

SCOTUSblog Briefing Paper**Elena Kagan – Gun Rights****June 28, 2010****I. Summary and our take**

Expect gun rights to make an appearance at Elena Kagan's confirmation hearings. Many Americans care deeply about gun rights and the gun lobby is influential. The issue will be especially sensitive with the Supreme Court poised to decide, just hours before the hearings begin, how to apply the individual right to bear arms to state and local governments.

Kagan's personal background, so far as we know, does not include familiarity with firearms or an upbringing that involves personal exposure to guns and their importance to many individuals. But the same was true, for example, of Justice Scalia.

There are two documents cited as supposed evidence that Kagan is hostile to gun rights. In a 1987 memo as a law clerk to Justice Thurgood Marshall in a predecessor to the *District of Columbia v. Heller* decision invalidating Washington, D.C.'s, handgun prohibition, she said in a single sentence that she was "not sympathetic" to a Second Amendment claim. While in the Clinton Administration in 1997, she helped draft a directive that temporarily suspended licenses to import assault rifles. More broadly, she worked on gun-related issues in the Administration.

We think, however, that these materials are too thin a reed on which to rest conclusions about Kagan's views on the Second Amendment. The memo contains only a single, unelaborated sentence on the point. She also wrote it for Justice Marshall in her role as a law clerk seeking to reflect her boss's views, at a time (thirty years ago) when it was firmly settled in the courts that the Second Amendment did not apply outside of service in an organized militia. Nothing in the memo (or otherwise in her background) suggests a hostility to *Heller's* reading of the Second Amendment that would cause her to be particularly hostile to that precedent. In response to questions from senators during her Solicitor General confirmation hearing, Kagan made her unequivocal reading of the case clear: "there is no question, after *Heller*, that the Second Amendment guarantees individuals the right to keep and bear arms."

The 1997 presidential directive – ultimately signed by Bill Clinton – temporarily suspended for 120 days certain licenses to import assault rifles. The suspension allowed the Bureau of Alcohol, Tobacco, and Firearms (ATF) to review whether recently modified assault rifle models, including the Uzi, should have been considered illegal under existing law. The directive itself bans no rifles, suspends no licenses permanently, and contains almost no ideological language (at the most extreme, it calls weapons with militaristic features "a potential threat to the public health and safety"). Even after the results of the review came back, Kagan was not hasty to ban guns: editing the ATF's report, she pushed back against one of its legal interpretations that would have banned more assault rifles.

Kagan worked on several gun control proposals and bills while working for the Clinton domestic policy team from 1997-1999. These included, among others, stiffer penalties for gun crimes,

mandatory minimum sentences for the “possession” – rather than mere “use” – of a gun during a crime, warnings in gun dealerships against giving firearms to juveniles, and the Brady Bill that requires background checks of gun purchasers. Kagan was regularly updated on the progress of the Administration’s gun initiatives, but she did not show consistent or significant resistance to these policies in the memos, emails, or notes available to us from the Clinton Library. Insofar as Kagan showed any resistance at all, it was to the nuances of particular legal arguments. One idea described as hers in an email is that the President might unilaterally require gun dealers to conduct background checks prior to sales.

These are not initiatives one would expect from an Administration that was committed to an expansive application of gun rights. But that was not the position of the Clinton Administration, and nothing in the materials suggests to us that Kagan was doing anything other than her job on behalf of the Administration. She was not particularly hostile to gun rights or the Second Amendment.

A recent claim by Kagan’s opponents is that she compared the National Rifle Association to the KKK. An internal White House note written in 1996, which appears to be in her handwriting, lists both organizations as among the “bad guy” groups that might unintentionally be given tax-exempt status by a charity bill. This was hardly a studied analogy of one organization to the other. It does reflect the Clinton Administration’s well-known perspective on the NRA.

Ultimately, we think Kagan likely supports gun control laws as a policy matter, based on her work and communications within the Clinton Administration. Yet this reveals little of relevance for a Supreme Court Justice. We cannot infer much about her current view of the Second Amendment and what restrictions on guns are permitted by it. Our best guess is that she would be with the Court’s left on the question. The only evidence of her constitutional view is her words from her Solicitor General confirmation, in which she said that there is an individual right to bear arms under *Heller*.

II. Relevant source materials

- A. Kagan’s [memo](#) for Justice Thurgood Marshall recommending denial of cert. in *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987), in which the petitioner had been convicted of violating a D.C. gun law (1987):
 - “[The 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.”
- B. [Note from within the White House](#) listing the NRA with the KKK as “bad guy orgs” (appears to be in Kagan’s handwriting, 1996). Identified by Bench Memos.
- C. A presidential [memo](#) (1997), which Kagan drafted with Charles Ruff while on the Domestic Policy Council, directing the 120-day suspension of permits for the importation of certain semiautomatic assault-type rifles:

- “The number of weapons at issue underscores the potential threat to the public health and safety that necessitates immediate action.” (p. 3 of PDF)
 - “The temporary suspension [of licenses] does not constitute a permanent revocation of any license. Permits will be revoked only if and to the extent that you [the Secretary of the Treasury] determine that a particular weapon does not satisfy the statutory test for importation, and only after an affected importer has an opportunity to make its case to the Department.” (PDF p. 4)
- D. The resulting review of imported assault rifles by the ATF is summarized in this 126-page [report](#). The report confirms the findings of the 1989 review, but adds to the list of features for which an assault rifle can be banned “the ability to accept a detachable large capacity magazine originally designed and produced for a military assault weapon.”
- Kagan’s resistance to the ATF’s legal interpretation, conveyed through her edits to the draft report (at the link above):
 - The report: “[T]he members of Congress and the importer in the Landies case assert that, by virtue of the definition of “large capacity ammunition feeding devices” contained in section 921(a)(31), any large magazine may be imported in the United States for sale without restriction as long as it was manufactured before September 13, 1994. This interpretation of the definition section effectively renders the ban on large magazines meaningless.” (p. 8 of PDF)
 - (a) Handwritten note in the margin by Kagan: “Why? No, it doesn’t.”
 - The report: “The plain meaning of a statute is generally conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.’ *United States v. Ron Pair Enterprises, Inc.*...Although criminal statutes generally are construed strictly, ‘if an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered.’ *United States v. Campos-Sarrano*...” (p. 10 of PDF)
 - (a) Note from Kagan: “Sounds pretty desperate.”
 - At a later date, after the ATF proposed a new rule that would allow imports of devices manufactured on or before the date of enactment, Kagan wrote that “[t]his new rule looks to me like a fair interpretation of the statute.” (p.1 of PDF)
- E. An internal White House [email](#) (1997) from Dennis Burke to Bruce Reed and Michelle Crisci, written after the Supreme Court struck down the Brady Act’s requirement of background checks before rifle sales:
- “Based on Elena’s suggestion, I have also asked both Treasury and Justice to give us options on what POTUS could do by executive action -- for example, could he, by executive order, prohibit a FFL [Federal Firearms License Dealer] from selling a handgun w/o a CLEO [chief law enforcement officer] certification? We will continue to pursue.” (p. 28 of PDF)

F. A [memo](#) from Kagan and her boss Bruce Reed to President Clinton, outlining progress on a number of domestic policy fronts:

- “Crime -- Gun Control Strategy: We will give you a separate memo early this week outlining an aggressive strategy for administration officials and Democratic Members of Congress to press for quick passage of our gun control proposals. The meeting you held yesterday with House Members produced a terrific front-page (second lead) article in today’s New York Times, headlined ‘House Democrats Press Early Vote on Firearms Bill’ and perfectly conveying our intended message.”

G. During her confirmation to be Solicitor General, Kagan addressed gun rights in her written [response](#) to a question submitted for the record by Senator Chuck Grassley:

- “[T]here is no question, after *Heller*, that the Second Amendment guarantees individuals the right to keep and bear arms and that this right, like others in the Constitution, provides strong although not unlimited protection against governmental regulation.” (PDF p.18)

III. Supporters and opponents

A. Opponents and pro-gun interest groups:

- *Generally:*
 - National Rifle Association spokesman Andrew Arulanandam:
 - (a) “The NRA regards Ms. Kagan’s views as ‘outside the mainstream.’ The NRA intends to ‘work with the Senate to make sure tough questions will be asked during her confirmation hearings.’” ([Wall Street Journal](#) (May 15, 2010) and [Los Angeles Times](#) (May 27, 2010))
 - (b) Brian Darling, the director of Senate relations for the Heritage Foundation:
 - (i) “[The] burden has shifted to Kagan to show that she is not hostile to the Second Amendment.” ([Wall Street Journal](#) (May 15, 2010))
- *On her work on gun policy in the Clinton Administration:*
 - A [Washington Times](#) editorial (June 9, 2010):
 - (a) “The most recent [Supreme Court] pick, Elena Kagan, ran much of President Clinton’s war on guns from 1995 to 1999. When Ms. Kagan served as Mr. Clinton’s deputy domestic policy adviser, she was a feverish proponent of gun control. From gunlock mandates to gun-show regulations, she was instrumental in pushing anti-gun policies, according to the Los Angeles Times.”

- Brian Darling, director of Senate relations at the Heritage Foundation, on [Human Events](#) (May 14, 2010):
 - (a) “Her efforts to restrict the importation of some guns, mandate trigger-locks on federal law-enforcement officers’ guns and efforts to close gun shows are three issues that must be raised during Kagan’s Senate Judiciary Committee confirmation hearing.”
 - James Oliphant at the [Los Angeles Times](#) (May 27, 2010) presents evidence in an impartial news feature suggesting that the Clinton Administration’s review of semiautomatic rifles was a deliberate partisan attempt to remove more types of guns from the market:
 - (a) “At the time of the import ban, Jose Cerda, who worked in the domestic policy shop run by Kagan and her boss, Bruce Reed, said, ‘We are taking the law and bending it as far as it can to capture a whole new class of guns.’”
 - (b) “‘For the Clinton administration, it was about pushing the envelope,’ said Stephen Halbrook, a lawyer who litigates gun rights cases. ‘They didn’t like firearms and wanted to restrict them as much as possible.’”
 - (c) “He said Kagan’s role in the crafting those policies should be established. ‘You’re responsible for who you work for and what you say,’ Halbrook added. ‘Whether that’s her agenda or not, she certainly went along with that.’”
 - (d) He also adds: “Republican senators on the Judiciary Committee, such as Sens. Tom Coburn of Oklahoma and John Cornyn of Texas, are expected to press Kagan hard on the issue, as they did last year with Sonia Sotomayor.”
 - [Los Angeles Times \(May 11, 2010\)](#):
 - (a) [“A centrist course meant](#) negotiating with the firearms industry on a deal to put child-safety locks on guns rather than risk a legislative showdown. Gun-control efforts were a hallmark of the Clinton administration. Kagan had already been involved in an executive order that required all federal law enforcement officers to install locks on their weapons. Those moves angered the National Rifle Assn., which became even more alarmed in late 1998 when Clinton proposed closing the ‘gun show’ loophole that allowed firearms purchases without background checks. A legislative effort to do just that was launched as Kagan departed the White House for Harvard in 1999.”
 - The Heritage Foundation, at its blog [The Foundry](#) (May 13, 2010):
 - (a) “Elena Kagan may be hostile to the view that the 2nd Amendment to the Constitution protects American’s individual right to keep and bear arms. Bloomberg reports today, ‘Kagan Was “Not Sympathetic” as Law Clerk to Gun-Rights Argument.’ With the evidence presented by the Los Angeles Times that Kagan was very active in the gun control agenda during her time as counsel for the President Bill Clinton Administration, a thorough examination of Kagan’s views on the 2nd Amendment is merited.”
- *On her handling of McDonald v. Chicago as Solicitor General:*

- Ken Klukowski and Ken Blackwell (Ohio Secretary of State) at [BigGovernment.com](#) (May 14, 2010):
 - (a) “When the Supreme Court considered its last Second Amendment case, *District of Columbia v. Heller* in 2008, then-U.S. Solicitor General Paul Clement filed a brief in the case, and then requested and received time to argue the federal government’s position in that case as to the meaning of the Second Amendment.”
 - (b) “When the *McDonald* case was argued before the Court on March 2 of this year, current Solicitor General Kagan argued ... Nothing. Not only did she not ask for time during oral argument, she didn’t even file a brief (which the solicitor general routinely does in important constitutional cases—and the *McDonald* case is monumentally important).”
- *On the Marshall memo:*
 - [Statement](#) of Representative Mike Pence (R-IN), speaking at the annual NRA convention (May 14, 2010):
 - (a) “Sympathy for the express language of the Bill of Rights should be a prerequisite of service on the Highest Court in the land. America doesn’t need one more justice on the Supreme Court who is ‘not sympathetic’ to the constitutional rights of individual Americans!”
 - Ed Whelan at [Bench Memos](#) (May 13, 2010):
 - (a) “[I]t’s interesting that Kagan, rather than stating that the claim was meritless, wrote that she was ‘not sympathetic’ to it. Now perhaps Kagan simply used those concepts interchangeably (in the same way that lots of folks say ‘I feel’ when they presumably mean ‘I think’). Or maybe it means that long before President Obama spelled out his lawless ‘empathy’ standard, Kagan thought it [meaningful](#) to form and express her [legal judgment](#) in terms of her personal [sympathy](#) (or, in this case, lack thereof).”
 - (b) “I am of course not contending that Kagan’s 1987 statement establishes her current views on the Second Amendment, but (depending on how one reads her statement that she was ‘not sympathetic’) it may well be one piece of evidence that supporters of Second Amendment rights try to factor into their overall calculus.”
- *On her view of the National Rifle Association:*
 - Robert VerBruggen at [The Corner](#) (June 18, 2010):
 - (a) “The second [[memo](#) recently released by the Clinton Library] does have Kagan’s name on it; it is a memo from Allegra to Kagan. Allegra reports that he checked the IRS’s ‘Cumulative List of Organizations Described in Section 170(c)’ — the list of tax-exempt organizations, which, he says, are the only

organizations the bill would cover — and that neither the NRA nor the KKK was on it. ‘If you have other names you want me to run down in the Cumulative List, I would be glad to check them out,’ he adds, suggesting that Kagan requested the initial check of the NRA and the KKK.

Is Kagan so hostile to gun rights that she would compare the top gun-rights organization in the United States with a viciously racist hate group? It sure looks that way. We look forward to her explanation.”

B. Supporters:

- *On the presidential order draft:*
 - [Wall Street Journal](#) (May 12, 2010):
 - (a) “Bruce Reed, who was Ms. Kagan’s boss at the Domestic Policy Council, which advised Mr. Clinton on various matters, said the directive was issued in response to bipartisan concern in Congress about the rifles. President George H.W. Bush, he added, had undertaken a similar review of assault-type rifles.”
 - [Politico](#) (May 12, 2010):
 - (a) “Reed said the memo was probably actually drafted by Jose Cerda, a domestic policy aide.”
 - (b) The article also quotes Reed as saying: “The Bush administration concluded, and the Clinton administration affirmed, that a small number of weapons had military configuration — that they failed to pass the sporting-purposes test because they were not designed for hunting. They were designed primarily for military purposes.”
 - James Oliphant at the [Los Angeles Times](#) (May 27, 2010):
 - (a) “‘As a White House aide, Elena Kagan provided legal advice and evaluated policy proposals for President Clinton, whose views on these issues were well established,’ said Ben LaBolt, a White House spokesman. ‘In her confirmation hearing for solicitor general, Ms. Kagan made clear that she considered Heller to be settled law, and the upcoming hearing will present the opportunity for further questions about her views of the law to be asked and answered.’”
- *On the lack of an amicus brief in McDonald v. Chicago:*
 - [Doug Kendall](#) of the Constitutional Accountability Center, defending Kagan against Klukowski’s charge (above) that Kagan had declined to file an *amicus* brief on behalf of the United States in *McDonald* (May 19, 2010):

- (a) “On the incorporation question, there is also the fact that the Solicitor General’s Office has a tradition of *not* weighing in on incorporation cases at all, regardless of where it may stand on the merits of the case.”
- (b) “General Clement did file a brief and request argument time in that case. But while Clement encouraged the Court to find a limited individual right to bear arms, he also urged it to preserve the federal government’s ability to regulate gun use, a position that invoked intense ire from the National Rifle Association and other supporters of Mr. Heller, who, as noted by SCOTUSBlog, went so far as to list the Bush Administration’s brief among those supporting the District of Columbia, not Heller.”

◦ *On the Marshall memo:*

- White House spokesman Ben LaBolt:
 - (a) The tone of Kagan’s memo reflected “the prevailing view of law at the time.” [Bloomberg](#) (May 13, 2010)
- [Media Matters](#) (May 13, 2010):
 - (a) “Supreme Court justices have often used the term ‘sympathetic’ to refer to their agreement with legal arguments. Examples of justices using the word ‘sympathetic’ or a form of that word to refer to agreement include:
 - (i) Justice Samuel Alito, who [wrote](#) in an opinion joined by Justice Clarence Thomas:
 - (ii) ‘As I have previously explained, I believe that the Court’s approach in *Begay*, like its approach in this case, “cannot be reconciled with the statutory text.” I nonetheless recognize that “stare decisis in respect to statutory interpretation has ‘special force,’ and I am sympathetic to the majority’s efforts to provide a workable interpretation of the “residual clause” of the Armed Career Criminal Act (ACCA), while retaining the “categorical approach” that we adopted in *Taylor v. United States*. In light of *Taylor* and *Begay*, I agree that this case should be remanded for resentencing. I write separately, however, to emphasize that only Congress can rescue the federal courts from the mire into which ACCA’s draftsmanship and *Taylor*’s “categorical approach” have pushed us.’

◦ *Generally:*

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- Greg Sargent at the [Washington Post](#)’s Plum Line blog (June 11, 2010), referring to the memo in which Kagan pushed back against the ATF’s legal interpretation that would ban more assault rifles:
 - (a) “It will be hard to square this memo with claims that Kagan is an ‘ideologue’ or prone to legal ‘activism.’”

- Paul Helmke, president of the Brady Center to Prevent Gun Violence, in the [Huffington Post](#) (June 10, 2010):
 - (a) “Just weeks into her new post, Kagan exhibited her willingness to listen to a variety of perspectives on gun policy by moderating a debate hosted by the law school’s target shooting club between gun-control advocates and 2nd Amendment gun rights proponents.”
 - (b) “[W]hile working for President Clinton, Kagan apparently was in the loop when the Clinton Administration fashioned reasonable steps to require child-safety trigger locks on handguns and when cities, such as Chicago, brought lawsuits against gun makers. American children – more than any other children in the developed world – have suffered inordinate amounts of injuries and death due to gun manufacturers’ refusals to spend, in some cases, only a few more pennies, to make their products safer.”

IV. News sources

- A. Los Angeles Times, [*Gun rights could pose problem for Kagan*](#) (May 27, 2010)
- B. Wall Street Journal, [*NRA Criticizes Kagan on Gun Rights*](#) (May 15, 2010)
- C. Business Week, [*Kagan Said She Was Not ‘Sympathetic’ Toward Gun-Rights Claim*](#) (June 13, 2010)