

QUESTIONS FOR THE RECORD
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QUESTIONS FROM SENATOR CORNYN

1. In your testimony, you discussed "red flag laws" and the concept of Extreme Risk Protection Orders (ERPOs) as a possible means of keeping firearms out of the hands of dangerously mentally-ill individuals. Of course that is a goal we all share. As I'm sure you are aware, several states have enacted ERPO laws to date; however, these laws have included varying levels of due process protections, some of which have been subject to abuse. As a result, this issue has become a cause of concern for many law-abiding gun owners. Would you agree that at a minimum, state ERPO laws should include robust front-end due process protections, penalties against the filing of frivolous charges, and mental health treatment for those who pose a significant danger to themselves or others?

RESPONSE: As I testified during my hearing, it is critical that we get an effective system in place that keeps firearms out of the hands of mentally ill people who pose a danger to themselves or others. A key part of any such system are laws that allow "Extreme Risk Protection Orders" to be obtained in appropriate circumstances. At the same time, we must take steps to ensure that any laws that restrict possession of firearms by law-abiding persons, even if only temporarily, conform to constitutional rights and standards – including those embodied in the Second, Fifth, and Fourteenth Amendments. To the extent that these laws also incorporate features that minimize the likelihood of their abuse, I would support that approach as well.

2. In your testimony, you stated that you have opposed bans on certain semi-automatic firearms (often misnamed as "assault weapons"). You also stated your long standing belief that the Second Amendment guarantees the fundamental, individual right to keep and bear arms for all law-abiding Americans - a belief that predates the Supreme Court's *Heller* and *McDonald* decisions. You also mentioned that, in looking at firearms regulations, it is appropriate to consider whether the burden on law-abiding individuals is proportionate to any general benefit to public safety. Would you further clarify that last statement, in light of Justice Scalia's holding in *Heller*, that the enumeration of the Second Amendment right "takes out of the hands of government the power to decide whether the right is really worth insisting upon"?

RESPONSE: When I was the Assistant Attorney General of the Office of Legal Counsel, I concluded that the Second Amendment creates a personal right under the Constitution. My analysis drew in part on the right of self-preservation set forth in John Locke's *Second Treatise of Government*. I was pleased to see that *Heller* vindicated my view, and there is no question following *Heller* that the right to keep and bear firearms is protected under the Second Amendment and that this is a personal right. As I stated during my hearing, what I would look for in assessing a gun-control measure is what burden it would impose on the constitutional rights of

law-abiding citizens and whether that burden has a sufficiently meaningful impact on crime to justify burdening a fundamental right. I would not favor pursuing gun-control measures that burden the Second Amendment rights of law-abiding citizens without having any meaningful impact on crime or public safety.