

Shoot First, Confirm Later

Why the NRA suddenly cares so much about Supreme Court nomination battles.

By Dahlia Lithwick

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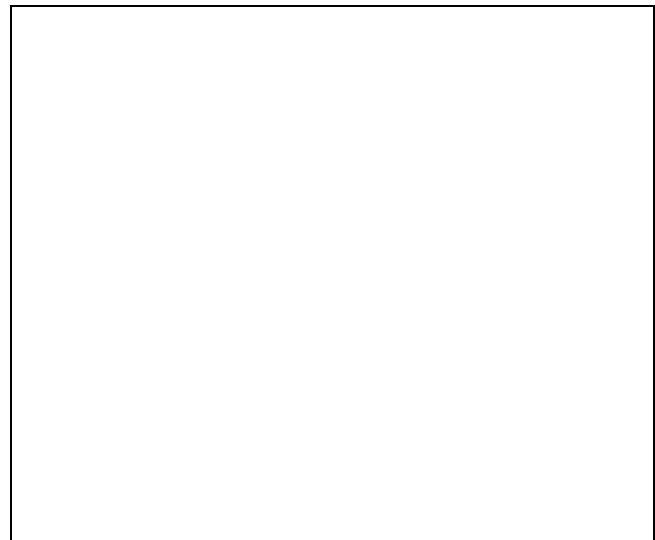
This may finally be the year the NRA traded in its safety goggles for rose-colored glasses. Certainly the nation's most powerful lobby group is entitled to take aim at anyone it wants. But the fact that the National Rifle Association has begun picking targets based on fantasy rather than fact says something sad about both the NRA and the state of American politics. The NRA's recent foray into the judicial confirmation process reveals that, when the subject is guns in America, legal aspirations now trump legal reality.

Start with the fact that the NRA hadn't waded into the Supreme Court judicial confirmation wars at all until it took aim at nominee Sonia Sotomayor last summer. Court-watchers were surprised at the group's decision to target Sotomayor, both because the Supreme Court had just handed down *District of Columbia v. Heller*, the most important Second Amendment victory in American history and also because the entire case against Sotomayor rested on the fact that she had been unwilling, as a court of appeals judge, to go further than the Supreme Court had gone in *Heller* and apply *Heller* to the states. In other words,

like staunch conservative judges Richard Posner and Frank Easterbrook of the Seventh Circuit Court of Appeals, Sotomayor felt it would be judicial activism of the worst sort to get ahead of the high court on a question the Supreme Court had expressly declined to answer yet. As Robert A. Levy of the Cato Institute explained last summer: "The decision of the Second Circuit panel, including Judge Sotomayor, was well within the bounds of responsible judging. Perhaps the Second and Seventh Circuits were correct. Perhaps the Ninth Circuit panel had the better of the argument. It's a close call—not the kind of call on which confirmations ought to turn (or even focus)."

But never mind, the NRA took aim at Sotomayor with both barrels and suffered some embarrassment when its effort to

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scare senators failed to have much impact. This wobble over Sotomayor may explain why, when Elena Kagan was up for Supreme Court confirmation this year, the NRA evinced some initial confusion over tactics for the confirmation hearings themselves, and even prevented its board members from testifying against her. After all, the evidence that Kagan is hostile to gun rights was even flimsier than their case against Sotomayor.

Once the hearings started, however, the NRA got it together enough to decide that Kagan presented a serious threat to gun rights. Within 24 hours of her Senate testimony, there came the NRA letter to the Senate. Then the print and Web ads, leading to a national anti-Kagan ad that aired on *Fox News* and culminated in an urgent action alert telling members to call their senators and tell them to "OPPOSE and filibuster the Kagan nomination!" Finally, the NRA pledged to count the vote on Kagan's confirmation vote as a "key vote" in upcoming congressional scorecards. As John Nichols explains, this all-powerful marker for those who displease the NRA is nothing to sneeze at:

Those ratings are a big deal for Republicans and many Democrats running in rural areas where a 100 percent rating from the NRA counts for something with voters. Remember that

two decades ago, Vermont Independent Bernie Sanders beat a Republican congressman at least in part by highlighting the low NRA rating of the incumbent. And Wisconsin Democrat Russ Feingold, one of the chamber's most ardent defenders of 2nd amendment rights, always makes note of what even a conservative critic acknowledges are "good ratings from the NRA—an important metric in a state bristling with deer rifles."

The decision to go after Kagan was a big deal for the NRA, too. As more than one columnist has noted, the NRA is protective of nothing so much as its own win-loss record, and its reputation as the most effective lobbying organization of all time. It tends to shy away from political battles it cannot win. But nobody should underestimate the outsized influence the NRA exerts. Which was why, when Sen. Ben Nelson

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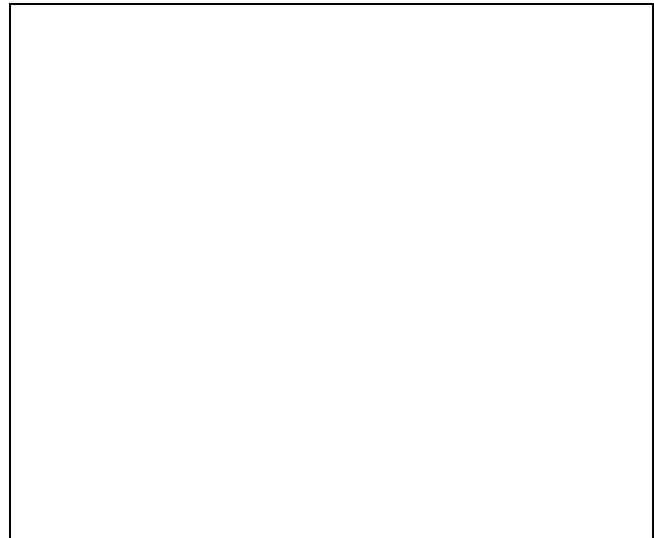
announced he would oppose Kagan, he made it clear that it was her alleged opposition to gun rights that did her in: "She's already made statements ... and has written things that would show a bias against the Second Amendment," he explained. And when the NRA failed to endorse Senate Majority Leader Harry Reid last week as punishment for his support of Kagan—despite his years-long efforts to appease them—it became clear that judicial nominations are now a life-or-death issue for the group.

You would not be wrong to question what, specifically, the NRA objected to about Kagan. Its strongest argument against her appeared to be the language she used in her hearings to affirm her strong support for both the Second Amendment and *Heller*. Even when she endorsed the NRA's view of the Second Amendment, the NRA wasn't happy, though. And that looks to be the difference between a powerful lobby group and an irrational one.

The whole Second Amendment case against Kagan is so slender that Senate Republicans barely bothered to make it at the hearings. Here's what it amounts to: In 1987, as a law clerk to Justice Thurgood Marshall, Kagan wrote the words "I'm not sympathetic" toward an appellant who wanted the Supreme Court to find his constitutional rights were

violated when he was convicted for carrying an unlicensed gun. (One might have thought the words "I'm not sympathetic" to *anything* would be music to anti-empathy Republican ears. But I digress.) The other damning fact? When working for the Clinton administration, she worked to strengthen a ban—promulgated by President George H.W. Bush—on importing semi-automatic assault rifles. In other words Kagan, like most Americans, as well the conservative majority in both the *Heller* and *McDonald* cases, is in favor of reasonable gun regulations. (In his majority opinion in *Heller*, Scalia took pains to explain that "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill. ... It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is

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completely detached from the prefatory clause. ... [B]ut the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." Translation: Under the NRA's litmus test for judges who have acceptable views of the Second Amendment, Scalia would fail too.)

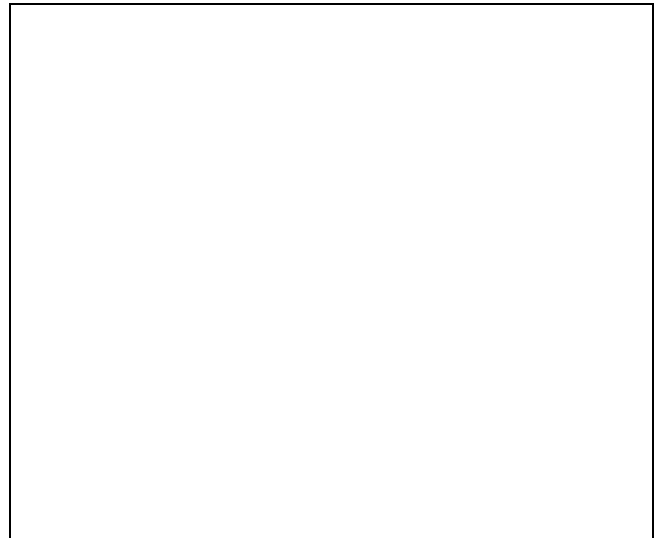
In reality, the whole case against Kagan was always about Sotomayor. The NRA feels like it was fooled, and it doesn't want to get fooled again. The theme of its national ad against Kagan, its letter to the Senate, even its urgent action alert, was that Sotomayor was a big liar when she told the Senate last year that she supports gun rights. How does the NRA know this? And what does it have to do with Elena Kagan? Follow closely: It seems that last year, when Sotomayor testified about *Heller*, she used the words "settled law" and "precedent"—the *very same words* Kagan used this year in discussing the decision. So, under the NRA's logic, if Sotomayor was lying, and Kagan used the same words, then Kagan was lying too. The only problem with this brilliant deduction is that if invoking "settled law" and "precedent" really means "I'm a big fat liar," Chief Justice John Roberts, and Justice Samuel Alito, both of whom used those words in their hearings, are liars as well.

Is there any real link between Kagan and Sotomayor, beyond these not-so-magic words? Something that made the two so completely fungible that the case against one became the case against the other? What makes a whole class of people inherently duplicitous, untrustworthy, and not-to-be trusted? In the 138-year-history of the NRA, what makes these two Supreme Court nominees so corrupt that the NRA must rise to oppose them?

It's either the New York thing or the neck ruffles. Perhaps Kagan = Sotomayor because women lie. Just ask Geoffrey Chaucer.

The only conclusion to be drawn here is that the NRA's very real opposition to Kagan was purely symbolic. Nobody has an inkling about Kagan's views on gun rights. Harry Reid, meanwhile, has given the NRA far more than he ever took away with his Kagan vote—a vote he defended

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with a love song to her strong support for the Second Amendment. The NRA traded a real ally for a fake enemy. Why? In a piece explaining the futility of attempting to appease the NRA, Dennis Henigan of the Brady Campaign explained *that its real objection to endorsing Reid wasn't just his Kagan vote, but also his attacks on opponent Sharron Angle, who famously explained her Second Amendment jurisprudence with the claim that it "is intended to ensure that the people have the means to engage in armed revolt "when our government becomes tyrannical," and that "Second Amendment remedies" may be needed if Harry Reid is re-elected.*

Reid's response to Angle was to call her out for "talking about armed resistance." That was a tactical mistake, because maybe that's exactly what Angle and her supporters in the NRA want to talk about. As Henigan put it, "It may be that the NRA simply could not endorse Senator Reid once he had attacked its core belief that the Second Amendment really is about armed revolt against our government."

The NRA has never had it better—which goes a long way toward explaining why it has never been so bereft. It's the most powerful lobby group in Washington, and five members of the Supreme Court have actually signed off on its constitutional

worldview. Yet it needs enemies to thrive, so it is responding by finding more and more lethal enemies where none exist. Today it's Attorney General Eric Holder and Elena Kagan, tomorrow it will be Phineas and Ferb. Don't look for reason or rationality in the NRA's continued involvement in evaluating and lobbying against future judges. This is an exercise in pure fantasy, and it's performed in the interest of pure power.

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