Confirmation Hearings for the Appointment of Sonia Sotomayor to the Supreme Court of the United States of America

Hearings before the Judiciary Committee of the United States Senate, July 13-17, 2009

Testimony of David B. Kopel
Research Director, Independence Institute, Golden, Colorado
Associate Policy Analyst, Cato Institute, Washington, D.C.

The case of *Sonia Sotomayor versus The Second Amendment* is not yet found in the record of Supreme Court decisions. Yet if Judge Sotomayor is confirmed to the Supreme Court, the opinions of the newest Justice may soon begin to tell the story of a Justice with disregard for the exercise of constitutional rights by tens of millions of Americans.

In *Maloney v. Cuomo*, Judge Sotomayor ruled that the peaceful ownership of arms by citizens is not a fundamental right. Her ruling was supported by no legal analysis. Rather, it was a pure declaration.

New York State is the only state in the union which completely prohibits the peaceful possession of nunchaku. After President Nixon's opening to China in the early 1970s, many Americans became interested in learning to practice the traditional martial arts of China and East Asia. At the same time, "kung fu" movies enjoyed a brief period of popularity, and some xenophobes began trying to suppress the martial arts. Unfortunately, legislators in New York State succumbed to the xenophobia, and outlawed nunchaku.[1]

By definition, any "martial art" involves training in some form of combat. The martial art may be "empty-handed", such as akido, judo, or kung-fu. Or it may use an arm, such as kyudo (Japanese archery) or nunchaku.[2]

In a colloquy with Senator Hatch on July 14, Judge Sotomayor said that there was a rational basis for the ban because nunchaku could injure or kill someone.[3] The same point could just as accurately be made about

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[1] During the same 1974-75 period, Massachusetts severely restricted nunchaku, but did not prohibit possession in the home, which was the type of possession at issue in *Maloney*. California and Arizona restricted possession and use to martial arts exhibitions or academies. Many other states have restrictions on carrying nunchaku in public places, or in school zones, but these laws simply treat nunchaku like many other arms, such as knives or blunt weapons.

[2] *See* David B. Kopel, *Self-defense in Asian Religions*, 2 LIBERTY LAW REVIEW 79 (2007).

[3]

> And -- and when the sticks are swung, which is what you do with them, if there's anybody near you, you're going to be seriously injured, because that swinging mechanism can break arms, it can bust someone's skull...

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bows and arrows, swords, or guns. All of them are weapons, and all of them can be used for sporting purposes, or for legitimate self-defense.

Judge Sotomayor's approach would allow states to ban archery equipment with no more basis than the declaring the obvious: that bows are weapons. Even if there were no issue of fundamental rights in this case, Justice Sotomayor's application of the rational basis test was shallow and insufficiently reasoned, and it was contrary to Supreme Court precedent showing that the rational basis test is supposed to involve a genuine inquiry, not a mere repetition of a few statements made by prejudiced people who imposed the law.[4]

The plaintiff in *Maloney* had argued that (even putting aside the Second Amendment) the New York prohibition violated his rights under the Fourteenth Amendment.[5] As Judge Sotomayor correctly recognized, resolution of this claim required deciding whether Mr. Maloney had been deprived of a fundamental right.

Whatever the situation regarding Circuit or Supreme Court precedent on the Second Amendment, there was no controlling precedent on whether Mr. Maloney's activity involved an unenumerated right protected by the Fourteenth Amendment. Accordingly, Judge Sotomayor and her fellow *Maloney* panelists should have provided a reasoned decision on the issue. Alternatively, the panel might have declined to decide the fundamental rights issue, while issuing an opinion holding that, even if right in general were fundamental, the right to Maloney's particular arm (nunchaku) is not.

Instead, the panel simply stated a general rule about the Fourteenth Amendment: "Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if 'rationally related to a legitimate state interest.'"

The quoted language came from *Beatie v. City of New York*, 123 F.3d 707 (2d. Cir. 1997), an unsuccessful challenge to the City government's severe restrictions on cigar smoking. *Beatie* itself was quoting the Supreme Court's *Cleburne v. Cleburne Living Center*.

The *Maloney* court's approach was evasive and disingenuous. Stating the test is not the same as applying the test. Pursuant to *Beatie*

HATCH: Sure.

SOTOMAYOR: ... it can cause not only serious, but fatal damage. So to the extent that a state government would choose to address this issue of the danger of that instrument by prohibiting its possession in the way New York did, the question before our court -- because the Second Amendment has not been incorporated against the state -- was, did the state have a rational basis for prohibiting the possession of this kind of instrument?

[4] *See, e.g.*, *Cleburne v. Cleburne Living Center*, 472 U.S. 432 (1985) (rejecting the claim that the mentally retarded a protected class for Equal Protection purposes, while finding that that a city's ban on a group home for the mentally retarded was irrational because it was based on prejudice and irrational fears).

[5] The brief pointed in various cases in which the Supreme Court had protected unenumerated rights, such as *Meyer v. Nebraska* (right to educate one's children), *Griswold v. Connecticut* (right of married couples to use birth control).

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and *Cleburne*, there is a two-part test:

1. Does the legislative act interfere with a fundamental right or single out a suspect classification?

2. If not, is there a rational basis for the law?

The cigar aficionado Mr. Beatie had conceded point 1, but had argued that there was no rational basis for the anti-cigar law; so the *Beatie* court analyzed only the second point, and decided that there was a rational basis. Mr. Maloney, in contrast, had argued energetically and extensively that New York state's ban on nunchuku violated his fundamental rights.

Yet Judges Sotomayor, Pooler, and Katzman simply presumed--with no legal reasoning--that his use of arms in the home is not a fundamental right.[6]

The 2009 *Maloney* case was not the first time Judge Sotomayor had written about arms and fundamental rights. In the 2004 case of *United States v. Sanchez-Villar*, she used some dicta from an older case in order to claim that "the right to possess a gun is clearly not a fundamental right."[7] That older case was *United States v. Toner*.[8]

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[6] Judges Pooler and Katxman were appointed by Republicans. The fact does not excuse Judge Sotomayor´s actions in the case. Judges who have been appointed by Republicans or Democrats alike may be hostile to constitutional rights, particularly if the right is one which is disfavored by the elite classes in the state where the judge comes from. Certainly if Judges Pooler or Katzman were ever to be considered for confirmation to another position of responsibility, their conduct in *Maloney* should be subject to the same kind of examination has Judge Sotomayor´s has been.

[7] *United States v. Sanchez-Villar*, 99 Fed.Appx. 256, 2004 WL 962938 (2d. Cir. 2004)(Summary Order of Judges Sack, Sotomayor & Kaplan), judgment vacated, *Sanchez-Villar v. United States*, 544 U.S. 1029 (2005)(for further consideration in light of the 2005 *Booker* decision on sentencing).

[8] *United States v. Toner*, 728 F.2d 115 (2d Cir., 1984).

Vincent Toner and Colm Murphy were convicted of attempting to purchase unregistered machine guns for the purpose of smuggling them to Northern Ireland, on behalf of misnamed Irish National Liberation Army. To their surprise, the purported middleman in the deal turned out to be an FBI informant.

On appeal, Murphy challenged, inter alia, the federal statute prohibiting illegal aliens from possessing firearms. He argued that since American citizens can possess firearms, the statute prohibiting illegal aliens from doing so was a denial of equal protection. The court's analysis of the issue is as follows:

> Murphy was convicted under Count Four of violating 18 U.S.C.App. § 1202(a)(5) (1976), which makes it a felony for an illegal alien to receive, possess or transport "in commerce or affecting commerce ... any firearm." Because receiving, possessing or transporting firearms in interstate commerce is not in and of itself a crime, United *States v. Bass*, 404 U.S. at 339 n. 4, 92 S.Ct. at 518 n. 4, and because being an illegal alien is not in and of itself a crime, Murphy argues that his Fifth Amendment right to equal protection of the law is violated by section 1202(a)(5). He concedes, however, that the statute passes constitutional muster if it rests on a rational basis, a concession which is clearly correct since the right to possess a gun is clearly not a fundamental right, cf. *United States v. Miller*, 307

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Post-*Heller*, the *Toner* dicta about arms was obviously invalid, since it was based on a misinterpretation of the Supreme Court's 1939 case *United States v. Miller*. So when the *Maloney* case came to the Second Circuit, Judge Sotomayor could not, and did not, cite *Toner*. As a result, there was no case law from the Second Circuit or from the Supreme Court to support the proposition that peaceful possession of arms is not a fundamental right as an unemerated Fourteenth Amendment right..

Testifying before this Committee on July 14, Judge Sotomayor provided further examples of her troubling attitude to the right to arms. She told Senator Hatch that the *Heller* decision had authorized gun control laws which could pass the "rational basis" test.[9] To the contrary, the *Heller* decision had explicitly rejected the weak standard of review which Justice Breyer had argued for in his dissent.[10]

Yet bereft of support from precedent or dicta, Judge Sotomayor simply presumed--on the basis of no legal analysis--that arms possession is not a fundamental right under the Fourteenth Amendment.

U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) (in the absence of evidence showing that firearm has "some reasonable relationship to the preservation or efficiency of a well regulated militia," Second Amendment does not guarantee right to keep and bear such a weapon), and since illegal aliens are not a suspect class. The *Toner* court then provided reasons why there is a rational basis for treating illegal aliens differently, in regards to arms possession.

It is questionable whether *Toner*'s language about fundamental rights created a controlling precedent; the issue was not even contested before the court, as appellant Murphy had conceded that no fundamental right was involved. However, *Toner* provided, at the least, some usable dicta, which Judge Sotomayor and the other two judges in her panel quoted in their Summary Order in *Sanchez-Villar* in 2004.

In 2008, the Supreme Court authoritatively ruled that the Second Circuit's 1984 reading of *Miller* was entirely wrong. In *District of Columbia v. Heller*, the majority opinion chastised lower court judges who had "overread Miller" and criticized Justice Stevens for wanting to defer to "their erroneous reliance" on interpretations similar to the one proffered by the Second Circuit in *Toner*.

The *Heller* decision stated that "*Miller* did not hold that and cannot possibly be read to have held" that only arms possession by the militia is protected by the Second Amendment. Quoting the exact sentence of *Miller* which had been quoted in *Toner*, the Heller decision explained that this sentence demonstrated *Miller*'s correct meaning: "it was that *the type of weapon at issue* was not eligible for Second Amendment protection." Thus, "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."

Post-*Heller*, *Toner*'s assertion that there is no fundamental right to possess a firearm was invalid. The assertion in *Toner* was based on solely on an interpretation of *Miller*, and the Supreme Court has unambiguously stated that the interpretation was wrong.

[9] "But even Justice Scalia, in the majority opinion in Heller, recognized that that was a rational basis regulation for a state under all circumstances, whether or not there was a Second Amendment right."

[10] To be precise, the Breyer dissent had argued for a "reasonableness" standard. This would be somewhat stronger than mere "rational basis."*A foriori*, the rejection of "reasonableness" also rejected "rational basis."

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Both Judge Sotomayor[11] and some of her advocates have pointed to the Seventh Circuit's decision in *NRA v. Chicago* as retrospectively validating her actions in *Maloney*. The argument is unpersuasive. Both the *Maloney* and the *NRA* courts cited 19th century precedents which had said that the Fourteenth Amendment's "privileges or immunities" clause did not make the Second Amendment enforceable against the states. However, as the *Heller* decision itself had pointed out, those cases "did not engage the sort of 14th Amendment inquiry required by our later cases." In particular, the later cases require an analysis under a separate provision of the Fourteenth Amendment, the "due process" clause.

Notably, the Seventh Circuit addressed this very issue, and provided a detailed argument for why the existence of modern incorporation under the due process clause would not change the result in the case at bar.[12]

In contrast, Judge Sotomayor's per curiam opinion in *Maloney* did not even acknowledge the existence of the issue.

Various talking heads have made the argument that since *Maloney* and *NRA* reached the same result, and since two of the judges in *NRA v. Chicago* were Republican appointees who are often called "conservatives", then the *Maloney* opinion must be alright.

This argument is valid only if one presumes that conservatives

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[1111] In response to a question from Senator Hatch, July 14, 2009.

[12] Even so, the Seventh Circuit panel was clearly straining to reach the result it did. Exemplifying what Justice Brennan had (in another context) described as "arroganee cloaked as humility," the panel claimed that it was merely obeying the rule that lower courts should not presume that a still-valid Supreme Court precedent is going to be overruled. As the key illustration, the panel pointed to the history of the 1997 Supreme Court decision in *State Oil Co. v. Khan*, which overruled the 1968 Supreme Court decision *Albrecht v. Herald Co.* In *Albrecht*, the Court had interpreted section 1 of the Sherman Antitrust Act, which forbids "Every contract, combination ... or conspiracy, in restraint of trade, " to mean that manufacturers are forbidden to set maximum prices that their retailers can charge. (This is called "vertical price fixing.") By 1996, economists had proven—and several Supreme Court cases had seemed to agree—that *Albrecht*'s rationale was entirely wrong. Yet *Albrecht* had not been overruled, and so the 7th Circuit obeyed it.

When the Supreme Court in *State Oil Co. v. Khan* overruled *Albrecht* in 1997, the Supreme Court praised the 7th Circuit for having adhered to *Albrecht*, since *Albrecht* had not yet been overruled, even though almost everyone had correctly predicted that its days were numbered.

In the handgun ban case, the 7th Circuit panel congratulates itself for its treatment of *Albrecht*, and said that a similar approach is required on the question of whether states must respect the Right to Keep and Bear Arms.

The panel's claim, however, is founded on a rather obvious logical error. *Albrecht*'s 1968 judicial rule against vertical price fixing was an interpretation of one phrase in one federal statute, and the 1997 *State Oil* case was a reinterpretation of that very same phrase.

However, the plaintiffs in *NRA v. Chicago* were asking the court to rule on a constitutional provision that none of the 19th century cases had addressed. The 19th century cases had decided that the Second Amendment does not, by its own force, apply to the states, and that the right to arms is not protected by the "privileges or immunities" clause of the 14th Amendment. However, none of the three cases involved a decision about incorporation under the "due process" clause.

Contrary to what the 7th Circuit panel implied, the fact that the Supreme Court rejects a claim based on one constitutional clause does not prevent a lower court from ruling in favor of a claim based on a separate constitutional clause. For example, if a local government does something concerning religion, and the Supreme Court rules that the government action does not violate the First Amendment clause which forbids a government "establishment of religion," then the plaintiff can file another lawsuit alleging that the very same government action violates the separate clause in the First Amendment that forbids "prohibiting the free exercise" of religion.

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and/or Republican appointees always meet the standard of strong protectiveness for constitutional rights which should be required for any Supreme Court nominee.

In the case of the *NRA v. Chicago* judges, that standard was plainly not met. The Seventh Circuit judges actually made the policy argument that the Second Amendment should not be incorporated because incorporation would prevent states from outlawing self-defense by people who are attacked in their own homes.[13]

A wise judge demonstrates and builds respect for the rule of law by writing opinions which carefully examine the relevant legal issues, and which provide careful written explanations for the judge's decisions on those issues.

Judge Sotomayor's record on arms rights cases has been the opposite. Her glib and dismissive attitude towards the right is manifest in her decisions, and has been further demonstrated by her testimony before this Committee. In Sonia Sotomayor's America, the peaceful citizens who possess firearms, bows, or martial arts instruments have no rights which a state is bound to respect, and those citizens are not even worthy of a serious explanation as to why.

[13] "Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the Second Amendment protects only the interests of law-abiding citizens ...Our hypothetical is not as far-fetched as it sounds."

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