REPUBLICAN NATIONAL LAWYERS ASSOCIATION

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The Honorable Harry Reid
Majority Leader, United States Senate
522 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mitch McConnell
Republican Leader, United States Senate
361-A Russell Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
437 Russell Office Senate Building
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member, Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Reid, McConnell, Leahy and Grassley:

The Republican National Lawyers Association opposes the confirmation of Caitlin Halligan to be United States Circuit Judge for the District of Columbia Circuit and urges Senators to oppose her nomination.

The Republican National Lawyers Association ("RNLA") is the principal national organization representing Republican lawyers across the country. We have followed the nomination of Ms. Halligan closely and write today to urge you to oppose her nomination to the United States Court of Appeals for the District of Columbia Circuit. The RNLA bases its opposition on a number of troubling aspects of Ms. Halligan's record, including a lack of candor in answers she provided to the United States Committee on the Judiciary ("Committee"); contradictory and uninformed statements she provided regarding certain lawsuits; her views on constitutional interpretation; and the needless haste with which this nomination has moved despite no need for another judge on the D.C. Circuit.

Ms. Halligan has provided answers to the Committee that demonstrate both a disturbing lack of candor and an uninformed view of legislation that she, through her public positions, deemed unconstitutional. These troubling characteristics of Ms. Halligan's record most prevalently manifest themselves in answers she provided Committee members regarding tort liability for gun manufacturers. Senator Coburn inquired about remarks Ms. Halligan gave on this subject in 2003,

specifically her view of then-pending federal legislation titled the Protection of Lawful Commerce in Arms Act ("PLCAA"). In response to Senator Coburn, Ms. Halligan stated:

> At the time [I gave the speech], the Attorney General [of New York Eliot Spitzer] was pursuing a common law action against a number of gun manufacturers, wholesalers, and retailers. That lawsuit was dismissed on legal grounds by a New York State intermediate appellate court. In light of the New York state court's decision, there is no basis in New York law for holding firearm manufacturers liable for crimes in which a handgun is used. *I am not familiar with the laws of any other state or federal law, and have no basis for an opinion regarding any such claims that might be brought in other jurisdictions.* (emphasis added). [1]

Ms. Halligan neglected to add that as Solicitor General of New York she filed an *amicus* brief supporting the City of New York's challenge to the constitutionality of the later-enacted PLCAA in the United States Court of Appeals for the Second Circuit (*City of New York v. Beretta USA Corp.*[2]). Despite her assertion that she is not familiar with any other state or federal laws, in that brief she demonstrates a thorough knowledge of nationwide tort laws by referencing the actions of "approximately thirty state legislatures" and even cites a law review article discussing the impact of these laws. Given that Ms. Halligan filed an *amicus* brief advocating the unconstitutionality of a federal statute on the subject, it would appear that Ms. Halligan had to possess knowledge about gun manufacturer tort liability far beyond her testimony.

In addition to Ms. Halligan's lack of candor on the subject of gun manufacturer tort liability, she mischaracterized the then-draft legislation. In the same 2003 speech referenced above, Ms. Halligan stated:

> If enacted, this legislation would nullify lawsuits brought by nearly 30 cities and counties – including one filed by my office – as well as scores of lawsuits brought by individual victims or groups harmed by gun violence . . . 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 or promote greater responsibility among gun dealers.

The National Rifle Association has pointed out this statement is factually inaccurate. The PLCAA only prohibited lawsuits "resulting from the criminal or unlawful misuse" of firearms or ammunition by third parties. It exempted

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[1] The case to which she refers in this response is *People of the State of New York v. Strum, Ruger & Company, Inc.*, 309 A.D.2d 91 (2003).
[2] 524 F.3d 384 (C.A. 2, Apr. 30, 2008).

traditional tort actions against gun makers. The bill did not, as Ms. Halligan claims, restrict the actions of state legislatures, as the introduction of numerous anti-gun bills in the New York legislature proves each year. As Solicitor General of New York, we would expect Ms. Halligan to ensure the accuracy of her statements and to avoid hyperbolic statements.

Ms. Halligan's statements regarding judicial philosophy also raise concerns about her candor. At her Senate Judiciary Committee hearing and in response to questions for the record, she indicated that judges should look to original intent when interpreting the Constitution. She explained in response to a written question from Senator Grassley: "A judge should look to domestic legal sources in interpreting the United States Constitution – specifically, the text of the Constitution, the original intent of the framers, and governing precedent." When asked whether she had previously discussed her views on originalism, she could not recall "expressing an opinion on this issue in the past."

Given Ms. Halligan's prior public positions in speeches and *amici*, it is surprising that she would assert that she adhered to originalism. Her record reveals numerous instances where she has advanced an "evolving or living constitution" methodology. For instance, in her 2003 speech discussing the PLCAA she explained, "[t]ime and time again we have seen how the dynamics of our rule of law enables enviable social progress and mobility." Likewise, as Solicitor General of New York, Ms. Halligan filed an *amicus* brief on behalf of eight states in *Roper v. Simmons*[3] in which she argued that state laws permitting the execution of convicted murderers who were 16 or 17 years old at the time of the crime were unconstitutional and violated the Eighth Amendment due to "evolving standards of decency." Similarly, Ms. Halligan authored an Attorney General opinion discussing same sex marriage in New York, in which she invoked the same themes on constitutional interpretation: "The question of whether the [Domestic Relations Law] authorizes and permits same-sex marriage must be analyzed in light of an ongoing and rapidly shifting debate about whether it is constitutional to deny eligibility for marital status to same-sex couples."[4]

Had Ms. Halligan been honest about her views on Constitutional interpretation, the Senate would have the opportunity to evaluate her nomination honestly and with the candor this seat deserves. Many Supreme Court justices, including those on the Court today, subscribe to the philosophy of a "living constitution" that Ms. Halligan appears to have adhered to in her earlier writings and statements. The conflict between her prior statements and confirmation statements raises serious questions. This lack of candor denies the Senate the ability to properly perform its constitutional role and brings into question all other aspects of Ms. Halligan's nomination.

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[3] 543 U.S. 551 (2005).
[4] NY AG Op. No. 2004-1 (March 3, 2004).

Finally, the D.C. Circuit is not in immediate need of another judge. There is time to give the nomination all the consideration it deserves. According to the Administrative Office of the U.S. Courts, filings in the District of Columbia Circuit Court fell 17% for the most recent 12-month period measured (ending March 31, 2010), as compared to the previous 12-month period. In fact, the D.C. Circuit's caseload per judge is 96, whereas the aggregate figure for the other regional courts of appeals is nearly four times higher (357). Further, there are five senior judges in the D.C. Circuit that carry significant caseloads. The court has actually cancelled many previously scheduled sitting days for the past two springs because there have not been enough cases to hear. Given these statistics, there should be no rush to confirm yet another judge to this circuit.

As a result of Ms. Halligan's lack of candor in her answers to the Committee, including her possibly disingenuous answers regarding judicial philosophy, and the lack of any current need to fill this particular vacancy, we urge senators to oppose Ms. Halligan's confirmation to the U.S. Court of Appeals for the District of Columbia Circuit.

Sincerely,

David Norcross
Chair

Cleta Mitchell
President