

Remarks of Sandra S. Froman

Before the Senate Judiciary Committee

July 16, 2009

Chairman Leahy and Ranking Member Sessions, thank you for the opportunity to appear before the Judiciary Committee today to discuss the nomination of Judge Sonia Sotomayor, particularly as it relates to her views on the Second Amendment.

Before I begin, let me state that the views I express today are my own and not those of any particular organization. Having said that, I believe my views are shared by Americans from all states and all walks of life who care about preserving our fundamental constitutional liberties for ourselves and future generations, especially the right to keep and bear arms.

It is extremely important that a Supreme Court justice understand and appreciate the origin and meaning of the Second Amendment, a constitutional guarantee permanently enshrined in the Bill of Rights that protects “the right of *the people* to keep and bear Arms.” It is a right exercised and valued by almost 90 million American gun owners as well as by tens of millions more who value the right to choose to own a firearm in the future or to enjoy the shooting sports with a friend or family member who owns a gun. It may be considered the ultimate constitutional right because it exists to protect all the others.

Yet Judge Sotomayor’s record on the Second Amendment together with her unwillingness or inability as an appellate judge to engage in any analysis of this enumerated right when twice given the opportunity to do so – including most recently after the Supreme Court’s landmark decision last year in *District of Columbia v. Heller* – suggest either a lack of understanding of Second Amendment jurisprudence or hostility to the right. Either possibility should be of grave concern to this committee, as it is to me and millions of other gun owners.

Last year, the Supreme Court held in *Heller* that the Second Amendment guarantees to all law-abiding, responsible citizens the individual right to keep and bear their private arms, particularly for self-defense. The Court was closely divided, however. Four of the nine justices dissented, arguing that the Second Amendment does not protect the right of an individual to use firearms for purely private, non-military purposes and endorsed the concept that “legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia.” The same four justices joined in a separate dissent saying that even if the Second Amendment protects a purely private right to own firearms, the District of Columbia’s absolute ban on handguns within the home should be upheld as a “reasonable” restriction. If this had been the majority view, then any gun ban could be upheld, and the Second Amendment would be meaningless.

While on the Second Circuit, Judge Sotomayor revealed her views on the right to keep and bear arms in two cases. In the 2004 case, *United States v. Sanchez-Villar*, Judge Sotomayor and two colleagues dismissed a Second Amendment claim in a footnote holding that “the right to possess a gun is clearly not a fundamental right.” They cited an earlier Second Circuit case but provided no reasoning or analysis to support their one-sentence conclusion rejecting the constitutional claim. Imagine if such abrupt treatment was afforded other fundamental rights guaranteed by the Bill of Rights, such as the First, Fourth and Fifth Amendments.

Judge Sotomayor’s 2004 ruling might have been overlooked as having been issued before the Supreme Court in *Heller* announced its modern jurisprudence on the Second Amendment. But Judge Sotomayor reiterated her view of the Second Amendment after *Heller*. In *Maloney v. Cuomo*, decided earlier this year, she was on a panel that held that the Second Amendment is not a fundamental right, that it does not apply to the states, and that if an object is “designed primarily as a weapon” that is a sufficient basis for total prohibition even within the home.

The *Maloney* opinion cited the 1886 Supreme Court case of *Presser v. Illinois* as controlling precedent for the proposition that the Second Amendment limits only the federal government and does not limit the states. The panel stated that *Heller* “does not invalidate this longstanding principle,” and concluded without analysis that even if *Heller* “might be read to question the continuing validity” of *Presser*, the 1886 case had “direct application” to *Maloney* and must be followed.

*Presser* and two other cases from the late 1800’s, *United States v. Cruikshank* (1876) and *Miller v. Texas* (1894), held that the Second Amendment does not apply to the states. Although the *Cruikshank* line of cases has never been overruled, they were decided before development of modern twentieth century incorporation jurisprudence. Thus, the cases are obsolete and mostly have been rejected by the Court. For example, *Cruikshank* also stated that the First Amendment right of assembly did not apply to the states, which the Court later repudiated. Otherwise, Americans would not have any assembly First Amendment rights against states and local governments, which would then be able to ban church attendance or make it a crime to gather on the steps of the statehouse to criticize government. Indeed, over the past 50 years, the Supreme Court has applied most of the Bill of Rights to the states.

An individual’s Second Amendment rights are no less deserving of protection against states and local governments. Although the Supreme Court did not have to decide the incorporation issue in *Heller*, because federal law applies directly in the District of Columbia, the Court warned in a footnote against the application of *Cruikshank* in future Second Amendment cases and specified the type of constitutional analysis that would be expected of lower federal courts presented with the incorporation issue: “With respect to *Cruikshank*’s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”

The *Maloney* panel was equally dismissive of the Fourteenth Amendment claim, concluding that laws “that do not interfere with fundamental rights” must be upheld if “rationally related to a legitimate state interest.” Judge Sotomayor and her panel members conducted no analysis to determine if the right at issue was fundamental but merely assumed it was not. They accepted that a rational basis existed for the statute because there had been testimony at the time the law was enacted that the weapon at issue, a nunchaku, was “designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill,” and went on to uphold the statute.

In light of the express warning in *Heller* about *Cruikshank*, Judge Sotomayor’s panel in *Maloney* was obligated at a minimum to conduct a proper Fourteenth Amendment due process analysis of Second Amendment incorporation before reaching a conclusion. By failing to do so, the *Maloney* court evaded its judicial responsibilities, offered no guidance to lower federal courts faced with this issue, and provided no assistance in framing the issue for eventual resolution by the Supreme Court of a conflict among the circuits.

In addition, the *Maloney* court’s use of the rational basis standard of review to uphold the New York statute’s ban on possession of nunchakus in the home, is incorrect in light of *Heller*’s holding that the District of Columbia’s categorical ban on handguns in one’s home would fail under any meaningful standard of review. After *Heller*, it is not proper to apply a rational basis standard to a Second Amendment claim without performing the requisite constitutional analysis to determine whether the right is fundamental, which the *Maloney* court did not do.

While Second Amendment supporters disagree with Judge Sotomayor’s substantive views of the Second Amendment, the manner in which she reached her conclusions is of equal or greater concern. When confronted with perhaps the most important question remaining after *Heller* about the right to keep and bear arms – whether the right is fundamental and should be incorporated by the Fourteenth Amendment to constrain the states – Judge Sotomayor dismissed the issue with no substantive analysis. Citing questionable precedent from the 1800’s, she did nothing to note over a century of radical changes in constitutional law, nothing to consider the merits of the argument, nothing to comment on the issue’s importance.

Whenever a federal appellate judge fails to provide any supporting analysis for his or her conclusion, or to address serious constitutional issues that are compelled by the case, it is legitimate to ask whether the judge reached that conclusion based on fair and impartial application of the Constitution and law to the facts or based on an unstated political or social agenda.

Whether the Second Amendment is incorporated to states and local governments is important because, in addition to federal statutes and regulations, there are tens of thousands of state and local laws regulating firearms that affect American guns owners in their daily lives. Preventing an individual from effectively exercising what the *Heller* Court said was the Second

Amendment's "core lawful purpose of self-defense" is no less dangerous to the individual when accomplished by a state law than by a federal law. And to the extent that the Second Amendment was intended as a "safeguard against tyranny," there is no reason why individuals should not be equally entitled to protection against tyranny by state governments as by the federal government.

Although the Court in *Heller* did not decide whether the Second Amendment is a "fundamental right", the opinion suggests as much, noting that the right to arms was "one of the fundamental rights of Englishmen" from whence our common law derives and that the "inherent right of self-defense has been central to the Second Amendment right." Thus, the right in every sense satisfies the Supreme Court's test in *Duncan v. Louisiana* that to be fundamental, the right must be "necessary to an Anglo-American regime of ordered liberty."

Whether the Second Amendment is a fundamental right is important to deciding whether a meaningful level of scrutiny should be applied to any governmental burden placed on the exercise of the right. It is also critical to answering the incorporation question because the Supreme Court has only incorporated against the states those rights it deems fundamental.

Judge Sotomayor's view that the right to keep and bear arms is not a fundamental right deserving of protection against states and local governments would rob the Second Amendment of any real meaning and would trample on the individual rights of America's nearly 90 million gun owners. Under her view of the Second Amendment, states and local governments could pass any kind of gun prohibition they want, including outright bans on firearms. Under her view, the gun bans in New York City, San Francisco, and Chicago would be upheld under the Constitution. Under her view, it would not violate the Constitution if – as implausible as it seems – the states of Nebraska and Montana decided to ban all guns used for hunting based on environmental concerns, or if the cities of Anchorage and Little Rock decided to ban all handguns within the city limits as a public safety measure. The City of New Orleans' door-to-door confiscation of firearms from law-abiding peaceable citizens that took place in the aftermath of Hurricane Katrina would be constitutional under Judge Sotomayor's view of the Second Amendment.

The lack of any serious constitutional analysis by Judge Sotomayor in the *Maloney* and *Sanchez-Villar* decisions is even more egregious when you compare them to the recent Ninth Circuit and Seventh Circuit cases that reached opposite views on Second Amendment incorporation.

In *Nordyke v. King*, the Ninth Circuit engaged in a detailed analysis of this question, concluding that the *Cruikshank* line of cases only prevented incorporation through the Privileges or Immunities Clause. The Ninth Circuit held that it was free to consider incorporation through the Due Process Clause and did so, concluding that the Second Amendment does apply to the states.

The Seventh Circuit, in *NRA v. Chicago*, reached the opposite conclusion on incorporation of the Second Amendment based on what it felt was controlling precedent of the *Cruikshank* line of cases from the 1800's, but not before discussing the question in depth, exploring the legal issues and explaining its conclusion in a nine-page opinion.

Against the backdrop of *Heller*, *NRA v. Chicago* and *Nordyke v. King*, Judge Sotomayor's two Second Amendment decisions raise questions not only about her substantive views of this enumerated right but about her willingness to engage in the rigorous constitutional analysis expected of a Supreme Court justice.

Today the Second Amendment survives by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningfully strict standard of review remain to be decided by the High Court. America has almost 90 million gun owners who value their Second Amendment rights. Those Americans deserve to have a justice who will interpret the Second Amendment in a fair and impartial manner consistent with the Amendment's text and intent. Judge Sotomayor has already revealed her views on these issues, and they are contrary to the language and purpose of the Second Amendment.

Regarding the Second Amendment, Judge Sotomayor's supporters say she will follow precedent. But this is no answer. If that means Judge Sotomayor will adhere to the *Cruikshank* line of cases, as she did in *Maloney*, then she would join the side of those justices who would hold that the Second Amendment applies only to the federal government, leaving cities and states free to completely ban firearms for any reason, or that the Second Amendment is not a fundamental right, which would allow cities and states to ban firearms if there is any "rational basis" for doing so. And in *Maloney*, Judge Sotomayor ignored precedent when she applied the rational basis test to uphold the New York statute banning nunchakus – after the Supreme Court in *Heller* stated that rational basis is not a sufficiently rigorous standard of scrutiny to apply to enumerated constitutional rights, such as the Second Amendment.

An appellate judge—and especially a Supreme Court justice—must write well-crafted opinions that fully and impartially explore the Constitution and statutes, and which are worthy of respect from those of us who must live by their decisions. While important in every case, this is particularly so in cases involving enumerated constitutional rights central to the freedom upon which this country was founded.

In the aftermath of *Heller*, there will be many gun-rights cases over the next thirty years, and whoever becomes the newest Supreme Court Justice will likely have a hand in deciding them all. This formative period of developing Second Amendment jurisprudence is when the right to keep and bear arms is most vulnerable.

The Second Amendment survives today by a single vote in the Supreme Court. But the next justice will have an impact beyond a single vote because his or her views will also affect the dynamic of the Court. The next justice will serve for life and that person's influence and legacy

will affect us all for generations to come. American gun owners, together with all Americans who revere the Constitution, deserve to have a Supreme Court justice who will interpret the Second Amendment fully and fairly in a manner consistent with its text and meaning.

A supermajority of Americans believe in an individual, private right to keep and bear arms. As a result, political candidates hostile to Second Amendment rights are often defeated at the ballot box. Gun prohibition activists are now looking to the courts and they support judges whom they believe will rule in favor of more limitations on firearms ownership and use. The President who nominated Judge Sotomayor has expressed support for the City of Chicago's gun ban, which is being challenged in *NRA v. Chicago*, a case that is headed toward the Supreme Court. Seating a justice on the Supreme Court who does not believe that the Second Amendment is a fundamental right deserving of protection against infringement by cities and states could do far more damage to the right to keep and bear arms than any legislation passed by Congress.

Based on her record and her treatment of the Second Amendment, I respectfully urge the Senate not to confirm Judge Sotomayor.