Written by **Jack Kenny** on June 4, 2010

Kagan Was 'Not Sympathetic' to Second Amendment Rights

In a memo she wrote as a young law clerk for Supreme Court Justice Thurgood Marshall in 1987, Elena Kagan said she was "not sympathetic" to a petitioner's claim that his conviction under a District of Columbia gun ban violated his Second Amendment rights.

In a terse, four-sentence memo, Kagan, now the U.S. Solicitor General and President Obama's nominee for the Supreme Court, recommended the petition be denied. The petitioner's sole claim, Kagan wrote, "is that the District of Columbia's statutes violate his constitutional right to 'keep and bear Arms.' I'm not sympathetic."

Twenty-one years later, the Supreme Court overturned the statute, ruling in *Heller v. District of Columbia* that the Second Amendment does protect an individual's right to keep and bear arms against infringement by the federal government, which governs the nation's capital. The Court in that 5-4 decision ruled that the right applies to individuals and not just to militias, but did not address issues of state, as opposed to federal, regulation of the firearms rights of private citizens.

The memo is one of hundreds written by Kagan as analyses of petitions to the Supreme Court during its 1987-88 session, the *New York Times* reported Friday. Though now more than two decades old, the writings mark the closest thing to a "paper trail" that Senators on the Judiciary Committee can use as a basis for questioning the nominee on her views of legal issues and the role of the Supreme Court in weighing state and federal statutes against the strictures of the Constitution.

In a June 1988 memorandum, for example, Kagan advised letting stand two appeals court rulings that had struck down actions by federal agencies, including the issuing of a license to build a ski lodge in a national forest. The lower court had overruled the agencies on the grounds that there were no detailed plans for the mitigation of environmental problems. The Reagan administration appealed, arguing the federal statute did not require such plans. But Kagan wrote the rulings were "consistent with the language and the purpose" of the statute and "make a great deal of policy sense."

She is almost certain to be questioned about that writing, since conservatives have long argued against judges ruling on matters of "policy," the province of the legislative and executive branches. Judges handing down policy judgments are often said to be "legislating from the bench."

Some memos suggest Kagan was often less interested in the merit of an appeal than in the anticipated outcome if the court took the case. In an April 1988 memorandum, for example, she recommended that the Court reject an appeal from a lower-court ruling in favor of prisoners who claimed the Constitution

required the county to pay for inmates' elective abortions. The judge "simply went too far," wrote Kagan, who called part of the ruling "ludicrous."

"And given that non-prisoners have no right to funding for abortions, I do not see why prisoners should have such rights," she wrote. Yet she argued against taking the county's appeal because the case "is likely to become the vehicle that this court uses to create some very bad law on abortion and/or prisoner's rights."

On law-enforcement issues, Kagan's recommendations about accepting or denying appeals often reflected her fear of giving the conservative Rehnquist Court opportunities to reverse liberal precedents. In one case, an appeals court ruled that evidence obtained against two suspects was the result of a "stop and frisk" rather than an arrest, and that probable cause to believe that a crime had been committed was not required in order for the evidence to be used against them at trial. Though Kagan strongly disagreed with the ruling, she recommended against taking the case for fear the Court would uphold the police action, a result she said "would be an awful and perhaps consequential holding."

Several memoranda, the *Times* noted, indicate a fondness for the doctrine of "substantive due process," under which rights not mentioned in the Constitution are found to be guaranteed under the "due process of law" clause in the Fifth and 14th amendments. The doctrine has been key to a number of Supreme Court decisions, including the 1973 *Roe v. Wade* ruling that the right to abortion is a guarantee of the Constitution under a general and undefined right to privacy. Substantive due process has often come under fire from critics of the court who see it as an excuse to make up new rights.

It has also been invoked to assert that the Constitution includes mandates for the government to take certain actions, as well as restrictions on government powers. In a case where county authorities were sued for not protecting a badly abused child, Kagan was sympathetic to the petitioners' case, but worried that taking the appeal would give the court majority an opportunity to affirm the appeals court holding that "the Constitution is a charter of negative rather than positive liberties."

On any of these matters it is uncertain to what extent the memos she wrote as a law clerk in the 1980s reflect the thinking of the former Harvard Law School dean today. During the confirmation hearings on her nomination for Solicitor General last year, the *Times* noted, Kagan said she no longer agreed with some of them and that her job as clerk was to "channel" the thinking of Justice Marshall. On the other hand, "I don't want to say there's nothing of me in these memos," she said, adding it was fair to say when looking at any of them "that I was stating an opinion."

One such opinion was that an appeals court got it right in holding that a pilot project that included funding for religious groups under the Adolescent Family Life Act violated the establishment clause of the First Amendment. "The funding here is to be used to support projects designed to discourage adolescent pregnancy and to provide care for pregnant adolescents," she wrote. "It would be difficult for any religious organization to participate in such projects without injecting some kind of religious teaching."

But when a Republican Senator brought up that memorandum during her confirmation hearing last year, Kagan went to some length to distance herself from its analysis, calling it "the dumbest thing I've ever heard."

Photo of Elena Kagan: AP Images