



Americans Against Gun Violence
P.O. Box 661252
Sacramento, CA 95866
(916) 668-4160 / (888) 286-8122
www.aagunv.org / info@aagunv.org

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The Honorable Dianne Feinstein
One Post Street, Suite 2450
San Francisco, CA 94104

Dear Senator Feinstein:

I'm writing on behalf of Americans Against Gun Violence to express our concerns about Donald Trump's nomination of Judge Neil Gorsuch to replace the late Antonin Scalia on the Supreme Court. As you undoubtedly know, Gorsuch, who is currently a judge on the Tenth Circuit Court of Appeals, has scant history in ruling on cases touching on the gun violence, gun control, and the Second Amendment. The parallels that have been drawn, however, between his judicial philosophy and Scalia's, along with his own praise of Scalia during his nomination press conference as a "towering" justice and a "lion of the law," are concerning. Also of concern is the fact that he was nominated by a president who during his presidential campaign expressed opposition to even the most basic gun control measures, including gun free school zones, universal background checks for gun purchases, and bans on assault weapons. Finally, the fact that the NRA endorsed Gorsuch immediately and enthusiastically suggests that the gun lobby knows more about Gorsuch's views on gun control and the Second Amendment than the rest of us do and that Gorsuch is likely to endorse the NRA's "individual rights" version of the Second Amendment, a version that the late Supreme Court Chief Justice Warren Burger called "one of the greatest pieces of fraud on the American public" that he had seen in his lifetime.¹

Antonin Scalia claimed to be an "originalist," basing his decisions on the original intent of the constitution.² He also railed against "judicial activism," the practice of judges changing the interpretation of laws to conform with their own ideology. In his majority opinion in the 2008 *Heller* decision, though, in which a narrow 5-4 majority of the Supreme Court struck down Washington DC's freeze on new handgun acquisition on the basis that it violated the Second Amendment, Scalia was clearly engaging in the flagrant judicial activism, substituting his own ideology for the original intent of the founders of the country.³

The *Heller* decision represented the first time in U.S. history that the Supreme Court had ever ruled that the Second Amendment guaranteed an individual right to own guns. Prior to 2008, it had been repeatedly established in Supreme Court decisions,⁴ in decisions of lower courts,⁵ and in reviews by legal historians⁶ that the Second Amendment, which

begins with the phrase, "A well regulated militia, being necessary to the security of a free state," was intended to protect the rights of states to maintain well regulated armed militias, such as the current day National Guard, and that it did not confer a right of individual citizens to own firearms. In particular, the Supreme Court ruled in 1939 in *United States v. Miller*⁷ and reiterated in 1980 in *Lewis v. United States*⁸ that "The Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" In his majority opinion in the *Heller* decision, Scalia effectively deleted the phrase, "A well regulated militia," from the U.S. Constitution.

Although strictly speaking, the *Heller* decision applies only to handguns kept in the home "for protection," it is a major obstacle to the adoption of definitive gun control laws in the United States. The *Heller* decision led to a flood of over 1,000 lawsuits by gun control opponents against all sorts of firearm regulations.⁹ Over 90% of those lawsuits have been unsuccessful. In particular, gun control laws that require background checks for firearm purchases, that prohibit open carrying of firearms in public places, that impose restrictions on who may carry concealed weapons, and that ban the possession of assault weapons have withstood post-*Heller* challenges. On the other hand, *Heller* has put gun control activists on the defensive, particularly with regard to handgun regulations. In the United States, 70-80% of all firearm related deaths are due to handguns.¹⁰ If the we are ever to reduce our extraordinarily high levels of gun violence to rates comparable to those in other high income democratic countries, we are going to need to adopt comparable gun control regulations, including stringent restrictions, if not complete bans, on private ownership of handguns. In order to accomplish this goal, the *Heller* decision must first be overturned.

Judge Gorsuch, like the late Antonin Scalia, claims to be an originalist. In his nomination press conference he also spoke of the need to avoid judicial activism, stating:

...it is for Congress and not the courts to write new laws. It is the role of judges to apply, not alter, the work of the people's representatives.

Judge Gorsuch's dissenting opinion in the case of *United States v. Games Perez*¹¹ is the only objective evidence presently available concerning his views on the Second Amendment, and it raises concerns as to whether he will stay true to his stated judicial philosophy of "originalism" when it comes to firearm related cases, or whether he will instead follow the example of the late Antonin Scalia, and revert to judicial activism in order to impose his own ideology. A detailed analysis of the *Games Perez* case is posted on the "Facts and FAQ's" page of the Americans Against Gun Violence website. In the interest of brevity, I won't include that analysis in this letter. In brief, though, since the Second Amendment was not directly at issue in *Games Perez*, it's difficult to read much into Judge Gorsuch's statement in his dissenting opinion that gun possession is "sometimes even protected as a matter of constitutional right."

Probably the most concerning aspect of Trump's nomination of Neil Gorsuch from our point of view is the NRA's enthusiastic endorsement of the nomination. NRA executive vice president Wayne LaPierre was sitting beside Donald Trump, smiling broadly, at the press event on February 1 when Trump exhorted members of the Senate to promptly confirm Gorsuch. The NRA apparently had advance knowledge of Trump's pick for the

Supreme Court vacancy. Its lobbying arm, the Institute for Legislative Action, issued a press release immediately following Trump's announcement of Gorsuch's nomination on in which its executive director Chris Cox stated:

President Trump has made an outstanding choice in nominating Judge Gorsuch for the U.S. Supreme Court. He has an impressive record that demonstrates his support for the Second Amendment.

The NRA's early and enthusiastic endorsement of Neil Gorsuch strongly suggests that the gun lobby knows something about his views on gun control and the Second Amendment that the rest of us don't.

Americans Against Gun Violence does not currently have a position on whether Judge Gorsuch's nomination as a Supreme Court justice should be confirmed. We firmly believe, though, that prior to a vote being taken on his confirmation, he should answer the following questions, and that his answers should be made public:

1. Do you believe that gun violence is a serious problem in the United States and that rates of firearm related deaths and injuries in our country are much higher than in every other high income democratic country of the world?
2. Do you believe that in order to reduce rates of gun violence in our country to levels comparable to those in other high income democratic countries, we must adopt comparable gun control laws, including stringent regulation, if not complete bans, on private ownership of handguns and assault weapons?
3. Do you agree with the late Supreme Court Chief Justice Warren Burger who said in an interview on the PBS News Hour on December 16, 1991, that the misrepresentation of the Second Amendment by special interests as guaranteeing an individual right to own guns was "one of the greatest pieces of fraud on the American public" that he had seen in his lifetime?
4. Do you agree that in 1939, the Supreme Court ruled in the case of *United States v. Miller* that the Second Amendment did not confer an individual right to own firearms unless such ownership bore "some reasonable relationship to the preservation or efficiency of a well regulated militia?"
5. Do you agree that in 1980, the Supreme Court reiterated in *Lewis v. United States* that, "The Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia?'"
6. Do you agree with the distinguished historians and legal scholars, including Carl Bogus, Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schworer, Fred Anderson, Carol Berkin, Paul Finkelman, R. Don Higginbotham, Stanley N. Katz, Pauline R. Maier, Peter S. Onuf, Robert E. Shalhope, John Shy, and Alan Taylor who presented extensive evidence in their *amici curiae* brief in the case of *District of Columbia v. Heller*¹² that the

framers of the U.S. Constitution never intended for the Second Amendment to be interpreted as conferring an individual right to own any kind of a firearm outside of service in a well regulated militia?

7. Do you agree that articles published in the legal literature between the time of the 1980 *Lewis* decision and the 2008 *Heller* decision arguing that the Second Amendment was intended to confer an individual right to own guns were written by a small group of individuals with financial ties to the gun lobby?
8. Do you agree that there is no net protective value from private ownership of handguns?
9. Do you agree that the 2008 *Heller* decision, in which five of nine Supreme Court justices, including the late Antonin Scalia, ruled that Dick Heller had a constitutional right to possess a handgun in his home “for protection” represented a radical reversal of over 200 years of prior legal precedent, including the Supreme Court’s rulings in *Miller* in 1939 and *Lewis* in 1980?
10. Do you agree that the late Justice Antonin Scalia was guilty of “judicial activism” in writing the majority opinion in the *Heller* decision, effectively deleting the phrase, “A well regulated militia,” from the U.S. Constitution?
11. Do you agree that *Heller* was wrongly decided?
12. If you were confirmed as a Supreme Court justice and plaintiffs were to apply for a *writ of certiorari* in a case seeking to overturn the *Heller* decision, would you vote to hear the case?

As the ranking member of the Senate Judiciary Committee, Senator Feinstein, you are in an ideal position to pose at least some of these questions to Judge Gorsuch. These 12 questions may seem to be unusually pointed ones for a Supreme Court nominee, but questions 1-11 address issues on which any candidate for the position of a justice on the Supreme Court in 2017, and particularly anyone who professes to be familiar with the career of the late Antonin Scalia, should be well informed. It’s almost certain that Justices Breyer, Ginsburg, Souter, and Stevens, who dissented in the 2008 *Heller* case, would answer yes to all 12 questions without hesitation, and that Justice Sotomayor, who replaced the retiring Justice Souter in 2009, and who dissented in the related case of *McDonald v. Chicago* in 2010, would also answer all 12 questions in the affirmative. To answer in the negative to any of the questions 1-11 is to deny the truth, and to answer “no” to question 12 is to deny the need to right a serious wrong.

Of course, there are many other issues other than gun control and the Second Amendment on which Judge Gorsuch should be carefully vetted. There is no other issue, however, that is more immediately life threatening, and more preventable, than gun violence. As noted above, the 2008 *Heller* decision stands in the way of the adoption of definitive gun control laws in the United States comparable to regulations that have long been in place in every other high income democratic country of the world. For example, the rate of firearm related deaths in the United States is nearly 50 times higher than the

rate in Great Britain, where private ownership of handguns is banned. Assuming that the adoption of firearm regulations in the United States comparable to those in Great Britain would result in similar rates of firearm related deaths, approximately 33,000 senseless firearm related deaths could be prevented in our country every year.¹³

In his nomination acceptance speech on January 31, Judge Gorsuch pledged to be a "faithful servant of the Constitution" and to serve with "impartiality and independence, collegiality and courage." Assuming that Judge Gorsuch is a man of his word and is informed on the issue of gun violence, he should have no hesitation in responding in the affirmative to all 12 of the above questions. If he does not respond in the affirmative to all 12 questions, we believe that his nomination as a Supreme Court justice should not be confirmed.

Thank you, Senator Feinstein, for your longstanding leadership in the field of gun violence prevention, and thank you for taking the time to read and consider our concerns about the nomination of Judge Gorsuch for the position of Supreme Court justice.

Sincerely,



Bill Durston, MD
President, Americans Against Gun Violence
(916) 202-0567

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- ⁴ *U.S. v. Miller*, 307 U.S. 174 (1939) (n.d.); *Lewis v. United States*, No. 55 (U.S. 1980).
- ⁵ See, for example *Quilici v. Village of Morton Grove*, 695 F. 2d 261 (Court of Appeals, 7th Circuit 1982).
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