Responses to Questions for the Record, March 6, 2013
Professor Laurence Tribe

QFRs from Senator Grassley

(1) Your prepared testimony quite correctly noted that the Supreme Court's *Heller* decision confirmed the constitutionality of "longstanding prohibitions on the possession of firearms by felons and the mentally ill" as well as historic prohibitions on "dangerous or unusual" weapons. However, on page 11, you wrote, "It is not inconceivable – indeed, it seems quite likely—that the Court's pause to distinguish unusually dangerous weapons from widely possessed handguns had precisely the 1994 Assault Weapons Ban, which included a prohibition on high-capacity magazines, in mind."

I fail to see the basis for the inference. The Court made clear the constitutionality of existing statutory prohibitions on possession of firearms by felons and the mentally ill, which dated back many decades. The analogous longstanding prohibition on dangerous weapons that the Court signaled was constitutional was obviously the longstanding ban on very dangerous machine guns. By contrast, the "assault weapons" ban existed for only ten years, and it had expired by the time of the *Heller* ruling. I do not think any fair reading of this language from the Court's opinion conclusively determines that an "assault weapons" ban, as opposed to a ban on machine guns, is constitutional under the Second Amendment. What is your basis for concluding that this language shows that such a ban would not "even implicate[] a [Second Amendment] right in the first place"?

RESPONSE

In *Heller*, the Supreme Court recognized the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" and unambiguously advised that the decision did not cast doubt upon this tradition.[1] Furthermore, the 1994 Assault Weapons Ban fit soundly within this tradition. At the time *Heller* was argued, the federal assault weapons ban was the most recently enacted – and still to this day remains – the paradigmatic contemporary example of major federal legislation prohibiting dangerous weapons. Thus, when I wrote in my prepared testimony that "it seems quite likely . . . that the Court[] had precisely the 1994 Assault Weapons Ban . . . in mind," I meant simply that, because the federal assault weapons ban was the paradigmatic example of contemporary federal gun-control legislation, it was likely on the minds of the justices and one factor that prompted the Court to reaffirm explicitly the tradition of prohibiting dangerous weapons. Although the federal assault weapons ban was, of course, not

[1] Dist. of Columbia v. Heller, 554 U.S. 570, 627 (2008).

before the Court in *Heller*, it was referenced throughout the briefs submitted to the Court,[2] confirming that it was almost certainly on the minds of the justices.

I also feel compelled to point out that your question mischaracterizes, in several respects, the point I made in my testimony as well the *Heller* decision itself. First, you assert that no "fair reading of [the] language from the Court's opinion *conclusively* determines that an 'assault weapons' ban . . . is constitutional under the Second Amendment." (emphasis added). I agree entirely and never contended that the Court's reference to prohibitions on "dangerous and unusual" weapons or any part of *Heller conclusively* addresses the constitutional questions raised by the proposed assault weapons and high-capacity magazine bans. The majority decision in *Heller* never so much as mentions the term "assault weapon," so I hardly could have argued that the decision takes a conclusive position on the matter. But a reasonable inference from *Heller* is that the majority went out of its way to affirm the constitutionality of "dangerous" weapon prohibitions to quell any concern that the Second Amendment would restrict future efforts to reauthorize the most well-known contemporary prohibition on "dangerous" weapons.

Second, your reading of *Heller*'s reference to a "historical tradition" of prohibiting "dangerous" weapons seems to presume that the Court meant to freeze that tradition in place, permitting the government to prohibit dangerous weapons historically banned but not newer weapons that lack the same regulatory pedigree. Yet the very nature of a "tradition" is that it links our past with our present. From that perspective, I find it quite significant that the Court did *not* narrowly define the relevant tradition as, for example, "the tradition of banning machine guns." In defining the tradition as the "tradition of prohibiting . . . 'dangerous and unusual' weapons,"[3] the Court signaled its support for allowing contemporary legislatures to maintain that tradition by banning especially dangerous weapons that new technologies introduce to American markets.

(2) On page 21 of your prepared testimony, you criticized the original "assault weapons" ban because it "grandfathered many thousands of weapons already owned, and those could still be sold or transferred." Do you believe that assuming that an "assault weapons" ban were constitutional, it could only be truly effective if it did not grandfather existing weapons, or at least criminalized the sale or transfer or such weapons?

RESPONSE:

As someone who supports an assault weapons ban because it will help to stem the tide of gun violence in our country, I of course would like to see the enactment of a ban that is as effective as possible, consistent with all applicable constitutional constraints. Many gun-

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[2] *See, e.g.*, Brief of the American Bar Association as Amicus Curiae Supporting Petitioners, at 13 – 14, District of Columbia v. Heller, 554 U.S. 570 (2008), 2008 WL 136349; Brief for State Firearm Associations as Amici Curiae in Support of Respondent at 21, n. 19, District of Columbia v. Heller, 554 U.S. 570 (2008), 2008 WL 383519.

[3] *Heller*, 544 U.S. at 627.

control experts believe that the best means to effectuate the goals of an assault weapons ban is to get those guns off the streets immediately. However, I recognize that at least some steps designed to achieve that aim would raise substantial constitutional questions. I also understand that, as with any sweeping regulatory change, sometimes the best way to change minds and gain broad-based buy-in from the American public is to take incremental steps.

I believe an assault weapons ban, with or without a grandfathering provision, will be an effective measure in reducing gun violence. The grandfathering approach may, however, take more time to prove its effectiveness. In drawing attention to the grandfathering policy in the 1994 ban, I meant only to rebut unfair criticisms of that ban for failing to contribute to a significant decline in gun violence before its premature expiration. The ban was not designed to work in a single a decade, and the Second Amendment certainly does not require that courts adopt such a short window for evaluating effectiveness.

(3) You testified that universal registration of firearms is constitutional under the Second Amendment. Do you believe that universal registration is an advisable measure to enact?

RESPONSE:

Many states have enacted gun registration laws, and as my prepared testimony demonstrates, there is no Second Amendment bar to reasonable registration requirements at either the state or federal level. As a policy matter, I find that mandatory, loophole-free registration is an eminently sensible means to aid law enforcement efforts to investigate crime and to ensure that firearms do not fall into the hands of felons and mentally ill persons, as well as others to whom the Second Amendment, rightly understood, does not extend a right to keep and bear arms. And federal efforts in particular are essential because no state or locality is an island when it comes to the sea of firearms.

(4) On page 24 of your prepared testimony, you indicated that conditions and qualifications on the commercial sale of arms are constitutional under the Second Amendment. Does this mean that Congress can ban the sale or transfer of all arms that are not handguns? Can Congress constitutionally ban the sale of any arms by citizens?

RESPONSE:

I believe your question mistakenly cites to page 24 of my prepared testimony. Perhaps you intended to reference page 28, in which I quote the Supreme Court in *Heller* as recognizing the common sense proposition that "laws imposing conditions and qualifications on the commercial sale of arms" are constitutionally permissible.[4] As my testimony demonstrates, this statement in the *Heller* decision means that Congress may

[4] *Id.* at 626 – 27.

enact reasonable background-check rules for gun sales. I have no doubt that Congress may lawfully enact similar types of regulations governing all firearm sales, including private sales between citizens. Your question further asks whether Congress may ban the "sale of any arms by citizens" or whether Congress may prohibit the sale or transfer of "all arms that are not handguns." As my prepared testimony makes clear, the constitutionality of any ban on the sale or possession of a certain type of weapon must be determined, *first*, by evaluating the law in light of the three threshold factors that determine the scope of Second Amendment coverage (dangerousness, nexus to self-defense, and commonality of use), and *second*, assuming the law does not implicate core Second Amendment values, by applying an intermediate level of scrutiny to the law, just as most federal and state courts have done in response to Second Amendment challenges. Beyond offering that response, I do not think it would be sensible for me to speculate about the legality of hypothetical laws described at such an abstract level of generality.

QFRs from Senator Graham

(1) How can the lower courts' widespread adoption of an "intermediate scrutiny" standard be squared with the Heller court's rejection of the interest-balancing approach advocated by Justice Breyer? Isn't intermediate scrutiny just another name for interest balancing?

RESPONSE:

State and federal courts have typically applied some form of intermediate scrutiny when evaluating the constitutionality of gun regulations under the Second Amendment. This approach is not inconsistent with the Court's rejection of Justice Breyer's "interest-balancing approach," and the *Heller* majority expressly said so. In rejecting Justice Breyer's approach, Justice Scalia's majority opinion argued that Justice Breyer favored "none of the traditionally expressed levels (strict scrutiny, *intermediate scrutiny,* rational basis), but rather a judge-empowering 'interest-balancing inquiry.'"[5] Moreover, the Court in *Heller* expressly noted that the D.C. handgun ban failed to withstand "any of the standards of scrutiny that we have applied to enumerated constitutional rights."[6]. It is unclear whether Judge Breyer's "interest-balancing" approach would have meaningfully differed from traditional intermediate scrutiny in practice. The *Heller* majority certainly supposed that it could, and for that reason, we will never find out. What is unambiguously clear is that the plain text of *Heller* forecloses any contention that intermediate scrutiny is inappropriate for evaluating Second Amendment claims.

(2) You mention the 1915 case in which the Supreme Court held that motion pictures—a new technology at the time—weren't entitled to First Amendment protection. You call that a "misjudgment," and I agree. But isn't this comparable to your argument that certain modern firearms that

[5] *Id.* at 634 (emphasis added).
[6] *Id.* at 628.

you consider "unusually dangerous" aren't protected by the Second Amendment?

RESPONSE:

My characterization of the Supreme Court's 1915 ruling in *Mutual Film Corp. v. Indus. Comm'n of Ohio* is not at all analogous to my conclusion that the Second Amendment does not protect assault weapons and high-capacity magazines. First, the explanation for the Court's decision in *Mutual Film* seems to lie in the Court's inadequate understanding of film as a new technology and its unduly limited conception of "speech" as a constitutionally protected activity. By contrast, I contend that assault weapons and high-capacity magazines fall outside the Second Amendment's scope *precisely because of* my understanding of how they operate and the special dangers they pose.

Second, although they are of course comparable in some respects, the First and Second Amendments implicate different values and concerns, making simplistic analogies between the two fields more misleading than instructive. Given the potentially enormous hazards to public safety inherent in the development of new weapons technologies, our Second Amendment doctrine must take cognizance of the dangerousness of modern weaponry when determining whether certain types of weapons are constitutionally protected. It is for this reason that the Supreme Court in *Heller* was so wise to incorporate dangerousness as a threshold consideration. Though certain new types of speech may pose novel threats to public welfare – violent interactive video games, for example – the degree of that threat is not nearly so strong, and the threat is in any event far less direct. This difference means that special judicial caution when construing the First Amendment to embrace new technologies is unwarranted.

(3) You refer to the Heller court's list of "longstanding prohibitions" as "examples of regulations that should not even receive further constitutional review." But the Court referred to these measures as "presumptively lawful." In your view, can that presumption ever be rebutted? For example, not every "condition and qualification on the commercial sale of arms" is automatically constitutional, is it? In fact, you say that a background check that took years to complete would be "a very severe burden" on Second Amendment rights, so doesn't that confirm that the "presumptively lawful" measures mentioned in Heller aren't immune from review?

RESPONSE:
The text of the *Heller* opinion states unequivocally that longstanding regulations are "permissible"[7] and that these regulations fall within "exceptions" to the right to keep and bear arms.[8] These statements establish that, if a regulation falls squarely within a historical tradition, then it is no longer subject to Second Amendment scrutiny. There is

[7] 554 U.S. at 635
[8] *Id.*

no other way to make sense of *Heller*'s clear statement that such a regulation comes within an "exception" to the right.

To be sure, even if a longstanding regulation is not subject to *Second Amendment* scrutiny, it may still be unconstitutional because it violates *some other constitutional principle*. For example, it is an unfortunate truth that in our country many states historically had laws prohibiting African Americans from bearing arms. Notwithstanding the historical pedigree of these laws, they are obviously unconstitutional; they are blatant violations of the principle of equality expressed in the Fifth and Fourteenth Amendments. Hence, I agree that longstanding regulations are "presumptively lawful"—not automatically so.

But when it comes to the proposed regulations pending before Congress, there can be no suggestion that they violate a constitutional principle apart from the Second Amendment. It follows that, under *Heller*, the long historical pedigree of these types of regulations establishes that they fall within an "exception" to the Second Amendment—without any need for further constitutional review.

(4) You mention the court's reference to "dangerous and unusual weapons." But isn't the historical record clear that the old rule against carrying such arms—going back to 14th century England—was really a time, place and manner restriction? After all, in the 14th century, there wasn't that much variety of swords, spears, crossbows and so on, and in the American cases applying it (notably in North Carolina, well into the 1960s) it was held to refer to perfectly ordinary, unquestionably common guns that were brandished or fired in a dangerous way. In fact, in the Lanier case that you cite, wasn't the North Carolina Supreme Court dealing with a defendant who rode his horse through a courthouse, and didn't the court say it would "attach no importance to the fact that *the defendant had no arms*"?

RESPONSE:

When *Heller* says that historical tradition supports excluding "dangerous and unusual weapons" from Second Amendment coverage, it clearly means that certain *types of weapons* may be prohibited outright—not just that these weapons are subject to time, place, and manner restrictions.

First, as a matter of ordinary English usage, "dangerous and unusual weapons" refers to a category of weapons, not to a category of times, places, or ways to use a weapon. Second, the *Heller* Court explicitly said that the dangerous-and-unusual exception concerns the "sorts of weapons" covered by the Second Amendment.[9] Third, the Court said that a prohibition on machineguns was an example of a regulation of "dangerous and unusual weapons."[10] Such a regulation obviously cannot be rationalized as a time, place, and

[9] *Id.* at 627.
[10] *Id.* at 624, 627.

manner restriction; rather, it is an outright prohibition of a type of weapon – and indeed of a type of weapon that could easily have become "common" had it not been banned so quickly.

It is true that legislatures may go beyond prohibiting particularly dangerous and unusual weapons, and may in addition prohibit using ordinary weapons at dangerous times, in dangerous places, or in dangerous ways. For example, *Heller* indicated that longstanding laws "forbidding the carrying of firearms in sensitive places" comport with the Second Amendment.[11] But these time, place, and manner restrictions fall within a *separate* exception to the right to keep and bear arms. There is no sound basis in the *Heller* opinion or in the historical record for collapsing that exception into the rule that dangerous weapons may be prohibited altogether.

(5) You suggest that guns with "large" magazines may have become common simply because they're "most readily ... available on the market." Are you really suggesting that revolvers or smaller-capacity pistols are not readily available? How can you square this with the ATF manufacturing and export reports, which show that more than 500,000 revolvers were sold in the U.S. in 2011? Surely, between those new guns and all the used ones on the market, anyone who wants a lower-capacity gun can find one.

RESPONSE:

I certainly did not suggest that smaller-capacity pistols are not readily available in the market. Instead, I merely said that "guns equipped with or ready for large-capacity magazines may simply be the weapons *most* readily made available on the market."[12] To say that large-capacity guns may be the weapons *most* readily available does not imply that small-capacity guns are not readily available at all.

[11] *Id.* at 626.
[12] Tribe Testimony, at 12 (emphasis added).