Written by **James Kinneen** on May 3, 2023

More Victories for Gun Rights; What Will the Future Hold?

Olga Mendenhall/iStock/Getty Images Plus

Gun-rights activists were handed a pair of victories last week, with U.S. District Judge Stephen McGlynn blocking enforcement of Illinois' "assault-weapons" ban known as PICA (Protect Illinois Communities Act) and Colorado seeing a proposed assault-weapons ban fail in a Democrat-controlled House Committee. However, in Washington, an assault-weapons ban was passed, making it the 10th state to enact such restrictions.

But while gun activists are bullish on the idea that bans on so-called assault weapons and large-capacity magazines (LCMs) are unconstitutional, challenges have failed before. And with an increasing number of states looking to impose these bans, as well as Democrats looking to push a national assault-weapons ban, it's worth looking into how both pro-gun and anti-gun judges have attacked or supported them. To do so, we looked at three post-*Bruen* cases: Illinois' successful challenge by Trump appointee Stephen McGlynn, Obama appointee Rickard Andrews' upholding of an assault-weapons ban in Delaware, and Obama Appointee John J. McConnell's upholding of a Rhode Island ban on magazines that hold more than 10 rounds, to preview some of the legal arguments you're likely to hear in the future and see how a decidedly pro-2A judge addressed them.

Magazines and Accessories Legally Protected as "Arms"?

No issue better illustrates the stark differences in these three takes on American gun laws than the question of what constitutes "arms." *In Ocean State Tactical vs State of Rhode Island*, Judge John McConnell made it abundantly clear he believed magazines do not constitute "arms" and are therefore not entitled to the legal protection that come with any laws protecting "arms." To make that case, he argued that magazines are not weapons themselves, but instead are more akin to a quiver that holds arrows and rejected the idea that guns are worthless without magazines, as "Without bullets, a firearm would be useless. But a firearm can fire bullets without a detachable magazine, and in any event, a firearm does not need a magazine containing more than ten rounds to be successful."

In *Delaware State Sportsmen's Association v. Delaware Department of Safety and Homeland Security*,

Judge Richard Andrews rejected that idea while referencing the Ocean State case by name, noting that in a pre-Bruen case out of New Jersey, the Third Circuit "did not restrict its holding to magazines necessary for the operation of certain firearms; rather, it broadly held that "magazines are arms."

But in his ruling striking down Illinois' PICA law, Judge Stephen McGlynn was strongest in his belief that magazines and gun accessories were inherently included in the concept of "arms." McGlynn noted the Seventh Circuit recognized the Second Amendment as extending to "corollaries to the meaningful exercise of the core right to possess firearms for self-defense" and that "It is hard to imagine something more closely correlated to the right to use a firearm in self-defense than the ability to effectively load ammunition into the firearm."

Going even further, he noted that because they allow people with disabilities the ability to shoot guns more successfully, "arm braces are an integral part of the meaningful exercise of Second Amendment rights for such individuals and can also be considered an 'arm.'"

Widely Utilized Tools of Self-Defense? Does It Matter?

One of the most pivotal arguments arising from assault-weapon bans and bans on large-capacity magazines is the question of whether or not the bans harm people's ability to defend themselves. In his ruling, Judge McGlynn made it abundantly clear that if only for banning people's chosen way of defending themselves, it obviously did. But while gun-control activists obsess over the number of AR-15s successfully used for self-defense, McGlynn noted it didn't really matter as "*Bruen* clearly holds that the Second Amendment protects 'possession and use' of weapons 'in common use' not just weapons in common use for self-defense." He pushed further by declaring, "Even if there was a requirement that the "common use" of an "arm" be self-defense, AR-15-style semiautomatic rifles would meet such a test considering that "34.6% of owners utilize these rifles for self-defense outside of their home and 61.9% utilize them for self-defense at home."

Perhaps most importantly, McGlynn was the only judge to reference the fact that, when it comes to the Second Amendment, personal defense isn't enough. While he acknowledged the Second Amendment primarily concerned hunting and self-defense, he added that "the additional purpose of securing the ability of the citizenry to oppose an oppressive military, should the need arise, cannot be overlooked."

This is a different take from Judge Andrews, though their initial conclusions were similar. Andrews said that the AR-15 was clearly in common use, and that though they don't get used often in self-defense scenarios, when it came to the "common use" issue "suitability is immaterial here." However, he disagreed with McGlynn's idea that common use was the end of the discussion, and explained that "in context, it seems that the Court was referring to 'common use' for self-defense." If they weren't, he argued, that would mean that machine guns, by way of there being nearly 200,000 legal ones in America, would "render the National Firearms Act's machine gun restrictions constitutionally suspect," but since the Supreme Court has noted they believe that law is very likely to remain deemed constitutional, the "common use" argument doesn't work as an end-all, be-all. His logic followed that even if a weapon is widely used, if it isn't being widely used for self-defense, it can be banned.

Judge McConnell attacked the idea of LCMs as being involved in self-defense with the most zeal, noting the testimony of ATF Agent Edward Troiano, who declared he could not recall a single Rhode Island self-defense case where someone fired more than 10 shots in their own defense. Judge McConnell thus declared that, in his view, the overwhelming evidence proved "at no time were LCM's considered 'Arms' nor were they used in any significant way for self-defense. They were not, then, and they are not,

today."

Historical Analog to Assault-weapon, LCM Bans?

The most pivotal legal question that arises with bans on so-called assault weapons and LCMs is whether there is a historical analog to them or not. To put it simply, if there is, the bans can stay, if there's not, they have to go.

In shooting down PICA, Mcglynn cited Brett Kavanaugh's belief that the Second Amendment "is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791" and went on to declare that the litany of historical gun regulations that gun-control advocates have cited to defend the assault-weapons ban in court were regulations about concealed carry, not about gun bans. As he put it, "The 'how and why' of a concealed carry regulation is categorically different than the 'how and why' of a ban on possession and cannot pass 'constitutional muster' as a historical analogue to demonstrate this Nation's historical tradition regarding an 'arms' ban."

This is wildly different from the other judges. While McConnell's "magazines aren't arms stance" allowed him to lean on firearm-accessory bans, Andrews (and Maryland Attorney General Brian Frosh, in declaring his state's assault weapons ban) cited a ban on carrying Bowie Knives from the 1830s to prove that there's a close enough historical analog to the assault-weapons ban. Andrews went on to talk about laws concerning carrying revolvers, and bans on the Tommy Gun that were enacted in the 1930s as proof that "the historical record that Defendants present, when viewed as a whole, illustrates a pattern: Firearms and accessories, along with other dangerous weapons, were subject to remarkably strict and wide-ranging regulation when they entered society, proliferated, and resulted in violence, harm, or contributed to criminality," meaning that the state's assault weapons and LCM bans **"**do not impose a greater burden on the right of armed self-defense than did analogous historical regulations."

If history is any indicator, gun-control advocates are going to ignore "common use" laws and any anti-tyranny arguments and instead attack semiautomatic rifles' efficacy in self-defense scenarios, attempt to deem "Arms" as not including magazines and pivotal things such as pistol braces to use ammunition limits as backdoor gun bans, and cite a variety of largely irrelevant historical weapons bans while ignoring the views of our Founding Fathers, all to force activist judges into enacting their demands.

Freedom-loving Americans need to recognize these tactics to understand how to disarm them in the courtroom, before gun grabbers use them to disarm you via the court system.