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Myths And Falsehoods About Judicial Nominee Caitlin Halligan

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With Senate Majority Leader Harry Reid (D-NV) having filed a motion to cut off a filibuster of the nomination of Caitlin Halligan to the U.S. Court of Appeals for the D.C. Circuit, often called the second most important court in the country, *Media Matters* presents a rebuttal to myths and falsehoods right-wing media have used to attack Halligan.

MYTH: Halligan Is A "Radical Choice" For The Federal Bench

CLAIM: Halligan Is A "Radical Choice." In a March 21 editorial, *The Washington Times* declared Halligan, as well as two other Obama judicial nominees, to be "radical choices for federal judgeships." [*The Washington Times*, 3/21/11]

CLAIM: "Halligan's Record Strongly Suggests That She's Hard Left On A Broad Array Of Issues." National Review Online blogger Ed Whelan wrote in a January 31 blog post: "On initial review, Halligan's record strongly suggests that she's hard Left on a broad array of issues." [National Review Online, 1/31/11]

REALITY: Halligan Has Support From Lawyers Across The Political Spectrum

FACT: Twenty-Three People Who Clerked For Justices Rehnquist, Scalia And Other Justices, And Who Served With Halligan, Called Halligan "A Talented And Fair-Minded Colleague." Halligan served as a law clerk for Supreme Court Justice Stephen Breyer during the 1997-98 term. Twenty-three people who served as Supreme Court clerks at the same time as Halligan wrote a letter in support of her nomination to the U.S. Court of Appeals for the D.C. Circuit. Signers included people who had clerked for the conservative then-Chief Justice William Rehnquist as well as Justices Antonin Scalia, Anthony Kennedy, and other justices. They wrote:

> Our shared experience left us with an indelible impression of Caitlin's brilliant legal mind, her collegiality and fair-mindedness, and her abiding respect for the rule of law. Even now, almost a decade and a half later, as we have moved on to disparate careers in the government, private sector, and the legal academy, we retain a distinct appreciation of Caitlin's sharp intelligence and her ability to cooperate with others in resolving difficult legal problems.
>
> [...]
>
> Throughout the year, Caitlin displayed a keen ability to listen to and accommodate the views of others, all the while simultaneously expressing and justifying her own view of the law. Although the Court during the 1997 Term issued an unusually high proportion of unanimous decisions, Caitlin's demeanor as a law clerk exuded reasonableness and collegiality even in those areas where we law clerks -- and the Justices for whom we worked -- disagreed.
>
> In sum, we hold Caitlin Halligan in high regard as a talented and fair-minded colleague who was a pleasure to work with in a sophisticated and demanding legal setting. We have no doubt that if she is confirmed by the Senate, her colleagues on the federal bench will soon arrive at a similar conclusion, and we appreciate your attention to her nomination. [Letter from Halligan's Supreme Court co-clerks, 2/28/11, via JudgingTheEnvironment.org]

FACT: Other Lawyers From Across The Political Spectrum, Including Former Bush D.C. Circuit Nominee Miguel Estrada, "Enthusiastically Support" Halligan. In addition to Halligan's colleagues from her time as a Supreme Court clerk, 21 other prominent attorneys from across the political spectrum wrote a letter saying that they "enthusiastically support" Halligan's nomination. Several of the signers worked in the office of the U.S. Solicitor General, including Miguel Estrada, whom President George W. Bush nominated for a seat on the same court as Halligan but withdrew his nomination in the face of opposition from Senate Democrats. The lawyers wrote:

> We write in enthusiastic support of the nomination of Caitlin Halligan to be a judge on the United States Court of Appeals for the District of Columbia Circuit. We are lawyers who have worked with Caitlin in various capacities. We believe that Caitlin is an outstanding selection for the D.C. Circuit. She is a first-rate lawyer and advocate. She is well respected and highly regarded as a leader of the profession. Caitlin also has an ideal judicial temperament. She brings reason, insight and judgment to all matters. Even those of us who have been on opposite sides of Caitlin in litigation have been greatly impressed with her ability and character. We have no doubt that she would serve with distinction and fairness. [Letter from 21 attorneys, 3/4/11, via JudgingTheEnvironment.org]

FACT: Law Enforcement Personnel Strongly Support Halligan. Halligan represented law enforcement officials as New York State's solicitor general and currently serves as counsel to the New York County District Attorney, the Manhattan prosecutor's office. She has received the support of police officers and sheriffs, the current New York City police commissioner Raymond Kelly, and New York state prosecutors. The following people or groups have written in support of Halligan:

- **National District Attorneys Association: Halligan "Would Be An Outstanding Addition" To The D.C. Circuit.** [National District Attorney Association letter, 6/2/11, via JudgingTheEnvironment.org]
- **New York Women In Law Enforcement: Halligan "Exemplifies All The Characteristics Of A Person We Would Want To Serve The People Of This Country In Such A Crucial Judgeship."** [New York Women in Law

Enforcement letter, 5/31/11, via JudgingTheEnvironment.org]

- **NYC Police Commissioner Kelly: Halligan "Posesses The Three Qualities Most Important For A Nominee: Intelligence, A Judicial Temperament, And Personal Integrity."** [Raymond Kelly letter, 5/26/11, via JudgingTheEnvironment.org]
- **New York State Sheriffs' Association: "We Have Every Confidence That [Halligan] Will Make An Outstanding Judge."** [New York State Sheriffs' Association, Inc. letter, 5/2/11, via JudgingTheEnvironment.org]
- **New York State Association Of Chiefs Of Police: Halligan "Has Demonstrated An Understanding Of The Need For Strong Law Enforcement To Protect Those In Our Communities Least Able To Protect Themselves."** [New York State Association of Chiefs of Police, Inc. letter, 4/27/11, via JudgingTheEnvironment.org]
- **National Center For Women & Policing: Halligan Is "A Person Of Solid Standing And Integrity" Who Would "Provide Fair And Equal Justice."** [National Center for Women & Policing letter, 6/8/11, via JudgingTheEnvironment.org]
- **District Attorneys Association Of The State Of New York: Halligan "Has Tirelessly Upheld The Ideals Of Strong Law Enforcement."** [District Attorneys Association of the State of New York letter, 4/22/11, via JudgingTheEnvironment.org]
- **Current Manhattan District Attorney: "I Was Impressed" With Halligan's "Fairness And Lack Of Partisanship."** [Cyrus Vance letter, 3/4/11, via JudgingTheEnvironment.org]
- **Former Manhattan District Attorney: Halligan "Brings Solid Law Enforcement Perspective To Her Work, And Upholds The Highest Standards."** [Robert Morgenthau letter, 3/23/11, via JudgingTheEnvironment.org]
- **Director Of Criminal Justice For Former Gov. Pataki: Halligan "Would Be A Fantasic Judge."** [Chauncey Parker letter, 2/28/11, via JudgingTheEnvironment.org]
- **Franklin County, NY, District Attorney: Halligan Has "Unparalleled Legal Reasoning Skills And A Firm Commitment To Our Constitutional Values.** [Derek Champagne letter, 2/14/11, via JudgingTheEnvironment.org]
- **Staten Island District Attorney: Halligan Would Be An "Ideal Appointee" To The D.C. Circuit.** [Daniel Donovan letter, 2/25/11, via JudgingTheEnvironment.org]
- **Onondaga County, NY, District Attorney: "I Do Not Think Any President, Democrat Or Republican, Could Find A More Qualified, A More Honorable Or A Finer Candidate Than Caitlin Halligan."** [William Fitzpatrick letter, 2/16/11, via JudgingTheEnvironment.org]

MYTH: Halligan's Legal Record Shows Hostility Toward Gun Rights

CLAIM: Halligan 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]

CLAIM: Halligan's "Record Is Particularly Troubling On Second Amendment Rights." From a *Washington Times* editorial:

> Another nominee already through the committee is D.C. Circuit choice Caitlin J. Halligan, whose record is particularly troubling on Second Amendment rights as she signed a brief arguing that gun manufacturers should be held liable in class-action lawsuits for harm inflicted when guns are used illegally. [*The Washington Times*, 3/21/11]

REALITY: Halligan Has Testified That She Will Uphold Second Amendment Rights

FACT: Halligan Said She "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 on the nomination of Caitlin Halligan, 2/2/11]

FACT: In The Cases To Which Her Opponents Point, Halligan Was Representing The State Of New York, Not Her Own Personal Views, And 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.*, 6/24/03, via FindLaw.com]
- 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.*, 4/30/08, via Lexis]

FACT: 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 12/1/11]

FACT: Neither Of The Cases At Issue Dealt With The Second Amendment At All.

- ***Sturm, Ruger* Case Dealt With New York State's Attempt To Hold Gun Manufacturers Liable For Crimes Committed With Guns Illegally Distributed In New York.** In deciding *People v. Sturm, Ruger Co. Inc.*, the New York State Supreme Court, Appellate Division stated: "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." 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.*, 6/24/03, via FindLaw.com]
- ***Beretta* Case Dealt With A Tenth Amendment Challenge To A Federal Law Restricting Gun Lawsuits Against Gun Manufacturers.** In *City of New York v. Beretta U.S.A. Corp.*, the United States Court of Appeals sided with gun manufacturers who sought dismissal of New York City's lawsuit against certain gun manufacturers under the federal Protection of Lawful Commerce in Arms Act. While the court cited the First and Tenth Amendments, it did not mention the Second Amendment. [*City of New York v. Beretta U.S.A. Corp.*, 4/30/08, via Lexis]

MYTH: Halligan Has Revealed "A Decided Slant" On The Issue Of Same-Sex Marriage

CLAIM: As New York State Solicitor General, Halligan Issued An Opinion That "Reveals A Decided Slant In Favor Of A Constitutional Right To Same-Sex Marriage." From a National Review Online blog post by Whelan:

> Let's begin our review of D.C. Circuit nominee Caitlin Halligan's record by examining the March 2004 opinion on same-sex marriage that Halligan issued in her capacity as solicitor general of New York.
>
> Halligan's opinion has three parts. First, she construes New York's Domestic Relations Law ("DRL") to require that a marriage performed in New York be between persons of opposite sex. Second, she outlines at length the "serious constitutional concerns" that her reading of the DRL supposedly raises. Third, she advises, based on a single trial-court ruling (which ended up being reversed), that New York law "presumptively requires that parties to [same-sex] unions must be treated as spouses for purposes of New York law." (Oddly, Halligan's own summary of the opinion in her Senate questionnaire response discloses the first part of her advice but not the second or third.)
>
> Halligan's opinion doesn't undertake to resolve definitively the "serious constitutional concerns" that it raises. That said, the opinion in several respects reveals a decided slant in favor of a constitutional right to same-sex marriage. [National Review Online, 1/31/11]

REALITY: Halligan Concluded That, At The Time, New York State Law "Did Not ... Authorize Same-Sex Marriage"

FACT: Even Though New York Did "Not Explicitly Prohibit Same-Sex Marriages," Halligan's Opinion Stated That "The Legislature Did Not Intend To Authorize Same-Sex Marriage." From a memo Halligan wrote on the issue of same-sex marriage:

> We can provide no certain guidance as to how New York courts will ultimately rule with respect to whether New York law permits or prohibits marriage by same-sex couples. 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, which we outline below. [New York attorney general's office, 3/3/04]

FACT: Halligan Advised New York State Officials Not To Perform Same-Sex Marriages. Halligan signed her memo a few days after the mayor of the small New York town of New Paltz began marrying same-sex couples. Halligan wrote that New York state officials should not be "issu[ing] marriage licenses to same-sex couple" or "solemniz[ing] the marriages of same-sex couples":

> Because the purpose of the marriage licensing process is to "provide[] a definite, well-chartered procedure for entrance into marriage, so that parties following the statutory requirements can have a fair degree of certainty in their marital status," Practice Commentaries to DRL § 13 at 149, we recommend that clerks not issue marriage licenses to same-sex couples, and officiants not solemnize the marriages of same-sex couples, until these issues are adjudicated by the courts. [New York attorney general's office, 3/3/04]

FACT: Halligan Gave Reasons Why Courts Could Either Uphold And Strike Down A Same-Sex Marriage Ban. In her memo, Halligan stated that, unlike other issues, "[w]hether New York's courts would uphold a same-sex marriage prohibition based on an interest in preserving traditional notions of marriage is a closer question." Halligan then reviewed federal court decisions and decisions from various state courts that have come to different conclusions

on whether same-sex marriage bans are constitutional. [New York attorney general's office, 3/3/04]

- **Courts And Other Legal Scholars Have Found Constitutional Bans To Be Constitutionally Problematic.** There is nothing odd or suspect about a state official such as Halligan noting that courts might very well strike down a ban on same-sex marriage. At the time, a New York state court had struck down New York's ban on same-sex marriage, a decision that was reversed by New York's highest court after Halligan wrote her opinion. Furthermore, state courts across the nation have ruled that same-sex marriage bans are unconstitutional. In addition, Ted Olson, who served as solicitor general under President George W. Bush, has argued that same-sex marriage bans violate the U.S. Constitution. [*Media Matters*, 2/1/11]

MYTH: Halligan Took An Out-Of-The-Mainstream Position On Military Detentions Since 9-11

CLAIM: Halligan Was A Signatory To A Report On Military Detentions That "Embodies ... Left-Wing Extremism." From a National Review Online blog post by Whelan:

> In March 2004, Caitlin Halligan was a signatory to a 154-page report issued by the Association of the Bar of the City of New York's Committee on Federal Courts, titled "The Indefinite Detention of 'Enemy Combatants': Balancing Due Process and National Security in the Context of the War on Terror." The report embodies the sort of left-wing extremism that the courts have rejected and that the Obama administration has had to retreat from. For example:
>
> The NYC Bar report maintains (p. 110) that the congressional Authorization for Use of Military Force (enacted September 18, 2001) does not authorize indefinite detention of enemy combatants. But Justice O'Connor's June 2004 opinion in *Hamdi v. Rumsfeld* specifically ruled that the AUMF does authorize indefinite detention of enemy combatants.
>
> [...]
>
> The NYC Bar report likewise argues vigorously against the use of military commissions to try alien terrorists for violations of the laws of war (even while grudgingly acknowledging the possible legality of their use). (See pp. 113-152.) Among its arguments for instead using Article III civilian courts:
>
> > It seems self-evident that the same [constitutional] protections [afforded ordinary criminals] should presumptively extend to those individuals whom the government has seized and proposes to detain for an extended, and perhaps indefinite, period of time because they are suspected of having engaged in conduct intended to further terrorist aims, thus violating applicable criminal laws."
>
> But there is nothing remotely "self-evident" about the position that alien enemy combatants whose only connection with this country consists of their acts of war against it should enjoy the constitutional rights that American citizens have. That position is instead a highly dubious policy choice -- one that even the Obama administration has abandoned.
>
> The NYC Bar report also contains highly tendentious rhetoric that misconceives the rationale of detention policy, such as this passage from its executive summary (ES 4):
>
> > Why should the First Amendment right of free speech, or the Fourth Amendment right to be

> free of unreasonable searches, be any less subordinate to the President's war power than the core due process right to remain free of unilateral executive detention? Pick your favorite constitutional amendment or right: its survival during the war on terror cannot be assumed if the legitimacy of these indefinite detentions is sustained.

All in all, the fact that Halligan would sign her name to the NYC Bar report ought to weigh heavily against her being confirmed to a court that has such an important role in national-security cases. [National Review Online, 2/1/11]

REALITY: Halligan Testified That She Did Not Approve Of The Military Detention Report In Question

FACT: Halligan Testified Under Oath That She Had Not Previously Reviewed The Detainee Report, And She Now Found It "Clearly Incorrect" In Some Parts, And Was "Taken Aback" By Its Tone. During the Senate Judiciary Committee's hearing on Halligan's nomination, Halligan said, "the bottom line is that the report does not represent my work. It does not reflect my views":

> SENATOR CHRISTOPHER COONS (D-DE). Thank you. In reviewing the background for this hearing today, I read, in particular, about a report that was issued by the Federal Courts Committee of the New York City Bar.
>
> It was entitled ``The Indefinite Detention of Enemy Combatants,'' and further titled, ``Balancing Due Process and National Security in the Context of the War on Terror.''
>
> I was a little concerned about this report, in particular, to the extent that it seemed to conclude the United States lacks the authority to detain folks who are considered enemy combatants, and I know you served on that Committee at the time the report was issued.
>
> If you could tell me something about your role in writing this report, whether you affirmed it or agree with it, and then, if possible, something about your view of the impact of terrorism on our communities and the importance of appreciating and respecting that impact, as you have conducted yourself in your recent legal roles.
>
> HALLIGAN: Thank you, Senator. I am really grateful to have the opportunity to address that report.
>
> I first became aware of the existence of that report this summer, when I went to the City Bar Association. In responding to this committee's questionnaire, I wanted to make sure that I had done full diligence, and I knew that I had been a member of the Committee that you referred to.
>
> And so I went through the bar association's files and I discovered this report. I was, frankly, taken aback by it, for a couple of reasons.
>
> First of all, the Supreme Court has clearly held that indefinite detention is authorized by the AUMF statute. And so the notion that the President lacks that authority, I think, is clearly incorrect.
>
> I also was a little bit taken aback by the tone of the report. I think that the issues of indefinite detention and any issues in the national security realm are very serious ones, and I think that approaching those issues

as respectfully as possible is the most productive way to proceed.

But the bottom line is that the report does not represent my work. It does not reflect my views. [Senate Judiciary Committee hearing on the nomination of Caitlin Halligan, 2/2/11]

MYTH: Halligan's Views On Diversity In Education Are Outside The Mainstream

CLAIM: Briefs Filed By Halligan In Supreme Court Cases Dealing With Diversity In Education May Be A Cause For Concern. From a National Review Online blog post by Whelan a day after he had said that Halligan's record suggests she is "hard Left" on a variety of issues:

I've barely found time to glance at them, but given tomorrow's hearing, I'll also call to the attention of readers that D.C. Circuit nominee Caitlin Halligan was the lead counsel on multi-state amicus briefs in the companion cases of *Grutter v. Bollinger* and *Gratz v. Bollinger* (both decided in 2003) and in the Seattle and Louisville schools cases (both decided in 2007).

Halligan's joint brief in *Grutter* and *Gratz* argued that the racial preferences in the University of Michigan's admissions programs for the college and for the law school did not violate the Equal Protection Clause. (By different majorities, with only Justice O'Connor and Justice Breyer in the majority in both cases, the Court struck down the college program but upheld the law school's.)

Halligan's joint brief in the Seattle and Louisville schools cases argued that the racial-assignment plans at issue did not violate the Equal Protection Clause. (By a 5-4 vote, the Court ruled that they did.) [National Review Online, 2/1/11]

REALITY: Halligan Was Representing A Client In Diversity Cases, Not Presenting Her Own Views

FACT: Halligan Filed The Briefs On Diversity As Solicitor General Of New York In Order To Defend New York State's Freedom To Pursue Policies Regarding Racial Diversity.

- **Halligan Filed Brief In *Grutter* And *Gratz* On Behalf Of The State Of New York And Wrote That The States Filing The Brief Had An Interest In Having The Freedom "To Take Race Or Ethnicity Into Account In College Admissions."** From the brief:

The need to take race or ethnicity into account in college admissions, like the mission, goals, and student body of each institution, varies over time and requires periodic re-evaluation. Some public colleges and universities that do not currently consider race may choose to in the future, while others that consider race now may not tomorrow. The Court's decision in these cases will therefore affect the ability of *all* public higher education institutions to decide how best to achieve the educational benefits of diversity for their students and their citizens. [Amici Curiae brief of 21 states and the Territory of the U.S. Virgin Islands in *Grutter v. Bollinger* and *Gratz v. Bollinger*, accessed 12/1/11]

- **Halligan Filed Brief In Seattle And Louisville Cases On Behalf Of State Of New York And Wrote That The States Were Interested In Having The Court "Continue To Afford A Degree Of Deference ... To School**

Boards' Educational Decisions" To Reduce Racial Isolation. From the brief:

> The States and their subdivisions are responsible for the public education of America's school children, and Amici States are firmly committed to the tradition of local control of those schools. Control of public K-12 education at the local level provides parents the opportunity to participate in decisionmaking regarding the education of their children, increases the accountability and responsiveness of school districts to local needs, and leads to greater community support for the schools. It also encourages experimentation and innovation in the schools' operation, leading to higher quality education.
>
> At the same time, to effectively plan and operate their school systems, school boards require stability and predictability in the legal landscape governing their schools. For the past 35 years, school boards that have voluntarily sought to reduce racial isolation in their schools have done so with the understanding that federal courts also recognize the importance of local control of public schools and the value of integrated education. The importance of these values should be reaffirmed in these cases, and the Court should continue to afford a degree of deference, within constitutional limits, to States' and local school boards' educational decisions as to how to advance these goals. [Amici Curiae brief of 17 states, the District of Columbia, and the Commonwealth of Puerto Rico in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*, 10/10/06]

FACT: The Supreme Court Ruled That Schools Could Take Race Into Account In Order To Achieve More Diverse Classrooms. In *Grutter v. Bollinger*, the Supreme Court sided by a 5-4 margin with the argument that Halligan made, stating that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." In the other cases, the Court ruled by narrow margins that the schools' programs violated the Constitution. [*Grutter v. Bollinger*, 6/23/03; *Gratz v. Bollinger*, 6/23/03; *Parents Involved in Community Schools v. Seattle School District No. 1*, 6/28/07]

FACT: In Two Of The Cases, Halligan's Brief Was Joined By The Republican Attorney General Of Utah. One of the other people who signed the brief filed by Halligan in the *Parents Involved in Community Schools* and *Meredith v. Jefferson County* cases was Mark Shurtleff, the Republican attorney general of Utah. [Amici Curiae brief of 17 states, the District of Columbia, and the Commonwealth of Puerto Rico in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*, 10/10/06]

FACT: In The Other Two Cases, A Bipartisan Group Of 29 Retired Military Officers And Other National Security Experts Filed Briefs On The Same Side As Halligan. In *Grutter* and *Gratz*, a bipartisan group of 29 retired military officers and other national security experts filed a brief on the same side as Halligan. The group included former Sen. William Cohen (R-ME), who served as Secretary of Defense under President Bill Clinton; Robert "Bud" McFarlane, a former Marine who served as National Security Advisor to President Ronald Reagan; and Gen. H. Norman Schwarzkopf, who served as commander of the coalition forces in the first Gulf War in 1991. The brief argued:

> Based on decades of experience, *amici* have concluded that a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security. The primary sources for the nation's officer corps are the service academies and the ROTC, the latter comprised of students already admitted to participating colleges and universities. At present, the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies. Accordingly, these institutions rely on such policies

[Amici Curiae brief of Lt. Gen. Julius W. Becton Jr., et al. in *Grutter v. Bollinger* and *Gratz v. Bollinger*, 2/19/03]

FACT: Sixty-Five Leading Businesses Also Filed A Brief On The Same Side As Halligan. Sixty-five leading American businesses, including 3M, Boeing, Coca-Cola, Hewlett-Packard, Intel, Kraft Foods, Microsoft, Nike, PepsiCo, Pfizer, Reebok, Sarah Lee, Shell Oil, and Whirlpool, filed a brief on the same side as Halligan. The brief argued:

> Now more than ever, the ability of universities, such as the University of Michigan, to consider all of an applicant's attributes is essential to create the educational environment necessary to best train all their students to succeed. The students of today are this country's corporate and community leaders of the next half-century. For these students to realize their potential as leaders, it is essential that they be educated in an environment where they are exposed to diverse people, ideas, perspectives, and interactions. In the experience of the *amici* businesses, today's global marketplace and the increasing diversity in the American population demand the cross-cultural experience and understanding gained from such an education. Diversity in higher education is therefore a compelling government interest not only because of its positive effects on the educational environment itself, but also because of the crucial role diversity in higher education plays in preparing students to be the leaders this country needs in business, law, and all other pursuits that affect the public interest.
>
> If the University of Michigan is not able to consider all qualities of each applicant to the University, including his or her racial or ethnic background, the University will be hampered in its search for students with the most promise, and its graduates will be less likely to receive an education that gives them "'wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.). The University's graduates will therefore be less likely to possess the skills, experience, and wisdom necessary to work with and serve the diverse populations of the United States and the global community. Graduates with such an education are important to the community as a whole, as well as to the *amici* businesses. [Amici Curiae brief of 65 leading American businesses in *Grutter v. Bollinger* and *Gratz v. Bollinger*, 2/18/03]

MYTH: Halligan's Testimony That She Will Look At Text And Original Intent To Interpret The Constitution Is "Not Believable"

CLAIM: Halligan's Testimony That The Best Way To Interpret The Constitution Is To Look At Constitutional Text And Original Intent Is "Not Believable." In a National Review Online blog post, Whelan wrote:

> Imagine for the moment what the response from the Left would be if a Republican president nominated to the D.C. Circuit a 43-year-old lawyer who:
>
> - Testified at his confirmation hearing that "the best way in which we can interpret [the Constitution] is to look to the text and the original intent of the Framers";
>
> - Opined (in the face of contrary Supreme Court precedent) that it is not "ever appropriate to rely on foreign law in deciding the meaning of the U.S. Constitution";
>
> - Rejected Justice William Brennan's constitutional vision;

- Stated that judicial doctrine should not "incorporate the evolving understandings of the Constitution forged through social movements, legislation, and historical practice"; and

- Rejected the notion that empathy should play a role in a judge's consideration of a case.

Further assume that the nominee has net assets worth eight million dollars, and I think that it's rather clear that the Left would attack the nominee as a fatcat reactionary.

Well, it turns out that the nominee I've described is none other than President Obama's pick for the D.C. Circuit, Caitlin Halligan. Why, one might wonder, is the Left supporting the nomination? And why aren't conservatives celebrating it? The answer, I'd submit, is that everyone recognizes that Halligan's confirmation testimony is, in the core sense of the word, incredible -- not believable.

As it happens, Halligan's responses to post-hearing questions provide additional reason (beyond her record, which I've addressed in previous posts) to disbelieve her testimony. In particular, asked whether she had ever before espoused the "original intent" methodology, Halligan responded, "I do not recall expressing an opinion on this issue in the past." Halligan gave the identical answer to the question whether she had ever before stated that it is not appropriate to rely on foreign law in deciding the meaning of the Constitution. (See answers 1.b and 3.b to questions from Senator Sessions, on pages 15 and 17 of this collection of Halligan's responses to post-hearing questions.) I guess that the prep sessions in which Halligan was apparently coached to testify as she did about original intent and foreign law didn't fall within the ambit of the questions. [National Review Online, 2/24/11]

REALITY: Halligan's Testimony Is In Line With What Other Progressives Believe

FACT: Some Progressives Strongly Believe That The Text And History Of The Constitution Should Form The Basis Of Constitutional Interpretation. It is not odd for progressives to argue that the constitutional text and its history are the best sources of constitutional interpretation. For instance, the Constitutional Accountability Center says:

The text of the Constitution must be the primary source of judicial guidance in deciding constitutional cases: that is what the judicial oath requires. An approach to constitutional interpretation that starts with a very careful parsing of the words of the Constitution is sometimes called "textualism." It is an approach best exemplified by great Supreme Court opinions written by justices such as John Marshall, the first John Marshall Harlan, and Hugo Black.

[...]

While history cannot trump text, historical sources such as the Federalist Papers can provide critical clues about what specific words meant to the framers and ratifying generation. As important, the best interpretations of the Constitution's general terms and embedded principles are informed by a careful consideration of historical events that led to the creation of the Constitution and made necessary changes to the document. [Constitutional Accountability Center, accessed 12/1/11]

FACT: Whelan Himself Acknowledges That "There Are Progressives Who Strongly Believe That The Text And History Of The Constitution Should Form The Basis Of Constitutional Interpretation." From a National Review Online blog post by Whelan:

> How does Media Matters contrive to rehabilitate Halligan? First, carefully avoiding the phrase "original intent," it points out that "there are progressives who strongly believe that the text and history of the Constitution should form the basis of constitutional interpretation." Indeed, there are. But there is nothing -- zilch, nada -- in Halligan's record to suggest that she is one of them. Also, "progressive" advocates of some form of originalism routinely (uniformly, I suspect) condemn the "original intent" species of originalism. For a progressive to talk favorably of "original intent" is rather like a supposed aficionado of baseball to talk of how many "points" a team has scored -- in other words, a basic marker of fakery. [National Review Online, 2/28/11]

MYTH: The D.C. Circuit's Case Load Is So Low It Does Not Need Another Judge

CLAIM: The D.C. Circuit Is "Underworked." From a National Review Online blog post by Whelan:

> 1. I am reliably informed that the D.C. Circuit, for the second straight year, has canceled scheduled argument days for the spring because it doesn't have cases for the argument days.
>
> 2. According to this table prepared by the Administrative Office of the U.S. Courts, filings in the D.C. Circuit fell 17% for the most recent 12-month period measured (ending March 31, 2010), as compared to the previous 12-month period.
>
> 3. Using that same table, one can calculate for each federal court of appeals the number of case filings per authorized judgeship. I readily concede that this is a crude measure of caseload, in part because the average D.C. Circuit case might be more complicated than the average case from other circuits, in part because it doesn't take into account the resources provided by senior judges. Nonetheless, the results are striking and would seem to confirm what those most familiar with the D.C. Circuit freely say -- that the court is underworked. Specifically, by this measure the D.C. Circuit's caseload per judge is 96, whereas the aggregate figure for the other regional courts of appeals is 357 -- nearly four times higher. (The per-circuit numbers for the other circuits range from 196 for the Tenth Circuit to 558 for the Eleventh.) [National Review Online, 2/2/11]

CLAIM: "The D.C. Circuit Has A Relatively Low Caseload." From a *Washington Times* editorial:

> The D.C. circuit has a relatively low caseload. This seat should remain unfilled until Ms. Halligan's record is straightened out. [*The Washington Times*, 2/9/11]

REALITY: Senate Confirmed Bush Judges When Caseload Was At A Lower Level

FACT: In 2005, The Republican-Controlled Senate Filled The 11th Seat On The D.C. Circuit By Confirming Bush Nominee Thomas Griffith. The Senate confirmed Thomas Griffith to a seat on the D.C. Circuit on June 14, 2005. At the time, the D.C. Circuit had 12 seats and Griffith's confirmation left the court with one vacancy, meaning that Griffith filled the 11th seat. [Senate vote on the nomination of Thomas Griffith, vote no. 136, 6/14/05; Administrative Office of U.S. Court chronological history of authorized judgeships in U.S. Courts of Appeals, accessed

12/1/11; Administrative Office of U.S. Courts archive of judicial vacancies, 7/1/05]

FACT: With Griffith Confirmed, There Were Approximately 121 Pending Cases Per D.C. Circuit Judge. According to statistics compiled by the Administrative Office of U.S. Courts, on June 30, 2005, less than a month after Griffith was confirmed, there were 1,329 pending cases. Since there were 10 active judges on the court before Griffith was confirmed, this meant that there were approximately 133 pending cases per active D.C. Circuit judge at the time, and after Griffith's confirmation, there were approximately 121 pending cases per active judge. [Administrative Office of U.S. Courts statistics for the federal judiciary, accessed 12/1/11]

FACT: Halligan Would Be Filling The 9th Seat On The D.C. Circuit. In 2008, Congress decreased the number of D.C. Circuit judgeships to 11. The court currently has three vacancies, which means that if confirmed, Halligan would fill the ninth seat on the court. [Administrative Office of U.S. Court chronological history of authorized judgeships in U.S. Courts of Appeals, accessed 12/1/11; Administrative Office of U.S. Courts list of judicial vacancies, accessed 12/1/11]

FACT: If Halligan Were Confirmed There Would Be 143 Pending Cases Per D.C. Circuit Judge. According to the Administrative Office of U.S. Courts statistics, as of June 30, 2011, there were 1,289 pending D.C. Circuit cases. With eight judges currently sitting on the court, there are approximately 161 pending cases for each active D.C. Circuit judge. If Halligan were confirmed, there would be approximately 143 pending cases for each active D.C. Circuit judge. [Administrative Office of U.S. Courts, accessed 12/1/11]

FACT: Even Whelan Acknowledges That "The Average D.C. Circuit Case Might Be More Complicated Than The Average Case From Other Circuits." From a National Review Online blog post by Whelan:

> Using that same table, one can calculate for each federal court of appeals the number of case filings per authorized judgeship. I readily concede that this is a crude measure of caseload, in part because the average D.C. Circuit case might be more complicated than the average case from other circuits, in part because it doesn't take into account the resources provided by senior judges. Nonetheless, the results are striking and would seem to confirm what those most familiar with the D.C. Circuit freely say -- that the court is underworked. Specifically, by this measure the D.C. Circuit's caseload per judge is 96, whereas the aggregate figure for the other regional courts of appeals is 357 -- nearly four times higher. (The per-circuit numbers for the other circuits range from 196 for the Tenth Circuit to 558 for the Eleventh.) [National Review Online, 2/2/11]

FACT: *National Review* Contributor Has Said That The D.C. Circuit Is "Often Considered The Second Most Important Court In The Land." From an October 2008 *National Review* article by law professor Jonathan Adler:

> Wheeler's scenario suggests dramatic changes circuit-by-circuit as well. Ten of the thirteen federal appellate courts have a majority of Republican-nominated judges, including the U.S. Court of Appeals for the D.C. Circuit, often considered the second most important court in the land. Yet after a President Obama's first term, Wheeler projects that only three circuit courts -- the Fifth, Eighth and Tenth -- would continue to have Republican-nominated majorities. Confirmation of Obama nominees would create Democratic majorities on the First, Second, Third, Fourth, Seventh, Eleventh and D.C. Circuits, and increase the Democratic margin in the Ninth. [*National Review*, 10/31/08]

MYTH: GOP Senators Can Filibuster Halligan Based On The Standards They

Have Set Up

CLAIM: GOP Senators Who Have Said That Filibusters Of Judicial Nominees Are Unconstitutional Can Nevertheless Filibuster Obama Nominees. From a National Review Online blog post by Whelan:

> As for the category of Republican senators who maintained that the Democratic filibuster of judicial nominees was unconstitutional: The authoritative body on this constitutional question, the Senate itself, has plainly concluded by its practices that the filibuster is constitutionally permissible. Although it seems to me permissible for a senator to continue to abide by his own contrary view, I don't see why, alternatively, he can't view the Senate as having authoritatively settled the question adversely to his view.
>
> Again, consider an analogy: Let's say that the Supreme Court has adopted a reading of Congress's Commerce Clause powers that a particular senator believes is overly expansive. Must the senator abide by his own more restrictive view? Or is he free to recognize that the Supreme Court's reading meaningfully defines the legal landscape and to operate within that landscape? Or let's say that a president disagrees with a Supreme Court decision that strikes down a federal criminal statute on constitutional grounds. Must the president continue to insist that federal prosecutors enforce that statute? I'd be very surprised if anyone flinging the hypocrite label at Republican senators would seriously maintain that the senator and the president in these hypotheticals are hypocrites if they choose to abide by the Supreme Court's rulings. [National Review Online, 5/20/11]

CLAIM: Filibustering Judicial Nominations Is "A Bad Practice," But That's Why Republicans Should Do It. From a National Review Online blog post by Whelan:

> I continue to hold the view that I've expressed since the outset of Bench Memos in 2004 -- that the filibuster of judicial nominees is constitutionally permissible but a bad practice. It's clear, however, that unilateral disarmament by Republicans would do nothing to deter Democrats from filibustering Republican nominees. As with the independent-counsel statute, *the only sensible choice for Republican senators who want to get rid of the filibuster in the long run is to employ it against very bad judicial nominees by President Obama.* [National Review Online, 5/17/11]

CLAIM: "A Republican Senator Should Put An Indefinite Hold On" Halligan's Nomination. From a February 9 *Washington Times* editorial:

> There are disturbing discrepancies in Senate testimony by D.C. federal appellate-court nominee Caitlin Halligan. If majority Democrats won't allow a full investigation, a Republican senator should put an indefinite hold on the nomination.
>
> The controversy is over a 2004 New York City bar association report on enemy combatants, which concluded that indefinite detention during wartime is unconstitutional. Ms. Halligan was listed as a signatory on the document but told Sen. Jon Kyl, Arizona Republican, that she first "became aware of the existence of the report" last summer. Now that the report is controversial, she claims its conclusion was "incorrect," that she was "a little bit taken aback by the tone of the report," and that it doesn't represent her work or views.
>
> Edward Whelan, president of the Ethics and Public Policy Center, is suspicious about the timing of Ms.

> Halligan's skepticism, especially since she listed this on a Judiciary Committee questionnaire among reports for which she had been "a member of the committee approving them." Review of the e-mail trail should show what role Ms. Halligan played and "whether she agreed with the positions that she now distances herself from," Mr. Whelan wrote for NRO.
>
> [...]
>
> The D.C. circuit has a relatively low caseload. This seat should remain unfilled until Ms. Halligan's record is straightened out. [*The Washington Times*, 2/9/11]

REALITY: Many GOP Senators Have Said Filibusters Of Judicial Nominees Are Unconstitutional

FACT: Republican Senators Have Said Or Suggested That It Is Unconstitutional To Filibuster Judicial Nominees. Defenders of Wildlife's Judging the Environment project has compiled quotations from sitting senators who have said or suggested that it is unconstitutional to filibuster judicial nominees. Some of those senators have maintained that position during the Obama administration. [JudgingTheEnvironment.org, accessed 12/1/11]

- **Sen. Johnny Isakson (R-GA): "The Way To Comply With The Constitution Is To Have An Up-Or-Down Vote On [Judicial] Nominees."** [CNSNews, 5/5/11]
- **Sen. John Thune (R-SD): "I Believe That Well-Qualified Judicial Nominees Should Receive A Vote On The Floor Of The United States Senate."** From a statement that appeared on Thune's website as recently as March 2011:

> I take very seriously the role that the U.S. Senate has when it comes to the Constitutional responsibility of "advise and consent" concerning judicial nominees. After reviewing their records, I believe that well-qualified judicial nominees should receive a vote on the floor of the United States Senate. [Thune.Senate.gov, 3/4/11, via Archive.org]

- **Sen. Orrin Hatch (R-UT): "The Constitution's Assignment Of Roles In The Judicial Selection Process Counsels Against Using The Filibuster To Defeat Majority-Supported Nominees."** [Congressional Record, 11/17/09]
- **Sen. John Cornyn (R-TX): "An Up-Or-Down Vote Is A Matter Of Fundamental Fairness, And It Is The Senate's Constitutional Duty To Act On Each Nomination."** [Cornyn.Senate.gov, 2/7/08]
- **Sen. Mike Crapo (R-ID) And Former Sen. Larry Craig (R-ID): "The Constitution Requires The Senate To Hold Up-Or-Down Votes On All Nominees."** [*Idaho Examiner*, 5/25/05]
- **Sens. Saxby Chambliss (R-GA) And Isakson: "The Constitution Require[s] An Up-Or-Down Vote."** [Isakson.Senate.gov, 5/24/05]
- **Sen. James Inhofe (R-OK): Democrats "Unconstitutionally Filibuster Any Judge They Do Not Like."** [Inhofe.Senate.gov, 5/24/05]
- **Sen. Jeff Sessions (R-AL): "The Constitution Is Clear That A Majority Is What We Were Looking For."** [Congressional Record, 5/23/05]
- **Sen. Chuck Grassley (R-IA): "We Need To Give These Nominees The Up-Or-Down Vote The Constitution Requires."** [Congressional Record, 5/23/05]

- **Sen. Kay Bailey Hutchison (R-TX): By Filibustering Judicial Nominees, Senators Are "Changing The Constitution Without Going Through The Process Of A Constitutional Amendment."** [Congressional Record, 5/19/05]
- **Sen. Richard Burr (R-NC): "Denying Judicial Nominees Of Both Parties ... An Up-Or-Down Vote ... Was Certainly Not The Intention Of Our Founding Fathers."** [Congressional Record, 5/19/05]
- **Sen. Jim DeMint (R-SC): Senators Who Filibuster Judicial Nominees "Are Trying To Thwart The Will Of The American People And The Constitution."** [Congressional Record, 5/12/05]
- **Sen. Pat Roberts (R-KS): If Filibusters Are Allowed, "We Are Really Changing The Constitutional Design Of What It Takes To Basically Nominate And Approve Any Judge."** [Fox Broadcasting Co., *Fox News Sunday*, 3/2/03, via FoxNews.com]

FACT: Republican Senators Also Pledged That They Would Not Filibuster Judicial Nominees Even If They Were Picked By A Democratic President. Defenders of Wildlife's Judging the Environment project has also compiled examples of a number of Republican senators who pledged not to filibuster judicial nominees no matter who was in the White House. [JudgingTheEnvironment.org, accessed 12/1/11]

- **Sen. Lamar Alexander (R-TN): "I Have Pledged And I Still Pledge To Give Up My Right To Filibuster Any President's Nominee For The Appellate Courts, Including The Supreme Court Of The United States."** [Congressional Record, 5/20/05]
- **Isakson On His Support For Ending Judicial Filibusters: "Were I In The Minority Party And The Issues Reversed, I Would Take Exactly The Same Position."** [Congressional Record, 5/19/05]
- **DeMint: "One Of My Goals As A Senator Is To Confirm Highly Qualified Judges By Ensuring Timely Up-Or-Down Votes For All Nominees No Matter Who Is President, No Matter Which Party Is In The Majority."** [Congressional Record, 5/12/05]
- **Sen. Tom Coburn (R-OK): "I Will Continue To Insist That The Judicial Nominations From Any President -- Republican Or Democrat -- Receive The Courtesy Of An Up-Or-Down Vote."** [Coburn.Senate.gov, 5/11/05]
- **Sen. Lisa Murkowski (R-AK): "I Support An Up-Or-Down Vote On All Nominations Brought To The Senate Floor, Regardless Of The President Nominating Them Or Which Party Controls The Senate."** [*Juneau Empire*, 5/9/05]
- **Isakson: "Every Judge Nominated By This President, Or Any President, Deserves An Up-Or-Down Vote."** [Congressional Record, 4/28/05]

FACT: Some Republican Senators Have Taken The Position That Nominees Can Only Be Filibustered In "Extraordinary Circumstances." In 2005, a "Gang of 14" senators agreed not to filibuster judicial nominees except in "extraordinary circumstances." Republican senators, including Sessions, Cornyn, Grassley, John McCain (AZ), and Jon Kyl (AZ), have purported to apply the "extraordinary circumstances" test in Senate floor speeches in 2011. [*Media Matters*, 11/3/11]

&mdash A.H.S.