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National Review Misfires In Attack On Obama Judicial Nominee Halligan's Gun Rights Record

March 14, 2011 3:02 pm ET

National Review Online blogger and conservative judicial activist Gary Marx accused Obama judicial nominee Caitlin Halligan of having "a very troubling record of dismissing the Second Amendment" during her time as New York state solicitor general. In fact, Marx's attack consists of criticism of Halligan for doing her job as solicitor general by filing briefs on behalf of the state of New York, and neither of the cases Marx cites deal with Second Amendment issues.

NRO Blogger Attacks Halligan For Court Filings In Suits Against Gun Manufacturers

NRO's Marx Points To Briefs Filed By Halligan To Claim She Has "A Very Troubling Record Of Dismissing The Second Amendment." From a National Review Online post by Gary Marx, executive director of the Judicial Crisis Network on Halligan's nomination to the U.S. Court of Appeals for the D.C. Circuit:

Since Ed and Carrie's entries were published, it has come to my attention that Halligan has a very troubling record of dismissing the Second Amendment while embracing discredited legal theories favored by trial lawyers.

In 2003, while serving as the solicitor general for the State of New York, Halligan signed the brief in the New York Supreme Court case *The People vs. Sturm, Ruger & Co.*, a lawsuit brought against handgun manufacturers, wholesalers, and retailers.

[...]

Luckily, like most courts that have addressed such claims, the court saw through the "public safety" facade and concluded that the nexus between the alleged conduct and the harm was "too tenuous and remote" to hold the industry liable.

[...]

Several years later, in *City of New York v. Beretta U.S.A. Corp.*, Halligan filed an amicus brief in support of New York City in a lawsuit in which it made similar public-nuisance claims against handgun manufacturers, wholesalers, and retailers.

Those lawsuits were part of a coordinated, national litigation strategy aimed at destroying the handgun industry. And they were just the latest in a long series of steps taken by trial lawyers to use public nuisance lawsuits to transfer wealth from targeted industries -- asbestos, tobacco, lead paint, lead pigment, guns -- to themselves. [National Review Online, 3/10/11]

In Cases Cited By NRO, Halligan Was Performing Her Duty As New York

Solicitor General

In Both Cases, Halligan Played A Role In Appeals As New York State Solicitor General. Marx cites two cases in which Halligan participated. In both cases, Halligan's name was on appellate briefs filed by the State of New York:

- In *People v. Sturm, Ruger Co. Inc.*, Halligan's name appears on a New York state appellate court brief filed by then-New York attorney general Eliot Spitzer on behalf of the people of New York. [*People v. Sturm Ruger Co. Inc.*, via FindLaw.com, 6/24/03]
- In *City of New York v. Beretta U.S.A. Corp.*, Halligan's name appears on a federal appellate court brief filed by then-New York attorney general Andrew Cuomo on behalf of the state of New York. [*City of New York v. Beretta U.S.A. Corp.*, via Lexis, 4/30/08]

NY Solicitor General "Is Responsible For Preparing And Arguing Civil And Criminal Appeals In Both State And Federal Court." From the New York state attorney general's website:

The Division of Appeals and Opinions operates under the direction of the Solicitor General, who, by statute, is appointed by the Attorney General. The Division is responsible for preparing and arguing civil and criminal appeals in both state and federal courts. The Division determines which cases are to be appealed and determines which legal arguments will be advanced on behalf of the State of New York. The Division also provides advice and counsel to the Attorney General and to Attorneys throughout the Office. [Office of the New York attorney general, accessed 3/14/11]

Neither Case Cited By NRO Involved The Second Amendment

New York Sought To Hold Gun Manufacturers Liable For Crimes Committed Using Guns Illegally Distributed In New York. The New York State Supreme Court, Appellate Division summarized the state of New York's argument as follows:

Plaintiff's complaint, as pertinent here, claims that illegally possessed handguns are a common-law public nuisance because they endanger the health and safety of a significant portion of the population; interfere with, offend, injure and otherwise cause damage to the public in the exercise of rights common to all; and that, after being placed on actual and constructive notice that guns defendants sell, distribute and market are being used in crimes, they have, by their conduct and omissions, created, maintained and contributed to this public nuisance, because they manufacture, distribute and market handguns allegedly in a manner that knowingly places a disproportionate number of handguns in the possession of people who use them unlawfully. Plaintiff further claims that defendants are on notice that certain types of guns, and guns sold in certain locales, are disproportionately used in the commission of crimes. They base that claim on the results of trace requests which the Bureau of Alcohol Tobacco and Firearms (BATF) initiates with respect to guns used in or associated with crimes, in furtherance of its duty to enforce and manage the federal firearm regulatory scheme.

Plaintiff therefore seeks an order, inter alia, "(1) directing defendants to abate the nuisance they have created and maintained within the State of New York [and] (2) directing each defendant to cease contributing to and maintaining the nuisance within the state of New York." [*People v. Sturm, Ruger Co. Inc.*, via FindLaw.com, 6/24/03]

- ***Sturm, Ruger Court Did Not Mention Second Amendment Once In Its Decision.*** In its decision siding with the

gun manufacturers and against the state of New York, the New York Supreme Court, Appellate Division did not once mention the Second Amendment. [*People v. Sturm, Ruger Co. Inc.*, via FindLaw.com, 6/24/03]

In *Beretta*, The City Of New York Filed A Tenth Amendment Challenge To A Federal Law Restricting Lawsuits Against Gun Manufacturers. In *Beretta*, New York City had filed a lawsuit against gun manufacturers, and the gun manufacturers sought to have the case dismissed after the federal government passed the Protection of Lawful Commerce in Arms Act, which restricted lawsuits against gun manufacturers. New York City argued that the statute did not require dismissal of the case and that the statute was unconstitutional under the First and Tenth Amendments. From the decision by the U.S. Court of Appeals for the Second Circuit:

Defendants-appellants-cross-appellees, manufacturers and wholesale sellers of firearms ("Firearms Suppliers"), appeal from so much of an order entered in the United States District Court for the Eastern District of New York (Weinstein, J.) as denies their motion, grounded on the claim restriction provisions of the Protection of Lawful Commerce in Arms Act, for dismissal of the complaint. In the complaint, plaintiff-appellee-cross-appellant, the City of New York (the "City"), seeks injunctive relief to inhibit the diversion of firearms into illegal markets. The District Court determined that the Act did not violate the United States Constitution, and that the Act's statutory exception for claims based on the violation of a state statute applicable to the sale or marketing of firearms is met by New York's criminal nuisance statute. The City cross appeals from so much of the above-described order as rejects, in accordance with the position taken by intervenor United States of America, various constitutional challenges to the Act raised by the City. [*City of New York v. Beretta U.S.A. Corp.*, via Lexis, 4/30/08]

- ***Beretta* Court Did Not Mention Second Amendment In Its Decision.** In its decision siding with the gun manufacturers and against New York City, the U.S. Court of Appeals for the Second Circuit did not mention the Second Amendment. [*City of New York v. Beretta U.S.A. Corp.*, via Lexis, 4/30/08]

Halligan Testified That She Would Uphold The Second Amendment

Halligan: "I Would Follow" Supreme Court Precedent Finding That The Second Amendment Protects An Individual's Right To Keep And Bear Arms. From the Senate Judiciary Committee's hearing on Halligan's nomination:

SEN. CHUCK GRASSLEY (R-IA): Well, that's pretty clear, so I won't have to follow up with another question I had on that subject.

On the Second Amendment, in 2003 you gave a speech expressing concern about federal legislation to limit the liability of gun manufacturers. You said, quote, "Such an action would likely cut off at the pass any attempt by states to find solutions through the legal system or their own legislatures that might reduce gun crime," end of quote. Many who opposed the Second Amendment rights made similar arguments against - after the Supreme Court decided *Heller*.

Do you personally agree that the Second Amendment protects individual rights to keep and bear arms?

MS. HALLIGAN: The Supreme Court has been clear about that. Yes, it does protect individual rights to bear arms, Senator.

SEN. GRASSLEY: And would you say that making it a functional right under *McDonald* was something you agree with as well?

MS. HALLIGAN: That's clearly what the Supreme Court held and I would follow that precedent, Senator.

[Senate Judiciary Committee hearing, via Nexis, 2/2/11]

— A.H.S.

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