Senator Tom Coburn, M.D.

Written Questions for the Record

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1. Please describe the different in analyses of the Second Circuit in *Maloney v. Cuomo* and the Seventh Circuit in *NRA v. Chicago*. Was the Second Circuit's opinion in *Maloney* flawed in your opinion?

Answer: The Second Circuit engaged in hardly any analysis, but merely asserted conclusions. The Seventh Circuit produced an extensive analysis of the relevant legal issues.

In particular, the central question of the case—whether the Second Amendment is enforceable against state governments—was brushed aside in a single paragraph by the Sotomayor opinion. The paragraph asserts that Supreme Court decisions prevent the lower federal courts from deciding the question.

The Seventh Circuit, although it ultimately came to the same result as had the Second Circuit, acknowledged that the answer was not so simple. The Seventh Circuit's treatment of the question of whether Supreme Court precedent is controlling was over three times longer than the Second Circuit's treatment.

The difference can hardly be explained as a reflection of varying writing styles. Judge Sotomayor's opinions in general have been described as wordy, lengthy, and ponderous. Yet in *Maloney*, she became terse, indeed reticent.

Judge Easterbrook, the author of the Seventh Circuit opinion, is widely acknowledged as one of the most outstanding legal writers of our times. So his much longer treatment of the issue cannot be ascribed to wordiness or the inability to write concisely. Simply put, Judge Easterbook needed to set forth the legal reasoning which underlay his top-level conclusions, and to address at least some of the arguments against his conclusions. Judge Sotomayor's uncharacteristically brusque opinion provided much less analysis.

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Rather significantly, the record shows that Judge Sotomayor, while usually quite prolix in her opinions, becomes taciturn in the presence of constitutional rights she seems not to favor: the right to arms in *Maloney*, the property right in *Didden*, the right to be promoted on the basis of objective merit rather than race in *Ricci*.

Supreme Court decisions, especially on controversial topics, need to support the legitimacy of the rule of law by offering the American people serious legal reasoning for those decisions. *Maloney* is but one example of Judge Sotomayor's refusal to do so, when the topic involves rights which she disfavors.

2. Was the Supreme Court's decision in *Presser v. Illinois* binding precedent on the Second Circuit in *Maloney* on the question of whether the Second Amendment has been incorporated on the states through the Due Process Clause of the Fourteenth Amendment?

Answer: No, although Judge Sotomayor claimed that it was. *Presser* mainly addressed the question of whether the Second Amendment directly applies to the states by its own terms, and the Court ruled that it does not. The Court very briefly addressed whether the result was changed by the Privileges or Immunities clause of the Fourteenth Amendment. The Court said nothing about incorporation via the Due Process clause of the Fourteenth Amendment.

A Supreme Court decision about the meaning of one clause in an Amendment certainly does not create precedent about the meaning of an entirely separate clause in the Amendment. For example, a decision that a government practice does not violate the First Amendment's Free Exercise clause does not create a precedent about whether that practice violates the Establishment clause.

Judge Sotomayor's per curiam opinion in *Maloney* implicitly recognized this fact. The opinion addressed (albeit in a brusque, conclusory, and unreasoned manner) the argument that the New York law violated the Equal Protection clause of the Fourteenth Amendment.

Obviously, the fact that *Presser* made Mr. Maloney into a loser under the Privileges or Immunities clause of the Fourteenth Amendment created no binding precedent about whether Mr. Maloney had a valid claim under the Equal Protection clause of the Fourteenth Amendment. Judge Sotomayor recognized as much, dealt with the Equal Protection claim, and she did not assert that *Presser* was controlling.

Yet Judge Sotomayor refused even to address the question of the Fourteenth Amendment's Due Process clause. Just as the *Presser* decision on the Privileges or Immunities clause does not create binding precedent about the Equal Protection clause, it does not create binding precedent about the Due Process clause.



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**Questions to David Kopel from Senator Hatch**

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?

Answer: The majority and dissenting opinions in *Heller* agreed that the Second Amendment right pre-exists the Constitution. The Second Amendment protects "the" right to keep and bear arms, a phrasing which clearly indicates that the Amendment guarantees an existing right, rather than creating a new one.

As to whether the right is "fundamental," the Supreme Court has not formally declared that the Second Amendment is, or is not, a "fundamental right" in the sense that it is protected from state and local government infringement by the Due Process clause of the Fourteenth Amendment. However, the *Heller* opinion itself repeatedly pointed out the English and American common law sources (including William Blackstone's *Commentaries*) which provided the foundation of the Second Amendment clearly recognized the right to armed self-defense to be a "fundamental" and "natural" right. (For details, see David B. Kopel, *The Natural Right of Self-defense: Heller's Lesson for the World*, 59 SYRACUSE LAW REVIEW 235 (2008), http://ssrn.com/abstract=1172255).

Further, Supreme Court opinions in a variety of constitutional cases have repeatedly listed the Second Amendment as among the fundamental elements of "liberty" protected by the Due Process clause of the Fourteenth Amendment. The language first appears in the second Justice Harlan's dissent in *Poe v. Ullman*; a few years later in *Griswold v. Connecticut*, the Court reversed itself, and took the position that Justice Harlan had favored in *Poe*. That language recognizes that the right to arms is part of the "liberty" protected by the Fourteenth Amendment, and also states that the protected liberty is not confined only to enumerated rights:

> "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."



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*Poe v. Ullman*, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting).

The above language has since been quoted with approval in five different Supreme Court opinions: *Albright v. Oliver*, 510 U.S. 266, 306-08 (Stevens, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 841 (1992)(O'Connor, J., opinion for the Court); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976) (Powell, J., plurality opinion); *Roe v. Wade*, 410 U.S. 113, 167 (1973) (Stewart, J., concurring); *see also* David B. Kopel, *The Supreme Court's Thirty-five Other Gun Cases*, 18 ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW 99 (1999), http://davekopel.org/2A/LawRev/35FinalPartOne.htm).

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?

Answer: Rational basis was the proper standard only if the Second Amendment did not apply (a point which the Sotomayor per curiam opinion addressed briefly) *and* if, despite what Mr. Maloney had argued in his brief, the New York law did not infringe on any *unenumerated* right protected by the Fourteenth Amendment. Judge Sotomayor's opinion simply assumed that there was no unenumerated right involved, but provided not a scintilla of reasoning in support of that assumption.

Judge Sotomayor's version of the rational basis test—as she used it in *Maloney*, and explained her theory in testimony before the Senate Judiciary Committee—would allow any arm to be banned, as long as the government can provide some evidence that the arm could injure someone. This theory would allow a state or local government to prohibit every and any type of arm.

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

Answer: She claimed to be following the pre-*Heller* decision of *Bach v. Pataki*. That case was dispositive on the meaning of *Presser v. Illinois* in regards to the Privileges or Immunities clause of the Fourteenth Amendment. Neither *Bach v. Pataki*, nor *Presser* itself, even addressed the question of the interpretation of the Due Process clause of the Fourteenth Amendment. Accordingly, precedent did not prevent Judge Sotomayor from considering Due Process incorporation.



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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?

Answer: Footnote 23 lists three nineteenth-century cases in which the Court rejected non-federal application of the Second Amendment. The Court noted that the theory of one of those cases (*United States v. Cruikshank*, which had also said that the First Amendment right to assemble was only enforceable against the federal government) was no longer valid in light of subsequent cases. The Court noted that the other two cases (*Presser v. Illinois* and *Miller v. Texas*) had not been over-ruled, but that each of nineteenth century cases had "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."

Accordingly, *Heller* seems to indicate that contemporary lower federal courts are "required" to "engage in the sort of Fourteenth Amendment analysis" which has been created by the "later" Supreme Court cases: namely whether the Second Amendment is incorporated via the Due Process clause.

Footnote 23 does not take any position on whether or not applying the Second Amendment to the states would be appropriate. The footnote simply says that the proper (indeed, "required") way to decide the issue is to "engage in the sort of Fourteenth Amendment inquiry required by our later cases."

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?

Answer: The Supreme Court currently uses the Due Process clause of the Fourteenth Amendment to make most of the Bill of Rights applicable to the states. The *Maloney* opinion, and the cases on which *Maloney* relies, only discuss the Privileges or Immunities clause of the Fourteenth Amendment.

To assert that a decision on the Privileges or Immunities clause creates a binding precedent for the entirely separate Due Process clause is implausible. A Privileges or Immunities decision has no more bearing on the Due Process clause than it does on the Equal Protection clause, or on the Citizenship clause of section 1 of the Fourteenth Amendment.



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