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Senator Tom Coburn, M.D.

Written Questions for the Record

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1. Please describe the different in analyses of the Second Circuit in *Maloney v. Cuomo* and the Seventh Circuit in *NRA v. Chicago*. Was the Second Circuit's opinion in *Maloney* flawed in your opinion?

Answer: The Second Circuit engaged in hardly any analysis, but merely asserted conclusions. The Seventh Circuit produced an extensive analysis of the relevant legal issues.

In particular, the central question of the case—whether the Second Amendment is enforceable against state governments—was brushed aside in a single paragraph by the Sotomayor opinion. The paragraph asserts that Supreme Court decisions prevent the lower federal courts from deciding the question.

The Seventh Circuit, although it ultimately came to the same result as had the Second Circuit, acknowledged that the answer was not so simple. The Seventh Circuit's treatment of the question of whether Supreme Court precedent is controlling was over three times longer than the Second Circuit's treatment.

The difference can hardly be explained as a reflection of varying writing styles. Judge Sotomayor's opinions in general have been described as wordy, lengthy, and ponderous. Yet in *Maloney*, she became terse, indeed reticent.

Judge Easterbrook, the author of the Seventh Circuit opinion, is widely acknowledged as one of the most outstanding legal writers of our times. So his much longer treatment of the issue cannot be ascribed to wordiness or the inability to write concisely. Simply put, Judge Easterbrook needed to set forth the legal reasoning which underlay his top-level conclusions, and to address at least some of the arguments against his conclusions. Judge Sotomayor's uncharacteristically brusque opinion provided much less analysis.

Rather significantly, the record shows that Judge Sotomayor, while usually quite prolix in her opinions, becomes taciturn in the presence of constitutional rights she seems not to favor: the right to arms in *Maloney*, the property right in *Didden*, the right to be promoted on the basis of objective merit rather than race in *Ricci*.

Supreme Court decisions, especially on controversial topics, need to support the legitimacy of the rule of law by offering the American people serious legal reasoning for those decisions. *Maloney* is but one example of Judge Sotomayor's refusal to do so, when the topic involves rights which she disfavors.

2. Was the Supreme Court's decision in *Presser v. Illinois* binding precedent on the Second Circuit in *Maloney* on the question of whether the Second Amendment has been incorporated on the states through the Due Process Clause of the Fourteenth Amendment?

Answer: No, although Judge Sotomayor claimed that it was. *Presser* mainly addressed the question of whether the Second Amendment directly applies to the states by its own terms, and the Court ruled that it does not. The Court very briefly addressed whether the result was changed by the Privileges or Immunities clause of the Fourteenth Amendment. The Court said nothing about incorporation via the Due Process clause of the Fourteenth Amendment.

A Supreme Court decision about the meaning of one clause in an Amendment certainly does not create precedent about the meaning of an entirely separate clause in the Amendment. For example, a decision that a government practice does not violate the First Amendment's Free Exercise clause does not create a precedent about whether that practice violates the Establishment clause.

Judge Sotomayor's per curiam opinion in *Maloney* implicitly recognized this fact. The opinion addressed (albeit in a brusque, conclusory, and unreasoned manner) the argument that the New York law violated the Equal Protection clause of the Fourteenth Amendment.

Obviously, the fact that *Presser* made Mr. Maloney into a loser under the Privileges or Immunities clause of the Fourteenth Amendment created no binding precedent about whether Mr. Maloney had a valid claim under the Equal Protection clause of the Fourteenth Amendment. Judge Sotomayor recognized as much, dealt with the Equal Protection claim, and she did not assert that *Presser* was controlling.

Yet Judge Sotomayor refused even to address the question of the Fourteenth Amendment's Due Process clause. Just as the *Presser* decision on the Privileges or Immunities clause does not create binding precedent about the Equal Protection clause, it does not create binding precedent about the Due Process clause.