

**Confirmation Hearings for the
Appointment of Elena Kagan to the
Supreme Court of the
United States of America**

**Hearings before the Judiciary Committee
of the United States Senate
July 1, 2010**

**Testimony on Second Amendment
and Related Issues**

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In regard to Second Amendment issues, Senators should carefully consider whether Elena Kagan will be a Supreme Court Justice like Hugo Black. In other words, can the Justice overcome a prejudiced background and

professional record in order to become a Justice who will fully protect constitutional rights?

Justice Black certainly did so. In Alabama, he had joined the Ku Klux Klan, and was elected to the U.S. Senate as the Klan's candidate. As a practicing attorney, he had engaged in vicious race-baiting in the courtroom against people of color.¹ Yet on the Supreme Court, Justice Black vigorously enforced the constitutional rules, such as the Equal Protection clause, against treating people of color as second-class citizens. He likewise staunchly defended the free speech, free press, assembly, and association right of civil rights organizations such as the NAACP. Today he is rightly remembered as a great Supreme Court Justice.

As we will detail, there are many items in Ms. Kagan's twentieth century legal record which raise very troubling concerns that she would not fully protect the Second Amendment rights of Americans, but instead would be willing to stretch the law in order to promote oppressive anti-gun laws and gun bans.

However, her record in the twenty-first century at least suggests the possibility of a more open-minded attitude. Alexander "Sasha" Volokh is an Assistant Professor at Emory Law School. He attended Harvard Law School while Ms. Kagan was there. He recalls:

In particular — and despite her presumably pro-gun-control views (see the [David Kopel post below](#)), she was a good friend of the HLS Target Shooting Club, which I founded in Fall 2001 and was the president of for two years.²

There are plenty of law schools where the Dean would not be “a good friend” of a Target Shooting Club. While this one piece of evidence about Dean Kagan is not conclusive, it does suggest that Senators that there is at least a possibility that her attitude towards gun owners, firearms organizations, and the Second Amendment has changed since the twentieth century.

¹ STEVE SUITTS, HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION (2005).

² Sasha Volokh, *My own Kagan experience*, THE VOLOKH CONSPIRACY weblog, May 11, 2010, 4:43 pm, <http://volokh.com/2010/05/11/my-own-kagan-experience/>. He also notes that Kagan, before becoming Dean, served as a cordial moderator for a gun control debate held at Harvard Law School.

If and only if her attitude as a Justice were dramatically different from her earlier record on gun issues—as Deputy White House Counsel and as a Supreme Court clerk, would there be reason to hope that as a Supreme Court Justice, she would fulfill her duty to respect and protect Second Amendment rights.

The unfortunate lesson of the confirmation of Justice Sotomayor is that Senators who care about the Second Amendment cannot rely on platitudes about “settled law” or even direct promises to abide by *Heller*. Before this Committee, Ms. Sotomayor declared, “I understand the individual right fully that the Supreme Court recognized in *Heller*.” And, “I understand how important the right to bear arms is to many, many Americans.”

To the Senate Judiciary Committee, Justice Sotomayor repeatedly averred that *Heller* is “settled law.” The Associated Press reported that Sen. Mark Udall “said Sotomayor told him during a private meeting that she considers the 2008 ruling that struck down a Washington, D.C., handgun ban as settled law that would guide her decisions in future cases.”³

Yet on June 28, 2010, Justice Sotomayor joined Justice Breyer’s dissenting opinion in *McDonald v. Chicago*, and announced that *Heller* was wrongly decided and should be over-ruled. Apparently her true belief was not what she told this Committee, but instead: “In sum, the Framers did not write the Second Amendment in order to protect a private right of armed self defense.”⁴

So by “settled law,” nominee Sotomayor seems to have meant “not settled; should be overturned immediately.”

Accordingly, statements from Ms. Kagan about *Heller* being “settled law” provide not an iota of assurance that as a Justice she would support *Heller*, rather than attempt to eliminate it.

Evidence of a hostile attitude towards the Second Amendment can be found starting at the beginning of her legal career.

Adding to concerns is that her answer to this Committee on June 29 about the infamous NRA/KKK comparison was incomplete and somewhat misleading.

“Not sympathetic” to Second Amendment claim. *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987), *cert. denied*, 484 U.S. 193 (1987), held that the Second Amendment only protects “collective” rights and not individual

³ Julie Hirschfeld Davis, *Sotomayor’s stance on gun rights prompts questions*, ASSOCIATED PRESS, June 12, 2009.

⁴ *McDonald v. Chicago*, 561 U.S. ___, slip op. at 31 (2010) (Breyer, J., dissenting).

rights, and upheld D.C.'s handgun ban. As clerk for Justice Thurgood Marshall, Kagan recommended against Supreme Court review with the comment: "Petitioner's sole contention is that the District of Columbia's firearms statutes violate his constitutional right to 'keep and bear Arms.' I'm not sympathetic."

District of Columbia v. Heller, 128 S. Ct. 2783 (2008), resolved that the right is indeed individual and invalidated the District's handgun ban. The dissents in that case reflect the continued lack of sympathy by some for the view that "the right of the people to keep and bear arms" refers, as do the First and Fourth Amendments, to a right of all individual American's.

Obviously the phrase "I'm not sympathetic" expressed Kagan's personal views. It cannot be brushed off as a clerk expressing her Justice's views.

Unfortunately, evidence of prejudice also appears much later in Ms. Kagan's career.

Comparing the NRA and the KKK as "Bad guy orgs." In a March 1996 document on the proposed Volunteer Protection Act, Kagan expressed concern to Justice Department Attorney Fran Allegra that "Bad guy orgs" like the National Rifle Association and the Ku Klux Klan might be protected from lawsuits.⁵ Allegra assured Kagan that the NRA and KKK would not qualify, since they are not on the IRS list of non-profits; Allegra added: "We probably need to be careful about suggesting 'bad' organizations will qualify for the provision bill as it would suggest we are allowing 'bad' organizations to qualify for tax-exempt status."⁶

The comparison is outrageous and malicious. There is all the difference in the world between a civil rights group that is a political opponent of the current president—and an organization created for terrorism and racial oppression

The White House explanation of the statement was implausible. According to the *Washington Post*:

Here's the White House version of events. At the time, two separate things were going on simultaneously. First, Clinton officials were concerned that the proposal would make it tougher for victims of gun violence to pursue liability claims. Officials viewed the bill as a major giveaway to the gun industry and the NRA. As part of analyzing the

⁵ Box 70, Folder 6, p. 4. References are to <http://www.clintonlibrary.gov/textual-KaganDPC.htm>.

⁶ *Id.* at 19.

impact in this area, Clinton lawyers looked at how it would benefit the NRA.

In a second, separate development, Democratic members of Congress were worried that the act could protect the KKK and other hate groups from liability. Senator Patrick Leahy branded it the “KKK protection act.” That prompted Clinton lawyers to analyze how it would impact such groups -- the KKK included.⁷

If we hypothesize that this explanation is truthful, it would reveal legal incompetence. The Volunteer Protection Act was to protect volunteers. It obviously had nothing to do with “the gun industry”—which like other industries, uses paid employees, not volunteers.⁸

Accordingly, the 2010 White House explanation about Kagan’s comment is not credible. Ms. Kagan is obviously intelligent enough to know the difference that a volunteer protection bill (which might protect the NRA, since the NRA has many volunteers) would not protect “the gun industry.”

Before this Committee, Ms. Kagan provided an entirely different answer. The very existence of shifting explanations raises serious concerns about veracity.

She told Senator Kyl that the NRA and KKK line was merely her notation of something that someone had told her on the telephone. This could perhaps be true for one specific document. But a different document, from Ms. Allegra,

⁷ Greg Sargent, The Plum Line, *Washington Post* online, June 18, 2010; 3:21 PM ET, http://voices.washingtonpost.com/plum-line/2010/06/latest_attack_on_kagan_she_com.html.

⁸ Several years later, there was a bill introduced which actually was criticized “as a major giveaway to the gun industry and the NRA.” That bill protect the gun industry from lawsuits which had been filed some big-city mayors, starting in late 1998. Eventually, that bill was enacted as the 2005 Protection of Lawful Commerce in Arms Act. Because some municipalities had sued firearms trade associations, like the National Shooting Sports Foundation, the bill included lawsuit protection for firearms business associations, arguably including the NRA.

We know that Kagan’s comments could not be about the PLCAA, which as of 1996 had not even been introduced.

As of 1996, Congress was considering a broad product liability reform bill (Gorton-Rockefeller). Conceivably, that bill might have been criticized as benefitting the gun industry, but it would not have benefited the NRA.

The current White House spin makes no sense, since the subject line of the Allegra memo itself is “Charities Bill,” and the charitable volunteer bill is the only draft that is included in the folder. Kagan had separate, extensive files on product liability legislation.

makes it clear that it was Kagan who was instructing Allegra specifically to look up the non-profit status of the KKK and the NRA.⁹

It appears that neither the White House version nor the Kagan version of the story provides a full and credible explanation of what happened. Thus, it may be reasonable consider the remark according to the natural meaning of the words: reflecting a narrow-minded, mean-spirited, and very prejudiced animosity towards America's oldest civil rights organization.

It is unfortunately true that a person whose entire life has been spent in Manhattan, Cambridge, Chicago, and Washington may have a very parochial and ill-informed view of the NRA. Just as a person who in the first half of the twentieth century had only lived in Clinton, Mississippi; Hattiesburg, Mississippi; Clinton, Alabama; and Muscle Shoals, Mississippi, might have a very inaccurate and prejudiced view of the NAACP.

Some judges overcome a narrow background, but some do not.

It is worth noting that Kagan's twinning of the NRA and the KKK reflects a profound ignorance of some important parts of our nation's history.

The President who decimated the first Ku Klux Klan was Ulysses S. Grant. He signed the Anti-Ku Klux Klan Act in 1871 (parts of which survive today as 42 U.S.C. §§ 1983 and 1985-86). In a report to Congress the following year, President Grant described parts of the South as

under the sway of powerful combinations popularly known as "Ku-Klux Klans," the objects of which were, by force and terror, to prevent all political action not in accord with the views of the members, *to deprive colored citizens of the right to bear arms* and of the right to a free ballot, to suppress schools in which colored citizens were taught, and to reduce the colored people to a condition closely akin to that of slavery¹⁰

Carrying out his constitutional duty to see that the laws be faithfully executed, President Grant devoted substantial federal resources—including the military—to suppressing the domestic terrorist organization.

After having been twice elected President of the United States, Ulysses Grant was later elected President of the National Rifle Association, serving in 1883 as the NRA's eighth President.

⁹ Fran Allegra to Elena Kagan, March 27, 1996, KCL 0090586 ("For now, I think we need to be cautious in picking examples of organizations. If you have other names you want me to run down in the Cumulative List, I would be glad to check them out.")

¹⁰ Ex. Doc. No. 268, 42nd Cong., 2d Sess. 2 (April 19, 1872) (emphasis added).

From the NRA's founding in 1871, nine of the NRA's first ten presidents were high-ranking Union officers during the Civil War.

The NRA has always stood up for civil rights, including the right to keep and bear arms without regard to race, color, or creed. The historic role of the KKK was to deprive African Americans of this right.

The cofounder of the NRA was General Ambrose Everett Burnside, who had recently finished two terms as Governor of Rhode Island. As a Union General, he had been a leader at integrating the freedmen into combat roles. As the *Providence Journal* later put it, Burnside was "One of the first of the regular army officers to approve heartily of Mr. Lincoln's emancipation policy, he was also one of the first to favor the arming of black troops, and one of the most successful in training them for action."¹¹

After founding the NRA, Burnside was elected Senator from Rhode Island. He fought against racial segregation in the military, and proposed that West Point adopt an affirmative action admissions plan for blacks.

The sixth NRA President, General Winfield Scott Hancock, was nationally extolled as "the hero of Gettysburg." As Democratic nominee for U.S. President in 1880, he had lost the popular vote by less than 10,000 votes, and if he had won the swing state of New York, he would have won the electoral vote. Hancock was remarkable for his time, always treating black people as equals, even before the Civil War. In 1880, Hancock led a national campaign to vindicate a black cadet at West Point who had been attacked by some white cadets, but whom the West Point administration claimed had injured himself.

The NRA's Articles of Incorporation omitted something that was common for other sporting organizations at the time: a racial exclusion clause. In contrast to many other organizations and clubs created in the late 19th and early 20th centuries—such as the U.S. Lawn Tennis Association, the Professional Golf Association, the New York Athletic Club (for track and field), and the Amateur Athletic Union (same), the NRA welcomed members and athletes of every race.

The NRA was the governing body for the sport of rifle shooting, and eventually became the governing body for almost all the shooting sports. In this way, the NRA set a good example of racial integration and equality for the millions of Americans who participated in the shooting sports. Even

¹¹ Quoted in BEN PERLEY POORE, *THE LIFE AND PUBLIC SERVICES OF AMBROSE E. BURNSIDE: CITIZEN, SOLDIER, STATESMAN* 265 (Providence: J.A. & R.A. Reid, 1882) (available on GoogleBooks).

during the worst of Jim Crow, a NRA match was one place where blacks and whites were exactly equal, and where skin color did not matter.

In the very segregated Washington, D.C., of the 1930s and 1940s, the shooting range at NRA National Headquarters was the only integrated place where a young black man could go and feel fully welcome. At least that was the experience of Richard Atkinson, a black man who grew up in the District during those years, and who was later was elected a director of the National Rifle Association.

The NRA's contribution to America are not limited to racial equality. The NRA has instructed millions of Americans how to handle guns safely and responsibly. Since the 1980s, the NRAs "Eddie Eagle" program has taught over ten million children that if they see a gun, "Stop! Don't touch! Leave the area. Tell an adult." The NRA has trained much of the nation's police, and many of the nation's police trainers. Eight U.S. Presidents have been NRA members—probably more than of any other civic organization in the United States.¹²

After World War II, President Harry S. Truman thanked the NRA:

During the war just ended, the contributions of the Association in the matter of small-arms training aids, the nation-wide pre-induction training program, the recruiting of experienced small-arms instructors for all branches of the armed services, and technical advice and assistance to Government civilian agencies aiding in the prosecution of the war—all contributed freely and without expense to the Government—have materially aided our war effort.¹³

Vilely equating the National Rifle Association of America and the Ku Klux Klan might be fashionable in the bigoted confines of an Upper West Side cocktail party in Manhattan. But no one who presently holds such beliefs could be fit to serve on the Supreme Court. Nor could someone who equated other honorable civic organizations (such the NAACP, ACLU, AFL-CIO) to the Klan.

¹² With the exception of the Boy Scouts, who automatically make the current U.S. President into the Honorary Boy Scouts President.

¹³ Reprinted in *Federal Firearms Legislation: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, United States Senate, 90th Cong. 484 (1968).

Does narrow-mindedness have legal consequences? The record shows that it does.

Drafting Clinton's 1997 order banning import of rifles that had been considered “sporting” and importable since 1968.

In 1994, Congress enacted a temporary (10-year) ban on so-called “assault weapons.” The manufacture and import of new “assault weapons” was banned.¹⁴ In 1990, Congress had enacted a different statute to prevent the domestic assembly from foreign parts of guns that President Bush had banned from importation in 1989. Thus, Congress had clearly defined what was a non-importable “assault weapon.”

However, a more general law, the Gun Control Act of 1968 requires that to be importable, firearms must be “particularly suitable for or readily adaptable to sporting purposes.”¹⁵

When the Bureau of Alcohol, Tobacco and Firearms was created in 1968, it took up the duty of determining which guns were importable. Under the BATF criteria, the import of many sporting rifles was allowed. Although some rifles have a cosmetic military appearance, the BATF criteria focused on the guns’ function.

Dissatisfied that firearms importers were strictly complying with the 1990 and 1994 statutory definitions of “assault weapons,” President Clinton wished to ban more gun imports. So he sidestepped Congress, decreed a suspension of import permits, and ordered a new study by BATF with the foregone conclusion that the targeted firearms would no longer be considered “sporting” and hence not importable.¹⁶

Democratic Senator Pat Leahy, who was then the ranking member of the Senate Judiciary Committee, wrote to President Clinton that he “strongly believes that using a Presidential directive to avoid the normal legislative process regarding any changes to the assault weapons ban is the wrong way to go.”¹⁷

In response to question from Senator Russ Feingold on June 29, Ms. Kagan said that her gun control work with President Clinton “actually bipartisan support here in Congress.” At least in regard to the import ban, this was not accurate. The very reason for imposing the ban

¹⁴ 18 U.S.C. §§ 921(a)(30) (definition), 922(v) (prohibition).

¹⁵ 18 U.S.C. § 925(d)(3).

¹⁶ President Clinton’s Memorandum for the Secretary of the Treasury, Subject: Importation of Modified Semiautomatic Assault-Type Rifles, Nov. 14, 1997.

¹⁷ <http://rpc.senate.gov/releases/1998/importban-kf.htm>.

administratively—for evading what Senator Leahy called “the normal legislative process”—was the absence of congressional support.

As requested by Clinton, Charles F.C. Ruff and Elena Kagan worked on drafting the ban directive.¹⁸

The directive is filled with exaggerated rhetoric about what it mischaracterized as “Assault-Type Rifles.” (Under the proper technical definition, an “assault rifle” is a selective-fire weapon capable of full automatic fire.¹⁹) The Kagan-Ruff directive states: “A recent letter from Senator Dianne Feinstein emphasized again that weapons of this type are designed not for sporting purposes but for the commission of crime.”²⁰

This was patent nonsense. It might be seriously believed by someone who had no experience with America’s broad culture of hunting and target shooting. But every one of the 58 banned guns was used in target competitions. Some had names like “Hunter” or “Sporter.”

The notion that respectable European sporting gun companies, some of which have been in business for centuries, were catering to a supposed American market of criminals by selling them expensive rifles was ridiculous.

This kind of rhetoric defames the millions of law-abiding Americans who purchased and own such rifles for lawful purposes.

To Senator Feingold, Ms. Kagan said that her White House work was “to keep guns out of the hands of criminals, to keep guns out of the hands of insane people.” Not so, in regards to the rifle ban. The ban was not directed to improving background checks, or cracking down on the black market. The ban kept guns out of the hands of law-abiding American citizens.

As directed, BATF claimed that the rifles had become, overnight, no longer “particularly suitable for or readily adaptable to sporting purposes.” The basis for this new assertion was that BATF solicited comments from hunting guides, and found that the guns were rarely recommended for

¹⁸ Memorandum for the President, Nov. 13, 1997. (Box 9, folder 3, p. 70.) References are to <http://www.clintonlibrary.gov/textual-KaganDPC.htm>.

¹⁹ “Assault rifles are short, compact, selective-fire weapons Assault rifles . . . are capable of delivering effective full automatic fire” HAROLD E. JOHNSON, SMALL ARMS IDENTIFICATION & OPERATION GUIDE – EURASIAN COMMUNIST COUNTRIES 105 (Defense Intelligence Agency 1980).

²⁰ So-called assault weapons “were used in only a small fraction of gun crimes prior to the ban: about 2% according to most studies and no more than 8%. Most of the AWs used in crime are assault pistols rather than assault rifles.” Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* (Report to the National Institute of Justice, U.S. Dep’t. of Justice 2004), at 2. The firearms at issue here were not even defined as “assault weapons.”

hunting trips.²¹ As if the only gun that is a “sporting” gun is one used by people who can afford to take trips with a professional guide. This is economic snobbery in the extreme—rather like claiming that the only foods permissible for human consumption are those which are the favorites of professional chefs.

In a minority of states, hunting is not allowed with magazines holding more than ten rounds.²² So therefore Kagan and the Clinton administration claimed that rifles which accept detachable clips that can hold more than ten rounds are not “sporting.”

But in fact, magazines of more than ten rounds are commonly used for many target shooting sports and competitions, and are required in some, as extensive evidence showed.

Besides, even if we presume that hunting according to the restrictive rules in a minority of states is the one and only firearms sport, the statute says: “particularly suitable for *or* readily adaptable to” sporting purposes.²³

A legal challenge was brought,²⁴ but ATF’s newly-minted application of the sporting criteria was upheld under the doctrine of “deference” to agency expertise. *Springfield, Inc. v. Buckles*, 292 F.3d 813 (D.C. Cir. 2002). The court rejected the importer’s contention that “even if its rifles are not ‘particularly suitable for’ ‘sporting purposes,’ they are ‘readily adaptable to’ that end because they can accept small magazines,” and accepted ATF’s view that “particularly suitable for *or* readily adaptable to” meant “particularly

²¹ *Department of the Treasury Study on the Importability of Modified Semiautomatic Assault Rifles* (April 1998), <http://www.atf.gov/publications/download/treas/treas-study-on-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf>.

²² For example, for deer hunting with a rifle, the following 13 states have a magazine capacity restriction of 10 or less: Arizona, Colorado, Florida, Maine, Maryland, Mississippi, Nevada, New Hampshire, New York, Oklahoma, Oregon, South Dakota, Vermont.

²³ Emphasis added. The Firearms Owners’ Protection Act of 1986 amended 18 U.S.C. § 925(d)(3) to state that “the Secretary shall authorize a firearm . . . to be imported if the firearm . . . is generally recognized as particularly suitable or readily adaptable to sporting purposes.” § 105, P.L. 99-308, 100 Stat. 449, 459 (1986). FOPA’s “shall authorize” replaced “may authorize” language from the 1968 GCA. The old GCA had said that “the Secretary may authorize a firearm . . . to be imported . . . if the person importing . . . the firearm . . . establishes to the satisfaction of the Secretary” that the firearm “is generally recognized as particularly suitable or readily adaptable to sporting purposes.” FOPA passed the Senate 79-15, with 30 Democrats in favor and 13 opposed. Among the Democratic senators voting favor were Joe Biden, George Mitchell, John Glenn, and Al Gore. FOPA passed the House 292-130, with Democrats voting 131 in favor and 115 opposed. House Democrats who voted for FOPA included Tom Lantos, Tim Wirth, Lee Hamilton, Dan Glickman, Jim Florio, Mike Synar, Tom Daschle, Tom Foley, and Les Aspin. The lead House sponsor, Harold Volkmer, was a Democrat; he now serves on the NRA Board of Directors.

²⁴ See Brief for Appellant, 2001 WL 36037956, and Reply Brief for Appellant, 2001 WL 36037958. Halbrook was counsel for appellant.

suitable for *and* readily adaptable to” sporting purposes. *Id.* at 818. The court accorded ATF discretion to deem shooting competitions and target shooting as not being “sporting purposes.” *Id.*

When the ban was announced, one of Kagan’s helpers in the White House, Jose Cerda stated, “We are taking the law and bending it as far as we can to capture a whole new class of guns.”²⁵

Mr. Cerda was exactly right. Kagan bent the law to claim that “sporting” gun use does not include formal target shooting competitions, or informal target practice. Kagan bent the law to claim that “or” means “and.” She banned 58 different models of rifles from the hands of law-abiding American citizens.²⁶

Her legal skills were impressive. She had very accurately gauged how much the courts would let her get away with. Which was quite a lot.

A Supreme Court Justice has tremendous power to “bend” the law. Without over-ruling *Heller*, a future Court could bend the law so much that much of the Second Amendment might be eviscerated.

As she accurately told Senator Feingold on June 29, 2010, the Supreme Court will soon have to set a standard of review for Second Amendment cases, and provide more guidance about what types of anti-gun laws are unconstitutional.

Of Ms. Kagan’s activities in the Clinton White House took place before *Heller* was decided, but the idea that the Second Amendment guarantees a meaningful individual right was well-known in the late 1990s.

Specific constitutional provisions aside, one of the most important jobs of the Supreme Court is to stop Executive Branch abuses of power. Ignoring a statute which says “or”—especially when the “or” was inserted for the specific purpose of reducing the government’s ability to ban guns, is itself an abuse of power. So is claiming that the sole standard for “sporting” use of guns is the activity of people who pay for professional guided hunts.

Ms. Kagan’s leading role in the 1997 import ban raises very serious concerns that as a Justice, she could turn a blind eye to Executive Branch abuses of the Second Amendment, and perhaps of other rights.

To her credit, on another import issue, Kagan did stick to the plain language of the law. The 1994 Crime Act banned magazines holding more

²⁵ Steve Berry, *Clinton Moves to Limit Import of Assault Guns*, LOS ANGELES TIMES, Oct. 22, 1997.

²⁶ The list of banned guns is available at BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FEDERAL FIREARMS REGULATIONS GUIDE 2005 (ATF pub. 5300.4, Sept. 2005), p. 167. <http://www.atf.gov/publications/download/p/atf-p-5300-4.pdf>.

than ten rounds, but only those “manufactured after the date of enactment” in 1994.²⁷ Despite that clear language, BATF sought to apply the ban to *all* imported magazines. “The Department of Justice found that this [BATF’s] interpretation, which was challenged in two lawsuits, was not supportable as a matter of law.”²⁸

The Clinton archives include a BATF memo arguing that the law prohibited import of the magazines “regardless of the date of manufacture.” Kagan wrote: “Plain language, guys.”²⁹ Indeed, the language was so plain that government counsel would not argue otherwise in litigation.

Suggestion of a Presidential decree criminalizing handgun sales if the Supreme Court invalidated the federal mandate that State and local law enforcement conduct background checks.

Printz v. United States, 521 U.S. 898 (1997), held that Congress could not commandeer State and local Chief Law Enforcement Officers (CLEOs) to conduct federal background checks on handgun purchasers. The provision of the Brady Act so requiring, 18 U.S.C. § 922(s)(2), was thus invalidated based on principles of Federalism and the Tenth Amendment.

After oral argument but before the decision was handed down, the following memo appeared: “Based on Elena’s suggestion, I have also asked both Treasury and Justice to give us options on what POTUS [President of the United States] could do by executive action – for example, could he, by executive order, prohibit a FFL [Federal Firearms Licensee] from selling a handgun w/o a CLEO certification.”³⁰

Yet the Brady Act was very clear that the only obligation of an FFL to a CLEO was to provide notice and a copy of a handgun transferee’s intent to receive a handgun. The FFL could then sell gun after either: 1. Receiving authorization from the CLEO, or 2. After five business days had passed. 18 U.S.C. § 922(s)(1)(A).

The Brady Act was written in this way for the specific purposes of allowing the handgun sale if the CLEO had not acted within five business days.

²⁷ 18 U.S.C. § 921(a)(31)(A).

²⁸ “Importation of Large Capacity Ammunition Feeding Devices,” undated. (Box 9, Folder 2, p. 11.)

²⁹ Box 6, Folder 12, p. 20.

³⁰ Dennis K. Burke 03/17/97 11:02:31 AM, Box 9, Folder 14, p. 27.

To suggest that the President might forbid the gun sale even after five business days had passed was flagrantly contrary to the direct and clear language of the Brady Act itself.³¹

The best interpretation of the Kagan memo was that—flouting the law which Congress had enacted specifically to set the rules for handgun sales—Kagan was asking for a search for some other law which might be bent or stretched so that the President could claim the unilateral authority to ban handgun sales. And such a presidential order really would have been a ban, since in many jurisdictions (including the entire state of Ohio) local law enforcement chose to not perform background checks.

In some jurisdictions, law enforcement had no capability to perform the checks, even if they wanted to. For example, Sheriff Printz was responsible for a Montana county the size of Rhode Island. At any given time, there were only three sheriff's department officers on duty, including the Sheriff himself. Stretched thin, they had no time to conduct investigations of all the handgun purchasers in the county.

At the worst, the Kagan query seems to assume an extraordinary power of the President to make law. The Supreme Court noted in the *Steel Mills Seizure Cases*: “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . The first section of the first article says that ‘All legislative Powers herein granted shall be vested in a Congress of the United States’”³² Within minutes of the ruling, President Truman complied by returning the mills to their owners.

In contrast, as Ms. Kagan anticipated the *Printz* decision, she began searching for ways to evade the Court’s decision, and the plain language of the law enacted by Congress.

First Amendment

It has been often and accurately said that the Second Amendment cannot long endure without a robust First Amendment. Other witnesses will testify

³¹ In *Printz*, the Supreme Court not only invalidated the federal command to CLEOs, but added that the sheriff was “prohibited from taking on these federal responsibilities under state law.” *Printz*, 521 U.S. at 934 n.18. Nonetheless, President Clinton wrote an open letter to CLEOs nationwide urging them to continue to conduct the checks. As counsel for Sheriff Printz, Stephen Halbrook wrote to President Clinton and Attorney General Reno urging them to state that they were not suggesting that CLEOs violate their own State laws. (See Box 9, Folder 10, p. 48.) A response was drafted arguing that the CLEO checks would be justified as type of joint federal-state criminal investigation. The draft was circulated to Kagan and others but never sent. (Box 9, Folder 10, p. 46-47.)

³² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952).

about Ms. Kagan's record on the First Amendment, which is much more extensive than her Second Amendment record.

It is clear enough, however, that not since Robert Bork has the Senate Judiciary Committee held hearings on a Supreme Court nominee with a well-established record of favoring substantial contraction of existing First Amendment rights.

Conclusion

McDonald v. Chicago was not the end of the Second Amendment story, but the beginning of an important new chapter. With guidance from the Supreme Court, lower courts all over the country will face many new questions under the Second Amendment. Is it constitutional that Illinois provides *no* legal way for a citizen to carry a firearm in public for lawful protection? That Maryland has a system for granting handgun carry permits, but that in practice almost no-one except the politically influential is granted a permit? That New York City takes many months to process applications to possess a handgun in the home? That some Massachusetts permits require that a gun in the home never be loaded, even in self-defense? That in New Jersey, it is a major felony to take your unloaded gun to a friend's home, and allow him to examine the gun while you watch? That some jurisdictions ban guns because of cosmetic factors? That a 1971 conviction for marijuana possession prohibits a woman in 2010 from possessing any firearm, even if she has led an exemplary life since 1971? That federal law only allows sporting gun imports, but not imports of guns which are well-suited for lawful self-defense?

If some of these laws seem to Senators to be obviously unconstitutional, it must be remembered that the law can be bent and stretched; if a straightforward statute can be stretched beyond its plain meaning so as to allow an executive order banning 58 models of rifles, the more general language of the Second Amendment could be far easier to bend.

Hugo Black showed that despite a nominee's background, it is sometimes appropriate to hope for the best rather than to fear the worst. Please consider each possibility carefully for Ms. Kagan.