



1015 15TH STREET N.W | SUITE 1100 | WASHINGTON, DC 20002
(202) 216-9309 | WWW.JUDICIALACTIONGROUP.COM

Caitlin J. Halligan
Nominee to the D.C. Circuit Court of Appeals

Action: Contact Your Senator and Tell Them to Continue Their Principled Opposition to Halligan

Halligan, Round Five: Time for President Obama to Throw in the Towel for a Radical Nominee Who Senators Dismissed Long Ago.

The History of Halligan's Five Nominations Shows Senate Consensus She Should Not be Confirmed. President Obama nominated Halligan to the D.C. Circuit Court of Appeals on September 29th, 2010, but neither Democrats nor Republicans have reacted positively to this radical nomination. On December 6th, 2011, Halligan's nomination failed a Senate cloture vote, falling well short of the 61 votes required to proceed. Nevertheless, President Obama has re-nominated Halligan four times, marking a total of five times her nomination has been submitted to the Senate, and five times it has gone unapproved. Ironically, only *once* in more than two years has Halligan been brought to the floor by Senate Majority Leader Harry Reid (D-NV). In essence, only *one* of Halligan's *five* nominations have been filibustered by minority Senators. Responsibility for her other *four* failed nominations rest solely on the shoulders of Majority Democrats who have refused to even bring Halligan's nomination to the floor for a vote.

Halligan Worked Extensively to Bankrupt Gun Manufacturers and Oppose Protections Critical to the Survival of Second Amendment Rights. Halligan's past comments opposing the *Protection of Lawful Commerce in Arms Act* (PLCAA) urged that gun manufacturers be liable for the actions of those whose misused their product resulting in harm to others. Further, on May 5, 2003, Halligan revealed at a Law Day celebration in White Plains, New York, her role in State lawsuits attempting to hold handgun manufacturers liable for criminal acts committed with handguns¹ – an effort closely orchestrated with the admitted intent of bankrupting gun manufacturers.² *These lawsuits specifically targeted gun manufacturers for liability similarly ludicrous to holding a manufacturer of scissors liable for the foolish, careless, or malicious actions of people who injured others (or themselves) with a pair of scissors.* Halligan's continual petitions seeking infringement of Second Amendment rights has earned the opposition of the Gun Owners of America, the National Rifle Association, and many others.³

Halligan has Repeatedly Downplayed the War Crimes of Terrorists, Arguing That They be Tried as U.S. Citizens Rather Than Enemy Combatants. In *Al-Marri v. Spagone*,⁴ Halligan suggested that terrorists should **have the same rights** granted to criminal defendants who are United States Citizens, rather than the laws and rights consistent with other enemy combatants.⁵

During Her “Confirmation Conversion,” Halligan Attempted to Distance Herself from Past Roles Producing A Controversial Report on War Crimes of Terrorists. Halligan was signatory to a 2004 New York City Bar Association report titled “The Indefinite Detention of ‘Enemy Combatants:’ Balancing Due Process and National Security in the Context of the War on Terror.”⁶ This report reaches some absurd conclusions regarding the role of Due Process in the War on Terror that are not consistent with the Constitution, nor Supreme Court precedent, nor even the D.C. Circuit Court of Appeals (to which Halligan is nominated),

Halligan lists the report on her official Senate Judiciary Committee questionnaire as one that she “prepared or contributed in the preparation of.” However, when controversy first arose over the report’s disturbing contents, and Senators pressed Halligan for further details on her views, she changed her tune, claiming: “I do not recall personally contributing or participating in these reports *other than as a member of the Committee approving them.*”⁷ In response to uproar in the legal community over the contents of the report, Halligan went on to claim that she had only recently learned of the report’s existence and attempted to disown the report by stating that its conclusions were “incorrect” and unrepresentative of her own opinion.

However, a review of the document reveals four members of the committee clearly indicated in their signature that they abstained from approving conclusions of the report.⁸ Halligan is not among those four, a fact clearly indicative of the conclusion that she approved the report at the time and only now abandons its position in light of recent controversy.⁹ Halligan’s attempts to distance herself from the report are unsuccessful and only raise further concerns about her veracity and apparent willingness to change the facts in order to achieve a favorable result.

Halligan’s Opposition to Traditional Marriage Takes the Form of Text-Book Judicial Activism. Halligan’s past statements analyzing New York State’s Domestic Relations Law (DRL) reveal a deep-seated discomfort with traditional marriage, with Halligan even going so far as to state that: “The exclusion of same-sex couples from eligibility for marriage ... presents serious constitutional concerns...”¹⁰ Halligan argues the text and “historical context” of the law is important when analyzing the DRL, but expresses no such concern for the text and “historical context” of the equal protection clause of the United States Constitution that she references.¹¹ Were Halligan to also consider the “historical context” of 1868, when the Equal Protection clause of the Fourteenth Amendment was adopted, she could not in good conscience maintain her argument that: “same sex marriage must be analyzed in light of an *ongoing and rapidly shifting debate about whether it is constitutional* to deny eligibility for marital status to same-sex couples.”¹²

In short, Halligan argues that an evolving constitutional theory – that ignores both the text of the law and intent of the lawmakers – should be used to determine whether same sex marriage can be written into the Constitution.

Halligan’s argument requires a result that is both contrary to the Constitution and was never contemplated by those that wrote and voted for the 14th Amendment. According to the late Judge Robert Bork, that is text-book judicial activism. Bork wrote: “Activist judges are those who decide cases in ways that have no plausible connection to the law they purport to be applying, or who stretch or even contradict the meaning of that law. *They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law.*”¹³

Halligan Petitioned The U.S. Supreme Court to Infringe on Executive Powers By Disregarding Limits on Judicial Authority. In the case of *Environmental Defense v. Duke Energy Corp.*, Halligan petitioned The U.S. Supreme Court to provide enforcement of EPA regulations about factory standards by authoring an amicus brief in favor of the Environmental Defense Fund (EDF).¹⁴ The Court eventually decided in favor of the EDF leading to harsher interpretation of existing environmental laws about factory standards. The EDF is an environmentalist organization that routinely and cavalierly uses litigation to create policy change. *According to their website: “Back in the 1960s when Environmental Defense Fund was just starting out, we had an unofficial motto: “Sue the bastards!”*¹⁵

Halligan’s Elitist View That Judges Can Raise Their Own Pay is Pure Activism, and Ignores the Plain Language of the Constitution. Halligan served as lead counsel and wrote and signed the amicus brief for the Fund for Modern Courts in the highly controversial case, *Kaye v. Silver*,¹⁶ arguing that judges have the authority to legislate from the bench and raise their own salaries. Her argument is directly contrary to both the New York State Constitution and the United States Constitution, both of which reserve control of judicial pay to the legislature with the caveat that judges’ compensation “**shall not be diminished**” during their term in office.¹⁷ Halligan attempts a bold distortion of this principle by *completely rewriting this Constitutional provision* in her brief as if the judges might not even notice: “The Compensation Clause ... serves the related purpose of assuring prospective judges that their **compensation not diminish** while sitting on the bench”¹⁸

However, the constitution does not require that salaries be raised, nor that cost of living raises be granted. Yet Halligan ignores the plain text of this constitutional provision, attempting to wildly infer that judges’ pay *cannot passively lose value* while they remain in office rather than following the explicit demand of this provision that the legislature may not attempt to punish a judge *by actively reducing their salary*. Such a naked attempt to completely change *not only the meaning but also to alter the very text* of a constitutional provision when arguing a case as a lawyer offers a terrifying foreshadowing of the tremendous lengths to which Ms. Halligan may go as a judge to mangle and re-legislate the law in her courtroom as she recklessly pursues whatever perfunctory outcome she might deem preferable to Equal Justice Under Law.¹⁹

Halligan’s Nomination is to an Unnecessary Position. The vacant seat to which Halligan is nominated represents unnecessary government expenditure because the D.C. Circuit already has enough judges.²⁰ In light of the present financial crisis, no branch of government stands immune from budget cuts, and leaving this seat open will save the American people money *without* limiting access to justice.²¹ Some argue that judicial emergencies exist in a number of Federal district and circuit courts where empty seats may lead to increased caseloads for some judges. While there is some dispute as to whether such judicial emergencies exist, there is no dispute that the D.C. Circuit is without such emergencies. The President and the Senate should first focus on appointing and confirming good judges to courts that are the most in need rather than politically prioritizing circuits, like the D.C. Circuit, that are not in need.

Halligan’s Appellate Brief in *Roper v. Simmons* Repeatedly Petitions The Court to Change Public Policy and Law through Judicial Activism. In *Roper v. Simmons*, 543 U.S. 551 (2005), Halligan wrote an amicus brief addressing the issue of whether the execution of “juvenile offenders” (murders who were age 16 or 17 at the time of their crime) violated the Eighth

Amendment bar on cruel and unusual punishment. At the time of adoption of the Eighth Amendment, capital punishment was not “cruel and unusual.” The Eighth Amendment has not been amended and its meaning has not been changed by legislators. Nevertheless, Halligan argued that judges should take it upon themselves to legislate from the bench that: “[an] enduring legislative consensus has emerged against executing juvenile offenders.”²² Her suggestion that courts should determine an emerging consensus among multiple states instead of simply applying the clear law of the state in question constitutes an express invitation for courts to legislate from the bench.²³ Halligan’s brief makes no attempt to understand the text and intent of those that wrote and voted for the Eighth Amendment. Rather Halligan argues that changes in “public opinion” over the last “15 years since *Stanford* demonstrates that this Court need not fear ... invalidating the juvenile death penalty now”²⁴ Halligan’s brief encourages the Court to usurp legislative power and re-legislate the meaning of the Constitution from the bench.

Financially, Halligan has Supported a Wide Variety of Organizations Who Regard *Roe v. Wade* as a Proper Exercise of Judicial Power. *Roe v. Wade*, the 1973 Supreme Court opinion that purported to unilaterally establish a Constitutional “right to abortion” has widely been dismissed by legal scholars of *all* political stripes as an abuse of judicial power – yet the organizations that Halligan supports financially continue to flagrantly ignore the tremendous judicial overreach exercised in *Roe*. These groups include: the New Israel Fund (a pro-abortion organization that compares the values they support to those of; “NOW, Planned Parenthood, NARAL, [and] Emily’s List”),²⁵ and the New York Women’s Foundation (an organization that provides grants to groups actively engaged in “...advocacy, and/or policy work...” supporting access to abortions.²⁶

¹ See briefs in: *The People vs. Sturm, Ruger & Co.*, and *City of New York v. Beretta U.S.A. Corp.*, (<http://www.nationalreview.com/bench-memos/261845/halligan-and-second-amendment-gary-marx>

² Available at: http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=31511 (last visited January 28, 2013).

³ A copy of GOA’s letter outlining Halligan’s anti Second Amendment positions can be found at: <http://web.archive.org/web/20120112204512/http://legaltimes.typepad.com/files/goa-opposition-letter.pdf> (last visited January 28, 2013).

⁴ *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). (Does the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorize - and if so does the Constitution allow - the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on a determination that the detainee conspired with al Qaeda to engage in terrorist activities?)

⁵ Full Brief Available at: *Al-Marri v. Spagone*, 2009 WL 230951 (U.S. 2009); *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

⁶ The Association of the Bar of the City of New York Committee on Federal Courts, *The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror* (February 6, 2004 (revised March 18, 2004)). The full report is available at: http://www.abcny.org/pdf/1C_WL06!.pdf (last visited January 28, 2013).

⁷ Response to question 12(b) Senate Judiciary Committee Questionnaire (updated); available at <http://www.judiciary.senate.gov/nominations/113thCongressJudicialNominations/upload/Halligan-Senate-Questionnaire-Public-Final.pdf> (last visited January 31, 2012).

⁸ Ed Whelen at National Review Online explains it this way: “If I’m understanding Halligan’s testimony correctly, she’s testifying that after being “very surprised” to discover her name on the report and after being “taken aback” by the substance and tone of the report, Halligan never saw fit to point out to anyone that she believed that she played no role in the report. That’s a very strange non-reaction. I would think that any lawyer with concern for her professional reputation would be upset to discover that her name had been appended to a report that “does not reflect [her] work or [her] views” and would be eager to take steps to set the matter right. All the more so for any lawyer about to be nominated to a federal judgeship.” Available at: <http://www.nationalreview.com/bench-memos/259032/dc-circuit-nominee-caitlin-halligan-s-testimony-report-indefinite-detention-part-> (last visited January 28, 2013).

⁹ Ed Whelen at National Review Online writes: “With a quick investigation, it ought to be a relatively easy matter to establish from the e-mail trail of City Bar committee members what role, if any, Halligan in fact played in the report, including, say, whether she agreed with the positions that she now distances herself from or whether she authorized her name to go on a report that she had barely bothered to skim. The results of this investigation might well bear significantly on her fitness for the seat to which she has been nominated, so I trust that chairman Leahy will ensure that the investigation is undertaken promptly.” Available at: <http://www.nationalreview.com/bench-memos/259032/dc-circuit-nominee-caitlin-halligan-s-testimony-report-indefinite-detention-part-> (last visited January 28, 2013).

¹⁰ Halligan stated in March 2004: “Although the DRL [Domestic Relations Law] does not explicitly prohibit same-sex marriages, it is our view that the Legislature did not intend to authorize same-sex marriage. The exclusion of same-sex couples from eligibility for marriage, however, presents serious constitutional concerns” NY AG Op. No. 2004-1 (March 3, 2004) at page 4. Available at: <http://www.ag.ny.gov/sites/default/files/opinion/I%202004-1%20pw.pdf> (last visited January 28, 2013).

¹¹ NY AG Op. No. 2004-1 (March 3, 2004) at page 10. Available at: <http://www.ag.ny.gov/sites/default/files/opinion/I%202004-1%20pw.pdf> (last visited January 28, 2013).

¹² NY AG Op. No. 2004-1 (March 3, 2004) at page 9 (emphasis added). Available at: <http://www.ag.ny.gov/sites/default/files/opinion/I%202004-1%20pw.pdf> (last visited January 28, 2013).

¹³ Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges*, 8 (2003) (emphasis added).

¹⁴ Brief in the case of *Environmental Defense v. Duke Energy Corporation*, 549 U.S. 561 (2007) Full text of brief available at: http://supreme.lp.findlaw.com/supreme_court/briefs/05-848/05-848.mer.ami.states.pdf (last visited January 28, 2013).

¹⁵ The quote cited in this paper has since been removed from the Environmental Defense Fund’s website, but may be reviewed in its original form at: <http://web.archive.org/web/20100924004442/http://www.edf.org/page.cfm?tagID=1740> (last visited January 28, 2013).

¹⁶ *Kaye v. Silver*, Supreme Court of the State of New York, County of New York, Index No.: 400763/08. A copy of Halligan’s brief is available at: http://www.moderncourts.org/documents/Kaye_v_Silver_Amicus_Brief.pdf (last visited January 31, 2013).

¹⁷ The New York Constitution Article VI, S 25(a), provides that: “The compensation of a judge ... **shall not be diminished** during the term of office for which he or she was elected or appointed.” (Emphasis added.) <http://www.dos.ny.gov/info/constitution.htm> (last visited January 28, 2013).

¹⁸ *Kaye v. Silver*, Supreme Court of the State of New York, County of New York, Index No.: 400763/08. A copy of Halligan’s brief is available at: http://www.moderncourts.org/documents/Kaye_v_Silver_Amicus_Brief.pdf (last visited January 31, 2013) at page 8. (Emphasis added.)

¹⁹ To further compound her attempts at logical gymnastics, Halligan even quotes from Alexander Hamilton in Federalist No. 79, “[w]e can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.” However, Halligan does not quote from the rest of Federalist No. 79 which makes clear that changes in the value of money were contemplated and rejected and that absolute discretion for any increases in judicial pay were left exclusively to the discretion of the legislature. (Continues on following page)

Contrary to Halligan’s out-of-context quote, Hamilton concluded his discourse on the subject saying: “It will readily be understood that *the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible*. What might be extravagant to-day, might in half a century become penurious and inadequate. *It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances.*” (Emphasis added.) Inflation is nothing new in 21st Century America; those who wrote and voted for the judicial compensation Constitutional provisions had the choice to require that judicial salaries would automatically increase with inflation and costs of living, but chose not to do so. ***For judges to now write such provisions into the Constitution is not only self serving but the worst type of legislating from the bench.***

As Alexander Hamilton also wrote in Federalist No. 78 (conveniently omitted from reference in Halligan’s brief: “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” (Hamilton is here quoting Montesquieu, “Spirit of Laws,” Vol. I, page 186.) The Federalist No. 79 is available in full here: <http://www.constitution.org/fed/federa79.htm>, Federalist No. 78 is available in full here: <http://www.constitution.org/fed/federa78.htm> (last visited January 28, 2013).

²⁰ Calculations according to caseload statistics available on the United States Courts website show the D.C. Circuit’s number of cases per judge is *less than one half* of the circuit with the *next lowest* figure (the Tenth Circuit), and *barely one fourth* of the average among the remaining circuits. Full Report Available at: <http://www.nationalreview.com/bench-memos/258719/why-push-halligan-ed-whelan> (last visited January 28, 2013) and <http://www.weeklystandard.com/blogs/dont-short-dc-circuit> (last visited January 28, 2013).

²¹ “*Given the reduced workloads, we should be having a discussion on reducing the staffing for this court, not filling a vacancy. This seat is not a judicial emergency; in fact, there is an argument to be made that this seat is unnecessary. With our massive debt and deficit, why should we spend any resources to fill the seat? I cannot justify that expenditure . . . I will have much more to say regarding this nomination, should it proceed to the Senate floor. I hope it doesn’t get that far.*” – Senator Chuck Grassley Ranking Member Senator Judiciary Committee [emphasis added] Available at: http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=31511 (last visited January 28, 2013).

²² Brief of New York, et al as Amici Curiae, p. 3, *Roper v. Simmons*, 543 U.S. 551 (2005).

²³ Contrary to Halligan’s view, the Constitution grants no authority to judges to impose an altered meaning of the constitution on all fifty states based on what several believe the law for criminal punishment should be in their particular state. Halligan’s view leads courts to subvert the first and foremost provision of our Constitution (Article I, Section 1) which provides that all legislative power is reserved to the elected representatives of the people, not to Article III judicial officers.

²⁴ Brief of New York, et al as Amici Curiae, p. 23, *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁵ <http://www.nif.org/issue-areas/womens-rights/> (last visited January 28, 2013).

²⁶ A full description of criteria applied by The New York Women’s Foundation when awarding grants is available at: <http://www.nywf.org/what-we-fund/our-work/health-sexual-rights-reproductive-justice/>. A chart detailing grant awards and organizations who received them throughout 2012 is available at: <http://www.nywf.org/what-we-fund/grantee-partners/> (last visited January 28, 2013).