

MEMORANDUM

TO Interested Parties
FROM Giffords Law Center to Prevent Gun Violence
DATE July 9, 2018
RE Judge Kavanaugh's Record on Gun Policy

On Monday, President Trump nominated **Judge Brett Kavanaugh** of the D.C. Circuit to fill Justice Kennedy's seat on the United States Supreme Court. The nominee has a troubling record on guns: Judge Kavanaugh has issued prior rulings that are ideologically aligned with the gun lobby and reflect a radical interpretation of the Constitution under which public safety justifications play no role in Second Amendment jurisprudence. Should Judge Kavanaugh be confirmed to the Court for life, the results could devastate elected officials' ability to adopt the public safety measures Americans have repeatedly demanded after massacres like Parkland.

I. Background on *Heller* and the Second Amendment

Ten years ago last month, in a landmark [5–4 ruling in *District of Columbia v. Heller*](#), the U.S. Supreme Court held that the Second Amendment protects an individual right of law-abiding citizens to possess a handgun in the home for self-defense. The Court struck down an extreme handgun ban in place in Washington DC, but cautioned that, like all rights, **the Second Amendment is “not unlimited”**: it is not a “**right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.**” The Court provided a [non-exhaustive list of gun regulations](#) it said were presumptively lawful, confirming that public safety laws and self-defense rights can be harmonized under the Second Amendment.

Heller ushered in a flood of litigation, including gun lobby-backed cases that sought to expand *Heller* to invalidate even moderate gun regulations. These cases [saw little success](#): reflecting the Supreme Court's recognition that many firearm laws pose no constitutional problem, lower courts have rejected post-*Heller* challenges [about 93% of the time](#). To date, consistent with *Heller*'s middle-ground approach, gun policy hasn't been an unusually partisan issue among lower courts. Judges appointed by both Democrats and Republicans voted to uphold key gun safety measures after *Heller*, including [minimum age](#) laws, [state](#) and [local](#) assault weapon bans, [concealed carry permitting](#) laws, and [risk-based gun removal](#) laws. Over the last ten years, the conservative-leaning Supreme Court [declined nearly every chance](#) to review Second Amendment cases or expand on the *Heller* ruling. During this time, [political opposition driven by the NRA](#), not *Heller* or judges, was by far the biggest obstacle to addressing the gun violence epidemic.

Most lower-court judges to consider Second Amendment cases have taken seriously *Heller*'s instruction that the Second Amendment is “not unlimited” by [overwhelmingly voting to uphold](#) laws that protect the public from gun violence without infringing constitutional rights. But a few judges, mostly those writing in dissenting opinions, have departed from this consensus view by broadly rejecting public safety justifications for firearm regulations and arguing that many more important measures are unconstitutional under the Second Amendment. Unfortunately, some of these dissenting judges are on President Trump's Supreme Court shortlist, and one of them, [Justice Neil Gorsuch](#), has already been confirmed to the Court. The confirmation of a second justice with views on gun policy

that are radically far from mainstream could result in the [dangerous expansion of Heller](#) gun lobby groups have not been able to achieve thus far.

II. Judge Kavanaugh's Record on Guns

In a follow-on case to *Heller* known as [Heller II](#), Judge Kavanaugh wrote a dissenting opinion arguing that Washington DC's [assault weapons ban](#) and [registration laws](#) violate the Second Amendment. While two other judges cast deciding votes upholding both laws, Judge Kavanaugh instead sided with the gun lobby's position that every type of firearm that is marketed and sold to enough Americans enjoys absolute constitutional protections, concluding that because assault weapons are in "[common use](#)" today and were not historically regulated, they cannot be prohibited under the Second Amendment. Similarly, Judge Kavanaugh determined that because most states do not require registration of firearms, [it is unconstitutional to have a mandatory registration law](#)—meaning that under his circular logic, any gun regulation that is not already widespread is constitutionally suspect.

In the same dissent in *Heller II*, Judge Kavanaugh interpreted the U.S. Supreme Court's decision in *Heller* to require judges to disregard compelling public safety justifications for gun regulations and consider only the text of the Second Amendment and the history and tradition of regulating in a certain area when deciding if a challenged law is constitutional. Under Judge Kavanaugh's [interpretation of the Second Amendment](#), there is an "absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations." This radical view would allow judges to pick and choose which gun regulations have adequate historical support and invalidate all other laws. For example, Judge Kavanaugh might vote to strike down important gun safety laws that address modern dangers that did not exist at the time of the founding of the United States, like [extreme-risk protection order](#) laws that remove guns from the possession of [likely mass shooters](#), and [domestic violence restraining order](#) laws that protect victims of domestic abuse (a crime that [wasn't even recognized](#) in early American history).

Finally, while Judge Kavanaugh has not issued a major ruling on the issue of public carry of firearms outside the home, he did [cast a dissenting procedural vote](#) in *Grace v. District of Columbia* stating he would leave in place a lower-court ruling striking down DC's concealed carry licensing law pending appellate review. This suggests that Judge Kavanaugh was sympathetic to the view that the [District of Columbia's "good reason" requirement](#) for concealed carry permit applicants is unconstitutional, a position that places him well outside the mainstream. Judges have overwhelmingly upheld similar concealed carry requirements, including those in place in [California](#), [Maryland](#), [New York](#), and [New Jersey](#)—and in each case, the U.S. Supreme Court [denied review](#), leaving favorable lower-court decisions upholding strong concealed carry permitting laws in place.

The above rulings should concern anyone who believes our leaders must remain empowered to take action to stem America's gun violence crisis. But President Trump's selection of a judge with outlier views is [no coincidence](#): it reflects the [clout of the NRA](#) and its influence over the Administration's policies and judicial nomination strategies. In early 2017, the NRA [spent \\$1 million](#) to support the nomination of Neil Gorsuch—and once Justice Gorsuch joined the Court, he [joined a dissenting opinion](#) arguing that California's strong concealed carry laws violate the Second Amendment. President Trump's nomination of Judge Kavanaugh seems a clear demonstration that the President is still letting the gun lobby dictate his policies, contradicting his [own call](#) for meaningful action after the massacre in Parkland.

III. Impact on Critical Firearm Policy Issues

While applying *Heller's* holding that individuals have a constitutional right to use a handgun for self-defense in the home, lower courts have generally exercised caution when confronting issues not yet addressed by the Supreme Court. This means some substantive Second Amendment questions lack definitive answers. If confirmed to the Supreme Court, Judge Kavanaugh could play a key role in shaping the Court's rulings on these and other areas of gun policy.

Concealed Carry. *Heller* recognized that “the majority of the 19th-century courts to consider” the issue of concealed carry of firearms upheld restrictions that were far more stringent than the moderate concealed carry regulations states have adopted today. While numerous federal courts, including the [Second](#), [Third](#), [Fourth](#), [Ninth](#), and [Tenth](#) Circuits, have interpreted *Heller* to allow for appropriately strong concealed carry regulations in public, [one outlier court](#) struck down a good-cause concealed carry permitting law in the District of Columbia. Seeking to capitalize on that decision, the NRA recently backed a series of lawsuits challenging strong concealed carry permitting systems in [New Jersey](#), [Maryland](#), and [New York](#), and filed a brief arguing that [Massachusetts’ concealed carry standards](#) are unconstitutional. One or more of these cases may be taken up by the US Supreme Court after Justice Kennedy’s replacement is confirmed.

Assault Weapon and Large-Capacity Magazine Restrictions. *Heller* stated that the Second Amendment is not a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose” and recognized that dangerous and unusual weapons, like those “most useful in military service,” may be prohibited. Many courts, including the [Second](#), [Fourth](#), [Seventh](#), and [DC Circuits](#), and district courts in [Colorado](#) and [California](#), have applied this reasoning to uphold assault weapon or large-capacity magazine (LCM) restrictions. However, [one outlier trial court recently sided with the NRA](#) in a challenge to California’s LCM possession ban, holding that the ban was likely unconstitutional and suggesting that magazine limits of *any* size pose a constitutional problem (that decision is being appealed). The California case—as well as gun lobby-backed suits challenging LCM laws in [Vermont](#) and [New Jersey](#)—may, in the near future, be appealed and eventually presented for Supreme Court review.

Post-Parkland Gun Safety Legislation. States have adopted [52 new gun safety laws since the school shooting in Parkland, FL](#). Gun lobby groups have responded to this renewed political and legislative energy by filing new court challenges to block gun safety laws. Lawsuits challenging [Florida’s new minimum age law](#), Maryland and Florida’s [trigger activator](#) bans, and [local gun safety ordinances](#) may tee up new Second Amendment issues for intermediate appellate courts, and possibly the US Supreme Court, in the years to come.

The Supreme Court has declined to weigh in on any of the above issues in the ten years since *Heller*, leaving it unclear how some members of the current Court would resolve these cases. Some justices, including Justices Thomas and Scalia and, recently, Justice Gorsuch, have revealed their views by [dissenting from the decision to deny review](#) in Second Amendment cases, expressing that [they would prefer to grant review](#) and [strike down](#) gun regulations in key policy areas. Because it only takes [4 votes](#) for the Supreme Court to grant review, the four more reliably conservative justices could have granted review in Second Amendment challenges without Justice Kennedy. It is possible the Court declined to do so because Justice Kennedy was a [moderating force](#) on Second Amendment issues who was unlikely to strike down the reasonable gun regulations Justices Gorsuch and Thomas disfavor. If true, Judge Kavanaugh’s potential confirmation to the Supreme Court presents a [disturbing possibility](#) that a new coalition of justices will vote to hear more firearm cases and strike down more lifesaving laws under a radically broad conception of the Second Amendment.

IV. Impact on Critical Firearm Policy Issues

In response to President Trump’s nomination of Judge Brett Kavanaugh to the U.S. Supreme Court, Giffords released the following statements:

[Former Representative Gabrielle Giffords:](#)

“In nominating Judge Kavanaugh to be the next Supreme Court justice, the Trump Administration is once again showing brazen disregard for the people it claims to protect. Judge Kavanaugh’s dangerous views on the Second Amendment are far outside the mainstream of even conservative thought and stand in

direct opposition to the values and priorities of the vast majority of Americans. America needs a Supreme Court justice who respects the Second Amendment but who also realizes reasonable regulations that reduce gun violence do not infringe on anyone's constitutional rights. But that's not the kind of justice President Trump nominated today.

"America's gun violence epidemic weighs daily on the minds of so many families in our country. Parents live in fear of hearing their children describe to them what it's like to go through an active shooter drill. Too many people in communities across the country live in fear of being shot in their neighborhoods. In states across the country, students and voters have been speaking up, taking to statehouses, and demanding that lawmakers pass effective gun safety legislation. Their advocacy is delivering results: just since the massacre in Parkland, more than 50 gun safety bills have passed in 26 states. Should the Senate confirm the nomination of Judge Kavanaugh, we have every indication to believe that he will prioritize an agenda backed by the gun lobby, putting corporate interests before public safety. Make no mistake, the progress we've achieved passing firearm laws that save lives every day will be in serious danger."

Hannah Shearer, Staff Attorney and Second Amendment Litigation Director at Giffords Law Center

"Judge Kavanaugh has expressed a dangerous hostility toward reasonable gun regulations and made clear he believes the government's power to address gun violence is extremely limited. Judge Kavanaugh rejects the idea that courts should consider public safety when judging gun cases and would strike down bedrock gun laws like those that restrict civilian use of the dangerous, military-style weapons regularly used in mass shootings.

"Even Justice Scalia, one of the most conservative Supreme Court justices in modern history, endorsed reasonable firearm regulations like the ones Judge Kavanaugh would strike down. Judge Kavanaugh's positions on the Second Amendment are outliers far outside the mainstream, and confirming him to the Supreme Court could negatively impact efforts to fight gun violence for many years to come. The notion of Judge Kavanaugh serving on our nation's highest judicial bench should worry Americans who care about the safety of their families and communities. Now is the time for them to speak up and demand a nominee who will respect centuries of American legal tradition, recognize that gun rights have always gone hand-in-hand with responsible regulations, and put the life and liberty of all Americans ahead of the interests of the gun lobby."

ABOUT GIFFORDS LAW CENTER

For nearly 25 years, the legal experts at Giffords Law Center to Prevent Gun Violence have been fighting for a safer America by researching, drafting, and defending the laws, policies, and programs proven to save lives from gun violence. Learn more at giffordslawcenter.org