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Witch Hunt Targets Obama Judicial Nominee Caitlin Halligan

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National Review Online contributor Ed Whelan has promised to show that the record of President Obama's nominee to the U.S. Court of Appeals for the D.C. Circuit Caitlin Halligan suggests she is "hard left on a broad array of issues." Whelan's first attack on Halligan is that she is out of the legal mainstream on the issue of same-sex marriage. But it is a fairly weak attack.

Whelan attacks a memo that Halligan wrote as solicitor general of New York state on the issue of whether New York law allows same-sex marriage. It's a strange for a conservative opponent of same-sex marriage like Whelan to focus on, since Halligan concludes that New York law does not allow same-sex marriage even though New York law did not "explicitly prohibit same-sex marriage"; says the constitutional question has not been decided yet and does not have a clear outcome; and advises New York officials not to perform marriages for same-sex couples. Indeed, here is Halligan's conclusion on the subject:

We conclude that the Legislature did not intend to authorize same-sex marriages. This interpretation of the statute, however, raises concerns, which are best resolved by the courts of this State.

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.

Whelan doesn't mention this, but Halligan's memo advising New York officials that they shouldn't perform same-sex marriages came only a few days after a mayor of the small New York town of New Paltz began marrying same-sex couples. Thus Halligan's memo -- which was informal and did not have the force of law -- directly contradicted the decision by a New York official that the laws of New York state allowed same-sex marriage.

Whelan's argument amounts to a criticism that Halligan does not give sufficient weight to some of the arguments that Whelan finds compelling. But that is hardly evidence that Halligan is "hard left."

Whelan believes that Halligan does not give sufficient weight to the argument that the state has a strong interest "in promoting marital procreation" and in supporting the "welfare of children" that would both be furthered by a ban on same-sex marriage.

However, Whelan fails to address important factors:

- 1. Halligan gives a reason that the courts may uphold same-sex marriage bans.** In her memo, Halligan states 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 reviews federal court decisions and decisions from various state courts that have come to different conclusions on whether same-sex marriage bans are constitutional.

2. Mainstream legal scholars agree that there are constitutional problems with same-sex marriage bans. State courts across the nation have ruled that same-sex marriage bans are unconstitutional, and noted legal scholars agree with their decisions. Whelan has repeatedly criticized former Solicitor General Ted Olson for arguing that same-sex marriage bans are unconstitutional. Similarly, he has strongly attacked federal judge Vaughn Walker, who found that California's ban on same-sex marriage violated the U.S. Constitution, but that does not mean they are outside the mainstream. Indeed, Olson was appointed as solicitor general by former President George W. Bush, and Walker was appointed by former President George H.W. Bush.

So, to sum up: Halligan explicitly advised New York state officials not to perform same-sex marriage even though the state's laws did not explicitly contain a ban on same sex marriage. She did not take a position on whether same-sex marriage bans were unconstitutional and gave arguments on both sides of the issue. And even if she had concluded that the ban was unconstitutional, that would not prove that she was "hard left" as Whelan seems to think.

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