

Sotomayor hearings: The complete transcript -- Day 4, Part 7



As we often do here on The Ticket, in addition to our own take on politics and events, we are providing a complete transcript of the Senate Judiciary Committee confirmation hearings on Judge Sonia Sotomayor's nomination to the Supreme Court for those interested in reading the participants' own words in full.

The goal, of course, is to provide Ticket readers the opportunity to make their own judgments on the back and forth between the nominee and other witnesses and the interrogating senators — some setting her up with softballs, others pursuing tougher lines of questioning.

And, if you choose, please feel invited to leave your own comments below and participate in the historic confirmation debate over the nomination of the first Latina to the nation's highest court.

Scroll up or down from here for the numerous items other Ticket writers are contributing minute by minute as the drama unfolds in Room 216 of the Hart Senate Office Building in Washington.

A complete cast of committee characters is added to the bottom of this item.

On Monday, we published the opening statements of each senator and Judge Sotomayor. Tuesday, we published the entire day's transcript proceedings in five parts. The links to all those pieces are at the end of this item.

Keep checking back here for updates.

-- Andrew Malcolm

ACTING CHAIR: Thank you very much for your testimony, Ms. Froman. Our next witness is David Kopel. He is currently the research director of the Independence Institute in Golden, Colorado, and an associate policy analyst at the Cato Institute. He is also a contributor to the National Review Magazine. He graduated from the University of Michigan Law School. Thank you very much for being here. We look forward to your testimony.

KOPEL: Thank you. 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.

New York state is the only state in the union which completely prohibits the peaceful possession of a nunchaku, a (inaudible) ban enacted after the opening to China in the early 1970s and the growth of interest in the martial arts. In the colloquy with Senator Hatch on July 14, Judge Sotomayor said that there was a rational basis for the ban because a nunchaku could injure or kill someone.

The same point could just as accurately be made about 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 to claim the obvious, that bows are weapons. Even if there were no issue of fundamental rights in this case, Judge Sotomayor's application of the rational-basis test was shallow and insufficiently reasoned, and it was contrary to Supreme Court testament 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 impose the law.

The plaintiff in Maloney had argued that even putting aside the Second Amendment the New York prohibition violated his rights under the 14th Amendment. There was no

controlling precedent on whether Mr. Maloney's activity involved an unenumerated right protected by the 14th Amendment. Accordingly, Judge Sotomayor and her fellow Maloney panelists should have provided a -- a reasoned decision on the issue.

Yet Judge Sotomayor simply presumed, with no legal reasoning, that Mr. Maloney's use of arms in his own home was not part of the exercise of a fundamental 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 -- the Heller decision had authorized gun control laws which could pass the rational basis test. To the contrary, the Heller decision had explicitly rejected the weak standard of review, which Justice Breyer had argued for in his dissent.

Both Judge Sotomayor 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 14th 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, quote, "did not engage in the sort of 14th Amendment inquiry required by our later cases." In particular, the later cases require an analysis under the separate provision of the 14th 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. In contrast, Judge Sotomayor's per curiam opinion in *Maloney* did not even acknowledge the existence of the issue.

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

This argument is valid only if one presumes that conservatives 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.

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 right cases has been the opposite. Her glib and dismissive attitude toward 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. Thank you.

KLOBUCHAR: Thank you very much. And did I say your name correctly?

KOPEL: (OFF-MIKE)