

Statement of Walter K. Olson
Senior Fellow, Manhattan Institute
House Judiciary Committee
Subcommittee on Commercial and Administrative Law
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Good morning. My name is Walter Olson. I am a senior fellow at the Manhattan Institute, with which I have been associated since 1985, and am the author of three books on the American civil justice system. My most recent book, *The Rule of Lawyers* (St. Martin's, 2003), published in January, includes a chapter exploring the origins and objectives of the movement seeking to make makers and distributors of guns pay for criminals' misuse of their wares.¹ I conclude that the gun suits are at best an assault on sound tenets of individual responsibility, and at worst a serious abuse of legal process. Even more ominously, the suits demonstrate how a pressure group can employ litigation to attempt an end run around democracy, in search of victories in court that it has been unable to obtain at the ballot box. Finally, I argue that strong Congressional action to restrict litigation of this type is not only consistent with a due regard for federalism and state autonomy, but is in fact required by it.

Point by point:

1. Litigation against gunmakers today takes the form of a highly coordinated campaign of nationwide scope, in which a few very active attorneys and anti-gun groups turn up again and again on the plaintiff's side, and in which the allegations advanced in particular lawsuits are frequently crafted to advance a wider legal strategy against the target industry. As Brady Campaign attorney Dennis Henigan has put it: "What you really want is a diversity of cases in lots of different regions, lots of different courts to create the greatest threat of liability."²
2. Organizers of this campaign intend to use litigation as leverage to obtain sweeping nationwide changes in the manufacture and distribution of guns, including the *de facto* banning of some models, compulsory changes in gun design, and major new paperwork burdens and privacy sacrifices for gun owners and dealers. Most of these changes if obtained are likely to be highly unwelcome to large numbers of law-abiding gun purchasers.

¹ Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law*, St. Martin's Press/Truman Talley Books, 2003, pp. 94-95, 99-128. See also my continually updated website [Overlawyered.com](http://www.overlawyered.com) and its subpage "Firearms Litigation Resources", online at <http://www.overlawyered.com/topics/guns.html>.

² Quoted in Peter Boyer, "Big guns", *The New Yorker*, May 17, 1999.

3. The idea of a litigation campaign against guns received its greatest impetus after the 1994 national elections, which swept from office many members of Congress identified with the cause of gun control. After that rout, some leading gun-control advocates concluded that the democratic process was not soon going to grant them the kinds of restrictions on gun distribution they sought any time soon. The alternative? As the lawyer who argued New York's *Hamilton v. Accu-Tek* put it, "You don't need a legislative majority to file a lawsuit".³
4. Anti-gun litigators were aware that they had little case under the principles that had prevailed over hundreds of years of common law. But they knew that some courts are tempted by the lure of judicial activism: if persuaded that it will serve the cause of social progress to invent new law out of whole cloth, that is what they will do. In addition, when many different actions are pressed in many different courts, the random factor present in any litigation begins to play a large role: even if defendants can fend off 98 percent of the cases, somebody somewhere is likely to break through, to the ruin of a given defendant or the entire industry. Given the lack of a loser-pays principle in American courts, there is little to discourage the filing of such speculative, long-shot litigation.
5. As industries go, America's gun industry generally consists of small and modest-sized companies, often family-owned: firearms scholar David Kopel has written that the nation's gun manufacturers would not be big enough to qualify for the Fortune 500 even if you combined them all into one company.⁴ As many journalistic accounts have made clear, anti-gun litigators were not only aware that the expense of legal fees might grind down the resources of the target businesses, but actually made such infliction of costs a conscious strategy.⁵ "As in the war against tobacco, winning in court isn't necessarily the objective of the lawyers," observed the *New Yorker's* Peter Boyer in an article on the strategy behind the gun suits. Defending against just twenty municipal suits, "according to some estimates, could cost the gun manufacturers as much as a million dollars a day."⁶ (The lawyers soon had thirty such suits going.) "The legal fees alone are enough to bankrupt the industry," boasted John Coale, a key lawyer in the municipal suits. Although the deliberate infliction of costs in order to compel settlement was once considered a gross breach of legal ethics, many partisans of the gun litigation appeared if anything to admire its use in this case. Thus the editorialists of the *Atlanta Journal-Constitution* approvingly noted that the suits "have already

³ Elisa Barnes, quoted in Paul M. Barrett, "Evolution of a Cause: Why the Gun Debate Has Finally Taken Off", *Wall Street Journal*, Oct. 21, 1999.

⁴ David Kopel, "Strongarm suits", *Liberty*, February 2000.

⁵ For example, according to one news report, one faction of private lawyers representing cities "argued against an early settlement" in strategy sessions, one reason being that "[p]rolonged litigation and larger legal costs ... would increase the financial pressure on the industry to accept new curbs." Paul M. Barrett, "Gun Makers, Municipal Representatives Ready to Meet on Settlement of Lawsuits", *Wall Street Journal*, Sept. 24, 1999.

⁶ Peter Boyer, "Big guns", *The New Yorker*, May 17, 1999.

forced some gun makers to the bargaining table” because they “can’t afford lengthy courtroom battles”.⁷

6. The sums of money being demanded in the municipal gun litigation are more than enough to drive every major gunmaker into bankruptcy many times over -- a prospect that would presumably entail serious disruptions in interstate commerce as well as in the assured supply of new guns to such purchasers as the U.S. military. However, many supporters of the municipal litigation have indicated that it is not actually intended to be tried to a final conclusion; the idea is instead to settle it as part of a “deal” in which the gun industry agrees to abide by various (unlegislated) gun controls. But such a settlement prospect poses distinctive dangers of its own. To begin with, other affected parties (including gun purchasers and dealers) will not be present in the settlement room, and their interests are likely to go unrepresented. Moreover, defendants can be arm-twisted in such a settlement into agreeing to adopt measures that go beyond what any court would have ordered, and it will subsequently be argued that gun purchasers, dealers and other “outsiders” lack standing to challenge the terms of a settlement, no matter how detrimental it may be to their interests, perhaps including the exercise of Constitutionally recognized liberties.
7. The gun suits are probably the boldest effort presently underway to employ liability litigation to usurp Congress’s Constitutionally specified role in lawmaking. Thus *The American Lawyer* reported that one of the municipal suits’ prime movers, the late Wendell Gauthier, recruited trial lawyer colleagues into the action because it “fit with Gauthier’s notion of the plaintiffs bar as a de facto fourth branch of government, one that achieved regulation through litigation where legislation failed.”⁸ Remarkably, many of Gauthier’s colleagues are equally outspoken. Attorney John Coale, spokesman for the municipal suits, has argued that “What has happened is that the legislatures ... have failed,” and: “Congress is not doing its job [and] lawyers are taking up the slack.”⁹ “The failure of Congress to address social problems in any meaningful way had left a void,” said Daniel Abel of Florida’s Levin Papantonio, active in both the gun and tobacco rounds. “Why was it important for trial lawyers to become this new arm of government?” asked Michael Papantonio of the same firm. “Because the new arm takes the place of an arm that’s not working anymore.”¹⁰ These quotes reveal an astounding contempt for the democratic process and for the lawmakers of this body.

⁷ “Gun lawsuits effective” (editorial), *Atlanta Journal-Constitution*, Oct. 12, 1999.

⁸ Douglas McCollam, “Long shot”, *American Lawyer*, June 1999.

⁹ Quoted in Patrick E. Tyler, “Tobacco-Busting Lawyers on New Gold-Dusted Trails”, *New York Times*, March 10, 1999.

¹⁰ Abel and Papantonio quoted in Elaine McArdle, “Trial lawyers, AGs Creating a New Branch of Government?”, *Lawyers Weekly USA*, July 12, 1999. A list of similar comments could be extended at length: see, for example, prominent trial lawyer Richard Scruggs’ assertion that “I think that, except in cases of the most compelling national interest, the political branches of government are incapable of solving pressing national problems” (“Election 2000: The Florida Vote”, CNN Live Event, November 29, 2000 (available on NEXIS)).

8. By design and by necessity, the antigun litigation campaign is interstate in its anticipated effects. Its suits in state courts demand damages from out-of-state defendants on a scale certain to impair the workings of interstate commerce, as well as the assessment of punitive damages against gun-industry actors based on their nationwide (as opposed to intrastate) courses of conduct. Indeed, gun lawsuits have repeatedly asserted a right to apply the law of one state or jurisdiction (such as New York) to gun sales which took place in *other* jurisdictions (such as South Carolina and Virginia), on the grounds that the firearms in question were later smuggled or otherwise taken into the state in which the lawsuit is going forward. The intended and expected effect is to identify isolated state courts that are amenable to the advocates' arguments, and then project the power of those courts so as to restrict gun freedoms in all 50 states, including states that would prefer to preserve for their citizens relatively liberal access to the means of self-defense. It is important that proponents of the gun-suit campaign not be allowed to hide behind the skirts of federalism. They are not, in fact, defending states' "right to govern themselves", but instead attempting to use litigation in the courts of some states to govern the citizens of other states.¹¹

As you are aware, H.R. 1036, the Protection of Lawful Commerce in Arms Act, would "prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others." In view of the history thus far of the gun litigation, I can only say: it's about time.

Thank you very much.¹²

-- Walter K. Olson, April 2, 2003

¹¹ For more extended discussion of the federalism issue, see *The Rule of Lawyers*, pp. 234-236, and Walter Olson, "Firing Squad", *Reason*, May 1999.

¹² I would like to incorporate as appendices to this statement three columns on the gun litigation that I published in *Reason* magazine in 1999 and 2000. All are online. They are: Walter Olson, "Firing Squad: In the gun litigation wars, who really speaks for federalism?", *Reason*, May 1999: <http://reason.com/9905/co.wo.reasonable.shtml>; "Big Guns: Plaintiffs' lawyers declare themselves the 'fourth branch of government' and go after firearms", *Reason*, October 1999: <http://reason.com/9910/co.wo.reasonable.shtml>; and "A Smith & Wesson FAQ: A gun deal with many losers", June 2000: <http://reason.com/0006/co.wo.a.shtml>. Although events have overtaken the columns in certain respects (notably with regard to the collapse of the proposed Smith & Wesson settlement), much of the analysis is of continuing applicability.