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Questions and Comments

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

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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."

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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

Government

US attorney defends approach

The federal civil case filed against Standard & Poor's on Tuesday in the Central District is without doubt one of the more sizeable and significant fraud cases to be brought in the southland in the past few years.

Corporate

Davis Polk works on two offerings and a billion-dollar acquisition

Menlo Park-based Davis Polk & Wardwell LLP lawyers guided clients on two stock offerings and a billion-dollar acquisition, all announced Wednesday.

Real Estate

Real Estate Deals

An advertising technology company leased a 17,800-square-foot building owned by an affiliate of Hackman Capital Partners LLC. SteelHouse Inc. leased the property, located at the WorkScapes campus in Culver City.

Litigation

California to host two major class actions, including lithium ion battery case

A judicial panel decided this week that California is the right venue for two major class actions, including one accusing a group of electronics companies of fixing prices of lithium ion batteries.

Government

State Bar accuses L.A. lawyer of stealing \$500,000 from Chinese couple seeking to immigrate

Los Angeles lawyer and biofuels entrepreneur Justin Moongyu Lee faces State Bar discipline for allegedly misappropriating \$500,000 from a Chinese couple seeking to invest the money in the U.S. in order to immigrate here.

San Bernardino County officials huddling to plot next move after adverse court ruling

San Bernardino County officials are meeting this week to decide their next move after a judge tossed the county's central claim in its suit against several government agencies.

Litigation

Jury to hear case of man, 25, who died after clinical trial

A Los Angeles jury is set to hear arguments next

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 yet another morning and find that the US has signed a treaty that requires 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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week in a hotly contested case in which the parents of a 25-year-old man contend he died after participating in a clinical trial involving an anti psychotic drug.

MGA requests arbitration award voiding

MGA Entertainment Inc. asked a local court Monday to void last month's preliminary arbitration award of \$23 million for unpaid legal fees to a law firm.

Lithium ion battery class action headed to California

A large class action lawsuit involving allegations a group of electronics companies fixed prices of lithium ion batteries will be heard in the Northern District of California.

Government

Fearing homelessness, law library sues San Francisco over alleged charter violation

Fearing the San Francisco Law Library will be literally homeless come May when its current space is closed for renovations, it filed suit Wednesday against the city and county of San Francisco.

Litigation

Former Universal Pictures executive sues LAPD over alleged beating

A former Universal Pictures and Deutsche Bank executive filed a \$20 million civil suit Wednesday, alleging two members of the Los Angeles Police Department viciously beat him last May.

Mergers & Acquisitions

Negotiating indemnification provisions in the M&A context



In this mock negotiation, Rick Climan and Keith Flaum debate the "indemnification provision" in the context of mergers and acquisitions agreements.

Commercial Law

Goodwill: If you ain't got nothing, you got nothing to lose

Dry Canyon held that a trial court must find that a business owner had goodwill to lose before the owner is entitled to present evidence of its loss of goodwill to a jury. By **John C. Murphy and Ali V. Tehrani**

Energy Law

Electric aggregation: a boost for renewables?

San Francisco has become one of the leaders of an emerging movement, called "electric aggregation," where cities buy cheap bulk electricity for the benefit of their citizens. By **Jake Seligman**

Zoning, Planning and Use

Infill or greenfield development? Or is