



March 1, 2013

Hon. Harry Reid
Majority Leader, United States Senate
522 Hart Senate Office Bldg
Washington, DC 20510

Hon. Mitch McConnell
Minority Leader, United States Senate
361-A Russell Senate Office Building
Washington, DC 20510

Dear Majority Leader Reid and Minority Leader McConnell:

We are writing on behalf of Constitutional Accountability Center, a public interest law firm, think tank and action center dedicated to fulfilling the progressive promise of the Constitution's text and history, to urge that Caitlin Halligan be confirmed promptly to the United States Court of Appeals for the District of Columbia Circuit.

As discussed below, Ms. Halligan is exceptionally well-qualified to serve as a federal appellate court judge. Ms. Halligan's nomination should have received, but did not receive, a yes-or-no vote on the Senate floor during the last Congress, but it must receive such a vote in 2013. When Ms. Halligan was first nominated in 2010, there were two vacancies on the D.C. Circuit; since then, two additional vacancies have opened up, including one just last month. This means that more than a third of the court's seats -- *four of eleven* -- are now vacant. It would be contrary to the interests of justice for the Senate to continue to force this important court to do the nation's business as understaffed as it is.

There can be no genuine dispute that Ms. Halligan is overwhelmingly qualified to serve on the D.C. Circuit. She has stellar academic credentials and an exemplary professional record as a litigator, as an appellate advocate, and as a dedicated public servant. A graduate of Princeton University and Georgetown Law School, Ms. Halligan clerked for Judge Patricia M. Wald of the D.C. Circuit and for Supreme Court Justice Stephen Breyer. Ms. Halligan has spent a significant portion of her career in public service, most notably as the Solicitor General of the State of New York, and currently as the General Counsel of the New York County District Attorney's Office. She has also, during the course of her distinguished career, practiced law with some of the nation's leading law firms.

While most lawyers go through their entire careers without appearing before the United States Supreme Court, Ms. Halligan has argued five cases before the High Court. She is a lawyer's lawyer who has earned the great respect of her peers, as evidenced not only by the "Unanimously Well Qualified" rating that she has received from the ABA, but also by the letter supporting her confirmation submitted to the Judiciary Committee by a bipartisan group of preeminent attorneys who have worked with her in

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various capacities, including such conservative luminaries as Carter Phillips and Miguel Estrada.¹ These attorneys have praised Ms. Halligan as “an outstanding selection for the D.C. Circuit,” explaining that:

[s]he 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.

Despite Ms. Halligan’s impeccable qualifications, and her support from prominent conservatives, her nomination was blocked during the last Congress, apparently in response to opposition from organizations including the National Rifle Association. President Obama re-nominated Ms. Halligan in January of this year, and on February 14, the Judiciary Committee again considered her nomination, with seven Republican members of the Committee voting against Ms. Halligan. Those who opposed Ms. Halligan in Committee on February 14 gave no reasons for their vote, but the concerns expressed about Ms. Halligan’s nomination during the last Congress were deeply misguided. To the extent they may again be driving opposition to Ms. Halligan’s nomination, we address them here.

One issue, raised in 2011 by Judiciary Committee Ranking Member Charles Grassley, centered upon the workload of the D.C. Circuit. Although Senator Grassley noted on March 10, 2011 that the Senate did not act on President George W. Bush’s nomination of Peter Keisler to fill the same seat on that court to which Ms. Halligan had been nominated, the analogy to the Keisler nomination was inapt. When Mr. Keisler was nominated, there were ten active judges on the D.C. Circuit; there were only nine in 2010 when Ms. Halligan was first nominated and only eight when opponents filibustered her nomination in 2011. And now, as noted above, there are only *seven* active judges on a court that Congress has determined should have *eleven*. No doubt that is why, in a recent *Roll Call* article, an unnamed Republican Senator was quoted as saying the workload argument against Ms. Halligan “has evaporated.”²

Resurrection of the “workload” argument against Ms. Halligan would not only be meritless, it would also be hypocritical. As Judiciary Committee Chairman Patrick Leahy stated in response to Senator Grassley in 2011, the D.C. Circuit’s caseload was similar then to what it was during the Bush Administration -- it still is -- yet, as Chairman Leahy observed, the Senate during that Administration had *twice* filled what was then the 10th seat on the Circuit (with Janice Rogers Brown and later with Brett Kavanaugh), as well as the 11th seat once (with Thomas Griffith). Ms. Halligan, if confirmed, would now fill the 8th seat, still leaving three vacancies on this important court.

Critics of Ms. Halligan in 2011, including the NRA, also seized on aspects of her record that they contended indicate hostility to Second Amendment rights or otherwise suggest she holds progressive views on certain legal topics. As Senator Leahy pointed out, however, these arguments against Ms. Halligan were largely based on her work as a lawyer for a client -- primarily as the Solicitor General of the State of New York. It is always very dangerous to attribute to a lawyer positions taken on behalf of a

¹ Letter to Senate Judiciary Committee from Clifford M. Sloan, *et al.*, March 4, 2011, available at: <<http://legaltimes.typepad.com/files/halligan-030411-jointletter.pdf>> (last visited February 28, 2013).

² Humberto Sanchez, “Halligan Vote Could Rekindle Judges Fight,” *Roll Call* (Feb. 26, 2013).

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client; all lawyers are required to represent their clients' interests zealously, and they violate their ethical obligations if they fail to do so. Indeed, as then-Judge, now Chief Justice, John Roberts testified in 2005 at his Supreme Court confirmation hearings before the Judiciary Committee, "I'm just saying that it is a basic principle in our system that lawyers represent clients and you do not ascribe the position of the client to the lawyer. It's a position that goes back to John Adams and the Revolution."³ Senators agreed. Senator Lindsey Graham stated, for example:

Another line of inquiry that's been disturbing to me is that we talk about the clients you [John Roberts] represent, whether it be the Ronald Reagan administration or some private sector client, and we tend to hold that maybe unpopular position against the lawyer. There's more and more of that happening. ... I really do worry that in the future that if we up here start holding who you represent against you, that young lawyers in the future will pass on the hard cases.⁴

Moreover, with respect to Ms. Halligan and the Second Amendment, Ms. Halligan made it expressly clear in her testimony at her confirmation hearing on Feb. 2, 2011 that she recognizes that the Supreme Court has held that an individual's right to keep and bear arms under the Second Amendment is a fundamental right, and pledged to follow the Court's precedent if she were confirmed, as she of course would be obligated to.

It is also worth noting that Ms. Halligan's conservative opponents have engaged in cherry-picking through her record. As with most if not all attorneys who have had the great honor of serving as the lawyer for a State or other governmental entity dealing with a myriad of legal and political concerns and interests, Ms. Halligan's record is replete with arguments made on behalf of her clients that could be characterized as "conservative," along with others that could be characterized as "liberal." In fact, the case that Ms. Halligan last argued before the Supreme Court (on March 21, 2011), *Tolentino v. New York*, 131 S. Ct. 1387 (2011), was a Fourth Amendment case in which Ms. Halligan urged the Court not to expand the exclusionary rule. Her position was supported in a brief filed by the Attorneys General of 26 other States, including the conservative Attorneys General of such States as Virginia, Texas, Utah, and South Carolina, as well as in a brief filed by the New York State Association of Chiefs of Police and the New York State Sheriffs' Association Institute. Ms. Halligan was given the honor of representing New York before the Supreme Court in *Tolentino* not because she's a conservative lawyer or a progressive lawyer, but because she's a great lawyer.⁵

Caitlin Halligan has the qualifications, experience, intellect and temperament to serve with great distinction on the D.C. Circuit. Given Ms. Halligan's stellar record, as well as the fact that the number of

³ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the Committee on the Judiciary, United States Senate, 109th Cong., 1st Sess. (Sept. 12-15, 2005), at 308.

⁴ *Id.* at 254.

⁵ A mere eight days after *Tolentino* was argued, the Supreme Court dismissed the case, stating only that review had been "improvidently granted." The dismissal left the lower court's ruling intact, the outcome that Ms. Halligan had sought. In fact, Ms. Halligan had urged the Court not to accept review in the first place.

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vacancies on the D.C. Circuit has doubled since Ms. Halligan was first nominated, Ms. Halligan's nomination should promptly be put to a vote. We urge every Senator to support her confirmation.

Respectfully,

A handwritten signature in black ink that reads "Doug Kendall". The signature is written in a cursive, slightly slanted style.

Douglas T. Kendall
President

A handwritten signature in blue ink that reads "Judith E. Schaeffer". The signature is written in a cursive, slightly slanted style.

Judith E. Schaeffer
Vice President