2011

The Past and Future Role of The Second Amendment and Gun Control in Fights Over Confirmation of Supreme Court Nominees

Allen K. Rostron

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America's elected representatives do many things well, but making firearms policies and assessing Supreme Court nominees are two tasks with which they have struggled greatly in recent decades. Indeed, it is tough to say which of the two areas – regulating guns or evaluating potential justices – has become the greater source of disappointment and discontent.

Gun control is one of the nation's most volatile public policy issues. Many contend that the country pays a heavy price every day as a result of woefully inadequate legal controls on firearms. Others believe that legal restrictions on guns are counterproductive and that the freedom to have guns is in great peril. This gun control versus gun rights debate "reached a painful stalemate long ago."[1] It has "become deeply enmeshed in the culture wars between liberals and conservatives, between people who live in cities and people who live in the country" and it is now "one of the arenas in which we as Americans try to figure out who we are."[2] Gun laws remain "an often incoherent patchwork of provisions" with "unjustifiable gaps,"[3] and little hope remains for a more sensible approach because gun issues have become a "premier lethal third rail in American politics."[4] Whatever one believes to be the ideal regulatory approach,

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1 Gary Younge, *Made in America: Pride that Keeps Gun Law in Place: The Massacre Grabbed Public Attention but Prompted Little Political Debate*, Guardian (London), Apr. 21, 2007, at 12.

2 Mark V. Tushnet, Out of Range: Why the Constitution Can't End the Battle over Guns, at xiv (2007).

3 Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 Md. L. Rev. 511, 513 (2008).

4 Harry Rosenfeld, *Killings Renew Gun Control Issue*, Times Union (Albany,

the government's handling of the issue has frequently been a national embarrassment.

Similarly, few people have good things to say about the process by which the U.S. Senate decides whether to confirm those nominated to become Supreme Court justices.[5] Hypocrisy abounds, and intellectual consistency is rare, as senators decry tactics and arguments used against a nominee they favor, but then turn around and employ exactly the same means of attack when they oppose a nominee's confirmation.[6] "Nobody is interested in playing by a fair set of rules" and "still less do many people seem to care how much right and left have come to resemble each other in the gleeful and reckless distortions that characterize the efforts to defeat challenged nominations."[7] In particular, observers condemn the Senate Judiciary Committee's hearings on Supreme Court nominations as farcical charades marked by fatuous political grandstanding and "Mickey Mouse maneuvers and insinuations, spiced here and there with outright lies."[8] Meanwhile, nominees take "the judicial Fifth" and decline to answer questions that would reveal their views about any controversial legal issues.[9] The hearings degenerate into "dreary rituals,"[10] a sort of

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N.Y.), Apr. 22, 2007, at E5.

5 *See* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 Yale L.J. 1491, 1491 (1992). The literature on the flaws of the confirmation process is voluminous. *See*, *e.g.*, Stephen L. Carter, The Confirmation Mess: Cleaning Up the Federal Appointments Process (1995); Richard Davis, Electing Justice: Fixing the Supreme Court nomination Process (2006); Christopher L. Eisgruber, The Next Justice: Repairing the Supreme Court Appointments Process (2009); Charles Pickering, Supreme Chaos: The Politics of Judicial Confirmation & the Culture War (2006); Benjamin Wittes, Confirmation Wars: Preserving Independent Courts in Angry Times (2009).

6 Michael M. Gallagher, *Disarming the Confirmation Process*, 50 Clev. St. L. Rev. 513, 517-18 (2003).

7 Carter, *supra* note 5, at ix.

8 Thomas Sowell, *Hypocrisy and Grandstanding at the Senate Condemnation Hearings*, Balt. Sun, Jan. 19, 2006, at 15A.

9 David E. Rosenbaum, *No-Comment Is Common at Hearings for Nominees*, N.Y. Times, July 12, 2005, at A16.

10 Press Release, Sen. John McCain, Remarks by John McCain on Judicial Philosophy (May 6, 2008), *available at* LEXIS, CQ Congressional Press Releases file.

"Kabuki theatre" with "rigidly structured performances featuring strictly scripted role-playing by the leading characters."[11]

This Article looks at the intersection of these two much-maligned areas of American law, politics, and policy. It reviews the role that the Second Amendment and other gun issues have played in the Senate's consideration of Supreme Court nominations over the past forty years, and in doing so, it aims to provoke thinking about the role these issues may play in future confirmation fights. While it was once rare for guns even to be mentioned in the hearings or debate over Supreme Court nominees, that is no longer the case. Gun issues played a particularly prominent role in the Senate's consideration of Samuel Alito, Sonia Sotomayor, and Elena Kagan, with the first suspected of being too hostile to gun control measures and the latter two nominees accused of being too inhospitable to gun rights. These nominations provide an interesting perspective on how fairly the controversial and complicated legal issues surrounding guns can be handled by nominees, senators, interest groups, media, and others involved in or affecting the confirmation process. The significance of gun issues in the assessment of potential justices will likely continue to grow in the wake of the Supreme Court's landmark Second Amendment decisions in *District of Columbia v. Heller*[12] and *McDonald v. City of Chicago*,[13] cases that highlighted the importance of the gun debate's constitutional dimension and left a host of unresolved questions about implementation of the newly invigorated right to keep and bear arms.

Part I of this Article looks back at Supreme Court nominations and confirmations from the early 1970s to the mid-2000s. It describes how the Second Amendment and other gun issues usually drew little attention, even when the nominee's record seemingly should have raised significant questions in the minds of gun control advocates or gun rights supporters in the Senate. On the few occasions when senators asked gun-related questions, however, the nominees' seemingly bland answers sometimes offered telling clues about the positions they would later take as members of the Court. Part II turns to the nomination of Samuel Alito and looks closely at the controversy over a dissenting opinion he wrote, while serving as a member of the U.S. Court of Appeals for the Third Circuit in a case about the federal authority to regulate machine guns. I

11 *Too Much Showmanship*, Star-Ledger (Newark, N.J.), July 17, 2009, at 14.

12 128 S. Ct. 2783 (2008).

13 130 S. Ct. 3020 (2010).

argue that the Senate's confirmation hearings served a beneficial function in this instance, providing an opportunity for a fairly reasonable and sophisticated airing of the issue. Part III looks at how a Second Circuit decision about the Second Amendment became one of the key weapons in the arsenal of those opposed to Sonia Sotomayor's nomination, and how once again the confirmation hearings provided an important means of pushing the debate away from crude distortions and oversimplifications and toward a more fairly reasoned weighing of the real issues. Finally, Part IV examines the impact of gun issues on the Senate's consideration of the most recent Supreme Court nominee, Elena Kagan. In this instance, many senators talked a great deal about guns, but unfortunately they seemed eager to show off their zeal for gun rights but less interested in actually using the confirmation hearings to learn about the nominee's experiences and views. After reflecting on these nominations, I conclude the Article with some parting thoughts about confirmation battles to come.

I. From Rehnquist to Roberts

It was not until the mid-1970s that gun control became an intensely bitter and persistent national controversy. Before that, Congress had passed a few significant firearm laws, but policy debates regarding guns were sporadic and the level of rancor generated by the issue paled in comparison to that of recent decades.[14] No major organizations pushing for stricter gun control measures even existed until 1974.[15] On the other side, the National Rifle Association (NRA) had been around for a century, but focused on hunting, target shooting, and conservation, while putting relatively little emphasis on political issues during most of that time.[16] Likewise, guns occupied little of the Supreme Court's attention. The Court had not said anything of real significance about the Second Amendment or gun laws since 1939.[17] Not surprisingly, then, guns were

14 *See, e.g.*, Robert J. Spitzer, The Politics of Gun Control 109-16 (3d ed. 2004).

15 Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 Fordham L. Rev. 681, 690-91 (2004).

16 Spitzer, *supra* note 14, at 75-76, 81, 82.

17 *See* United States v. Miller, 307 U.S. 174 (1939) (rejecting a Second Amendment challenge to federal prosecution for illegal possession of sawed-off shotgun).

not an important issue when it came to scrutinizing Supreme Court nominees. For example, no one mentioned anything about the Second Amendment or gun control at the confirmation hearings conducted by the Senate Judiciary Committee for William Rehnquist and Lewis Powell in 1971[18] or for John Paul Stevens in 1975.[19]

No one else would be nominated for a seat on the Supreme Court until Sandra Day O'Connor in the fall of 1981.[20] By that point, the modern battle lines on gun issues had begun to appear. The fledgling national gun control organizations launched significant but largely unsuccessful initiatives seeking to convince legislators and voters to ban handguns.[21] "Hardliners" took over the NRA, and they were determined to ramp up the organization's lobbying and electioneering efforts. They fought more aggressively and uncompromisingly against any proposed gun control measures.[22] The murder of John Lennon in December 1980 and the attempted assassinations of President Ronald Reagan and Pope John Paul II in the spring of 1981 drew new attention to the hazards of guns in the wrong hands and further intensified the national debate over the problem.[23]

Nevertheless, the constitutional and other legal issues surrounding guns seemed to be of only mild interest to the senators weighing O'Connor's nomination. Republicans briefly quizzed O'Connor about the Second Amendment at her confirmation hearings.[24] When Strom Thurmond, the arch-conservative Senator from South Carolina, asked whether Congress could curtail the right to keep and bear arms, O'Connor explained that *United States v. Miller*[25] was the only major Supreme Court precedent on the point, and that the Court, in *Miller*, decided that the Second Amendment did not guarantee the right to have any certain type

18 *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. (1971).

19 *Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearings Before the S. Comm. on the Judiciary*, 94th Cong. (1975).

20 *Nomination of Sandra Day O'Connor: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. (1981) [hereinafter *O'Connor Hearing*].

21 Goss, *supra* note 15, at 691-93.

22 Spitzer, *supra* note 14, at 89-90.

23 *See, e.g.*, Rudy Maxa, *In Wake of Shootings, Handgun Control Folks Reap a Big Harvest of New Supporters*, Wash. Post Mag., Oct. 4, 1981, at 2.

24 *O'Connor Hearing*, *supra* note 20, at 134-35, 164-65.

25 307 U.S. 174 (1939).

of weapon, and that lower courts generally had interpreted the Second Amendment "as being a prohibition against Congress in interfering with the maintenance of a State militia, which appeared to be the thrust of the language in the amendment."[26] O'Connor added that many states had laws restricting possession and use of guns in various ways, such as laws prohibiting the carrying of concealed guns, and that these laws were enacted pursuant to the "police power which is reserved to the States."[27] O'Connor's answer implied that she considered these laws to be valid exercises of state authority, although she did not explicitly say so. Thurmond did not comment on O'Connor's response or ask any other questions on the topic, suggesting that he was not terribly bothered that O'Connor seemed more likely to support reasonable gun control measures than to push for any dramatic expansion of gun rights.

That afternoon, another long-serving Republican, Bob Dole, followed up with another question about the Second Amendment's effect.[28] Like Senator Thurmond before him, Dole seemed to be offering O'Connor a chance to make a statement about the importance of gun rights, but her answer again leaned cautiously in the other direction. O'Connor once again emphasized that the Supreme Court in *Miller* had interpreted the Second Amendment as being a prohibition against Congress interfering with the maintenance of state militias.[29] She reiterated that "the States, acting in their police power, had adopted a wide range of statutes regulating the possession and use of firearms," adding that the right to own and use guns for sport purposes or self-defense was well protected in most places, including in her home state of Arizona, simply because legislators had chosen to put only limited restrictions on guns.[30] Like Thurmond, Dole let the subject drop without further questions. O'Connor gave fairly guarded answers to Thurmond's and Dole's queries, primarily sticking to factual observations rather than expressing her personal views. To the extent that O'Connor's answers revealed something about her attitude toward guns, she sounded like a moderate supporter of reasonable gun control measures, but the gun issue simply did not play a prominent role in the consideration of O'Connor's

26 *O'Connor Hearing*, *supra* note 20, at 135.
27 *Id.*
28 *Id.* at 164.
29 *Id.*
30 *Id.* at 165.

nomination. O'Connor went on to win Senate approval by a 99-0 vote.[31]

Antonin Scalia walked an equally smooth path to approval by the Senate in 1986.[32] During his hearing before the Senate's Judiciary Committee, no one asked Scalia about the Second Amendment or anything else relating to guns.[33] Although Scalia's track record as a member of the U.S. Court of Appeals for the D.C. Circuit included several interesting cases relating to firearms,[34] no one asked him to comment on those cases.[35] On the same day that it unanimously approved Scalia's appointment to the Court, the Senate also confirmed William Rehnquist's elevation to Chief Justice.[36] Again, no senator questioned Rehnquist about anything relating to gun laws or the Second Amendment.[37]

Just a year later, Robert Bork became the next Supreme Court nominee to go before the Senate for confirmation hearings. Bork's nomination, and ultimate rejection by the Senate, was replete with controversy. Guns became a contentious issue in the Bork drama,

31 Fred Barbash, *O'Connor Confirmed as First Woman on Supreme Court; Senate Confirms O'Connor 99-0*, Wash. Post, Sept. 22, 1981, at A1.

32 *See* Al Kamen, *Rehnquist Confirmed in 65-33 Senate Vote; Scalia Approved as Associate Justice, 98-0*, Wash. Post, Sept. 18, 1986, at A1.

33 *Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. (1986) [hereinafter *Scalia Hearing*].

34 *See* Romero v. Nat'l Rifle Ass'n of Am., Inc., 749 F.2d 77 (D.C. Cir. 1984) (rejecting claims that the NRA should be liable to the widow of a man killed with a pistol and ammunition stolen from an NRA office); Nat'l Coal. to Ban Handguns v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 632 (D.C. Cir. 1983) (holding that a person is not required to have a bona fide commercial enterprise or business premises in order to obtain a federal license to sell firearms). One witness at Scalia's confirmation hearings, Audrey Feinberg of the Nation Institute, a civil liberties research group, suggested that Scalia's decisions in these cases revealed him to be a right-wing extremist on legal issues relating to gun control. *Scalia Hearing*, *supra* note 33, at 248.

35 Scalia would go on to write the Supreme Court's landmark opinion about the Second Amendment in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (striking down laws that banned handguns and required other guns to be kept unloaded and either disassembled or secured by a trigger lock). *See also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) (finding that the Fourteenth Amendment's Due Process Clause incorporates the right to keep and bear arms).

36 Kamen, *supra* note 32.

37 *Nomination of Justice William Hubbs Rehnquist: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. (1986).

but only behind the scenes. Bork apparently had little interest in the constitutional or policy issues surrounding firearms. Concerned that Bork was not making a good impression in the Senate hearings, a White House staff member advised Bork to try to steer the discussion toward America's great love affair with guns. Bork simply did not share that passion:

> Will Ball of the White House staff told Bork that he needed to "score a few more points." At one point, he said, perhaps Bork could bring the discussion around to the right to bear arms, a popular issue in the heartland. Bork said he had never really thought about that right. "Judge, goddamn, surely you've thought about the Second Amendment," protested Ball in his down-home southern accent. "Not really," Bork said, and the issue died. [38]

In the flurry of recriminations within conservative circles after Bork's defeat, some complained that the NRA, one of the nation's most powerful lobbying groups, had stayed on the sidelines rather than joining the push to confirm Bork. The NRA failed to come to Bork's aid, even though, as a member of the U.S. Court of Appeals for the D.C. Circuit, Bork made several decisions favorable to the interests of gun advocates,[39] and Bork-backers contacted every member of the NRA's board in a last-ditch effort to enlist the NRA's support.[40] The reasons for the NRA's inaction are the subject of sharp dispute. The NRA claimed that the White House asked it to stay out of the fight over Bork because the NRA's help would be counterproductive and only serve to further polarize the matter.[41] Sources close to Bork offered a different explanation, saying that the NRA was troubled by Bork's opposition to the exclusionary rule.[42] Gun dealers frequently invoked that rule in seeking to suppress

38 Ethan Bronner, Battle for Justice: How the Bork Nomination Shook America 238 (1989).

39 For example, Bork joined Scalia in rejecting tort claims brought against the NRA. *See Romero*, 749 F.2d 77 (D.C. Cir. 1984) and discussion *supra* note 34.

40 Patrick B. McGuigan & Dawn M. Weyrich, Ninth Justice: The Fight for Bork 79 (1990).

41 *Id.*

42 Bronner, *supra* note 38, at 203; McGuigan & Weyrich, *supra* note 40, at 79.

evidence from searches of their stores,[43] while gun owners used it to fight prosecution when police seized unregistered firearms from automobiles during traffic stops.[44] Bork's son later criticized the NRA for failing to back Bork because of its concerns about how Bork would influence Fourth Amendment jurisprudence.[45]

Ultimately, the NRA would not regret its failure to help Bork. A few years after his failed nomination, Bork said that the original intent of the Second Amendment was merely "to guarantee the right of states to form militia, not for individuals to bear arms."[46] Perhaps relishing the opportunity to take a stab at an organization that failed to help him, Bork mocked the NRA for thinking that the Second Amendment "protects their right to have Teflon-coated bullets."[47] He analogized the NRA's handling of the Second Amendment to the American Civil Liberties Union's treatment of the First Amendment,[48] a comparison that, coming from Bork, was a grave insult to the NRA.[49]

The legal and political issues surrounding guns thus wound up playing an interesting but indirect role in the Bork saga. Compared to the furor over Bork's views on other issues like privacy and civil rights, guns barely factored into the debate over whether the Senate should confirm Bork's nomination. Likewise, no one seemed interested in finding

43 *See* McGuigan & Weyrich, *supra* note 40, at 79.

44 Bronner, *supra* note 38, at 203.

45 R.H. Bork, Jr., *The Media, Special Interests, and the Bork Nomination*, *in* Ninth Justice: The Fight for Bork, *supra* note 40, at 253.

46 Claudia Luther, *Bork Says State Gun Laws Constitutional*, L.A. Times, Mar. 15, 1989, § 2, at 5; *see also* Robert H. Bork, Slouching Toward Gomorrah 166 n.† (1996) (arguing that "[t]he Second Amendment was designed to allow states to defend themselves against a possibly tyrannical national government" and "[n]ow that the federal government has stealth bombers and nuclear weapons, it is hard to imagine what people would need to keep in the garage to serve that purpose").

47 Miriam Bensimhon, *The Advocates: Point and Counterpoint, Laurence Tribe and Robert Bork Debate the Framers' Spacious Terms*, Life, Fall 1991, at 96.

48 Bork, *supra* note 46, at 152.

49 Bork apparently would later change his mind about the issue and join an amici brief arguing that the Second Amendment broadly protects private possession and use of guns unrelated to militia activities. Brief for Amici Curiae Former Senior Officials of the Department of Justice in Support of Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290), *available at* 2008 WL 405551.

out what Anthony Kennedy, the nominee that the Senate ultimately confirmed in Bork's place, thought about the Second Amendment or gun control. The Senate Judiciary Committee did not ask Kennedy a single question about those topics during his confirmation hearing.[50] Kennedy, of course, would go on to be the Court's crucial swing vote in a plethora of significant cases, including the most important Second Amendment rulings in American history.[51]

The Senate Judiciary Committee continued to ignore gun issues in considering subsequent confirmations, even when the nominee had something in his or her background that seemingly warranted closer scrutiny. For example, after President George H.W. Bush nominated David Souter in 1990, gun control advocates uncovered a brief, signed by Souter in 1976 when he was New Hampshire's attorney general, arguing that the Second Amendment provides no individual right to have guns and instead protects only the states' authority to maintain militias.[52] The brief made the argument in particularly vivid terms:

> Even in the state of Texas, a jurisdiction steeped in the lore of the wild west, of the quick draw and the showdown at high noon, it has been held that the state may, in the interest of public safety, prohibit carrying a pistol on one's person, despite a state constitutional guarantee of the right to bear arms. Surely no contrary result could be reached in a jurisdiction where no state constitutional right to bear arms exists, and where the war whoop of hostile Indians was last heard in 1763.[53]

The brief persuaded the New Hampshire Supreme Court to uphold a conviction under the state's law prohibiting unlicensed carrying of a

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50 *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. (1987).

51 *See* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

52 Press Release, Center to Prevent Gun Violence, Souter's Legal Brief Contradicts NRA Claims on Second Amendment (Aug. 19, 1990), *available at* LEXIS, PR Newswire file.

53 *Id.*

loaded handgun.[54] Although gun control proponents touted the brief as a repudiation of the NRA's interpretation of the Second Amendment,[55] gun rights proponents seemed unconcerned. Stephen Halbrook, a leading advocate for the NRA and its constitutional theories, dismissed the brief as something that likely was written by one of Souter's underlings in the attorney general's office, was never seen by Souter, and bore his name only as a formality.[56] The NRA's top lobbyist James J. Baker likewise assured nervous gun enthusiasts that "[e]verything we have been able to learn indicates that Souter looks at the Constitution from an historical perspective."[57]

If the NRA was not worried, that apparently was good enough for its allies in the Senate. At Souter's confirmation hearing, no one mentioned the brief or asked him about his views on the Second Amendment.[58] Alan Simpson, a Republican from Wyoming, seemed to be the only one itching to ask a question about guns, but it was an itch that he narrowly managed to resist scratching. After questioning Souter about other matters, Simpson found himself with a few minutes left and "a great temptation" to ask Souter about gun control.[59] Simpson then delivered a rambling soliloquy about how attitudes toward guns vary dramatically within the United States. He said, "[t]here is a sign in Massachusetts on the border that says if you have a gun in your possession it is a $100 fine," but "in Wyoming you carry a gun in the gun rack of your pickup truck."[60] Simpson paused to note that his friend from Massachusetts, apparently referring to Senator Ted Kennedy, had "an ever more intimate and personal reason" to feel strongly about gun issues.[61] "Talk about crazies with arms, versus the legitimate citizen with his arms," Simpson

54 *See* New Hampshire v. Sanne, 364 A.2d 630 (N.H. 1976).

55 Press Release, *supra* note 52.

56 Steven A. Holmes, *Gun-Control Group Heartened by '76 Souter Brief*, N.Y. Times, Aug. 19, 1990, § 1, at 17.

57 Jim Schneider, *Vegetarian Fascists Stalk the Forest*, Shooting Indus., Nov. 1, 1990, at 18.

58 *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. (1990).

59 *Id.* at 126.

60 *Id.*

61 *Id.*

mused.[62] In the end, Simpson opted not to ask a question, praised Souter for being a good listener, and concluded "I guess I am not going to worry about you at all" because "my President appointed you" and "I think you are going to be a splendid, splendid judge."[63] Some years later as a member of the Supreme Court, Souter would make clear that his position on the Second Amendment was the sort that tended to be favored more in Massachusetts than Wyoming,[64] presumably to the dismay of Simpson and other senators who favored gun rights but failed to ask Souter any questions about that constitutional provision when they had the chance.

When Clarence Thomas came before the Senate Judiciary Committee in 1991, Senator Simpson showed the same odd combination of interest in gun issues but unwillingness to ask questions about them during hearings. While chatting with a panel of witnesses who were there to talk about Clarence Thomas's views on issues concerning women, Simpson noted that he had refrained from asking Thomas about the Second Amendment during the hearing even though he knew that issue mattered most to his constituents.[65]

> I have been asked – I come from Wyoming, and I get my lumps on the reproductive rights issue. But I get another one. They say, Why don't you ask him about something that really is important to us, and that is ask him about how he is on the 2d amendment and gun control. Because if he is not right on that, Simpson, junk him. Get him. We are counting on you to do that.
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> Well, I am not going to do that. I have asked him about that, and he said, you know, he wasn't going to get

62 *Id.*

63 *Id.*

64 Souter would be one of the dissenters when the Court struck down gun laws in *United States v. Lopez*, 514 U.S. 549, 603-15 (1996) (Souter, J., dissenting), *Printz v. United States*, 521 U.S. 898, 970-76 (1997) (Souter, J., dissenting), and *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822-47 (2008) (Souter joined dissents by Justices Stevens and Breyer).

65 *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong., pt. 3, at 254 (1991). This was before the controversy over Thomas's alleged harassment of Anita Hill engulfed the nomination. *See id.* pt. 4.

> into anything of high controversy. . . .[66]

This time, Simpson's faith in the nominee would not be misplaced, for Clarence Thomas would turn out to be one of the Supreme Court's most ardent supporters of gun rights.[67]

By the time President Bill Clinton had the opportunity to make Supreme Court nominations, gun control had become a contentious issue that was frequently in the headlines. Clinton made gun issues a priority, and he seemed to relish butting heads with the NRA.[68] Momentum was building in Congress for enactment of federal laws requiring background checks for gun purchasers and prohibiting certain military-style "assault" weapons.[69] Not surprisingly, Clinton's nominees faced some questions about the Second Amendment during their confirmation hearings. For example, Senator Orrin Hatch, a conservative Republican from Utah, pressed Ruth Bader Ginsburg to explain why the right to keep and bear arms should not be treated as applying to state and local governments through the Fourteenth Amendment, like most other Bill of Rights provisions.[70] From the opposite end of the political spectrum, Senator Dianne Feinstein, a California Democrat and ardent gun control supporter, invited Ginsburg and Clinton's subsequent nominee Stephen Breyer to endorse the proposition that the Second Amendment protects only the right to keep and bear arms in connection with service in an

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66 *Id.* pt. 3, at 254.

67 Long before he voted for a broad interpretation of the Second Amendment in *Heller*, Thomas wrote a concurring opinion that foreshadowed the Supreme Court's move toward a more robust defense of gun rights. *See Printz*, 521 U.S. at 898, 935-39 (Thomas, J., concurring). Indeed, Thomas hinted that he thought the federal laws requiring criminal background checks on gun purchasers might violate the Second Amendment, *see id.* at 938, a position that would make Thomas a relatively militant defender of gun rights. *Cf. Heller*, 128 S. Ct. at 2816-17 (providing presumption of validity to laws prohibiting felons from possessing firearms and imposing conditions of the commercial sale of firearms).

68 *See, e.g.*, John King, *Clinton Provides Ammo in Attack on Gun Lobby*, Chi. Sun-Times, Mar. 7, 1993, at 24.

69 *See* Spitzer, *supra* note 14, at 120-28.

70 *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 128-29 (1993) [hereinafter *Ginsburg Hearing*].

organized militia like the National Guard.[71] Ginsburg declined to reveal anything about her views on the matter, saying "I am not prepared to expound on it beyond making the obvious point that the second amendment has been variously interpreted."[72] Breyer was a bit more forthcoming. Like Ginsburg, he declined to express an opinion about the Second Amendment's meaning.[73] He went out of his way, however, to emphasize repeatedly that he believed there was a broad and virtually unanimous consensus in America that many legal restrictions on guns can be validly imposed.[74]

> [E]very week or every month for the last 14 years, I have sat on case after case in which Congress has legislated rules, regulations, restrictions of all kinds on weapons; that is to say, there are many, many circumstances in which carrying weapons of all kinds is punishable by very, very, very severe penalties. And Congress, often by overwhelming majorities, has passed legislation imposing very severe additional penalties on people who commit all kinds of crimes with guns, even various people just possessing guns under certain circumstances.
>
> In all those 14 years, I have never heard anyone seriously argue that any of those was unconstitutional in a serious way. I should not say never because I do not remember every case in 14 years. So, obviously, it is fairly well conceded across the whole range of society, whatever their views about gun control legislatively and so forth, that there is a very, very large area for government to act. . . .[75]

71 *Id.* at 241-42; *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 261-63 (1994) [hereinafter *Breyer Hearing*].

72 *Ginsburg Hearing*, *supra* note 70, at 128; *see also id.* at 241-42 (repeating that the meaning of the Second Amendment was "a controversial question" that "may well be before the Court again" and "it would be inappropriate for me to say anything more than that").

73 *Breyer Hearing*, *supra* note 71, at 262.

74 *Id.* at 262-63.

75 *Id.* at 262.

While Breyer followed these remarks with the perfunctory reminder that he could not say how he would decide particular questions that might come before the Court in the future, anyone even mildly attuned to the debate over gun issues in America could have easily predicted that Breyer would favor giving governments wide latitude to regulate guns in the interest of public safety. And when the Supreme Court finally tackled the Second Amendment in *District of Columbia v. Heller*, that is exactly what Breyer did.[76] His dissenting opinion in *Heller* struck exactly the same chord as the remarks he made about the Second Amendment at his confirmation hearing, emphasizing the pragmatic reasons why courts should defer to reasonable legislative determinations that gun control laws will advance significant public policy goals like reducing crime and injuries.[77]

A decade later, during his confirmation hearings to become the Court's Chief Justice, John Roberts would give similarly revealing clues about his views on the Second Amendment during what seemed to be an innocuous deflection of a question. Senator Russ Feingold, a Democrat from Wisconsin with a mixed record on gun issues,[78] asked whether Roberts believed the Second Amendment protects an individual right to have guns for private purposes or only a collective right to keep and bear arms in connection with militia service.[79] Roberts declined to express a view on the matter, explaining that there was a circuit split on the issue and so it was likely to be a question before the Supreme Court at some point.[80] But after brushing off the question in that routine way, Roberts dropped a subtle but significant hint about his real views on the Second Amendment. Referring to the Supreme Court's last major ruling on the right to keep and bear arms, *United States v. Miller*,[81] Roberts said:

76 128 S. Ct. 2783, 2847-70 (2008) (Breyer, J., dissenting).

77 *Id.* at 2847; *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3124-29, 3134-38 (2010) (Breyer, J., dissenting) (arguing that courts should defer to reasonable state legislative determinations about costs and benefits of gun regulations).

78 For an eloquent explanation of Feingold's middle-of-the-road approach to gun issues, see 108 Cong. Rec. S1964-65 (daily ed. Mar. 2, 2004).

79 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 360 (2005) [hereinafter *Roberts Hearing*].

80 *Id.* at 360-61.

81 307 U.S. 174 (1939).

> I know the *Miller* case side-stepped that issue. An argument was made back in 1939 that this provides only a collective right, and the Court didn't address that. They said instead that the firearm at issue there – I think it was a sawed-off shotgun – is not the type of weapon protected under the militia aspect of the Second Amendment.
>
> So people try to read into the tea leaves about *Miller* and what would come out on this issue, but that's still very much an open issue.[82]

To those deeply immersed in the Second Amendment debate, this was a dead giveaway, like a "tell" that reveals the strength of a poker player's hand. "When he said that, it was a signal, to my ears," explained Dennis Henigan, the lead lawyer at the Brady Center to Prevent Gun Violence.[83] While gun control advocates had long taken the position that *Miller* conclusively rejected the "individual rights" interpretation of the Second Amendment, gun rights advocates insisted that *Miller* "side-stepped" the question and it was still an "open issue."[84] Sure enough, just a few years later, Roberts would go on to be part of the Supreme Court majority finding that *Miller* had side-stepped the issue and concluding that the Second Amendment provides an individual right unconnected to militia service.[85]

Gun control issues and the Second Amendment thus generally played a surprisingly limited role in the evaluation of Supreme Court nominees in recent decades, even though political and legal controversies surrounding guns grew more intense during this time. In most instances, no one on the Senate Judiciary Committee even bothered to ask about the nominee's views on gun issues. When someone did broach the

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82 *Roberts Hearing*, *supra* note 79, at 361.

83 Tony Mauro, *Both Sides Fear Firing Blanks if D.C. Gun Case Reaches High Court*, Law.com, July 30, 2007, http://www.law.com/jsp/article.jsp?id=900005556503.

84 *Id.*

85 *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2813-14 (2008) (finding that *Miller* addressed only the type of weapons covered by the Second Amendment and said nothing about the type of people or activities protected by the provision).

subject, the results were often quite interesting. Even when trying to give a bland, uncontroversial answer, nominees like Stephen Breyer[86] and John Roberts[87] let some striking clues slip about their fundamental stances in the gun debate. Guns never became a key issue for any Supreme Court nominee, however, until the three most recent high court hopefuls, Samuel Alito, Sonia Sotomayor, and Elena Kagan, had their chances to go before the Senate seeking confirmation.

II. Machine Gun Sammy

Guns became a significant issue in the debate over Samuel Alito's nomination largely because of a dissenting opinion that Alito wrote in *United States v. Rybar* while serving as a member of the U.S. Court of Appeals for the Third Circuit.[88] The *Rybar* case concerned the federal laws that regulate machine guns.[89] Since the passage of the National Firearms Act of 1934, machine guns have been subject to a special federal system of registration, taxation, and other restrictions.[90] In 1986, Congress went further and essentially cut off the supply of new machine guns to the civilian market, allowing automatic weapons already registered under the National Firearms Act to remain in circulation but prohibiting registration of any other machine guns.[91]

Raymond Rybar ran afoul of these federal laws when he sold two submachine guns to a firearms collector at a gun show in western Pennsylvania in 1992.[92] Rybar learned about machine guns while serving as a U.S. Army paratrooper in Vietnam,[93] and he had a small

86 *See supra* notes 73-77 and accompanying text.

87 *See supra* notes 80-85 and accompanying text.

88 United States v. Rybar, 103 F.3d 273, 286-294 (3d Cir. 1996).

89 A machine gun is an automatic weapon, meaning that it can fire more than one shot with a single pull of the trigger. 26 U.S.C. § 5845(b) (2006).

90 *See id.* §§ 5801-72; Allen Rostron, *High Powered Controversy: Gun Control, Terrorism, and the Fight over .50 Caliber Rifles*, 73 U. Cin. L. Rev. 1415, 1428-34 (2005).

91 *See* Firearm Owners' Protection Act, Pub. L. No. 99-308, § 102(9), 100 Stat. 449, 452-53 (1986) (codified at 18 U.S.C. § 922(o) (2006); Rostron, *supra* note 90, at 1434.

92 *Rybar*, 103 F.3d at 275.

93 Defendant's Response to Government's Objections to Presentence Report and Memorandum in Aid of Sentencing, United States v. Rybar, Crim. No.94-243

metalsmithing business that included repairing machine guns and making parts for them.[94] Although Rybar had federal licenses authorizing him to manufacture and sell firearms, the submachine guns he sold at the gun show were not registered under the National Firearms Act.[95] When the collector ran into trouble with federal law enforcers, he named Rybar as the source of the submachine guns[96] and a grand jury soon indicted Rybar for illegally possessing and transferring the two weapons.[97]

The district court threw out the charges against Rybar for illegally transferring unregistered machine guns, concluding that it would be fundamentally unfair to punish a person for failing to register weapons that Congress's 1986 enactment had made impossible to register.[98] However, the district court upheld the charges of unlawful possession of machine guns. Rybar entered a conditional guilty plea to those charges, maintaining his right to challenge on appeal the constitutionality of the federal laws underlying his conviction.[99]

Rybar began serving an eighteen-month prison sentence,[100] but hoped that the Third Circuit would overturn his conviction on appeal. Although he would also rely on the Second Amendment right to keep and bear arms, his chief argument was that Congress had exceeded its authority under the Commerce Clause by prohibiting purely intrastate possession of unregistered machine guns.[101]

Just a few days before the due date for Rybar's appellate brief,[102] the Supreme Court issued a decision that provided surprising new

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(W.D. Pa. Mar. 25, 1995), http://www.titleii.com/bardwell/us_v_rybar_brf2.txt (last visited Aug. 23, 2010).

94 Wyndle Watson, *Slings and Arrows of Outrageous Good Fortune*, Pitt. Post-Gazette, Aug. 29, 1993, at D16.

95 Appellant's Petition for Rehearing with Suggestion of Rehearing *en banc*, United States v. Rybar, 103 F.3d 273 (3d Cir. 1996) (No. 95-3185), http://www.titleii.com/bardwell/us_v_rybar_brf6.txt (last visited Aug. 23, 2010).

96 *Id.*

97 *Rybar*, 103 F.3d at 275.

98 *Id.*

99 *Id.*

100 *Id.*

101 Brief for the Appellant at 7-24, United States v. Rybar, 103 F.3d 273 (3d Cir. 1995) (No. 95-3185), 1995 WL 17197799.

102 *See id.* at 12-24.

support for Rybar's position. In *United States v. Lopez*,[103] the Supreme Court struck down the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm within one thousand feet of a school.[104] The Court concluded that, in enacting the statute, Congress exceeded its authority to regulate interstate commerce because the possession of a gun near a school is not a commercial activity.[105] The statute applied to all firearms, not just those proven to have a connection to or effect upon interstate commerce.[106] Citing *Lopez*, Rybar argued that if the federal government does not have the power to ban possession of firearms near schools, it also does not have the power to punish him for possession of machine guns.[107]

Judge Alito agreed. He saw no basis for distinguishing the law struck down in *Lopez* from the federal statute restricting possession of machine guns under which Rybar had been convicted.[108] In Alito's view, the *Lopez* decision was not merely a "constitutional freak"; instead, it showed that "the Commerce Clause still imposes some meaningful limits on congressional power."[109] Alito emphasized that his position on the issue would not prevent lawmakers from enacting "adequate regulation" of machine guns.[110] Congress could cure the constitutional defect in the statute by making credible findings that possession of machine guns substantially affects interstate commerce, by assembling sufficient evidence to that effect, or by adding a jurisdictional element to the statute so that federal prosecutors would be required in each case to prove that

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103 514 U.S. 549 (1995).

104 Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (codified as amended at 18 U.S.C. §§ 921(a)(25)-(27), 922(q), 924(a)(4)).

105 514 U.S. at 561.

106 *Id.* at 561-62. After *Lopez*, Congress amended the statute that had been struck down, making it apply only to "a firearm that has moved in or that otherwise affects interstate or foreign commerce." 18 U.S.C. § 922(q)(2)(A) (2000), amended by Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 369-71 (1997). The amended statute has been upheld as a valid exercise of federal authority over interstate commerce. *See, e.g.*, United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005); United States v. Danks, 221 F.3d 1037, 1038-39 (8th Cir. 1999).

107 United States v. Rybar, 103 F.3d 273, 277-78 (3d Cir. 1995).

108 *Id*. at 286-87 (Alito, J., dissenting).

109 *See id.* at 286.

110 *Id.* at 287.

the defendant's machine gun had moved in or otherwise affected interstate commerce.[111] Alito also pointed out that even if the federal government did not regulate machine gun possession, every state would remain free to do so.[112]

Unfortunately for Raymond Rybar, Judge Alito was the only one of the three judges on the Third Circuit panel in the case who saw the issue that way. Over Alito's dissent, the other two judges voted to uphold Rybar's conviction on the ground that Congress reasonably could have believed that banning possession of machine guns would have a substantial effect on interstate commerce.[113] The vast majority of federal appellate judges across the nation similarly found that the machine gun statute is valid,[114] although a few judges in other circuits shared Alito's sentiment that the statute exceeds Congress's proper reach.[115]

As soon as Alito's nomination to join the Supreme Court was announced on October 31, 2005,[116] his dissenting opinion in *Rybar* became a key element in the debate over the nomination. Alito's supporters hailed the *Rybar* dissent as a courageous defense of gun rights.[117] Critics condemned it as a prime example of Alito's "aggressively outlying record"

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111 *Id.*

112 *Id.*

113 *Id.* at 282-83 (majority opinion).

114 *See, e.g.*, United States v. Franklyn, 157 F.3d 90, 93-97 (2d Cir. 1998); United States v. Knutson, 113 F.3d 27, 29-31 (5th Cir. 1997); United States v. Kenney, 91 F.3d 884, 886-91 (7th Cir. 1996); United States v. Rambo, 74 F.3d 948, 951-52 (9th Cir. 1996); United States v. Wilks, 58 F.3d 1518, 1519-22 (10th Cir. 1995).

115 *See* United States v. Beuckelaere, 91 F.3d 781, 787-88 (6th Cir. 1996) (Suhrheinrich, J., dissenting); United States v. Kirk, 70 F.3d 791, 798-802 (5th Cir. 1995) (Jones, J., dissenting); *cf.* United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003) (holding that the federal government could ban possession of a machine gun that had been transferred from one person to another at some point before being illegally possessed, but not a homemade machine gun produced and possessed only by defendant himself), *vacated*, 545 U.S. 1112 (2005), *remanded to* 451 F.3d 1071 (9th Cir. 2006) (upholding the federal law even for a homemade machine gun).

116 President George W. Bush & Judge Samuel A. Alito, *Remarks by President George W. Bush at Announcement of His Nomination of Judge Samuel A. Alito to the Supreme Court of the United States* (Oct. 31, 2005), *available at* LEXIS, Federal News Service file.

117 *See, e.g.*, Editorial, *A Supreme Nomination*, Wash. Times, Nov. 1, 2005, at A18.

as a judge.[118]

Interest groups opposed to Alito's nomination quickly bestowed on him the nickname "Machine Gun Sammy."[119] Their creative efforts to draw attention to the *Rybar* dissent included production of a "wanted" poster, declaring that Alito had been consorting with "practically criminal organizations, including the NRA" and that he should be considered "armed (with extreme political views) and dangerous (to the nation's future)." [120] The "wanted" poster featured an image of Alito's face photoshopped onto the body of a dapper Prohibition-era gangster holding a "Tommy" submachine gun.[121]

Some observers felt this sort of dramatization of Alito's record went too far. They complained that depicting Alito as a gangster, even in a way obviously not meant to be taken literally, tapped into stereotypes about Italian-Americans and organized crime.[122] Others complained that gun control advocates had oversimplified the issue presented in *Rybar* too much by, for example, portraying Alito as "favor[ing] legal machine guns."[123]

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118 Cragg Hines, *'Scalito?' Nothing Is 'Lite' About Bush's Newest Pick*, Hous. Chron., Nov. 1, 2005, § B, at 9.

119 Press Release, Brady Campaign to Prevent Gun Violence, 'Machine Gun Sammy,' a Perfect Halloween Pick, Says Brady Campaign (Oct. 31, 2005), *available at* LEXIS, PR Newswire file.

120 Gun Guys, WANTED: "Machine Gun Sammy," http://www.gunguys.com/mgsammy.php (last visited Apr. 14, 2010) [hereinafter WANTED: "Machine Gun Sammy"]. GunGuys was at the time a project of the Freedom States Alliance (which subsequently merged into States United to Prevent Gun Violence). Gun Guys, About Us, http://www.gunguys.com/?page_id=3598 (last visited Aug. 23, 2010).

121 WANTED: "Machine Gun Sammy," *supra* note 120.

122 *See, e.g.*, M. Charles Bakst, *Italian-Americans and the Alito Nomination*, Providence J. (R.I.), Jan. 10, 2006, at B-01; Elizabeth Gudrais, *Panel Says Alito Critics Recycling Stereotypes*, Providence J. (R.I.), Jan. 6, 2006, at B-01; Rosario A. Iaconis, Opinion, *Alito Can Be Proud of His Heritage: Critics of the Court Nominee Are Resorting to Anti-Italian Smears, but He Has a Majestic Patrimony Behind Him*, Newsday (N.Y.), Nov. 30, 2005, at A39.

123 *E.g.*, Vincent Carroll, Editorial, *On Point: The "Machine Gun" Lie*, Rocky Mtn. News (Denver), Nov. 2, 2005, at 41A (quoting Press Release, *supra* note 119); Eugene Volokh, *Brady Campaign Misrepresents Judge Alito's Position on Machine Gun Possession*, Volokh Conspiracy, Nov. 5, 2005, http://volokh.com/posts/1131223466.shtml (quoting Press Release, *supra* note 119).

Of course, one must bear in mind that rhetorical exaggeration and hyperbole are routine tools of issue advocacy groups across the political spectrum. Special interest groups struggle mightily to arouse support and draw attention to their messages, and, in doing so, they inevitably employ a certain degree of dramatic license. Just as the law affords leeway to the "puffery" of merchants hawking their wares,[124] or the overheated raves of Hollywood publicists,[125] we can expect and tolerate rhetorical flourishes from interest groups that we might condemn if they came from other sources like scholars, journalists, or politicians.

The *Rybar* dissent was a significant topic of discussion during Alito's confirmation hearing before the Senate Judiciary Committee.[126] Alito and the senators handled the issue in a reasonable and fair manner. Before Alito had even begun to speak, several senators brought up the *Rybar* case in their opening statements. In measured terms, they advised Alito of their concerns about his *Rybar* dissent and how it suggested that Alito had an unduly narrow view of congressional authority. No one claimed that Alito had taken a frivolous position in *Rybar* or accused him of seeking to flood the streets with automatic weapons. Senator Dianne Feinstein, for example, rightly pointed out that Alito wanted to strike down the machine gun law "based essentially on a technicality."[127] In other words, rather than undercutting federal power in any truly significant way, Alito's position in *Rybar* would have forced the federal government to jump through some additional hoops to accomplish essentially the same end result. Feinstein and other senators certainly were entitled to be skeptical of what seemed to be a hyper-technical approach to federal authority in the *Rybar* dissent and to quiz Alito about whether he would similarly seek to minimize federal power in future instances when the stakes might be much higher.

At the hearing, Alito had fair opportunities to defend his *Rybar*

124 *See* David G. Owen, Products Liability Law § 3.2, at 123 (2d ed. 2008).

125 *See* Presidio Enterprises v. Warner Bros. Distrib., 784 F.2d 674 (5th Cir. 1986) (rejecting fraud claims against film studio that declared its movie about killer bees invading America would be a blockbuster hit).

126 *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Alito Hearing*].

127 *Id.* at 26; *see also id.* at 38 (statement of Sen. Schumer) (expressing concern about whether Alito still holds the "cramped views of congressional power" evident in his *Rybar* dissent).

dissent. He explained why he felt it was consistent with the Supreme Court's reasoning in *Lopez* and why it posed no significant obstacle to strict government regulation of machine guns.[128] Alito emphasized that his "position in *Rybar* was really a very modest position, and it did not go to the question of whether Congress can regulate the possession of machine guns."[129] He noted that his opinion spelled out how "it would be easy for Congress" to fix the statute by making more specific findings about how possession of machine guns generally affects interstate commerce or by requiring prosecutors to prove in each case brought under the statute that the particular machine gun in question had some connection to interstate commerce.[130] Alito conceded that he might have reached a different conclusion if the Supreme Court's subsequent decision in *Gonzales v. Raich*,[131] which upheld federal authority to ban medical use of marijuana, had been available to him when *Rybar* was decided.[132]

At one point during the proceedings, Senator Arlen Specter described Supreme Court nomination hearings as "a subtle minuet, with the nominee answering as many questions as he thinks necessary in order to be confirmed."[133] Senator Joe Biden later said he hoped Alito's hearing could be a conversation rather than a minuet, because "we – you and I and this Committee – owe it to the American people in this one democratic moment to have a conversation about the issues that will affect their lives profoundly."[134] Unfortunately, the Alito hearing did not generate an informative and useful airing of every issue. Alito, for example, purported not to know enough about *Bush v. Gore*,[135] one of the most famous and important decisions in recent history, to be able to

128 *See, e.g.*, *id.* at 377-78, 395-98, 406-07, 444-45, 633. To the extent that anyone said anything arguably misleading about the machine gun issue during the hearing, it was when Alito's supporters cited a Ninth Circuit ruling as support for Alito's views but neglected to mention that the ruling had been vacated by the Supreme Court. *See, e.g.*, *id.* at 377 (statement of Sen. Kyl) (referring to United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), *vacated*, 545 U.S. 1112 (2005), *remanded to* 451 F.3d 1071 (9th Cir. 2006)).

129 *Alito Hearing*, *supra* note 126, at 377.

130 *Id.* at 377-78.

131 545 U.S. 1 (2005).

132 *Alito Hearing*, *supra* note 126, at 628-29.

133 *Id.* at 3.

134 *Id.* at 18.

135 531 U.S. 98 (2000).

say whether it was rightly decided.[136] He obfuscated rather than trying to shed any real light on hot-button issues like abortion.[137] But with respect to the *Rybar* issue, Alito's hearing generally fulfilled the hopes for more than a meaningless minuet. The hearing provided a fair exploration of Alito's position in *Rybar* and a reasonably sophisticated dialogue about differing conceptions of the reach of the federal government's commerce power.

Rybar was not a major point of discussion when the Judiciary Committee met a few weeks later and voted on sending Alito's nomination to the full Senate.[138] Although the Committee remained divided over the nomination, with all ten Republicans voting in Alito's favor and all eight Democrats voting against him, interest in *Rybar* and gun control in general had receded to the point where only a few of the committee's members mentioned those matters in the remarks preceding and explaining their votes.[139] To the extent that senators mentioned gun issues, the discussion seemed to move back in the direction of oversimplification and away from the careful and precise articulation of the issues that had characterized the dialogue with Alito at the hearings. For example, Senator Herb Kohl, a Democrat from Wisconsin, complained that Alito "was in the extreme minority of judges around the country when he found that Congress has no ability to regulate machine guns."[140] Again, Alito arguably took an unduly narrow and exacting view of congressional authority in *Rybar*. He would have forced Congress to be more precise in its findings about how machine guns affect interstate commerce or perhaps limit the federal statutes so that they would apply only to machine guns shown to have

136 *Alito Hearing*, *supra* note 126, at 386.

137 *See, e.g.*, *id.* at 432-34.

138 *The Nomination of Samuel Alito to the Supreme Court*: *Meeting of the S. Comm. on the Judiciary*, 109th Cong. (2006), *available at* LEXIS, Federal News Service file [hereinafter *Alito Committee Meeting*].

139 *Id.* (statements of Senators Kohl, Feinstein, and Schumer).

140 *Id.* At the press conference following the committee vote, Senator Charles Schumer similarly characterized Alito as having taken the position that "the federal government can't regulate machine guns." Sen. Harry Reid et al., *Press Conference with Democratic Leaders and Members of the Senate Judiciary Committee Following Committee Vote on Nomination of Judge Samuel Alito to Be an Associate Justice of the Supreme Court* (Jan. 24, 2006), *available at* LEXIS, Federal News Service file.

some connection to interstate commerce.[141] The fact that Alito would make Congress take those steps to revise the machine gun laws might suggest that Alito would limit Congress's ability to act in other important contexts where its ability to work around the Supreme Court's objections might be less clear. As Senator Feinstein argued to her fellow Judiciary Committee members before their vote, Alito had merely made a technical objection to the way in which Congress enacted the machine gun law, but that sort of nitpicking about federal authority might suggest that Alito, if allowed to become a member of the Supreme Court, would be inclined to make it very difficult for Congress to pass additional laws relating to gun violence and other important issues like worker safety and consumer protection.[142] While it oversimplifies the issue to say Alito's position would have left Congress with no ability to regulate machine guns, legitimate reasons for concern about Alito's vision of federal authority certainly existed.

A few days later, the same general pattern emerged in the full Senate's debate on Alito's nomination. In a few isolated instances, Alito's critics oversimplified or exaggerated the *Rybar* issue. For example, Senator Barbara Boxer warned that if the Senate confirmed Alito, "our children could end up living in a very different America," one where "[d]angerous automatic weapons might become broadly available."[143] But most senators simply and fairly argued that *Rybar* and other evidence in Alito's record suggested Alito would take a restrictive view of congressional authority, not just for firearms but also with respect to other significant issues like civil rights, environmental laws, health and safety regulations, and major federal programs like Social Security and Medicare.[144] In response, Alito's supporters in the Senate offered a plausible defense of the *Rybar* dissent, saying it merely represented Alito's conscientious effort to follow Supreme Court precedent and pointing out that Alito provided "a virtual roadmap for how Congress could regulate the possession of guns in a way consistent

141 *See supra* note 111 and accompanying text.

142 *Alito Committee Meeting*, *supra* note 138.

143 152 Cong. Rec. S310 (daily ed. Jan. 30, 2006) (statement of Sen. Boxer).

144 *See, e.g.*, 152 Cong. Rec. S342-43 (daily ed. Jan. 31, 2006) (statement of Sen. Chafee); 152 Cong. Rec. S152 (daily ed. Jan. 26, 2006) (statement of Sen. Feinstein); 152 Cong. Rec. S69 (daily ed. Jan. 25, 2006) (statement of Sen. Clinton); *Id.* at S85 (statement of Sen. Reed).

with the Constitution and Supreme Court case law."[145]

The process led to a reasonable exploration and airing of the issue. In the end, attentive observers, including senators on both sides of the aisle, surely knew that Alito was unlikely to lead a judicial crusade to wipe out all legal restrictions on machine guns. But at the same time his dissenting opinion in *Rybar* was a telling indication that he would tend to take a relatively narrow view of federal authority in general, and that he was likely to look favorably on gun rights arguments in particular. In short, the senators knew what they were getting with Alito, and they confirmed his nomination, albeit by a fairly narrow margin, with 58 senators voting for Alito and 42 voting against him.[146] Alito lived up to expectations by becoming a crucial fifth vote for the majority opinion in *Heller*, a decision unlikely to bring about unfettered access to automatic weapons,[147] but one that nevertheless dramatically re-drew the lines in constitutional law with respect to guns.[148]

III. The Gun Grabbers' Dream Come True

Gun enthusiasts seemed to draw little reassurance from the Supreme Court's pronouncements about the Second Amendment in *Heller*. Barack Obama's victory in the presidential election in November 2008 sparked a binge of gun purchases across the nation.[149] Although the Obama Administration has thus far been uninterested in doing anything relating to firearms (except making it legal to carry them in more places),[150] many Americans remain convinced that a crackdown on

145 152 Cong. Rec. S304 (daily ed. Jan. 30, 2006) (statement of Sen. Kyl).

146 152 Cong. Rec. S348 (daily ed. Jan. 31, 2006).

147 To date, courts have shown no inclination to believe that *Heller* casts doubt on the validity of federal restrictions on machine guns. *See, e.g.*, Hamblen v. United States, 591 F.3d 471, 474 (6th Cir. 2009); United States v. Fincher, 538 F.3d 868, 873-74 (8th Cir. 2008).

148 Alito would go on to write the opinion in McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), concluding that the right to keep and bear arms applies to state and local governments through the Fourteenth Amendment.

149 Allen Rostron, *Cease Fire: A "Win-Win" Strategy on Gun Policy for the Obama Administration*, 3 Harv. L. & Pol'y Rev. 347, 347-48 (2009).

150 *See* Brady Center to Prevent Gun Violence, President Obama's First Year: Failed Leadership, Lost Lives 2 (2010) (giving Obama a report card with all "F" grades for his handling of gun policy issues during his first year in

gun access is somehow right around the corner.[151]

The Supreme Court's ruling in *Heller* left many questions unanswered, one of the most crucial being whether the right to keep and bear arms should be "incorporated" into the Fourteenth Amendment so as to restrain the actions of state and local governments.[152] Although the Bill of Rights applies directly only to the federal government, the Supreme Court has decided, in a string of rulings stretching over many years, that most of the provisions of the Bill of Rights are fundamentally important and therefore apply to state and local governments through the Fourteenth Amendment's due process clause.[153] For example, freedom of speech is expressly protected against federal infringement by the First Amendment, but freedom of speech is also a fundamental part of what it means to receive due process of law as promised by the Fourteenth Amendment.[154] The Supreme Court has balked at incorporating only a few Bill of Rights provisions, most notably the Fifth Amendment's clause requiring serious criminal prosecutions to be initiated by grand jury indictments and the Seventh Amendment's guarantee of the right to a jury trial in civil cases.[155] Without incorporation of the right to keep and bear arms, *Heller*'s impact would be dramatically limited. States, cities, and counties could remain free to ban or restrict guns in any manner.

In several cases decided more than a century ago, such as *United States v. Cruikshank*[156] and *Presser v. Illinois*,[157] the Supreme Court indicated that the Second Amendment could be infringed only by the federal government and did not apply to the states. Those rulings, however, were issued before any part of the Bill of Rights had been incorporated into

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office).

151 *See* Rostron, *supra* note 149, at 347-48.

152 *See generally* John E. Nowak & Ronald D. Rotunda, Constitutional Law § 10.2, at 396-99 (7th ed. 2000) (providing an overview of the Bill of Rights provisions and their incorporation into the Fourteenth Amendment). The Supreme Court would answer this question, a year after *Heller*, in the case of McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). *See infra* notes 265-266 and accompanying text.

153 *Id.*

154 *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925).

155 *See* Nowak & Rotunda, *supra* note 152, § 10.2, at 397-98.

156 92 U.S. 542, 553 (1875).

157 116 U.S. 252, 264-65 (1886); *see also* Miller v. Texas, 153 U.S. 535, 538 (1894).

the Fourteenth Amendment.[158] As the incorporation movement gained steam during the twentieth century, the Supreme Court never had an occasion to revisit the question of whether the right to keep and bear arms should be incorporated.[159] Cases like *Cruikshank* and *Presser* therefore took on an odd status as the years passed. Everyone knew these decisions were at least in some sense obsolete because they predated the emergence of the contemporary approach to incorporation questions. The rulings were incomplete in their reasoning, even if not necessarily wrong in their results. But the Supreme Court had never overruled them, and therefore they remained binding precedents that lower courts had an obligation to follow. The Supreme Court has emphasized many times that it alone has the authority to decide when one of its past decisions should be overruled, and lower courts should resist the temptation to take it upon themselves to say that a Supreme Court ruling is archaic and no longer controls.[160]

Even when the Supreme Court, in *Heller*, finally addressed the Second Amendment for the first time in many years, the Court was able to avoid the incorporation question because the case involved laws of a jurisdiction, the District of Columbia, that is a special federal territory and not a state. The majority opinion in *Heller* included a footnote acknowledging that the incorporation issue was not before the Court but would need to be decided in the future since old decisions like *Cruikshank* and *Presser* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases" and therefore did not settle the point.[161]

The incorporation issue soon popped up in courts around the country. Relying on *Heller*, litigants challenged the constitutionality of state and local legal restrictions on weapons. Jim Maloney was one individual who brought such a challenge, although it was unusual in that the case did not involve guns. Maloney lives on Long Island in New

158 The first step in the line of Supreme Court decisions incorporating Bill of Rights provisions into the Fourteenth Amendment is generally considered to be *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

159 The incorporation issue did not come up in *United States v. Miller*, 307 U.S. 174, 175 (1939), the only significant Second Amendment case heard by the Supreme Court in the twentieth century, because that case involved a constitutional challenge to a federal statute rather than a state law.

160 *See, e.g.*, United States v. Hatter, 532 U.S. 557, 567 (2001); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

161 District of Columbia v. Heller, 128 S. Ct. 2783, 2813, n.23 (2008).

York. He is a lawyer, a U.S. Naval Reserve officer, a former paramedic, and a long-time student and practitioner of martial arts.[162] In the early 1970s, when Maloney was in high school, he began studying karate.[163] At that time, a boom in the popularity of "kung fu" movies had drawn attention to martial arts devices known as "nunchaku," "nunchucks," or "chukka sticks."[164] These devices consist of two pieces of wood or other hard material connected by a cord or chain.[165] Skilled users can swing the nunchaku from hand to hand and around their bodies using a variety of intricate techniques and patterns. Maloney explained that his interest in nunchaku stemmed in part from the fact that they are good weapons for defending against knife attacks. When Maloney was five years old, an attacker killed Maloney's father with a knife.[166]

Late in the summer of 2000, a telephone company employee working outside Maloney's home complained that Maloney pointed a rifle at him.[167] Although the worker alleged that Maloney threatened him with the gun and said "I'll shoot you,"[168] Maloney claimed that he merely looked at the worker through a telescope attached to a cane, which Maloney used for bird watching, and the worker had mistaken the contraption for a rifle with a scope.[169] In any event, police soon arrived, and Maloney refused to let them enter his home because they did not have a warrant.[170] Maloney also refused to come out of the house, and so a

162 Amended Verified Complaint at 4-5, Maloney v. Spitzer, No. 03 Civ. 0786 (E.D.N.Y. Sept. 3, 2005).

163 *See* Jim Maloney, *Forbidden Sticks: A Four-Century Blog Tour (1609-2009)*, http://nunchakulaw.blogspot.com/ (July 4, 2009).

164 *See, e.g.*, Enter the Dragon (Concord Productions Inc. 1973); Way of the Dragon (Concord Productions Inc. 1972); Fist of Fury (Golden Harvest Co. 1972).

165 Maloney v. Cuomo, 470 F. Supp. 2d 205, 207 (E.D.N.Y. 2007), *aff'd*, 554 F.3d 56 (2d Cir. 2009), *cert. granted, judgment vacated, and remanded sub nom.*, Maloney v. Rice, 130 S. Ct. 3541 (2010).

166 Maloney, *supra* note 163.

167 *Id.*

168 Brief of Defendant-Appellee Kathleen A. Rice at 5, Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009) (No. 07-0581-CV) [hereinafter "District Attorney's Brief"].

169 Maloney, *supra* note 163; *High Court May Review Personal Weapons Ruling* (NPR radio broadcast June 1, 2009), *available at* LEXIS, National Public Radio file.

170 District Attorney's Brief, *supra* note 168, at 5; Maloney, *supra* note 163.

twelve-hour standoff ensued.[171] At two o'clock in the morning, Maloney finally relented and surrendered to police, who then searched the house and seized weapons including a nunchaku found under a couch.[172] Police charged Maloney with several criminal offenses including possession of the nunchaku.[173] Possession of nunchaku has been prohibited in New York since 1974,[174] although Maloney asserts that he was unaware the law banned mere possession in one's own home.[175]

Maloney eventually agreed to plead guilty to disorderly conduct, and in return prosecutors dropped all other charges including the nunchaku possession offense.[176] Maloney nevertheless felt that New York's ban on nunchaku was unconstitutional, so he filed a lawsuit against the state's attorney general and local district attorney seeking to have the nunchaku law declared invalid as an infringement of freedom of speech, the right to keep and bear arms, and unenumerated rights protected by the Ninth Amendment.[177] A federal district court dismissed Maloney's case and upheld the New York nunchaku ban.[178] Maloney appealed to the U.S. Court of Appeals for the Second Circuit.

The Supreme Court boosted Maloney's hopes by handing down its decision in *Heller* while Maloney's case was still pending on appeal. At oral argument before the Second Circuit panel, Maloney quipped that his arguments about the right to keep and bear arms may have looked like "the work of someone who was insane" when he filed his briefs, but after *Heller* he was "in good company."[179] Sonia Sotomayor,

171 District Attorney's Brief, *supra* note 168, at 5; Maloney, *supra* note 163.

172 District Attorney's Brief, *supra* note 168, at 5; Maloney, *supra* note 163.

173 Maloney v. Cuomo, 470 F. Supp. 2d 205, 207-08 (E.D.N.Y. 2007), *aff'd* 554 F.3d 56 (2d Cir. 2009), *cert. granted, judgment vacated, and remanded sub nom.*, Maloney v. Rice, 130 S. Ct. 3541 (2010).

174 N.Y. Penal Law § 265.01(1) (2008).

175 *See* Maloney, *supra* note 163.

176 *Maloney*, 470 F. Supp. 2d at 208; District Attorney's Brief, *supra* note 168, at 6.

177 *Maloney*, 470 F. Supp. 2d at 208, 211. Maloney also sued a newspaper for libel in its coverage of the incident, *see* Maloney v. Anton Cmty. Newspapers, Inc., 791 N.Y.S.2d 598, 598-99 (N.Y. App. Div. 2005), and sued the police and others involved, *see* Maloney v. County of Nassau, 623 F. Supp. 2d 277, 280 (E.D.N.Y. 2007). He also founded a new organization, called the National Alliance for Relief from Nunchaku Intolerance in America, or NARNIA. *High Court May Review Personal Weapons Ruling*, *supra* note 169.

178 *Maloney*, 470 F. Supp. 2d at 214.

179 Transcript of Oral Argument at 1, Maloney v. Cuomo, 554 F.3d 56 (2d Cir.

one of the Second Circuit judges in Maloney's case, pointed out that the Supreme Court in *Heller* had not resolved the incorporation issue and suggested that her court remained obligated to follow the old Supreme Court precedents, like *Cruikshank* and *Presser*, which found the Second Amendment inapplicable to state laws.[180] "I think we have abundant case law," Sotomayor observed, "that says we have to follow Supreme Court precedent that's directly on point."[181]

A month later, Sotomayor's reasoning carried the day when the Second Circuit issued its brief per curiam decision in the case.[182] The court affirmed the dismissal of Maloney's challenge to the nunchaku ban, noting that Supreme Court precedent squarely contradicted Maloney's argument that the right to keep and bear arms extends to state and local governments.[183] Although that precedent was old and arguably obsolete, "[w]here, as here, a Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions."[184] Unless and until the Supreme Court opted to overturn its old precedents and find that the right to keep and bear arms is a fundamental right deserving heightened protection under the Fourteenth Amendment, only the lowest form of "rational basis" scrutiny could be applied, and New York's ban on nunchaku conceivably could serve a legitimate government purpose because nunchaku are potentially dangerous weapons.[185] In short, Judge Sotomayor and her Second Circuit colleagues chose the path of judicial restraint over activism, leaving it to the Supreme Court to decide whether keeping and bearing arms is among the fundamental rights incorporated and applied against state and local

2009) (No. 07-0581-CV), *available at* http://homepages.nyu.edu/~jmm257/argument-corrected.pdf.

180 *Id.*

181 *Id.* Later in the argument, Sotomayor suggested that nunchaku might not be "arms" within the Second Amendment's meaning. *Id.*

182 *Maloney*, 554 F.3d at 58-60, *cert. granted, judgment vacated, and remanded sub nom.*, Maloney v. Rice, 130 S. Ct. 3541 (2010).

183 *Id.* at 58-59.

184 *Id.* at 59 (quoting Bach v. Pataki, 408 F.3d 75, 86 (2d Cir. 2005) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))) (internal quotation marks omitted).

185 *Id.* at 59-60.

governments through the Fourteenth Amendment.

The *Maloney* decision initially sparked no great outcry, even from the most ardent gun rights proponents, because it simply reached the conclusion that the Supreme Court soon would need to address the incorporation issue. This is not to say that *Maloney*'s reasoning was indisputable. Some scholars believed that if lower courts read the old Supreme Court cases like *Cruikshank* and *Presser* very exactingly, they could conclude that those old cases foreclosed incorporation via the Fourteenth Amendment's privileges or immunities clause but did not squarely address and therefore did not preclude lower courts from finding the right to keep and bear arms incorporated into the Fourteenth Amendment's due process clause.[186] This approach requires a very delicate parsing of the old opinions, because in every one of them the Supreme Court rejected due process as well as privileges or immunities arguments.[187] Nevertheless, drawing a subtle distinction between the Fourteenth Amendment's clauses, a Ninth Circuit panel soon concluded, contrary to the *Maloney* decision's approach, that they did not need to wait for the Supreme Court to incorporate the right to keep and bear arms.[188]

At that point, a circuit split existed. It was an odd split because each circuit's reasoning ultimately would lead to exactly the same spot. The Ninth Circuit would incorporate the right. The Second Circuit would leave it up to the Supreme Court to incorporate the right. Either way, it was clear that the Supreme Court would soon resolve the issue.

186 *See, e.g.*, Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 190-93 (2008) (discussing the possibility that Second Amendment rights could be incorporated through the Fourteenth Amendment's Privileges or Immunities Clause).

187 *See* Miller v. Texas, 153 U.S. 535, 539 (1894); Presser v. Illinois, 116 U.S. 252, 267-68 (1886); United States v. Cruikshank, 92 U.S. 542, 553-54, 557-59 (1875).

188 Nordyke v. King, 563 F.3d 439, 446-47, 450, 454-57 (9th Cir. 2009). The Ninth Circuit soon decided to rehear the case en banc, and in doing so declared that the original panel's opinion could no longer be cited as precedent by or to the Ninth Circuit. *See* Nordyke v. King, 575 F.3d 890, 891 (9th Cir. 2009). After hearing argument, the en banc court then opted to wait and let the Supreme Court resolve the issue. *See* Nordyke v. King, No. 07-15763 (9th Cir. Sept. 24, 2009). After the Supreme Court made its decision in *McDonald*, the Ninth Circuit vacated the original panel's opinion and remanded the case to that panel for further consideration in light of *McDonald*. *See* Nordyke v. King, No. 07-15763, 2010 WL 2721856 (9th Cir. July 12, 2010).

Given that the five justices who constituted the majority in *Heller* were still on the Court, the Court was virtually certain to rule that the right to keep and bear arms is incorporated into the Fourteenth Amendment and therefore applies to state and local governments.

The *Maloney* decision thus was, in truth, a decision of remarkably little consequence. It nevertheless suddenly became a cause célèbre for many in the gun rights camp when President Obama offered Judge Sotomayor a promotion to the nation's highest court. Commentators immediately began to scrutinize the *Maloney* opinion, looking for any telltale signs it contained about Sotomayor's stance on gun issues.

Many ardent defenders of gun rights offered fair assessments of the *Maloney* case. For example, UCLA law professor Eugene Volokh, a noted supporter of gun rights, acknowledged that Sotomayor did not do anything radical in the *Maloney* case.[189] Volokh guessed that Sotomayor probably would be a gun control proponent, simply because she was nominated by Obama and had never said anything favorable about gun rights, but he recognized that the *Maloney* opinion revealed little about her views on the issue.[190] Robert Levy, the libertarian lawyer and writer who initiated the *Heller* litigation and thus would be one of the first inductees in any Second Amendment hall of fame, similarly found that Sotomayor's decision in *Maloney* was "well within the bounds of responsible judging."[191] Even Jim Maloney, the nunchaku afficianado against whom Sotomayor and the Second Circuit had ruled, felt that it was unfair to use his case as evidence that Sotomayor would be hostile to gun rights as a member of the Supreme Court. He told reporters:

> I did not expect to win. I'll say that much. And, you

189 *Morning Edition: Sotomayor's Second Amendment Record* (NPR radio broadcast June 1, 2009), *available at* LEXIS, National Public Radio file.

190 *Id.*; *see also* Jacob Sullum, *Guns in Unincorporated Territory*, Reason.com, June 17, 2009, http://reason.com/archives/2009/06/17/guns-in-unincorporated-territory ("The bottom line is that an intellectually honest judge could have gone either way on the question of whether Supreme Court precedents foreclose incorporation of the Second Amendment. Sotomayor, a left-leaning Greenwich Village resident chosen by a president who never met a gun control he didn't like, probably is not a big fan of the Second Amendment. But this particular case does not prove it.").

191 Robert Levy, *Sotomayor and the Second Amendment*, FindLaw, July 31, 2009, http://writ.news.findlaw.com/commentary/20090731_levy.html.

> know, it was clear to me that they had a very solid basis for saying that the Second Amendment is not incorporated, and that essentially they are powerless to do anything about it. They had a defensible position there.[192]

Other gun rights proponents were sharper in critiquing the *Maloney* opinion but fair in doing so. For example, David Kopel, one of the most prolific writers on gun rights issues, questioned whether the relatively cursory dismissal of Fourteenth Amendment issues in *Maloney* might signal that Sotomayor had more "hostility, rather than empathy," for gun owners and their rights.[193] That sort of analysis was a reasonable attempt to find whatever clues might exist about Sotomayor's attitude toward gun issues.

The criticism of Sotomayor's views quickly grew more intense. Newspapers reported that the NRA was "deeply troubled" by the "clear hostility Sotomayor has shown toward their most cherished ideals."[194] Another gun rights group, the Gun Owners of America, not only denounced Sotomayor as an "anti-gun radical," but claimed her decision in *Maloney* "displayed contempt for the rule of law under the Constitution."[195] Again, a certain amount of hyperbole should be expected from these types of issue advocacy groups.[196] But too often, the discussion of *Maloney* degenerated into crude oversimplifications and distortions. Senators opposed to her nomination went on television to suggest, quite erroneously, that Sotomayor had refused to follow the Supreme Court's holding that the Second Amendment protects an individual right.[197] Conservative politician and pundit Ken Blackwell

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192 *High Court May Review Personal Weapons Ruling*, *supra* note 169.

193 David Kopel, *Sonia Sotomayor Versus the Second Amendment*, Volokh Conspiracy, May 26, 2009, http://volokh.com/2009/05/26/sonia-sotomayor-versus-the-second-amendment/, *available at* LEXIS, Newstex file.

194 Charles Hurt, *NRA's Big Guns Holding Fire – For Now*, N.Y. Post, May 29, 2009, at 15.

195 Press Release, Gun Owners of America, Obama Picks Anti-Gun Judge for the Supreme Court (May 29, 2009), *available at* http://gunowners.org/a052909.htm.

196 *See supra* notes 124-125 and accompanying text.

197 *See, e.g.*, *State of the Union with John King: Interview with Senators Hutchison, Klobuchar; Interview with Senate Minority Leader Mitch McConnell* (CNN television broadcast May 31, 2009) (statement of Sen. Hutchison), *available at*

perhaps went the furthest, penning an inflammatory broadside claiming that Obama's nomination of Sotomayor was a "declaration of war against America's gun owners and the Second Amendment."[198] Blackwell did not bother to say anything – not a single word – about how Sotomayor and her Second Circuit colleagues may have reasonably believed they were bound by Supreme Court precedents.[199]

Blogs and other websites became particularly fertile sources of wild characterizations and misinformation. One essay that circulated widely on the internet dubbed Sotomayor "A Gun-grabber's Dream Come True."[200] Within just a few hours after her nomination, a report appeared on the internet claiming that one of Sotomayor's "legal theses" written at Princeton University was entitled "Deadly Obsession: American Gun Culture."[201] According to this report, the thesis explained that the Second Amendment not only failed to give any right to individual citizens, but it actually made it illegal for them to own firearms.[202] Most readers failed to notice a small tag at the bottom of the story that said "satire," and the story quickly ricocheted around the internet. The report was immediately debunked as an obvious fraud,[203] but commentators across the electronic world continued to pass it off as true.[204]

Just a few days after the announcement of Sotomayor's nomination,

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LEXIS, CNN Transcripts file.

198 Blackwell originally posted his essay, entitled "Obama Declares War on America's Gun Owners," on a blog on the Fox News website. It is no longer available there, but can still be found on miscellaneous sites around the internet, such as at http://activitypit.ning.com/form/topics/ken-blackwell-obama-declares.

199 *See id.*

200 Kurt Nimmo, *Sotomayor on the Supreme Court: A Gun-grabber's Dream Come True*, Infowars, May 28, 2009, http://www.infowars.com/sotomayor-on-the-supreme-court-a-gun-grabbers-dream-come-true/.

201 *See* Nathan Figler, *Obama's Supreme Pick*, American News Inc., May 26, 2009, http://jumpinginpools.blogspot.com/2009/05/sotomayor-gun-ownership.html.

202 *Id.*

203 *See* David Kopel, *Highly Dubious Claim Against Sotomayor*, Volokh Conspiracy, May 26, 2009, http://volokh.com/2009/05/26/highly-dubious-claim-against-sotomayor/, *available at* LEXIS, Newstex file.

204 *See, e.g.,* Gun Owners of America, *supra* note 195 (claiming that the national Fox News network had reported on Sotomayor's radical anti-gun thesis); Nimmo, *supra* note 200.

the U.S. Court of Appeals for the Seventh Circuit issued a decision that should have laid to rest the hysterical fulminations about *Maloney*. In that decision, written by Judge Frank Easterbrook and joined by Judge Richard Posner, two of the nation's foremost conservative legal minds, the Seventh Circuit reached the same conclusion as the *Maloney* opinion.[205] The Seventh Circuit judges found that the old Supreme Court decisions like *Cruikshank* and *Presser* were still binding on them. Arguments about why those old cases should be overruled and the right to keep and bear arms should be incorporated into the Fourteenth Amendment "are for the Justices rather than a court of appeals."[206]

The Seventh Circuit's ruling made it unmistakably clear that *Maloney*, at the very least, was well within the mainstream of judicial thinking on the subject and did not reflect radical reasoning or defiance of precedent. To those determined to spread false fears about Sotomayor's nomination, it made no difference. Members of the Senate, for example, went on suggesting that the Second Circuit's opinion in *Maloney* had somehow defied the Supreme Court's *Heller* decision and its interpretation of the Second Amendment.[207] Sotomayor and her colleagues on the Second Circuit panel in *Maloney* went out of their way to respect and defer to the Supreme Court's authority, and this is what they got in return for it.

Sotomayor's confirmation hearings before the Senate's Judiciary Committee gave her a chance to address the *Maloney* case and the unfair distortions being thrown about by her critics.[208] As soon as she got a chance to speak on the issue, Sotomayor said that she accepted the Supreme Court's decision in *Heller* as establishing that the Second Amendment is an individual right.[209] She explained that *Heller* did not decide the incorporation issue, and she explained why she and her Second Circuit colleagues in the *Maloney* case concluded that only the Supreme

205 Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, 567 F.3d 856, 857 (7th Cir. 2009), *rev'd sub nom.*, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

206 *Id.* at 860.

207 *See, e.g.*, Sen. Jeff Sessions et al., *Press Conference: The Supreme Court Nomination of Judge Sonia Sotomayor* (June 24, 2009), *available at* LEXIS, Federal News Service file.

208 *Confirmation Hearing on the Nomination of Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Sotomayor Hearing*].

209 *Id.* at 67.

Court itself could overrule its older cases and incorporate the right to keep and bear arms into the Fourteenth Amendment.[210] She added that she would have an open mind about the incorporation issue if serving as a justice when the Supreme Court decided that issue,[211] although she would recuse herself if *Maloney* was the case in which the Court chose to grant certiorari.[212] Acknowledging the varying feelings about guns in America, Sotomayor mentioned that "one of my godchildren is a member of the NRA, and I have friends who hunt," and she emphasized that she understood "how important the right to bear arms is to many, many Americans."[213]

Senators nevertheless proceeded to question her at great length about *Maloney*, incorporation, and the right to keep and bear arms.[214] They made grandiose pronouncements about how the right to own guns "may very well hang in the balance with your ascendency to the Supreme Court."[215] Sotomayor's presence, however, meant that they simply could not get away with distorting or oversimplifying the matter to the same extent that they could in speeches, press conferences, or television interviews. Whenever the Senators tried to portray *Maloney* as representing some sort of bold defiance of Supreme Court precedent, Sotomayor was there to remind them that the core point of the *Maloney* opinion was that lower courts should humbly defer to the Supreme Court's authority and not presumptuously declare a higher court's precedents to be obsolete.[216] The *Maloney* case "was decided on the basis of precedent," she repeated over and over, and when there is Supreme Court precedent on point, only the Supreme Court can decide what to do, and in the meantime, the lower courts' hands are tied.[217] When the senators tried to portray *Maloney* as the work of wildly radical liberal judges, Sotomayor was there to point out that the conservative jurists of the Seventh Circuit had reached exactly the same conclusion.[218]

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210 *Id.* at 67-68.
211 *Id.* at 68.
212 *Id.* at 113.
213 *Sotomayor Hearing*, *supra* note 208, at 68.
214 *Id.* at 86-90, 112-15, 117-19, 344-47, 357, 393-95, 423-25, 439, 444-45.
215 *Id.* at 444 (statement of Sen. Coburn).
216 *E.g.*, *id.* at 343-46, 394-95, 397, 444, 457-59.
217 *Id.* at 444.
218 *E.g.*, *Sotomayor Hearing*, *supra* note 208, at 74, 394, 439, 444.

Those senators who were skeptical of Sotomayor's views had to backpedal and talk about the issue in more specific, precise, and accurate ways to continue pressing the point. They had to acknowledge that the issue was complicated and that their criticism of Sotomayor actually rested on a relatively subtle disagreement about a fairly technical point of law. Sotomayor's supposed sin, they eventually had to concede, was that she had not parsed the Supreme Court's nineteenth-century cases carefully enough to realize that they only precluded her court from finding the right to keep and bear arms incorporated within the Fourteenth Amendment's privileges or immunities clause and did not definitively close the door to incorporation via the due process clause.[219] To put it mildly, this was an awfully slender reed on which to base the conclusion that Sotomayor was a manipulative ideologue hellbent on pursuing a radical anti-gun agenda. Meanwhile, the questioning gave Sotomayor the opportunity to hammer home the simple, understandable message that it makes sense for major constitutional issues to be decided by the nation's highest court.[220] The longer and deeper the discussion went on the issue, the more it sounded like Sotomayor had a fairly straightforward, common-sense position, while the senators questioning her were splitting hairs and obsessing over arcane legal trivia.

Indeed, one of the moments in the hearings that got widespread attention occurred during Senator Hatch's questions about *Maloney* and whether Sotomayor's position in that case meant she would vote to uphold virtually any state or local weapons ban. Sotomayor calmly said, "Sir, in *Maloney* we were talking about nunchuck sticks."[221] She methodically proceeded to explain the nature and potential danger of these items. To many observers, that moment epitomized the tenor of the entire proceeding. Sotomayor was being pragmatic, while senators like Hatch played partisan politics and endlessly dwelled on trifles like the right to keep and bear nunchucks.[222]

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219 *Id.* at 89-91 (statement of Sen. Hatch); *see also Exec. Business Meeting of the S. Judiciary Comm.; Subject: Comm. Vote on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the Supreme Court*, 111th Cong., July 28, 2009 [hereinafter *Sotomayor Comm. Meeting*] (statement of Sen. Sessions), *available at* LEXIS, Federal News Service file.

220 *See, e.g.*, *Sotomayor Hearing*, *supra* note 208, at 89.

221 *Id.* at 90.

222 *See, e.g.*, Maureen Dowd, Op-Ed., *White Man's Last Stand*, N.Y. Times, July 15,

As the nomination made its way out of the Judiciary Committee and toward a vote in the full Senate,[223] the NRA announced that, for the first time in its history, it would oppose the confirmation of a Supreme Court nominee.[224] In addition, the NRA declared that it would be "scoring" the vote, meaning that it would count the vote as part of its annual ratings of legislators' performances.[225] Insiders reported that the NRA initially was not inclined to score the vote, perhaps realizing that Sotomayor's confirmation was inevitable and preferring not to tarnish its reputation as an interest group that legislators dared not defy.[226] Republican leaders in the Senate, however, persuaded the NRA to take a stronger stand, hoping it would help to reduce Sotomayor's margin of victory.[227]

Senators largely met the NRA's position "with a shrug."[228] In the debate preceding the vote to confirm Sotomayor's nomination, senators talked frequently and in great detail about the *Maloney* case and the Second Amendment.[229] But while Sotomayor's critics could say that they did not like her decision and that failure to incorporate the Second Amendment would drastically undercut the constitutional protection of the right to keep and bear arms,[230] it was difficult to portray Sotomayor as

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2009, at A25; Dana Milbank, *Grasping at Nunchucks in the Hearing Room*, Wash. Post, July 15, 2009, at A7.

223 The Judiciary Committee voted 13 to 6 in favor of Sotomayor. *Sotomayor Comm. Meeting*, *supra* note 219.

224 David G. Savage & James Oliphant, *Sotomayor Vote a Power Play; Senators' Choices May Show Extent of Influence Held by NRA, Obama*, Chi. Trib., Aug. 4, 2009, at C11.

225 Tony LoBianco, *NRA Sets Sights on Senators Who Back Sotomayor in Vote*, Wash. Times, July 24, 2009, at A7.

226 Julie Hirschfeld Davis, *NRA Takes Aim at Sotomayor and Some Senators Take Cover*, News J. (Wilmington, Del.), Aug. 2, 2009.

227 *Id.*

228 *Id.*

229 *See, e.g.*, 155 Cong. Rec. S8905-07 (daily ed. Aug. 6, 2009) (statement of Sen. Leahy); *id.* at S8940 (statement of Sen. Hutchinson); 155 Cong. Rec. S8812-13 (daily ed. Aug. 5, 2009) (statement of Sen. Crapo); *id.* at S8821 (statement of Sen. Kyl); *id.* at S8842-43 (statement of Sen. Sessions); 155 Cong. Rec. S8738 (daily ed. Aug. 4, 2009) (statement of Sen. Feinstein).

230 *See, e.g.*, 155 Cong. Rec. S8811-12 (daily ed. Aug. 5, 2009) (statement of Sen. Barrasso); 155 Cong. Rec. S8735-36 (daily ed. Aug. 4, 2009) (statement of Sen. Sessions); *id.* at S8747 (statement of Sen. Hatch); *id.* at S8783 (statement

having taken a radical or extreme position.[231] The Second Circuit's ruling in *Maloney* was unanimous, the Seventh Circuit's conservative judges had reached the same conclusion,[232] and the Ninth Circuit had just granted an en banc rehearing in the only case where a federal appellate court had gone the other way.[233] It is tough to characterize someone as being outside the judicial mainstream on an issue where she adopts the majority view. As Senator Sheldon Whitehouse put it, Sotomayor's ruling in *Maloney* was "properly conservative in a judicial sense."[234] Again, the senators opposed to Sotomayor's nomination were left to pick nits and split hairs, for example, by complaining that the *Maloney* opinion was too "cursory" because it devoted only one paragraph to the incorporation issue while the Seventh Circuit's opinion had taken two and a half pages to reach the same conclusion.[235] One senator went so far as to say the real problem was that Sotomayor had too much respect for precedent,[236] a charge that others rightly recognized as leaving judges "caught in a Hobson's choice" because any judge too quick to reject precedents would surely be condemned for judicial activism.[237]

In the end, Sotomayor won the votes of every Democrat in the Senate, even those from conservative states where the NRA maintains great

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of Sen. Chuck Grassley).

231 *Compare* 155 Cong. Rec. S8928 (daily ed. Aug. 6, 2008) (statement of Sen. Conrad) (expressing hope that Supreme Court would incorporate the right to keep and bear arms but nevertheless finding that Sotomayor's record "has been very much in the judicial mainstream on gun issues"), *and* 155 Cong. Rec. S8797 (daily ed. Aug. 5, 2009) (statement of Sen. Martinez) (explaining that Sotomayor's position in *Maloney* was "too narrow and contrary to the Founders' intent," but "not out of the mainstream"), *with id.* at S8795 (statement of Sen. Burr) (insisting that Sotomayor had ignored the *Heller* decision and reached "a conclusion no other court has ever reached"), *and id.* at S8814 (statement of Sen. Wicker) (arguing that Sotomayor's decision in *Maloney* had been "certainly out of the mainstream" because it relied on nineteenth-century caselaw "arguably" superseded by *Heller*).

232 *See supra* notes 205-206 and accompanying text.

233 *See supra* note 188.

234 155 Cong. Rec. S8743 (daily ed. Aug. 4, 2009).

235 *See* 155 Cong. Rec. S8842-43 (daily ed. Aug. 5, 2009) (statement of Sen. Sessions).

236 *See* 155 Cong. Rec. S8897 (daily ed. Aug. 6, 2009) (statement of Sen. DeMint).

237 *See id.* at S8906 (statement of Sen. Leahy).

influence.[238] She also picked up the votes of nine Republicans, including two – Lindsay Graham and Lamar Alexander – who had received "A" ratings from the NRA in the past.[239] While some political observers believed that Sotomayor would have received additional support from Republicans but for the NRA's scoring of the vote,[240] others felt that the gun issue wound up having no impact on the results.[241] Matthew Dowd, a former political strategist for President George W. Bush, said "gun rights had nothing to do with it"; most Republicans opposed Sotomayor simply because "Supreme Court nominations have become dodgeball games, with Democrats lining up on one side and Republicans lining up on our side."[242]

IV. Another Anti-Gun Radical

Both teams began warming up for the next round of battle over a Supreme Court nomination as soon as Justice John Paul Stevens announced in April 2010 that he soon would be retiring from the Court.[243] Before the ink was dry on Stevens's resignation letter, talk had already turned to what the records of the leading candidates to replace him might reveal about their views on the Second Amendment and other gun policy issues.[244]

238 155 Cong. Rec. S8945 (daily ed. Aug. 6, 2009); Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. Times, Aug. 7, 2009, at A1.

239 The NRA's grades for Graham, Alexander, and other 2008 Senate candidates can be found at http://www.votesmart.org/issue_rating_detail.php?r_id=4229. The other seven Republicans who voted for Sotomayor had nothing to fear because they already had poor ratings from the NRA or were on the verge of retirement. *See* Chris Cillizza, *Sotomayor and the 2010 Races*, Wash. Post, Aug. 10, 2009, at A2.

240 David G. Savage & James Oliphant, *NRA Ad Takes on Kagan, Sotomayor; The Group Urges Members to Tell Their Senators 'Not to Fall for the Same Trick Twice'*, L.A. Times, July 14, 2010, at A12 (reporting that White House officials believe the NRA's opposition took away up to ten votes from Sotomayor).

241 Savage, *supra* note 238.

242 *Id.*

243 Sheryl Gay Stolberg & Charlie Savage, *Justice Stevens Retiring, Giving Obama a 2nd Pick*, N.Y. Times, Apr. 10, 2010, at A1.

244 *See* Kurt Hofmann, *How Justice Stevens' Retirement Might Benefit Gun Rights*, St. Louis Gun Rights Examiner, Apr. 10, 2010, http://www.examiner.com/x-2581-St-Louis-Gun-Rights-Examiner~y2010m4d10-How-Justice-Stevens-retirement-might-benefit-gun-rights; David Kopel, *Diane Wood on the Second Amendment*, Volokh Conspiracy, Apr. 9, 2010, http://volokh.

Gun rights proponents warned that they needed to brace themselves for another nominee with "radical" views on gun control.[245]

At that point, little was known about Elena Kagan's views on guns.[246] She had never been a judge and therefore never decided any cases about guns, and she had not written about gun issues during her time as a law professor. When President Obama announced in May 2010 that Kagan would be the nominee, initial news reports emphasized that she had taken a moderate, cautious approach to gun issues when she appeared before the Senate the previous year to be confirmed as the nation's solicitor general, saying that she had "no reason to believe" *Heller* was wrongly decided and that "there is no question 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."[247] Skeptics, however, felt sure that Obama would not have nominated Kagan unless she favored strict gun control measures.[248]

Those scouring Kagan's past for clues soon found several documents that fueled concerns about Kagan being hostile to gun rights. The earliest was from 1987, when Kagan worked at the Supreme

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com/2010/04/09/diane-wood-on-the-second-amendment/; David Kopel, *Merrick Garland Is No Friend of the Rights of Gun Owners*, Volokh Conspiracy, Apr. 10, 2010, http://volokh.com/2010/04/09/merrick-garland-is-no-friend-of-the-rights-of-gun-owners/.

245 Press Release, Rep. Todd Tiahrt, Rep. Tiahrt Comments on President Obama's Next Supreme Court Nominee (Apr. 10, 2010), *available at* LEXIS, US Fed News file.

246 *See* David Kopel, *Potential Supreme Court Nominee Records on the Second Amendment*, Volokh conspiracy, Apr. 11, 2010, http://volokh.com/2010/04/11/potential-supreme-court-nominee-records-on-the-second-amendment/ (describing Kagan's record on Second Amendment issues as "Unknown").

247 Peter Baker & Jeff Zeleny, *Obama Said to Pick Solicitor General for Court*, N.Y. Times, May 10, 2010, at A1; Robert Barnes, *High Court Nominee Never Let Lack of Experience Hold Her Back*, Wash. Post, May 10, 2010, at A5; *On the Issues: Obama's Supreme Court Nominee*, Wash. Post, May 11, 2010, at A7.

248 *See, e.g.*, Chuck Norris, *The New Abortion*, Creators Syndicate, May 10, 2010, available at LEXIS, Creators Syndicate file (stating that evidence of Kagan's beliefs about gun control was "extremely scarce" but asking "[t]hen again, does anyone suppose Obama's desire to appoint her implies her conservative stance on the Second Amendment?").

Court as a law clerk for Justice Thurgood Marshall.[249] Kagan had the task of reviewing some of the many certiorari petitions that continually pour into the Supreme Court. One petition, in the case of *Sandidge v. United States*,[250] was brought by a person who claimed that the District of Columbia had violated his right to keep and bear arms by convicting and punishing him for unlicensed possession of a pistol. Kagan wrote a terse note to Justice Marshall, describing the case and saying that she was "not sympathetic" to the petitioner's Second Amendment claim.[251] The Supreme Court unanimously denied the petition, declining to hear the case.[252]

Kagan would not have a reason to think much about gun issues again until about a decade later when she went to work as a lawyer and policy advisor for President Clinton. The White House actively pursued a number of gun control efforts during that time, such as a push to promote the availability of trigger locks for handguns and to require background checks for all gun purchasers at gun shows.[253] Documents indicated that Kagan played some role in a number of these initiatives. For instance, after the Supreme Court ruled in *Printz v. United States* in 1997 that Congress could not force state and local law enforcement officers to carry out background checks on gun purchasers,[254] Kagan suggested that Clinton might deal with the problem by issuing executive

249 *See* Greg Stohr & Kristin Jensen, *Kagan Said She Was 'Not Sympathetic' Toward Gun-Rights Claim*, Bloomberg, May 12, 2010, http://www.bloomberg.com/news/2010-05-12/kagan-said-she-was-not-sympathetic-toward-gun-rights-claim-in-1987-memo.html.

250 *See* Sandidge v. United States, 520 A.2d 1057 (D.C.), *cert. denied*, 484 U.S. 868 (1987). The court decisions contain no explanation of the circumstances surrounding Sandidge's arrest. According to one account, Sandidge worked at a laundromat where there had been several robberies and he carried a pistol to protect himself while transporting cash receipts for the laundromat. *See* William J. Olson, Testimony on the Nomination of Elena Kagan to be Associate Justice of the United States Supreme Court, July 1, 2010, http://judiciary.senate.gov/pdf/07-01-10%20Olson%20Testimony.pdf.

251 Stohr & Jensen, *supra* note 249.

252 Sandidge v. United States, 484 U.S. 868 (1987).

253 *See* James Oliphant, *Gun Rights Could Be Obstacle for Kagan; The Supreme Court Nominee's Stance Isn't Clear, but the NRA Is Expressing Concern*, L.A. Times, May 28, 2010, at A14; James Oliphant & Richard A. Serrano, *Documents Paint Kagan as a Pragmatist*, L.A. Times, June 5, 2010, at A14.

254 *See* Printz v. United States, 521 U.S. 898 (1997).

orders that would prohibit firearms dealers from selling handguns where law enforcement agencies refused to conduct the background checks.[255]

For most gun control issues that arose during Kagan's time in Washington, however, the precise extent of Kagan's involvement was unclear. For example, gun rights proponents quickly fixated on a presidential memorandum, signed by Clinton in 1997, which directed the Treasury Department (which at that time included the Bureau of Alcohol, Tobacco, and Firearms) to crack down on imports of certain foreign-made "assault type" rifles.[256] Kagan's name appeared on a cover sheet accompanying a draft of the memorandum, and some reports suggested that Kagan had drafted the memorandum and was "deeply involved" in the issue.[257] But according to Bruce Reed, who was Clinton's chief domestic policy advisor and Kagan's boss at the time, the memorandum was written by someone else, Kagan merely transmitted it to Clinton as requested, and thus the presence of Kagan's name on the cover sheet was a meaningless formality.[258] This is the sort of factual uncertainty that ideally would be resolved during the confirmation process, including Kagan's hearings before the Senate Judiciary Committee.

Perhaps the most provocative document from Kagan's days in the Clinton Administration was a sheet of handwritten notes which seemed to characterize the NRA in an unflattering way.[259] While analyzing proposed legislation that would protect non-profit organization's volunteer workers from tort liability in some instances,[260] Kagan apparently asked a Justice

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255 *See* Sheryl Gay Stolberg, *Glimpses of Kagan's Views in Clinton White House*, N.Y. Times, June 5, 2010, at A10.

256 The cover sheet and memorandum can be found at http://www.clintonlibrary.gov/Documents/Kagan%20-%20Bruce%20Reed/Kagan%20-%20Bruce%20Reed%20-%20Crime%20Series/Box%2080%20Assault%20Weapons.pdf.

257 Josh Gerstein, *Clinton Centrist in W.H. Memos*, Politico.com, May 12, 2010, *available at* LEXIS, Politico.com file.

258 Mike Allen, *Kagan Signed Weapons Memo*, Politico.com, May 12, 2010, *available at* LEXIS, Politico.com file.

259 *See* Robert Verbruggen, *Did Kagan Compare the NRA with the KKK?* Nat'l Rev. Online, June 18, 2010, http://www.nationalreview.com/corner/232102/did-kagan-compare-nra-kkk-robert-verbruggen.

260 The bills, *see* Volunteer Protection Act of 1995, H.R. 911 and S. 1435, 104th Cong. (1995), eventually became law as the Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (1997) (codified at 42 U.S.C. §§ 14501-14505).

Department official to check whether the NRA or the Ku Klux Klan would be among the organizations receiving protection under the bill.[261] In notes taken during a conversation with that official, Kagan listed the NRA and KKK under the heading of "bad guy" organizations.[262] To Kagan's critics, this suggested she was "so hostile to gun rights that she would compare the top gun-rights organization in the United States with a viciously racist hate group."[263]

Kagan's past thus contained significant fodder for Senators interested in asking about gun issues at her confirmation hearings.[264] Just a few hours before those hearings began, the U.S. Supreme Court focused further attention on guns by announcing its decision in *McDonald v. City of Chicago*.[265] By a 5-4 vote, the Court held that the right to keep and bear arms applies to state and local governments through the Fourteenth Amendment's due process clause.[266] As with *Heller*, gun rights advocates cheered the result, but worried about the narrow margin of victory. In their view, the case underscored the need for close scrutiny of Supreme Court nominees like Kagan, for "the personal right of every American to own a gun hangs by a single vote on the Supreme Court."[267] The

261 Verbruggen, *supra* note 259.

262 Kagan's notes, along with a memorandum from the Justice Department attorney working with her on the matter, were among documents released by the William J. Clinton Presidential Library and available at http://www.clintonlibrary.gov/KAGAN%20DPC%201/DPC%20-%20Box%20070%20-%20Folder%20006.pdf#page=19).

263 Verbruggen, *supra* note 259.

264 Official transcripts of Kagan's hearings before the Senate Judiciary Committee have not yet been released, but unofficial versions are available. *See, e.g.*, *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, June 28, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/01/AR2010070103025_pf.html [hereinafter *Kagan Hearing - June 28, 2010*]; *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, June 29, 2010, *http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf* [hereinafter *Kagan Hearing - June 29, 2010*]; *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, June 30, 2010, http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf [hereinafter *Kagan Hearing - June 30, 2010*].

265 McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

266 *Id.*

267 *Kagan Hearing – June 28, 2010*, *supra* note 264 (statement of Sen. Sessions).

McDonald decision also left some senators feeling betrayed by Sonia Sotomayor.[268] Testifying at her hearing before the Judiciary Committee a year earlier, Sotomayor had said that she understood and accepted the Supreme Court's decision in *Heller* as establishing that the Second Amendment protects an individual right,[269] but Sotomayor nevertheless joined the dissenters in *McDonald* who found "nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes."[270]

While the circumstances suggested that Kagan might be subjected to a long and detailed interrogation about every aspect of her past work relating to guns, Senators spent surprisingly little time quizzing Kagan about those matters. Senator Jon Kyl asked about Kagan's notes characterizing the NRA and KKK as bad organizations.[271] Kagan claimed that she was merely jotting down things that someone else said and that equating the NRA with the KKK would be "ludicrous."[272] Senator Chuck Grassley asked Kagan about the Sandidge case and why, as Justice Marshall's law clerk, she was "not sympathetic" to the petitioner's Second Amendment claim in that case.[273] Kagan explained how the legal landscape had shifted dramatically since 1987, when she reviewed

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268 *See Kagan Hearing – June 29, 2010*, *supra* note 264 (statement of Sen. Cornyn); *Kagan Hearing – June 30, 2010*, *supra* note 264 (statement of Sen. Sessions).

269 *Sotomayor Hearing*, *supra* note 208, at 68-69.

270 *McDonald*, 130 S. Ct. at 3120 (Breyer, J., dissenting, joined by Justices Ginsburg and Sotomayor). Of course, Sotomayor might argue that her dissenting vote in *McDonald* did not contradict her Senate testimony. For example, she might contend that she merely testified that she understood the Supreme Court's ruling in *Heller*, not that she necessarily agreed with it and would vote to reaffirm it. She could also argue that believing the Second Amendment protects an individual right does not necessarily mean believing that right is fundamental in the sense required for incorporation into the Fourteenth Amendment. *Compare* David Kopel, *Sotomayor Targets Guns Now; Justice's Dissent Contradicts Confirmation Testimony*, Wash. Times, June 30, 2010, § B, at 1, *with* Adam Shah, *Conservative Media Figures Falsely Accuse Sotomayor of Testifying Untruthfully on Gun Rights*, Media Matters for America, June 29, 2010, http://mediamatters.org/blog/201006290037.

271 *Kagan Hearing – June 29, 2010*, *supra* note 264.

272 *Id.*

273 *Id.*

the certiorari petition in *Sandidge*.[274] At that time, there were no lower court decisions finding the Second Amendment applicable to private, individual activity unrelated to militia service.[275] Twenty years later, when the Supreme Court agreed to hear the *Heller* case, there was a distinct split among the circuits, and the issue was ripe for review.[276] Senator Grassley also gave Kagan the opportunity to explain the suggestions she had made about how the Clinton Administration should respond to the *Printz* decision.[277] Of course, Kagan's explanations of these matters would not persuade everyone, but at least the questioning gave her the opportunity to tell her side of the story.

In many other respects, significant questions went unasked. No one inquired about the extent to which Kagan handled any of the other significant gun control issues, such as trigger locks, gun shows, and lawsuits against gun manufacturers, that arose while she worked for the Clinton Administration. Indeed, no one asked Kagan about President Clinton's effort to ban imports of assault weapons, or why Kagan's name appeared on the cover sheet of the draft presidential memorandum on that topic.[278] Kagan's critics trumpeted that issue as a key part of her record of anti-gun extremism,[279] and yet no senator on the Judiciary Committee asked Kagan about the extent of her involvement in the matter. Kagan's opponents in the Senate often seemed to avoid asking questions that would give Kagan an opportunity to undermine their criticisms of her. Senator Jeff Sessions, for example, declared at the outset of the hearings that Kagan was "the central figure in the Clinton-Gore efforts to restrict gun rights," but then had no questions for Kagan about any of the work that she did on gun control issues.[280]

Rather than asking questions to which Kagan might be able to give a concrete answer, several Senators pressed her about the meaning of the Second Amendment and the precedential significance of the *Heller*

274 *Id.*

275 *Id.*

276 *Id.*

277 *Kagan Hearing – June 30, 2010*, *supra* note 264; *see supra* notes 254-55 and accompanying text.

278 *See supra* note 256-258 and accompanying text.

279 *See, e.g.*, Brian Darling, *Kagan Bad on Guns*, Human Events Online, May 14, 2010, http://www.humanevents.com/article.php?id=36973 (describing the issue as "a 'smoking gun' that indicates Kagan's extensive anti-gun activism").

280 *Kagan Hearing – June 28, 2010*, *supra* note 264.

and *McDonald* decisions.[281] These questions came from Senators on both sides of the political spectrum, with some worried that Kagan would be too quick to overrule these precedents and others fearing that she would be too reluctant to do so. These were basically rhetorical questions, for Kagan naturally provided the same generic response to them all. She would give the same respect to *Heller* and *McDonald* as any other Supreme Court precedents.[282] She might vote to follow the precedents, and she might vote to overrule them if sufficient reasons existed for doing so.[283] She would not make any promises more specific or binding than that.[284] Senator John Cornyn complained that this was exactly the sort of vague explanation of stare decisis that Sonia Sotomayor had offered when asked about *Heller* at her confirmation hearings a year earlier, and yet Sotomayor had gone on to join the dissenters in *McDonald* and their conclusion that there is no fundamental constitutional right to keep and bear arms for private self-defense purposes.[285]

Just after the hearing's conclusion, the NRA issued a letter stating that it opposed Kagan's confirmation because "throughout her political career, she has repeatedly demonstrated a clear hostility" to the right to keep and bear arms.[286] The Judiciary Committee nevertheless soon voted to approve Kagan's nomination and send it to the full Senate for consideration.[287] During the Senate's debate, the Second Amendment was one of the primary concerns raised by those opposed to Kagan's confirmation.[288] As evidence of her hostility to gun rights, Senators cited

281 *Kagan Hearing – June 29, 2010*, *supra* note 264; *Kagan Hearing – June 30, 2010*, *supra* note 264.

282 *Kagan Hearing – June 29, 2010*, *supra* note 264; *Kagan Hearing – June 30, 2010*, *supra* note 264.

283 *Kagan Hearing – June 29, 2010*, *supra* note 264.

284 *Id.*

285 *Id.*

286 Letter from Wayne LaPierre & Chris Cox to Sen. Patrick Leahy & Sen. Jeff Sessions, July 1, 2010, http://www.nraila.org/media/PDFs/Kagan.pdf.

287 Sheryl Gay Stolberg, *Senate Panel Backs Kagan Nomination, with One Republican Vote*, N.Y. Times, July 21, 2010, at A11.

288 *See, e.g.*, 156 Cong. Rec. S6614 (daily ed. Aug. 3, 2010) (statement of Sen. Kyl); *id.* at S6615 (statement of Sen. Inhofe); *id.* at S6624 (statement of Sen. Cornyn); *id.* at S6670-6671 (statement of Sen. Grassley); *id.* at S6675 statement of Sen. LeMieux); 156 Cong. Rec. S6686-6687 (daily ed. Aug. 4, 2010) (statement of Sen. Hutchison); *id.* at S6694 (statement of Sen. Murkowski); *id.* at S6695 (statement of Sen. Chambliss); *id.* at S6702 (statement of Sen.

her unsympathetic response to the certiorari petition in the *Sandidge* case,[289] her work for the Clinton Administration,[290] her characterization of the NRA as a "bad guy" organization akin to the KKK,[291] and even the fact that "[s]he grew up on the upper west side of New York."[292] Indeed, four of Kagan's most determined opponents in the Senate presented a 47-minute colloquy devoted entirely to explaining how Kagan posed a grave threat to Second Amendment rights.[293]

During the debate, Senators repeatedly condemned Kagan on grounds that she was not asked to address when she testified before the Judiciary Committee. For example, several senators emphasized that a White House official, talking to newspaper reporters back in 1997, had described the Clinton Administration's effort to restrict imports of assault weapons as a matter of "taking the law and bending it as far as we can to capture a whole new class of guns."[294] The Senators used that provocative quotation to suggest that Kagan wanted to ban guns and would distort the law to achieve that end, even though they had not raised the issue during Kagan's hearing when she would have had a fair chance to explain the Administration's policy and the role she played in crafting it.

Several Senators also attacked Kagan because, as Solicitor General, she did not file an amicus brief on behalf of the United States in the *McDonald* case.[295] Although no one asked Kagan about this during her

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Shelby); *id.* at S6719 (statement of Sen. Coburn); *id.* at S6743 (statement of Sen. Crapo); 156 Cong. Rec. S6759-6760 (daily ed. Aug. 5, 2010) (statement of Sen. Burr).

289 *See, e.g.*, 156 Cong. Rec.S6692 (daily ed. Aug. 4, 2010) (statement of Sen. Ensign).

290 *See, e.g.*, 156 Cong. Rec. S6759-6760 (daily ed. Aug. 5, 2010) (statement of Sen. Burr).

291 *Id.* at S6760.

292 156 Cong. Rec. S6605 (daily ed. Aug. 3, 2010) (statement of Sen. Sessions).

293 *See* 156 Cong. Rec. S6804-6810 (daily ed. Aug. 5, 2010) (statements of Sen. Ensign, Sen. Sessions, Sen. Thune, and Sen. Wicker). Video of the colloquy is available at http://www.youtube.com/watch?v=cOVnQ_fiZwk&feature=youtube_gdata.

294 156 Cong. Rec. S6670 (daily ed. Aug. 3, 2010) (statement of Sen. Grassley); 156 Cong. Rec. S6823 (daily ed. Aug. 5, 2010) (statement of Sen. Sessions); Elizabeth Shogren et al., *Clinton Moves to Limit Import of Assault Guns*, L.A. Times, Oct. 22, 1997, at A1.

295 156 Cong. Rec. S6694 (daily ed. Aug. 4, 2010) (statement of Sen. Murkowski); *id.* at S6697 (statement of Sen. Thune); *id.* at S6702 (statement of Sen. Shelby);

confirmation hearing, one Senator, Lindsay Graham, included it among his supplemental questions submitted to Kagan in writing after the hearing.[296] Kagan had a rather compelling explanation. Decisions about incorporation, such as *McDonald*, have no direct impact on the federal government. They are really the business of state and local governments, and therefore the federal Office of the Solicitor General had a longstanding tradition of not taking a position on incorporation questions.[297] Kagan's opponents in the Senate ignored that explanation. Indeed, they not only insisted that Kagan's failure to file a brief demonstrated her intense hostility to Second Amendment rights, but also wrongly suggested that Kagan was unwilling to explain the matter because a privilege shielded her decisionmaking from scrutiny.[298]

The Senate confirmed Kagan by a vote of 63 to 37.[299] Like Sotomayor, Kagan won the support of nine Senators with "A" ratings from the NRA.[300] Some political pundits saw the result as a "significant rejection" of the NRA's lobbying and "a signal that Senate Democrats – and a number of Republicans – are willing to buck the group that likes to position itself as the thousand-pound gorilla of legislative lobbying in Washington."[301] Others saw no reason to think the NRA had lost its

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id. at S6743 (statement of Sen. Crapo); 156 Cong. Rec. S6760 (daily ed. Aug. 5, 2010) (statement of Sen. Burr).

296 Sen. Lindsay Graham, Elena Kagan Questions for the Record, at 1, *available at* http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-QFRs.pdf.

297 *Id.* For a corroborating account provided by one of the lawyers who met with Kagan in an unsuccessful effort to convince her that the United States should file a brief, see Doug Kendall, Klukowski's Distortion of Elena Kagan's Gun Rights Record, May 19, 2010, http://theusconstitution.org/blog.history/?p=1682.

298 *See* 156 Cong. Rec. S6694 (daily ed. Aug. 4, 2010) (statement of Sen. Murkowski) ("We may never know the answer to this question because the deliberations of the Solicitor General's Office are privileged.").

299 Carl Hulse, *Senate Confirms Kagan as Justice in Partisan Vote*, N.Y. Times, Aug. 6, 2010, at A1.

300 Press Release, Brady Center to Prevent Gun Violence, Confirmation of Elena Kagan Is Another Defeat for Gun Lobby; NRA 'A' Rated Senators Confirm Kagan Despite NRA Opposition (Aug. 5, 2010), *available at* LEXIS, States News Service file.

301 John Nichols, *Kagan Confirmed as NRA Attacks Misfire*, Aug. 4, 2010, http://www.thenation.com/blog/153911/kagan-confirmed-nra-attacks-misfire.

clout and predicted that Senators would still "scurry like scared rabbits the next time an NRA vote of consequence comes up."[302] The one thing on which virtually all observers could agree is that the Senate continues to grow ever more partisan and polarized in its handling of Supreme Court confirmations.[303]

V. Conclusion

Guns are likely to remain a significant topic of discussion for future nominations. *Heller* and *McDonald* were 5-4 decisions, after all, and so when one of the majority's five members leaves the Court, the scrutiny of the nominated replacement's attitudes toward guns will be particularly intense. Moreover, even if, as I suspect, *Heller* and *McDonald* will never be expressly overruled, their real effect remains to be determined. Although the Supreme Court decided important questions about the scope of the right to keep and bear arms, questions of even greater practical significance remain unanswered. How strong is this right? Will it have virtually no effect on gun laws other than in the few jurisdictions that have handgun bans, or will it imperil a wider array of legal restrictions and controls on guns? What level of scrutiny will courts use to determine what laws infringe the right? The Supreme Court presumably will address these questions at some point in the future, and its answers will determine the real ultimate impact of what the Court did in *Heller* and *McDonald*.

Of course, nominees are unlikely to say how they will decide future cases. Therefore, senators need to find ways to talk to nominees about guns without directly asking how they would rule on the particular legal issues that could come before the Court. Even when nominees try not to reveal their views on unresolved questions, much can be gleaned from the ways in which they describe the past cases or the ways in which they talk about the questions likely to come up in the future. For example, during

302 Chan Lowe, *The Kagan Confirmation*, Aug. 6, 2010, http://blogs.trb.com/news/opinion/chanlowe/blog/2010/08/chan_lowe_the_kagan_confirmati.html.

303 Editorial, *The Destructive Politics of Judicial Confirmation*, Denver Post, July 22, 2010, at B-10; Josh Gerstein, *Kagan Win Warns of Battles Yet to Come*, Politico.com, Aug. 5, 2010, *available at* LEXIS, Politico file; Ruth Marcus, *Broken Confirmation; The High Court Nomination Process Gets Worse*, Wash. Post, Aug. 11, 2010, at A17.

their respective confirmation hearings, Stephen Breyer and John Roberts both gave stronger clues about their Second Amendment views than they probably intended.[304]

Senators also might try asking about guns purely from a policy perspective rather than as a constitutional issue. For example, senators might ask a nominee whether, as a voter or legislator, she would support various types of laws such as a ban on machine guns, a measure allowing college students to carry concealed guns on campuses, or a provision requiring all sellers at gun shows to conduct criminal background checks on gun purchasers. Again, senators could take the constitutional aspect of these issues off the table simply by asking the nominee to assume these measures would be constitutional and to explain whether she would support them as a policy matter. The answers might reveal a great deal about the nominee's overall perspective and inclinations toward gun issues without directly calling for answers about future cases that could come before the Court.

The confirmation process is far from perfect, but the face-to-face dialogue between nominees and senators can promote more precise and reasoned consideration of important issues. For both Samuel Alito and Sonia Sotomayor, for example, the hearings performed that function and provided some antidote to the strident and simplistic characterizations being made about the nominee's views outside the Senate's hearing room. A reasonable and thoughtful airing of differing views about guns at Supreme Court confirmation hearings will not eliminate the bitterness and stubbornness that pervades the debate over guns in America, but it is at least a small step in the right direction.

304 *See supra* notes 73-85 and accompanying text.