

**Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
On Cloture On The Nomination Of Caitlin Halligan to the D.C. Circuit  
December 5, 2011**

Tomorrow the Senate should be holding an up-or-down vote on the long-delayed nomination of Caitlin Halligan to fill one of three vacancies on the Court of Appeals for the D.C. Circuit. Instead, for the seventh time since President Obama took office 34 months ago, we are required to overcome a Republican filibuster for the Senate to consider one of President Obama's superbly qualified judicial nominees.

Ms. Halligan, President Obama's first nominee to the important D.C. Circuit, is the former Solicitor General for the State of New York. With an impressive record in private practice and public service, she is widely respected for the quality of her work as an advocate. Indeed, Ms. Halligan's nomination was greeted with bipartisan support and has since garnered endorsements from law enforcement officials and organizations, women's organizations, law school deans and professors, judges and preeminent lawyers from across the political spectrum. The Judiciary Committee favorably reported Ms. Halligan's nomination nearly nine months ago.

By any traditional standard, she is the kind of superbly qualified nominee who should easily have been confirmed by the Senate months ago with the support of both Republicans and Democrats. I am disappointed that yet again instead of seeing bipartisan cooperation we are required to seek cloture.

New Standards for President Obama's Judicial Nominations

From the beginning of the Obama administration, we have seen Senate Republicans shift significantly away from the standards they used to apply to the judicial nominations of a Republican President. During the administration of the last President, a Republican, Republican Senators insisted that filibusters of judicial nominees were unconstitutional. They threatened the "nuclear option" in 2005 to guarantee up-or-down votes for each of President Bush's judicial nominations. Senator McConnell, then the Republican whip, said: "Any President's judicial nominees should receive careful consideration. But after that debate, they deserve a simple up-or-down vote. . . . It's time to move away from advise and obstruct and get back to advise and consent. The stakes are high . . . . The Constitution of the United States is at stake."

Many Republican Senators declared that they would never support the filibuster of a judicial nomination—never. Yet, only a few years later, Senate Republicans reversed course and filibustered President Obama's very first judicial nomination, that of Judge David Hamilton of Indiana.

David Hamilton was a widely respected 15-year veteran of the Federal bench. President Obama nominated Judge Hamilton in March 2009, after consultation with the most senior and longest-serving Republican in the Senate, Senator Dick Lugar of Indiana, who strongly supported the nomination. Rather than welcome the nomination as an attempt by President Obama to step

away from the ideological battles of the past, Senate Republicans ignored Senator Lugar's support, caricatured Judge Hamilton's record and filibustered his nomination. After the Senate rejected that filibuster, Judge Hamilton was confirmed.

The partisan delays and opposition to President Obama's judicial nominations have continued since. Senate Republicans have required cloture motions to be filed on judicial nominations that ultimately won unanimous support from the Senate. Earlier this year they filibustered the nomination of Professor Goodwin Liu of California, who was supported by both his home state Senators to fill a judicial emergency vacancy on the Ninth Circuit. That successful filibuster of a brilliant lawyer and a good man prevented the Senate from having an up-or-down vote on his nomination and prevented an outstanding nominee from serving the American people on the Federal bench. They attempted to justify that filibuster on ideological grounds. There is no such justification here, in connection with the nomination of Caitlin Halligan who is a mainstream lawyer and public servant from New York.

Senate Republicans took the virtually unprecedented step this year of requiring cloture to be filed on a district court nomination. That effort to ratchet up the judge wars was rejected when 11 Republican Senators joined to ensure an up-or-down vote on the nomination of Jack McConnell to the District of Rhode Island.

With their latest filibuster, the Senate Republican leadership seeks to set yet another new standard, one that threatens to make confirmation of any nominee to the D.C. Circuit virtually impossible for the future. Caitlin Halligan is well-qualified nominee with a mainstream record as a brilliant advocate on behalf of the State of New York and in private practice. I have reviewed her record carefully in the course the Judiciary Committee's thorough process, including her response to our extensive questionnaire and her answers to questions at her hearing and in writing following the hearing. In my view, there is no legitimate reason or justification for filibustering her nomination.

Caitlin Halligan is the kind of nominee who has demonstrated not only legal talent but also a dedication to the rule of law throughout her career. We should encourage nominees with the qualities of Ms. Halligan to engage in public service and we should welcome them on the Federal bench, not denigrate them. Concocted controversies and a blatant misreading of Ms. Halligan's record as an advocate are no reason to obstruct this outstanding nomination.

We must reject these misguided arguments. This filibuster against this qualified woman will set a standard that could not be met by judicial nominees of Presidents of either party. I trust that, as with the nomination of Jack McConnell, sensible Republican Senators will, again, join in preventing such an outcome. It is time to edge away from this dangerous precipice.

#### Caitlin Halligan is a Well-Qualified Nominee with Widespread Support

When Democratic Senators cooperated to confirm John Roberts to the D.C. Circuit in 2003, it broke the stalemate created by the Republicans refusal for years to even consider President Clinton's nominees to that Court. Like John Roberts, Caitlin Halligan is a highly regarded

appellate advocate with the kind of impeccable credentials in both public service and private practice that make her unquestionably qualified to serve on the D.C. Circuit. She should be confirmed, not unjustifiably filibustered.

Ms. Halligan served for nearly six years as Solicitor General of New York and has been a leading appellate lawyer in private practice. She is currently General Counsel at the New York County District Attorney's Office, an office that investigates and prosecutes 100,000 criminal cases annually in Manhattan. Ms. Halligan has served as counsel of record in nearly 50 matters before the U.S. Supreme Court, arguing five cases before that court and many cases before Federal and state appellate courts. Just as John Roberts had served in government and clerked for the Supreme Court, she clerked for Supreme Court Justice Stephen Breyer. She also clerked for Judge Patricia Wald on the D.C. Circuit, the court to which she has been nominated. The American Bar Association's Standing Committee on the Federal Judiciary, which Republican Senators often cite, unanimously rated Ms. Halligan "Well-Qualified" to serve on the D.C. Circuit. That is the highest rating that can be received from its non-partisan peer review.

The letters of support we have received for Ms. Halligan's nomination from a broad range of people and organizations is a testament both to her exceptional qualifications to serve and to the fact that this should be a consensus nomination, not a source of controversy and contention.

Twenty-one prominent appellate advocates from across the political spectrum who have worked with Caitlin Halligan, including Miguel Estrada and Carter Phillips, endorsed her nomination, writing:

"We believe that Caitlin is an outstanding selection for the D.C. Circuit. She is a first-rate lawyer and advocate. She is well respected and highly regarded as a leader of the profession. Caitlin has an ideal judicial temperament. She brings reason, insight and judgment to all matters. Even those of us who have been on the opposite sides of Caitlin in litigation have been greatly impressed with her ability and character. We have no doubt she would serve with distinction and fairness."

When Ms. Halligan was nominated, Carter Philips, a preeminent Supreme Court advocate who served as Assistant to the Solicitor General during the Reagan administration, described her as "one of those extremely smart, thoughtful, measured and effective advocates" and concluded that she "will be a first-rate judge." Judge Albert Rosenblatt, who was appointed to serve on New York's highest court by former Republican Governor George Pataki, wrote in praise of Ms. Halligan's work as New York's Solicitor General, concluding that "her sense of fairness and balance is among the best – if not the best – that I have ever seen in my 34 years as a judge and a prosecutor." This is not a nomination that should be filibustered. To do so will set a destructive standard that no one will be able to meet. If someone of Caitlin Halligan's outstanding credentials, character and experience cannot be confirmed, no one can be.

The nomination of Ms. Halligan has likewise received significant support from law enforcement officials and organizations. The National District Attorneys Association has called Caitlin Halligan's background "impressive," stating that she "would be an outstanding addition" to the

D.C. Circuit. District Attorneys from the State of New York, including Republicans Derek Champagne, Daniel Donovan, Jr., William Fitzpatrick, James Reams and Scott Burns, support her nomination, as do the New York Association of Chiefs of Police and the New York State Sheriff's Association. New York City Police Commissioner Raymond Kelly has said that Ms. Halligan has the "three qualities important for a nominee: intelligence, a judicial temperament, and personal integrity." Legendary New York County District Attorney Robert Morgenthau, endorsing her nomination in the "strongest of terms," described Ms. Halligan as "qualified in terms of intellect, ability and temperament." This is not someone to be filibustered and blocked from serving as a Federal judge.

More than 20 former United States Supreme Court clerks, including clerks who worked for conservative Justices such as former Chief Justice Rehnquist, Justice Scalia and Justice Kennedy, wrote that they "retain a distinct appreciation of Caitlin's sharp intelligence and her ability to cooperate with others in resolving difficult legal problems." They concluded their letter of support by praising her "reasonableness and collegiality," and calling her a "fair-minded colleague who was a pleasure to work with in a sophisticated and demanding legal setting." This is not a closed minded ideologue. Caitlin Halligan is an outstanding lawyer who will be an outstanding judge.

Ms. Halligan's nomination has received support from numerous women's law enforcement, business, and legal organizations, including the New York Women in Law Enforcement, the National Center for Women and Policing, the National Conference of Women's Bar Associations, and the Women's Bar Association of the District of Columbia. The U.S. Women's Chamber of Commerce asked the Senate to confirm Ms. Halligan, describing her as "exceptionally well-qualified" with "outstanding legal credentials and legal experience that is both broad and deep." The National Conference of Women's Bar Associations, which supports Ms. Halligan because her "broad experience, public service and intellect make her well suited to the federal appellate bench," also notes that "her appointment would add much needed diversity to the federal court, where only three women are among the active judges on the DC Circuit." More than 100 women who are deans and professors at top law schools throughout the country strongly support the nomination because "Ms. Halligan has won accolades for her judgment, legal acumen, and expertise in appellate litigation," and because her "legal credentials, experience and accomplishments make her exceptionally well-qualified to serve" on the D.C. Circuit. They also echo the need for bringing gender diversity to this critical court, noting that, "women have been historically underrepresented on this court, as only five of the fifty-seven judges to serve there have been women." This outstanding nominee is a leader and role model whose career should not be short-circuited by petty partisanship.

I ask unanimous consent that these letters of support appear in the Record at the conclusion of my remarks.

#### Playing Politics with the D.C. Circuit

I fear that what is behind this misguided filibuster attempt is a continuation of a decades-long attempt by Senate Republicans to play politics with the Federal court and, in particular, to

engage in a rear guard action to preserve the D.C. Circuit as a Republican bastion, despite the fact that the American people elected a Democratic President. A recent *Washington Post* editorial urging the Senate to confirm Ms. Halligan's confirmation, suggested as much, stating: "GOP senators are grasping at straws to block Ms. Halligan's ascension, perhaps in hopes of preserving the vacancy for a Republican president to fill." Yet again, we see Senate Republicans shifting the standards they use and the arguments they make based on the party of the President making the nominations. They say one thing when President Clinton is in office, flip when the President is a Republican, and flop when the American people elect President Obama.

When President Clinton nominated qualified moderates to vacancies on the D.C. Circuit, Republicans refused to proceed. The last of three Clinton nominees to the D.C. Circuit was confirmed in 1997, after being nominated in 1995 and stalled through the 1996 session when not a single circuit nominee was confirmed by the Senate Republican majority. When Senate Republicans stalled the nomination of Merrick Garland to the D.C. Circuit beyond the 1996 election, even Senator Hatch became frustrated, and in March 1997 he proclaimed that the way that Republicans were opposing judicial nominees was "playing politics with judges," was "unfair" and that he was "sick of it." He was right. Merrick Garland, like Caitlin Halligan, was superbly qualified, and was only being obstructed for partisan political gain.

But once the blockade against Judge Garland was broken by President Clinton's reelection, Senate Republicans erected an impenetrable wall around the D.C. Circuit. Neither of President Clinton's two other nominees were allowed a Senate vote, or even Judiciary Committee consideration. That escalation in the judge wars was untoward, it was wrong. It hurt the court and was unfair to both Allen Snyder and Elena Kagan, President Clinton's outstanding nominees. Allen Snyder had served as a clerk to Justice Rehnquist and was an experienced and respected litigator. Elena Kagan went on to become Dean of the Harvard Law School and win confirmation to the United States Supreme Court. These were unquestionably qualified nominees. The fact is that for the rest of President Clinton's second term, virtually his entire second four years, given that Judge Garland had actually first been nominated in his first term, Senate Republicans would not consider another nominee to the D.C. Circuit. They just blocked and pocket filibustered outstanding nominees because they could.

Republican Senators pretended to justify their refusal to proceed on President Clinton's D.C. Circuit nominees not by arguing against the nominees, but by arguing that the caseload of the D.C. Circuit did not justify the confirmation of any more judges. They were contending that the 11<sup>th</sup> and 12<sup>th</sup> judgeships on the D.C. Circuit should not be filled. They argued that 10 judges were enough.

But what happened when George W. Bush became President? Republican Senators set aside those arguments when considering the nominations of a Republican President to the same court even as the caseload numbers went down, Senate Republicans abandoned their hollow caseload arguments to press for confirmation of multiple Bush nominees to the D.C. Circuit. Their actions showed that they were not really concerned with a caseload justification. Their reversal now to readopt a caseload argument is not consistency of principle, but relates to the principal who is making the nomination and appears political.

Despite the unwillingness of Senate Republicans to act on President Clinton's nominees to the D.C. Circuit for years, Senate Democrats did proceed to consider President Bush's nominations. The first confirmation, for which I voted, was of now-Chief Justice John Roberts to be a judge on the D.C. Circuit. At the time, John Roberts had been Allen Snyder's junior and his partner at Hogan and Hartson. He was the first judge confirmed to the circuit in six years.

The Senate then confirmed a series of questionable nominees to the D.C. Circuit: Janice Rogers Brown, Thomas Griffith and Brett Kavanaugh. The same Republican Senators who blocked President Clinton's nominations from even being considered by the Judiciary Committee supported every nomination of President Bush's to the D.C. Circuit, as they filled the ninth seat, twice filled the 10<sup>th</sup> seat on the court and went on to fill the 11<sup>th</sup> seat that they had said was unnecessary when a Democratic President was doing the nominating. With the change of administration, Republican Senators have now dusted off an old obstructionist argument about the D.C. Circuit's caseload, something they ignored for eight years as President Bush's nominees were confirmed to fill the 10<sup>th</sup> seat twice and also the 11<sup>th</sup> judgeship. But they have ratcheted up their partisan opposition and now oppose even filling the ninth judgeship. With three vacancies on the D.C. Circuit, that is the judgeship that Caitlin Halligan would be filling—not the 11<sup>th</sup> that Senate Republicans filled just recently, or the 10<sup>th</sup> that they voted twice to fill, but the ninth. This is not a basis on which to oppose as qualified a nominee as Caitlin Halligan, who has widespread support from law enforcement and the legal community.

The so-called "caseload" concern is no justification for filibustering this nomination. The D.C. Circuit is now more than one-quarter vacant, with three judicial vacancies. In fact, the Senate has acted on the so-called caseload argument. We have already eliminated effective in 2008 the 12<sup>th</sup> judgeship on that court. In so doing, the Senate and the Congress reaffirmed the authorization of 11 judges needed for the important D.C. Circuit. This court is often considered the second most important court in the land because of the complex cases that it handles. The court reviews complicated decisions and rulemaking of many Federal agencies, and in recent years has handled some of the most important terrorism and enemy combatant and detention cases since the attacks of September 11. As noted in the recent *Washington Post* editorial: "[Caseload numbers do] not take into account the complexity and scope of the cases that land at the court. They include direct appeals involving federal regulatory decisions and national security matters, including cases stemming from the detentions at the U.S. naval base in Guantanamo Bay, Cuba." I asked unanimous consent that a copy of this editorial be included in the Record at the conclusion of my remarks.

The D.C. Circuit's cases have only increased in importance and the court's caseload has not gone down since Republican Senators supported every one of President Bush's nominations to that court. According to the Administrative Office of U.S. Courts, the caseload per active judge has increased by one third since 2005, when the Senate confirmed President Bush's nomination of Thomas Griffith to fill the 11<sup>th</sup> seat on the D.C. Circuit. That is right -- the D.C. Circuit's caseload has actually increased. Judge Griffith's confirmation resulted in there being approximately 121 pending cases per active D.C. Circuit judge. There are currently 161 pending cases for each active judge on the D.C. Circuit, one-third higher. If Ms. Halligan were confirmed to the ninth seat, there would be approximately 143 pending cases for each active

D.C. Circuit judge, still significantly higher than after the Senate confirmed President Bush's nominee to the 11<sup>th</sup> seat in 2005. In addition, according to the Administrative Office of the U.S. Courts, written decisions per active judge have risen 20 percent since 2007. By any objective measure the work of the D.C. Circuit has grown and the multiple vacancies should be filled, not preserved and extended for partisan purposes.

Of course, if Republican Senators seeking to use caseload figures to justify their opposition to this nomination were serious, they would not be continue their refusal to consent to the Senate considering the nominations of Morgan Christen of Alaska to the Ninth Circuit, and Judge Adalberto Jordan of Florida to the Eleventh Circuit, the two circuits with the highest number of cases per active judge. They would not be doing everything they can to delay filling vacancies on the Ninth Circuit, a court burdened by multiple vacancies and the largest caseload in the Nation, and we would instead take up and confirm the nomination of Jacqueline H. Nguyen who is nominated to fill the judicial emergency vacancy that remains open after the Republican filibuster of Goodwin Liu. I have repeatedly urged the Senate to take up and consider these nominations, which are supported by home state Senators, yet Republicans have refused to consider them for months. In fact, courts throughout the country are in need of more confirmed judges and more judgeships to handle high and increasingly complicated caseloads, yet we currently have 25 judicial nominations favorably reported by the Judiciary Committee awaiting final action by the Senate. Republicans concerned about caseload should join with us to consider these nominations.

The Senate should not filibuster but should be voting to confirm the nomination of Caitlin Halligan to fill a vacancy on a critical court that is one quarter vacant with only eight active judges and higher caseloads than when Republicans voted to confirm President Bush's nominees fill the ninth, 10<sup>th</sup> and 11<sup>th</sup> judgeships on this court just a couple of years ago.

#### Opposition to Caitlin Halligan Based on Distortion of her Record

Some have sought to criticize Ms. Halligan for positions she advocated on behalf of the State of New York while serving as its Solicitor General. At her confirmation hearing, Ms. Halligan made clear she filed briefs under the direction of New York's Attorney General, arguing on behalf of the State of New York, not based on her personal views. Yet some outside groups and even some Senators ignore this and seek to use those advocacy positions as a basis to filibuster her nomination.

These arguments are particularly hard to accept for anybody who understands the role of advocates in our legal system. Our legal system is an adversary one, predicated upon legal advocacy for both sides. Nominees such as Chief Justice John Roberts have said lawyers do not stand in the shoes of their clients. Since when do we impose a litmus test for nominees that they can never have been legal advocates? If we were to do that, we would have no judges. Almost every nominee who had been a practicing lawyer would be disqualified by one side or the other. This is especially hard to understand for any Senators who support the rights of states to defend their interests in courts, the duty Caitlin Halligan owed to New York as its Solicitor General.

Some have pointed to her role as New York’s Solicitor General acting at the direction of New York’s Attorney General in tort lawsuits against gun manufacturers as suggesting that she will not uphold the Second Amendment if confirmed as a judge. As a strong supporter of the Second Amendment, I asked her during her hearing whether as a judge she would faithfully follow and apply the Supreme Court’s precedent from *District of Columbia v. Heller* and *McDonald v. Chicago*, which held that the Second Amendment protects an individual right to keep and bear arms for self defense. She testified that she would. When asked by Senator Grassley whether the rights conferred under the Second Amendment are fundamental, Ms. Halligan answered: “That is clearly what the Supreme Court held and I would follow that precedent, Senator.”

In her personal capacity, Ms. Halligan has never challenged or otherwise criticized the Protection of Lawful Commerce in Arms Act (PLCAA) or been critical of the Second Amendment. As New York State’s Solicitor General, she prepared an *amicus* brief at the direction of the New York Attorney General in a case where New York City challenged the PLCAA, seeking to safeguard New York’s police powers. The arguments made in the brief were made on behalf of New York State. In the *amicus* brief, New York State argued that the PLCAA should be struck down as an unconstitutional exercise of Congress’s legislative power that infringed on states’ rights to exercise the police power within their borders. The *amicus* brief did not make a single reference to the Second Amendment. Any criticism of the PLCAA in New York State’s brief or in the speech she gave as a surrogate for and on behalf of New York Attorney General Spitzer reflected New York State’s federalism concerns. It is hardly surprising that New York State — like many other states — advocated for a position that supported state powers.

As Solicitor General for the State of New York, Caitlin Halligan vigorously advocated for New York’s interests, in particular the right to govern in traditional state law areas. For example, in the *Grutter v. Bollinger* affirmative action case, New York joined 20 other states in arguing that they “must have the freedom and flexibility” to set their own education policy. I assume that position does not raise concerns for those seeking a basis for opposing her nomination. Nor I assume did her defense as New York’s Solicitor General of the constitutionality of the death penalty.

Indeed, Ms. Halligan’s time as Solicitor General shows all the hallmarks of serious advocacy consistent with the interests of her “client”. When New York municipal attorneys requested advice as to whether clerks could issue marriage licenses to same-sex couples, Ms. Halligan carefully analyzed New York’s statutory law and concluded that the state legislature did not intend to authorize marriage licenses to be given to same-sex couples, even though the statutory language is gender neutral. After observing that this interpretation raised “constitutional questions,” she outlined the current case law and stated that it was for the courts to resolve the issue. This measured response is no basis on which to caricature her record.

Most disconcerting of all are the attacks from some on the outside suggesting that Ms. Halligan lacked candor in the answers she provided to the Judiciary Committee. I hope that we do not see any Senators repeating these baseless charges to create another false controversy. Ms. Halligan has been honest and forthcoming throughout the confirmation process, providing the Committee with her entire record and giving detailed, accurate, and clear answers to over 150 questions

from Judiciary Committee members at her hearing and in written follow-up questions on a wide range of topics, such as judicial philosophy, constitutional interpretation, the Tenth Amendment, the Second Amendment, the Commerce Clause, the Eighth Amendment and the death penalty, military commissions and indefinite detention, tort liability, Federal preemption, and standing. In my view, Ms. Halligan's answers to questions from Committee members were detailed and substantive, and show an impressive depth and breadth of knowledge on complex legal issues. There is no lack of record or failure to respond as there was, unfortunately, when the Bush administration would not make information available to Senators in connection with the nomination of Miguel Estrada. There is no lack of forthrightness, as there was when Brett Kavanaugh was manipulating the confirmation process as a political crony and insider during the Bush administration.

Those concerned with a 2004 report that questioned the indefinite detention of enemy combatants issued by the Association of the Bar of the City of New York's Committee on Federal Courts at a time when she served on the Committee continue to ignore Ms. Halligan's repeated testimony that she had no role in preparing the report, that she was not aware of the report until preparing for her nomination and that report "does not reflect [her] views." At no time during Ms. Halligan's hearing or in the Committee's consideration of her nomination did any Senator question Ms. Halligan's candor or thoroughness in answering questions. I hope that no Senator does so now to attempt to justify this unjustifiable filibuster.

#### No Justification for a Filibuster of Caitlin Halligan's Nomination

Given Caitlin Halligan's impeccable credentials and widespread support, this should be the kind of consensus nomination supported by Senators of both parties who seek to ensure that the Federal bench continues to attract the best and brightest. Certainly, her nomination should not be subject to a filibuster. Regrettably, however, the Senate's Republican leadership seems intent on continuing with the practices they began when President Obama first took office, engaging in narrow, partisan attacks on his judicial nominations. They seem intent on setting a new standard that could not be met by the judicial nominees of Presidents of either party.

Republican Senators who just a few years ago protested that the filibuster of any judicial nomination was unconstitutional, Republican Senators who joined in a bipartisan memorandum of understanding to head off the "nuclear option" and agreed that nominees should only be filibustered under "extraordinary circumstances," abandoned all that they said they stood for and joined together in an attempt to prevent an up-or-down vote on President Obama's very first judicial nominee, David Hamilton. There were certainly no "extraordinary circumstances" to justify the Republican filibuster of Judge Hamilton, and several Republican Senators joined together with Democratic Senators in rejecting that filibuster. I trust that they will do so, again, and reject this unjustifiable filibuster of Caitlin Halligan.

By the standard utilized in 2005 to end filibusters and vote on President Bush's controversial nominees, this filibuster should be ended and the Senate should vote on the nomination. Those Senators who claim to subscribe to a standard that prohibits filibusters of judicial nominees except in "extraordinary circumstances" cannot support this filibuster. There are no

“extraordinary circumstances” here. The 14 Senators who signed the Memorandum of Understanding in 2005, the then “Gang of 14,” wrote about their “responsibilities under the Advice and Consent Clause of the United States Constitution” and that fulfilling their constitutional responsibilities in good faith meant that nominations “ should only be filibustered under extraordinary circumstance.” Here there are none.

In 2005, Senator Graham, a member of the “Gang of 14” described his view of what comprises the “extraordinary circumstances” justifying a filibuster. He said: “Ideological attacks are not an ‘extraordinary circumstance.’ To me, it would have to be a character problem, an ethics problem, so allegations about the qualifications of a person, not an ideological bent.” Caitlin Halligan has no “character problem,” no “ethics problem,” and there is no justification for this filibuster. Caitlin Halligan is a superbly qualified nominee whose personal integrity, temperament and abilities have been attested to by lawyers and judges from both sides of the aisle. The many leading lawyers who have worked with Ms. Halligan, law enforcement officials and organizations supporting her nomination have all attested to Ms. Halligan’s “temperament,” “fairness” and “balance” in addition to her legal judgment and qualifications for the D.C. Circuit. Hollow contentions about the caseload of the quarter-vacant D.C. Circuit fall well short of any standard of “extraordinary circumstances.”

The signers of that 2005 Memorandum of Understanding, and the Senate, demonstrated what they thought that agreement entailed when they proceeded to invoke cloture on a number of controversial nominations. The Senate invoked cloture on the nomination of Janice Rogers Brown to the D.C. Circuit, the circuit to which Caitlin Halligan has been nominated.

As a Justice on the California Supreme Court, Janice Rogers Brown was a nominee with a consistent and extensive record, both on the bench and off, of using her position as a member of the court to put her views above the law. This was not a question of one case or one issue on which Democrats differed with the nominee—I have voted for hundreds of nominees of Republican and Democratic Presidents which whom I differ on many issues. But this was a nominee with views so extreme she was opposed not just by her home state Senators, but also by more than 200 law school professors from around the Nation who wrote to the Committee expressing their opposition.

Her record in numerous decisions as a judge showed that she was willing to put her personal views above the law on issue after issues, including a willingness to roll back the clock 100 years on workers’ and consumers’ rights, to undermine clean air and clean water protections for Americans and their communities, laws providing affordable housing, zoning laws that protect homeowners, and protections against sexual harassment, race discrimination, employment discrimination, and age discrimination. In fact, while serving on the California Supreme Court, Justice Brown had argued that Social Security is unconstitutional, a position clearly at odds with well established law. She went so far as to say “today’s senior citizens blithely cannibalize their grandchildren.”

Despite her ideological extremism and willingness to implement her radical personal views as a judge without regard to the existing law, she was confirmed to the D.C. Circuit, her nomination

judged not to present “extraordinary circumstances” supporting a filibuster. There is no justification under the standard applied to the nomination of Janice Rogers Brown for a filibuster of the nomination of Caitlin Halligan, a widely respected nominee with a clear devotion to the rule of law and no record of ideological extremism.

Under the Gang of 14’s Memorandum of Understanding, the Senate also agreed to invoke cloture on the nomination of Priscilla Owen to the Fifth Circuit, a nominee whose rulings on the Texas Supreme Court were so extreme they drew the condemnation of other conservative judges on that court. Alberto Gonzales, President Bush’s White House counsel and later his Attorney General, went so far as to describe one of her opinions as advocating “an unconscionable act of judicial activism.” Her nomination was determined not to present “extraordinary circumstances.”

Neither was the nomination of Thomas Griffith to the D.C. Circuit, despite his decision to practice law without a license for a good part of his career, which I felt should be disqualifying. Yet his nomination was not judged to present “extraordinary circumstances” and he was confirmed to fill the 11<sup>th</sup> seat on the D.C. Circuit. There is no question under the standard Republicans applied to the nomination of Thomas Griffith, Caitlin Halligan should be confirmed to fill the ninth judgeship on that court.

I urge Republican and Democratic Senators to come together and end this misguided filibuster of Caitlin Halligan’s nomination to the D.C. Circuit. There is no basis under any standard for blocking her nomination from having an up-or-down vote. To the contrary, Caitlin Halligan’s impeccable credentials and record as an accomplished advocate make her nomination worthy of bipartisan support. I look forward to ending this filibuster and voting to confirm Caitlin Halligan to the D.C. Circuit.

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