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Halligan and the Second Amendment

By Gary Marx

Posted on March 10, 2011 10:56 AM

Later today the Senate Judiciary Committee will vote on Caitlin Halligan's nomination to the D.C. Circuit Court of Appeals. My colleague Carrie Severino summarized the case against Halligan in this post, and Ed Whelan has written a series of posts that are available here.

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. Here's how the appellate court summarized Halligan's argument:

> 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.

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. According to the opinion:

> [G]iving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities . . . . Indeed, such lawsuits employed to address a host

> of societal problems would be invited into the courthouse whether the problems they target are real or perceived; whether the problems are in some way caused by, or perhaps merely preceded by, the defendants' completely lawful business practices; regardless of the remoteness of their actual cause or of their foreseeability; and regardless of the existence, remoteness, nature and extent of any intervening causes between defendants' lawful commercial conduct and the alleged harm.

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.

In his excellent book "The Rule of Lawyers," Walter Olson explains that the sums of money the plaintiffs were demanding in those lawsuits were "more than enough to drive every major gun maker into bankruptcy many times over." Stuart Taylor, no arch-conservative, described the strategy as "a deeply disturbing way of making policy" that was started by "private lawyers and municipalities with big financial interests at stake," in which plaintiffs "sought to bludgeon gunmakers into settling before trial." (Stuart Taylor Jr., "Guns and Tobacco: Government by Litigation"; no longer online.) According to Olson, when the Clinton administration sought to pressure gun makers into settling, Eliot Spitzer "reportedly warned an executive of holdout Glock: 'If you do not sign, your bankruptcy lawyers will be knocking at your door.'"

So let's revisit the question Ed Whelan asked back in early February: Why the Push on Halligan?

I wouldn't be surprised if it had something to do with the reason President Obama nominated Louis Butler and Jack McConnell. Louis Butler, you may recall, is the failed Wisconsin judge whose ridiculous theory of "collective liability" would make any lead paint company liable for damages regardless of whether they made the paint in question. And Jack McConnell is a major Sheldon Whitehouse donor who played a leading role in the national trial lawyers' effort to put tobacco and lead paint manufacturers out of business by filing a never-ending stream of frivolous lawsuits. The trial lawyers may like Butler, McConnell, and Halligan, but there's enough there there for the Senate to say "thanks, but no thanks."

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