

**Testimony on the Nomination of
Elena Kagan to be Associate Justice of the United States Supreme Court**
United States Senate Judiciary Committee
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by

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Chairman Leahy, Senator Sessions, and Members of the Committee:

My name is William Olson. I have practiced law in the District of Columbia and the Commonwealth of Virginia for 34 years, including Second Amendment law. For many years, our law firm has represented one of the nation's leading pro-Second Amendment groups — **Gun Owners of America**.¹ We have filed amicus briefs in U.S. Supreme Court cases such as Heller, McDonald, and in a few weeks, plan to file another amicus brief in the U.S. Court of Appeals for the District of Columbia Circuit — in a case known as Heller II.

Despite the Court's recent decision in District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008) and this past Monday's decision in McDonald v. Chicago, 561 U.S. ___ (2010), freedom-loving Americans understand that their right to keep and bear arms continues to be in jeopardy. Both victories were achieved by a narrow 5-4 vote. The elevation of any opponent of private ownership of firearms to the High Court constitutes a direct threat to the Second Amendment.

While Solicitor General Kagan's record on many important issues is sparse, the Committee must draw conclusions from what has been disclosed. As of today, her record reveals an underlying hostility to the people's right to keep and bear arms. She is not a person who could be expected to defend the Second Amendment as an Associate Justice of the Supreme Court. No Senator who fails to do everything in his power to prevent another anti-gun Justice from ascending to the High Court can return home and claim to be a friend of the Second Amendment.

I will address one revealing incident from each stage of Elena Kagan's career — as a Supreme Court law clerk in the 1980's, as a Clinton political operative in the 1990's, and as a nominee before this Committee.

If, after these hearings, there remain any questions as to what Elena Kagan said, or did, or believes about the Second Amendment, it would be my hope and prayer that no vote on her confirmation would occur until those issues are fully addressed.

¹ The Gun Owners of America website is at <http://gunowners.org/>. The Gun Owners Foundation website is at <http://www.gunowners.com/>.

1. The Case of Lee A. Sandidge v. United States.

Elena Kagan first revealed her Second Amendment views 23 years ago in Sandidge v. United States, 520 A.2d 1057 (D.C. App.), *cert. denied*, 484 U.S. 868 (1987). There, the defendant was convicted of possession of an unregistered handgun and ammunition in the District of Columbia — essentially the same provisions of the D.C. Code ruled unconstitutional in Heller. The D.C. Court of Appeals affirmed his conviction.

I happen to be familiar with that 1987 case, as firearms attorney Dan Peterson and I filed the only amicus brief in that case in the D.C. Court of Appeals — supporting Mr. Sandidge’s appeal. In our amicus brief, we explained that the D.C. government asserted:

the limitless principle that “statutory regulation of firearms is constitutionally permissible under the Second Amendment...”
[and] that the Second Amendment does not “**guarantee to individuals the right to possess firearms.**”²

I searched for and found my Sandidge file, and refreshed my recollection about the facts of the case. The file in Sandidge records that Mr. Sandidge was an African-American man who worked at a laundromat in the District. He was required to carry its cash receipts with him from the laundromat to his apartment over the laundromat at the end of the day — which necessitated leaving the building and walking on the street briefly between the two entrances. Mr. Sandidge previously had been robbed, and was carrying a .25 semi-automatic pistol for his own protection when he was arrested. In fact, there was testimony that there had been frequent robberies at the laundromat.

Mr. Sandidge’s petition for a writ of certiorari was reviewed by Elena Kagan while clerking for Justice Thurgood Marshall. Ms. Kagan’s memorandum on the case recommended to Justice Marshall the denial of the petition for cert, as follows:

[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.**³

² Amicus Brief of Center for Judicial Studies and Gun Owners Foundation, Lee A Sandidge v. United States of America, D.C. Court of Appeals No. 84-1045 (Oct. 14, 1986), p. 10 (emphasis added). The Court’s opinion appears at 520 A.2d 1057 (D.C. App., 1987). (The Center for Judicial Studies was founded and headed by revered scholar and constitutional lawyer, the late James McClellan. <http://www.mcclellanlibrary.org/>)

³ Elena Kagan, Memorandum of Aug. 27, 1987, Sandidge v. United States (emphasis added).

The appellant's brief in Sandidge, and our amicus brief, set out many of the same arguments and authorities later relied on by the Supreme Court in Heller. Ignoring these matters, the D.C. Court of Appeals improperly ruled that the Second Amendment was a collective right, not an individual right. One of the D.C. Court of Appeals judges advanced the astonishing theory that the Second Amendment did not even apply to the District of Columbia.

But law clerk Kagan had no problem turning her back on a man improperly convicted for owning a handgun for self-defense purposes — which Heller later ruled was protected by the Second Amendment. She was “not sympathetic.” Two points.

First, as a Supreme Court Justice, Elena Kagan would have significant discretionary powers, especially in decisions whether to grant certiorari. The Supreme Court Rules set forth the reasoned considerations governing the Court's discretion whether to grant review — unsurprisingly, “not sympathetic” is not one of them.⁴

Second, while most gun owners are not lawyers, they are better students of the Constitution than Ms. Kagan, having long understood that the Second Amendment protects an individual right. If, while serving as a Supreme Court law clerk, Elena Kagan did not “sympathize with” a man unjustly convicted for exercising his Second Amendment right to keep and bear arms in his own self-defense, why should anyone trust her to protect the Second Amendment now?

It is not that a judge cannot have strong feelings about a case, but emotion untethered to reason in the exercise of power to grant or deny review bespeaks an absence of judicial temperament. Since Sandidge, Ms. Kagan has neither said nor done anything to assure this body that she would not be governed by the same overriding anti-gun emotions.

2. Role in the Clinton Administration.

Elena Kagan's role from 1995 through 1999 as an Associate Counsel and Deputy Assistant for Domestic Policy in the Clinton Administration gives us what may be the most revealing insight into her hostility to the Second Amendment — the fact that she appeared willing to misuse the President's power to issue Executive Orders to usurp the authority of Congress to impose illegal barriers to firearms ownership. In her zeal for gun control, she showed a lack of respect for constitutional separation of powers as clarified by Justice Hugo Black in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). There, a member of the “liberal wing” of the Court, Justice Black stated emphatically that it was Congress, not the

⁴ However, certiorari can be granted for “an important question of federal law that has not been, but should be, settled by this Court.” Supreme Court Rule 10(c).

President, who had the authority to determine national policy and to set the rules for carrying that policy into effect.

Ms. Kagan was heavily involved in the Clinton White House's damage control involving the constitutional challenge to the ill-conceived 1994 Brady Bill. In a case litigated by firearms scholar Stephen P. Halbrook, Sheriff Jay Printz of Montana and Sheriff Richard Mack of Arizona convinced the U.S. Supreme Court in Printz v. United States, 521 U.S. 898 (1997), to strike down the Brady Bill requirement that state and local law enforcement officers be drafted into federal service to conduct and certify background checks on all handgun sales.

Even before this ruling was announced on June 27, 1997, the Clinton White House actively pursued an end-run strategy should the Supreme Court find the Brady Bill unconstitutional. Elena Kagan was in the thick of it.

After discussing legislative options to "respond to this Supreme Court decision," a March 17, 1997 e-mail from Dennis K. Burke concludes with a revelation about Elena Kagan's role:

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 licensee] from selling a handgun w/o a CLEO [chief law enforcement officer] certification? We will continue to pursue.⁵

The only conclusion that can be drawn from this e-mail is that Elena Kagan believed that the President of the United States had authority to circumvent the role of Congress and to act unilaterally, without any statutory authority, to impose restrictions on the private ownership of handguns. Like President Truman's advisors, discredited in Youngstown, Ms. Kagan had no constitutional misgivings about a unilateral presidential seizure of power.

Then, in November 1997, Ms. Kagan co-authored a transmittal memorandum to President Clinton that attached a proposed Presidential Directive to suspend the importation of new classes of firearms that were not covered by the 1994 assault weapons ban and had already been approved for importation by ATF.⁶ The Los Angeles Times reported that: "At the time of the import ban, Jose Cerda, who worked in the domestic policy shop run by Kagan and her

⁵ Dennis K. Burke e-mail to Michelle Crisci and Bruce Reed, Mar. 17, 1997 (KCL 6272) (emphasis added).

⁶ Memorandum from Charles F.C. Ruff and Elena Kagan to President William J. Clinton (Nov. 13, 1997).

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.’”⁷

In response to President Clinton’s actions, then Senate Judiciary Committee Ranking Member Patrick Leahy was reported to have written 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.”⁸ I agree completely with the position taken at the time by Senator Leahy.

3. Statements During Confirmation Hearings.

During her confirmation hearing to be Solicitor General, Elena Kagan was asked about the Supreme Court’s decision in Heller. Although she acknowledged the precedential weight of Heller and agreed to abide by the Heller decision as Solicitor General, she expressly “refrained from providing [her] personal views” or stating whether the case “was rightly decided?”⁹

First, as a Supreme Court Justice, Elena Kagan must take an oath to support the U.S. Constitution as the Supreme Law of the Land. Yet it appears that she believes that her oath is to “support” Supreme Court case precedent, not to support the Constitution as it is written, as required by Article VI.

When asked whether the Second Amendment protected the individual right to keep and bear arms, she stated:

there is no question, **after Heller**, that the Second Amendment [contains such a guarantee].¹⁰

⁷ James Oliphant, “Gun Rights Could Pose Problem for Kagan” (May 27, 2010) <http://www.latimes.com/news/nationworld/nation/la-na-kagan-guns-20100528,0,6017901.story>

⁸ See U.S. Senate Republican Policy Committee, *Clinton’s New Gun Ban: Administration Set to Trespass on Congressional Authority* (Mar. 16, 1998), available at <http://rpc.senate.gov/releases/1998/importban-kf.htm>

⁹ Elena Kagan responses to “Written Questions of Senator Chuck Grassley to Elena Kagan to Be Solicitor General, U.S. Department of Justice,” p. 1; Elena Kagan responses to “Written Questions of Chairman Patrick Leahy for Elena Kagan Nominee to be Solicitor General of the United States,” p. 7, <http://judiciary.senate.gov/nominations/111thCongress/ExecutiveNominations/upload/Kagan-QFRs.pdf>.

¹⁰ Elena Kagan responses to “Written Questions of Senator Chuck Grassley to Elena Kagan to Be Solicitor General, U.S. Department of Justice,” p. 2 (emphasis added),

That's nice — but what about before Heller? Heller did not rewrite the Second Amendment — the Supreme Court's decision only rejected a false notion that it protected a collective right. Her answer, that as Solicitor General she was bound by Heller, provides no assurance to this body that as a Supreme Court Justice, she is bound by the Second Amendment as written by the framers, rather than as interpreted by her predecessors.

Indeed, General Kagan's only reference to Second Amendment rights is to court opinions. When asked in these hearings on Tuesday by Senator Grassley whether the Second Amendment codified a preexisting right, or whether the right to keep and bear arms was created by the Constitution, she replied: "I never really considered that question." But when Senator Grassley asked the question whether the Second Amendment right was a "fundamental right," Kagan readily replied that it was so because the majority of justices in the McDonald case said so.

So the Kagan view of rights is whatever a majority of the Supreme Court rules at a particular time in a particular case. Under her philosophy of rights, what the Court grants, the Court may take away. No wonder Ms. Kagan refrained from testifying before this Committee during its hearings on her nomination as Solicitor General whether Heller was "rightly decided."¹¹ She has no standard whereby to measure the rightness or wrongness of a court decision.¹² Rather, to her a court opinion is "settled law" and "entitled to respect."

Beyond that — whether rights are given to us by our Creator God as the Declaration of Independence states — is a question that she never took time to consider. If Ms. Kagan has never even thought about whether our inalienable right to defend ourselves from criminals and tyrants comes from God or Government, she cannot be trusted to protect our God-given right to self-preservation.

<http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.

¹¹ Elena Kagan responses to "Written Questions of Chairman Patrick Leahy for Elena Kagan Nominee to be Solicitor General of the United States," p. 7, <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>

¹² This is true not only with respect to the Second Amendment, but the First as well. During re-argument in Citizens United, when asked by Justice Ginsburg whether it would be unconstitutional for the government to ban a book on a candidate for election to federal office, General Kagan declined to admit any First Amendment violation. Her only reply was that "the FEC never has never applied [2 U.S.C. section] 441b in that context" and "there would be quite good as-applied challenge to any attempt to apply 441b in that context." Citizens United v. Federal Election Commission, 558 U.S. 50 (2010), Tr. 64-65 (reargument).

Based on her statements, could there be any doubt that, if General Kagan had been the pivotal vote on the Court when it decided Heller, she would have swung the decision against the right of American citizens to possess firearms suitable and necessary for their self-defense? And while General Kagan now professes to support the precedent of Heller, at its core, Heller only determined that a complete ban on handguns was impermissible, leaving many issues to be decided in the future. None of the nine justices advanced the view that the right was a collective one, only differing as to the scope of the right. However, we can find no indication that Ms. Kagan agrees that the Second Amendment secures an individual right, which could make her, if confirmed, the most anti-Second Amendment of all sitting Justices.

CONCLUSION

In responding to questions from this Committee when confirmed as Solicitor General, Elena Kagan stated that her job then was to “channel” Justice Thurgood Marshall.¹³ Justice Marshall apparently did not feel himself bound by the text of the Constitution, preferring to “do what [he thought] was right, and let the law catch up.”¹⁴ I doubt that the American people want a Justice who would channel such views and do what she thinks is right on the Second Amendment — since, thus far, Elena Kagan has yet to show the Second Amendment any respect whatsoever.

¹³ Confirmation Hearing on the Nomination of Elena Kagan Nominee to be Solicitor General of the United States (Feb. 10, 2010) p. 99, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:55828.pdf

¹⁴ Deborah L. Rhode, *A Tribute to Justice Thurgood Marshall: Letting the Law Catch Up*, 44 Stan. L. Rev. 1259 (June, 1992).

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Mr. Olson holds a J.D. degree from the T.C. Williams School of Law, University of Richmond, and an A.B. degree in Political Science and Economics from Brown University. He is a member of the bars of the Commonwealth of Virginia and the District of Columbia, and admitted to practice before the U.S. Supreme Court, the U.S. Courts of Appeals for the 4th, 5th, 6th, 7th, 10th and 11th and D.C. Circuits, the U.S. District Courts for the District of Columbia, Eastern District of Virginia, Maryland (inactive), the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Armed Forces. He has been listed in *Who's Who in American Law*, *Who's Who in America*, and *Who's Who in the World*.

He was appointed by President Reagan to the Board of Directors of the national Legal Services Corporation (LSC), where he also served as Chairman. He had earlier served in the Office of President-Elect Reagan as head of the Transition Team for the LSC. He also served as a liaison member of the Administrative Conference of the U.S. He served for three years as Special Counsel (for Labor and Employee Relations) to the Board of Governors of the U.S. Postal Service. In the Reagan Administration, he also served on the President's Export Council's Subcommittee on Export Administration. He served as Chairman of the Fairfax County (Virginia) Republican Party.

Since its founding in 1993, Mr. Olson has served as legal co-counsel of the Free Speech Coalition, an organization dedicated to defending the speech, advocacy, and associational rights of nonprofit organizations against excessive government regulation. He has served as legal co-counsel to the Free Speech Defense and Education Fund since its formation in 1995. He is legal counsel to Conservative Legal Defense and Education Fund. He has been a founding director and officer of Victims Assistance Legal Organization (VALOR) since 1979. He served for six years on the Board of Directors of Goodwill Industries of Greater Washington (formerly Davis Memorial Goodwill Industries).

He is the author and co-author of legal and public policy studies on topics including executive orders and emergency powers, postal law and economics, immigration law, and firearms law. His writings have been published by organizations such as the American Enterprise Institute, CATO Institute, Crew & Kleindorfer, U.S. Border Control, Gun Owners Foundation, and articles in publications such as *Engage: The Journal of the Federalist Society*, and *USA Today*. He has testified before Committees of the U.S. Congress, the Federal Election Commission, and the Internal Revenue Service on a variety of occasions. He has also been a guest on radio and television shows such as the *Jim Lehr Newshour*, the *Larry King Show*, the *Art Bell Show*, CNN's *Crossfire*, Fox's *O'Reilly Factor*, NET's *Endangered Liberties*, and the *Glenn Beck Television Show*.

Mr. Olson lives in Frederick County, Virginia with his wife Janet, who was former Executive Director of the U.S. House of Representatives Republican Conference. The Olsons have two grown children.