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Obama's D.C. Circuit Pick Meets Skeptical Republicans



Caitlin Halligan followed an often-used script today during her confirmation hearing for the U.S. Court of Appeals for the D.C. Circuit, telling a Senate committee that if confirmed, she would defer to Supreme Court precedent and to the Framers' intent.

But her hour-long testimony made clear that Republicans are laying the ground for possible opposition to her nomination. They questioned Halligan, a longtime New York appellate lawyer, about statements she's made or signed on to, and they renewed a long-running debate about whether the influential D.C. Circuit has more judges than it needs.

If confirmed, Halligan, 44, would quickly be on the short list for the next Democratic nominee for the U.S. Supreme Court. Four sitting justices are alumni of the D.C. Circuit, and she is President Barack Obama's first nominee for the D.C. Circuit.

Sen. Chuck Grassley (R-Iowa), the ranking Republican on the Senate Judiciary Committee, warned it might not be easy for Halligan to get there.

"This committee has multiple precedents establishing a heightened level of scrutiny given to nominees for the Court of Appeals of the D.C. Circuit," Grassley said at the opening of Halligan's hearing. He listed President George W. Bush's six nominees for the court — only four of whom were confirmed. "All had a difficult and lengthy confirmation process. This included delays, filibusters, multiple hearings and other forms of obstruction," he said.

Democrats responded by lauding Halligan's credentials, including as New York's state solicitor general and as head of the appellate practice at Weil, Gotshal & Manges. Early in her career, she clerked for former D.C. Circuit Chief Judge Patricia Wald and for Justice Stephen Breyer. She's now general counsel in the Manhattan district attorney's office.

"The remarkable thing about Caitlin's experience is her unique depth of knowledge about the practicalities of government," said Sen. Chuck Schumer (D-N.Y.).

Under questioning, Halligan, pictured above, kept her answers short and emphasized judicial modesty. She called the Constitution an "enduring" document and echoed conservative jurists' language about originalism. "If faced with a constitutional question, a judge has to look to the text and attempt to understand the original intent behind those words," she said.

Sen. Jon Kyl (R-Ariz.) questioned Halligan about a 185-page document produced in 2004 by a committee of the New York City Bar Association. The document attacked Bush's system of indefinite detention of terrorism suspects, and Halligan is listed on a page as a member of the 39-person committee that produced it.

Many of the objections Republicans raised, including the bar association report, were the subject of debate in recent days between two bloggers: Ed Whelan, a former Justice Department official who writes for the conservative National Review Online, and Adam Shah of the liberal Media Matters.

Halligan said she learned of the bar association report for the first time in summer 2010, while preparing nomination materials for the D.C. Circuit. She backed away from its contents.

"I must say I don't really have clear views about a range of the other issues raised in the report, but I certainly do not agree with them and it does not reflect my work or my views," she told Kyl. She added that she has no recollection of the report from when it was drafted. "I clearly should have paid more attention to that and would not agree to serve on a committee like that in the future unless I could be fully apprised of the work that it was conducting."

Sen. Mike Lee (R-Utah), a first-year senator, brought up a speech Halligan gave in May 2003 in which she called courts "the special friend of liberty" and said that courts enable "social progress." Lee asked Halligan to explain what she meant.

"Senator, that was a speech that was given in the attorney general's stead," she responded, referring to former New York Attorney General Eliot Spitzer, who was her boss. "I don't recall candidly what was in my head when I made that particular remark, and I don't see any way in which it would affect my role as a judge one way

or another, were I lucky enough to be confirmed.”

In response to other questions, Halligan repeatedly shied away from giving her own views on hot-button issues. She said she would follow Supreme Court precedent on gun rights and the death penalty. Asked about an amicus brief she helped to write in a case about indefinite detention, she responded, “It was filed on behalf of a client. It was not my personal view.”

The D.C. Circuit has 11 spots for active judges, and there are nine confirmed. During both the Clinton and Bush administrations, senators of the party opposite the president’s argued that the court has more judges that it needs given its caseload. During the Bush administration, court’s size was even reduced from 12 judges.

Two Republicans, Grassley and Lee, said similar considerations will play into how they vote on Halligan. “If anything, the caseload of the D.C. Circuit has decreased rather than increased over the last couple years,” Lee said.

Schumer argued that the court “isn’t really in balance,” with three judges nominated by Democrats and six by Republicans. “My colleagues on the other side voted repeatedly to fill the 10th and 11th seats when they were empty,” he said.

A committee vote on Halligan is likely in the next several weeks.

National Law Journal photo by Diego M. Radzinski. An earlier version of this post said only three of Bush's D.C. Circuit nominees were confirmed. Four were.

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