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Calling Out Kavanaugh – for his hypocrisy on gun control and the Second Amendment (among other important issues)

A Message from the President of Americans Against Gun Violence

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In his opening statement at his Senate Judiciary Committee confirmation hearing, Donald Trump's nominee to fill the vacancy on the Supreme Court, Judge Brett Kavanaugh, sought to portray himself as a humble servant of the U.S. Constitution. He stated:

> A judge must be independent and interpret the law, not make the law. A judge must interpret the Constitution as written, informed by history and tradition and precedent. In deciding cases, a judge must always keep in mind what Alexander Hamilton said in Federalist 83: "the rules of legal interpretation are rules of common sense."[1]

These are noble words, but actions speak louder than words, and through his actions, Judge Kavanaugh has demonstrated on a number of issues that his statement above is sheer hypocrisy.

There is no issue on which Judge Kavanaugh's hypocrisy is more blatant than that of gun control and the Second Amendment, and there is no more flagrant example of his hypocrisy than his dissenting opinion in the 2011 case, *Heller versus the District of Columbia.*[2] In this opinion, Kavanaugh claimed that a ban on assault rifles – and even a requirement that other guns be registered – violated the Second Amendment.

By way of background, the 2011 case of *Heller v. District of Columbia* (*Heller II*) was a sequel to the 2008 case, *District of Columbia v. Heller* (*Heller I*).[3] In *Heller I,* Dick Heller, a Washington DC security guard, challenged the constitutionality of the District's Firearms Control and Registration Act of 1975 which prohibited DC residents from acquiring any new handguns after 1975 and which required that all handguns owned prior to that date be registered and be stored locked and unloaded when not in use. A District Court judge initially dismissed Heller's lawsuit, but Heller appealed the decision to the U.S. District Court of Appeals for Washington DC. A three judge panel ruled in Heller's favor in a split, 2-1

decision, with two of the judges concluding that the District's partial handgun ban violated the Second Amendment.

The District of Columbia appealed the panel's ruling to the Supreme Court. In a 5-4 decision (*Heller I*), the Supreme Court ruled in 2008 that the Second Amendment did in fact confer a right to keep a handgun in the home for "self-defense." (The Court did not acknowledge the extensive evidence documenting that there is, in fact, no net protective value of keeping a handgun in the home.) **The 2008 *Heller* decision was the first time in U.S. history that the Supreme Court had ever ruled that the Second Amendment conferred an individual right to own any kind of a gun outside of service in a "well regulated militia."** The Court had previously ruled on four separate occasions (*United States v. Cruikshank* in 1876,[4] *Presser v. Illinois* in 1886,[5] *U.S. v. Miller* in 1939,[6] and *Lewis v. United States* in 1980,[7]) that the Second Amendment **did not** confer an individual right to own a gun.

After the 2008 *Heller I* decision, the District of Columbia dropped its ban on new handgun acquisition. The District kept in place, though, a previous ban on assault weapons and high capacity magazines, and it further tightened regulations for registering other firearms. Fresh off his victory in *Heller I,* Dick Heller filed another lawsuit challenging the assault weapons ban, the high capacity magazine ban, and the registration requirements for other guns. The District Court ruled against Heller, as it had in *Heller I,* and Heller again appealed the lower court's ruling to the U.S. District Court of Appeals for Washington DC. His appeal was again heard by a three judge panel which this time included Judge Brett Kavanaugh. The other two judges on the panel ruled that the assault weapons ban, the high capacity magazine ban, and most of the registration requirements for other guns did not violate the Second Amendment, even in the aftermath of the Supreme Court's radical 2008 *Heller I* decision. Kavanaugh dissented, though, and wrote a lengthy dissenting opinion.

Kavanaugh began his dissent by quoting the Second Amendment, which states, in its entirety:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

To his credit, Kavanaugh acknowledged in his dissent that *Heller I* was a controversial decision, citing two critical articles in legal journals.[8] He stated that the reason for the controversy was, "in part," the fact that there was a high rate of gun violence in the District of Columbia. He failed to mention, however, that the main reason why *Heller I* was so controversial was that it reversed over 200 years of prior legal precedent, including four prior Supreme Court decisions in which it had been decided that the Second

Amendment did not confer an individual right to own guns.[9] In particular, Kavanaugh failed to mention the unanimous opinion of the Supreme Court in *Miller* in 1939, reiterated in *Lewis* in 1980, that, "The Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[10] Kavanaugh also failed to mention that the majority opinion in *Heller I,* written by the late Justice Antonin Scalia, falsely implied that the *Heller I* was consistent with those prior Supreme Court decisions. Instead, Kavanaugh stated in his dissent that in *Heller I,* "the Supreme Court held that the Second Amendment confers 'an individual right to keep and bear arms.'"[11] The term, "an individual right to keep and bear arms," appears only once in Scalia's majority opinion in *Heller I.* Scalia wrote:

> The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes *an individual right to keep and bear arms* [italics added].

In quoting Scalia's use of the term, "an individual right to keep and bear arms," Kavanaugh failed to note that in the preceding sentence, Scalia effectively deleted the term, "A well regulated militia, being necessary to the security of a free state," from the U.S. Constitution, and that Scalia created a new "individual right to keep and bear arms" outside of service in a well regulated militia, despite the fact that the Supreme Court had previously specifically stated that no such right existed.

In his dissenting opinion in *Heller II,* Kavanaugh went on to state with regard to the panel on which he served on the U.S. District Court of Appeals for Washington DC:

> As a lower court, however, it is not our role to re-litigate *Heller* or to bend it in any particular direction. Our sole job is to faithfully apply *Heller* and the approach it set forth for analyzing gun bans and regulations.

Ignoring his own admonition, Kavanaugh went on in his dissent to argue that the scope of the *Heller I* decision should be vastly expanded to confer an individual right to own assault weapons - and probably high capacity magazines as well - and to preclude requiring that other guns be registered.

Kavanaugh wrote:

> In *Heller*, the Supreme Court held that handguns – the vast majority of which today are semi-automatic – are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens.

In fact, the term, “traditionally banned“ (or any similar term) does not appear in the *Heller I* majority opinion. Scalia uses the term, “in common use” in his majority opinion to claim, falsely, that the *Miller* decision applied only to types of firearms “in common use” by militias. The term, “in common use,” is used once in the *Miller* decision to describe the types of arms that colonial militia men were expected to bring with them when reporting for duty, but nowhere in the *Miller* decision is it stated or implied that there is a constitutional right for individual citizens to own or carry firearms of the type “in common use.”

In his dissent, Kavanaugh went on to write:

> There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles. Semi-automatic rifles, like semi-automatic handguns, have not traditionally been banned and are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses. Moreover, semi-automatic *handguns* are used in connection with violent crimes far more than semi-automatic *rifles* are. It follows from *Heller*’s protection of semi-automatic handguns that semi-automatic rifles are also constitutionally protected and that D.C.’s ban on them is unconstitutional. By contrast, fully automatic weapons, also known as machine guns, have traditionally been banned and may continue to be banned after *Heller*.

There are multiple serious problems with the above statement. In the first place, the term, “semi-automatic,” like the term, “traditionally banned,” doesn’t appear anywhere in the *Heller I* majority opinion. In implying that the *Heller I* decision confers an individual right to own semi-automatic handguns as opposed to revolvers which fire more slowly and take more time to reload, Kavanaugh is already “bending” the *Heller I* decision in the direction of expanding the categories of firearms that the Court considers to be constitutionally protected.

Kavanaugh’s statement that semi-automatic rifles have not “traditionally been banned” is inconsistent with the fact that soon after semi-automatic rifles with characteristics of assault rifles became widely available - and soon after they started being used in mass shootings - states like California passed laws intended to ban them. The first California assault weapons ban was enacted in 1989,[12] and a federal assault weapons ban was enacted in 1994, but allowed to sunset in 2004. At the time that Kavanaugh was writing his dissenting opinion in *Heller II,* at least five states had assault weapons bans.[13]

Kavanaugh’s statement that “semi-automatic rifles, like semi-automatic handguns…are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses” is also inaccurate. Semi-automatic handguns are rarely if ever used for hunting. It’s only over the past couple of decades that semi-automatic rifles have come to be used

commonly for hunting, but this trend is due to marketing by the gun industry and its associated gun lobby, not due to a real need for such weapons for hunters to practice their sport. In fact, it has been argued that using semi-automatic rifles to hunt is unsportsmanlike

As far as “self-defense in the home” goes, there is extensive evidence that far from being protective, guns kept in the home are much more likely to be used to kill,[14] injure,[15] or intimidate[16] household members than to protect them. Kavanaugh is correct in stating that semi-automatic handguns are used in crime more often than semi-automatic rifles, but this fact is not evidence in support of creating a constitutional protection for civilian ownership of either type of weapon. Finally, “fully automatic weapons, also known as machine guns,” are not completely banned, although civilian ownership of such weapons has been stringently regulated under federal law since the passage of the National Firearms Act of 1934.[17] Kavanaugh fails to note in his dissent that semi-automatic rifles like the AR-15 can be easily modified with parts available over the internet to fire almost as rapidly as fully automatic ones.[18]

In his dissenting opinion in *Heller II,* Kavanaugh went on to claim that the District of Columbia’s requirement for registration of firearms was unconstitutional and that the ban on magazines capable of carrying more than 10 rounds of ammunition might be unconstitutional as well if such magazines were “in common use” and had not previously been “traditionally banned.” Without going into detail on these points, it should be noted that the *Heller I* decision did not address the issue of whether requiring registration of firearms was constitutional, nor did it address the constitutionality of banning high capacity magazines. And needless to say, the Second Amendment itself does not address the issue of gun registration or civilian ownership of high capacity magazines.

The most glaring problem with Kavanaugh’s dissent in *Heller II* is the utter lack of common sense that he demonstrated in writing his dissent in the first place and the lack of common sense that he demonstrated once again during his rambling defense of his dissent when he was questioned by California Senator Dianne Feinstein during his confirmation hearing on September 5, 2018.[19] Semi-automatic rifles of the type included in the District of Columbia assault weapons ban, fed with bullets through high capacity magazines, are specifically designed to be used to kill and maim large numbers of human beings in a short period of time. Common sense dictates that there is no legitimate civilian use for such weapons.

At the time that Kavanaugh wrote his dissenting opinion in *Heller II* in 2011*,* assault rifles equipped with high capacity magazines had already been used in a number of horrific mass shootings, beginning with the Cleveland Elementary School mass shooting in Stockton, California, in 1989. In the seven years since Kavanaugh wrote his dissent, assault rifles equipped

with high capacity magazines have been used in many other mass shootings, including the Sandy Hook Elementary School mass shooting in 2012; the San Bernardino mass shooting in 2015; the Pulse Nightclub mass shooting in 2016; the Las Vegas mass shooting in 2017 (the worst mass shooting in U.S. history to date), and the Marjory Stoneman Douglas High School mass shooting earlier this year. It is inconceivable that the founders of our country would have included an amendment in the U.S. Constitution intended to guarantee an individual right for U.S. civilians to own such weapons of mass destruction, and it is unacceptable to allow an individual who lacks the common sense to understand this principle to have a seat on the United States Supreme Court.

It's expected that the final vote on Kavanaugh's confirmation as a Supreme Court Justice will be held in the U.S. Senate by September 20. Of course, there are also serious concerns about Kavanaugh's ability to rule objectively on a number of issues other than gun control and the Second Amendment, including women's reproductive rights, executive privilege (including whether the President has the power to pardon himself), the Affordable Care Act, personal privacy, campaign finances, consumer protection, and voting rights, just to name a few. On the gun control issue alone, though, there is presently enough objective evidence to deny Kavanaugh a seat on the Supreme Court. **Please call your U.S. Senators today and urge them to vote against Kavanaugh's confirmation.**

Realistically, given the current makeup of the U.S. Senate, we must be prepared to accept the fact that Kavanaugh may be confirmed despite his hypocritical, counterfactual positions on gun control, the Second Amendment, and other important issues. Even if he is confirmed, though, we need not accept his radical views as fact.

The late Supreme Court Chief Justice Warren Burger called the misrepresentation of the Second Amendment as conferring an individual right to own guns "one of the greatest pieces of fraud on the American public by special interest groups" that he had seen in his lifetime.[20] It's our mission at Americans Against Gun Violence to expose this fraud and to work toward the adoption of stringent gun control regulations in the United States comparable to the regulations that have long been in effect in all other high income democratic countries of the world – countries in which the rate of gun homicide is, on average, 25 times lower than in the USA,[21] and in which mass shootings, including shootings on school campuses, are rare or non-existent.[22]

Please become a member of American Against Gun Violence, if you haven't done so already, and please make an additional donation if you're able. Please also discuss the issue of the Kavanaugh nomination as it relates to gun control and the Second Amendment with friends, family, and colleagues, and urge them to join Americans Against Gun Violence as well.

For more information on the epidemic of gun violence that afflicts our country and for suggestions about other steps that you can take to help stop gun violence, please go to the Facts and FAQ's page of the Americans Against Gun Violence website.

And finally, please never give up. It's our firm belief at Americans Against Gun Violence that we have not only the ability, but also the moral responsibility to reduce rates of gun violence in the United States to rates comparable to those in other economically advanced democratic countries. Some cynics claim that we'll never achieve that goal. We're confident that someday we will. The only question is how many more innocent people will be killed by guns before that day arrives. Thanks for your help in making that day come sooner rather than later.

Sincerely,

Bill Durston, MD
President, Americans Against Gun Violence

Notes: Dr. Durston is a board certified emergency physician, a former expert marksman in the U.S. Marine Corps, and a combat veteran decorated for "courage and composure under fire" during the Vietnam War.

References

[1] "Judge Brett Kavanaugh's Opening Statement: Full Prepared Remarks and Video," *The New York Times*, September 5, 2018, sec. U.S., https://www.nytimes.com/2018/09/04/us/politics/judge-brett-kavanaughs-opening-statement-full-prepared-remarks.html.

[2] Heller v. District of Columbia, 670 F. 3d (Court of Appeals, Dist. of Columbia Circuit 2011).

[3] District of Columbia v. Heller, 554 US (Supreme Court 2008).

[4] United States v. Cruikshank, 92 US (Supreme Court 1876).

[5] Presser v. Illinois, 116 US (Supreme Court 1886).

[6] U.S. v. Miller, 307 U.S. 174 (1939) (n.d.).

[7] Lewis v. United States, No. 55 (U.S. 1980).

[8] Richard Posner, "In Defense of Looseness," The New Republic, August 26, 2008, https://newrepublic.com/article/62124/defense-looseness; J. Harvie Wilkinson III, "Of Guns, Abortions, and the Unraveling Rule of Law," *Virginia Law Review*, 2009, 253–323.

[9] United States v. Cruikshank, 92 US; Presser v. Illinois, 116 US; *Miller*; *Lewis*, 445.

[10] *Miller*.

[11] Heller v. District of Columbia, 670 F. 3d.

[12] Patrick McGreevy, "California Adopted Some of the Toughest Gun Control Laws in Country after Multiple Mass Shootings," latimes.com, October 2, 2017, http://www.latimes.com/politics/la-pol-ca-gun-bill-timeline-20171002-htmlstory.html.

[13] "Machine Guns & 50 Caliber," *Giffords Law Center to Prevent Gun Violence* (blog), accessed September 11, 2018, http://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/machine-guns-50-caliber/.

[14] Arthur L. Kellermann and Donald T. Reay, "Protection or Peril?," *New England Journal of Medicine* 314, no. 24 (June 12, 1986): 1557–60, https://doi.org/10.1056/NEJM198606123142406.

[15] Arthur L. Kellermann et al., "Injuries and Deaths Due to Firearms in the Home," *Journal of Trauma and Acute Care Surgery* 45, no. 2 (1998): 263–67.

[16] Deborah Azrael and David Hemenway, "'In the Safety of Your Own Home': Results from a National Survey on Gun Use at Home," *Social Science & Medicine* 50, no. 2 (January 2000): 285–91.

[17] "Machine Guns & 50 Caliber."

[18] Dana Liebelson, "How to Make Your Gun Shoot Like It's Fully Automatic—in One Easy Step," *Mother Jones* (blog), December 21, 2012, https://www.motherjones.com/politics/2012/12/how-make-your-gun-shoot-fully-automatic-one-easy-step/.

[19] "Supreme Court Nominee Brett Kavanaugh Confirmation Hearing Day 2 Part 1," 5 2018, https://www.c-span.org/video/?449705-1/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-1.

[20] Warren Burger, PBS News Hour, December 16, 1991, https://vimeo.com/157433062.

[21] Erin Grinshteyn and David Hemenway, "Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010," *The American Journal of Medicine* 129, no. 3 (March 1, 2016): 266–73, https://doi.org/10.1016/j.amjmed.2015.10.025.

[22] Max Fisher and Josh Keller, "What Explains U.S. Mass Shootings? International Comparisons Suggest an Answer," *The New York Times*, November 7, 2017, sec. Americas, https://www.nytimes.com/2017/11/07/world/americas/mass-shootings-us-international.html.