FindLaw Legal News and Commentary
http://writ.news.findlaw.com/commentary/20090731_levy.html

# Sotomayor and the Second Amendment

**By ROBERT A. LEVY**

Friday, July 31, 2009

The hearings are over; no major gaffes; and confirmation is all but certain. But that hasn't dampened opposition from the National Rifle Association, which will count senators' votes on Sonia Sotomayor as part of its influential legislative score card on gun-rights issues. And Ralph Reed, a GOP strategist, has advised Republicans to make "her an issue in key races next year." Well, there may be good reasons to oppose Judge Sotomayor's confirmation as Supreme Court justice, but her recent holding on the right to keep and bear arms is not one of them.

First, some background: The Supreme Court ruled in 1833 (*Barron v. Baltimore*) that the Bill of Rights restrained only the federal government, not the states. The states, however, proved to be imperfect guardians of our liberties. Slavery was the obvious example, a partial remedy for which was three post-Civil-war constitutional amendments. One of those, the 14th, barred the states from abridging the "Privileges or Immunities" of citizens, or denying "Due Process" to any person.

Five years after the 14th Amendment was ratified, the Supreme Court in the *Slaughter-House Cases* effectively erased the Privileges or Immunities Clause from the Constitution. Thirteen years later, in *Presser v. Illinois* (1886), the Court confirmed that the right to keep and bear arms was not among the "privileges or immunities" of citizens of the United States that the states were barred from abridging.

Then the legal framework changed. In a series of cases beginning in 1897, the Court used the Due Process Clause of the 14th Amendment to "selectively incorporate" almost all of the Bill of Rights so they could be invoked against the states. Oddly, no case addressed whether the Second Amendment was incorporated. Thus *Presser* – a pre-incorporation case – seemed to control; and by its terms, the Second Amendment did not bind state governments. Until June of last year, that proposition was mostly ignored. But the Court then issued its blockbuster opinion in *District of Columbia v. Heller*, which declared that the right to keep and bear arms belonged to individuals, independent of militia service. Suddenly, the applicability of the Second Amendment to the states took on major significance. *Heller* provided no answer because it arose in Washington, D.C., which is a federal enclave, not a state.

Fast forward to February 2009. The U.S. Court of Appeals for the Second Circuit had to determine in *Maloney v. Cuomo* whether a New York state ban on a Japanese martial arts weapon known as a nunchaku in the home violated the Second Amendment. Judge Sotomayor was a member of a three-judge panel, which ruled that *Presser* foreclosed a Second Amendment challenge. The panel also cited *Bach v. Pataki*, a prior Second Circuit case, which had reached the same conclusion. Technically, the *Maloney* panel could not overrule a previous panel of the same court. In effect, Sotomayor's panel said, "Maybe *Presser* is still good law, or maybe *Presser* has been superseded by the Supreme Court's later incorporation cases. We three judges cannot make that decision – first, because another panel of this court has already followed *Presser* and, second, because the Supreme Court and not an appellate court must say when earlier Supreme Court cases are superseded."

This past June, the Seventh Circuit agreed with Sotomayor. In *McDonald v. Chicago*, a three-judge panel, including esteemed conservatives Frank Easterbrook and Richard Posner, held that *Presser* barred a Second Amendment challenge to Chicago's gun laws. Interestingly, in April, a Ninth Circuit panel disagreed. In *Nordyke v. King,* the panel concluded that *Presser* foreclosed the use only of the Privileges or Immunities Clause, but did not foreclose selective incorporation of the Second Amendment via the Due Process Clause. That holding will be reconsidered, however, by a larger contingent of 11 Ninth Circuit judges. Oral argument is set for September 21.

Which panel got it right? Most likely, it won't matter – because the Supreme Court will review one or more of the three Second Amendment cases; and precedent will not bind the high Court. We should have an answer shortly. Either way, the decision of the Second Circuit panel, including Judge Sotomayor, was well within the bounds of responsible judging. Perhaps the Second and Seventh Circuits were correct. Perhaps the Ninth Circuit panel had the better of the argument. It's a close call –not the kind of call on which confirmations ought to turn (or even focus).

Finally, some gun rights advocates criticize Sotomayor's *Maloney* opinionfor stating that the right to nunchakus in the home is not a "fundamental right." But that statement had nothing to do with the Second Amendment. Instead, it concerned a different claim by the plaintiff under a doctrine known as substantive due process, which pertains to unenumerated constitutional rights, not those expressly listed in the Bill of Rights. Unless an unenumerated right is "fundamental," the courts will be highly deferential to legislative restrictions. Only if the right is "necessary to [our] regime of ordered liberty" or "deeply rooted in this Nation's history and tradition" will a right be deemed fundamental. The Sotomayor panel decided that the statute in question, regarding the unenumerated right to a nunchaku, not the enumerated right to keep and bear arms, did not meet those criteria.

Of course, those doctrinal pronouncements – differentiating between so-called fundamental and non-fundamental rights; diminishing the importance of unenumerated rights – are confused and confusing. Therein lay fertile ground for questioning Judge Sotomayor. What is her view of the Ninth Amendment – designed to protect unenumerated rights? Should the Supreme Court have bifurcated our rights – fundamental vs. non-fundamental – as it did in a single footnote in a 1938 case, *United States v. Carolene Products*? Those were among the issues she should have addressed at her confirmation hearings. Her answers would have revealed a great deal more about her theory of rights than did her *Maloney* opinion on an inscrutable question about judicial precedent.

---

*Robert A. Levy, chairman of the Cato Institute, was co-counsel to the plaintiff in District of Columbia v. Heller. Cato also filed a joint Supreme Court brief with the Institute for Justice arguing that Second Amendment rights are among the Privileges or Immunities of citizens.*