



Obama Can't Just Rule by Decree, Const. Law Experts Say

By: Pete Winn - January 14, 2013

President Obama on Tuesday is expected to use “executive action” to advance gun control, but constitutional law experts told CNSNews.com that there really isn’t much that Obama can legitimately do to regulate guns -- and still be faithful to the U.S. Constitution.

At a news conference Monday, Obama said he intends to take some unilateral executive action pertaining to gun control, as part of recommendations that will be put forward by a gun control task force headed by Vice President Joe Biden.

“My understanding is the vice president is going to provide a range of steps that we can do to prevent gun violence. Some of them will require legislation,” Obama said. “Some of them I can accomplish through executive action. And so I’ll be reviewing those today, and as I said, I’ll speak in more detail to what we’re going to go ahead and propose later in the week.”

“I am confident that there are some steps that we can take that don’t require legislation and that are within my authority as president and where get a step that has the possibility to reduce the possibility of gun violence, then I want to go ahead and take it,” Obama said.

Roger Pilon, vice president for legal affairs at the Cato Institute, told CNSNews.com that while the president certainly has a history of issuing executive orders, his hands are tied.

“This president has shown no shyness about using executive orders, but here there’s just a little bit that he can do,” Pilon told CNSNews.com.

“He can’t, for example, ban assault weapons or he can’t order expanded background checks, it seems to me,” he added. “He could limit the numbers and types of weapons that come into the country from abroad, it seems to me -- it’s possible.

Ronald Rotunda, Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University Law School in Southern California, said the U.S. Constitution doesn't allow a president to simply issue directives.

"The president can't just rule by decree – we don't do that in our country." Rotunda told CNSNews.com. "I think it's a tough case for him to make."

"Typically, a president can issue an executive order pursuant to an act of Congress or a ratified treaty. Or sometimes directly pursuant to a constitutional provision," Rotunda said.

"For example, the president has the right to recognize foreign governments and decide which governments to recognize. He can simply decide, for instance, to recognize mainland China, rather than Nationalist China, as has been done.

"But otherwise, the power is limited. He has to find support in a statute or a treaty. There's nothing in treaties about guns, so then (he would have) to find something in a statute.

Rotunda said the idea that Obama might order the Bureau of Alcohol, Tobacco and Firearms to seize certain kinds of weapons or ammo, is unlikely. But if it did somehow come about, then "it's certainly going to be tested in court," Rotunda told CNSNews.com.

"The last time a president used an executive order that wasn't authorized by statute – the last major time in the Supreme Court – was *Youngstown Sheet and Tube v. Sawyer*, where the president said, pursuant to his powers as commander-in-chief, that he was going to seize steel mills. And the Supreme Court said, in no uncertain terms, that that was unconstitutional."

That case was heard in 1952 – and the president in question was President Truman.

Rotunda, whose textbooks on constitutional law have taught generations of law students in some of America's top law schools, says one of the reasons why the Court rebuked Truman was because Congress had already considered the issue of seizing the steel mills and decided against authorizing it.

When it comes to guns and ammo, Rotunda said, Congress has also already spoken by allowing the ban on assault weapons to lapse, while maintaining other firearms regulations to remain in effect.

"So, I think it is going to be a hard field to hoe to say that he has had this power all along, when Congress has looked at this area very carefully," Rotunda said.

"It is one of the most regulated areas in the United States – alcohol, tobacco and firearms are, all three, highly regulated."

Pilon said one thing Obama might do is foster the exchange of information.

“He can certainly better coordinate the sharing of information that takes place between agencies of the federal government and between the federal government and the states – and so far as they are cooperating,” Pilon said, “because there seems to be a backlog right now – or at least a slowness – surrounding the communication between those who check backgrounds and sharing this information more broadly.”

After the school shooting in Newtown, Conn., in December, Obama named Vice President Joe Biden to lead a task force to present proposals for gun control. Biden, who met with House members on Monday about guns, has said he would give his recommendations to Obama by Tuesday.