Article

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D.C. Circuit Court Nominee Faces Scrutiny

Prepared Statement of Ranking Member Chuck Grassley
Senate Judiciary Committee Executive Meeting
Caitlin Joan Halligan
Nominee to be United States Circuit Judge for the District of Columbia
Wednesday, March 10, 2011

Nominations to the D.C. Circuit deserve special scrutiny. Many view this court as the second in importance only to the Supreme Court of the United States. The Court of Appeals for the D.C. Circuit hears cases affecting all Americans. It is frequently the last stop for cases involving federal statutes and regulations. As we all know, Judges who sit on this court are frequently considered for and have been elevated to the Supreme Court. So there is a lot at stake with nominations to this court.

This seat, to which Ms. Halligan is nominated, became vacant with the elevation of John Roberts as Chief Justice of the United States in September 2005. Peter Keisler was first nominated for the seat in June of 2006.

His nomination stalled in committee in both the 109th and 110th Congress. Mr. Keisler was eminently qualified to serve on that court. He had a distinguished academic and professional record. His public service included serving as Acting Attorney General. Despite his qualifications, Mr. Keisler waited 918 days for a committee vote, which never came.

At the time of his hearing Democrats objected to even holding a hearing for the nominee. One of my Democrat colleagues on this committee summarized the threshold concerns. He stated:

> "Here are the questions that just loom out there: 1) Why are we proceeding so fast here? 2) is there a genuine need to fill this seat? 3) has the workload of the DC Circuit not gone down? 4) should taxpayers be burdened with the cost of filling that seat? 5) does it not make sense, given the passion with which arguments were made only a few years ago, to examine these issues before we proceed?"

I have not heard these concerns expressed by my colleagues on the other side with respect to the nomination that is before us now. But that does not mean that these issues have gone away. I have great concern about the need to fill existing vacancies on the D.C. Circuit. Senator Sessions and I recently sent a letter to Chief Judge David Sentelle, concerning caseload statistics over the last five years. On February 23, 2011, we received his response indicating that he had directed the Clerk of the Court to promptly obtain that data and provide it to us.

While we have not received a final response, statistics from the Administrative Office of the U.S. Courts show that caseloads of the D.C. Circuit have decreased markedly over the last several years. This decrease is evident in both the total number of appeals filed and the

total number of appeals pending. Specifically, the total number of appeals filed in the U.S. Courts of Appeals for the District of Columbia Circuit decreased by over 14 percent between 2005, when 1,379 appeals were filed, and 2010, when 1,178 appeals were filed. Meanwhile, with a smaller court, more appeals were terminated during this period. The total number of appeals pending was reduced from 1,463 appeals to 1,293 appeals. This is a decrease of nearly 12 percent.

The workload decline is also demonstrated in the per panel and per judge statistics. Filings per panel and filings per judge show a decline of nearly 7 percent during this period, as well. Pending appeals per panel dropped over 9 percent. Interestingly, the D.C. Circuit ranks last among the circuit courts in 2010 in this category. That means it has the lightest workload, per panel.

Given the reduced workloads, we should be having a discussion on reducing the staffing for this court, not filling a vacancy. This seat is not a judicial emergency; in fact, there is an argument to be made that this seat is unnecessary. With our massive debt and deficit, why should we spend any resources to fill the seat? I cannot justify that expenditure.

Nevertheless, the majority has determined to bring this nomination forward for consideration. As I have stated, we must carefully review the qualifications of nominees to this court. This committee has multiple precedents establishing a heightened level of scrutiny given to nominees for the Court of Appeals for the D.C. Circuit. President Bush's nominees – Miguel Estrada, John Roberts, Tom Griffith, Brett Kavanaugh, Peter Keisler, and Janice Rogers Brown – all had a difficult and lengthy confirmation process. This included delays, filibusters, multiple hearings, and other forms of obstruction.

I am not suggesting that course of action be repeated, but I would argue for a rigorous review of the nominee. Such a review raises substantive and serious concerns about Ms. Halligan's qualifications for appointment as a Circuit Judge.

Ms. Halligan was a member of the Association of the Bar of the City of New York's Committee on Federal Courts when it published a February 6, 2004 report entitled "The Indefinite Detention of 'Enemy Combatants' and National Security in the Context of the War on Terror." That report argued there were serious constitutional concerns with the detention of apprehended terrorists in military custody and went on to conclude that terrorists should, by and large, be tried in civilian courts. Although she has tried to distance herself from that report, she did not abstain from it. Nor did she take any action to repudiate the report either before her nomination or before her hearing was held.

Ms. Halligan was also a member of the New York State Bar Association's Special Committee on the Civil Rights Agenda when it published an October 2008 report entitled "Steps Toward A More Inclusive New York and America," discussing a number of issues, including the death penalty. The report specifically emphasized the issue of race in the context of death penalty policy, stating that "[t]here are significant disparities in every state capital system, particularly in regard to the race of the murder victim. Little has been done to change these disparities and identify the cause." Discussing the work of its Capital Jury Project, the report stated "[t]he analysis thus far indicates that the race of individual jurors and the overall racial composition of juries has a substantial impact on the sentencing decision, especially in cases that involve a black defendant and white victims." Ultimately, the report recommended that "the death penalty should not be reinstated in New York at this time."

On May 5, 2003, Ms. Halligan gave a speech at a Law Day celebration in White Plains, New York revealing her role in State lawsuits attempting to hold handgun

manufacturers liable for criminal acts committed with handguns. The speech primarily concerned the Supreme Court's recent preemption jurisprudence, but Ms. Halligan also commented on then-pending legislation. The then-pending Protection of Lawful Commerce in Arms Act (PLCAA) was subsequently enacted by Congress, to address nuisance lawsuits against handgun manufacturers.

In her speech she stated, "[i]f 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 systemor their own legislatures – that might reduce gun crime or promote greater responsibility among gun dealers." Ms. Halligan also stated that "[her] office [as Solicitor General] ha[d] employed similar strategies in using federal environmental laws long left unenforced by federal agencies to require power plants to cut harmful emissions."

I am concerned that Ms. Halligan has not been totally forthcoming with this committee in regard to her anti-gun stance. When asked in written questions whether she believed there is a basis in the law for liability of gun manufacturers, Halligan deflected merely noting that:

"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 manufactures 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."

I have difficulty squaring this response with statements made in briefs she filed, which suggest she had some familiarity with the laws of other states and the federal government. For example, in arguing that PLCAA violates the principles of federalism, she stated: "state legislatures across the country have addressed the alleged problem of civil liability suits brought against the gun industry. In response to this perceived problem, approximately 30 state legislatures have adopted legislation similar to the [PL]CAA, limiting in various ways the availability of civil remedies for alleged torts committed by members of the gun industry." Her brief also referenced the district court's opinion, which specifically describes the laws of other states.

I would note the concerns expressed by both the National Rifle Association as well as the Gun Owners of America. The NRA wrote, in part, "Our opposition is based on Ms. Halligan's attacks on the Second Amendment rights of law-abiding Americans. Specifically, she worked to undermine the [PLCCA] .... This bill was an essential protection both for the Second Amendment rights of honest Americans and for the continued existence of the domestic firearms industry as a supplier of arms for our nation's defense."

The Gun Owners of America also expressed their unequivocal opposition to the nomination. They stated, "Given Halligan's admitted involvement in New York's legally specious, politically motivated efforts to bankrupt gun manufacturers through frivolous litigation, Halligan has proven to us that she places liberal political activism above fealty to the law."

I ask consent to insert into the record letters from these organizations expressing their opposition to this nominee.

Ms. Halligan may have further indicated an activist view of the legal system when she stated that "courts are the special friend of liberty. Time and time again we have seen how the dynamics of our rule of law enables enviable social progress and mobility."

The record is clear, and well-documented, that Ms. Halligan has a record of advocating extreme liberal positions on constitutional issues. She authored an informal opinion on behalf of Attorney General Spitzer regarding New York's Domestic Relations Law (DRL), invoking a theory of an evolving Constitution when she went on to raise potential constitutional concerns:

"[t]he question of whether the DRL authorizes and permits same-sex marriage must be analyzed in light of an ongoing and rapidly shifting debateabout whether it is constitutional to deny eligibility for marital status to same-sex couples."

As New York's Solicitor General, Ms. Halligan was responsible for recommending to Attorney General Spitzer that the state intervene in several high profile Supreme Court cases, and filed amicus briefs that consistently took liberal positions regarding the Constitution. These included cases on abortion, affirmative action, immigration, and federalism.

While many of these were cases in her role as Solicitor General of New York, she has similar cases in her private practice. She co-authored an amicus brief on behalf of "Constitutional, Criminal Procedure, and other legal scholars" in Al-Marri v. Spagone, 129 S. Ct. 1546 (2009), arguing that the Authorization for Use of Military Force did not authorize the seizure and indefinite military detention, without criminal trial, of a Lawful Permanent Resident alien who allegedly conspired with Al-Qaeda to execute terror attacks on the United States.

Mr. Chairman, I will have much more to say regarding this nomination, should it proceed to the Senate floor. I hope it doesn't get that far. Frankly, I would be surprised if a number of my colleagues on the other side don't end up expressing their concerns to the Majority Leader. I would think, given her record, many Democrats would prefer to not have to face a vote on this nomination.

Suffice it to say, there are numerous concerns regarding the nominee's judicial philosophy and her approach to interpreting the Constitution. I do not believe that she will be able to put aside her long record of liberal advocacy and be a fair and impartial jurist. Those concerns, coupled with the facts regarding the D.C. Circuit Court's workload, lead me to oppose this nomination.
