National Rifle Association of America
Institute for Legislative Action
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Office of the Executive Director
Chris W. Cox

July 7, 2009

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

I am writing to express the National Rifle Association's very serious concerns about the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

We are particularly dismayed about the U.S. Court of Appeals for the Second Circuit's recent decision in the case of *Maloney v. Cuomo*, which involved the application of the Second Amendment as a limit on state law, via incorporation of the Second Amendment through the Fourteenth Amendment's Due Process Clause. Judge Sotomayor was on the panel that decided this case in a brief—and in our opinion, clearly incorrect—*per curiam* opinion.

The *Maloney* panel claimed that "it is settled law...that the Second Amendment applies only to limitations the federal government seeks to impose on this right." It based this ruling on the 1886 case of *Presser v. Illinois*, decided long before the development of the Supreme Court's modern incorporation doctrine. But as the Court made clear last year in *District of Columbia v. Heller*, post-Civil War cases such as *Presser* "did not engage in the sort of Fourteenth Amendment inquiry *required* by our later cases."

Further, *Presser* (along with *United States v. Cruikshank*) only stands for the concept that the guarantees in the Bill of Rights do not apply *directly* to the States. As we have seen throughout the Supreme Court's Twentieth Century jurisprudence, most of the Bill of Rights has been incorporated against the States through the Fourteenth Amendment's Due Process Clause. Thus, the failure of the *Maloney* panel to engage in a proper due process analysis of the Second Amendment is extremely troubling, to say the least.

The Second Circuit's decision (as well as the Seventh Circuit's similarly flawed reasoning in *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*) is at odds with the Ninth Circuit's decision in *Nordyke v. King*, which did engage in a full Fourteenth Amendment analysis (again, as *required* by the Supreme Court in *Heller*). The Ninth Circuit held that while the Second Amendment does not apply to the states directly or through the Privileges or Immunities Clause, modern Fourteenth Amendment cases do require its incorporation through the Due Process Clause. This stark circuit split makes it highly likely that the Supreme Court will take up one or more of these cases in the immediate future, perhaps as soon as next term.

In addition, Judge Sotomayor was a member of the panel in the case of *United States v. Sanchez-Villar*, where (in a summary opinion) the Second Circuit dismissed a Second Amendment challenge to New York State's pistol licensing law. That panel, in a terse footnote, cited a previous Second Circuit case to claim that "the right to possess a gun is clearly not a fundamental right." Since the precedent cited for that point is no longer valid in the wake of *Heller*, Judge Sotomayor should be asked whether she would take the same position today.

The cases in which Judge Sotomayor has participated have been dismissive of the Second Amendment and have troubling implications for future cases that are certain to come before the Court. Therefore, we believe that America's eighty million gun owners have good reason to worry about her views. We look forward to a full airing of her past decisions and judicial philosophy at the upcoming committee hearings, and urge you and all committee members to engage in the most serious questioning possible on these critical issues.

Out of respect for the confirmation process, the NRA has not announced an official position on Judge Sotomayor's confirmation. However, should her answers regarding the Second Amendment at the upcoming hearings be hostile or evasive, we will have no choice but to oppose her nomination to the Court.

Finally, we would caution you against lending any credence to the endorsement of Judge Sotomayor's nomination by organizations that falsely claim to represent gun owners, while promoting an anti-gun agenda. These front groups' actions give them no credibility to speak on this nomination.

Thank you for your attention to our concerns. Should you have any questions or wish to discuss further, please do not hesitate to call on me personally.

Sincerely,



Chris W. Cox

Executive Director

Cc: The Honorable Harry Reid, Senate Majority Leader

The Honorable Mitch McConnell, Senate Republican Leader

Members of the Senate Committee on the Judiciary