

Questions to Sandy Froman from Senator Hatch

Q: Is the right to keep and to bear arms a right the government provides or is it a fundamental right that existed prior to America's founding?

A: The right to keep and bear arms existed prior to America's founding. The Supreme Court explicitly declared that the right to bear arms preexisted the adoption of the Constitution. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

Q: Was the use of the "rational basis" test in *Maloney* the proper standard of review? What are the practical implications of using rational basis review to evaluate weapons restrictions?

A: The Supreme Court expressly declared that rational-basis review is not the proper test for Second Amendment claims, and therefore Judge Sotomayor was refusing to follow clear Supreme Court precedent by applying that test. The same dissenting justices who argued the Second Amendment secures no individual right also joined another dissent, authored by Justice Breyer, arguing that the D.C. gun ban should be upheld because it passes the rational-basis test. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting). The majority in *Heller* specifically rebutted Justice Breyer's dissent, expressly holding that the rational-basis test is not the appropriate standard of review because it does not sufficiently protect the right to keep and bear arms. *Id.* at 2817–18. All nine justices acknowledged that the D.C. gun ban would survive rational-basis review, *id.* at 2817 n.27, so the fact that the D.C. gun ban was struck down as unconstitutional separately proves that the Court rejected Judge Sotomayor's test.

Q: Judge Sotomayor said that she was following 2nd Circuit precedent in the *Maloney* decision. Do you agree?

A: No, I do not agree. Three issues must be addressed here.

First, it is troubling that as a member of the first appellate panel to take a serious Second Amendment claim post-*Heller*, Judge Sotomayor did not explore in any depth the questions concerning incorporation or what constitutes a fundamental right. While she cited precedent, she did nothing to determine whether those precedents were still binding, summarily stating that they were. This is an abdication of a circuit judge's responsibility to fairly explore relevant legal issues and provide reasons underlying the panel's decision.

Second, whether Judge Sotomayor was following Second Circuit precedent with regards to the rational-basis test is irrelevant, because any such precedent was overruled by *District of Columbia v. Heller*.

Third, Judge Sotomayor went far beyond any precedent. In wrongly applying the rational-basis test, she went a step further to promulgate a rule that is irreconcilable with *Heller*. Judge Sotomayor joined an opinion holding that, if a law regulates a dangerous device that can kill or maim, then that danger is a sufficient basis to completely prohibit such a device. *Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009).

Although *Maloney* involved martial arts weapons that are not firearms, most Second Amendment cases involve firearms. Firearms are inherently dangerous, with the power to kill or maim. Thus, Judge Sotomayor and her colleagues in *Maloney* set up the following syllogism: (1) A law subject to rational-basis review will be upheld as constitutional if it is rationally related to any legitimate state interest. (2) All restrictions on deadly devices are rational. (3) Firearms are deadly. (4) Therefore, all laws restricting firearms are constitutional. Under this flawed framework, the D.C. gun ban in *Heller* would have been upheld. In fact, this reasoning creates a *per se* rule under which any gun restriction would automatically be upheld, rendering the Second Amendment meaningless. This reasoning is fatally deficient, and flagrantly disregards Supreme Court precedent in *Heller*.

Q: Judge Sotomayor said that footnote 23 of the *Heller* decision explained that the 2nd Amendment does not apply to the states. Is that what the footnote says? Does footnote 23 explain that applying the 2nd Amendment to the states would be inappropriate?

A: *Heller*'s footnote 23 does not say that the Second Amendment does not apply to the states, nor does it say that such an application would be inappropriate. This footnote mentions the three cases from the late 1800's wherein the Court held that the Second Amendment does not apply to the states. The first is *United States v. Cruikshank*, and the other two, *Presser v. Illinois* and *Miller v. Texas*, cite *Cruikshank* as the precedent they follow. Footnote 23 expressly notes that *Cruikshank* also stated the First Amendment does not apply to the states. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008). This footnote thus suggests that *Cruikshank* reasons that, to the extent that the First Amendment does not apply to the states, likewise the Second Amendment does not apply to the states to precisely the same extent. The Supreme Court has subsequently incorporated every provision of the First Amendment to the states. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). This of course suggests that the Second Amendment may well apply to the states, though the Court acknowledged that the incorporation question was not presented in *Heller*. The

Court in *Heller* also said that these antiquated Second Amendment precedents do not engage in the sort of inquiry the Court later declared to be necessary for Fourteenth Amendment analysis.

Therefore the Court in *Heller* footnote 23 called into question whether the *Cruikshank* line of cases are still good law, and further suggested that lower courts are obliged to attempt to perform the required Fourteenth Amendment inquiry. Judge Sotomayor ignored this, saying that the incorporation question is “settled law,” and did not engage in the type of inquiry *Heller* said was required.

Q: In my questions, I talked about the difference between incorporation through the Privileges and Immunities clause of the 14th Amendment and incorporation through the Due Process Clause of the 14th Amendment. Which clause does the Supreme Court use to apply the provisions of the Bill of Rights to the states? Which clause was discussed in the cases cited by the *Maloney* opinion?

A: There are two possible answers to this question, neither of which supports Judge Sotomayor’s treatment of the Second Amendment. Those provisions of the Bill of Rights that have been applied to the states have been so applied by incorporating them into the Fourteenth Amendment Due Process Clause. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (incorporating the right to counsel). This is important because the earlier cases cited by Judge Sotomayor focused on the Fourteenth Amendment Privileges or Immunities Clause. The question therefore becomes whether those nineteenth-century cases should be read broadly or narrowly.

First, an appellate court could hold that the *Cruikshank* lines of cases only precludes incorporation through the Privileges or Immunities Clause, leaving open the possibility that a court could incorporate the Second Amendment through the Due Process Clause. The Ninth Circuit, in a panel that included two Democrat-appointed judges, unanimously held that the Second Amendment was incorporated through the Due Process Clause. *See Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009). This approach is also advocated by one of the foremost Second Amendment scholars. *See* Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 *Syracuse Law Review* 185, 195 (2008).

The second option is that a circuit court could hold that the *Cruikshank* cases cover all of the Fourteenth Amendment. The Seventh Circuit held exactly that, in a case that has now petitioned for Supreme Court review. *See NRA v. Chicago*, 567 F.3d 856 (7th Cir. 2009). In arriving at this conclusion, however, it was again after a lengthy and detailed analysis

of the question, in which the Seventh Circuit noted that there were serious arguments in favor of incorporating the Second Amendment, but then concluded that only the Supreme Court could issue such a holding. This broader reading of *Cruikshank* has been adopted by another lawyer who strongly supports Second Amendment incorporation. See Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment through the Privileges or Immunities Clause*, 39 New Mexico Law Review 195 (forthcoming Oct. 2009). But Judge Sotomayor and her panel in *Maloney* reached this conclusion through a summary glossing over of the issue, without any substantive analysis. This is what Judge Sotomayor was criticized for by another Democrat-appointed judge in another high-profile case. *Id.* at n.524 (citing *Ricci v. DeStefano*, 530 F.3d 88, 92 (2d Cir. 2009) (Cabranes, J., dissenting from denial of rehearing *en banc*)). The Supreme Court later reversed Judge Sotomayor in the *Ricci* case.

Judge Sotomayor followed neither approach. Therefore Judge Sotomayor was violating precedent, rather than following it, raising grave concerns regarding her attitude toward Second Amendment issues and her approach to interpreting the Constitution.