The Second Amendment and the "Fundamental" Right to Bear Arms

In today's hearing, Judge Sotomayor has been asked about her position on the Second Amendment. The Second Amendment to the U.S. Constitution provides, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Last year, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment protects an "individual right to possess and carry weapons in case of confrontation." 128 S. Ct. 2783, 2797. Critics of Judge Sotomayor contend she has been "dismissive" of the Second Amendment and that she displays an "extreme anti-gun philosophy." Senator John Cornyn, in one of his daily questions for Judge Sotomayor, asked what she means when she agreed that the Second Amendment does not protect a fundamental right.

Judge Sotomayor's Record on the Second Amendment

Judge Sotomayor has participated in only two cases reviewing Second Amendment claims during her tenure on the bench. In both of these cases, unanimous panels of the Second Circuit faithfully applied clear precedent that compelled denial of the constitutional claims. In 2004, several years before *Heller,* Judge Sotomayor sat on a panel that issued a summary order affirming a drug dealer's conviction for possession of a firearm by an illegal alien. *United States v. Sanchez-Villar,* 99 F. App'x 256 (2d Cir. 2004), *vacated and remanded on other grounds,* 544 U.S. 1029. Devoting the bulk of the opinion to the defendant's ineffective assistance of counsel claim, the panel rejected in a footnote his argument that New York's law forbidding him from carrying a gun violated the Second Amendment. The panel cited decades-old Second Circuit precedent that "the right to possess a gun is clearly not a fundamental right." *Id.* at *5 n.1 (*citing United States v. Toner,* 728 F.2d 115, 128 (2d Cir. 1984)).

In *Maloney v. Cuomo,* 554 F.3d 56 (2d Cir. 2009), Judge Sotomayor signed a unanimous per curiam opinion rejecting a plaintiff's claim that a New York law is unconstitutional insofar as it punishes possession of nunchakus (weapons consisting of two sticks connected by a chain) in one's home. The panel appropriately described *Heller* as conferring an individual right on citizens to keep and bear arms, *id.* at 58, but it rejected plaintiff's claim based on longstanding precedent that the Second Amendment did not apply to state regulations, as opposed to federal regulations involving gun rights in the District of Columbia at issue in *Heller. Id.* at 58-59; *see also Presser v. Illinois,* 116 U.S. 252, 265 (1886) (stating the Second Amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state."). The *Heller* majority noted that the case did not present the question of whether the Second Amendment applies to the states, 128 S. Ct. at 2813 n.23, so the Second Circuit remained bound to follow *Presser*, the case that directly controls review of state firearms restrictions. *Maloney,* 554 F.3d at 59. The Seventh Circuit, in an opinion written by Judge Easterbrook, one of the nation's most prominent conservative jurists, recently agreed with the Second Circuit that the

Second Amendment does not apply to state regulations. *See Nat'l Rifle Assoc., Inc. v. Chicago,* 2009 U.S. App. LEXIS 11721, at *4-5 (7th Cir. 2009). The Ninth Circuit, however, recently ruled in *Nordyke v. King,* 563 F.3d 439 (9th Cir. 2009), that the Second Amendment does apply to the states. Petitions for certiorari has been filed in *Maloney* and in *NRA v. Chicago,* and a petition for rehearing *en banc* was filed in *Nordyke.* The Second Circuit's decision in *Maloney* was a reasonable, mainstream application of longstanding precedent unaltered by *Heller* – but given the circuit split, it is reasonable to expect that the Supreme Court will soon consider the question of incorporation of the Second Amendment against the States under the Due Process Clause of the Fourteenth Amendment.

The Context: Second Amendment Rights After *Heller*

In addition to faithfully applying the precedents by which they were bound, the rulings in both *Sanchez-Villar* and *Maloney* fell within the constitutional parameters announced by Justice Scalia for the majority in *Heller.* The crux of the *Heller* decision was to identify the right conferred by the Second Amendment as belonging to an individual, rather than to the collective people's right to bear arms for use in a militia. Justice Scalia specifically stated in *Heller* that the Second Amendment does *not* secure an unlimited right to bear arms, 128 S. Ct. at 2816, and "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-17. *See also id.* at 2799 ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose."*). The two restrictions on weapons possession upheld by Judge Sotomayor while on the Second Circuit are similar to those described by Justice Scalia in *Heller* to be permissible. Of particular note is that Justice Scalia read *United States v. Miller,* 307 U.S. 174 (1939), the Supreme Court decision upholding the first federal firearms regulation, to say that the Second Amendment does not protect weapons not typically possessed by law-abiding citizens for lawful purposes, such as shot-barreled shotguns**.** *Id.* at 2815. Given this limitation on an individual's right to bear arms, it is reasonable to conclude that, even if the Second Amendment does apply to New York State law, a court might decide, following Justice Scalia's formulation of *Miller,* that an individual does not have a constitutional right to possess nunchakus, and that a state regulation on this particular type of weapon passes constitutional muster.

Senator Cornyn's and others' concerns that Judge Sotomayor does not treat the Second Amendment as conferring a "fundamental right" raises a slightly trickier issue. As mentioned above, the *Sanchez-Villar* panel cited longstanding Second Circuit precedent that the right to possess a gun is not fundamental, and in *Maloney,* after concluding that the Second Amendment does not apply to state regulations, the Second Circuit indicated that the Second Amendment did not confer a fundamental right and proceeded to apply rational basis review to the nunchakus prohibition. 554 F.3d at 59. However, the Supreme Court has *not* announced that the Second Amendment confers a "fundamental right." Although Justice Scalia refers to 18th-century English subjects' political (as opposed to constitutional) right to bear arms as both a "fundamental" and a "natural" right, *Heller,* 128 S. Ct. at 2798, 2799, he does not describe the right as written in the U.S. Constitution as "fundamental." *See id.* at 2817-818. In fact, he

assiduously avoids specifying the nature of the right and announcing the appropriate level of scrutiny with which a restriction of the right should be reviewed. Instead, he makes the conclusory statement that "under any of the standards of scrutiny that we have applied to enumerated constitutional rights," the District of Columbia regulation would fail constitutional muster. *Id.* Justice Breyer devotes a considerable amount of his dissent to arguing that courts should review Second Amendment claims under the rational basis standard, and in a footnote responding to Justice Breyer, Justice Scalia suggests that gun regulations should receive more stringent scrutiny than rational basis review. Accordingly, Republicans might criticize Judge Sotomayor for the *Maloney* panel's willingness to apply rational basis review to the nunchakus prohibition (and it is reasonable to project that a majority of the Supreme Court will announce a stricter standard if given the chance in the next several years). However, the Second Circuit's refusal to categorize the right to bear arms as a fundamental right was the correct course for an appellate court to currently take; doing otherwise would have constituted judicial activism beyond the bounds of Supreme Court precedent. And until the Supreme Court holds otherwise, an appellate court should apply rational basis review to state regulations.