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D.C. Circuit Nominee Caitlin Halligan: The Death Penalty and State "Consensus"

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Among recent novelties in the Supreme Court's decisionmaking, few are more deserving of derision than the Court's gerrymandered concoction of a national "consensus" among the states in support of its invention of new limits on the death penalty. D.C. Circuit nominee Caitlin Halligan's amicus brief in *Roper v. Simmons* (decided in 2005) strongly indicates that she is a vigorous supporter of this sorry practice.

The issue that the Court addressed in *Roper* was whether the execution of offenders who were 16 or 17 at the time of their offense violates the Eighth Amendment. Halligan, in her capacity as solicitor general of New York, was the lead lawyer (counsel of record) for eight states that submitted an amicus brief that argued that an "enduring legislative consensus has emerged against executing juvenile offenders."

According to Halligan, this "enduring legislative consensus" emerged from the fact that over the previous 15 years, a grand total of seven states (plus the federal government) had legislated against (or, in one case, acquiesced in a state court ruling against) execution of offenders who were under 18 at the time of their offense. Thus, whereas in 1989 (when the Court last visited the issue), only "11 of the 37 states that authorized capital punishment prohibited executing" those who were 16 or 17 at the time of their offense (Brief at 6-7), at the time Halligan filed her amicus brief *18 of 37* did. That's sure some consensus, isn't it? And fifteen years (or less) would hardly seem an adequate base of time to discern whether any supposed consensus is "enduring."

It's useful to have in mind the underlying facts that were the occasion for Halligan to argue (and for the Court to hold) that the Eighth Amendment categorically forbids the execution of offenders who were 16 or 17 at the time of their offense. In brief: When he was 17, Christopher Simmons planned a brutal murder. He assured his friends they could "get away with it" because they were minors. In the middle of the night, Simmons and a friend broke into a woman's home, awakened her, covered her eyes and mouth with duct tape, bound her hands, put her in her minivan, drove to a state park,

walked her to a railroad trestle spanning a river, tied her hands and feet together with electrical wire, wrapped her whole face in duct tape, and threw her from the bridge. Exactly as Simmons planned, his victim drowned an unspeakably cruel death in the waters below.

Halligan had complete discretion whether or not to file an amicus brief in *Roper*. This wasn't a case in which New York was a party. Further, it's striking that Halligan would conclude that New York had an interest in having the Court bar other states from letting juries play their traditional role—and in leveraging New York's position against those other states. Halligan claims in her statement of amici interest that New York and the other amici states "value highly the discretion accorded them by our federal system to punish crimes as they deem appropriate." But her brief belies her claim.

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