

Letter to Senator Cruz on constitutional issues in federal gun control proposals

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On Tuesday, the U.S. Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights will hold a hearing “Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment.” Senator Dick Durbin (D-Ill.) is Chair of the Subcommittee, and Senator Ted Cruz (R-Texas) is the Ranking Member. The Subcommittee has solicited letters from the public. My letter is below.

Feb. 8, 2013

Dear Senator Cruz:

I am submitting this letter for the Feb. 12, 2013, Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights hearing “Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment.”

To begin with, the Subcommittee should acknowledge that crime reduction policy has been a great success in the United States in recent decades. For example, in the early 1980s, the U.S. homicide rate was more than 10 per 100,000 population. Today, that rate has fallen by over half, to under 5. This is comparable to the early 1960s. Overall rates of violent crime have also fallen sharply since their peak of several decades ago.^[1]

There are many causes for this progress. Perhaps one of them is that today, 41 of the 50 states respect the constitutional right to bear arms, so that a law-abiding adult can obtain a permit to carry a concealed firearm for lawful protection, or even carry without a permit in a few states. In contrast, in the early 1980s, only about half a dozen medium or small states provided a fair system for licensing the carrying of firearms.

Second, the exploitation of the Newtown murders as an occasion to impose a plethora of new anti-gun laws is unwise. Professor Gary Kleck, of Florida State University, is by far the most eminent worldwide scholar on quantitative data about firearms, and the effect of firearms laws. His book *Point Blank: Guns and Violence in America* was the winner of the Michael J. Hindelang Award of the American Society of Criminology, for “the most outstanding contribution to criminology” in a three-year period.

Kleck’s 2009 article “The worst possible case for gun control: mass shootings in schools” [American Behavioral Scientist 52(10):1447-1464] explains why gun control laws enacted as part of an inchoate desire to “do something” after an atrocious crime such as a mass murder in a school are particularly unlikely to prevent future such crimes. Rather, the “do something” anti-gun laws typically amount to an expression of rage against guns or gun owners, and fail to make children safer.

Regarding some particular proposals that have been raised, as alleged responses to Newtown:

The “assault weapons” issue is one of the most long-standing hoaxes in American politics. The

guns suggested for prohibition do not fire faster, nor do they fire more powerful ammunition, than guns which are not singled out for prohibition. External features such as telescoping stocks, or forward grips, make it easier for a user to control the firearm, to shoot it accurately, and to hold it properly. Features which make a firearm more accurate are not a rational basis for prohibition.^[2]

Magazines holding more than 10 rounds are not “high capacity.” Semi-automatic handguns constitute over 82% of new handguns manufactured in the United States.^[3] A large percentage of them have standard, factory capacity magazines of 11 to 19 rounds. The AR-15 type rifle has for years been the best-selling rifle in the United States. The factory standard magazine for an AR-15 rifle is 30 rounds.

Assertions by some prohibitionists that the aforesaid common guns and common magazines are only made for mass murder are a malicious libel against the millions of peaceable Americans who own these self-defense and sporting tools.

Pursuant to *District of Columbia v. Heller*, such firearms and magazines may not be prohibited, because they are “typically possessed by law-abiding citizens for lawful purposes.” 554 U.S. 570, 625 (2008). As *Heller* explained, the Second Amendment prohibits prohibition of “an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose” of self-defense. *Id.* at 628.

Senator Feinstein’s prohibition bill targets an enormous class of arms. Taking into account the at least 4 million AR-15 rifles, plus everything else, the Feinstein ban would likely apply to at least 10 million firearms.

As for the magazines, the Feinstein ban does not focus solely on genuinely “high capacity,” non-standard magazines (e.g. 75 or 100 rounds) but instead bans common magazines holding 11 or more rounds; the gigantic class of what she would ban probably numbers at least several tens of millions, and perhaps much more.

That in itself is sufficient, according to *Heller*, to make prohibition unconstitutional.

The conclusion is reinforced by *Heller*’s observation that handgun prohibition was unconstitutional “Under any of the standards of scrutiny that we have applied to enumerated constitutional rights.” *Id.* at 628. For substantive rights (as opposed to procedural ones), the two main standards are Strict Scrutiny and Intermediate Scrutiny. The former is for most situations of racial discrimination by government, and for most types of content-based restrictions on speech. The latter is used for government discrimination based on sex, as well as for most “time, place, and manner” regulations of speech in public places.

So we know that handgun prohibition fails Strict Scrutiny and also fails Intermediate Scrutiny. Although formulations of Intermediate Scrutiny vary from case to case, the general approach is that to pass Intermediate Scrutiny, a law must involve “an important government interest” and must “substantially” further that interest.

Now consider Intermediate Scrutiny as applied to handguns. Handguns constitute approximately one-third of the U.S. gun supply. They are used in about half of all homicides.^[4]

And yet, a handgun ban fails Intermediate Scrutiny. If a handgun ban fails, then the bans on magazines and on so-called “assault weapons” must also fail.

The large majority of firearms banned by Sen. Feinstein’s bill are rifles. Rifles constitute about a third of the American gun supply. But rifles account for fewer than 3% of U.S. homicides—fewer than blunt objects such as clubs or hammers. The rifles covered by the Feinstein bill would account

for even less.

Because handguns (very frequently used in crime) cannot be banned under Intermediate Scrutiny, rifles, or a subset of rifles (rarely used in crime) cannot be banned either.

There are no solid national statistics about the current use of 11+ magazines in crime. Given that 11-19 round magazines are standard for a large fraction of modern handguns, one might guess that 11+ round magazines would be used in some crimes. Even so, such magazines would be used less often in crime than handguns in general. Thus, a magazine ban also fails Intermediate Scrutiny.

It is important to remember that when applying Intermediate Scrutiny to a Second Amendment question, *Heller's* methodology (by announcing that a handgun ban fails Intermediate Scrutiny) is that one must not consider solely the criminal uses of an arm. One must also consider the frequency of an arm's use by "law-abiding citizens for lawful purposes." The sheer quantity of what Senator Feinstein would ban is itself evidence that the banned firearms and magazines are "typically possessed by law-abiding citizens for lawful purposes."

Heller makes it clear that some non-prohibitory controls are permissible. Because the *Heller* case was about a gun ban, the Court did not deeply explore the contours of legitimate non-prohibitory controls. However, the Court has said enough to at least raise questions about the constitutionality of "universal background checks."

It is often said, by anti-gun lobbyists, that 40% of firearms sales take place today without checks. Notably, the study on which this claim is based was conducted before the National Instant Criminal Background Check System became operational.

Besides that, a great many private transfers of firearms take place between family members, or other persons who have known each other for many years.

More fundamentally, private transfers are not within the proper scope of Congress's power to regulate "Commerce . . . among the several States." Pursuant to federal law since 1968, private sales may only take place intra-state. 18 U.S.C. §922(a). They are not interstate commerce. Nor, indeed, are they necessarily commerce of any sort, no matter how broadly defined, since many such transfers are gifts.

In *Printz v. United States* (1997), Justice Thomas's concurring opinion suggested that a mandatory federal check on "purely intrastate sale or possession of firearms" might violate the Second Amendment. 521 U.S. 898, 938 (2007).

This view is supported by the Supreme Court's opinion in *District of Columbia v. Heller*. There the Court provided a list of "longstanding" laws which were permissible gun controls. *Heller* at 626-27. The inclusion of each item on the list, as an exception to the right to keep and bear arms, provides guidance about the scope of the right itself.

Thus, the Court affirmed "prohibitions on the possession of firearms by felons and the mentally ill." Felons and the mentally ill are exceptions to the general rule that individual Americans have a right to possess arms. The exception only makes sense if the general rule is valid. After all, if *no-one* has a right to possess arms, then there is no need for a special rule that felons and the mentally ill may be barred from possessing arms.

The second exception to the right to keep and bear arms is in favor of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." This exception proves another rule: Americans have a general right to carry firearms. If the Second Amendment only applied to the keeping of arms at home, and not to the bearing of arms in public places, then

there would be no need to specify the exception for carrying arms in “sensitive places.”

The third *Heller* exception is “laws imposing conditions and qualifications on the commercial sale of arms.” The word “commercial” does not appear because the Supreme Court was trying to use extra ink. Once again, the exception proves the rule. The Second Amendment allows “conditions and qualifications” on the *commercial sale* of arms. The Second Amendment does not allow Congress to impose “conditions and qualifications” on *non-commercial* transactions.

Federal law has long defined what constitutes “commercial sale” of arms. A person is required to obtain a Federal Firearms License (and become subject to many conditions and qualifications when selling arms) if the person is “engaged in the business” of selling firearms. This means:

a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;

18 U.S.C. §921(a)(21)(D). Of course a person who is “engaged in the business,” but who does not have a FFL, is guilty of a federal felony every time he sells a firearm. 18 U.S.C. §§922(a), 924.

Currently, the federal NICS law matches the constitutional standard set forth in *Heller*. NICS applies to all sales by persons who are “engaged in the business” (FFLs) and does not apply to transfers by persons who are not “engaged in the business.”

President Obama has already ordered the Bureau of Alcohol, Tobacco, Firearms and Explosives to inform FFLs about how they can perform a NICS check for private persons who would like such a check. On a voluntary basis, this is legitimate, but it would be constitutionally dubious to mandate it.

Finally, there has been talk of new federal laws against gun trafficking and against straw purchases. Fortunately, gun trafficking and straw purchases are already illegal, and there are many people who have the federal felony convictions to prove it.

Allegedly, federal prosecutors will be more willing to enforce the already-existing bans on trafficking and straw purchases if the laws are restated by enacting new legislation. A simpler approach would be for the President or the Attorney General to order U.S. Attorneys to give greater attention to the enforcement of the existing laws. Moreover, new statutes, especially when drafted in a “do something” crisis atmosphere may turn out to be highly overbroad, and to impose harsh new penalties on persons who were not the intended targets of the new statutes. The poorly-named “USA PATRIOT Act” should provide a cautionary example.

Below are some articles which might be interest to the Subcommittee.

“Guns, Mental Illness and Newtown.” Why random mass shootings have increased and what to do about it. *Wall Street Journal*. Dec. 17, 2012.

<http://online.wsj.com/article/SB10001424127887323723104578185271857424036.html>.

“Arming the right people can save lives.” Good guys with guns have managed to thwart many mass attacks. *Los Angeles Times*. Jan. 15, 2013. <http://www.latimes.com/news/opinion/commentary/la->

[oe-kopel-guns-resistance-nra-20130115.0.955405.story](http://www.davekopel.org/2A/oe-kopel-guns-resistance-nra-20130115.0.955405.story).

My U.S. Senate Judiciary Committee testimony on gun violence. Jan. 30, 2013.

<http://davekopel.org/Testimony-Senate-Judiciary-Kopel-1-30-13.pdf>.

“Ronald Reagan’s AR-15.” Volokh.com. Jan. 15, 2013. <http://www.volokh.com/2013/01/15/ronald-reagans-ar-15/>.

“A Principal and his Gun.” How Vice Principal Joel Myrick used his handgun to stop the school shooter in Pearl, Mississippi. By Wayne Laugesen. *Boulder Weekly*. Oct. 15, 1999.

<http://davekopel.org/2A/OthWr/principal&gun.htm>.

Pretend “Gun-free” School Zones: A Deadly Legal Fiction. 42 Connecticut Law Review 515 (2009).

<http://ssrn.com/abstract=1369783>.

“Gun-Free Zones.” *Wall Street Journal*, April 18, 2007. The murders at Virginia Tech University.

<http://davekopel.org/2A/OpEds/Gun-Free-Zones.htm>.

Sincerely,

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[2] See David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 *Journal of Contemporary Law* 381 (1994), <http://davekopel.org/2A/LawRev/rational.htm>. Cited in *Kasler v. Lungren*, 72 Cal. Rptr. 2d 260, 265 (Cal. App. 1998)

[3] 2011 manufacturing data from the Bureau of Alcohol, Tobacco, Firearms & Explosives.

<http://atf.gov/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf>.

[4] In 2011, there were 12,664 murders in the U.S. Handguns accounted for 6,220; shotguns for 356; rifles for 323; “other guns” for 97; and “firearms, type not stated” for 1,587. (Total of 8,583 firearms homicides). Knives were 1,694, and “Blunt objects (clubs, hammers, etc.)” were 496.

FBI, Uniform Crime Reports, *Crime in the United States 2011*, Table 8, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-8>.

The FBI reports that firearms (not differentiated by type) were used in 41% of robberies in 2011. FBI Uniform Crime Reports, *Crime in the United States 2011*, Robbery Table 3.

<http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/robbery-table-3>.

Firearms were used in 21% of aggravated assaults. FBI Uniform Crime Reports, *Crime in the United States 2011*, Aggravated Assault Table, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/aggravated-assault-table>. Given the preponderance of handguns, compared to long guns, in homicides, it is reasonable to infer that handguns are also disproportionately used in robberies and aggravated assaults. Firearms are rarely used in forcible rapes.

