MD, MPH, et al, "Extreme Risk Protection Orders Intended to Prevent Mass Shootings," *Annals of Internal Medicine* (2019), https://www.acpjournals.org/doi/10.7326/M19-2162; Giffords Law Center to Prevent Gun Violence, "Preventing the Next Parkland: A Case Study of Broward County's Use and Implementation of Florida's Extreme Risk Law," February 2020, https://lawcenter.giffords.org/wp-content/uploads/2020/02/Giffords-Law-Center-Preventing-the-Next-Parkland-Report.pdf.

[31] *Id.*

[32] Jeffrey W. Swanson, et al., "Implementation and Effectiveness of Connecticut's Risk–based Gun Removal Law: Does it Prevent Suicides." *Law & Contemporary Problems* 80 (2017): 179–208; Jeffrey W. Swanson, et al., "Criminal Justice and Suicide Outcomes with Indiana's Risk-Based Gun Seizure Law." *The Journal of the American Academy of Psychiatry and the Law* (2019); Aaron J. Kivisto and Peter Lee Phalen, "Effects of Risk–based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015," *Psychiatric Services* 69, no. 8 (2018): 855–862.

signs of imminent violence, and also trained to recognize and avert racial and other biases in implementing these laws.[33] CHP funding may appropriately be used proactively for this training.

B. Firearm relinquishment laws

Firearm relinquishment laws help to verify that gun owners who become legally ineligible to keep or possess guns, such as those convicted of a domestic violence offense, actually comply with the law, and transfer their firearms to an authorized third party or law enforcement.

There is no federal law regarding relinquishment of firearms by people who have become prohibited from possessing them. Though people may be prosecuted and incarcerated for illegally retaining their firearms after a criminal conviction or other firearm-prohibiting event, federal law provides no standard mechanism to proactively ensure that such individuals relinquish their firearms.

Unfortunately, in most contexts, the majority of states also rely largely on the honor system, instead of proactively ensuring that people relinquish their weapons once they become prohibited from owning them. An analysis by the *Chicago Tribune* in 2019, for instance, found that nearly 80% of Illinois residents whose firearm licenses had been revoked by state law enforcement may still have been armed, because law enforcement had not recovered these prohibited individuals' firearms, or required any verification that they relinquished them themselves.[34] Similarly, reports from California's Department of Justice indicate that in 2018 alone, more than 11,000 Californians who became newly prohibited from possessing guns unlawfully failed to relinquish their weapons.[35]

However, some state and local governments have implemented effective firearm relinquishment laws, especially to ensure firearms are removed from people who have perpetrated domestic violence, or who become subject to domestic violence, extreme risk, and other violence-related protective orders. Many of these laws require newly prohibited gun owners to sell or transfer their firearms within specified time periods and provide receipts and/or affidavits to courts or law enforcement verifying that they relinquished all firearms.

Research has shown that these requirements are effective: laws which require people who become subject to domestic violence-related firearm prohibitions to verify that they relinquished

[33] See, e.g., Jeffrey W. Swanson, "The color of risk protection orders: gun violence, gun laws, and racial justice," *Injury Epidemiology* 7, no. 46 (2020), https://injepijournal.biomedcentral.com/articles/10.1186/s40621-020-00272-z.

[34] Annie Sweeney, Stacy St. Clair, Cecilia Reyes, and Sarah Freishtat, "More than 34,000 Illinoisans Have Lost their Right to Own a Gun. Nearly 80% May Still be Armed," *Chicago Tribune*, May 23, 2019, https://bit.ly/2HQpFqJ.

[35] Office of the Attorney General, "APPS 2018: Annual Report to the Legislature," California Department of Justice, March 1, 2019, 1, https://oag.ca.gov/system/files/attachments/press-docs/apps-2018.finaldocx.pdf (noting that "an annual record number of 11,333 prohibited persons were added to the APPS [Armed Prohibited Persons System] database" in 2018).

their guns were linked to a 16% reduction in intimate partner gun homicides.[36] After King County, Washington, established a dedicated law enforcement unit tasked with removing guns from people subject to domestic violence protective orders, the number of firearms recovered from these prohibited individuals quadrupled.[37] In California, a dedicated state law enforcement team tasked with proactively recovering firearms from unlawfully armed individuals proactively recovered more than 2,100 illegally owned firearms in 2019.[38]

These efforts require proactive partnerships between law enforcement, courts, and community members, including newly prohibited gun owners, who should work together to prevent firearm violence and homicide, and reduce the risk that community members will be subsequently arrested and prosecuted for unlawful possession of firearms. By involving law enforcement in preventative efforts to address gun violence and homicide and reduce arrest and incarceration, these laws can help build trust and legitimacy while more effectively and justly keeping vulnerable community members, especially victims of domestic violence, safer from harm.

C. Oversight of gun dealers

Federal law requires gun retailers to obtain a federal license from the ATF, but oversight of these licensees is strictly limited. For this reason, 26 states have enacted their own laws, providing for stronger local oversight of businesses that sell firearms. Sixteen of these states and DC require gun dealers in their jurisdictions to obtain a state license, and many impose stricter safety, security, and transparency requirements than federal law.[39] COPS funding may help states implement these laws.

For example, Illinois enacted a law in 2019 that requires gun dealers in the state to obtain a license from the state police, and comply with specified regulations governing storage of firearms, employee training, and other safety concerns.[40] In Maryland, state police are directed to license handgun dealers, ensure dealers' compliance with state laws regarding the retention of sale records, and inspect dealers' inventory and records at least once every two years.[41]

These kinds of laws are effective. A 2009 study found that cities in states that comprehensively regulate retail firearms dealers and cities where these businesses undergo regular compliance

[36] AprilM. Zeoli, et al., "Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations With Intimate Partner Homicide," *American Journal of Epidemiology* 187, no. 11 (2018): 2365–2371.

[37] Chris Ingalls, "New Rapid Response Team Disarms Accused Abusers," King 5 News, February 8, 2018, https://kng5.tv/2VKdFMH.

[38] Office of the Attorney General, "APPS 2019: Annual Report to the Legislature," California Department of Justice, accessed October 27, 2020, 17, https://oag.ca.gov/system/files/attachments/press-docs/APPS%202019%20Report.pdf.

[39] See Giffords Law Center to Prevent Gun Violence, "Gun Dealers," accessed October 27, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/gun-sales/gun-dealers/.

[40] 2017 IL SB 337 (codified at 430 Ill. Comp. Stat. Ann. 68/5-1, et seq.).

[41] Md. Code Ann., Pub. Safety §§ 5-110, 5-145.

inspections have significantly lower levels of gun trafficking than other cities.[42] The International Association of Chiefs of Police has also recommended that state and local governments enact their own dealer licensing requirements, because they can respond to specific community concerns, and because state and local oversight of licensees helps reduce the number of corrupt and irresponsible dealers.[43]

These laws require law enforcement staffing and resources for proper implementation. They also require law enforcement to interact with community members in a proactive manner to identify patterns of corrupt or irresponsible gun dealer practices that fuel the black market supply of firearms. CHP funding should be available for these purposes.

D. Reporting of lost or stolen firearms

Stolen guns also enter the illegal market, and are an appealing source of firearms for people who are legally prohibited from acquiring guns, or intend to commit crimes. Laws that require firearm owners to notify law enforcement about the loss or theft of a firearm, therefore, serve several public safety functions by helping deter gun trafficking and straw purchasing. Without reporting laws, straw purchasers can often falsely claim that a gun they bought and gave to a prohibited person was lost or taken in an unreported theft. Reporting laws also help ensure that prohibited persons—such as people who have a serious criminal conviction or are subject to a domestic violence restraining order—cannot falsely claim that guns have been lost or stolen when law enforcement acts to remove firearms from their possession. Twelve states and DC require firearm owners to report the loss or theft of at least some firearms to law enforcement.[44]

In order for lost and stolen reporting laws to be effective, law enforcement must have the trust of the community members, and an accurate and efficient method for recording reports of lost and stolen firearms. This requires resources, which CHP funding could provide.

E. Firearm purchaser permitting

Twelve states and DC require individuals to obtain a license or permit from law enforcement before purchasing or owning at least some firearms.[45] These laws ensure that gun owners have passed a background check before they purchase a gun. In contrast to states which require a background check at the point of sale of a firearm, licensing laws typically require an in-person

[42] Daniel W. Webster et al., "Effects of State-Level Firearm Seller Accountability Policies on Firearms Trafficking," *J. Urban Health* 86 (2009): 525.
[43] Int'l Ass'n of Chiefs of Police (IACP), "Taking a Stand: Reducing Gun Violence in Our Communities," August 3, 2007, 14, https://www.theiacp.org/resources/taking-a-stand-reducing-gun-violence-in-our-communities.
[44] See Giffords Law Center to Prevent Gun Violence, "Reporting Lost & Stolen Guns," accessed October 27, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/reporting-lost-stolen-guns/.
[45] Giffords Law Center to Prevent Gun Violence, "The Case for Firearm Licensing," April 2020, https://lawcenter.giffords.org/wp-content/uploads/2020/04/Giffords-Law-Center.The-Case-for-Firearm-Licensing.pdf.

application at law enforcement agencies, which provides an additional safeguard against fraud or inaccuracies that could allow ineligible individuals to obtain guns unlawfully.

In addition, licensing laws that require periodic renewal can also reduce gun crimes by helping law enforcement confirm that a gun owner remains eligible to possess firearms and facilitating the removal of firearms from people who become ineligible. Furthermore, many states will only issue or renew firearm licenses after an applicant has completed a safety training course, and firearm safety tests showing that the applicant knows relevant gun laws and how to safely load, fire, and store a gun.[46]

Studies show that these components of licensing laws can lead to significant reductions in gun homicides, gun suicides, and mass shootings.[47] Licensing laws also are associated with reduced rates of gun trafficking and crime gun diversion.[48] One reason these laws may be so effective is that they mandate face-to-face interaction with law enforcement. Research suggests that people seeking to commit crimes are more deterred from purchasing a gun when a background check is conducted by a law enforcement officer than when it is conducted by a federally licensed firearms dealer.[49]

Requiring prospective purchasers to interact with law enforcement also appears to deter straw purchasing.[50] Straw purchasing—in which a purchaser buys a gun on behalf of another individual—is the most common way guns are diverted to the illegal market.[51] People may be less likely to misrepresent themselves and their intentions when face-to-face with law enforcement as opposed to in a gun store.

[46] *Id.*

[47] Kara E. Rudolph et al., "Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides," *American Journal of Public Health* 105, no. 8 (2015): e49–e54; Cassandra K Crifasi et al., "Effects of Changes in Permit-to-purchase Handgun Laws in Connecticut and Missouri on Suicide Rates," *Preventive Medicine* 79 (2015): 43–49; Daniel Webster, et al., "Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides," *Journal of Urban Health* 91, no. 2 (2014): 293–302; Cassandra K. Crifasi, et al., "Association Between Firearm Laws and Homicide in Urban Counties," *Journal of Urban Health* 95, no. 3 (2018): 383–390.

[48] Daniel W. Webster et al., "Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns," *Injury Prevention* 7, no. 3 (2001): 184–189; Glenn L. Pierce et al., "Impact of California Firearms Sales Laws and Dealer Regulations on the Illegal Diversion of Guns," *Injury Prevention* 21, no. 3 (2015): 179–184; Daniel W. Webster et al., "Preventing the Diversion of Guns to Criminals through Effective Firearm Sales Laws," in *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis*, eds. Daniel W. Webster and Jon S. Vernick (Baltimore, MD: Johns Hopkins University Press, 2013), 109-122.

[49] Cassandra K. Crifasi, Alexander D. McCourt, Daniel W. Webster, "The Impact of Handgun Purchaser Licensing on Gun Violence," accessed October 27, 2020, https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_docs/Impact_of_Handgun.pdf.

[50] Kara Rudolph, Elizabeth Stuart, Jon Vernick, and Daniel Webster, "Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides," *American Journal of Public Health* 105, no. 8 (2015): e49–e54.

[51] Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers," June 2000, https://giffords.org/wp-content/uploads/2020/07/Following-the-Gun_Enforcing-Federal-Laws-Against-Firearms-Traffickers-1.pdf.

Like all the state gun laws discussed above, firearm purchaser permitting requires a considerable investment of law enforcement time and resources. Most of this time and resources are not spent investigating and prosecuting crimes; rather, they are spent informing the public of legal requirements, and processing applications. Implementation occurs in this way, and enforcement can occur primarily through the regulation of gun sellers, who must ensure that all gun buyers have licenses. Law enforcement must monitor and inspect gun sellers to ensure that they are only selling guns to license holders. This approach focuses on bringing businesses and gun purchasers into compliance with the licensing requirements, rather than prosecuting non-compliant individuals. This oversight requires law enforcement to work in a spirit of cooperation, rather than conflict, with businesses and the public to fully implement the law. The COPS Office should prioritize the use of CHP funding to assist with effective implementation of these laws using this approach.

(2) Federal efforts to reduce gun trafficking

In many cases, gun trafficking crosses jurisdictional boundaries. Gun traffickers take advantage of our nation's porous gun laws by buying guns in states with weak gun laws and illegally reselling them in states with strong gun laws. Gun traffickers often target particular localities as sources for the guns they sell. They often choose to sell those guns in other localities where there is a strong market for illegal guns.[52]

Federal law enforcement efforts to reduce gun trafficking are therefore dependent on partnerships with both local law enforcement and members of the community. The gun tracing process often begins when a local law enforcement officer recovers a gun that has been used in a crime. The officer can then submit the firearm's make, model, and serial number to the ATF, and the ATF can trace the gun. In this way, gun trafficking investigations necessarily involve partnerships between federal and local law enforcement. They also involve eTrace, the system developed by the ATF so law enforcement agencies across the country can quickly request gun tracing. The COPS statute explicitly encourages the use of COPS funding for the development of "interoperable communications technologies" like eTrace.[53]

As the House Committee on Appropriation recognized in its report on its FY 2020 bill, law enforcement agencies often submit incorrect information to the ATF for firearms tracing. The committee urged the ATF to increase trace submission training for law enforcement agencies, to include online training.[54] COPS funding could also support this training.

Gun trace data collected by the ATF can be used to identify the sources of crime guns. The sources may be a gun dealer or dealers, or a gun trafficking ring localized in a community far from where the guns were recovered. Turning gun trace information into actionable leads often involves talking to members of the community that have knowledge about the sources of crime

[52] Brian Knight, "State Gun Policy and Cross–state Externalities: Evidence from Crime Gun Tracing," *American Economic Journal: Economic Policy* 5, no. 4 (2013): 200–229.
[53] 34 U.S.C. § 10381(b)(8).
[54] H.R. Rep. No. 116-455 (2020): 81, https://www.congress.gov/116/crpt/hrpt455/CRPT-116hrpt455.pdf.

guns. Federal law enforcement officers may have difficulty doing these investigations because they lack the necessary connections in the community. Consequently, they are often dependent on local police to make these connections.

Local law enforcement agencies are often focused on violent crimes occurring within their own communities. Re-orienting them to focus on the source of guns that are being used in violent crimes in other communities may require transformational change. This kind of transformational change within police departments is one of the elements of community oriented policing, and requires training and funding, which can be provided by CHP grants.

An example of what can be accomplished to address gun trafficking through coordination between federal and local law enforcement is shown through the Youth Crime Gun Interdiction Initiative (YCGII). The YCGII, part of the ATF's national illegal firearms trafficking prevention program in the 1990's, developed information about how juveniles and criminals illegally obtain crime guns, and used that information to support federal, state, and local law enforcement efforts to reduce illegal access to firearms. A cornerstone of YCGII was support for comprehensive crime gun tracing by law enforcement agencies. In 1997, 17 cities across the United States participated in the YCGII. By 2000, the number of participating jurisdictions increased to 50. The YCGII made substantial accomplishments both in tracing and investigative activity.[55]

Gun traffickers constitute a problem both in the community where the guns are used and in the community where the guns originate. In order to solve this problem, local law enforcement must often cooperate with federal law enforcement efforts. In *City of Los Angeles v. Barr,* the Court upheld the requirement that CHP grant applicants certify that they would cooperate with federal law enforcement efforts to reduce illegal immigration. While no certification requirement is necessary with respect to gun trafficking, funding should be directed to helping local law enforcement work with federal law enforcement to stop crime guns from originating in their communities.

(3) Use of COPS funding for community violence interruption strategies, such as Group Violence Intervention

Community violence interruption strategies, especially the Group Violence Intervention (GVI) strategy discussed below, have demonstrated how robust partnerships between law enforcement and community stakeholders can help achieve significant reductions in shootings and homicides in a short period of time, while also building community trust and reducing law enforcement agencies' traditional reactive approaches to "anti-gang" enforcement.

Shootings and homicides in America are highly concentrated in our cities, particularly within city neighborhoods marked by high levels of racial segregation, severe concentrated poverty, and

[55] Bureau of Alcohol, Tobacco, Firearms & Explosives, "Youth Crime Gun Interdiction Initiative Performance Report for the Senate and House Committees on Appropriations Pursuant to Conference Report 105-825, October 1998," February 1999, https://www.atf.gov/file/5601/download.

estrangement from law enforcement. An analysis by *The Guardian* observed that more than a quarter of the nation's gun homicides occurred in city neighborhoods containing just 1.5% of the US population.[56] This violence imposes an enormously unequal burden on communities of color, and Black men in particular. Black men constitute just 6% of the US population, but account for more than half of the nation's gun homicide victims.[57]

Traditional law enforcement approaches often fail to recognize that the vast majority of shootings—even in our most distressed and homicide-plagued neighborhoods—are perpetrated by a relatively tiny segment of the community, affiliated with loosely organized street groups, and that people typically join these groups not because they are prone to violence, but because they are seeking protection *from* it. According to a research review by the US Justice Department, young people most commonly join these groups seeking safety and security.[58] People who have been victims of or witnesses to violence are particularly likely to join violent street groups, and are at significantly higher risk of both perpetrating violence, and being shot or killed.

In multiple cities, intervention strategies designed to interrupt cycles of group-related violence and retaliation have been remarkably effective.[59] For example, in some cities, including Stockton and Oakland, California, and Camden, New Jersey, law enforcement agencies have been able to leverage and cement gains in community trust by implementing initiatives like the Group Violence Intervention (GVI) strategy, which actively refocuses law enforcement resources around the prevention of lethal violence and protection of people at highest risk. To be effective, this strategy relies on a robust partnership between law enforcement, community leaders, and service providers.

[56] Aliza Aufrichtig, et al., "Want to fix gun violence in America? Go local," *The Guardian*, January 9, 2017, https://www.theguardian.com/us-news/nginteractive/2017/jan/09/special-report-fixing-gun-violence-in-america. In 2019, the National Network for Safe Communities confirmed that at least half of homicides and nonfatal shootings involve people—as victims and/or perpetrators—known by law enforcement to be affiliated with "street groups" involved in violence constituting, on average, less than 0.6% of a city's population, and an even smaller percentage actually perpetrate violent crime. See Stephen Lurie, et al., "The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities (forthcoming); Stephen Lurie, Alexis Acevedo, and Kyle Ott, "Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/nnsc_gmi_concentration_asc_v1.91.pdf; Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 2020, 31-32, https://lawcenter.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf

[57] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed October 27, 2020 https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.

[58] James C. Howell, "Gang Prevention: An Overview of Research and Programs," US Department of Justice Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, December 2010, https://www.ncjrs.gov/pdffiles1/ojjdp/231116.pdf.

[59] *See e.g.*, Giffords Law Center to Prevent Gun Violence, "A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence," April 23, 2019, https://lawcenter.giffords.org/wp-content/uploads/2019/05/Giffords-Law-Center-A-Case-Study-in-Hope.pdf

The GVI strategy is a form of problem-oriented policing (as opposed to traditional "incident-driven" policing), that was pioneered in the enormously successful Operation Ceasefire in Boston in the mid-1990s, where it was associated with a 61% reduction in youth homicide.[60] To implement the GVI strategy effectively, police departments must partner closely with credible community leaders and service providers to jointly convene "call-ins" with a relatively small number of individuals identified as having the highest risk of becoming a victim and/or perpetrator of violence in the near future. These individuals are typically young men involved with street groups, who often have extensive histories of violent victimization, trauma, and criminal involvement. In other words, they are often fearful of violence and distrustful of the police, yet interested in opportunities to become safer.

At the call-ins, people representing the community's moral voice communicate a strong demand for the shooting to stop and give an explanation about how violence has affected their families and community. Parents who lost their children to violence are often the most effective voices, along with former group members who lost friends to violence.

Social service providers then present plans to connect high-risk individuals with services, ranging from trauma counseling, mediation, and peer coaching to job training and relocation assistance to help people at risk of being shot find temporary housing away from a dangerous situation. These providers offer genuine support and interventions to promote pathways to peace and healing for the community's highest-risk, often desperate young men.

And finally, law enforcement officers often deliver a respectful notification regarding the legal risks individuals may face if the community's plea for peace is ignored. Because most shootings and murders do not lead to arrests in many communities, this notification or promise of accountability can have a focused deterrent effect on people involved in cycles of violence.

By working to engage with the community on a targeted effort to prevent the most serious crimes, law enforcement agencies can demonstrate that they are responsive to community concerns and begin to build more trust. By building police legitimacy and decreasing violence, these efforts can create a positive feedback loop of increased community engagement, increased law enforcement effectiveness, decreased vigilante violence and less heavy-handed law enforcement, and save more lives.

While law enforcement plays an essential role in GVI, the strategy's success depends on the dedicated participation of community leaders. When this happens, at-risk individuals are more likely to recognize that police officers are acting on behalf of the neighborhood, rather than as an occupying, external force.[61] In this way, the GVI model exemplifies community-oriented policing at its best.

[60] Anthony A. Braga, et al., "The Boston Gun Project: Impact Evaluation Findings," May 17, 2000, https://nij.ojp.gov/library/publications/boston-gun-project-impact-evaluation-findings.

[61] "The places in which violence is most prevalent too often are the very places in which police-community relations are the most strained." Tracey L. Meares and Dan M. Kahan, "Law and (Norms of) Order in the Inner City," *Law and Society Review* 32 (1998): 805–838,

The GVI model has a remarkably strong track record, featuring a documented association with homicide reductions of 30–60%.[62] When violence intervention experts compared more than 1,400 individual studies of crime-reduction strategies in 2016, they identified GVI as having "the strongest and most consistent anti-violence effects."[63] Additionally, the DOJ has compiled a review of known crime prevention strategies, in which it gives the GVI approach its highest rating, noting the existence of multiple studies confirming GVI's efficacy.[64]

Despite these impressive results, GVI is still not receiving sufficient public funding, and cities are being turned away. The COPS Office should focus funding on GVI strategies, because they accomplish many of the purposes of the COPS statute at one time. The COPS statute calls for more law enforcement officers involved in activities like GVI "that are focused on interaction with members of the community on proactive crime control and prevention."[65] GVI programs seek "to increase police participation in multidisciplinary early intervention teams" and "to develop and implement innovative programs to permit members of the community to assist State, tribal, and local law enforcement agencies in the prevention of crime in the community."[66]

For these reasons, the COPS Office should prioritize funding for law enforcement officers to engage in GVI and similar programs.

(4) Use of COPS funds to improve law enforcement agencies' clearance rates for shootings and homicides

COPS grants should be used to support evidence-based efforts to improve law enforcement agencies' poor and declining record of solving homicides and shootings.

http://digitalcommons.law.yale.edu/fss_papers/482; *see also* Chris Melde et. al., "On the Efficacy of Targeted Gang Interventions: Can We Identify Those Most At Risk?," *Youth Violence and Juvenile Justice* 9 (2011): 279–94, http://yvj.sagepub.com/content/9/4/279.

[62] Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," accessed October 17, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.

[63] Thomas Abt, "We Can't End Inequality Until We Stop Urban Gun Violence," The Trace, July 12, 2019, https://www.thetrace.org/2019/07/we-cant-endinequality-until-we-stop-urban-gun-violence/; Democracy International, "What Works in Reducing Community Violence: A Meta-review and Field Study for the Northern Triangle," US Agency for International Development, February 2016, https://www.usaid.gov/sites/default/files/USAID-2016-What-Works-in-Reducing-CommunityViolence-Final-Report.pdf; National Academies of Sciences, Engineering, and Medicine, *Proactive Policing: Effects on Crime and Communities,* David Weisburd and Malay K. Majmundar eds. (Washington: The National Academies Press, 2018), https://www.nap.edu/catalog/24928/proactive-policing-effects-on-crime-and-communities.

[64] National Institute of Justice, Office of Justice Programs, "Crime & Crime Prevention," accessed February 22, 2016, https://www.crimesolutions.gov/TopicDetails.aspx?ID=13; *see also* US Department of Justice, Office of Justice Programs, "Community Crime Prevention Strategies," accessed February 22, 2016, https://www.crimesolutions.gov/TopicDetails/.

[65] 34 U.S.C. § 10381(b).

[66] *Id.*

Traditional law enforcement efforts to address community violence by punitively targeting "gang" members and identities have largely failed, and often cause significant harm and mistrust among the larger community. Homicide remains the leading cause of death for young Black men in this nation.[67] A majority of homicides of Black Americans never lead to an arrest, let alone a conviction.[68] In the absence of an effective and trusted public safety system, victims of violence and young people seeking protection from violence may become embroiled in cycles of retaliatory violence and vigilantism that threaten the safety and wellbeing of entire communities caught in the crossfire. Deep alienation from law enforcement fuels this violence, along with ready access to firearms; researchers have found strong evidence that "neighborhoods where the law and the police are seen as illegitimate and unresponsive have significantly higher homicide rates," even after accounting for differences in race, age, poverty, and other structural factors,[69] and that the proliferation of guns among a community's young people can lead to a contagious and deadly arms race.[70]

For families grieving a murdered or injured loved one in cities across the country, the jarring truth is that the justice system usually fails to deliver justice. This helps explain why a desperate few decide to take justice into their own hands, fueling cycles of retaliatory shootings. Cities that solve fewer homicides have much higher rates of homicide on average.[71] And low and decreasing law enforcement clearance rates for shootings and homicides are both a significant cause and effect of community distrust and cycles of violence.

A recent in-depth investigation by *The Washington Post* found that across 52 of the nation's largest cities over the past decade, a majority (53%) of all murders of Black Americans never led to an arrest, let alone a conviction, and nearly three-quarters of all unsolved murders in these cities involved a victim who was Black.[72] Gun homicides and nonfatal shootings are even less likely to lead to an arrest; researchers found that across 22 cities, law enforcement failed to

[67] CDC WONDER, "Underlying Cause of Death, 1999–2017," accessed November 7, 2019, https://wonder.cdc.gov/.

[68] Wesley Lowery, Kimbriell Kelly, and Steven Rich, "Murder with Impunity: An Unequal Justice," *The Washington Post*, July 25, 2018, https://www.washingtonpost.com/graphics/2018/investigations/black-homicides-arrests/?utm_term=.bb58c728ae95.

[69] David S. Kirk and Andrew Papachristos, "Cultural Mechanisms and the Persistence of Neighborhood Violence," *American Journal of Sociology* 116, no. 4 (January 2011): 1190–1233, https://liberalarts.utexas.edu/_files/kirkds/KirkPapachristos_AJS2011_Published.pdf.

[70] David Hemenway, et al., "Gun Carrying Among Adolescents," *Law & Contemporary Problems* (1996): 39, 47–48, (finding "carrying firearms makes other students feel less safe, which increases the likelihood that they will in turn carry guns" and concluding "results of contagion modeling suggest that small initial changes in gun carrying can have multiplicative effects"); Richard B. Felson and Paul-Philippe Pare, "Firearms and fisticuffs: Region, race, and adversary effects on homicide and assault," *Social Science Research* 39, no. 2 (2010): 274, https://richardfelson.files.wordpress.com/2013/06/firearms-and-fisticuffs.pdf.

[71] *See e.g.*, Thomas K. Hargrove, Rachael Rosselet and Eric W. Witzig, "Are Murders Worth Solving?" Murder Accountability Project, January 24, 2018, http://www.murderdata.org/2018/01/are-murders-worth-solving-new-analysis.html.

[72] Wesley Lowery, Kimbriell Kelly, and Steven Rich, "Murder with Impunity: An Unequal Justice," *The Washington Post*, July 25, 2018, https://www.washingtonpost.com/graphics/2018/investigations/black-homicides-arrests/?utm_term=.bb58c728ae95.

make an arrest in 65% of fatal shootings involving a Black or Hispanic victim, and 80% of nonfatal shootings involving a Black victim.[73]

The lack of accountability for gun violence is no secret in impacted communities. When the Urban Institute surveyed young people from Chicago neighborhoods with the highest rates of homicide, only 14% said they thought a person was likely to "get caught" for shooting at someone in their neighborhood, and that number was even lower among young people who said they had carried a gun before.[74] Unsurprisingly, just 13% said police in their neighborhood were effective at reducing crime.[75] Violence prevention experts have noted that this "near-total impunity for homicides and shootings in distressed communities" is a major driver of community distrust and community violence, as it "signals that the state can't or won't actually protect people from the most significant harm. Where that's true, people feel the need to protect themselves and settle disputes through other means, including private violence."[76]

In 2013, the Bureau of Justice Assistance partnered with the International Association of Chiefs of Police to identify best practices for improving law enforcement agencies' capacity to solve homicide cases in order to address the concern that in many communities, "offenders were literally getting away with murder."[77] Their best-practices report included a host of practical recommendations but ultimately concluded that all of them "rely on a community who trust and support the police and are therefore willing to talk with investigators and/or voluntarily provide information to the police."[78]

COPS funding should be used to update these best practices recommendations, and support training and hiring of officers and other personnel dedicated specifically to improving clearance rates for shootings and homicides through best practices, including partnerships with the community, use of innovative technology, and efforts to better secure witnesses' safety and participation. Solving more homicides and shootings would help significantly to prevent and deter retaliatory shootings and build self-reinforcing gains in community trust.

IV. Legal justification

[73] Sarah Ryley, Jeremy Singer-Vine, and Sean Campbell, "Shoot Someone In a Major U.S. City, and Odds Are You'll Get Away With It," The Trace, January 24, 2019, https://www.thetrace.org/features/murder-solve-rate-gun-violence-baltimore-shootings/.
[74] Jocelyn Fontaine, et al., "'We Carry Guns to Stay Safe' Perspectives on Guns and Gun Violence from Young Adults Living in Chicago's West and South Sides," The Urban Institute, October 2018, 8, https://www.urban.org/sites/default/files/publication/99091/we_carry_guns_to_stay_safe_1.pdf.
[75] *Id*.
[76] Stephen Lurie, "There's No Such Thing as a Bad Neighborhood," CityLab, February 25, 2019, https://www.citylab.com/perspective/2019/02/brokenwindows-theory-policing-urban-violence-crime-data/583030/.
[77] *See* David L. Carter, "Homicide Process Mapping: Best Practices for Increasing Homicide Clearances," Bureau of Justice Assistance, September 2013, https://www.iir.com/Documents/Homicide_Process_Mapping_September_email.pdf.
[78] *Id*. at 12.

The DOJ has broad discretionary authority to select focus areas for CHP grants. In *City of Los Angeles v. Barr,* the Ninth Circuit described this authority as subject to a "highly deferential standard."[79] The court in that case upheld the DOJ's choice of illegal immigration as a focus area, because the DOJ was authorized to fill "gaps" in the statute and nothing about that choice conflicted with the statute.[80] The same is true here; addressing gun violence and homicide fits even more squarely within the statutory purposes outlined in the authorizing act than immigration enforcement.

In *City of Los Angeles v. Barr,* the court also addressed the city's claim that "elements of DOJ's scoring system are unlawful because they (1) violate constitutional principles of separation of powers and exceed DOJ's lawful authority, (2) violate the Spending Clause, and (3) are arbitrary and capricious under the Administrative Procedure Act."[81] The court rejected all of these claims, however, holding, among other things, that:

> Because DOJ's scoring process does not coerce an applicant or authorize the federal government to exercise any control over state or local law enforcement, it does not violate 34 U.S.C. § 10228(a), which states: "Nothing in this chapter or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof."[82]

Consequently, similar claims are not likely to succeed against the proposals put forth in this memorandum. Choosing to focus on gun violence homicide in the administration of COPS grants is an appropriate use of DOJ's discretion with regards to these grants.

[79] 929 F.3d 1163, 1177 (9th Cir. 2019).
[80] *Id.*
[81] *Id.* at 1172, 1183.
[82] *Id.* at 1176, fn.7.

RECOMMENDED ACTION MEMO

Agency: Department of Justice
Topic: Shifting Federal Law Enforcement Priorities to Focus on Illegal Gun Trafficking
Date: November 2020

Recommendation: The next administration should discontinue the Operation Relentless Pursuit and Operation Legend initiatives and shift federal law enforcement resources toward investigations and prosecutions of individuals responsible for illegal gun trafficking.

I. Summary

Description of recommended executive action

The Trump administration has implemented a draconian "tough on crime" approach that surges federal law enforcement into communities through initiatives such as Operation Relentless Pursuit and Operation Legend. Not only does this approach harm communities—particularly communities of color—by perpetuating over-policing and mass incarceration, it has also been proven not to be particularly effective in reducing gun violence. In contrast, federal law enforcement has lagged far behind when it comes to addressing the supply side of gun violence by developing effective enforcement initiatives to target illegal gun trafficking.

The next administration should terminate Operation Relentless Pursuit and Operation Legend, redirect federal grant dollars to support community-based violence intervention programs, and focus federal law enforcement efforts on illegal gun trafficking.

Overview of process and time to enactment

The next attorney general can issue new guidance to all Department of Justice component agencies immediately after being sworn in. A separate memo offering recommendations for the president's FY 2022 budget request offers guidance on how to reallocate federal grant dollars.

II. Current state

The Trump administration instituted a harmful and ineffective "tough on crime" approach to gun violence

From the earliest days of his campaign, Trump signalled that a strict "tough on crime" approach would be a hallmark of his administration—founded primarily on the false assertion that criminal gangs of immigrants were driving high rates of violent crime. This approach has had a broad footprint across the administration. In the Department of Justice, it has been marked by aggressive enforcement initiatives. In December 2019, Attorney General Barr launched one such initiative—Operation Relentless Pursuit (ORP). ORP is a joint initiative of the Bureau of

Alcohol, Tobacco, Firearms and Explosives (ATF), Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and the US Marshal's Service that surged federal law enforcement resources to seven cities identified as experiencing elevated violent crime rates (Albuquerque, Baltimore, Cleveland, Detroit, Kansas City, Memphis, and Milwaukee) and "bulked up" federal task forces that work with state and local law enforcement.[1] In May 2020, the Department of Justice announced that $61 million in grant funding through the Community Oriented Policing Services and Bureau of Justice Assistance programs had been released to ORP target cities, $51 million of which was used to hire an additional 217 police officers.[2]

In July 2020, Attorney General Barr announced a second similar initiative to surge federal law enforcement resources to cities experiencing an increase in violent crime, Operation Legend (OL).[3] OL began in Kansas City, Missouri and was expanded to include Chicago, Albuquerque, Cleveland, Detroit, Milwaukee, St. Louis, Memphis, and Indianapolis. In the first two months of this initiative, more than 2,000 people were arrested, 476 of whom were charged with federal offenses, primarily for firearm and drug-related crimes.[4]

Civil rights groups and advocates for criminal justice reform strongly oppose this type of federal law enforcement initiative, arguing that this approach will further exacerbate over-policing and mass incarceration of communities of color. A July 2020 letter signed by dozens of racial justice and civil rights organizations, Civil Rights Corps, and The Leadership Conference on Civil and Human Rights explained the harms caused by ORP:

> Operation Relentless Pursuit replicates the most devastating aspects of the Violent Crime Control and Law Enforcement Act of 1994, which flooded America's streets with cops and dramatically increased incarceration rates, especially in Black and Brown communities. ORP funds a similar influx of police officers and federal agents, bolsters prosecutors' offices, and incentivizes additional federal criminal prosecutions by requiring departments receiving funds to investigate and prosecute certain federal crimes, such as drug trafficking and gang involvement. These actions are not constructive ways to achieve true public safety but serve only to continue the legacy of systemic racism and criminalization of minority communities.[5]

[1] Department of Justice, Office of Public Affairs, "Attorney General William P. Barr Announces Launch of Operation Relentless Pursuit," December 18, 2019, https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-relentless-pursuit.
[2] Department of Justice, Office of Public Affairs, "Justice Department Releases $61 Million in Awards to Support Efforts to Combat Violent Crime in Seven U.S. Cities," May 11, 2020, https://www.justice.gov/opa/pr/justice-department-releases-61-million-awards-support-efforts-combat-violent-crime-seven-us.
[3] Department of Justice, Office of Public Affairs, "Attorney General William P. Barr Announces Launch of Operation Legend," July 8, 2020, https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-legend.
[4] Department of Justice, Office of Public Affairs, "Operation Legend: Update on Federal Charges," September 3, 2020, https://www.justice.gov/opa/pr/operation-legend-update-federal-charges.
[5] Leadership Conference on Civil and Human Rights, Civil Rights Corps, "Letter to Chairwoman Maloney, Chairwoman Lowey, and Ranking Members Comer and Granger," July 14, 2020, https://cdn.buttercms.com/Kmgx7RR7RI2qxUtj6aIp.

Researchers and criminal justice experts are also skeptical that this type of approach is actually effective at reducing violent crime, because these initiatives narrowly focus on individual criminal acts and fail to address underlying root causes of violent crime.[6] Researcher Thomas Abt explained the limitations of this enforcement-only approach:

> At the end of the day, you need a balanced, evidence-informed strategy that is not just about a program or two. It's about how multiple programs interact to produce a cumulative effect. We should leverage the soft, supportive power of the federal government a bit more, and the hard power a bit less.[7]

While these initiatives and the inflammatory rhetoric of the Trump administration have been recent developments, the problem of federal law enforcement focusing on individuals for crimes like illegal gun possession—as opposed to larger-scale criminal enterprises facilitating illegal gun trafficking—is longstanding. For example, a recent analysis of the ATF's budget by the Center for American Progress found that, from 2013 through 2020, the agency dedicated disproportionate resources to law enforcement activities focused on "firearms criminal use and possession" and "combating criminal organizations." During this period, funding for these categories grew from 36% of the overall budget for law enforcement operations in 2013 to 54% in 2020. At the same time, funding for program activities focused on "deterring illegal firearms trafficking/violent gun crime" and "diversion of firearms from legal commerce" remained stagnant and only represented between 24% and 27% of the total budget for law enforcement operations.[8]

The ATF's disproportionate focus on individual acts of gun violence is also represented in data on federal prosecutions for gun-related crimes. An analysis of DOJ data by the Transactional Records Access Clearinghouse (TRAC) found 6,526 new weapons-related prosecutions from October 2018 through April 2019, 63% of which were led by the ATF. Sixty-seven percent of these prosecutions were "felon in possession" cases, which charge an individual, who was prohibited from buying or possessing guns because of a previous felony conviction, with possessing a firearm.[9] Many of these cases involve individuals charged only with illegally possessing a gun or ammunition, not with any additional acts of violence.[10]

[6] Marcia Brown, "Operation Legend Is Another Attempt To 'federalize' Policing. Organizers Are Pushing Back." The Appeal, August 13, 2020, https://theappeal.org/operation-legend-is-another-attempt-to-federalize-policing-organizers-are-pushing-back/.
[7] Id.
[8] Chelsea Parsons, Eugenio Weigend Vargas, and Rukmani Bhatia, "Rethinking ATF's Budget To Prioritize Effective Gun Violence Prevention," Center for American Progress, September 17, 2020, https://www.americanprogress.org/issues/guns-crime/reports/2020/09/17/490494/rethinking-atfs-budget-prioritize-effective-gun-violence-prevention/.
[9] TRAC Reports, "Federal Weapons Prosecutions Continue to Climb in 2019," June 5, 2019, https://trac.syr.edu/tracreports/crim/560/.
[10] Maria Chapa Lopez, "Tampa Man Indicted for Being a Felon in Possession of a Firearm," U.S. Department of Justice, June 12, 2020, https://www.atf.gov/news/pr/tampa-man-indicted-being-felon-possession-firearm; Andrew E. Lelling, "Brockton Man Pleads Guilty to Being Felon in Possession of Firearm," U.S. Department of Justice, April 14, 2020, https://www.atf.gov/news/pr/brockton-man-

The ATF has also devoted substantial agency resources to enforcing federal drug laws, regardless of whether the cases have a nexus to gun-related crimes: according to DOJ data obtained by TRAC, 11% of new prosecutions referred by the ATF in June 2020 were for drug or drug trafficking offenses.[11]

This allocation of ATF resources has resulted in the agency focusing on cases that, while vital to addressing gun-related crime and community safety issues, are already addressed by state and local law enforcement agencies. This is also a missed opportunity for the ATF and other federal law enforcement agencies to focus their unique jurisdiction and resources on the type of cross-jurisdictional criminal activity that is responsible for trafficking firearms into vulnerable communities with high rates of gun violence.

III. Proposed action

The next administration should discontinue the Operation Relentless Pursuit and Operation Legend initiatives and shift federal law enforcement resources toward investigations and prosecutions of individuals responsible for illegal gun trafficking.[12] In addition to these funding shifts, the next attorney general should issue guidance to the United States Attorneys Offices, the FBI, and ATF, urging a focus on illegal gun trafficking.

As former ATF Director Bradley Buckles noted in his foreword to the agency's 2000 report on firearms trafficking, nearly every gun used in a crime was first a legal gun sold through legitimate channels.[13] Following the first legal purchase, there are many opportunities for individuals to divert guns from the legal market into secondary, illegal gun markets where they are often destined for use in violent crime. Gun trafficking is facilitated by a variety of tactics,

pleadsguilty-being-felon-possession-firearm; Ronald A. Parsons Jr., "Rapid City Man Sentenced for Illegal Possession of Ammunition," U.S. Department of Justice, March 5, 2020, https://www.atf.gov/news/pr/rapid-city-man-sentenced-illegal-possession-ammunition; Scott W. Brady, "Pittsburgh Felon Charged With Unlawful Possession of a Pistol and Ammunition," U.S. Department of Justice, January 8, 2020, https://www.atf.gov/news/pr/pittsburgh-felon-charged-unlawfulpossession-pistol-and-ammunition.

[11] TRAC Reports, "Prosecutions for June 2020," July 16, 2020, https://trac.syr.edu/tracreports/bulletins/jatf/monthlyjun20/fil/; Craig Carpenito, "Trenton Man Sentenced to 10 Years in Prison for Role in Heroin Trafficking Conspiracy," U.S. Department of Justice, August 27, 2020, https://www.atf.gov/news/pr/trenton-man-sentenced10-years-prison-role-heroin-trafficking-conspiracy; U.S. Attorney's Office District of New Jersey, "Passaic County Man Admits Participating in Heroin Conspiracy," August 18, 2020, https://www.atf.gov/news/pr/passaic-county-man-admits-participating-heroin-conspiracy; James P. Kennedy Jr., "Jamestown Man Pleads Guilty to Selling Meth," U.S. Department of Justice, August 17, 2020, https://www.atf.gov/news/pr/jamestown-man-pleads-guilty-selling-meth.

[12] A separate memo outlining recommendations for the Biden administration's first budget request offers recommendations for how to shift grant funding away from these programs and towards programs focused on community-based violence intervention.

[13] U.S. Department of the Treasury and Bureau of Alcohol, Tobacco and Firearms, "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers," June 2000, https://www.hsdl.org/?abstract&did=1622.

including straw purchasing, complicity from corrupt dealers, theft from gun stores, and sales through unlicensed private sellers that are not required to conduct background checks under federal law.[14]

The cross-jurisdictional nature of illegal gun trafficking makes it particularly important for federal law enforcement to take the lead. Gun trafficking is generally an interstate crime, with guns being moved across state lines from states with weaker gun laws to states with stronger laws.[15]There are well-known gun trafficking corridors across the country, the most famous of which is known as the "Iron Pipeline" along Interstate 95 on the east coast, through which guns are trafficked north.[16] According to ATF trace data from 2010 to 2019, 29% of all crime guns submitted for tracing crossed state lines before being used in a crime. In some states, this problem is particularly acute. A recent analysis by the New York State Office of the Attorney General found that from 2010 to 2015, 74% of handguns recovered in connection with crimes in New York, through which I-95 runs, were originally purchased from out-of-state gun dealers.[17] The cross-jurisdictional nature of this crime makes it more difficult for local law enforcement to identify gun trafficking patterns effectively, execute search warrants, and use other investigative tools outside of their jurisdiction.

In addition, the ATF's role as the only federal agency with jurisdiction to conduct regulatory oversight of the gun industry makes it particularly well-suited to lead on gun trafficking investigations and refer those cases to federal prosecutors. Corrupt retail gun dealers account for a higher volume of guns diverted into the illegal market than any other single trafficking channel.[18] Researchers estimate that, nationwide, approximately 2,000 firearms dealers and pawnbrokers knowingly sell firearms illegally,[19] engaging in behavior such as failing to keep required records, transferring to prohibited persons, making false entries in record books, and conducting illegal out-of-state transfers.[20] One of the most important ways the ATF can be alerted to signs of gun dealer complicity in illegal gun trafficking is through regular compliance inspections. Under federal law, the ATF is permitted to conduct one regulatory compliance inspection of each licensee per year, and the ATF has set an internal goal of inspecting all gun

[14] Id.

[15] Alex Yablon and Daniel Nass, "Potential Gun Trafficking Hubs Revealed in ATF Data," The Trace, October 24, 2019, https://www.thetrace.org/2019/10/guntrafficking-hubs-atf-time-to-crime/.

[16] Aaron Smith, "How the Iron Pipeline funnels guns into cities with tough gun laws," CNN Money, January 19, 2016, https://money.cnn.com/2016/01/19/news/iron-pipeline-gun-control/index.html.

[17] New York State Office of the Attorney General, "Target on Trafficking: New York Crime Gun Analysis," accessed October 29, 2020, https://targettrafficking.ag.ny.gov/#part1.

[18] ATF "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers." *See also*, Anthony A. Braga, et al., "Interpreting the Empirical Evidence on Illegal Gun Market Dynamics," *Journal of Urban Health* 89, no. 5 (2012): 779–793.

[19] Garen J. Wintemute, "Firearms Licensee Characteristics Associated with Sales of Crime-Involved Firearms and Denied Sales: Findings from the Firearms Licensee Survey," *RSF: The Russell Sage Foundation Journal of the Social Sciences* 3, no. 5 (2017): 58–74.

[20] ATF "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers." *See also*, Anthony A. Braga, et al., "Interpreting the Empirical Evidence on Illegal Gun Market Dynamics," *Journal of Urban Health* 89, no. 5 (2012): 779–793.

dealers once every three years.[21] However, current resource limitations have left the agency falling far short of either goal. In 2019, ATF investigators conducted only 13,079 compliance inspections of firearms licensees, meaning that 83% of those licensed by the ATF to manufacture or distribute guns did not receive an inspection that year.[22] These inspections are crucially important: in fiscal year 2019, 47% of the licensees inspected were found to have violations, and the violations that were discovered ranged from failure to properly complete the paperwork necessary for crime gun tracing to failure to conduct a background check.[23] Because of the limited resources available for gun dealer compliance inspections, the ATF generally prioritizes inspections of those dealers who are at risk for compliance issues, such as those who have had crime guns traced to them; have experienced theft; or are located near the southern border, where international gun trafficking often occurs, or in communities that have high violent crime rates.[24]

The next attorney general should clearly articulate that focusing federal law enforcement resources on illegal gun trafficking is a top priority and a key pillar in the administration's approach to reducing gun violence. Personnel and other resources that had been dedicated to Operation Relentless Pursuit and Operation Legend should be redirected to a new national initiative focused on gun trafficking.

[21] Bureau of Alcohol, Tobacco, Firearms and Explosives, "Congressional Budget Submission Fiscal Year 2020," U.S. Department of Justice, March 2019, https://www.justice.gov/jmd/page/file/1144651/download.
[22] Bureau of Alcohol, Tobacco, Firearms and Explosives, "Fact Sheet – Facts and Figures for Fiscal Year 2019," June 2020, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2019.
[23] Id.
[24] Bureau of Alcohol, Tobacco, Firearms and Explosives,"Congressional Budget Submission Fiscal Year 2020"; Office of the Inspector General, "Review of ATF's Federal Firearms Licensee Inspection Program," U.S. Department of Justice, April 2013, https://oig.justice.gov/reports/2013/e1305.pdf.

RECOMMENDED ACTION MEMO
Agency: Department of Justice, Executive Office of United States Attorneys (EOUSA)
Topic: Domestic Violence Specialists
Date: November 2020

Recommendation: Ensure there is a domestic violence specialist in each of DOJ's 94 US Attorney's Offices.

I. Summary

Description of recommended executive action

Every year, millions of Americans report intimate partner violence (IPV).[1] Firearm access makes this violence particularly deadly, posing a serious threat to victims: domestic violence assaults involving a gun are 12 times more likely to result in death than those involving other weapons or bodily force.[2] While domestic violence touches all groups, 85% of IPV victims are women.[3] As a result, an abuser's mere access to a firearm makes it five times more likely that a woman will be killed.[4]

In order to promote a coordinated, multidisciplinary response to domestic violence, the next administration should ensure there is a domestic violence specialist in each of the 94 USAttorney's Offices (USAOs) to serve as an assistant United States attorney (AUSA). This domestic violence specialist would support the adoption of trauma-informed prosecutorial techniques; support local non-profit organizations, advocacy groups, and state and municipal agencies in accessing federal resources for survivors; and ensure federal prosecutions are targeted towards the most violent domestic violence offenders.

Overview of process and enactment

Under 28 U.S.C. § 543(a), the US attorney general may appoint attorneys to assist US attorneys (i.e. AUSAs) "when the public interest so requires." Under Department of Justice (DOJ) regulations, the authority to appoint AUSAs has been delegated to the director of the Office of Attorney Recruitment and Management (OARM).[5] Individual US attorneys are authorized to recruit, screen, and submit nominations of the best-qualified candidates to serve as AUSAs; however, these appointments must be approved by the OARM.[6] As such, appointing

[1] Centers for Disease Control and Prevention, "Preventing Intimate Partner Violence," 2018, https://www.cdc.gov/violenceprevention/pdf/IPV-Factsheet.pdf.
[2] Linda E. Saltzman, "Weapon Involvement and Injury Outcomes in Family and Intimate Assaults," *JAMA* 267, no. 22 (1992): 3043–3047.
[3] Emory University School of Medicine, "Domestic Violence/Intimate Partner Violence Facts," accessed October 1, 2020, http://psychiatry.emory.edu/niaproject/resources/dv-facts.html.
[4] J.C. Campbell, "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study," *American Journal of Public Health* 93, no.7 (2003): 1089–1097.
[5] U.S. Department of Justice, "Justice Manual: 3-4.300(A)," Accessed October 1, 2020, https://www.justice.gov/jm/jm-3-4000-personnel-management.
[6] *Id*. at 3-4.213.

domestic violence specialists is within the authority of the DOJ, and the agency may use existing funding to carry out such appointments.[7] To effectuate these appointments, the OARM and the Executive Office of United States Attorneys (EOUSA) should direct all individual USAOs that do not currently employ a domestic violence specialist as an AUSA to identify existing budgetary authority and use it to hire a domestic violence specialist to fill an AUSA position, as such positions become available.

II. Current state

Scope of domestic violence in the United States

In the US, more than 10 million adults experience domestic violence annually.[8] While domestic violence touches all groups, 85% of IPV victims are women,[9] and about one in four women in the US report experiencing some form of sexual or physical violence or stalking by an intimate partner throughout their lifetime.[10]

The biggest definable group of female murder victims consists of those killed by intimate partners: one study found that between 1976 and 2005, 30% of female murder victims were killed by intimate partners, while only 5% of male murder victims were killed by an intimate partner.[11] More recent data confirms this fact: between 2003 and 2012, 33.7% of homicides of women resulted from intimate partner violence.[12]

Firearm access makes domestic violence far more lethal. Domestic violence assaults involving a gun are 12 times more likely to result in death than those involving other weapons or bodily force.[13] As a result, an abuser's mere access to a firearm makes it five times more likely that a woman will be killed.[14] The scope of this violence is enormous: nearly one million women alive today in the US have reported being shot or shot at by intimate partners, and 4.5 million women have reported being threatened with a gun.[15]

[7] *See e.g.*, U.S. Department of Justice, "FY21 Request At A Glance - U.S. Attorneys," 2020, https://www.justice.gov/doj/page/file/1246611/download.

[8] National Coalition Against Domestic Violence, "Domestic Violence Fact Sheet," accessed October 1, 2020, https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457.

[9] Emory, *supra* note 3.

[10] Sharon G. Smith et al., "National Intimate Partner and Sexual Violence Survey 2015 Data Brief – Updated Release," National Center for Injury Prevention and Control, November 2018, https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf.

[11] Jacqueline Campbell, et al., "Intimate Partner Homicide: Review and Implications of Research and Policy," *Trauma, Violence & Abuse* Vol. 8, no. 3 (2007), 246.

[12] Arkadi Gerney and Chelsea Parsons, "Women Under the Gun," Center for American Progress, June 18, 2014, https://www.americanprogress.org/issues/guns-crime/reports/2014/06/18/91998/women-under-the-gun/.

[13] Linda E. Saltzman, et al., "Weapon Involvement and Injury Outcomes in Family and Intimate Assaults," *JAMA* 267, no. 22 (1992): 3043–3047.

[14] Campbell, *supra* note 4.

[15] Everytown for Gun Safety, "*Guns and Violence Against Women*," October 17, 2019, 4, https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/.

With our high rates of domestic violence-related gun violence, the US is the most dangerous country in the developed world when it comes to women and guns. Women in the US are 21 times more likely to be killed with a gun than women in other high-income countries.[16]

The COVID-19 pandemic has accelerated these devastating trends. According to the Center for American Progress, "stay-at-home orders essential to slowing the spread of the virus, coupled with the economic and health stressors caused by the pandemic, have forced [domestic violence] survivors already at risk of domestic abuse into even more vulnerable and dangerous positions."[17] While the piecemeal nature of data reporting by states and localities makes it difficult to paint an accurate picture of the prevalence and severity of IPV overall, available fragmented data from counties across the country indicate that almost every state has reported increases in IPV.[18]

Despite the prevalence of domestic violence in the US, the criminal justice system's response to domestic violence is significantly lacking. Survivors are often re-traumatized through their experiences in legal proceedings, and many choose not to report crimes, due to fear of retaliation from abusers or doubts about the legal system's effectiveness.

Federal resources and programs

Much of the progress made to address the needs of domestic violence survivors over the past 25 years has focused on building a network of national, state, and local programs and services intended to prevent, mitigate, and respond to domestic violence.[19] This infrastructure—made up of elements such as crisis hotlines, shelters, domestic violence programs, and state, local, and tribal law enforcement—has been bolstered by a series of federal laws, such as the Violence Against Women Act (VAWA), which first passed in 1994 and was reauthorized in 2000, 2005, and 2013.

Among other things, the VAWA has enhanced investigations and prosecutions of sex offenses; provided for a number of grant programs to address the issue of violence against women from a variety of angles, including law enforcement, public and private entities and service providers, and victims of crime; and established immigration provisions for abused immigrants.[20]

The Office on Violence Against Women (OVW) administers the majority of VAWA-authorized programs, while other federal agencies, including the Centers for Disease Control and Prevention (CDC) and the Office of Justice Programs (OJP), also manage VAWA programs. Since its creation in 1995 and through fiscal year 2018, the OVW has awarded more than $8 billion in grants and cooperative agreements to state, tribal, and local governments, nonprofit

[16] Erin Grinshteyn and David Hemenway, "Violent Death Rates in the US Compared to Those of the Other High-income Countries," *Preventive Medicine* 123 (2019): 20–26.

[17] Osub Ahmed and Robin Bleiweis, "Ensuring Domestic Violence Survivors' Safety," Center for American Progress, August 10, 2020, https://www.americanprogress.org/issues/women/reports/2020/08/10/489068/ensuring-domestic-violence-survivors-safety/.

[18] *Id.*

[19] *Id.*

[20] Congressional Research Service, "The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization," April 23, 2019, https://fas.org/sgp/crs/misc/R45410.pdf.

organizations, and universities.[21] In fiscal year 2019, approximately $559 million was appropriated for VAWA-authorized programs administered by the OVW, OJP, and CDC. While several extensions of VAWA were provided through fiscal year 2019 continuing appropriations, authorizations for appropriations for all VAWA programs have since expired.[22]

In April 2019, the US House Of Representatives passed the Violence Against Women Reauthorization Act of 2019 (H.R. 1585).[23] In addition to reauthorizing the programs noted above, the legislation would explicitly empower the attorney general to appoint "special assistant United States attorneys for the purpose of prosecuting violations" of the Gun Control Act's (GCA) domestic violence-related gun-possession prohibitors (discussed below).

Federal domestic violence prosecutions

Federal prosecutions for domestic-violence crimes are extremely rare. While statistics are limited, a Bureau of Justice Statistics (BJS) study from 2005 found that between 2000 and 2002, individuals suspected of domestic-violence crimes comprised only 4% of the 18,653 violent crime suspects referred to US attorneys.[24]

Federal prosecutions are also extremely rare for domestic-violence-related gun crimes. From 2008 to 2012, only 244 individuals with prior domestic violence convictions were prosecuted under federal law for unlawful firearms possession.[25] Although that number increased to 418 from 2013 to 2017, the vast majority of domestic violence crimes are still prosecuted at the state and local levels.[26]

At the federal level, there are two statutes under which domestic violence crimes are predominately prosecuted: VAWA and the Gun Control Act (GCA).

VAWA, *inter alia,* makes it a federal crime to:

- cross state lines or enter or leave Indian country and physically injure an "intimate partner"[27]
- cross state lines to stalk or harass or to stalk or harass within the maritime or territorial lands of the United States, including military bases and Indian country[28]
- cross state lines, or enter or leave Indian country and violate a qualifying protection order[29]

Amended in 1994 and 1996, the GCA makes it a federal crime to:

[21] *Id.*
[22] *Id.*
[23] Violence Against Women Reauthorization Act of 2019, H.R.1585, 116th Cong. (2019).
[24] Matthew R. Durose, et. al, "Family Violence Statistics," Bureau of Justice Statistics, June 2005, 2, https://www.bjs.gov/content/pub/pdf/fvs07.pdf.
[25] TracReports, "Federal Weapons Prosecutions Rise for Third Consecutive Year," November 29, 2017, https://trac.syr.edu/tracreports/crim/492/.
[26] *Id.*
[27] 18 U.S.C. § 2261 (a)(1).
[28] 18 U.S.C. § 2261A.
[29] 18 U.S.C. § 2262 (a)(1).

- possess a firearm and/or ammunition while subject to a qualifying protection order[30]
- possess a firearm and/or ammunition after a conviction of a qualifying misdemeanor crime of domestic violence[31]
- possess a firearm and/or ammunition after a conviction of a felony[32]

US Attorneys' Offices are responsible for prosecutions arising under these statutes. Currently, there are 94 US attorneys: one for each of the 94 federal judicial districts. In addition to their main offices, many US attorneys maintain smaller satellite offices throughout their districts. US attorneys are appointed by the president and confirmed by the Senate, and they serve terms of four years or at the president's discretion. While US attorneys are political appointees, the assistants, by law, hold non-partisan jobs.

Each USAO consists of two major divisions: criminal and civil. The criminal division, which is significantly larger than the civil division in most offices, prosecutes violations of the federal criminal laws, such as organized crime, drug trafficking, political corruption, tax evasion, fraud and other financial crimes, bank robbery, cybercrime, human trafficking, and civil rights offenses. Many criminal divisions have specialized units or sections within them, while in others, criminal AUSAs are generalists.

Several criminal divisions have a specific section or unit that focuses on sex offenses and domestic violence. For example, the US attorney for the District of Columbia operates a "Sex Offense and Domestic Violence Section."[33] The section is staffed with four supervisors (a chief and three deputy chiefs), and a large number of highly trained prosecutors who handle misdemeanor and felony cases involving the above crimes. The Sex Offense and Domestic Violence Section assistant United States attorneys are supported by victim-witness assistance advocates and two child interview specialists who have vast expertise in the areas of domestic violence, child abuse and sexual assault, along with paralegals and legal assistants.

Trump administration efforts

In June 2019, Attorney General William Barr established a working group of US attorneys focused on prosecuting domestic abusers for illegal firearms possession.[34] The Domestic Violence Working Group consists of nine US attorneys from across the country.[35] The group shares best practices for prosecuting federal domestic violence crimes and provides guidance for how to collaborate with local law enforcement agencies and nonprofits.

Erin Nealy Cox, US attorney for the Northern District of Texas, chairs the working group. Her office leads the country in domestic violence prosecutions.[36] In 2018, Cox's office prosecuted 23

[30] 18 U.S.C. 922(g)(8).

[31] 18 U.S.C. 922(g)(9).

[32] 18 U.S.C. 922(g)(1).

[33] U.S. Attorney's Office for the District of Columbia, "Sex Offense and Domestic Violence Section," July 17, 2020, https://www.justice.gov/usao-dc/superior-court/sex-offense-domestic-violence.

[34] Kerry Shaw, "New DOJ Effort Targets Domestic Abusers," The Trace, June 11, 2019, https://www.thetrace.org/2019/06/doj-us-attorneys-domestic-violence-guns/.

[35] Id.

[36] Id.

people with prior misdemeanor domestic violence convictions.[37] Just four years earlier, only 23 individuals in the entire country were prosecuted under the same federal statute.[38]

Obama administration efforts

Among other efforts to combat violence against women, the Obama administration launched the Sexual Assault Demonstration Initiative (SADI) to expand victims' services and build organizational capacity in six cities throughout the country.[39] The four-year program aimed to identify gaps in resources for survivors of domestic violence and sexual assault, devise site-specific solutions, and implement enhanced services at the local level.[40]

The program has continued under the Trump administration, and participating sites are eligible to receive up to $450,000 in funding over three years. Organizations selected to participate in the initiative also receive technical assistance provided by the National Resource Sharing Project and the National Sexual Violence Resource Center.

III. Proposed action

Substance of proposed action

In order to promote a coordinated, multidisciplinary response to domestic violence, the next administration should appoint a domestic violence specialist in each of the 94 USAOs to serve as an AUSA. The domestic violence specialist would be charged with improving the criminal justice system's overall response to domestic violence crimes in their jurisdiction.

In particular, the domestic violence specialist would have the following responsibilities.

- Support the adoption of trauma-informed prosecutorial and law enforcement practices at the federal, state, and local level. The domestic violence specialist would work with attorneys within their jurisdiction—including both within their own US Attorney Office and by partnering with state and local prosecutors and law enforcement—to implement evidence-based or promising policies and practices to incorporate trauma-informed techniques designed to: (a) prevent re-traumatization of the victim, (b) ensure that individuals use evidence-based practices to respond to and investigate cases of domestic violence, dating violence, sexual assault, and stalking, (c) improve communication between victims and law enforcement officers in an effort to increase the likelihood of the successful investigation and prosecution of the reported crime in a manner that protects the victim to the greatest extent possible, and (d) increase collaboration among stakeholders who are part of the coordinated community response to domestic violence, dating violence, sexual assault, and stalking.

[37] *Id.*

[38] *Id.*

[39] The White House, "The Administration's Record on Violence Against Women," accessed October 1, 2020, https://obamawhitehouse.archives.gov/1is2many/about/federal-efforts.

[40] Stephanie M. Townsend, "Sexual Assault Demonstration Initiative: Final Report," Sexual Assault Demonstration Initiative, January 6, 2017, https://www.nsvrc.org/sites/default/files/2017-09/sadi-finalreportfinal508.pdf.

- Work with local law enforcement agencies to develop and implement policies and procedures regarding Extreme Risk Protection Orders (ERPOs). Nineteen states and the District of Columbia currently have ERPO laws.[41] These laws create a process by which families, household members, or law enforcement officers can petition a court to temporarily restrict a person's access to firearms. This tool saves lives by allowing the people who are most likely to notice when a loved one or community member becomes a danger to take concrete steps to disarm them. The domestic violence specialist would work with local law enforcement agencies in their jurisdiction to develop and implement procedures, protocols, or training to assist in the implementation of ERPO laws, and help ensure the lawful recovery and storage of any dangerous weapon from an individual subject to an ERPO.

- Work with federal agencies and local advocates to increase outreach to populations experiencing domestic violence but not currently accessing services. The domestic violence specialist would build strong relationships with advocates to develop a deep understanding of the particular needs in their jurisdiction. Using this knowledge, the specialist should work with state and local agencies and nonprofits to identify federal resources available to fill service gaps for victims. In particular, in coordination with the DOJ's Office for Victims of Crime and the OVW, the specialist would work with localities to best utilize grant programs such as the following.

    - **The Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking grant program (ICJR program).**[42] The ICJR Program is designed to encourage partnerships among state, local, and tribal governments, courts, victim service providers, coalitions and rape crisis centers to ensure that sexual assault, domestic violence, dating violence, and stalking are treated seriously, requiring the coordinated involvement of the entire criminal justice system and community-based victim service providers. The ICJR Program challenges communities to work collaboratively to identify problems and share ideas that will result in effective responses to ensure victim safety and offender accountability.

    - **Sexual Assault Services Program (SASP) Formula grants.**[43] These grants are the first federal funds solely dedicated to the provision of direct intervention and related assistance for sexual assault victims. SASP directs grant dollars to states and territories to assist them in supporting rape crisis centers, and other nonprofit organizations or tribal programs that provide services, direct intervention, and related assistance to victims.

    - **STOP Violence Against Women Formula grants.**[44] STOP grants enhance the capacity of local communities to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services. As a condition of this funding, VAWA requires states and local governments to certify that their judicial

[41] Giffords Law Center, "Extreme Risk Protection Orders," accessed October 1, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/.

[42] 34 U.S.C. §§ 10461-10465.

[43] 42 U.S.C. §14043(g).

[44] 34 U.S.C § 10441.

administrative policies and practices include notification to domestic violence offenders of both federal firearm prohibitions mentioned above and any applicable related federal, state, or local laws.[45] The law also requires coordination and collaboration with federal, state, and local entities engaged in violence against women activities.[46]

- **Grants for Outreach and Services to Underserved Populations (Underserved program).**[47] The Underserved program supports the development and implementation of strategies targeted at adult or youth victims of sexual assault, domestic violence, dating violence, or stalking in underserved populations; and victim services to meet the needs of such populations. Eligible applicants include nonprofit organizations that serve populations traditionally underserved due to geographic location, religion, sexual orientation, gender identity, race and ethnicity, and special needs (such as language barriers, disabilities, legal status, or age).

- **Legal Assistance for Victims (LAV) grants.**[48] The LAV program strengthens civil and criminal legal assistance for survivors of domestic violence, dating violence, sexual assault, and stalking. These grants support survivors who are seeking legal relief in matters relating to or arising out of abuse or violence. Eligible applicants include private nonprofit entities; territorial organizations; Indian tribal governments and tribal organizations; and publicly funded organizations not acting in a governmental capacity, such as law schools.

- Ensure survivor supports are fully accessible to all survivors. Given that survivors represent all gender identities and sexual orientations, and that LGBTQ people face disproportionately high rates of intimate partner violence, the DV specialist would work to ensure that DV programs and support services are free of discrimination.

- Prioritize prosecutions under 18 U.S.C. 922(g)(8) and (9). People who have been convicted of domestic violence crimes tend to be high-risk offenders. Prosecuting these individuals for illegal firearms possession could prevent other forms of violent crime, such as homicides and mass shootings. An analysis of 749 mass shootings between 2004 and 2019 found that nearly 60% were either domestic violence attacks, or committed by men with histories of domestic violence.[49] The domestic violence specialist would help USAOs target prosecutions under 8 U.S.C. 922(g)(8) and (9) to the most violent offenders. The specialist would also help ensure that those convicted of domestic violence crimes or are subject to protective orders relinquish their firearms and are notified about the firearm prohibitions.

Process

[45] 34 U.S.C § 10449(e).

[46] 34 U.S.C § 10441(c).

[47] 34 U.S.C. § 20123.

[48] 34 U.S.C. § 20121.

[49] Jackie Gu, "Deadliest Mass Shootings are Often Preceded by Violence at Home," *Bloomberg* June 30, 2020, https://www.bloomberg.com/graphics/2020-mass-shootings-domestic-violence-connection/.

As noted above, under 28 U.S.C. § 543(a), the attorney general may appoint USAs "when the public interest so requires." Individual US attorneys are authorized to recruit, screen, and submit nominations of the best-qualified candidates to serve as AUSAs. However, these appointments must be approved by the OARM.

US attorneys' direct authorized positions for fiscal year 2021 total 11,344 positions, including 5,928 attorneys.[50] As such, appointing domestic violence specialists to serve as an AUSA is within the authority of the DOJ, and the agency may use existing funding to carry out such appointments. To effectuate these appointments, the OARM and EOUSA should direct all individual OUSAs that do not currently employ a domestic violence specialist as an AUSA to identify existing budgetary authority, and use it to hire a domestic violence specialist to fill an AUSA position as available.

IV. Risk Analysis

Legal vulnerability

There is little legal vulnerability in instituting this recommendation. Appointing a domestic violence specialist is within the Attorney General's legal authority under 28 U.S.C. § 543(a). The appointment of domestic violence specialists also complies with the Appointments Clause of the US Constitution, which permits Congress to vest the attorney general with power to appoint "inferior officers."

As noted above, if enacted, the Violence Against Women Act Reauthorization of 2019 would empower the attorney general to appoint "special assistant United States attorneys for the purpose of prosecuting violations" of "paragraphs (8), (9), and (10) of section 922(g)." Although these appointments could be accomplished through this new specific provision of authority, the attorney general already has authority to appoint such individuals under 28 U.S.C. § 543(a).

Other potential downsides

Some criminal justice reform advocates may oppose increasing the number of prosecutors in US Attorneys' Offices. While the domestic violence specialist would lead prosecutions, the primary goal of the position is to promote a multidisciplinary, community-based response to domestic violence crimes.

This role would aim to improve the criminal justice system's overall response to domestic violence crimes and increase the quality of services available to survivors. The specialist would support the implementation of trauma-informed prosecutorial practices and bias training. The specialists would serve as leaders on domestic violence legal advocacy in their respective regions and develop working groups to systematize best practices.

Federal domestic violence prosecutions are extremely rare and limited to high-risk offenders. Prosecuting domestic abusers for illegal firearms possession would not significantly increase the incarcerated population, 90% of whom are held in state prisons.[51] Furthermore, prosecuting

[50] *See e.g.*, U.S. Department of Justice, "FY21 Budget Request At A Glance - U.S. Attorneys," 2020, https://www.justice.gov/doj/page/file/1246611/download.

[51] Ann Carson, "Prisoners in 2018," Bureau of Justice Statistics, April 2020, https://www.bjs.gov/content/pub/pdf/p18.pdf.

these individuals should be a priority, as it could prevent other forms of violent crime, such as mass shooting and other homicides.

For example, an analysis conducted by Everytown for Gun Safety, found that in at least 54% of mass shootings, the perpetrator shot a current or former intimate partner or family member during the course of the incident.[52] In addition, about 20% of all mass public shootings involved a domestic dispute as a contributing factor.[53] It is possible, therefore, that prohibitions associated with domestic violence could disarm a potential mass shooter and prevent a mass shooting.

[52] Everytown for Gun Safety. Mass Shootings in the United States, 2009-2018, forthcoming. https://every.tw/1XVAmcc.

[53] Krouse, William J., and Daniel J. Richardson, "Mass Murder with Firearms: Incidents and Victims, 1999–2013," Congressional Research Service, July 30, 2015, https://fas.org/sgp/crs/misc/R44126.pdf.

RECOMMENDED ACTION MEMO

Agency: Department of Health and Human Services
Topic: Gun Violence as a Public Health Emergency
Date: November 2020

Recommendation: Declare public health emergencies in areas where shootings and gun homicides are greatest, and use the authority pursuant to those declarations to address those emergencies.

I. Summary

Description of recommended executive action

In the midst of the devastating coronavirus pandemic, many families in the United States face another ongoing public health crisis. Cycles of "community gun violence" and shootings have continued and even exploded in some areas. While the novel coronavirus overshadowed all other public health emergencies in 2020, gun violence continues to attack particular communities in the US. The pandemic has disrupted programs meant to reduce shootings, further exacerbating the violence, and increasing the number of neighborhoods where violence is reaching emergency levels.

Gun violence in America was already a public health crisis. In 2017, gun deaths reached their highest level in at least 40 years, with 39,773 deaths that year alone.[1] This number represented an increase of 16% from 2014, and meant that, on average, over 100 Americans died each day from gun violence.[2] However, like other public health crises, gun violence does not affect all Americans equally. A disproportionate impact falls upon people of color in cities with high levels of shootings and gun homicide.[3] In these cities, gun violence constitutes a public health emergency.

Consequently, the HHS should recognize the potential for a gun violence public health emergency nationwide, and begin collecting the data necessary to quickly determine when and where outbreaks of shootings and gun homicides rise to the level of public health emergencies. The HHS should then collect such data on an ongoing basis.

Most importantly, the Secretary of the HHS should formally declare these sharp spikes in gun violence to be public health emergencies in the areas when these outbreaks occur. Declaring these emergencies will not conflict with efforts to address the coronavirus, but will provide the

[1] Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), "Fatal Injury Reports," accessed February 20, 2019, https://www.cdc.gov/injury/wisqars.
[2] *See id.*
[3] "Global Study on Homicide: Trends, Contexts, Data," United Nations Office on Drugs and Crime, 2013, https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf.

HHS with the authority to address these gun violence emergencies. When the HHS has determined and declared gun violence to be an emergency in an area, it can use its authority to create coalitions of stakeholders and establish plans using evidence-based strategies to reduce gun violence in these communities. In accordance with appropriations by Congress, the HHS should then begin funding the programs to implement these plans.

Overview of process and time to enactment

As soon as taking office, the secretary should formally find that, alongside the coronavirus, there is a significant likelihood that public health emergencies exist from gun violence across the country. The HHS should then prioritize the creation of a process to continuously gather the data necessary to identify the counties experiencing shooting outbreaks. By July 2021, the HHS should begin identifying these counties and declaring these outbreaks to be public health emergencies.

By September 2021, coalitions of stakeholders in the first of these areas should be formed as community working groups. These working groups should choose community violence intervention strategies to address the violence. In the 2022 fiscal year and beyond, the HHS should be able to fund the programs to implement these strategies. This timeline appropriately reflects the urgency of the gun violence crisis. The HHS will declare public health emergencies in more counties as they experience outbreaks of gun violence, and begin the process there as well.

II. Current state

Gun violence in America

Gun violence in America is a public health crisis and it is getting worse. The explosion of gun violence in major US cities is now commonplace in the news media. Over 1.2 million Americans have been shot in the last decade,[4] millions more have witnessed gun violence firsthand, and hundreds of millions—nearly every American—will know at least one victim of gun violence in their lifetime.[5]

While a majority of gun deaths are suicides,[6] the number of gun homicides and nonfatal shootings is also outrageously high, and the burden does not fall equally on all. Gun homicides are a uniquely American crisis: the US rate is 25 times that of other high-income countries,[7] and these shootings are disproportionately concentrated in communities of color. As a result, black

[4] Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), “Fatal Injury Reports,” accessed February 20, 2019, https://www.cdc.gov/injury/wisqars.
[5] *See*, e.g., Katherine Fowler, et al., “Childhood Firearm Injuries in the United States,” *Pediatrics* 140, no. 1 (2017).
[6] Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), “Fatal Injury Reports,” accessed February 20, 2019, https://www.cdc.gov/injury/wisqars.
[7] Erin Grinshteyn and David Hemenway, “Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015,” *Preventive Medicine* 123, (2019): 20–26.

Americans are 10 times more likely than white Americans to die by gun homicide, and firearm violence is the *leading* cause of death among black males ages 15 to 34, and black children.[8] This violence is also highly concentrated geographically. In American urban centers with significant minority populations, like New Orleans, Detroit, and Baltimore, the homicide rate is up to 10 times higher than the national average—between 30 and 40 murders per 100,000 people.[9]

Most recently, on July 21, 2020, the Chicago police began an investigation into a mass shooting that left at least 15 people wounded outside a funeral home in the Auburn Gresham neighborhood. Chicago Mayor Lori Lightfoot condemned the "horrific mass shooting," and pleaded for help from the local community.[10] However, when gun violence flares, it becomes difficult for local community leaders and activists to effectively control its scope without additional resources from the federal government. Federal assistance to address the gun violence problem is necessary. Indeed, Mayor Lightfoot sent a letter to President Trump asking him not to deploy federal law enforcement agents but rather "help the city address violent crime by cracking down on the proliferation of illegal guns."[11]

Public health emergency declarations

Legal background

Until now, our public health care system has failed to address the emergency nature of gun violence in communities of color. However, under the Public Health Service Act (PHSA), the secretary (the secretary) of the Department of Health and Human Services (HHS) has the authority to declare a public health emergency (PHE) if he or she determines that:

> (1) a disease or disorder presents a public health emergency, or
> (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists.[12]

While the secretary of the HHS serves at the pleasure of the President, the secretary alone—not the president—has the power to declare public health emergencies. Historically, presidents

[8] Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), "Fatal Injury Reports," accessed February 20, 2019, https://www.cdc.gov/injury/wisqars. Calculations include children ages 0–17 and were based on the most recent available data: 2017.
[9] Ted Heinrich, "Problem Management: The Federal Role in Reducing Urban Violence," 2012, at 7. On file at the Law Center to Prevent Gun Violence.
[10] "Lightfoot Calls for Information on 'Cowardly Gunmen' in Funeral Shooting That Left 15 Wounded," NBC Chicago, July 22, 2020, https://www.nbcchicago.com/news/local/lightfoot-calls-for-information-on-cowardly-gunmen-in-funeral-shooting-that-left-15-wounded/2309262/.
[11] Claudia Morell, "Chicago Mayor Lori Lightfoot Asks Trump Not To Send Federal Agents, Saying It Would 'Spell Disaster'", WBEZ Chicago, July 20, 2020, https://www.wbez.org/stories/chicago-mayor-lori-lightfoot-asks-trump-not-to-send-federal-agents-saying-it-would-spell-disaster/000b3268-a620-4f01-ba02-abe5a28562e1.
[12] 42 U.S.C. § 247d.

have circumvented this requirement by issuing directives urging the secretary to "consider" declaring an emergency.[13]

PHE declarations allow the HHS to waive certain federal regulatory and reporting requirements; enter into grants and contracts as needed; allow states to temporarily reassign personnel supported with federal funds; and mobilize federal resources (directly and through assistance to states) to support surveillance, investigations, and control measures.[14] A PHE declaration also authorizes the secretary to access federal funds from the Public Health Emergency Fund. These funds can be used to "facilitate coordination" among governmental entities and private and public health care entities that are affected by the emergency.[15] They can also be used to make grants, enter into contracts, and conduct supportive investigations pertaining to the emergency; and to strengthen biosurveillance capabilities to identify, collect, and analyze information regarding the emergency.[16]

The PHE fund was established as a "no year" account, with an initial appropriation of $30 million. However, no regular appropriations to this fund have been made. Instead, appropriations for public health emergencies have been made through the Public Health and Social Services Emergency Fund (PHSSEF). Among other things, the HHS uses the PHSSEF to maintain certain HHS offices, most notably the Office of the Assistant Secretary for Preparedness and Response. Over one billion dollars was appropriated to this account for fiscal year 2020 (and similar amounts in previous years) "to support activities related to countering potential biological, nuclear, radiological, chemical, and cybersecurity threats to civilian populations, *and for other public health emergencies*."[17] Through supplemental appropriations, Congress has also appropriated amounts to this Fund for the COVID-19 response.[18] Congress can also appropriate funds for HHS to use funding programs to respond to public health emergencies through "public health emergency cooperative agreements."[19]

Under the Public Health Services Act, the secretary can also decide that there is *significant potential* for a public health emergency.[20] Even though this falls short of an actual declaration, such determination would give the secretary authority to gather data and conduct an analysis to determine the scope and severity of the gun violence epidemic in the communities suffering the

[13] *See, e.g.,* Combatting the National Drug Demand and Opioid Crisis, 82 Fed.Reg. 50305(2).
[14] *Id.*
[15] 42 U.S.C. § 247d(b)(2).
[16] *Id.*
[17] Further Consolidated Appropriations Act, 2020, Pub.L. 116-94, 133 Stat. 2534 (2019). (Italics added.) About half of this money was set aside for the Biomedical Advanced Research and Development Authority.
[18] Government Accountability Office, "COVID-19: Opportunities to Improve Federal Response and Recovery Efforts," June 25, 2020, https://www.gao.gov/reports/GAO-20-625/. *See also* Congressional Research Service, "Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (P.L. 116-123): First Coronavirus Supplemental," March 25, 2020, https://crsreports.congress.gov/product/pdf/R/R46285.
[19] *See* 42 U.S.C. § 247d-3a.
[20] 42 U.S.C. § 247d(b)(1).

most.[21] It also provides the secretary with access to the PHE fund (and arguably, PHSSEF), which, if that money is appropriated to that fund, would allow the secretary to: (1) provide grants and other funding for investigations on gun violence, and (2) strengthen biosurveillance capabilities to identify, collect, and analyze information regarding gun violence.[22]

If the secretary determines that a public health crisis is "significantly likely" to become a public health emergency, the secretary may also waive the requirements of the Paperwork Reduction Act (PRA).[23] The PRA requires a federal agency that wants to impose a reporting requirement on the public to seek approval from the Office of Management and Budget and follow specific procedures.[24] If the PRA is waived based on the likelihood of a PHE, the HHS can then collect information quickly and more efficiently.

Prior PHE declarations

As of May 2020, 39 separate public health emergencies have been declared in response to 25 unique situations since the beginning of the Obama administration.[25] The Trump administration has used the power frequently, declaring 29 emergencies, compared to the 10 issued during the duration of the Obama administration.[26] Of the 39 total, three declarations were made on a nationwide basis and 36 were issued in a particular state or territory.[27] Under the PHSA, a public health emergency status expires after 90 days, if it is not renewed.[28] Eleven of the public health emergencies declared during the Obama and Trump administrations were renewed one or more times.[29]

Public health emergency declarations are most commonly issued for single states in response to natural disasters. For example, between August and September 2019, separate public health emergencies were ordered in Puerto Rico, Florida, Georgia, South Carolina, and North Carolina in response to Hurricane Dorian.[30] The Category 5 storm was one of the most powerful hurricanes on record, caused dozens of deaths internationally, and led to billions of dollars in economic losses.

[21] *Id.*
[22] *Id.*
[23] 42 U.S.C. § 247d(f).
[24] 44 U.S.C. § 3501 et seq.
[25] Office of the Assistant Secretary for Preparedness and Response, U.S. Dep't of Health and Human Services, "Public Health Emergency Declarations," accessed August 20, 2020, https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.
[26] *Id.*
[27] *Id.*
[28] 42 U.S.C. § 247d(a).
[29] Office of the Assistant Secretary for Preparedness and Response, U.S. Dep't of Health and Human Services, "Public Health Emergency Declarations," August 20, 2020, https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.
[30] *Id.*

The Trump administration first declared the opioid crisis as a PHE in October 2017. This declaration has been renewed nine times since.[31] A September 2018 Government Accountability Office report noted that the federal government had only used three of the seventeen authorities granted under this emergency declaration and had not tapped into the PHE fund.[32] Bills to use the PHSSEF to address the opioid crisis have also not been enacted,[33] although other funding has been provided for addressing the opioid crisis with reference to the PHSA.[34]

The coronavirus was declared a public health emergency on January 31, 2020.[35] Congress quickly provided appropriations to address this emergency,[36] and this declaration has been renewed several times since then.

III. Proposed action

This memorandum proposes a four-step process to address the public health emergency posed by gun violence.

1. Preliminary finding. The secretary formally finds a significant probability that gun violence will become a public health emergency nationwide. Once the secretary has made this finding, the Public Health Service Act authorizes the secretary to "rapidly respond to the immediate needs" resulting from this potential public health emergency, including through the expedited distribution of resources from the PHE fund (to the extent such resources exist), or the PHSSEF. The administration should then waive the requirements of the Paperwork Reduction Act, hastening the timeline for the HHS to collect real-time data about gun homicides.

2. Information collection. A finding of a significant probability of a public health emergency would enable the HHS to then fast track the collection of information about gun homicides across the country. The collection of this information is the second step in the process. Historically, data about shootings and gun homicides is collected and published notoriously slowly. If the HHS finds a significant probability of a PHE, however, this data could be collected more quickly.

[31] *Id.*
[32] Government Accountability Office, "Opioid Crisis: Status of Public Health Emergency Authorities," September 2018, https://www.gao.gov/assets/700/694745.pdf.
[33] *See, e.g.,* H.R. 4447 (114th Cong,).
[34] *See, e.g.,* Further Consolidated Appropriations Act, 2020, Pub.L. 116-94, 133 Stat. 2534 (2019), Continuing Appropriations Act 2019, Pub. L. 115-245, 132 Stat. 2981 (2018).
[35] "Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, January 31, 2020, https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx; "Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus," January 31, 2020, https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html.
[36] Families First Coronavirus Response Act, Pub. L. No: 116-127; CARES Act, Pub. L. 116-136; Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. 116-123.

The HHS should use the National Vital Statistics System (NVSS) in this process. The National Vital Statistics System is the oldest and most successful example of inter-governmental data sharing in public health. The shared relationships, standards, and procedures form the mechanism by which the National Center for Health Statistics (NCHS) collects and disseminates the nation's official vital statistics. This data is provided through contracts between NCHS and vital registration systems operated in the various jurisdictions that are legally responsible for the registration of vital events. In NVSS, data pertaining to causes of death are classified and coded according to the International Classification of Diseases (ICD). Consequently, NVSS data represents the best source for information that distinguishes between gun homicides and other gun deaths.[37] The HHS should prioritize the collection of this data on an ongoing basis, so that the NVSS continues to gather this data quickly into the future.

3. Declaration of a public health emergency. With this information, the HHS will be able to identify the counties where outbreaks of gun violence reach the level of public health emergencies. In order to make these determinations fairly, the HHS should establish an objective metric for the level of violence that constitutes an emergency. This level should depend on both the number of gun homicides and the homicide rate, and HHS should use the same metric consistently over time.

   We suggest declaring a PHE in any county that has suffered 12 gun homicides in the past year and has a rate of gun homicides that is four times the national rate. Using this metric, ten counties were experiencing PHEs from gun homicides during all four quarters of 2018.[38] (Currently, there is no system that reliably provides complete and accurate data about nonfatal shootings. As a result, the metrics suggested here rely solely on gun homicides and gun homicide rates.)[39]

   The HHS will then respond through the third, most important step in the process: declare the outbreaks of gun violence as PHEs in these counties. The HHS should be ready to begin making these declarations by mid-2021 at the latest. In the future, when the data in the NVSS indicates that a county is experiencing an outbreak of gun violence, the HHS will be able to respond with a PHE declaration. (Once a PHE has been declared in a county, the HHS should use its authority to begin the collection of data regarding

[37] Centers for Disease Control and Prevention, National Center for Health Statistics, "About NVSS: National Vital Statistics System," updated January 4, 2016, https://www.cdc.gov/nchs/nvss/about_nvss.htm.
[38] *See* Centers for Disease Control and Prevention, CDC WONDER, https://wonder.cdc.gov/. These counties were: City of St. Louis, MO; City of Baltimore, MD; Hinds County, MS; Orleans Parish, LA; Shelby County, TN; Caddo Parish, LA; Jefferson County, AL; Jackson County, MO; East Baton Rouge Parish, LA; and Philadelphia County, PA. Those counties encompass the cities of St. Louis, MO; Baltimore, MD; Jackson, MS; New Orleans, LA; Memphis, TN; Shreveport, LA; Birmingham, AL; Kansas City, KS; Baton Rouge, LA; and Philadelphia, PA.
[39] If HHS chooses to identify counties that have suffered 12 gun homicides each year, and have gun homicide rates that are twice the national rate, about 30 counties were experiencing PHEs in 2018. If HHS chooses to identify counties that have suffered 12 gun homicides each year, and have gun homicide rates that are three times the national rate, about 15 counties qualify.

nonfatal, as well as fatal, shootings in that county. The HHS may want to rely on that data for renewals of PHE declarations for that county.)

4. *C*ommunity Violence Intervention. Finally, the HHS will use its authority to respond to these emergencies by working with law enforcement, public health experts, and community groups in those counties to establish and fund programs that address these emergencies. These programs must use community violence intervention strategies that are evidence-based. Generally, community violence intervention programs should begin addressing an outbreak as soon as possible after a PHE has been declared in that area.

   Once a PHE has been declared, the HHS could form or enlarge community working groups in jurisdictions known to have high rates of gun homicides. The working groups can then each conduct a problem analysis—an in-depth qualitative and quantitative review of local community violence dynamics—and identify one or more intervention projects using an evidence-based strategy that could meaningfully reduce shootings and save lives.[40] Some of these strategies are described in more detail below.

IV. Legal justification

Under the PHSA, the secretary may declare a public health emergency if he or she determines that: "(1) a disease or disorder presents a public health emergency; or (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists."[41] The statute states that the secretary may consult public health officials before making this determination. However, the statute fails to define the terms "disease or disorder" or "public health emergency." Additionally, the language used in prior declarations of public health emergencies is bare.[42] As a result, guidance from prior declarations about what constitutes a public health emergency is limited. Nevertheless, there can be no doubt that the gun violence crisis in particular areas of the country rises to the level of an emergency.

The extent of the crisis

Consensus on the public health consequences of gun violence exists. For the first time, the nation's largest physicians group, the American Medical Association, formally adopted a policy designating gun violence as a public health crisis. Additionally, the American Psychiatric Association reported in 2018 that "the majority of Americans (87%) see gun violence as a public

[40] Giffords Law Center to Prevent Gun Violence et al., "A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence," April 2019, https://giffords.org/lawcenter/report/a-case-study-in-hope-lessons-from-oaklands-remarkable-reduction-in-gun-violence/.
[41] 42 U.S.C. § 247d.
[42] Office of the Assistant Secretary for Preparedness and Response, U.S. Dep't of Health and Human Services, "Public Health Emergency Declarations," August 20, 2020, https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.

health threat, including 77% of Republicans and 96% of Democrats."[43] Besides the obvious health implications of gunshot wounds, victims and witnesses of gun violence "may experience stress, depression, anxiety, and post-traumatic stress disorder." This reality is amplified by the fact that "[a]n estimated three million children witness a shooting each year."[44] Exposure to violence has also been linked to other specific health problems that include asthma, heart disease, and babies born underweight.[45]

As if the overwhelming human toll were not enough, shootings have an outsized economic impact, including medical expenses; law enforcement and criminal justice costs;lost income; and pain and suffering. Estimates indicate that the cost of gun violence is at least $229 billion every year—working out to approximately $700 per American.[46] It is clear from this data that the severity of gun violence has reached crisis proportions similar to those of the opioid crisis.

Furthermore, gun violence has a lasting negative impact on the physical and psychological health of the American people and their communities. Gun violence as a disease of the individual is also very difficult to get rid of. The strongest risk factor for violent injury is a history of previous violent injury, with the chances of injury recidivism as high as 45% within the first five years.[47] In fact, a previous violent injury makes future death from violent injury nearly twice as likely. This means that, while immediate intervention is necessary to stop the spread of violence, intervening can also have positive preventative benefits far into the future. Therefore, it should fall under the purview of an agency dedicated to addressing, monitoring, and combating situations that negatively impact a society's health, such as gun violence.

Intersection with the coronavirus

A declaration acknowledging gun violence as a PHE is necessary to recognize the true nature of the plight of those communities that are struggling with the coronavirus pandemic while simultaneously battling shootings and gun homicides. In many places within the US, the two disasters have become deeply entwined.[48] Panic-buying due to the coronavirus has led guns to

[43] American Psychiatric Association, "Americans Overwhelmingly See Gun Violence as a Public Health Issue; They Want Congress to Act and CDC to Conduct Research," May 7, 2018, https://www.psychiatry.org/newsroom/news-releases/americans-overwhelmingly-see-gun-violence-As-a-public-health-issue-they-want-congress-to-act-and-cdc-to-conduct-research.
[44] Everytown for Gun Safety, "Fact Sheet: The Impact of Gun Violence on Children and Teens," May 29, 2019, https://everytownresearch.org/report/the-impact-of-gun-violence-on-children-and-teens/.
[45] David Hemenway, "Costs of Firearm Violence: How You Measure Things Matters," in *Social and Economic Costs of Violence: Workshop Summary*, ed. Deepali Patel and Rachel Taylor, (Washington DC: The National Academies Press, 2012), 61, https://www.nap.edu/read/13254/chapter/1.
[46] Mark Follman, Julia Lurie, Jaeah Lee, and James West, "The True Cost of Gun Violence in America," *Mother Jones*, April 15, 2015, https://www.motherjones.com/politics/2015/04/true-cost-of-gun-violence-in-america/.
[47] J. Purtle et. al., "Hospital-based Violence Intervention Programs Save Lives and Money," *J. Trauma Acute Care Surg*. 75, no. 2 (2013): 331–333.
[48] Inquirer Editorial Board, "When coronavirus and gun violence collide, it makes both more deadly," *Philadelphia Inquirer*, March 26, 2020, https://www.inquirer.com/health/coronavirus/coronavirus-covid-19-crime-gun-violence-philadelphia-20200326.html.

fly off the shelves of gun stores at an almost unprecedented rate.[49] While many cities have reported drops in crime overall, community violence has continued unabated and, in some cities, it has significantly spiked.[50] Mayors and officials around the nation have pleaded with residents to halt cycles of shootings and retaliations as their communities "battle two public health crises: coronavirus and gun violence."[51]

DeVone Boggan, the executive director of the Bay Area-based violence prevention group Advance Peace, explained that the pandemic has exacerbated violence in underserved areas by introducing unemployment, hampering access to mental health care and other social services, and keeping everyone home, fueling conflict within families and communities—and making rivals easier to track down. "Being in a dysfunctional environment with multiple people who are all going through the same thing and respond in volatile ways creates a combustion that can produce some of the things that we are seeing in some of these neighborhoods," he said.[52]

In addition, when public health systems are stretched thin, shootings are likely to become more fatal.[53]Victims of violence and COVID-19 patients must compete for strapped healthcare resources, including ambulances, ICU beds, and ventilators. Across the country, it is estimated that roughly 80,000 people are admitted to emergency rooms for gunshot wounds each year, of whom 20,000 must be treated in ICUs.[54] Many of these patients require large quantities of blood to stay alive, 10 times as much blood as other trauma patients on average.[55] But our healthcare systems have had to battle severe shortages of both blood and ICU resources. When the pandemic was at its worst in New York City, roughly 20% of ambulance workers were out sick,[56] which led to warnings of a "serious decline in ambulance services," and reports of hundreds of

[49] Max Matza, "How the coronavirus led to the highest-ever spike in US gun sales," BBC News, April 6, 2020, https://www.bbc.com/news/world-us-canada-52189349.
[50] Chandler Thornton, et al., "Shootings across US amid continued summer surge in gun violence," CNN, August 17, 2020, https://www.cnn.com/2020/08/16/us/nyc-chicago-gun-violence/index.html.
[51] "Kenney says Philly is battling 2 public health crises: Guns and coronavirus," KYW Radio, March 31, 2020, https://kywnewsradio.radio.com/articles/news/kenney-says-philly-is-battling-gun-and-coronavirus-crises
[52] Champe Burton et al., "Mass Shootings Are Soaring, With Black Neighborhoods Hit Hardest," The Trace, September 3, 2020, https://www.thetrace.org/2020/09/mass-shootings-2020-gun-violence-black-neighborhoods/.
[53] Champe Barton, "A Trauma Surgeon Fears for Shooting Victims as Virus Slams Hospitals," The Trace, March 31, 2020, https://www.thetrace.org/2020/03/dallas-trauma-surgeon-coronavirus-shooting-victims-hospital-resources/
[54] Elinore Kaufman, "Please, Stop Shooting. We Need the Beds," *NY Times*, April 1, 2020, https://www.nytimes.com/2020/04/01/opinion/covid-gun-violence-hospitals.html?auth=login-email&login=email.
[55] Champe Barton, "A Trauma Surgeon Fears for Shooting Victims as Virus Slams Hospitals," The Trace, March 31, 2020, https://www.thetrace.org/2020/03/dallas-trauma-surgeon-coronavirus-shooting-victims-hospital-resources/
[56] Eva Pilgrim et al., "EMS on the front lines dealing with 'madness,' sleeping in their cars to avoid infecting their families," ABC News, March 31, 2020, https://abcnews.go.com/Health/ems-front-lines-dealing-madness-sleeping-cars-avoid/story?id=69901930

ambulance calls at a time left on hold.[57] Traumatic gunshot injuries that would have been survivable before the coronavirus may often be fatal when health care systems are overwhelmed.

Declaring gun violence a public health emergency like the coronavirus, would provide some of the flexibility health care systems need to address both emergencies at once. Among other things, a PHE declaration gives the HHS the authority, upon the request of the governor of the state or tribe, to reassign certain federally funded personnel to address the emergency.[58] A PHE declaration for gun violence in a particular community would therefore enable the personnel of health care systems in that community to shift appropriately between the needs of those affected by the coronavirus and the needs of those affected by shootings.

As the coronavirus spreads, depleted homicide investigation units may also become increasingly unsuccessful at holding individuals accountable for violence. Before the crisis hit, law-enforcement agencies in cities across the nation already failed to make an arrest in a majority of fatal and nonfatal shootings involving victims of color.[59] When homicide investigators are not able or trusted to bring legal justice to mourning communities, a desperate and traumatized few may become more likely to turn to vigilante retaliatory violence instead.[60]

The opioid crisis and other analogies

The Trump administration's declaration of the opioid crisis as a public health emergency is the declaration perhaps most comparable to a potential gun violence public health emergency declaration. Neither gun violence nor opioid abuse are infectious diseases spread through bacteria or viruses. They are not natural disasters like hurricanes or wildfires. But they do kill tens of thousands of Americans each year, affect certain communities at a disproportionately high rate, and have solutions that are rooted in public health. When these declarations are considered along with the tens of thousands of lives and hundreds of billions of dollars lost each year to gun violence, it is clear that this administration would be on firm ground formally labelling gun violence a public health emergency.

Secretary Hargan's previous decision to classify opioid use as a public health emergency in October 2017, occurred after several steps towards this goal. In March and December of 2016, the Center for Disease Control (CDC) responded to the increasing abuse of opioids in America by publishing Opioid Prescribing Guidelines and a report detailing the record high opioid-related

[57] Scot Paltrow, "New York's paramedics unable to answer emergency calls as 20% of service ill, most with COVID-19," *Reuters*, March 28, 2020, https://nationalpost.com/news/canada/coronavirus-outbreak-is-stretching-new-yorks-ambulance-service-to-breaking-point.
[58] 42 U.S.C. § 247d(e).
[59] Sarah Ryley et al., "Shoot Someone In a Major U.S. City, and Odds Are You'll Get Away With It," The Trace, January 24, 2019, https://www.thetrace.org/features/murder-solve-rate-gun-violence-baltimore-shootings/.
[60] Giffords Law Center, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," January 2020, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.

deaths in America. Then in March 2017, President Trump issued Executive Order 13784, creating a commission to study the scope of the opioid crisis.[61] Trump appointed Governor Chris Christie of New Jersey as the commission's chairman, with two other governors, an addiction researcher, and a former congressman-in-recovery to round out the commission. Per President Trump's executive order, the commission was funded and administratively supported by the Office of National Drug Control Policy. As to the composition of the commission, the executive order simply mandated that it be "fairly balanced in terms of the points of view represented and the functions to be performed by the Commission."

The commission released an interim report in July 2017. Its "first and most urgent" recommendation was to declare the opioid crisis a national emergency,[62] and less than three months after the report was released, President Trump issued a memorandum directing the secretary to "consider declaring that the drug demand and opioid crisis described in section 1 of this memorandum constitutes a Public Health Emergency."[63] Acting HHS Secretary Eric Hargan announced a formal declaration that same day. It has been renewed every ninety days since. In the opioid crisis declaration, which consists of no more than four lines of text, Secretary Hargan declared a public health emergency exists "as a result of the consequences of the opioid crisis affecting our nation."[64] Based on the foregoing, it appears the secretary has complete discretion to determine that gun violence presents a public health emergency under the statute.

The implications of the gun violence crisis are analogous in scope and magnitude to those of the opioid crisis; therefore, a public health emergency declaration based on gun violence is a consistent application of the secretary's powers under the PHSA. For example, a fact mentioned repeatedly in the commission's report is the statistic that 175 Americans die daily from opioid overdose.[65] In urging a public health emergency declaration, President Trump's commission found that "opioid overdose deaths ha[ve] reached epidemic proportions," citing CDC data stating that 33,091 people died in 2015 from opioid overdose.[66] In 2016 this number was reported to be 42,000. The report also addressed the financial burden of the opioid crisis and found that the total estimated economic burden reached approximately $111 billion.[67]

If a simple comparison of these statistics to those vis-à-vis gun violence was conducted, the severity of the gun violence problem in America appears equivalent to the severity of the opioid

[61] Establishing the President's Commission on Combating Drug Addiction and the Opioid Crisis, Executive Order 13784, 82 Fed.Reg. 16283 (March 29, 2017).
[62] The President's Commission on Combating Drug Addiction and the Opioid Crisis, "Interim Report," accessed October 13, 2020, https://www.whitehouse.gov/sites/whitehouse.gov/files/ondcp/commission-interim-report.pdf.
[63] Combatting the National Drug Demand and Opioid Crisis, Memorandum for the Heads of Executive Departments and Agencies, 82 Fed.Reg. 50305 (October 26, 2017).
[64] Office of the Assistant Secretary for Preparedness and Response, U.S. Dep't of Health and Human Services, "Determination that a Public Health Emergency Exists," October 26, 2017, https://www.phe.gov/emergency/news/healthactions/phe/Pages/opioids.aspx.
[65] The President's Commission on Combating Drug Addiction and the Opioid Crisis, November 2017, 5, https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf.
[66] *Id.* at 31.
[67] *Id.*

crisis. For example, figures from 2013-2017 indicate that 36,000 Americans are killed each year by guns, reflecting an average of approximately 100 per day. Moreover, in 2017, the year the opioid crisis was described to have reached epidemic proportions warranting a public health emergency declaration, gun deaths spiked with 39,773 deaths that year alone.[68]

Most gun deaths are suicides, however. Nevertheless, shootings and homicides, when viewed as a whole constitute a problem similar in scope. Interpersonal gun violence in America includes not only 12,000 deadly shootings, but also another 80,000-plus nonfatal shootings per year.[69] According to cost estimates developed by the Pacific Institute for Research and Evaluation (PIRE) and relied on by the Centers for Disease Control and Prevention (CDC), each gun-related death costs approximately $49,164 and each nonfatal shooting that requires hospitalization costs $63,289 in medical expenses.[70] The average cost of a police investigation and related criminal justice expenses for a fatal shooting adds an additional $439,217. The average value of lost work for a single fatal shooting is $1,742,722; for a nonfatal shooting that requires hospitalization it is $81,559.[71] The impact on the communities that are hardest hit is clearly as devastating as the opioid crisis.

The Trump administration declared the opioid crisis a PHE nationwide, yet failed to secure significant funding or appropriately use its authority to address the opioid PHE. As noted above, a September 2018 GAO report found that the federal government had not used most of the authorities granted under this emergency declaration or tapped into the PHE Fund.[72]

The approach suggested in this memorandum is different. By declaring that gun violence poses a "significant likelihood" of a PHE nationwide, rather than a nationwide PHE, and then declaring that gun violence constitutes a PHE only in the areas where gun homicides are highest, the next

[68] Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), "Fatal Injury Reports," accessed February 20, 2019, https://www.cdc.gov/injury/wisqars.
[69] *Id.;* Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), "Nonfatal Injury Reports," accessed February 20, 2019, https://www.cdc.gov/injury/wisqars.
[70] "Societal Cost per Firearm Injury, United States, 2010," Pacific Institute for Research and Evaluation, December 2012, http://www.pire.org/documents/gswcost2010.pdf. The PIRE estimates were funded by the Health Resources and Services Administration, US Department of Health and Human Services, and by Public Health Law Research, a national program of the Robert Wood Johnson Foundation. PIRE is a nonprofit research organization which focuses on using scientific research to inform public policy. "Overview," Pacific Institute for Research and Evaluation, accessed October 13, 2020, https://www.pire.org/Home/Overview. The cost of injury estimates developed by PIRE have been used by the US Centers for Disease Control as the basis for their cost of injury calculator. "Injury Prevention & Control: Data & Statistics (WISQARS), WISQARS Cost of Injury Reports Help Menu: Frequently Asked Questions," Centers for Disease Control and Prevention, http://www.cdc.gov/injury/wisqars/cost_help/faqs.html#where_data. Medical care and treatment costs in 2010 dollars were inflated using the medical care component of the Consumer Price Index, calculated by the Bureau of Labor Statistics. Medical care and treatment costs represent one component of the overall healthcare costs tabulated in this section. Other components of the overall healthcare costs were inflated using the general Consumer Price Index.
[71] *Id.*
[72] Government Accountability Office, "Opioid Crisis: Status of Public Health Emergency Authorities," September 2018, https://www.gao.gov/assets/700/694745.pdf.

administration has an opportunity to use a more nuanced approach that will focus attention on the needs of particular communities that suffer the outbreaks of shootings. In this way, the next administration could distinguish its use of PHE declarations from that of the prior administration while building upon the kernel of truth—that gun violence in some communities has reached emergency levels just as the opioid crisis has—in a way that will better prompt real action to address these emergencies.

There are more analogies in addition to President Trump's declarations related to the opioid crisis. Gun violence is admittedly unlike many of the other situations that have been declared public health emergencies, because it arises from intentional acts of interpersonal violence. However, the PHSA specifically mentions "bioterrorist attacks" as an example of something that can cause a public health emergency.[73] Like shootings and gun homicides, bioterrorist attacks are intentional acts of violence that use unusually dangerous weapons that can cause severe injuries and deaths in a short amount of time. The mention of bioterrorist attacks in the statute should therefore confirm that outbreaks of gun violence should be recognized as public health emergencies.

What will be gained from a PHE declaration

Even without a public health emergency declaration, the HHS has significant authority to address public health crises.[74] In addition, without an appropriation from Congress for the Public Health Emergency Fund or another dedicated account, the executive branch's ability to address a public health emergency is limited. However, declaring public health emergencies in the areas where they exist would send a clear message to policymakers that funding is necessary to address the crisis. Declaring emergencies specifically in these areas (as opposed to a single declaration of gun violence as an emergency nationwide) would also focus attention on the areas that need help the most.

In the neighborhoods where gun homicides are greatest, there can be no doubt that the ongoing violence constitutes a true public health emergency. Community members are faced with acute danger from this violence daily, and the situation demands immediate action. When the safety of a community is imperiled to this degree, government agencies have a moral duty to acknowledge the situation. A declaration of a public health emergency would formally recognize the gravity and seriousness of this crisis.

A PHE declaration is a clear way for the administration to call on Congress to appropriate money to address the crisis. A declaration of a public health emergency would also underscore the urgency of the problem, and communicate to other policymakers, such as state and local government officials and legislators, that action is necessary. State and local governments have largely failed to acknowledge the emergency nature of the gun violence crisis. This failure is a manifestation of our society's larger failure to recognize the plight of minority communities and

[73] 42 U.S.C. § 247d.
[74] "Legal Authority of the Secretary," U.S. Department of Health & Human Services, accessed October 13, 2020, https://www.phe.gov/Preparedness/support/secauthority/Pages/default.aspx.

the horrific impact gun violence is having on those communities. In order to activate a response commensurate with the evidence and the challenges presented by gun violence in these communities, only a declaration of a public health emergency will suffice.

The contagiousness of community violence

Addressing outbreaks of community gun violence as public health emergencies is also consistent with the contagious nature of this violence. Being the victim of violence significantly increases the chances of a person becoming a perpetrator of violence,[75] which means that gun violence can spread from person to person through the contact of the violence itself. Consequently, shootings and gun homicides spread like a transmissible disease through neighborhoods.[76] Murder is often related to cycles of retaliatory shootings among cliques of desperate young men in particular. At least 50% of homicides and 55% of nonfatal shootings involve people associated with gangs, or more loosely affiliated "street groups" involved in violence, typically representing less than 0.6% of a city's population.[77]

As noted above, the result is that murder is highly concentrated geographically. Only 1% of the US population lives in urban census tracts that experienced two or more fatal shootings in 2015.[78] People who live in these areas are 400 times more likely to be shot to death than the average person in other high-income countries.[79]

Research also shows definite patterns in gun violence networks, which can be used to determine when and where intervention can be made to stem the contagion. For example, one study found that more than half of the gun violence in an area over an eight-year period occurred in cascades through networks of people arrested together for the same offense. Further, the study determined that after being arrested—or "infected"—by the person responsible for the gun violence, those individuals were at highest risk of being shot in the 125 days after infection.[80]

The contagious nature of gun violence also signifies that public health emergency declarations will be an effective way to address outbreaks. Rapid responses are necessary to prevent the

[75] Jeffrey B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, "Firearm Violence, Exposure and Serious Violent Behavior," *Science* 308 (2005): 1323-1326.
[76] Gary Slutkin, "Why we need to treat violence like a contagious epidemic," *The Guardian*, January 13, 2020, https://www.theguardian.com/us-news/commentisfree/2020/jan/13/changing-violence-requires-the-same-shift-in-understanding-given-to-aids.
[77] Stephen Lurie, Alexis Acevedo, and Kyle Ott, "Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence," National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/nnsc_gmi_concentration_asc_v1.91.pdf.
[78] Aliza Aufrichtig, et al., "Want to fix gun violence in America? Go local.", *The Guardian*, January 9, 2017, https://www.theguardian.com/us-news/nginteractive/2017/jan/09/special-report-fixing-gun-violence-in-america.
[79] *Id.*
[80] Bess Connolly, "Yale study finds that gun violence is a 'contagious' social epidemic," YaleNews, January 4, 2017, https://news.yale.edu/2017/01/04/yale-study-finds-gun-violence-contagious-social-epidemic. n

spread of community violence through neighborhoods. These responses should use public health approaches like Cure Violence and others described below, which are based on the insight that violent behavior is a "contagious disease transmitted from person to person via emulation and social norms."[81]

Funding for community-based violence intervention programs

Beyond mere recognition of the extent of the gun violence crisis, real action is required. Certain community violence intervention strategies have been proven to work. In a short period of time, they can significantly reduce gun violence, alleviating emergencies and dramatically increasing the safety of community members. If the HHS declares a public health emergency in areas with outbreaks of gun violence, it would send a clear signal to Congress that these communities need immediate funding for these programs.

Community-based violence intervention strategies include Hospital-based Violence Intervention Programs (HVIPs). These programs focus on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury. HVIPs screen patients based on predetermined criteria to identify those individuals most at risk for re-injury, and connect qualifying candidates with trained case managers. These case managers provide clients with intense oversight and assistance, both in the hospital and in the crucial months following the patient's release.[82] During this time, case managers help connect high-risk individuals to a variety of community-based organizations in order to give them access to critical resources, such as mental health services, tattoo removal, GED programs, employment, court advocacy, and housing.

A second promising approach is the Chicago-based Cure Violence (CV) program.[83] The first element of the CV model is to detect and resolve potentially violent conflicts through the use of culturally competent individuals known as "violence interrupters," whose role is to serve as street-level conflict mediators. [84] The second element of the CV approach is the identification and treatment of high-risk individuals through outreach workers (OWs), who connect clients with services designed to help bring about positive life changes. The third element of the CV model focuses on changing community-level social norms by educating, empowering, and mobilizing community members, encouraging them to speak out in favor of positive change and peaceful

[81] Giffords Law Center to Prevent Gun Violence, "Healing Communities in Crisis: Lifesaving Solutions to the Urban Gun Violence Epidemic," March 10, 2016, https://giffords.org/lawcenter/report/healing-communities-in-crisis-lifesaving-solutions-to-the-urban-gun-violence-epidemic/; for more information about the Cure Violence model and their work in other states and municipalities visit cureviolence.org.
[82] Rochelle A. Dicker et. al., "Where Do We Go From Here? Interim Analysis to Forge Ahead in Violence Prevention," *J. Trauma* 67, no. 6 (2009): 1169–1175, http://violenceprevention.surgery.ucsf.edu/media/1691926/where.pdf.
[83] Wesley G. Skogan et al., "Evaluation of CeaseFire-Chicago," 2009, http://www.ipr.northwestern.edu/publications/papers/urban-policy-and-community-development/docs/ceasefire-pdfs/mainreport.pdf.
[84] Chris Melde et. al., "On the Efficacy of Targeted Gang Interventions: Can We Identify Those Most At Risk?," *Youth Violence and Juvenile Justice* 9 (2011): 279–94, http://yvj.sagepub.com/content/9/4/279.

conflict resolution. These efforts target key stakeholders in the community, including residents, clergy members, school leaders, directors of community-based organizations, and local political leaders.

Another effective strategy is Group Violence Intervention (GVI). GVI is a form of problem-oriented policing that was first used in the enormously successful Operation Ceasefire in Boston in the mid-1990s, where it was associated with a 61% reduction in youth homicide.[85] The program has now been implemented in a wide variety of American cities, with consistently impressive results. GVI involves a series of in-person meetings, known as "call-ins," with this small segment of the population and community leaders. Call-ins are intimate affairs—involving no more than 30 attendees—and they communicate a strong message that the shooting must stop. Law enforcement representatives then deliver a message that if the community's plea is ignored, swift and sure legal action will be taken against any group responsible for a new act of lethal violence. This process is repeated and creates a powerful "focused deterrence" effect that has been shown to rapidly reduce violent behavior. During call-ins, at-risk individuals are also connected with social-service providers who can direct them on a new path.[86]

There are a number of other programs or actions that could be used to curb gun violence in communities of color beyond the three discussed above.[87] Community members involved in a working group might have other ideas. The HHS should not hesitate to support programs agreed upon by community members, provided they are evidence-based.

When implemented properly, these programs are remarkably effective. Oakland, California, cut its shootings and homicides nearly in half over six years by incorporating GVI into its city-wide response to crime.[88] A 2014 quantitative evaluation of four Chicago police districts where Cure Violence was implemented, found a 31% reduction in homicide, a 7% reduction in total violent crime, and a 19% reduction in shootings in targeted districts.[89] San Francisco General Hospital's Wraparound Project introduced the HVIP strategy in 2005. In its first six years of

[85] Anthony A. Braga et al., "The Boston Gun Project: Impact Evaluation Findings," May 17, 2000, https://web.archive.org/web/20080313063608/http://www.hks.harvard.edu/urbanpoverty/Urban%20Seminars/May2000/BragaBGP%20Report.pdf.
[86] *See* Giffords Law Center to Prevent Gun Violence, "Intervention Strategies," access October 13, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/.
[87] *See, e.g.,* City of Milwaukee Health Department, Office of Violence Prevention, "Milwaukee Blueprint for Peace," 2017, https://www.preventioninstitute.org/sites/default/files/publications/Milwaukee%20Blueprint%20for%20Peace.pdf.
[88] Giffords Law Center to Prevent Gun Violence et al., "A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence," April 2019, https://giffords.org/lawcenter/report/a-case-study-in-hope-lessons-from-oaklands-remarkable-reduction-in-gun-violence/.
[89] David B. Henry et al, "The Effect of Intensive CeaseFire Intervention on Crime in Four Chicago Police Beats: Quantitative Assessment," Institute for Health Research and Policy, University of Illinois at Chicago, 2014, http://cureviolence.org/wp-content/uploads/2015/01/McCormick-CeaseFire-Evaluation-Quantitative.pdf.

operation, the project was associated with a 400% decrease in the rate of injury recidivism.[90] These intensive programs are crucial to a proportionate response to outbreaks of gun violence in a community, and should be implemented whenever and wherever such violence becomes a public health emergency.

Conclusion

Declaring outbreaks of gun violence to be public health emergencies is rooted in science, and is proportional to the real-life experiences of suffering communities. These declarations could ensure that the communities that suffer these outbreaks are not forgotten while the nation as a whole combats the coronavirus. These declarations could also lead to effective interventions that could save lives. By making these declarations, the next administration has an opportunity to steer the national conversation towards a response to gun violence that truly reflects it as an emergency.

Next Steps

In addition to the steps outlined above, the administration should recommend that the HHS recognize gun violence as a national health security threat under the National Health Security Strategy (NHSS). The NHSS is a memorandum published by the HHS every four years. It identifies potential security threats, and outlines strategies to improve the nation's ability to address and respond to these threats.[91] The NHSS encompasses a holistic view of public health and health care by focusing on behavioral health and social service. Although gun violence does not fall under the purview of previously identified threats, the latest memorandum discussed human-caused accidents like 9/11 and "lone wolf" terrorism.[92] The next NHSS memorandum must also discuss gun violence.

More importantly, the NHSS emphasizes that threats to the nation continue to evolve, so it is critically important to "continually assess what realistic scenarios should inform our preparedness efforts." Therefore, the administration should argue that gun violence is well within the 21st century threat landscape and deserves immediate preparedness efforts. By including gun violence as a national health security threat under the NHSS, the HHS would have resources available to outline strategies to contain outbreaks of gun violence.

[90] Randi Smith et al., "Hospital-based Violence Intervention: Risk Reduction Resources That Are Essential for Success," *J. Trauma Acute Care Surg.* 74, no. 4 (2013): 976–980.
[91] See 42 U.S.C. § 300hh-1.
[92] Dep't of Health and Human Services, Assistant Secretary for Preparedness and Response, "National Health Security Strategy 2019-2020," accessed October 13, 2020, https://www.phe.gov/Preparedness/planning/authority/nhss/Documents/NHSS-Strategy-508.pdf.

RECOMMENDED ACTION MEMO

Agency: Department of State, Department of Commerce
Topic: Transferring Oversight Authority Over Certain Firearm Exports
Date: November 2020

Recommendation: Restore oversight of firearm exports and imports to the Department of State by reversing Trump administration rules that transferred oversight of these weapons to the Department of Commerce.

I. Summary:

Description of recommended executive action

The federal government regulates the export and import of firearms according to the particular listing of that type of firearm. Most firearms and ammunition are typically listed on the US Munitions List (USML), a list of defense articles, services, and technologies with military applications overseen by the Department of State. Accordingly, export and import of items on the USML are subject to significant congressional oversight and stringent licensing requirements, and violations of USML regulations may result in significant civil and criminal penalties.[1]

Firearms not on the USML are typically listed on the Commerce Control List (CCL). The export and import of these firearms are overseen by the Department of Commerce and are subject to less-stringent regulations and reporting requirements.

In early 2020, the Trump administration finalized two rules shifting most firearms, ammunition, and firearm component parts from the USML to the CCL. One rule, issued by the State Department, amended the USML to *remove* these weapons and ammunition from the list.[2] Another, issued by the Commerce Department, *added* these items to the CCL.[3] Together, these companion rules decreased regulatory requirements and congressional oversight over the

[1] Martin Horan, "ITAR Requirements: The Consequences of Non-Compliance," *FTP Today*, May 29, 2019, https://www.ftptoday.com/blog/itar-requirements-the-consequences-of-non-compliance.
[2] U.S. State Department, "International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III," 85 Fed. Reg. 3,819 January 23, 2020, https://www.federalregister.gov/documents/2020/01/23/2020-00574/international-traffic-in-arms-regulations-us-munitions-list-categories-i-ii-and-iii.
[3] The Industry and Security Bureau, "Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)," 85 Fed. Reg. 4,136, January 23, 2020, https://www.federalregister.gov/documents/2020/01/23/2020-00573/control-of-firearms-guns-ammunition-and-related-articles-the-president-determines-no-longer-warrant.

export and import of dangerous and deadly weapons. The changes were supported by the National Rifle Association (NRA).[4]

To reverse the Trump administration's attempt to deregulate firearm exports and imports, the next administration should:

(1) issue a Department of State rule to amend the USML to include the weapons and ammunition the Trump administration transferred off the list

(2) issue a Department of Commerce companion rule to relinquish regulatory control of these items as they are transferred off the CCL and back to the USML

Overview of process and time to enactment

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the notice-and-comment rulemaking (NCRM) process.[5] For each of the two rules described above, the administration should issue a notice of proposed rulemaking (NPRM) through the Federal Register which should include a summary of the proposed changes and information about the need and authority for the changes. The NPRM should also set forth the time period—generally 30 to 60 days—for the public to submit comments about the proposed rule. The Trump administration allowed for 45 days of public comment for both the State Department[6] and Commerce Department[7] proposed rules they issued.

Once the comment period closes, the administration should respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly) and publish the final rule in the Federal Register. A rule generally goes into effect thirty days after it is published.[8] In total, the multi-phase NCRM process generally extends for a year.

II. Current state

The export and import of firearms and ammunition is controlled by the federal government, depending on the particular listing of the type of firearm. Under the Arms Export Control Act

[4] NRA ILA, "Docket No. DOS-2017-0046; RIN 1400-AEJO; International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III," Comment submitted to the Department of State, July 9, 2018, *https://beta.regulations.gov/document/DOS-2017-0046-2626*.
[5] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[6] U. S. State Department, "International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III," 83 FR 24198, May 24, 2018, https://www.federalregister.gov/documents/2018/05/24/2018-10366/international-traffic-in-arms-regulations-us-munitions-list-categories-i-ii-and-iii.
[7] Industry and Security Bureau, "Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)," 83 FR 24166, May 24, 2018, https://www.federalregister.gov/documents/2018/05/24/2018-10367/control-of-firearms-guns-ammunition-and-related-articles-the-president-determines-no-longer-warrant.
[8] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.

(AECA), all "defense articles" controlled for export and import are listed on the USML, which is in the International Traffic in Arms Regulations (ITAR).[9] The USML contains several categories of firearms and related defense articles, and is within the purview of the State Department, subject to various licensing requirements.

Certain other types of firearms that are not on the USML are listed on the CCL, which is within the Export Administration Regulations (EAR). The Export Control Reform Act (ECRA) is the permanent statutory authority of the EAR.[10] The CCL is subject to the Commerce Department's jurisdiction, and is overseen by the Bureau of Industry and Security (BIS), a division of the Commerce Department.

Earlier this year, both the State Department and Commerce Department published final rules that drastically changed the implementation of this regulatory framework. The State Department published rules that amended Categories I, II, and III of the USML by removing many types of firearms from these categories.[11] Simultaneously, the Commerce Department published a companion rule that transferred oversight over certain firearms and related items to the CCL.[12] The concurrent rules were finalized and enacted with few changes between the proposed and final versions.[13]

In particular, the rules asserted that firearms "which have an inherently military function" will remain under the State Department's purview, while other firearms, such as those widely available in retail markets, will be part of the CCL and thereby subject to the Commerce Department's control. Given that many firearms that serve "an inherently military function" are also widely available for sale in the US, these changes effectively limited oversight over many dangerous weapons and ammunition, including the following.

- Four sniper rifles designed for long-distance strategic military targets, including the following.
    - The L115A3 sniper rifle, used by the UKArmed Forces. In 2009, a British Army Corporal in Afghanistan used this sniper rifle to shoot and kill two Taliban fighters

[9] 22 U.S.C. § 2778.
[10] Akin Gump Strauss Hauer & Feld LLP, "The Export Control Reform Act and Possible New Controls on Emerging and Foundational Technologies," September 12, 2018, https://www.akingump.com/en/news-insights/the-export-control-reform-act-of-2018-and-possible-new-controls.html.
[11] State 2020 Rule *supra* note 2.
[12] Commerce 2020 Rule *supra* note 3.
[13] Initially, the Trump administration's proposed rules would have also transferred technical data for 3D-printed guns from its listing on the USML to the CCL. In response to this specific provision, 22 states and the District of Columbia filed suit. A U.S. District Court in Washington enjoined the regulation "insofar as it alters the status quo restrictions on technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment." *Washington v. U.S. Dep't of State*, No. 2:20-CV-00111-RAJ, 2020 WL 1083720 (W.D. Wash. Mar. 6, 2020).

and destroy their machine gun from a distance of 2,700 yards. At the time, this shot was the world record for the longest kill shot ever recorded.[14]
    - The Barrett M82, a 50-caliber anti-armor sniper rifle used by armies all over the world, including the US and Ukraine. The M82 can "penetrate light armor, down helicopters, destroy commercial aircraft, and blast through rail cars and bulk storage tanks filled with explosive or toxic chemicals" from distances of 1,000 to 2,000 yards.[15]
    - The M40A5 sniper rifle, used by the US Marine Corps, which is a "highly modified" version of a Remington 700 hunting rifle and is capable of hitting targets with a high-level of accuracy from a distance of 1,000 yards.[16]

- Four sidearms used by US armed forces, including the SIG Sauer Mk 25, which is advertised by its manufacturer as "designed for the U.S. military, carried by elite forces, and proven to be the premier combat pistol."[17]

- A number of semi-automatic assault pistols that "combine the firepower of a rifle, [and ability] to accept high-capacity ammunition magazines designed for assault rifles with the increased concealability of a handgun."[18] These weapons pose a special threat to law enforcement as they are capable of penetrating defensive body armor.

The Trump administration framed these changes as part of the USML review process that began in 2011 under the Obama administration to streamline the USML and ensure State Department oversight concentrated on military-style articles.[19] The Obama administration's

[14] Nikola Budanovic, "The Sniper Who Killed a Taliban Machine Gunner from 8,120 Feet away," *War History Online*, June 1, 2017, https://www.warhistoryonline.com/articles/what-sniper-who-killed-a-taliban-machine-gunner-from-8120-feet-away-xc.html.
[15] Tom Diaz, "Clear and Present Danger: National Security Experts Warn About the Danger of Unrestricted Sales of 50 Caliber Anti-Armor Sniper Rifles to Civilians," Violence Policy Center, July 2005, https://vpc.org/studies/50danger.pdf.
[16] Kyle Mizokami, "5 Sniper Rifles That Can Turn Any Solider [sic] into the Ultimate Weapon," *The National Interest*, March 11, 2018, https://nationalinterest.org/blog/the-buzz/5-sniper-rifles-can-turn-any-solider-the-ultimate-weapon-24851.
[17] Sig Sauer, "P226," accessed October 16, 2020, https://www.sigsauer.com/products/firearms/pistols/p226/.
[18] Violence Policy Center, "AR-15 and AK-47 Assault Pistols: Rifle Power in a Handgun," accessed October 16, 2020, https://www.vpc.org/studies/armor.pdf.
[19] State 2020 Rule *supra* note 2. ("The Department [of State] underscores that this rule constitutes an important part of a nine-year program of revisions that has streamlined the USML...the Department [of State] has repeatedly stated its goals for that program...First, that it is seeking to better focus its resources on protecting those articles and technologies that provide the United States with a critical military or intelligence advantage. As applied to this rule, for example, firearms and firearms technology that are otherwise readily available do not provide such an advantage...Second, to resolve jurisdictional confusion between the ITAR and EAR among the regulated community through revision to "bright line" positive lists. Third, to provide clarity to the regulated community thereby making it easier for exporters to comply with the regulations and enable them to compete more successfully in the global marketplace.").

revisions, however, focused on aircraft technology, gas turbine engines, and component parts—not firearms.[20]

In terms of oversight and regulatory control, there are several significant differences between the USML and the CCL.

- Articles on the USML require notification to Congress before export, but articles on the CCL do not. This means a significant number of weapons exports are no longer subject to any level of oversight or scrutiny from lawmakers.[21] In June 2020, the Center for International Policy highlighted the impact of this change by providing data about USML Category I-III notifications lawmakers received in 2019 that would likely have gone unseen by Congress under the current guidelines.[22] Examples include a $2.4 million sale of semi-automatic rifles to security forces of the Philippines government, which US lawmakers blocked due to ongoing police-led violence against Philippino citizens.[23]

- The USML requires exporters and importers of listed items to register with the State Department, while the CCL does not require registration. To engage in the export or import of items on the CCL, companies and individuals are required to apply for a license, but are not required to register with the Commerce Department. To engage in the export or import of items on the USML, companies and individuals must *both* apply for a license and register with the State Department. The registration requirement is far more involved, and provides regulators with important sources of information regarding firearms exports and imports.

- Because some US manufacturers may no longer have to register with the State Department, they are not required to provide advance notification of intended sales or transfers to foreign persons of ownership or control of the registrant. Without the advance notification requirement, foreign entities could potentially influence the sales and marketing activities of US manufacturers in a manner that would be detrimental to US national security.

- The Department of Commerce, unlike the Department of State, does not charge registration or licensing fees. As such, the transfer to the CCL could constitute an unnecessary burden on taxpayers.

- Providing "services" related to items listed on the USML triggers licensing requirements, while the CCL does not. Under the ITAR, companies must apply for a license with the

[20] Congressional Research Service, "The U.S. Export Control System and the Export Control Reform Initiative," updated January 28, 2020, https://fas.org/sgp/crs/natsec/R41916.pdf.
[21] Center for International Policy, "The Firearm Sales Lawmakers Would Have Missed in 2019," Security Assistance Monitor, June 4, 2020, http://securityassistance.org/fact_sheet/firearm-sales-lawmakers-would-have-missed-2019.
[22] *Id*.
[23] *Id*.

State Department to export "defense services" to foreign entities. Defense services include items such as providing assistance or training to foreign persons in the design, development, manufacture, production, repair, maintenance, and operation of weapons on the USML. Companies must also request a license if they seek to provide military training to foreign units or manufacture, produce, repair, maintain, or operate weapons on the USML. However, the Commerce Department's CCL does not have a similar defense services rule for items moving from the USML to the CCL. Instead, EAR controls are focused more on technology transfers. As a result, under the proposed rule, US companies may be able provide a wide range of training activities, design and development assistance, testing, and production assistance on firearms and ammunition to foreign persons without sufficient US oversight. For example, a US company would likely no longer be required to obtain US government approval before it provided training to foreign security forces around the world on how to aim and fire certain guns.

- State conducts more thorough end-use monitoring regarding USML items than Commerce for items on the CCL. Through the Department of State's Blue Lantern program, US embassy officials in the country receiving the export are required to conduct pre-license checks and post-shipment verifications of items.

III. Proposed action

To protect global and national security, the next administration should issue new regulations to restore oversight of firearm exports and imports to the Department of State by reversing Trump administration rules that transferred oversight of such weapons to the Department of Commerce.

A. Substance of the new rules

State Department USML rule

The Department of State should promulgate a new rule that reverses the Trump administration's deregulation of firearms. The rule should include, at the very least, the complete list of firearms, ammunitions, and component parts that were transferred to the CCL by the Trump administration, and propose the amendment of USML Categories I-III to include those articles again.

This list should be accompanied by a clear and comprehensive explanation of how this reversal in policy supports the goals of both the agency and the AECA, which include the "furtherance of world peace and the security and foreign policy of the United States,"[24] explained in greater detail below.

Commerce Department CCL rule

[24] 22 U.S.C. § 2778 (a)(1).

The Department of Commerce should issue a new rule that reverses the Trump administration's rule. The rule should identify a clear and complete list of military-style weapons, ammunition, and component parts currently subject to its oversight through their inclusion on the CCL, and stipulate that these articles will no longer be included on the CCL and are being transferred to the USML via the Department of State's proposed rule. The Department of Commerce should support the Department of State's rule by also providing an explanation of how increased regulation of these articles, through their inclusion on the USML, is in accordance with the goals of the Department of Commerce and the ECRA.

B. Process

The Supreme Court has held that agencies seeking to "amend or repeal a rule" must "use the same procedures...as they used to issue the rule in the first instance."[25] Therefore, the Department of State and the Department of Commerce must both go through the NCRM process under the APA.[26] First, each agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.[27]

The public then has an opportunity to comment on the proposed rules. The agencies set the time period for public comments, typically at least 30 days.[28] The agencies must then review the comments and respond to "significant" comments.[29] The agencies may then make changes to the proposed rule based on those comments.[30]

Once the revision process concludes, the agencies publish the finalized rule in the Federal Register, accompanied by a "concise general statement" of the rule's "basis and purpose."[31] Generally, the rules may not go into effect less than 30 days after the publication of the finalized versions.[32]

C. Legal justification

State Department USML rule

[25] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015).
[26] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[27] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," updated January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.

The AECA authorizes the president to control the export and import of defense articles.[33] This authority includes creating and updating the USML, which lists items, technologies, and services that are properly classified as defense articles.[34] The AECA also requires the president to regulate the export and import of articles on the USML.[35] The president has delegated this authority to the secretary of State, who administers the ITAR through the Directorate of Defense Trade Controls (DDTC).[36] Thus, the AECA authorizes the Department of State to promulgate rules that alter or amend Categories I-III of the USML in accordance with federal agency rulemaking provisions.[37]

Commerce Department CCL rule

Items not subject to ITAR or any other set of licensing regulations are subject to regulation under ECRA.[38] The Department of Commerce performs its duties under the ECRA by updating the CCL as a list of items to be regulated under the EAR.[39] Thus, the Department of Commerce maintains the authority to promulgate rules related to the maintenance of the CCL, including transferring items off the CCL.

IV. Risk analysis

Agency rulemaking is generally subject to two types of challenges: procedural challenges and substantive challenges. Procedural challenges center on whether the agency promulgated the final rule in accordance with the requirements outlined by § 553 of the APA.[40] The procedural requirements of the APA are discussed in Section III of this memorandum. So long as the Department of Commerce and the Department of State are careful to observe these requirements, the new rule is likely to withstand procedural challenges.

On substantive legal grounds, the Department of State and Department of Commerce rules proposed here also have minimal legal vulnerability. As both agencies have issued regulations amending the content of both the USML and CCL in the past, doing so again is clearly within the scope of their authority. The main legal question will be whether the rulemaking record supports the agencies' change in position in reverting back to the pre-Trump administration status quo, such that the new rules are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[41]

[33] 22 U.S.C. § 2778(a)(1). *See also* Exec. Order No. 13,637, 78 Fed. Reg. 49 (Mar. 13, 2013).
[34] 22 U.S.C. § 2778(a)(1).
[35] *Id.*
[36] 22 C.F.R. § 120.1(a).
[37] 5 U.S.C. § 553.
[38] 50 U.S.C. §§ 4801-51.
[39] 15 C.F.R. §§ 730-44 (2012); 50 U.S.C. §§ 4801-51 (2018).
[40] 5 U.S.C. § 553.
[41] 5 U.S.C. § 706(2)(A).

One of the most precedential and often-cited cases that discusses the arbitrary-and-capricious standard in the context of an agency's change in position is *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Company*.[42] There, the Supreme Court considered the National Highway Traffic Safety Administration's (NHTSA) repeal of a requirement that motor vehicles have automatic seatbelts or airbags. The NHTSA stated that it could no longer support the finding that automatic restraints would provide significant safety benefits to consumers, thereby reversing its own finding from several years prior.

The Supreme Court explained that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[43] Courts cannot substitute their own judgment for the agency's, but the agency "must examine the relevant data and articulate a satisfactory explanation for its action."[44] In this case, the Supreme Court found that NHTSA's explanation was insufficient to allow the Court to "conclude that the rescission was the product of reasoned decision making."[45] NHTSA relied on substantial uncertainty to justify its actions, but this is not enough: the "agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'"[46]

So long as they provide such a reasoned explanation, agencies are afforded latitude even when they depart from a prior position by altering or repealing rules.[47] In 2009, the Supreme Court established the principles governing this type of agency change.[48] Specifically, while an agency must "display awareness that it is changing position...it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change adequately indicates."[49] As stated by the Supreme Court in *Chevron*, initial administrative decisions are not "carved in stone;" rather, the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis."[50]

There are two scenarios that may require a "more detailed justification" on the part of an agency: (1) if the prior policy "engendered serious reliances issues," or (2) if a new policy relies on fact finding that contradicts its prior policy.[51]

[42] *State Farm*, 463 U.S. 29 (1983).
[43] *Id*. at 30.
[44] *Id*.
[45] *Id*. at 52.
[46] *Id*. (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).
[47] *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2217, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").
[48] *F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. 502, 513 (2009).
[49] *Id*.
[50] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 863 (1984).
[51] *Id*. In particular, when there has been "decades" of reliance on a prior policy, the agency must present a more reasoned explanation for overruling its prior position. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016).

Reliance interests

As to reliance interests, the Trump administration's rules represented a significant shift away from the status quo regulation of firearms. Presidents have traditionally exercised their authority to control the export of "defense articles," including most firearms and ammunition, through the State Department. Past administrations have done so by including all handguns, rifles and short-barreled shotguns, and certain kinds of ammunition on the USML. A change back to the long-term status quo will thus not significantly impact reliance interests.

Fact finding

As to fact finding that contradicts prior policy, there are ample ways in which both agencies can provide a "more detailed justification" for why good reasons exist for a reversal and that the agencies believe the change in policy to be better.[52] These reasons include the following.

- **The agencies' prior reasoning regarding weapons that have "an inherently military function" was unsound.**

The rule issued by the Trump administration State Department claimed the purpose of their effort to "revise the USML" was to "limit its scope to those items that provide the United States with a critical military or intelligence advantage *or, in the case of weapons, perform an inherently military function*."[53] (Emphasis added). This standard is not required by statute, but is a creation of the executive branch. The State Department then went on to reason that:

> "[G]iven that the majority of the items referenced in these comments that will transfer to the CCL through this rule are widely available in retail outlets in the United States and abroad, and widely utilized by the general public in the United States, it is reasonable for the Department to determine that they do not serve an inherently military function."[54]

This reasoning is not sound. Just because military-style weapons are "widely utilized by the general public in the United States" does not mean they "do not serve an inherently military function." In fact, as noted above, many of the weapons removed from the USML were designed, marketed, and continued to be deployed for military use.

The fact that some gun enthusiasts "enjoy" shooting these weapons and have labeled this activity "modern sport shooting" or "tactical shooting" does not change the design or purpose of these firearms or the danger they pose in civilian hands. Military-style semiautomatic firearms were used to perpetrate the tragedies that occured in an elementary school in Newtown, Connecticut, at a music festival in Las Vegas, Nevada, at a workplace in San Bernardino,

[52] *F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. at 515.
[53] State 2020 Rule *supra* note 2.
[54] *Id.*

California, in a movie theatre in Aurora, Colorado, and at a high school in Parkland, Florida, among others. Because of the dangerous nature of these weapons, DC and seven states ban them. Because of the military nature and serious lethality of these weapons, they belong on the USML.

- **The agencies' prior reasoning regarding the retail availability of firearms was contradictory to fact.**

The State Department's final rule stated items to be removed from the USML "are widely available in retail outlets in the United States and abroad, and widely utilized by the general public in the United States."[55] The addition of "abroad" was added in response to comments submitted during the proposed rule's comment period, which criticized the proposed rule for focusing exclusively on the United States gun market ,despite the fact that the domestic gun market is not the market to which exports treated by the rules would be directed.

While the final rule added the word "abroad," it provided no facts to justify the assertion that the firearms removed from the USML are actually "widely available in retail outlets...abroad." In fact, the final rule seemed to conclude that the availability of weapons in retail outlets abroad was irrelevant to its reasoning:

> The Department recognizes that there are variations in commercial availability of firearms not only between nations, but also within the domestic market itself; however, this variation in availability does not overcome the Department's assessment that the subject firearms do not provide a critical military or intelligence advantage such that they warrant control under the ITAR.[56]

The State Department's factual assertion that the firearms removed from the USML are "widely available in retail outlets...abroad" is wrong, as is its reasoning that the availability of firearms abroad doesn't matter.

As to the factual inaccuracies, the US retail firearms market is qualitatively and quantitatively different from nearly every market in the world.[57] For example, the US, with 4.4% of the world's population, comprises more than 45% of the world's firearms in civilian possession.[58] Belize, Colombia, Israel, Japan, Kenya, Turkey, and the United Kingdom do not permit any civilian use of some or all types of semi-automatic firearms removed from the USML, and so cannot be said to have any retail availability of these prohibited firearms.[59] Other nations, including Australia, Canada, Croatia, India, Lithuania, New Zealand, South Africa, and Switzerland apply special restrictions to civilian possession of semi-automatic firearms, such as proof that they are

[55] State 2020 Rule *supra* note 2.
[56] *Id.*
[57] John Lindsay-Poland, "Comment on Proposed Rules on Categories i-ii-iii by Depts. of State and Commerce," July 9, 2018, https://beta.regulations.gov/document/DOS-2017-0046-3038.
[58] *Id.*
[59] *Id.*

needed for self-defense, so it cannot be said that these firearms are "widely available in retail outlets" there.[60]

The State Department's reasoning is also flawed. The State Department claims the limited availability of firearms at retail outlets abroad "does not overcome the Department's assessment that the subject firearms do not provide a critical military or intelligence advantage." Yet, the State Department's entire rationale that such firearms "do not provide a critical military or intelligence advantage" is that they are widely available at retail outlets. Either the State Department believes domestic gun markets are solely relevant to the analysis (which as detailed above, is factually inaccurate), or the State Department's logic collapses on itself.

- **The agencies' prior reasoning undermines Congress' intent in passing the AECA.**

When Congress passed the AECA, they gave the president authority to designate items for additional controls in order to further world peace, national security, foreign policy, reducing international terrorism, and preventing the proliferation of armed conflict.[61] In removing military-style firearms from the USML, the Trump administration undermined each of these purposes.

For example, the Trump administration rules increase the likelihood of small-arms trafficking. Over the past decade, US criminal prosecutions and research studies have shown how the smuggling of small numbers of firearms on a regular basis can have a large impact on gun violence in Mexico and Central America.[62] Indeed, trafficking experts have long argued that "small arms and spare parts are the lifeblood of the gray market."[63] Small arms are often the weapons of choice for terrorists, human rights abusers, and other bad actors. By moving certain military-style firearms off the USML, gun exporters are now subject to less oversight, increasing the risk of guns falling into the wrong hands.[64]

[60] *Id.*
[61] 22 U.S.C. § 2778(a)(1).
[62] Matt Schroeder, "Dribs and Drabs: The Mechanics of Small Arms Trafficking from the United States," Small Arms Survey no. 17, March 2016, https://www.files.ethz.ch/isn/196408/SAS-IB17-Mechanics-of-trafficking.pdf.
[63] Willian J. Lowell, "Re: 'Category VII Revision' and 'USML—Positive List.'," Comments on Public Notice 7256 and Public Notice 7257, February 7, 2011, https://www.armscontrol.org/system/files/Lowell_Comments_ExportReform_Feb7_2011.pdf
[64] Giffords, "Giffords Condemns Trump Administration Proposal to Deregulate the Oversight of Firearm Exports," November 13, 2019, https://giffords.org/press-release/2019/11/trump-firearms-exports-2/.

RECOMMENDED ACTION MEMO

Agency: Department of Defense, Department of the Army, United States Army Corps of Engineers ("USACE")
Topic: Trump Administration Rule Allowing Guns on USACE Land
Date: November 2020

Recommendation: Reverse a Trump administration rule that allows for the possession and use of firearms on project sites owned and run by the US Army Corps of Engineers.

I. Summary

Description of recommended executive action

For decades, the United States Army Corps of Engineers ("USACE") embraced a commonsense approach limiting the possession of loaded firearms and ammunition on public lands it controls (e.g. water resource development projects). Namely, USACE allowed for possession of loaded firearms for law enforcement purposes, hunting, and recreational shooting, while requiring written permission from district commanders in all other circumstances (the "Traditional Rule").[1]

However, in late 2020, the Trump administration is expected to finalize a rule overturning this long-standing regulation in favor of a scheme that disposes of the written permission requirement and defaults to applicable state and local firearm regulations where the USACE property is located ("the Trump Rule").[2] In effect, the Trump Rule will allow for both the open and concealed carry of firearms on public lands controlled by USACE—including military-style assault rifles—so long as potential possessors abide by the minimal standards set out by state and local law in many jurisdictions.

By allowing visitors to freely carry firearms in densely populated recreational areas and near critical infrastructure, the Trump Rule will pose significant risks to public safety, USACE park rangers, and national security. To protect the safety of Americans, the next administration should begin the rulemaking process to reinstate the Traditional Rule.

Overview of process and time to enactment

The Administrative Procedure Act ("APA") requires that federal agencies issue rules through the notice and comment rulemaking ("NCRM") process.[3] To reinstate the Traditional Rule, USACE will be required to issue a notice of proposed rulemaking ("NPRM"), provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the

[1] 11 Fed. Reg. 9278, 9279 (August 24, 1946) (until recently, codified at 36 C.F.R. § 327.13).
[2] 85 Fed. Reg. 20460, "Rules and Regulations Governing Public Use of Water Resource Development Projects Administered by the Chief of Engineers," Federal Register, April 13, 2020, https://www.federalregister.gov/documents/2020/04/13/2020-07184/rules-and-regulations-governing-public-use-of-water-resource-development-projects-administered-by.
[3] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

Federal Register. A rule generally goes into effect thirty days after it is published.[4] This multi-phase process generally extends for a year.

II. Current state

Longstanding USACE regulation

Since 1946, when USACE first designated lands for public recreational use, the agency has restricted the possession of firearms on public lands it controls.[5] In the decades since—including during the Trump administration—the agency has consistently adopted additional rules[6] and guidance[7] codifying and implementing those initial protections. Under the Traditional Rule and the guidance implementing the Rule:

- USACE regulations allowed for possession of loaded firearms for law enforcement purposes, hunting, and recreational shooting, in accordance with applicable local, state, and federal law.[8]

- For all other purposes, USACE regulations required individuals to obtain written permission from district commanders in order to possess a loaded firearm.[9]

To obtain written permission from a district commander, USACE implementing guidance required an individual to (1) have a state-issued weapons permit and (2) only carry the firearm in a concealed manner.[10] Even if these requirements were met, permission was granted at the discretion of each district commander, who was also required to consider whether the possession would "interfere, impede, or disrupt the use of a project or otherwise impair safety."[11]

The Traditional Rule and the guidance implementing the Rule are part of a longstanding government practice of regulating or prohibiting the possession of firearms in public spaces, including areas of recreation, and near potential targets of terrorism.

Trump administration action

On April 13, 2020, the Department of the Army, through USACE, issued a proposed rule to eliminate these important protections and make it easier for individuals to carry loaded firearms on the 12 million acres of public land it controls.[12] In response to the proposed rule, the agency received over 8,380 comments.[13]

[4] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.

[5] 11 Fed. Reg. 9278, 9279 (August 24, 1946) (initially codified at 36 C.F.R. § 301.8).

[6] *See e.g.*, 36 C.F.R. § 313.12 (1966) (codifying the 1946 regulations); 36 C.F.R. § 327.13 (1976) (codifying the 1946 regulations); 36 C.F.R. § 327.15 (1986) (extending the restrictions to shooting ranges).

[7] USACE, "Command Guidance in Considering Firearm Possession Requests Under 36 C.F.R § 327.13(a), Explosives, Firearms, other Weapons and Fireworks," Department of the Army, May 14, 2018, https://corpslakes.erdc.dren.mil/employees/cecwon/pdfs/18May14-FirearmsPossessionGuidance.pdf.

[8] Supra note 1.

[9] *Id.*

[10] Supra note 7.

[11] *Id.*

[12] Supra note 2.

[13] *Id.*

We expect that the Trump Rule will be finalized before January 20, 2021. We also expect that the Trump administration will simultaneously revoke the guidance implementing 36 C.F.R. § 327.13(a)(4), the written permission requirement.

Together, the Trump Rule and revocation of the Traditional Rule's implementing guidance will:

- Remove the written permission requirement, allowing individuals to carry firearms on federal public lands so long as they comply with state and local law, including unqualified people with a dangerous history in states with weak carrying laws

- Remove the requirement that firearms only be carried in a concealed manner, thus allowing individuals to openly carry loaded firearms, including high-powered assault rifles, on federal public lands

In its notice of proposed rulemaking (NPRM), the agency explained the Trump Rule would benefit the public by eliminating the "burdensome" requirements that had governed possession of weapons on USACE land for decades.[14]

Dangers inherent in the Trump Rule

Public safety and national security are threatened by the Trump Rule.

- By removing the written permission requirement (a form of permitting), the Trump Rule will allow dangerous individuals, including those who have not passed a background check, to carry loaded weapons on public lands. Permitting systems ensure important public safety standards are preserved when people carry handguns in public places, and most states require safety training and a background check in order to receive a concealed carry permit.[15] However, not all states have such permitting systems in place; there are currently 15 states that allow concealed firearms to be carried without a background check or firearms training.[16] In these states, the Trump Rule will make such "permitless carry" regimes the rule for USACE public lands, thus allowing dangerous individuals to carry loaded weapons near critical infrastructure and high-density recreation areas.

  Multiple studies show that restrictions on carrying concealed weapons like those in place under the Traditional Rule can increase public safety. For example, recent analyses have shown that states with weak standards for concealed carry have higher rates of

[14] *Id.*
[15] According to an analysis by Everytown: 39 states and D.C. require firearm training in order to get a concealed carry permit; 34 states and D.C. require applicants to pass a background check; 30 states and D.C. disqualify people convicted of (a) misdemeanor "crimes of violence," as classified by the state, or (b) certain serious violent misdemeanors such as assault and battery, threatening, or crimes committed with a weapon, available at: https://beta.regulations.gov/document/COE-2018-0008-8354.
[16] Giffords Law Center, "Concealed Carry," accessed October 1, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/.

violent crime[17] and gun homicides[18] than would be expected if the states had stricter standards for public carry.

- By removing the ban on open carry, the Trump Rule will authorize this dangerous practice on USACE public lands in nearly all states. Because open carry is legal in nearly all states, the Trump Rule will authorize this dangerous practice on nearly all federal public lands controlled by USACE.[19] By promoting gun carrying in public places, often with few restrictions, open carry can increase the likelihood of conflict, severely endangering public safety. Researchers have suggested that the presence of visible firearms may alter behavior and increase aggressive and violent behaviors.[20]

- USACE property is made up of highly dense recreational areas. USACE property receives 370 million visits per year, making it the most visited of any single federal agency's sites.[21] USACE property is particularly vulnerable to shootings purely on account of the increased number of interactions between civilians. *United States v. Lauchli* demonstrates the risks inherent in loaded firearm possession on USACE property and the vital need to place restrictions on such possession.[22] In *Lauchli*, the defendant was fishing with his wife while on the Kaskaskia River in Clinton County, Illinois when his fishing line got tangled with lines of several people fishing from the shore. An argument ensued and the defendant, in anger, pulled a revolver and threatened to injure the other fishermen. The defendant was charged and convicted of possessing a loaded firearm on USACE property, in violation of the Traditional Rule.[23]

  The Trump Rule will open the floodgates to millions of visitors carrying firearms in areas where disputes can quickly escalate over minor issues. Should disputes arise over fishing, musical tastes, or invasion of personal space (especially in the midst of a global pandemic), firearms can lead to explosive encounters and threaten public safety, especially when alcohol is brought into the mix.

- USACE park rangers are mainly responsible for visitor assistance and issuing minor park-related citations; they do not carry weapons and cannot enforce state or other

[17] John J. Donohue, Abhay Aneja, and Kyle D. Weber, *"*Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis,*" Journal of Empirical Legal Studies* 16, no. 2 (2019): 198–247.
[18] Michael Siegel, et al., "Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States,*" American Journal of Public Health* 107, no. 12 (2017): 1923–1929.
[19] Giffords Law Center, "Open Carry,*"* accessed September 1, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/.
[20] Arlin J. Benjamin Jr., Sven Kepes, and Brad J. Bushman, "Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-analytic Review of the Weapons Effect Literature,*" Personality and Social Psychology Review* (2017); Arlin James Benjamin Jr. and Brad J. Bushman, *"*The Weapons Priming Effect*," Current Opinion in Psychology* 12 (2016): 45-48; David Hemenway, Mary Vriniotis, and Matthew Miller, "Is an Armed Society a Polite Society? Guns and Road Rage,*" Accident Analysis & Prevention* 38, no. 4 (2006): 687-695.
[21] Decl. of Stephen B. Austin in Supp. of Def's Opp'n to Pls' Mot. for Prelim. Inj. ¶ 3, *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, No. 4: 14-CV -00139-HLM (N.D. Ga. 2014), ECF 11-1 (filed July 14, 2014).
[22] *United States v. Lauchli,* 724 F.2d 1279, 1281 (7th Cir. 1984).
[23] *Id.*

federal laws.[24] Without means for keeping order, USACE park rangers cannot protect civilians should a violent shooting erupt.

- The Trump Rule will expose the US to terrorist and military threats. The USACE manages critical water infrastructure projects that provide energy and supply "water to thousands of cities, towns, and industries from the 9.5 million acre-feet of water stored in its 116 lakes and reservoirs throughout the country, including service to approximately 1 million residents of the District of Columbia and portions of northern Virginia."[25] If even one dam were destroyed, the consequences would be devastating. This tie-in to critical infrastructure and the nation's water supply differentiates the USACE from the National Park Service and other federal agencies. The risk of catastrophic damage from armed terrorists make gun regulation necessary.

III. Proposed action

The next administration should issue a new rule ("New Rule") to reinstate the Traditional Rule.

A. Substance of the New Rule

The New Rule should reinstate the Traditional Rule and its implementing guidance. This would reverse the dangerous changes made during the Trump administration and once again:

- Allow for possession of firearms on USACE land for law enforcement purposes, hunting, and recreational shooting, in accordance with applicable local, state, and federal law (this change should be made via rulemaking and mirror the Traditional Rule.)

- Require that, for all other purposes, individuals receive written permission from a district commander to possess a firearm on USACE land (this change should be made via rulemaking and mirror the Traditional Rule.)

To obtain written permission from a district commander, an individual would be required to: (1) have a state-issued weapons permit, (2) only carry the firearm in a concealed manner, and (3) comply with other reasonable conditions imposed by the district commander, keeping in line with the discretion provided to district commanders under the Traditional Rule and the guidance implementing the Rule. These changes could be made via rulemaking or, as with the Traditional Rule, be implemented via guidance.

B. Process

Although the next administration will rely on the Traditional Rule to inform development of the New Rule, the administration must go through the NCRM process under the APA.[26]

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking;

[24] Supra note 20.
[25] Claudia Copeland, "Terrorism and Security Issues Facing the Water Infrastructure Sector," Congressional Research Service, December 15, 2010, https://fas.org/sgp/crs/terror/RL32189.pdf.
[26] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.[27]

Then the agency must accept public comments on the proposed rule for a period of at least thirty days.[28] Received comments must be reviewed, and the USACE must respond to significant comments, either by explaining why it is not adopting proposals or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the *Federal Register* along with a concise explanation of the rule's basis and purpose.[29] Generally, the final rule may not go into effect until at least thirty days after it is published.

If the next administration chooses to issue updated guidance to implement any of the policy changes discussed above, the requirements will be less demanding. This type of guidance may appropriately be considered an interpretive rule because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[30] The APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another statute provides otherwise.[31] As the Supreme Court observed in *Perez*, issuing interpretive rules is "comparatively easier" than issuing legislative rules.[32] However, "that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'"[33]

Unlike notice and comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[34] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, as well as the process by which the public may petition the agency to modify or remove the guidance.

[27] 5 U.S.C. § 553(b).
[28] 5 U.S.C. § 553(d).
[29] 5 U.S.C. § 553(b).
[30] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,99 (1995)).
[31] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, at footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[32] *Perez*, 575 U.S. at 97.
[33] *Id.* (citing *Guernsey*, 514 U.S. at 99).
[34] Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents.

Agencies should also consider the recommendations of the Administrative Conference, most recently updated on June 13, 2019.[35] The most relevant recommendations concern transparency and public participation. These include: (1) providing "members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule"; (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint;[36] and (3) avoiding the use of mandatory language (such as "shall" or "must") to accurately reflect the non-legislative nature of the guidance.[37]

C. Legal justification

The USACE is authorized to issue regulations under 16 U.S.C. § 460, which states "[t]he water areas of all . . . [water resources development] projects shall be open to public use . . . and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use . . . under such rules and regulations as the Secretary of the Army may deem necessary." This authority extends to "the waters of such projects" and "any land federally owned and administered by the Chief of Engineers" at the projects.[38]

IV. Risk analysis:

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[39] Regulating USACE's land is clearly within USACE's statutory authority and is unlikely to be challenged on such grounds.[40] If the New Rule is judicially challenged, it will likely be challenged for improperly following procedural rulemaking, arbitrary and capricious agency action, or violating the Second Amendment.

Procedural challenges

By following the NCRM process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but court opinions about agency action make clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.[41]

[35] Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

[36] *Id.* at 7.

[37] *Id.*

[38] 16 U.S.C. § 460(d); see also 36 CFR 327.0 & 327.1(c).

[39] 5 U.S.C. § 706.

[40] *See* 16 U.S.C. § 460(d) ("The water areas of all such projects shall be open to public use . . . all under such rules and regulations as the Secretary of the Army may deem necessary . . . .").

[41] *See* Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," 92 N.C.L. Rev. 721, 737-38 (2014) (describing "first" and "second" order inquiries into an agency's decision making). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

In particular, the USACE should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.[42] The agency must address the concerns raised in all non-frivolous and significant comments.[43] The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.[44] By reviewing the comments submitted to the Trump Rule, the next administration can produce a New Rule that anticipates the types of comments a new NPRM may receive.

Arbitrary-and-capricious challenge under the APA

If there is a judicial challenge brought regarding the New Rule being arbitrary or capricious, a court will invalidate the regulation if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[45] The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action establishing a nexus between the facts and the agency's choice.[46] Where an agency fails to consider important facts or where its explanation is either unsupported or contradicted by the facts, it is grounds for the court to find the rule "arbitrary or capricious."[47]

Further, when a challenged rule reverses or rescinds an existing rule, an agency must provide a "reasoned analysis" in which it acknowledges a change in policy and provides a "good reason" for the proposed change.[48] However, the additional "reasoned analysis" requirement does not automatically subject rule reversals to a higher level of scrutiny.[49] There are some circumstances in which a justification must be more detailed for policy changes than for initial policies, such as when the new policy relies on factual findings contradicted by those underlying the existing policy.[50] The "reasoned analysis" does not require agencies to persuade the court that a new policy is superior to the one being reversed, but merely requires an agency to "display awareness that it is changing position" and demonstrate that "there are good reasons for it."[51]

[42] 5 U.S.C. § 553(c).

[43] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).

[44] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).

[45] 5 U.S.C. § 706(2)(A).

[46] *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[47] *Id.* at 43.

[48] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[49] *Id.* at 515.

[50] *Id.* at 515-516.

[51] *Id.* at 515.

Therefore, to withstand a potential judicial challenge that the New Rule is an arbitrary and capricious action by USACE, the agency must be able to demonstrate that it considered all factors pertinent to the issue in its decision-making and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy based on sound evidence, empirical or otherwise. Second, it should contain an acknowledgement of the Trump Rule and address why the policy reasons cited in support of the Trump Rule (mainly the "compliance burden") are outweighed by public safety factors outlined above.

A. Facts and Data Rationale

The first component of the framework, which is applicable to all rulemaking, is the requirement to consider all relevant factors and data, and to articulate a satisfactory explanation that gives "a rational connection" between the findings and the decision.[52] There are three primary factors implicated in the policy at issue: public health and safety, administrative burden, and regulatory consistency.

i. Public health and safety

The USACE is concerned with the health and safety of the public visiting property under its control and the USACE park rangers who patrol the land. Being able to effectively and efficiently police who is in possession of a firearm on USACE property is an important consideration in protecting the health and safety of public visitors and USACE park rangers. Numerous recent studies have shown statistically significant links between permissive gun possession laws and increased violent crime, firearm homicides, and unintentional injury.[53] The Traditional Rule allowed USACE park rangers to ensure that dangerous individuals, including those who would fail a background check, do not possess a firearm on USACE property. The Trump Rule takes away this important protection.

USACE park rangers cannot carry firearms, and are therefore ill-equipped to handle situations where visitors become violent.[54] Furthermore, USACE property includes various dams and important water sources that supply necessary water and energy to local towns.[55] USACE property is thus susceptible to potential attacks. With more unregulated firearms on the property, USACE would be unable to adequately protect such important resources without state and local law enforcement. Again, since the USACE park rangers are not armed, the rangers

[52] *State Farm*, 463 U.S. at 43.
[53] *See, e.g.,* John D. Donohue, et al., "Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis," *NAT'L BUREAU OF ECON. RESEARCH*, Working Paper No. 23510 (2018), https://www.nber.org/papers/w23510.pdf (linking permissive right-to-carry laws with statistically significant increases in violent crime and homicide); Michael Siegel et al., "Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States," AM. J. PUB. HEALTH 107 (2017), 1923, 1923 - 1929 (finding right-to-carry and "may-issue" laws are associated with increased rate of gun homicides; J. DeSimone, S. Markowitz, and J. Xu, "Child Access Prevention Laws and Nonfatal Gun Injuries," *Southern Economic Journal* 80, no. 1 (2013) (finding statistically significant difference in accidental injury rate among adults in states with concealed carry laws).
[54] "Firearms at Army Corps Water Resource Projects: Proposed Legislation and Issues in the 113th Congress," Congressional Research Service, March 16, 2015, https://crsreports.congress.gov/product/pdf/R/R42602/18.
[55] *Id.*

would have a difficult time seizing a weapon from an uncooperative visitor. The New Rule would help USACE ensure the health and safety of visitors and allow USACE park rangers to more effectively manage the use of firearms on USACE property.

ii. Administrative burden

The Trump Rule argued that a change in policy was necessary to ease the administrative burden created by the Traditional Rule and create regulatory consistency across federal departments. Although the New Rule would require additional paperwork, which is estimated to take 300 hours per year to review, it is not an administrative burden that outweighs the health and safety considerations outlined above. The Trump Rule noted that changing the USACE policy would have an estimated cost savings of $2,340, which is the estimated cost of reviewing 300 applications in a year.[56] The estimated cost savings do not take into account the cost of implementation of the Trump Rule, including the additional law enforcement needed for protection and the injuries that would result from an increased presence of firearms on federal lands. Even assuming the estimate was accurate, such nominal savings surely ignore the actual costs of the change in policy and should not overshadow the health and safety considerations.

iii. Regulatory consistency

The Trump Rule's rationale for regulatory consistency similarly lacked a genuine justification for a policy change. The Trump Rule asserted that removing the written permission requirement would reduce confusion by bringing USACE property into alignment with other federal lands. That assertion ignores the real differences between USACE property and other federal lands.

USACE property receives more visitors per year than any other single federal agency's sites.[57] Along with being one of the most visited federal agency's sites, USACE property includes water infrastructure projects that provide critical energy and water supply to local residences. USACE property is busier and more susceptible to attack than other federal lands. At the same time, USACE park rangers are unable to carry firearms themselves and must rely on local law enforcement from various state and local governments for protection. Changing the Traditional Rule for regulatory consistency ignores the inconsistency between how federal lands are actually run on a day-to-day basis, and the New Rule would allow USACE to better manage its land.

B. Reasoned Analysis

The second component of this framework is the "reasoned analysis" requirement. The New Rule is a change in policy direction from the Trump Rule. Therefore, the New Rule must address the various reasons USACE wants to revert back to the old policy and why the Trump Rule is the wrong policy for the agency.

The health and safety, administrative burden, and regulatory consistency reasons discussed above each acknowledge that the Trump Rule should be repealed because it does not adequately address issues created by removing the written permission requirement. The Trump Rule failed to sufficiently point to a rational policy justification for the change. The neglect of such an important factor in the rulemaking process is further evidence the existing policy was ill-advised and the New Rule's change in direction is justified.

[56] COE-2018-0008 (posted April 13, 2020).
[57] Supra note 20.

If the New Rule adheres to the guidance offered in this section, it should be able to withstand the judicial review process. The New Rule considers all relevant factors to USACE in managing its property, and offers rational explanations connecting the finding to the agency action. Further, the policy change meets the reasoned analysis requirement by addressing the lack of rationale behind the Trump Rule's change in policy and why the New Rule's policy is critical for safely managing USACE property. Thus, it is unlikely a court will find the USACE acted arbitrarily and capriciously in issuing the New Rule.

Constitutional challenge

The New Rule would be identical to the Traditional Rule, which has already survived Second Amendment scrutiny and been declared constitutional by numerous federal courts.[58] Thus, there is no reason to suggest the New Rule will be struck down as unconstitutional.

Most circuits have adopted a two-step approach to evaluating Second Amendment challenges, in which they ask: "(1) Is the restricted activity protected by the Second Amendment in the first place? [and] (2) If so, does it pass muster under the appropriate level of scrutiny?"[59] The scrutiny applied "will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right."[60]

A. Activity Protected by the Second Amendment

First and foremost, the Second Amendment does not create an unqualified right to possess and use a loaded firearm in public places.[61] The New Rule is constitutional and one of the permissible restrictions on firearm possession contemplated by the Supreme Court in *Heller*.

Indeed, USACE policy since at least 1946 has recognized that limitations to bringing guns on USACE property is appropriate.[62] Here, the New Rule is less strict than its 1946 counterpart; an individual may possess firearms following written permission from a district commander, at authorized shooting ranges, or for lawful hunting or fishing if the firearms are being transported lawfully over USACE property. Over time, USACE policy was changed to allow the possession of firearms in each of these circumstances.[63]

Some firearm regulations do not implicate core Second Amendment protections at all; the Second Amendment allows gun restrictions in "sensitive places."[64] While Second Amendment jurisprudence recognizes a right to self-defense, the narrowly tailored New Rule does not

[58] *See, e.g., GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs,* 212 F. Supp. 3d 1348, 1366 (N.D. Ga. 2016); *see generally Lauchli,* 724 F.2d at 1281 (enforcing penalties for violation of Traditional Rule).
[59] *GeorgiaCarry.org,* 212 F. Supp. 3d at 1359; *accord United States v. Marzzarella,* 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester,* 628 F.3d 673, 680 (4th Cir. 2010); *Ezell v. City of Chi.,* 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Reese,* 627 F.3d 792, 800–01 (10th Cir. 2010); *Heller v. D.C. (Heller II),* 670 F.3d 1244, 1252 (D.C. Cir. 2011).
[60] *GeorgiaCarry.org,* 212 F. Supp. 3d at 1359 (*quoting Ezell,* 651 F.3d at 701).
[61] *D.C. v. Heller,* 554 U.S. 570, n.2 (2008) ("[T]he Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.")
[62] *See*, *e.g.,* 11 Fed. Reg. 9278, 9279 § 301.8 (August 24, 1946) ("Loaded rifles, loaded pistols, and explosives are prohibited in the reservoir area.").
[63] 36 C.F.R. § 327.13.
[64] *Heller*, 554 U.S. 570 (2008).

diminish that right because it applies to property that is on or near sensitive military installations and it allows for the possession of weapons after receiving written permission from USACE. *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 38 F. Supp. 3d 1365, 1376 (N.D. Ga. 2014), *aff'd,* 788 F.3d 1318 (11th Cir. 2015).

In *GeorgiaCarry.org,* Plaintiff commenced an action after he was denied written permission to carry his firearm on USACE property in Georgia by a district commander, pursuant to the Traditional Rule.[65] Plaintiff claimed that the regulation requiring written permission was unconstitutional under the Second Amendment because it infringed on his right to self-defense. The District Court disagreed, holding that the only right to self-defense recognized was within the home, not on USACE property; therefore, the New Rule, like the Traditional Rule, would not infringe on that right.[66]

B. Applicable Level of Scrutiny

Even if the Proposed Rule was within the scope of the Second Amendment, intermediate scrutiny would apply, and the regulation would still be found constitutional as a matter of law.

Intermediate scrutiny applies to regulations that implicate Second Amendment protected activity. Because the *Heller* Court largely avoided defining the contours of non-strict scrutiny for the Second Amendment, decisions by Circuit Courts provide the most guidance on this question. For example, the Second Circuit holds that a regulation passes intermediate scrutiny if "it is substantially related to the achievement of an important governmental interest."[67] Multiple Circuit Courts have applied this formulation of intermediate scrutiny analysis, including the Fourth Circuit when it upheld a regulation that restricted possession of loaded firearms in motor vehicles on National Park Service land.[68]

Here, the New Rule, too, would withstand intermediate scrutiny. The USACE has a substantial interest in public safety and national security on USACE property, and the regulation is substantially related to that interest.[69] Plainly, strict scrutiny does not apply to the New Rule because it does not infringe upon the core protection of self-defense in the home.

Throughout its many years in force, only one federal court questioned the constitutionality of the Traditional Rule.[70] In *Morris,* the Court improperly interpreted *Heller's* exception for sensitive places when it defined the Traditional Rule as a "ban imposed by the Corps [that] applies to outdoor parks."[71] Simply dismissing USACE property as outdoor parks because they include recreational areas does not make the place less sensitive under *Heller*. The national security concerns for USACE regulations that impact "700 dams – holding back more than 100 trillion gallons of water" are certainly different than those implicated by the average campground.[72]

[65] *GeorgiaCarry.org,* 212 F. Supp. 3d at 1366.
[66] *Id.*
[67] *Kachalsky v. Cty. of Westchester,* 701 F.3d 81, 96 (2d Cir. 2012).
[68] *U.S. v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011) ("[T]he government has amply shown that the regulation reasonably served its substantial interest in public safety in the national park area.").
[69] *GeorgiaCarry.org, Inc.*, 38 F. Supp. 3d at 1378.
[70] *Morris v. U.S. Army Corps of Eng'rs,* 60 F. Supp. 3d 1120, 1122 (D. Idaho 2014).
[71] *Id.* at 1124.
[72] *Id.* at 1121.

Moreover, *Morris* should not and has not been countenanced by any other court because it was based, in large part, on a Ninth Circuit decision that was later overruled.[73] There exists no case law actually calling into doubt the Traditional Rule's—and, thus, the New Rule's—constitutionality under the Second Amendment.

[73] *Id.* (relying on *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1148 (9th Cir. 2014 (*Peruta I*).

RECOMMENDED ACTION MEMO
Agency: Department of Defense (DoD)
Topic: Reporting to the National Instant Criminal Background Check System (NICS)
Date: November 2020

Recommendation: Take aggressive actions to ensure that any court martial that disqualifies a servicemember from purchasing or possessing a firearm under federal law is reported to NICS.

I. Summary

Description of recommended executive action

Federal law requires the Department of Defense (DoD) to provide records to the National Instant Criminal Background Check System (NICS) identifying people prohibited from purchasing or possessing firearms, including people who have been convicted through court martials of felony-level crimes and misdemeanor crimes of domestic violence. Yet, the DoD has persistently been unable to fully carry out its obligation to report these individuals to NICS.

Under this proposal, the DoD would take aggressive action to ensure that these individuals are reported to NICS, including the following:

- Strengthening its implementation plan under the Fix NICS Act of 2018, including by shortening the relevant timelines
- Issuing military orders requiring the appropriate personnel to fulfill their NICS reporting obligations
- Demoting those military personnel who fail to fulfill their NICS reporting obligations
- Withholding bonus pay from political appointees within DoD who fail to fulfill their NICS reporting obligations

Overview of process and time to enactment

The DoD is already two decades behind in fulfilling its NICS reporting obligations. Yet, an individual who has been convicted through a court martial of a disqualifying crime could walk into a gun store and attempt to purchase a gun on any day. The urgency of the danger to public safety requires immediate action. The next administration should prioritize this problem so that the DoD is in full compliance with its NICS reporting obligations by mid-2022 at the latest.

II. Current state

The Brady Act and DoD records

Enacted in 1993, the Brady Handgun Violence Prevention Act (Brady Act) required the attorney general to create NICS, which became operational in 1998. NICS is the system used by the Federal Bureau of Investigation (FBI), and state, tribal, and local agencies to conduct background checks on firearms purchasers and transferees. NICS contains information

identifying people who are prohibited from purchasing or possessing firearms under federal or state law.[1]

Federal, state, tribal, and local courts and agencies submit information in various forms to NICS about people who are legally ineligible to possess firearms. The Brady Act authorized the attorney general to secure information about these people from federal departments and agencies. More importantly, that law mandated that the head of each department or agency furnish this information to NICS at the attorney general's request.[2] The DoD has information about people who have been convicted through court martials of felony-level crimes and misdemeanor crimes of domestic violence. People who have been convicted of such crimes are not eligible to possess firearms under federal law.[3]

Longstanding military policies and instructions require reporting to NICS. In 1987, long before the Brady Act became law, the DoD inspector general issued a memorandum to establish policies and procedures for the defense criminal investigative organizations (DCIOs) to report offender criminal history data to the FBI.[4] DoD Instruction 5505.11, originally issued in 1998, in turn, mandates that DCIOs and other DoD law-enforcement organizations submit criminal history data, including fingerprints and disposition data to the FBI's Criminal Justice Information Services (CJIS) Division.[5] CJIS maintains the files of the National Crime Information Center (NCIC), which are accessed when a background check is conducted through NICS.[6] Each branch of the military is therefore already obligated by law to report certain offender criminal history data for members of the military for inclusion in NICS (and, more specifically, the files of NCIC).

DoD's failure to report to NICS

The DoD has persistently been unable to carry out its obligation to fully report these individuals to NICS. This failure is well-documented. Indeed, as early as 1997, the DoD inspector general evaluated compliance by the Air Force, Navy and Army with the criminal history data reporting requirements, and published the results of that evaluation. The 1997 report stated that, over an eighteen-month period, the Air Force failed to submit appropriate records in approximately 50% of its cases; the Navy failed to submit final records in approximately 94% of its cases; and the Army failed to submit records in approximately 79% of its cases.[7]

Reporting to NICS by both federal and state agencies became the focus of congressional attention again following the fatal shooting of 32 students and faculty at Virginia Tech in 2007. The Virginia Tech shooter was ineligible to possess firearms, but the State of Virginia had failed

[1] Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1993); Federal Bureau of Investigation, "National Instant Criminal Background Checks System (NICS) 2018 Operations Report," accessed October 14, 2020, https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view.
[2] Brady Handgun Violence Prevention Act § 103(e)(1) (now codified at 34 U.S.C. § 40901(e)(1).
[3] 18 U.S.C. § 922(g).
[4] *See* Inspector Gen., Dep't of Defense, "Evaluation of Department of Defense Compliance with Criminal History Data Reporting Requirements," February 10, 1997, 4, 20.
[5] *Id.*, *see also* Office of the Inspector General of the Department of Defense, "DoD Instruction 5505.11: Fingerprint Reporting Requirements," October 31, 2019, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550511p.pdf.
[6] 28 C.F.R. §§ 25.2, 25.4.
[7] Inspector Gen., Dep't of Defense, "Evaluation of Department of Defense Compliance with Criminal History Data Reporting Requirements," February 10, 1997, 4, 20.

to properly report records about him to NICS.[8] As a result Congress enacted the NICS Improvement Amendments Act of 2007.[9] Although the primary focus of this legislation was NICS reporting by states, the Act also imposed an affirmative duty on federal departments and agencies to report disqualifying information to NICS in electronic form on a quarterly basis.[10] To incentivize compliance, the attorney general is required to provide an annual report to Congress on each department's or agency's success.[11]

The DoD's reporting to NICS improved, but in 2015, the DoD inspector general reported that the same problems persisted, and the Air Force still failed to submit approximately 32% of its qualifying records; the Navy still failed to submit approximately 25% of its qualifying records; and the Marine Corps failed to submit approximately 33% of its qualifying records.[12]

The Sutherland Springs shooting and its aftermath

On November 5, 2017, a gunman opened fire at a church in Sutherland Springs, Texas, killing 26 people and injuring an additional 20. The gunman was a former member of the Air Force who had been convicted in a court-martial after a brutal assault on his wife and stepson. The Air Force admitted that it had failed to report the conviction to NICS properly, enabling the shooter to purchase the guns used in the massacre.

Soon thereafter, on December 4, 2017, the DoD inspector general released a third report, similar to the 1997 and 2015 reports, evaluating compliance by the Air Force, Navy, Army and Marine Corps with their criminal history data reporting requirements. The 2017 report stated that, for convictions between January 1, 2015 and December 31, 2016, the Air Force failed to submit final disposition reports in approximately 14% of its cases, the Navy failed to submit final disposition reports in approximately 36% of its cases, the Army failed to submit final disposition reports in approximately 41% of its cases, and the Marines Corps failed to submit final disposition reports in approximately 36% of its cases. The DoD inspector general acknowledged the seriousness of these failures by saying, "[a]ny missing . . . final disposition report can have serious, even tragic, consequences."[13]

The Sutherland Springs shooting and the subsequent DoD inspector general report brought the DoD's reporting failures to the attention of policymakers nationwide. The DoD acting inspector general testified to Congress in April 2018 that these problems persisted because the DoD simply "didn't take [his office's] recommendations as seriously as they should have."[14]

[8] *See* Michael Luo, "Cho's Mental Illness Should Have Blocked Gun Sale," *N.Y. Times*, April 20, 2007, https://www.nytimes.com/2007/04/20/us/20cnd-guns.html.
[9] *See* NICS Improvement Amendments Act of 2007 (NIAA), Pub. L. No. 110-180, 121 Stat. 2559 (2008).
[10] *Id.* § 101(a) (codified at 34 U.S.C. § 40901(e)(1)(C)-(D)).
[11] *Id.* (codified at 34 U.S.C. § 40901(e)(1)(E)).
[12] Inspector Gen., Dep't of Defense, "Evaluation of Department of Defense Compliance with Criminal History Data Reporting Requirements," February 12, 2015, i.
[13] Inspector Gen., U.S. Dep't of Defense, "Evaluation of Fingerprint Card and Final Disposition Report Submissions by Military Service Law Enforcement Organizations," December 4, 2017, 6 ("2017 Report").
[14] In addition, three municipalities, who use NICS to fulfill their legal obligations, sued DoD and its constituent military departments to compel the department's more thorough compliance. However, in January 2019, the Fourth Circuit affirmed the dismissal of their claim, holding both that the appellants lacked constitutional standing and failed to establish subject matter jurisdiction under the Administrative Procedure Act. See *City of New York v. United States DoD,* 913 F.3d 423 (4th Cir. 2019). Another lawsuit, brought by families of the victims, is ongoing, however. *See Holcombe v. United States,* 388 F. Supp. 3d 777 (2019) (granting in part and denying in part the plaintiffs' motion to dismiss for lack of jurisdiction).

Fix NICS and the current status at the DoD

In response to the Sutherland Springs shooting, Congress again amended the statute governing NICS to improve inter-agency reporting.[15] The Fix NICS Act of 2018 requires the head of each federal department or agency with disqualifying records, in coordination with the attorney general, to establish a four-year implementation plan to maximize reporting, including annual benchmarks, and an estimated deadline for full compliance. Second, the head of each federal department or agency must now certify twice per year that they are uploading criminal records information to NICS and provide the number of records submitted.[16]

Fix NICS holds departments and agencies that fail to report accountable in two ways. First, the attorney general must make a semiannual "substantial" compliance determination based on the department or agency's implementation plan; publish on the DOJ's website; and report to Congress on any department or agency that has failed to submit the required certification or comply with its implementation plan. Second, the law makes political appointees at non-compliant departments and agencies ineligible for bonus pay for each fiscal year from 2019 through 2022 until the department or agency achieves substantial compliance with its implementation plan.[17]

In November 2019, the attorney general published the first report on federal agencies' and departments' compliance with Fix NICS. Although Fix NICS requires these reports to be published semiannually, this report covered the first three reporting periods required by the act. According to the report, the DoD was the only federal department or agency that certified that it had failed to comply with its NICS reporting obligations, and this failure continued through all three reporting periods.[18]

The report also provided a summary of the DoD's implementation plan. The plan provided that the DoD would not publish an agency NICS implementation policy until June 2021, would not update all relevant agency policies to incorporate its NICS implementation policy until June 2023, and would not be in compliance with either the NICS Improvement Amendments Act of 2007 or Fix NICS until September 2023.[19]

However, a DoD inspector general report, issued in February 2020, claimed the DoD is in "100%" compliance with its NICS reporting obligations. This report did not describe its methodology, and the basis for this claim is unclear.[20]

[15] Fix NICS Act, Pub. L. No. 115-141, Div. S, Title VI (2018).
[16] *Id.* § 602.
[17] *Id.* § 602(1) (codified at 34 U.S.C. § 40901(e)(1)(F)-(I)).
[18] Dep't of Justice, "The Attorney General's Semiannual Report on the Fix NICS Act," November 2019, https://www.justice.gov/ag/page/file/1217396/download (indicating on page 6 that a certification was received from DoD, and in Appx A, page 2, that DoD failed to comply with its reporting obligations).
[19] Appx B., page 8
[20] Dep't of Defense, Office of Inspector General, "Evaluation of DoD Law Enforcement Organization Submissions of Criminal History Information to the Federal Bureau of Investigation," February 21, 2020, https://media.defense.gov/2020/Feb/25/2002254091/-1/-1/1/DODIG-2020-064_REDACTED.PDF.

A much more transparent account of federal agencies' compliance with the requirements of Fix NICS came when the Government Accountability Office (GAO) issued a report in July 2020.[21] Among other things, the report reiterated the deadlines noted in the November 2019 AG report, including that DoD would not update all relevant agency policy until June 2023. The GAO report also stated:

> According to DoD officials, not all components or law enforcement agencies can track how many records they submit to the III or NCIC databases because their computer systems are not capable of providing this information. As a result, DoD certified that it is not in compliance with the Fix NICS Act's record submission requirements. To address this issue, DoD reported in its implementation plan that it plans to acquire a system that can track these record submissions. This system is to be evaluated by DoD's Office of Cost Assessment and Program Evaluation in September 2020, reach initial operating capability by September 2021, and enable DoD to be compliant with the Fix NICS Act by September 2023.

III. Proposed action

Description of substance

The DoD should take aggressive action to ensure that these individuals are reported to NICS. The first thing the DoD should do is work with the attorney general to strengthen the DoD's Fix NICS implementation plan. As described above, the DoD's current plan unnecessarily delays the relevant timelines so that the DoD is not required to come into full compliance until September 2023. This deadline is unacceptable. The DoD should be in full compliance by mid-2022 at the latest. Furthermore, the current plan does not include "a needs assessment, including estimated compliance costs,"[22] even though the Fix NICS Act explicitly requires federal agencies' plans to include these assessments.[23] The DOJ must provide the DoD with technical assistance if necessary to help the DoD fulfill these obligations.[24]

Secondly, the DoD must issue military orders requiring the appropriate personnel to fulfill their NICS reporting obligations. As described below, military orders have much of the force of law, and failure to obey them can result in criminal penalties.

Description of the process for the new administration

The DoD should update its NICS implementation policy and all relevant agency policies within a short period of time. This step in the process can be completed long before the June 2023 deadline set by the DoD's current implementation plan. The next administration should make it a priority for the DoD to complete this step in the process within a few months of taking office, and before June 2021 at the latest. This new policy should assign NICS reporting obligations to the appropriate servicemembers and give them the full force of military orders.

As noted above, the DoD's Office of Cost Assessment and Program Evaluation should have evaluated a new system for tracking record submissions by September 2020. The next

[21] Government Accountability Office, "GUN CONTROL DOJ Can Further Improve Guidance on Federal Firearm Background Check Records," July 2020, https://www.gao.gov/assets/710/707986.pdf.
[22] *Id.* at Table 7.
[23] 34 U.S.C. § 40917(b)(2).
[24] 34 U.S.C. § 40901(e)(1)(J).

administration must begin implementing this system immediately, so that the DoD can be in full compliance by mid-2022 at the latest.

In addition, giving military orders the force of law means not hesitating to hold those who disregard these orders accountable. At the very least, military personnel who fail to comply with their NICS reporting obligations should be demoted.

Finally, the Fix NICS Act explicitly authorized the withholding bonus pay from political appointees within the DoD who fail to fulfill their NICS reporting obligations. The DoD should not hesitate to make use of this authority when appropriate.

The DoD's failure to fulfill its NICS reporting obligations is dangerous, illegal, and unacceptable, especially in the context of the military. In contrast, the actions described above are reasonable, achievable, and proportional responses to the threat to public safety posed by this failure.

The DoD's NICS reporting failures violate the law

As described above, the Brady Act, the NICS Improvement Amendments Act of 2007, and Fix NICS each unambiguously require all federal departments and agencies, including the DoD, to report to NICS. The DoD is not meeting these legal obligations. In fact, the DoD's own inspector general's reports clearly document that, as far back as 1997, and continuing through the present, the DoD has systematically and knowingly failed to fulfill these obligations.

The DoD inspector general has warned the DoD for at least two decades about this long-standing and systemic failure to comply with the law requiring it to report criminal conviction information, "repeatedly [finding] deficiencies with military services' submission of...final distribution reports and other criminal history information to the FBI."[25] There can be no question that the DoD should take all necessary actions to come into compliance with the law.

The DoD's reporting failures imperil public safety

Given the danger that exists when a prohibited person has not been reported to NICS, these lag times are unacceptable and threaten public safety. Both the Virginia Tech and Sutherland Springs shootings amply demonstrated the horrific results that can occur when people who have become ineligible to possess firearms are not properly reported to NICS. As long as the DoD fails to properly report every disqualifying court martial to NICS, the danger of similar tragedies persists.

The DoD's NICS reporting failures are particularly unacceptable since the military arms service members and trains them in the usage of firearms, giving them greater skills with weapons designed to inflict fatal injuries in combat situations. Along with the authority that commanders have to provide service members with these skills should come a responsibility to ensure that service members don't use these skills to commit acts of violence against civilians. Reporting to the NICS is crucial to fulfilling this responsibility. A service member who has been convicted in a court-martial of a felony-level crime or domestic violence, yet possesses a firearm, poses the same, if not greater, threat to public safety than a civilian convicted of a similar crime. That

[25] Dep't of Defense, Office of Inspector General, "Evaluation of DoD Law Enforcement Organization Submissions of Criminal History Information to the Federal Bureau of Investigation," February 21, 2020, https://media.defense.gov/2020/Feb/25/2002254091/-1/-1/1/DODIG-2020-064_REDACTED.PDF.

information must be reported to NICS so that these individuals are not able to pass a background check to buy a gun.

The nature of the military makes these failures even less acceptable

The DoD's failure to ensure that court-martials are properly reported to NICS is particularly shocking, given the discipline expected within the military. Servicemembers who fail to obey lawful orders of their superiors can be punished through court martials.[26] As one commentator has described

> ...commanders continue the tradition borrowed from King George III of controlling behavior within the military by deciding whom to punish, how, and for what conduct; given that a much wider swathe of conduct is potentially criminal in the military than outside of it, this is enormous power. Not only do commanders decide whom to prosecute and for what crimes; they also decide whom to alternatively discipline outside of the courtroom and whom not to discipline at all…Such wide-ranging authority to respond to misconduct does not operate in a vacuum. It is coupled with commanders' vast administrative and operational powers over individuals under their command. Such power includes, *inter alia,* the authority to evaluate and promote,... certify fitness for deployments; it also includes the power to order members, if in an operational setting, to take the next hill or fly the next sortie.[27]

Senior officers should order those in the proper positions to ensure that court martials are properly reported to NICS, and commanders should use their authority to ensure that those who fail to obey these orders are held accountable.

The military exists to protect and defend our country from acts of violence. As such, the requirement that the DoD properly report to NICS fulfills the purpose of the military directly. The DoD's continuing failure to fulfill this responsibility is an embarrassment.

Reporting to NICS should be one of the military's highest priorities

The military often sees itself as a world apart, separate and exempt from the norms of civilian life. Nevertheless, the law recognizes that the military and civilian worlds can impact one another. While a federal statute, known as the Posse Comitatus Act, enacted in 1878, prohibits the military from being used for domestic law enforcement activities, an exception applies when expressly authorized by the Constitution or Congress.[28] Congress has expressly authorized the sharing of information between the military and law enforcement, and federal law states "The needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account in the planning and execution of military training or operations."[29]

Besides constituting a violation of the laws mentioned above, the DoD's failure to fulfill its NICS reporting obligations is inconsistent with these longstanding, well-recognized principles. Until now, the military has failed to sufficiently take into account civilian law enforcement's need for

[26] 10 U.S.C. § 890-892.
[27] Rachel E. VanLandingham, "Military Due Process: Less Military & More Process," *Tul. L. Rev.* 94 no.1, (November 2019), 19-20.
[28] Congressional Research Service, "The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law," November 6, 2018, https://fas.org/sgp/crs/natsec/R42659.pdf.
[29] 10 U.S.C. § 271(b).

information about service members and former service members who are not legally eligible to possess firearms. The time is far past due to remedy these deficiencies.

IV. Risk analysis

There is little legal risk involved in the actions proposed above. The most likely area of dispute, however, involves the effects of these actions on individual members of the military. However, the **DoD's authority to hold personnel accountable for failure to fulfill NICS reporting requirements is clear.**

The secretary of the DoD can issue military orders requiring the appropriate personnel to report to NICS. To some extent, these orders may already exist, but personnel have not complied with them. Disobeying these orders constitutes an "offense" punishable by court-martial under the Uniform Code of Military Justice (UCMJ).[30] Dereliction of duties is also an offense, and simple negligence is the proper standard for determining whether nonperformance of military duty is derelict within the meaning of the UCMJ.[31] Court-martial convictions for dereliction of duties have been upheld for, among other things, failing to record the weather properly,[32] provide adequate financial support for a spouse,[33] or verify amusement game cash receipts.[34]

Disobeying orders and dereliction of duties can be punished through a court-martial, but would more likely be punished through one of the non-judicial methods listed in UCMJ. One of these methods is demotion.[35] The USMJ authorizes commanding officers to "in addition to or in lieu of admonition or reprimand" impose "reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction."[36] Additionally, an officer of the grade of major, lieutenant commander, or above is authorized to impose "reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades."[37]

Once military personnel have received proper orders to fulfill their NICS reporting obligations, they must treat these obligations as part of their military duties. If they fail to obey these orders, or are derelict in these duties, they must be subject to demotion.

In addition, the Fix NICS Act made political appointees at non-compliant departments and agencies ineligible for bonus pay for each fiscal year from 2019 through 2022, until the department or agency achieves substantial compliance with its implementation plan.[38] As noted above, the DoD's current implementation plan has so far failed to include all the elements required by the Fix NICS Act. These political appointees should therefore be considered ineligible for bonus pay during this time period at least.

[30] 10 U.S.C. §§ 890-892.
[31] 10 U.S.C. § 892; *United States v. Lawson,* 36 M.J. 415, 1993 CMA LEXIS 55 (C.M.A. Apr. 19, 1993).
[32] *United States v. Dellarosa,* 30 M.J. 255 (C.M.A. 1990).
[33] *United States v. Blanks,* 77 M.J. 239 (C.A.A.F 2018).
[34] *United States v. Bankston,* 22 M.J. 896 (N.M.C.M.R 1986).
[35] 10 U.S.C. § 815.
[36] 10 U.S.C. § 815(b)(2)(D).
[37] 10 U.S.C. § 815(b)(2)(H)(iv).
[38] 34 U.S.C. § 40901(e)(1)(F)-(I)).

V. Conclusion

The DoD's continuing failure to fulfill its NICS reporting obligations puts us all in danger, and places the DoD in violation of the law. An aggressive response is necessary for the next administration to fix this problem. Issuing military orders with the force of law to compel DoD personnel to fulfill these obligations, and holding personnel accountable when they do not comply are responsible measures proportional to the risks. The next administration should not hesitate to take these steps.

RECOMMENDED ACTION MEMO
Agency: Department of Education
Topic: Prohibiting the Use of Grant Funds to Purchase Firearms
Date: November 2020

Recommendation: issue guidance and amend regulations clarifying for state and local education agencies that firearms purchases and training are a prohibited use of Education Department grant funds.

I. Summary

Description of recommended executive action

In 2018, school shootings in Parkland, Florida, and Santa Fe, Texas, increased public discourse on school safety and renewed debate over whether schools should arm staff. President Trump tweeted his support for arming teachers, writing: "Armed Educators (and trusted people who work within a school) love our students and will protect them. Very smart people. Must be firearms adept & have annual training. Should get yearly bonus. Shootings will not happen again - a big and very inexpensive deterrent. Up to States"[1]

Around this time, Texas and Oklahoma asked the US Department of Education ("Education Department" or "the Department") to clarify whether states could use the Education Department grant funds to purchase firearms or fund firearms training.[2] In particular, the states asked whether the purchase of firearms or firearms training was an allowable use of Student Support and Enrichment (SSAE) grants, a program authorized by Title IV Part A of the Every Student Succeeds Act (ESSA).[3] Texas and Oklahoma are two of nine states that allow employees to be armed on school campuses, but firearms are not currently purchased with federal funds.[4]

Secretary of Education Betsy DeVos did not respond to these inquiries directly. Instead, Secretary DeVos stated in a letter to Congress that she would not "take ***any action*** that would expand or restrict the responsibilities and flexibilities granted to State and local educational agencies" by the ESSA, which provides the statutory authority for a wide variety of Education Department grant programs (emphasis in original).[5]

The Trump administration's response has left open the question of whether the Education Department believes states and local education agencies (LEAs) can use SSAE grants to arm

[1] Elizabeth Landers, "Trump Tweets Support For Arming Teachers, Says 'Up To States'," CNN, February 24, 2018, https://www.cnn.com/2018/02/24/politics/trump-tweet-arming-teachers/index.html.
[2] Adam Harris, "A Loophole That Could Let States Buy Teachers Guns With Federal Funds," *The Atlantic* August 23, 2018, https://www.theatlantic.com/education/archive/2018/08/the-audacity-of-arming-teachers-with-federal-dollars/568387/; Andrew Ujifusa, "DeVos Ponders Letting Schools Buy Guns Under ESSA in Twist on Federal Law," Education Week, August 23, 2018, http://blogs.edweek.org/edweek/campaign-k-12/2018/08/devos-schools-buying-guns-essa-twist-federal-law.html.
[3] Pub. L. 114-95 (December 10, 2015), and most recently amended through Pub. L. 115-224.
[4] Erica L. Green, "Betsy DeVos Eyes Federal Education Grants to Put Guns in Schools," *The New York Times* August 23, 2018, https://www.nytimes.com/2018/08/23/us/politics/devos-guns-in-schools.html.
[5] Secretary Betsy Devos, "Letter to Rep. Bobby Scott, Ranking Member," August 31, 2018, https://edlabor.house.gov/imo/media/doc/Response%20to%20Rep%20Scott.pdf.

educators. However, the text and intent of the ESSA make clear that Congress did not intend that SSAE or any other Education Department program be used for this purpose. To prevent state and LEAs from abrogating the intent of Congress by using federal funding to arm educators and school staff, the next administration should take two executive actions:

(1) Issue guidance clarifying that purchasing firearms or funding firearms training is not a permissible use of any Education Department grant funds.

(2) Issue a rule to amend the Education Department General Administrative Regulations (EDGAR) to clarify that the use of grant funds for purchasing firearms or funding firearms training is prohibited.

Overview of process and time to enactment

Issuing agency guidance is an expedient and discretionary process, and the next administration should take this step immediately as the formal rulemaking process gets underway. The Education Department should draft and finalize a guidance document that clearly states the agency interprets the ESSA to prohibit grant recipients from using funds to purchase firearms or firearms training. To comply with best practices for agency guidance, the document should acknowledge that such guidance does not have legislative authority, and provide details on how the public may submit a complaint seeking the rescission or modification of the guidance. Once finalized, the document should be published on the Education Department's website.

The Education Department should concurrently begin the notice and comment rulemaking process, as required by the Administrative Procedure Act (APA).[6] This multi-phase process will likely extend for about a year and requires the Department to issue a notice of proposed rulemaking (NPRM), provide a period for receiving public comments, issue a response to significant received comments (by either modifying the proposed rule or responding to substantive comments directly), and publish the final rule in the *Federal Register*. A rule generally goes into effect thirty days after it is published.[7]

II. Current state

Statutory framework: ESSA and SSAE grants

The ESSA provides the statutory authority for a wide variety of Education Department grant programs. These grants are often specifically tailored for narrow purposes and uses.[8] However, Title IV Part A of the ESSA, which creates SSAE grants, provides the most flexible statutory uses for grant funds, under which an argument for purchasing firearms could be made.

States and LEAs that receive SSAE grants must use the funds for activities that support three goals: (1) providing well-rounded educational opportunities, (2) supporting safe and healthy students,and (3) improving the use of technology in order to improve academic achievement

[6] 5 U.S.C. § 553.
[7] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.
[8] *See, e.g.*, Grants for State Assessments and Related Activities (20 U.S.C. § 6361); Teacher and School Leader Incentive Fund Grants (20 U.S.C. § 6632). The Department also provides a searchable index of ESSA grant programs, available at https://www2.ed.gov/policy/elsec/leg/essa/legislation/index.html.

and digital literacy.[9] Proponents of arming teachers argue that the "supporting safe and healthy students" category may give states latitude to use the funding for firearms or firearms training.

In FY19, Title IV Part A grants totaled $1.17 billion.[10] In applying for this funding, states submit Title IV grant applications to the Education Department. Once the state application is approved, local school districts apply for funding directly from the state. Any local education agency that receives a Title IV grant of $30,000 or more must spend at least 20% of the funds for activities to support safe and healthy students.[11] Additionally, local education agencies applying for Title IV funds must conduct a comprehensive needs assessment and develop the application in consultation with parents, students, teachers, principals, other school leaders, community-based organizations, and local government representatives.[12]

Trump administration interpretation of ESSA

In 2018, school shootings in Parkland, Florida, and Santa Fe, Texas, caused increased public discourse on school safety and whether school staff should be armed. Around this time, Texas and Oklahoma asked the Education Department to clarify whether states could use Education Department grant funds to purchase firearms or fund firearms training.[13] In particular, the states asked whether the purchase of firearms or firearms training was an allowable use of SSAE grants.

In an August 2018 letter to Congress on the issue, Secretary DeVos stated that Title IV does not grant her the authority to determine the scope of allowable use of funds, as doing so would infringe on the "substantial flexibility" the ESSA provides to school districts to use the grant funds in accordance with their own assessment of their needs.[14] However, the secretary clearly has statutory authority to issue regulations and guidance to implement grant programs under ESSA,[15] a fact the Department has explicitly stated.[16]

[9] 20 U.S.C. §§ 7117, 7118, 7119.
[10] Council of Urban Boards of Education, "The Opportunity to Increase Equity: A Guide to ESSA Title IV, Part A," National School Boards Association (2019), 2, https://www.nsba.org/-/media/NSBA/File/cube-the-opportunity-to-increase-equity-guide-2019.pdf?la=en&hash=7E5ADF16C16E846A1BCA648223291EF2D6955AF9.
[11] 20 U.S.C. § 7116.
[12] *Id.*
[13] Supra note 2.
[14] Supra note 5.
[15] *See, e.g.*, 20 U.S.C. § 1221e–3 ("The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department."); 20 U.S.C. § 3474 ("The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.").
[16] In 2016, the Department issued a proposed rule under ESSA (Part I, not Part IV) and received comments that argued that this rule was "an overreach" of the agency's authority and that "any regulatory requirement that is not specifically authorized by the statute and that establishes parameters for how States or [local education agencies] implement the law exceeds the Department's authority and violates the statute." The Department responded to these comments by explaining, "given that the Secretary has general rulemaking authority, it is not necessary for the statute to specifically authorize the Secretary to issue a particular regulatory provision." 81 Fed. Reg. 86076, 86082, "Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act—Accountability and State

Regulatory schema: Uniform Guidance and EDGAR

Title IV Part A grant funds are regulated by two overlapping regulatory schemes: (1) the Uniform Guidance (UG) for federal agency grant programs, promulgated by the Office of Management and Budget (OBM),[17] and (2) the Education Department General Administrative Regulations (EDGAR) for Education Department grants.[18] The UG contains general principles applicable to all grant programs for which agencies have adopted the UG, while the EDGAR provides specific guidance on Education Department grants to current and prospective grantees. Neither the UG nor the EDGAR specifically states whether firearms purchases or training are allowable uses of grant funds.

A. Uniform Guidance for federal grants, 2 C.F.R. Part 200

The UG is intended to serve as a streamlined, government-wide framework for grants management. The UG stems from OMB statutory authority,[19] and each agency subsequently adopts the UG under its own statutory authority to issue rules and regulations. Federal regulations set out each agency's particular adoption and any applicable exceptions to the UG.[20] Thirty-two federal agencies have adopted the UG.

Congress has delegated authority to the Education Department to issue regulations to implement grant programs at 20 U.S.C. § 1221e-311[21] and 20 U.S.C. § 3474.12.[22] The Education Department adopted the UG with limited exceptions, not relevant here.[23] This means that unless an exception is provided for in EDGAR's adoption of the UG, or a more restrictive provision is provided for
elsewhere in EDGAR or in the specific terms of the grant, the list of allowable and unallowable costs in the UG applies to all Education Department grant programs.

Other than those costs specifically disallowed in Subpart E (e.g., alcoholic beverages (§ 200.423), and bad debts (§ 200.426)), the UG provides a list of factors affecting allowability of costs under federal awards—including that costs must be necessary and reasonable for the performance of the award.[24] A cost is reasonable if its nature and amount do

Plans," Final regulations (November 29, 2016), https://www.federalregister.gov/documents/2016/11/29/2016-27985/elementary-and-secondary-education-act-of-1965-as-amended-by-the-every-student-succeeds.

[17] 2 C.F.R. Part 200 (December 19, 2014); 78 Fed. Reg. 78608 (December 26, 2013), as amended at 79 Fed. Reg. 75882 (December 19, 2014).

[18] EDGAR 34 C.F.R. Part 299 implements the ESEA. The Education Department provides a crosswalk of the UG and the EDGAR, available at: https://www2.ed.gov/policy/fund/guid/uniform-guidance/index.html.

[19] 31 U.S.C. § 503.

[20] 2 C.F.R. B.

[21] "The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department." 20 U.S.C. § 1221e-3.

[22] "The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department." 20 U.S.C. § 3474.

[23] 2 C.F.R. § 3474.1; 79. Fed. Reg. 75871, 75873-74; (December 19, 2014); 80 Fed. Reg. 67261 (November 2, 2015).

[24] 2 C.F.R. § 200.403.

"not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time that decision was made to incur the cost."[25] In incurring a reasonable cost necessary for the operation, the grant recipient must have "acted with prudence in the circumstances considering their responsibilities to the non-federal entity, its employees, where applicable its students or membership, the public at large, and the federal government."[26]

B. Relevant EDGAR provisions: 34 C.F.R. Parts 75 and 76

The EDGAR adopts the UG cost principles described above for both direct and state-administered grants, including Title IV Part A of the ESEA.[27] In addition, the EDGAR prohibits two other categories of costs: (1) use of funds for religious worship, instruction, or proselytization, and use of funds for any equipment or supplies to support such activities;[28] and (2) acquisition of real property or construction, which can only be an allowable cost if specifically permitted by the authorizing statute or implementing regulations for the program.[29]

III. Proposed action

To ensure that Education Department funds are not used to provide school employees with guns or firearms training, the next administration should:

(1) issue guidance clarifying that Education Department grant funds may not be used to purchase firearms or fund firearms training

The next secretary of Education could promptly issue new guidance clarifying that firearms and firearms training are not permissible uses for any type of Education Department grant fund, including Title IV funds. Although such guidance is not legally binding, it is a valuable way to provide clarity to state governments, interested parties, and the public.[30] Moreover, agency guidance is not required to go through notice and comment rulemaking (NCRM). Thus, it is an important interim step to take while the agency begins the NCRM process outlined below.

A. Process

This type of guidance may appropriately be considered an interpretive rule because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[31] The APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another

[25] 2 C.F.R. § 200.404.
[26] *Id.*
[27] 34 C.F.R §§ 75.530, 76.530. 34 C.F.R. Part 299 provides implementing regulations for Titles I through VII of ESEA, as amended. This Part was most recently amended to clarify that the UG applies to all ESSA programs except for Impact Aid in Title VIII of the ESSA. 84 Fed. Reg. 31660, 31667 (July 2, 2019). Part 299 therefore also applies to Title IV Part A of the ESSA.
[28] 34 C.F.R. §§ 75.532, 76.532.
[29] 34 C.F.R. §§ 75.533, 76.533.
[30] *See* Blake Emerson and Ronald M. Levin, "Agency Guidance through Interpretive Rules: Research and Analysis*,"* May 28, 2019, 10, ("Most agencies [] use interpretive rules in adjudication and enforcement processes... Interpretive rules might also be directed towards members of the public, providing clarity or announcing a change in the agency's position concerning the meaning of regulatory or statutory terms.").
[31] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,99 (1995)).

statute provides otherwise.[32] As the Supreme Court observed in *Perez*, issuing interpretive rules is "comparatively easier" than issuing legislative rules.[33] However, "that convenience comes at a price: interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'"[34] This underscores the importance of reinforcing this guidance by issuing a formal rule as soon as practicable.

Unlike notice and comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[35] The Education Department maintains such a database.[36] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, as well as the process by which the public may petition the agency to modify or remove the guidance.

Agencies should also consider the recommendations of the Administrative Conference, most recently updated on June 13, 2019.[37] The most relevant recommendations concern transparency and public participation. These include: (1) providing "members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule"; (2) stating on the guidance document that the public is entitled to that opportunity and providing detailed information about how and where an individual can submit their complaint;[38] and (3) avoiding the use of mandatory language (such as "shall" or "must") to accurately reflect the non-legislative nature of the guidance.[39]

B. Legal justification

[32] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[33] *Perez*, 575 U.S. at 97.
[34] *Id.* (citing *Guernsey*, 514 U.S. at 99).
[35] Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents.
[36] This database was announced in the *Federal Register* on February 26, 2020: https://www.govinfo.gov/content/pkg/FR-2020-02-26/pdf/2020-03811.pdf.
[37] Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[38] *Id.* at 7.
[39] *Id.*

Earlier this year, the Education Department reaffirmed that its " guidance documents are not binding and do not have the force and effect of law."[40] The agency stated that it:

> ...also lacks the power to bind third parties without appropriate Federal Register publication, notice, and comment or by failing to provide constitutional fair notice of its legal requirements before engaging in formal or informal adjudication. The Department believes that it may properly conduct discretionary rulemaking only in the interstices of statutory silence and genuine ambiguity, and that, as a policy matter, it should do so only rarely and cautiously.[41]

None of the applicable statutory or regulatory authorities expressly provide for firearms, so the Education Department can clearly provide guidance on such an ambiguity. Although issuing guidance is not legally binding, issuing guidance will be the most expedient way to affirm the next administration's position that firearms are not an allowable use of grant funds.

Under the APA, agencies do not need to follow notice and comment rulemaking procedures for interpretive rules, even if the new guidance constitutes a significant change or deviates drastically from a previous interpretation adopted by the agency.[42] The Education Department *may* rely on prior agency guidance, but it is not bound to do so.

Moreover, prior agency guidance supports the interpretation that firearms are not allowable use of funds under the ESSA, and the Education Department has not issued new guidance that otherwise interprets Title IV Part A of the ESSA. In fact, the current Education Department has seemingly endorsed the interpretation that funds may not be used for firearms on at least three occasions.

One. In August 2018, the Education Department launched a new funding program,"Grants to States for School Emergency Management (GSEM)."[43] The GSEM grants were designed to enable schools to have "plans in place to keep students and staff safe," in recognition of the fact that "schools play a key role in taking preventive and protective measures to stop an emergency from occurring or reduce its impact."[44] The GSEM cited a 2013 "Guide for Developing High-Quality School Emergency Operations Plans," which states that "the possibility of an active shooter situation is not justification for the presence of firearms on campus in the hands of any personnel other than law enforcement officers."[45]

In expressing this opinion, the 2013 guide "represent[s] the collective expertise of the federal agencies issuing this document": the Education Department, the Department of Health and Human Services (HHS), the Department of Homeland Security (DHS), the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the Federal Emergency Management Agency (FEMA).[46] Although Secretary DeVos has favored deferring to local decision makers to determine how to use grant funds, the next administration could

[40] 85 Fed. Reg 3190, 3206 (January 17, 2020) (citing *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015).
[41] *Id.*
[42] *Perez*, 575 U.S. at 95.
[43] 83 Fed. Reg. 37797 (August 2, 2018).
[44] *Id.*
[45] 83 Fed. Reg. 37798 at 66.
[46] *Id.*

reemphasize its reliance on sources like the 2013 guide that represent long-standing inter-agency opinion on this issue.

Two. A 2018 report on school safety and recent school shootings provides some support for the no-funding-for-firearms interpretation.[47] The report, jointly authored by the Education Department and three other agencies, does not directly answer the question of whether Education Department grants may be used for firearms. However, it applauds the passage of the Students, Teachers, and Officers Preventing (STOP) School Violence Act of 2018, describing it as important legislation that "helps school personnel and law enforcement identify and prevent violence in schools" via grant funding.[48] These grants are managed by the DOJ, but the act specifically provides that "[n]o amounts provided as a grant under this part may be used for the provision to any person of a firearm or training in the use of a firearm."[49] This does not prevent Education Department grants from being used for firearms, but the report does provide a record of the Trump administration's support for legislation that prohibits funding for firearms in schools.

However, this record is tempered by some of the 2018 report's specific recommendations that seemingly endorse the view that local communities could, and even should consider opportunities to increase an armed presence in schools, whether through agency grant funding or otherwise. The report notes that "[s]chool districts may consider arming some specially selected and trained school personnel (including but not limited to [School Resource Officers] SROs and [School Safety Officers] SSOs) as a deterrent."[50] It also suggests local schools consider "whether or not it is appropriate for specialized staff and non-specialized staff to be armed for the sake of effectively and immediately responding to violence."[51] The report proposes that schools hire military veterans and retired law enforcement personnel for school-based positions to help ensure school safety and security.[52] It goes on to advocate that the Education Department, DOJ, and DHS each explore modifications to existing grants in order to designate a portion of funding "for school security activities, and premise the use of those funds on activities that accomplish enhancements recommended in [agency] guidance or standards."[53] Notwithstanding these recommendations, a new secretary of education still has the authority to issue clear guidance that purchasing firearms is not an allowable use of grant funds.

Three. In 2019, a House of Representatives Education and Labor Committee hearing referenced an internal, deliberative Education Department memo in which the agency's own counsel determined that "[i]f the secretary were to permit the use of Title IV Part A funds for the purchase of firearms, it appears that it would be the first time a Federal agency authorized the purchase of weapons for school personnel without specific statutory authorization. It is therefore reasonable for the secretary not to allow this use of funds absent specific congressional

[47] Department of Education, Department of Justice, Department of Health and Human Services, Department of Homeland Security, "Final Report of the Federal Commission on School Safety," December 18, 2018, https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.
[48] *Id.* at 9; H.R. 4909, 115th Cong. (March 15, 2018), https://www.congress.gov/115/bills/hr4909/BILLS-115hr4909rfs.pdf.
[49] H.R. 4909 § 2706(a).
[50] Federal Commission on School Safety, "Final Report of the Federal Commission on School Safety," December 18, 2018, 106, https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.
[51] *Id.*
[52] *Id.* at 14, 106, 113–16.
[53] *Id.* at 126.

authorization, and it is unlikely that this interpretation would be subject to a successful legal challenge."[54] Secretary DeVos has not used this internal conclusion to issue public guidance, but this memo supports the ability of the new administration to issue guidance and a formal rule to clarify that firearms are not an allowable use of grant funds.

(2) issue a rule to amend the EDGAR and clarify that the use of Education Department grant funds to purchase firearms or firearms training is prohibited

The EDGAR currently includes two types of broad prohibitions: (1) an outright prohibition on the use of funds for religious activities, and (2) a prohibition on the use of funds to acquire or construct real property that is subject to exceptions when the authorizing statute or implementing regulations for the program explicitly allow using funds that way.[55]

A new secretary could amend EDGAR to prohibit the use of funds for firearms and firearms training. An outright prohibition, rather than a conditional prohibition is warranted given that, unlike in the context of real property, no federal statute explicitly (or even implicitly) allows for the use of Education Department grant funding for firearms and firearms training.

A. Process

The new rule must go through the NCRM process under the APA.[56]

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then the agency must accept public comments on the proposed rule for a period of at least thirty days. The received comments must be reviewed, and the Education Department must respond to significant comments, either by explaining why it is not adopting proposals or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the *Federal Register* along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least thirty days after it is published.

B. Legal justification

As noted above, the Education Department has promulgated detailed regulations that speak to acceptable uses for grant funds both by adopting uniform government-wide grantmaking regulations as well as specific regulations that govern state block grant programs, such as SSAE.[57] For both sets of regulations—the uniform grantmaking regulations and the regulations

[54] Jason Botel, "Determining Options for the Allowable Use of Funds for School Safety Measures Under Title IV, Part A 7," July 16, 2018; *see also* Michael Stratford, "DeVos Refused to Bar Federal Money for Guns in Schools, but Internal Memo Said She Could," POLITICO April 10, 2019, https://www.politico.com/story/2019/04/10/betsy-devos-block-guns-schools-memo-1342592.
[55] 34 C.F.R. §§ 75.532, 76.532, 75.533, 76.533.
[56] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[57] 2 CFR 3473.1; 2 CFR (Part 200).

governing state block grant programs—the department relied on its broad, general rulemaking authority, which it can similarly use here.[58]

The Education Department has used this authority to promulgate regulations restricting the use of funds further than what is provided for in the UG. For example, during the Obama administration, in the NCRM process to issue regulations for the State Vocational Rehabilitation Services Program, a commenter questioned whether the Education Department had authority to exclude/disallow third-party-in-kind contributions as a source of allowable matching funds, given that such contributions *were* permissible under the UG.[59] The Education Department relied on 2 C.F.R. § 200.102(c) to affirm its authority to enforce more restrictive grant requirements than the UG contains: "the federal awarding agency may apply more restrictive requirements to a class of federal awards or non-federal entities when approved by OMB, or when required by federal statutes or regulations." In that instance, the statute explicitly prohibited third-party in-kind contributions as a source of match.[60] However, ED could promulgate regulations that prohibit firearms purchases given that, as outlined in the risk analysis section below, no federal statute concerning Education Department grant programs allows for their purchase.

Other agencies implementing federal grants specifically delineate allowable from unallowable costs in agency guidance beyond the list of specific costs in the UG and the federal statute they are interpreting. For example, as part of the DOJ's COPS Office School Violence Prevention Program, the agency provides lists of both allowable and unallowable costs.[61] Although the STOP School Violence Act stated specifically that the grant funds may not be used for firearms or firearms training, the guidance extends beyond the statutory authority for the grant by providing an extensive list of unallowable equipment/technology costs.[62]

The Department of Transportation's (DOT) Safe Routes to School (SRTS) grant program has also gone beyond the UG and the OMB cost principles to outline allowable and unallowable costs. The Safe, Accountable, Flexible, Efficient Transportation Equity Act authorized the SRTS grants and provided general and noncomprehensive guidelines on allowable and unallowable costs.[63] The agency's interpretation of these guidelines includes prohibitions on certain types of costs not explicitly barred by statute, such as office furnishings, advertising, and promotional items.[64]

[58] 20 USC 1221e-3; 20 USC 3474.
[59] 81 Fed. Reg. 55630, 55699 (August 19, 2016) (citing 2 C.F.R. § 200.306 which states "that for all Federal awards, any shared costs or matching funds and all contributions, including cash and third-party in-kind contributions, must be accepted as part of the non-Federal entity's cost sharing or matching when specific criteria are met.").
[60] 2 C.F.R. § 361.60(b)(2).
[61] Department of Justice, "FY 2020 COPS Office School Violence Prevention," accessed October 1, 2020, https://cops.usdoj.gov/pdf/2020AwardDocs/svpp/Allowable_Costs_List.pdf.
[62] *Id.* at 5–8.
[63] H.R. 3, 109th Cong. (January 4, 2005) § 1404.
[64] Department of Transportation, Federal Highway Administration, "Safe Routes to School," accessed October 1, 2020, https://www.fhwa.dot.gov/environment/safe_routes_to_school/guidance/#toc123542201.

IV. Risk analysis

Legal vulnerability

Proponents of arming teachers could potentially argue that the ESSA allows for the purchase of firearms or firearms training using SSAE funds, and thus, a rule prohibiting grant funding to that effect would violate the APA.[65]

A court will invalidate a proposed regulation if an agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[66] Under the APA, a court reviews final agency action under the deferential arbitrary and capricious standard, which presumes the agency action to be valid and seeks to determine "whether the agency articulates a rational connection between the facts and choice made."[67]

However, using SSAE funds for weapons and weapons-related activities is clearly barred by ESSA and existing Education Department regulations. First, the only category of funding that is even relevant to school safety is category two of the SSAE statute, which provides therein for funding "violence prevention" activities only by "the promotion of school safety … through the creation and maintenance of a school environment that is *free of weapons*."[68] As part of this gun-free campus goal, the statute provides that schools must impose expulsion periods of at least one year on any student who brings a firearm to school.[69] Second, using SAE funds to arm teachers would be contrary to the UG's requirement that grant costs be "necessary and reasonable for the performance of the federal award"[70] and that they be allocated to a given award only in proportion to the benefits received from the cost.[71]

Even if a court were to find ESSA ambiguous as to the allowance of SSAE funding to purchase guns, a court would move on to step two of *Chevron* and would normally defer to an agency's interpretation so long as it is reasonable.[72] The reasonable nature of the agency's interpretation here is supported by the language and legislative history of the ESSA.[73]

[65] Gun proponents might also attempt to mount a challenge against Education Department guidance on this topic, however, they would be required to prove such guidance constitutes final agency action under the APA. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).
[66] 5 U.S.C. § 706(2)(A).
[67] 384 F. Supp. 3d at 1172.
[68] 20 U.S.C. § 7112(5) (emphasis added).
[69] 20 U.S.C. § 7961.
[70] 2 C.F.R. 200.403(a).
[71] 2 C.F.R. 200.405.
[72] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984).
[73] *See, e.g.,* Andrew Ujifusa, "Lawmakers Strike Deal on Education Spending, Omit Ban on Money for Guns," Education Week September 13, 2018, http://blogs.edweek.org/edweek/campaign-k-12/2018/09/education-spending-deal-lawmakers-omit-guns-ban-money.html ("Rep. Tom Cole, R-Okla., the chairman of the House subcommittee that controls federal education spending, said he agreed with DeLauro that ESSA money could not be used for guns. 'It's already against the law,' he said. 'I think it's pretty clear, if you read the Every Student Succeeds Act.'"); Andrew Ujifusa, "DeVos Ponders Letting Schools Buy Guns Under ESSA in Twist on Federal Law," Education Week, August 23, 2018, https://blogs.edweek.org/edweek/campaign-k-12/2018/08/devos-schools-buying-guns-essa-twist-federal-law.html ("'[Using these funds for firearms] is way outside the scope of what Congress intended for this program,' said Ally Bernstein, the executive director of the Title IV-A Coalition. 'In our conversations with the department, we were never made aware that they were considering this.'").

A challenge to the proposed rule may also invoke a provision of the ESSA entitled "Rulemaking," which states that "[t]he Secretary shall issue regulations under this Act only to the extent that such regulations are *necessary* to ensure that there is compliance with the *specific* requirements and assurances required by this Act" (emphasis added).[74] However, the Department could likely successfully argue that § 7915 does not prohibit the issuance of regulations under SSAE or negate the agency's general rulemaking authority. Moreover, the previous discussion of the ESSA's language and legislative history underscores the agency's argument that this rule is exactly necessary to ensure compliance with the ESSA's intention and requirements.

Other considerations

If a state or local education agency sought reimbursement for a firearm purchased with Title IV grant funding, the Education Department could rely on prior guidance and its discretion to disallow those costs—before even issuing affirmative guidance or a formal rule on the matter. The Education Department's 2016 guidance document on Title IV grants provides a table of examples of allowable uses of SSAE funds, and key considerations to determine whether an activity is an allowable use of funds under the SSAE program.[75]

Although these considerations are quite general, a number of SSAE grant funding application requirements apply that would require an extensive community needs assessment of a diverse stakeholder group to determine whether there is a basis to assert that firearms are a purchase for which there is a consensus of community need. A grant applicant would have to successfully show that, based on a comprehensive needs assessment, purchasing firearms or funding firearms training was a reasonable and necessary use of grant funds.[76] Secretary DeVos has consistently left the burden with the grant recipient to justify whether an expense is necessary or reasonable.

Additionally, if the Education Department for some reason did not want to pursue a blanket prohibition on firearms purchases and training (because, for example, such a ban may be overturned by subsequent administrations), it could instead issue guidance designating firearms as equipment requiring prior approval to purchase. It could then reject applications for approval to use grant funds for firearms or firearms training on a case-by-case basis.

The UG provides the opportunity for the awarding agency to require prior written approval in advance of "special or unusual costs."[77] The UG further stipulates that the "absence of prior written approval on any element of cost will not, in itself, affect the reasonableness or allocability of that element, unless prior approval is specifically required for allowability as described under certain circumstances," including the purchase of equipment. Equipment is tangible personal property with a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the value established by the agency or $5,000.[78]

[74] 20 U.S.C. § 7915.
[75] Department of Education, "Non-Regulatory Guidance: Student Support and Academic Enrichment Grants," October 2016, https://www2.ed.gov/policy/elsec/leg/essa/essassaegrantguid10212016.pdf.
[76] *See, e.g.*, ESSA § 4106(c)(1).
[77] 2 C.F.R. § 200.407 (grant applicants may also seek out prior approval to ensure its intended use of grant funds is allowable).
[78] 2 C.F.R. § 200.33. The price of a particular firearms purchase would impact the analysis set forth here.

The UG provides that general purpose equipment is "equipment which is not limited to research, medical, scientific or other technical activities."[79] Firearms would presumably fall into this category of equipment, depending on cost. Purchases of general purpose equipment "are unallowable as direct charges, except with the prior written approval of the Federal awarding agency or pass-through entity."[80] The Education Department could issue guidance that firearms are capital expenditures under 2 C.F.R. § 200.439 and thus require prior approval, or the Department could specifically promulgate a regulation stipulating that firearms purchases require prior approval under the statute.

Further, the agency awarding the grant has the responsibility to review, negotiate, and approve the cost allocation plans of grant recipients.[81] Thus, the Education Department could reject cost allocation plans on an individual basis if applicants indicate they will use funds for firearms. However, the limited focus of this action would require separate action to address firearms training and could prevent the opportunity to consider other security equipment beyond firearms. Additionally, the regulations that address equipment are within 2 C.F.R. Part 200 and promulgated under OMB's authority. Therefore, the Education Department cannot amend those regulations directly; instead, it would interpret the meaning of those regulations as they apply to Education Department grants.

[79] 2 C.F.R. § 200.48.
[80] 2 C.F.R. § 200.439(b)(1).
[81] 2 C.F.R. § 200.19.

RECOMMENDED ACTION MEMO
Agency: Department of State
Topic: Reversing the Rescission of the 2002 Policy on Silencer Exports
Date: Novemer 2020

Recommendation: Reinstate the 2002 State Department firearms silencer policy prohibiting the export of silencers for commercial sales.

I. Summary:

Firearm silencers are inherently dangerous devices that shooters can use to suppress the sound of gunfire and mask muzzle flash. These deadly accessories, which put law enforcement and the public at grave risk by making it more difficult to identify nearby gunshots and locate an active shooter, have been regulated effectively in the United States since the 1930s and are thus rarely used in crime. Still, the gun lobby has made concerted efforts to make it easier to buy and sell silencers. After a failed attempt at domestic deregulation in 2017, the gun lobby succeeded in making silencers easier to export abroad in 2020, when the Department of State rescinded an 18-year-old guidance document governing how silencers could be exported. As a result, silencers are now legally allowed to be sold commercially to foreign companies, putting lives overseas at risk.

Overview of process and time to enactment

The State Department should renew its guidance document regarding silencer exports. It can do this by issuing a memo to enact this recommendation immediately without the need for a formal rulemaking process, so long as it explains the reason for the change and acknowledges reliance interests. Because this recommendation reinstates a previous guidance document, this could be done at the very beginning of the administration.

II. Current state

The dangers of silencers

Federal law defines “firearm silencer” as “any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for the use in assembling or fabricating a firearm silencer or firearm muffler, any part intended only for use in such assembly or fabrication.”[1] Domestically, silencers are regulated under the National Firearms Act, which requires silencers to be registered with ATF.[2] This law, on the books since 1934, has made it more difficult to obtain silencers than consumer firearms.

[1] 18 U.S.C., § 921(a)(24).
[2] 26 U.S.C. § 5841 et seq.

However, when criminals have gained access to silencers, they have been used in targeted, assassination-style murders.

In 2013, Christopher Dorner, a Los Angeles Police Department officer who had been let go from his job, was able to target law enforcement officers in what the Police Foundation described as a bizarre act of vengeance—a "gang-style hit" on innocent people sitting in a car.[3] He murdered four people and wounded several others. Police were initially puzzled as to why no neighbors heard the 14 shots, but it was later discovered that Dorner used a silencer.

Firearm silencers have also long been used to gain a strategic advantage over military enemies in times of war, including when SEAL Team Six killed Osama Bin Laden.[4] While silencers do not completely quiet the sound of gunfire, they do alter the sound of gunfire and hide muzzle flash, making it difficult to recognize. In the case of SEAL Team Six, highly trained soldiers used silencers to successfully ambush guards successfully and apprehend the world's most wanted terrorist.

Silencer export regulation in the Bush administration

The Arms Export Control Act (AECA) authorizes the president to control the export and import of defense articles.[5] This authority is administered through the United States Munitions List (USML). As described further below, the president exercises significant discretion in the use of this authority, which applies to exports of items on the USML, regardless of whether the intended end user is a foreign government or a private member of the public. Regulation of items on the USML entail a registration requirement, a congressional notification of pending transfers, end-use checks on foreign recipients, special requirements for transfers of registered exporters to foreign ownership, and other requirements.[6]

In 2002, the State Department moved to create additional regulations on the export of silencers. Describing them as having a "one-dimensional, clandestine" purpose, the department moved to allow the export of silencers only to government entities, police, and military forces—not private or commercial recipients—in countries friendly to the United States.[7] Under this guidance, the Department of Defense (DOD) would review all applications for export licenses and determine how many silencers each applicant could export. An application would require a specific purchase order from the foreign government to whom the silencer would be sold, as well as a letter outlining the specific intended use of the silencer by that government or official entity, and

[3] Police Foundation, "Police under Attack: Southern California Law Enforcement Response to the Attacks by Christopher Dorner," accessed October 22, 2020, https://www.policefoundation.org/wp-content/uploads/2015/07/Police-Under-Attack.pdf
[4] Mark Mazzetti et al., "SEAL Team 6: A Secret History of Quiet Killings and Blurred Lines," *N.Y. Times*, June 6, 2015, https://www.nytimes.com/2015/06/07/world/asia/the-secret-history-of-seal-team-6.html?_r=1
[5] 22 U.S.C. § 2778(a)(1). *See also* Exec. Order No. 13,637, 78 Fed. Reg. 49 (March 13, 2013).
[6] *See* 22 U.S.C. § 2778 et seq.
[7] "Action Memo from Lincoln P. Bloomfield, Assistant Secretary for Political-Military Affairs, to William J. Lowell, Director Defense Trade Controls," April 18, 2002.

a signed non-transfer and end-use agreement. Export licenses would be valid for only one year, and DOD would conduct post-shipment checks on each approved license to ensure compliance with these requirements.[8]

Deregulation attempts in the Trump administration

The Trump administration has gone to great lengths to widen the gun industry's market to sell their products both domestically and abroad. With regards to exports, the administration has taken three significant actions. First, it settled a lawsuit by agreeing to allow the posting of gun blueprints online for anyone to download and use for the 3-D printing of firearms. The online distribution of these blueprints had previously been considered an export of technical data regarding defense articles subject to the AECA.[9] Second, the administration utilized the federal rulemaking process to loosen restrictions on the export of most firearms (not including silencers), ammunition, and this 3-D code. Proposed in 2018 and finalized in March 2020, a new rule moved oversight of firearms exports from the State Department's USML to the Department of Commerce's Commerce Control List (CCL).[10]

This memo focuses on the third action the administration has taken to boost the gun industry's ability to sell its products abroad: the rescission of the State Department's 2002 policy regarding silencer exports. As described below, the next administration should renew that policy.

Silencers

Domestically, the popularity of silencers among gun enthusiasts has skyrocketed in recent years. Leading up to the 2016 election, President Trump's son appeared in SilencerCo videos and spoke in support of the use of silencers, calling a silencer "a great instrument," and claiming "there's nothing bad about it at all."[11] The administration's support of the silencer industry continued as it entered the White House, leading to huge increases in silencers registered with

[8] *Id.*
[9] *See Washington v. United States Dep't of State,* 443 F. Supp. 3d 1245 (W.D. Wash 2020) (describing the litigation).
[10] Bureau of Industry and Security, Department of Commerce, "Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)," 85 Fed. Reg. 4136, January 23, 2020, https://www.federalregister.gov/documents/2020/01/23/2020-00573/control-of-firearms-guns-ammunition-and-related-articles-the-president-determines-no-longer-warrant
[11] Michael S. Rosenwald, "Gun silencers are hard to buy. Donald Trump Jr. and silencer makers want to change that.", *Wash. Post.,* Jan. 9, 2017, https://www.washingtonpost.com/local/gun-silencers-are-hard-to-buy-donald-trump-jr-and-silencer-makers-want-to-change-that/2017/01/07/0764ab4c-d2d2-11e6-9cb0-54ab630851e8_story.html

ATF. Nine hundred thousand silencers were registered before the Trump administration took over in 2016;[12] as of May 2019, that number stood at more than 1.75 million.[13]

In 2017, claiming the audial dangers of gunshot noise, congressional Republicans worked to advance H.R. 367, the Hearing Protection Act, which would remove silencers from the National Firearms Act and allow them to be transferred like other firearms, subject to the same loopholes in federal law.[14] These provisions were also included in H.R. 3668, the Sportsmen's Heritage and Recreational Enhancement (SHARE) Act, which was marked up in the House Committee on Natural Resources.[15] The bill's proponents argued that not only would the widespread use of silencers improve public health, their deregulation was necessary due to long wait times that had arisen from the high volumes of silencer orders in recent years, following the White House's advocacy. Following opposition from law enforcement leaders,[16] the bill stalled.

Thus, the administration turned to the international silencer market. In July 2020, the State Department repealed its 2002 silencer export policy that placed additional regulations to control the end users of American silencers better. As a result, silencers are now regulated like other USML items, and can be sold to foreign private companies. The change could mean a reported additional $250 million in profits for American silencer companies[17] and increased the likelihood that silencers will fall into the hands of those wishing to use them against American troops.

III. Proposed action

A. Substance

The next administration should issue a letter or memorandum from the State Department's Director of Defense Trade Controls within the Department of State to the Assistant Secretary for Political/Military Affairs reinstating the 2002 regulations regarding the export of firearm silencers. Just as the Department had the authority to issue this guidance document in 2002, the Department has the authority to re-issue a similar document today. The letter or memorandum should outline the previous requirements and limitations governing the export of silencers that will take effect, and the oversight around the end-use of these silencers by allied foreign governments, militaries, or police departments.

[12] Bureau of Alcohol, Tobacco, Firearms & Explosives, Firearms Commerce in the United States, "Annual Statistical Update 2016," accessed October 22, 2020, https://www.atf.gov/resource-center/docs/2016-firearms-commerce-united-states/download.
[13] Bureau of Alcohol, Tobacco, Firearms & Explosives, Firearms Commerce in the United States, "Annual Statistical Update 2019," accessed October 22, 2020, https://www.atf.gov/firearms/docs/report/2019-firearms-commerce-report/download.
[14] H.R. 367 (115th Cong.) https://www.congress.gov/bill/115th-congress/house-bill/367/text.
[15] H.R. 3668 (115th Cong.) https://www.congress.gov/bill/115th-congress/house-bill/3668.
[16] Law Enforcement Coalition for Common Sense, "Letter to Congressional Leaders," September 11, 2017, https://giffords.org/wp-content/uploads/2017/09/Final-LE-letter_Silencers_SHARE-9.17-1.pdf.
[17] Michael LaForgia and Kenneth P. Vogel, "Inside the White House, a Gun Industry Lobbyist Delivers for His Former Patrons," *N.Y. Times,* July 13, 2020, https://www.nytimes.com/2020/07/13/us/trump-gun-silencer-exports.html.

B. Process

The State Department's letter may be viewed as a formal guidance document. Publication of formal guidance documents is a common practice of federal agencies which seek to clarify or interpret the laws to which they are subject. This process normally involves the internal development of the guidance's substance in accordance with the Department's written procedures.

This type of guidance may appropriately be considered an interpretive rule because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[18] The Administrative Procedure Act's (APA's) NCRM requirement "does not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another statute provides otherwise.[19] As the Supreme Court observed in *Perez*, issuing interpretive rules is "comparatively easier" than issuing legislative rules.[20] However, "that convenience comes at a price: interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'"[21]

Unlike notice-and-comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October of 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[22] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, and the process by which the public may petition the agency to modify or remove the guidance.

[18] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,99 (1995)).
[19] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[20] *Perez*, 575 U.S. at 97.
[21] *Id.* (citing *Guernsey*, 514 U.S. at 99).
[22] Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents.

Agencies should also consider the recommendations of the Administrative Conference, most recently updated on June 13, 2019.[23] The most relevant recommendations concern transparency and public participation including: (1) providing "members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule," (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint,[24] and (3) avoiding the use of mandatory language (such as "shall" or "must") to accurately reflect the non-legislative nature of the guidance.[25]

As discussed further below, the State Department should provide a reasoned explanation for the change and demonstrate an awareness of the reversal in policy in issuing this guidance. In this way, the new guidance document will not be identical to the 2002 document. The State Department should also acknowledge the possibility that the gun industry has relied on the Trump administration's rescission of the earlier guidance, and address why those reliance interests are outweighed by public safety factors.

C. Legal justification

The Arms Export Control Act (AECA) authorizes the president to control the export and import of defense articles.[26] This authority includes creating and updating the USML, which lists items, technologies, and services that are properly classified as defense articles.[27] The AECA also requires the president to regulate the export and import of articles on the USML.[28] The AECA gives the president authority to designate items for additional controls in order to further world peace, national security, foreign policy, reduce international terrorism, and prevent the proliferation of armed conflict.[29] The president has delegated this authority to the secretary of State, who administers the International Traffic in Arms Regulations (ITAR) through the Directorate of Defense Trade Controls (DDTC).[30]

While changes in USML designations are required to go through the federal rulemaking process, placing additional guidelines over the issuance of licenses to export such items does not. Firearm silencers are listed on the USML as Category I "firearms and related articles." This reversal in policy would not change that designation.

IV. Risk analysis

[23] Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[24] *Id.* at 7.
[25] *Id.*
[26] 22 U.S.C. § 2778(a)(1). *See also* Exec. Order No. 13,637, 78 Fed. Reg. 49 (March 13, 2013).
[27] 22 U.S.C. § 2778(a)(1).
[28] *Id.*
[29] 22 U.S.C. § 2778(a)(1).
[30] 22 C.F.R. § 120.1(a).

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components. First, the action must mark the “consummation” of the agency’s decision making process—it cannot be of a tentative or intermediate nature. Second, the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.”[31] Consequently, the guidance document proposed by this memorandum may not qualify as a final agency action. However, if a court determines the guidance document is a final agency action, or if a potential exporter of silencers challenges a denial of an export license pursuant to this guidance, these actions can only be challenged if they are subject to judicial review (and, as described below, there is a strong argument that they are not). If a court finds these actions are subject to judicial review, the challengers might argue that they are beyond the agency’s statutory authority, violate a constitutional right, constitute arbitrary or capricious agency action, or that the agency failed to follow procedural requirements.[32]

Action committed to agency discretion by law

The Administrative Procedures Act withdraws judicial review where "an agency action is committed to agency discretion by law."[33] "[I]f the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," then it is unreviewable.[34]

The AECA states:

> Decisions on issuing export licenses under this section shall take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.[35]

This broad language does not provide a meaningful standard against which to judge the president’s exercise of discretion with regards to the export of items on the USML. Furthermore, as one court has opined:

> ….the AECA's delegation of authority to control arms exports is decidedly one involving foreign affairs and national security. As the Court of Appeals for the Federal Circuit has stated, "the broad statutory delegation in the AECA incorporates the 'historical authority of the President in the fields of foreign commerce." [Citation omitted.] Specifically, the AECA provides that the President, or his delegate, may approve the exportation of defense articles when he determines that such action is "consistent with the foreign

[31] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).
[32] 5 U.S.C. § 706.
[33] 5 U.S.C. § 701(a)(2).
[34] *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).
[35] 22 U.S.C. § 2778(a)(2).

> policy interests of the United States," 22 U.S.C. § 2751, and "in furtherance of world peace and the security and foreign policy of the United States." *Id.* § 2778(a)(1). Congress has also authorized the Secretary of State to "revoke, suspend, or amend" an export license "without prior notice, whenever the Secretary deems such action to be advisable." *Id.* § 2791(2)(A). Such express statutory language "fairly exudes deference" to the executive branch, and therefore, precludes judicial review under the APA.[36]

The State Department's authority to deny export licenses for items on the USML is clear, and there is a strong argument that the renewed guidance on the issue of silencer exports would not be subject to judicial review.

Procedural requirements

The APA establishes a procedure for agency rulemaking (publication of a notice of proposed rulemaking in the Federal Register, followed by an opportunity for public comment; collectively "§ 553 procedures") that agencies must follow, unless the rule in question falls within certain exceptions, including an exception for situations where there is a military or foreign affairs function involved.[37] As described above, silencer export license applications involve foreign affairs and are thus subject to the discretion of the president.

Under the APA, agencies also do not need to follow notice-and-comment rulemaking procedures for interpretive rules, even if the new guidance constitutes a significant change or deviates drastically from a previous interpretation adopted by the agency.[38] Agencies are free to issue "interpretative rules" to advise the public of the agency's construction of a statute that it administers. Agencies are likewise free to issue "general statements of policy" to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power. As a result of these exceptions, a court is not likely to strike down the State Department's renewal of its silencer export policy on procedural grounds.

Arbitrary and capricious challenges under the APA

The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data, offered a satisfactory explanation for its action, and established a nexus between the facts and the agency's choice.[39] When an agency fails to consider important facts or when its explanation is either unsupported or contradicted by the facts, the court has grounds to find the rule "arbitrary or capricious."[40]

[36] *U.S. Ordnance, Inc. v. United States Dep't of State,* 432 F. Supp. 2d 94, 98-99 (D.D.C. 2006).
[37] 5 U.S.C. § 553(a)(1).
[38] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015).
[39] *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[40] *Id.* at 43.

Agencies are free to change their existing policies, as long as they provide a reasoned explanation for the change and demonstrate an awareness of the new policy.[41] However, the agency must provide good reasons for such change, and an explanation as to why such change may ignore or disregard any "facts and circumstances that underlay or were engendered by the prior policy."[42] The agency's document must contain an acknowledgment of reliance interests and address why those interests are outweighed by public safety factors. Even if such reliance interests are serious, public safety factors can outweigh them.[43]

Here the State Department should acknowledge that silencer manufacturers and importers may have relied on its rescission of the 2002 policy and begun expanding their investment in the silencer trade. However, as described above, silencers present serious threats to public safety and these threats outweigh these reliance interests.

[41] *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009).
[42] *Id.*
[43] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1914 (2020).

RECOMMENDED ACTION MEMO

Agency: Department of Veterans Affairs
Topic: Evaluations of VA Lethal Means Reduction and Gun Safety Programs for Suicide Prevention Among Veterans
Date: November 2020

Recommendation: Ensure that federally mandated research evaluations of VA suicide prevention and mental healthcare activities include evidence-based assessments of the VA's lethal means reduction and gun safety programs for veterans at risk of suicide.

I. Summary

Description of recommended executive action

Federal law requires the Department of Veterans Affairs (VA) to implement a comprehensive suicide prevention program to address the nation's elevated rate of suicide among military veterans, and requires the VA to conduct evidence-based research and evaluations to identify best practices for suicide prevention among the veteran population. While the VA has supported an increasingly large research base on these issues, few if any studies have evaluated the effectiveness of either longstanding or more recent VA initiatives that promote safe firearm storage and encourage at-risk veterans to limit access to firearms and other highly lethal suicide means.

Firearms are responsible for nearly 70% of fatal suicide attempts among US veterans.[1] As a result, the administration's secretary of veterans affairs should ensure that annual research evaluations of the VA's suicide prevention and mental healthcare activities also include evidence-based assessments of the VA's lethal means reduction and gun safety programs for at-risk veterans.

Overview of process and time to enactment

As discussed below, federal law requires the VA to provide for annual independent evaluations of the department's mental healthcare and suicide prevention activities, and to support research on best practices for suicide prevention among veterans on an ongoing basis, in consultation with the Department of Health and Human Services, the National Institute of Mental Health, the Substance Abuse and Mental Health Services Administration, and the Centers for Disease

[1] Bridget Matarazzo, "Lethal Means Safety: How PTSD Clinicians Can Have the Conversation," Department of Veterans Affairs, January 16, 2019, Table 1, https://www.ptsd.va.gov/professional/consult/2019lecture_archive/01162019_lecture_slides.pdf.

Control and Prevention.[2] The VA should ensure that evaluations of the VA's lethal means reduction and gun safety programs for at-risk veterans are completed within the next few years.

II. Current state

In late 2007, President Bush signed the Joshua Omvig Veterans Suicide Prevention Act into law, which directed the secretary of veterans affairs to "develop and carry out a comprehensive program designed to reduce the incidence of sucide among veterans."[3] That law also requires the VA to provide for ongoing research on best practices for suicide prevention among veterans, in consultation with the heads of four specified agencies: the Department of Health and Human Services, the National Institute of Mental Health, the Substance Abuse and Mental Health Services Administration, and the Centers for Disease Control and Prevention.[4] Notably, this law also provides the secretary of Veterans Affairs with broad discretion, in carrying out the VA's suicide prevention program, to "provide for other actions to reduce the incidence of suicide among veterans that the Secretary considers appropriate."[5]

Also in 2007, federal legislation funded the establishment of a medical "center of excellence" to develop and study evidence-based public health approaches to suicide prevention among veterans.[6]

In 2015, President Obama signed into law the Clay Hunt Suicide Prevention for American Veterans Act, which, among other things, sought to strengthen the VA's focus on best practices research by directing the Department of Veterans Affairs to order annual third-party evaluations of VA's mental healthcare and suicide prevention programs. The evaluations are meant to identify the most effective programs conducted by the VA and propose best practices for caring for individuals who suffer from mental health challenges, or who are at risk of suicide.[7] That law requires the VA to submit to Congress an annual report containing the most recent independent research evaluations received by the VA secretary, along with any recommendations the secretary considers appropriate.[8]

Activities under the Obama administration

[2] 38 U.S.C. § 1720F(e).
[3] Joshua Omvig Veterans Suicide Prevention Act, Pub. Law 110-110, codified in relevant part at 38 U.S.C. § 1720F.
[4] 38 U.S.C. § 1720F(e).
[5] 38 U.S.C. § 1720F(k).
[6] *See* Congressional Research Service, "Health Care for Veterans: Suicide Prevention," February 23, 2016, 5, https://crsreports.congress.gov/product/pdf/R/R42340.
[7] Clay Hunt Suicide Prevention for American Veterans Act, Pub. Law 114-2, codified in relevant part at 38 U.S.C. § 1709B.
[8] 38 U.S.C. § 1709B(b).

Under the Obama administration, the VA made considerable strides in implementing new suicide prevention initiatives. President Obama signed multiple executive orders to improve suicidal veterans' access to mental healthcare, and to promote effective research and development of effective diagnosis and treatment of mental injuries associated with suicide risk.[9]

Among many other things, the Veterans Health Administration issued policies requiring clinicians to develop suicide prevention safety plans for high-risk patients, including a plan to reduce the potential for use of lethal means, and to use regularly updated "patient record flags" in inpatients' electronic health records to identify and track patients at high risk for suicide.[10] A 2017 inspector general report found that clinicians properly included lethal means assessment and counseling in 90% of at-risk patients' safety plans.[11] VA policy also established a suicide prevention coordinator to serve in every VA Medical Center.[12] The Veterans Health Administration also maintained a gun safety program, launched in 2008, to distribute free gun safety locks and disseminate gun safety information to patients.[13]

A comprehensive analysis of veteran suicides completed in August 2016 by the VA's Office of Suicide Prevention confirmed that firearms played a disproportionate role in veterans' suicide mortality and concluded that "[t]hese results strongly suggest that firearms safety initiatives are likely an important component of an effective suicide prevention strategy for male and female Veterans."[14]

Activities under the Trump administration

In March 2019, President Trump signed Executive Order 13861, establishing a three-year national effort to address veteran suicide, called the President's Roadmap to Empower Veterans and End a National Tragedy of Suicide (PREVENTS). The executive order established an inter-agency "Veteran Wellness, Empowerment, and Suicide Prevention Task Force," co-

[9] *See, e.g*, Office of the Press Secretary, "Fact Sheet: President Obama Signs Executive Order to Improve Access to Mental Health Services for Veterans, Service Members, and Military Families," August 31, 2012, https://obamawhitehouse.archives.gov/the-press-office/2012/08/31/fact-sheet-president-obama-signs-executive-order-improve-access-mental-h; Office of the Press Secretary, "Fact Sheet: President Obama Announces New Executive Actions to Fulfill our Promises to Service Members, Veterans, and Their Families," August 26, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/08/26/fact-sheet-president-obama-announces-new-executive-actions-fulfill-our-p.

[10] *See* Office of Inspector General, "Evaluation of Suicide Prevention Programs in Veterans Health Administration Facilities," Department of Veterans Affairs, May 18, 2017, 3-5, https://www.va.gov/oig/pubs/VAOIG-16-03808-215.pdf.

[11] *Id.* at 9, Table 2.

[12] Congressional Research Service, "Health Care for Veterans: Suicide Prevention," February 23, 2016, 9, https://crsreports.congress.gov/product/pdf/R/R42340.

[13] Congressional Research Service, "Health Care for Veterans: Suicide Prevention," February 23, 2016, 11, https://crsreports.congress.gov/product/pdf/R/R42340.

[14] Office of Suicide Prevention, "Suicide Among Veterans and Other Americans 2001-2014," Department of Veterans Affairs, August 3, 2016, 47, https://www.mentalhealth.va.gov/docs/2016suicidedatareport.pdf.

chaired by the secretary of veterans affairs and the assistant to the president for domestic policy. The order charged the task force with developing a "roadmap" for improving veteran suicide prevention and, among other things, developing "a national research strategy to improve the coordination, monitoring, benchmarking, and execution of public- and private-sector research related to the factors that contribute to veteran suicide."

The roadmap report, issued in June 2020, was criticized as relatively tepid and vague.[15] It did, however, include general recommendations to "increase implementation of programs focused on lethal means safety" and to launch a national public health messaging and media campaign which, among other things promotes safety planning tools and resources to promote lethal means safety.[16] The roadmap also included recommendations for improving suicide prevention research and data collection activities.

In 2019, the VA also partnered with the National Shooting Sports Foundation and the American Foundation for Suicide Prevention to create a messaging toolkit with educational information and resources for the development of programs regarding suicide awareness and safe firearm storage.[17]

The VA's annual reports to Congress, submitted pursuant to the Clay Hunt Suicide Prevention for American Veterans Act, have thus far not included the findings of any comprehensive evaluation of VA suicide prevention activities pertaining to firearm and lethal means safety.

Unless rescinded or extended, President Trump's Executive Order 13861, which established a national inter-agency task force to address veteran suicide, will expire and dissolve the task force in March 2022.

III. Proposed action

The administration's new secretary of veterans affairs should ensure that VA research and evaluation activities, including the annual independent evaluation of suicide prevention and mental healthcare programs required by the Clay Hunt Suicide Prevention for American Veterans Act, include a comprehensive assessment of the VA's lethal means reduction and gun safety efforts for veterans.

IV. Legal justification

[15] *See* Nikki Wentling, "Trump unveils 'bold' plan to prevent veteran suicide, but critics say it's not enough," *Stars and Stripes*, June 17, 2020, https://www.stripes.com/news/us/trump-unveils-bold-plan-to-prevent-veteran-suicide-but-critics-say-it-s-not-enough-1.634192.
[16] U.S. Department of Veterans Affairs, "PREVENTS Task Force Roadmap Report," June 17, 2020, https://www.va.gov/PREVENTS/docs/PRE-007-The-PREVENTS-Roadmap-1-2_508.pdf.
[17] U.S. Department of Veterans Affairs, "PREVENTS Task Force Roadmap Report Supplemental Materials," June 17, 2020, 164, https://www.va.gov/PREVENTS/docs/PREVENTS-Supplemental-Materials-for-the-Roadmap-508.pdf

As discussed above, federal law provides the secretary of veterans with broad discretionary authority to take actions the secretary believes appropriate to reduce the incidence of suicide among veterans.[18] The law also directs the VA to provide for annual third-party evaluations of VA's mental healthcare and suicide prevention programs in order to identify the most effective programs conducted by the VA and propose best practices for caring for individuals who suffer from mental health challenges, or who are at risk of suicide.[19]

Consistent with the recommendations of the PREVENTS task force and the VA's mandate to identify best practices in veteran care and suicide prevention through robust research and evaluation, the VA should ensure that future research evaluations of VA suicide prevention activities include assements regarding the effectiveness and impact of lethal means reduction and gun safety programs for reducing veteran suicide.

[18] 38 U.S.C. § 1720F(k).
[19] Clay Hunt Suicide Prevention for American Veterans Act, Pub. Law 114-2, codified in relevant part at 38 U.S.C. § 1709B.