Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On The Nomination Of Caitlin Halligan to the D.C. Circuit
March 5, 2013

Tomorrow, the Senate will have an opportunity to correct itself and complete action on the nomination of Caitlin Halligan to the D.C. Circuit. She was first nominated to a vacancy on the Court in September 2010, almost 30 months ago. No one who knows her, no one who is familiar with her outstanding legal career, can be anything but impressed by her experience, her intellect and her integrity. Hers is a legal career that rivals that of the D.C. Circuit Judge she was nominated to succeed.

That judge was John Roberts, Jr., who served on the D.C. Circuit and now serves as the Chief Justice of the United States. I voted for his confirmation to both the D.C. Circuit and later to the Supreme Court. He and I do not share the same judicial philosophy or political party, but I voted for him because he was well qualified. I did not agree with every position he had taken or argument he had made as a high-level lawyer in several Republican administrations, but I supported his nomination to the D.C. Circuit because of his legal excellence. Caitlin Halligan, too, is well qualified and her nomination deserves a vote. John Roberts was confirmed unanimously to the D.C. Circuit on the day the Judiciary Committee completed consideration of his nomination and reported it to the Senate. It is time for the Senate to consider Caitlin Halligan's nomination on her merits and end the filibuster that has extended over two years.

Let us apply the same standard to her that we applied to the nomination of Judge Roberts. After being nominated and renominated four times over the course of the last three years, it is time for the Senate to accord this outstanding woman the debate and vote on the merits that she deserves.

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. The ABA Standing Committee on the Federal Judiciary has reviewed her nomination and unanimously found her well qualified. The judge for whom she clerked on the D.C. Circuit, former Chief Judge Pat Wald, urges her confirmation. Those who have worked with her all praise her. We have not heard a single negative comment on her legal ability, her judgment, her character, her ethics, or her temperament. By the standard we have used for nominees of Republican Presidents, there is no question that Caitlin Halligan should be confirmed and this ill-advised filibuster should end. Earlier this month the Senate ended a filibuster against the nomination of Robert Bacharach and he was confirmed unanimously to the Tenth Circuit. We finally were allowed to complete action on the nomination of William Kayatta to the First Circuit. So, too, the Senate should now reconsider its prior treatment of Caitlin Halligan and confirm her nomination.

She is a stellar candidate with broad bipartisan support. She is supported by law enforcement, with whom she worked closely while serving as the chief appellate lawyer of the State of New York and as general counsel for the Manhattan District Attorney. That includes the support of New York City Police Commissioner Ray Kelly, the New York Association of Chiefs of Police,

and the National District Attorneys Association. Carter Phillips, who served as Assistant to the Solicitor General during the Reagan administration, describes her as "one of those extremely smart, thoughtful, measured and effective advocates" and concluded that she "will be a first-rate judge." She has the strong support of the New York Women in Law Enforcement, the National Center for Women and Policing, the National Conference of Women's Bar Associations, the Women's Bar Association of the District of Columbia, and the U.S. Women's Chamber of Commerce. I ask unanimous consent to include a list of those letters of support for Ms. Halligan in the Record at the conclusion of my remarks.

It is disappointing that narrow, special interest groups seek to misrepresent her as a partisan or ideological crusader. She is not. She is a brilliant lawyer who knows the difference between the roles of legal advocate and judge. She will be a fair, impartial and outstanding judge.

While serving as the Solicitor General for the State of New York, she was an advocate, representing the interests of her client. How often have we heard Republican Senators say that what lawyers do and say in legal proceedings should not be used to undermine their judicial nominations? Chief Justice Roberts himself has made that point. At his confirmation hearing to join the United States Supreme Court, Judge Roberts said:

> "[I]t's a tradition of the American Bar that goes back before the founding of the country that lawyers are not identified with the positions of their clients. The most famous example probably was John Adams, who represented the British soldiers charged in the Boston Massacre. He did that for a reason, because he wanted to show that the Revolution in which he was involved was not about overturning the rule of law, it was about vindicating the rule of law.
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> Our Founders thought that they were not being given their rights under the British system to which they were entitled, and by representing the British soldiers, he helped show that what they were about was defending the rule of law, not undermining it, and that principle, that you don't identify the lawyer with the particular views of the client, or the views that the lawyer advances on behalf of the client, is critical to the fair administration of justice."

That has always been our tradition – at least until now. This litmus test that would disqualify nominees because as lawyers they represented a legal position in a case is dangerous and wrong. Almost every nominee who had been a practicing lawyer would be disqualified by such a test. By the standard that is being applied to Caitlin Halligan, John Roberts could not have been confirmed to serve as a Federal judge let alone as the Chief Justice of the United States.

Yet some have justified their filibuster because she was directed by the New York Attorney General to draft an amicus brief challenging a Federal law that protected gun manufacturers from liability for crimes committed with their products. As New York's Solicitor General she filed a brief in support of a class action lawsuit against anti-choice clinic protestors under the Hobbs Act. She filed a brief on behalf of New York in support of a lower court's decision to permit back pay to undocumented employees whose employers were violating Federal law. She filed a

brief on behalf of New York and other states in support of the University of Michigan's affirmative action program. In all of these cases, she was representing her client, the State of New York.

Note that her critics are not arguing that she was a bad lawyer. In essence, what they are contending is that because they disagree with the legal positions taken on behalf of her client, she should not get an up-or-down vote. That is wrong.

Caitlin Halligan's public service to the State of New York is commendable and no reason to filibuster this nomination. Our legal system is an adversarial system, predicated upon legal advocacy for both sides. There is a difference between serving as a legal advocate and as an impartial judge. She knows that. She is a woman of integrity. No one who fairly reviews her nomination has any reason to doubt her commitment to serve as an impartial judge. It is not only wrong, but dangerous to attribute the legal positions she took in representing her client, the State of New York, to her personally and to take the additional leap to contend that her personal views will override her commitment to evenhandedly apply the law.

John Adams, one of our most revered Founders, wrote that his representation of the British soldiers in the controversial case regarding the Boston Massacre was "one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country." That is our tradition. The Senate should end this filibuster and vote to confirm a woman who has ably served as a public official representing the State of New York and the District Attorney of Manhattan.

The other justification Republican Senators used two years ago to justify their filibuster is gone. Some contended that the caseload of the D.C. Circuit was not sufficiently heavy to justify her appointment. There are now four vacancies on the D.C. Circuit, the vacancies have doubled during the last two years, the bench is more than one-third empty. This is reason enough for Senators to reconsider their previous vote and end this filibuster.

The Senate responded to this caseload concern in 2008 when we agreed to decrease the number of D.C. Circuit judgeships from 12 to 11. Caitlin Halligan is nominated to fill the eighth seat on the D.C. Circuit, not the eleventh. Just a few years ago, when the D.C. Circuit caseload per active judge was lower than it is now, all Republican Senators voted to confirm nominees to fill the ninth seat, the tenth seat twice and the eleventh judgeship on this court. In fact, the D.C. Circuit caseload per active judge has increased 50 percent from 2005 when the Senate confirmed a nominee to fill the eleventh seat on the D.C. Circuit bench. The caseload on the D.C. Circuit is also greater than the caseload on the Tenth Circuit to which the Senate just confirmed Judge Robert Bacharach of Oklahoma last week.

In her recent column in *The Washington Post*, Judge Wald explains why the work of the D.C. Circuit, with its unique jurisdiction over complex regulatory cases is different and more onerous than in other circuits and why the court needs to have its vacancies filled. She wrote:

> The number of pending cases per judge has grown from 119 in 2005 to 188 today. A great many of these are not easy cases. The D.C. Circuit hears the most complex, time-consuming, labyrinthine disputes over regulations with the greatest impact on ordinary Americans' lives: clean air and water regulations, nuclear plant safety, health-care reform, insider trading and more. These cases can require thousands of hours of preparation by the judges, often consuming days of argument, involving hundreds of parties and interveners, and necessitating dozens of briefs and thousands of pages of record – all of which culminates in lengthy, technically intricate legal opinions.

She also notes: "The D.C. Circuit has 11 judgeships but only seven active judges. There is cause for extreme concern that Congress is systematically denying the court the human resources it needs to carry out its weighty mandates." I ask that a copy of her article be included in the Record at this point.

I urge those who have said that filibusters of judicial nominations are unconstitutional to end this filibuster. I urge those who said they would never support a filibuster of a judicial nomination to end this filibuster. I urge those who said that they would only filibuster in "extraordinary circumstances" to end this filibuster. I urge all those who care about the judiciary, the administration of justice, the Senate and the American people to come forward and end this filibuster.

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