Weapons regulation: 'a national interest of very nearly the first magnitude'

President Barack Obama can achieve gun control through a treaty. To meet his promise to "do everything in his power" to decrease gun violence he can act the way the U.S. did to address another "national interest of very nearly the first magnitude" - one, like gun violence, "a matter of the sharpest exigency for the national wellbeing."

The president, through the treaty power of the U.S., can enter into an international agreement, say with Canada and Mexico, to (a) meet the objective of decreasing gun related violence in the contracting states and (b) commit to doing so through banning automatic assault weapons and high capacity magazines.

No doubt this end run around the states, the House of Representatives, and perhaps even the Senate, would be controversial. But legally it can be done.

Here is how it might work.

The treaty power is provided for in the U.S. in Article II section 2 of the Constitution: The president "shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

That power is significant: Article VI states that the "Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." And it instructs: "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Emphasis added).

The breath of the power was made clear in an iconic Supreme Court opinion by Justice Oliver Wendell Holmes, Jr. in 1920. The case involved a prosecution for the illegal hunting of migratory birds undertaken under legislation consistent with a treaty, The Migratory Bird Treaty Act of 1918 between the U.S. and Great Britain. The law, among other regulatory provisions it enumerated, prohibited hunting during...
closed seasons.

The justice for the court declared "it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." A power to protect endangered animals (birds were being decimated for both hunting and fashion at the time) certainly is not greater than one to protect our citizens, including our children.

This was not the last word on treaties and constitutional provisions. Later the Supreme Court, in a case involving the trial rights of wives of servicemen who killed their husbands, held that treaties cannot abrogate an individual liberty granted under the Bill of Rights.

The Second Amendment, part of the Bill of Rights, of course protects an individual liberty. And in two recent Supreme Court cases, District of Columbia v. Heller and McDonald v. Chicago, the court concluded that the amendment protects an individual's right to possess a firearm, unconnected to service in a militia. However the court recognized prohibitions and restraints consistent with the Second Amendment.

The approach that the president employs, if stymied under the advice and consent provision for treaty making, might be a congressional-executive agreement, such as was undertaken in other controversial international arenas including our entry into NAFTA and the WTO. Here he can act without the need of a super majority of the Senate - or of either House. Or he can even act alone through executive agreement. Entering international agreements by himself or with the Congress historically has been by far much more common than the process for treaty making using the "advice and consent" approach (involving two-thirds of the Senate).

The treaty or agreement would be different from the one that gun control opponents have attacked recently. A proposed multilateral treaty would tighten regulation of and set international standards for the import, export and transfer of conventional weapons. Early in the first Obama administration the U.S. indicated its willingness to negotiate such an agreement if any outcome came from complete consensus among the sovereign states. Then, opponents of gun regulation painted dire scenarios as they certainly would for the present proposal. Wrote one blog: "We will wake up one morning and find that the US has signed a treaty that prohibits firearm and ammunition manufactures from selling to the public ... And then, we will wake up one morning and find that the US has signed a treaty that prohibits US citizens to deliver any firearm they own to the local government collection and destruction center or face imprisonment." Gun owners and advocates however need only face a morning when certain select weapons and killing capacities will be well regulated to protect the national interest.

Our treaty partners may eagerly welcome the new international agreement. Just as our own states' laws are only as effective as those of neighbor states, so too national laws, even the most stringent, are challenged by porous thousand-mile borders.

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