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CONSTITUTIONAL OPINIONS

Caitlin Halligan Need Not Apply

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The D.C. Circuit Court of Appeals does not require her services.

Unlike the rest of us, federal judges have lifetime jobs. Before giving a nominee a lifetime job, Congress shouldn't just look at the nominee's ability and temperament. It should also think about whether the country and its taxpayers need another permanent employee. Congress should think hard on both grounds before giving Caitlin Halligan, a nominee for the D.C. Circuit Court of Appeals, a lifetime job.

Halligan's record shows that the D.C. Circuit doesn't need her help deciding cases. When she was Solicitor General for the State of New York, working for Attorneys General (and aspiring Governors) Eliot Spitzer and Andrew Cuomo, she advanced positions on high-profile legal issues that consistently raise yellow caution flags.

For example, Halligan supported New York's efforts to hold the manufacturers of handguns liable for criminal acts committed with handguns. Those lawsuits represented an activist effort to use the courts to solve a societal problem. When Congress was considering shutting those lawsuits down, Halligan gave a speech in which she noted how the "dynamics of our rule of law enables enviable social progress and mobility," a formulation that sounds like it's from the living Constitution hymnal.

The New York Court of Appeals rejected the arguments in a brief that Halligan signed, explaining that the state's legislative and executive branches were "better suited" to solving societal problems than the judiciary. And, after Congress passed the Protection of Lawful Commerce in Arms Act, Halligan signed a friend-of-the-court brief contending that the Act was unconstitutional. The Second Circuit rejected those arguments.

Another caution flag is warranted for the friend-of-the-court brief that Halligan wrote for New York and seven other states in *Roper v. Simmons*. In that brief, she argued that "an enduring legislative consensus has emerged against executing juvenile offenders." Simmons was sentenced to death in Missouri after being convicted of a gruesome felony murder that he committed when he

was 17 years old. After assuring his friends that they could "get away with it" because they were minors, Simmons and his friends broke into a woman's house in the middle of the night and kidnapped her, driving her in her minivan to a state park. There, they walked her to a railroad trestle above a river where they bound her hands and feet with electrical wire and covered her face with duct tape before throwing her into the river to drown.

In Article V of the Constitution, the States agreed that it would take three fourths of them, 38 of the 50 states, to amend it. In her amicus brief, Halligan contended that "an enduring consensus" against the execution of juvenile murderers had emerged. She crafted that "enduring consensus" by noting that, of the 37 states that authorize capital punishment, the number of them that prohibited the execution of juveniles had increased from 11 to 18 (plus the federal government) over the preceding 15 years. That's well short of the 38 needed to amend the Constitution.

Sad to say, though, a majority of the Supreme Court bought that argument, holding that "evolving standards of decency" and the Eighth Amendment's prohibition of cruel and unusual punishment barred the execution of juvenile killers like Simmons.

Halligan also wrote an opinion advising that New York law should be read to require that members of same-sex unions be considered spouses under state law. New York's Domestic Relations Law then required that marriages performed in New York be between persons of the opposite sex, but Halligan said that reading the law that way raised "serious constitutional concerns." She relied on a state trial court ruling holding that New York law had to recognize parties to same-sex unions as spouses under state law. New York's appellate courts subsequently reversed that ruling, though, and the New York Legislature did not recognize same-sex marriages until mid-2011.

On the gun lawsuits and same-sex marriage, Halligan got herself and the State leading a parade of one. In response to a question from Senator Sessions, Halligan wrote that, as Solicitor General, she based her recommendations on the legal positions the state should take "on an analysis of the legal issues and the state's interest in the issues at hand." While the ultimate recommendation represented a "synthesis" of other staff and agency views, Halligan's views probably carried great weight with her bosses, and it is unlikely that the State took any legal action over her negative recommendation. For that reason, even though we should be careful in judging an attorney's judicial philosophy and understanding of the role of the courts from that attorney's clients and arguments, Halligan's trailblazing and progressive legal work is different.

On top of her record, there's no good reason to give Halligan a lifetime appointment on the D.C Circuit. The Founders provided that federal judges would "hold their Offices during good Behavior" and that their pay should not be "diminished during their Continuance in Office" in Article III of the Constitution. They wanted to make sure that federal judges were not

"overpowered, awed or influenced" by the Executive or Legislative branches of government as Alexander Hamilton put it in Federalist No. 78. After all, the colonists complained that King George III "made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries" in the Declaration of Independence.

Even if we think judicial independence from the other branches of government is a good thing, that's no reason to be hasty in bestowing permanent employment on anyone. In fact, the seat that Halligan has been nominated to fill has been vacant for nearly six years. There's not only no hurry, but the court's workload doesn't need her help to get it done.

In 2010, the D.C. Circuit had the lowest number of appeals pending per panel of all of the other circuits. Its workload has also been declining with the number of appeals filed decreasing by more than 14 percent from 2005 to 2010, and the number of appeals pending decreased by nearly 12 percent during the same time. Clearly, the D.C. Circuit doesn't need Halligan to help handle its declining workload.

Indeed, if the Circuit needed help, the Senate could have considered the nomination of Peter Keisler for that seat. Instead, the Senate Judiciary Committee made the former Assistant Attorney General and well-respected Keisler wait for 918 days for a hearing that never came.

The Senate should think long and hard before bringing Halligan's nomination to a vote. There is no need for another lifetime appointment to the D.C. Circuit, and her consistent record of using the courts to solve societal problems is troublesome.

Update: Number of states needed to amend the Constitution corrected.

About the Author

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