NATIONAL REVIEW

A Federal Judge Halts California's Confiscation of High-Capacity Magazines

Josh Blackman

July 3, 2017

In 2000, California banned the sale of firearm magazines that can hold more than ten rounds. Residents who already possessed such magazines were "grandfathered" in. Or at least that was the promise.

Recently, Californians approved Proposition 63, which would have required all grandfathered owners to surrender those magazines by July 1, 2017, or face up to a year in prison. Civil-rights groups challenged the confiscation in federal courts. With less than a day to spare, Judge Roger T. Benitez of the Southern District of California blocked the measure from going into effect. In his thoughtful opinion, he meticulously deconstructs every strawman erected by gun-control advocates, who can show no evidence that limiting magazine sizes will improve public safety. No doubt this decision will be appealed, but the higher courts should take note: Judge Benitez provided a clinic on how to scrutinize laws that restrict Second Amendments rights.

In District of Columbia v. Heller, the Supreme Court recognized that the Second Amendment protects an individual right to keep and bear arms. That right is not limited to guns; it extends also to the ammunition and magazines that make the gun operable. California's law directly infringes on that right, by prohibiting law-abiding firearm owners from using their magazine of choice for self-defense. Following Heller, lower courts have held that the government can ban certain types of arms only if it demonstrates that doing so will reasonably protect public safety. Unfortunately, in the past, most judges simply rubber-stamp whatever evidence the state provides to justify gun-control measures, whether or not it fits with public safety.

Not Judge Benitez. He refused to defer to the attorney general's "incomplete studies from unreliable sources" about a "homogenous mass of horrible crimes in jurisdictions near and far for which large capacity magazines were not the cause." With the precision of a scalpel, the court systemically sliced apart the government's unpersuasive efforts to justify the ban. For example, the attorney general had relied on a survey of shootings published by Mother Jones, a progressive magazine. Judge Benitez dismissed the publication, which "has rarely been mentioned by any court as reliable evidence." Moreover, he added, "it is fair to say that the magazine survey lacks some of the earmarks of a scientifically designed and unbiased collection of data."

What about the government's citation of a survey issued by the group Mayors Against Illegal Guns? Judge Benitez noted that this group, founded by former New York City mayor Michael Bloomberg, "is apparently not a pro-gun rights organization." That is an understatement. More significantly, the court concluded, the survey of 92 mass shootings — 82 of which were outside California — "does not demonstrate that the ban on possession of magazines holding any more than 10 rounds" would reasonably help the state to achieve its public-safety goals. Of the ten shootings in California, eight were not known to involve high-capacity magazines, and two involved magazines that were probably illegal. For example, the Santa Monica shooter used high-capacity magazines that were likely shipped from outside California. "Criminalizing possession of magazines holding any more than 10 rounds," the court reasoned, "likely would not have provided additional protection from gun violence for citizens or police officers or prevented the crime." More important, even though millions of high-capacity magazine are owned nationwide, the mayors' survey could identify only six mass-shooting incidents between 2009 and 2013 that employed them.

The government's expert witnesses fared no better. The court dismissed their evidence as little more than "anecdotal accounts, collected by biased entities, on which educated surmises and tautological observations are framed." One professor said the ban on high-capacity magazines "seems prudent," based only on what Judge Benitez labelled "a complete absence of reliable studies done on formal data sets." Another professor justified the ban on large magazines by citing the need to force "mass shooters to pause and reload ammunition." That argument, supported by zero data, is belied by common experience. The court noted that during mass shootings in Alexandria, Va., and Fort Hood, Texas, mass shooters were able to reload several times without difficulty; they were stopped only when confronted by another shooter. In any event, why stop at ten rounds? For example, New York sought to limit magazine sizes to seven rounds, because the average defensive gun use involves on average two rounds. Judge Benitez asked, somewhat rhetorically, why not then limit magazines to three rounds?

In other contexts, courts are perfectly comfortable second-guessing the government's need to promote public safety — even concerning the rights of aliens outside the United States and in delicate matters of foreign affairs. For example, in recent litigation over the travel ban, federal courts have dismissed the executive branch's goal of protecting national security as a fraud. But with the Second Amendment, courts have regrettably treated the right to keep and bear arms as a second-class right and consistently accepted the government's interests as articles of blind faith.

Not so in Judge Benitez's courtroom. He explained that "the phrase 'gun violence' may not be invoked as a talismanic incantation to justify any exercise of state power." In any case, the measures in question would not deter crime. "Criminals intent on violence would then equip themselves with multiple weapons," Benitez observed. Or, as Justice Stephen Breyer noted last year in an opinion striking down Texas's abortion laws, "determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations." (Of course, the right to keep and bear arms is framed in the Constitution; a right to privacy is not.) Criminals bent on breaking the law will break the

law. Confiscation measures like Proposition 63 punish law-abiding citizens, limit their ability to defend themselves, and have at best a negligible impact on public safety.

On the same day that Judge Benitez issued his important decision, another federal judge in Sacramento reached the opposite result, allowing the confiscation measure to go into effect. The California attorney general will no doubt seek an emergency stay from the Ninth Circuit Court of Appeals to nullify Judge Benitez's decision. Second Amendment rights, alas, have not fared well in that court. Because of the urgency of this case, sooner or later an emergency petition may wind up on the desk of Justice Anthony Kennedy, who supervises appeals from California. Justice Kennedy joined the Heller decision in 2008 and two years later joined the follow-up case of McDonald v. City of Chicago. But since 2010, the Court has not heard arguments in any Second Amendment case. Regrettably, last week the Supreme Court turned away another case from California that concerned the right to carry outside the home. Only Justice Clarence Thomas and his newest colleague, Justice Neil Gorsuch, disagreed: "The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right," Thomas wrote. Over the last seven years, the justices have hesitated to expand gun rights beyond allowing law-abiding citizens to keep a firearm in the home. Proposition 63 is radically different from previous appeals: It attempts to take away what law-abiding citizens already have. Perhaps now that the fear of confiscation has come to fruition, five justices will intervene and ensure that Americans are not punished for exercising their constitutional rights.

Josh Blackman is a constitutional-law professor at the South Texas College of Law in Houston, an adjunct scholar at the Cato Institute, and the author of Unraveled: Obamacare, Religious Liberty, and Executive Power.