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More Media Matters Follies on D.C. Circuit Nominee Halligan

By Ed Whelan

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It's become a telltale sign: When I receive an e-mail with a subject line that spews with hateful obscenities, that means that the poor fellow at Media Matters who bird-dogs me has published and distributed to his handful of gullible readers another item that incompetently takes issue with one of my blog posts. As a general rule, I see little point in responding to Media Matters, in part because, from what I've seen, it doesn't have a practice of correcting its errors or linking to my responses, in part because I trust that any intelligent and fair-minded reader who runs across its attacks and then reads the posts of mine that it's attacking won't need any guidance to see straight.

But now and then, if only for comic relief, I can't resist the temptation to respond. Such is the case with Media Matters' latest defense of D.C. Circuit nominee Caitlin Halligan.

I can't help but start by noting that Media Matters wrongly contended a few weeks ago that Halligan's position on the AUMF and indefinite detention of enemy combatants was the same as Justice Scalia's (for my brief refutation, see my update at the end of this post)—only to have Halligan at her hearing repudiate that position as “clearly incorrect.” (See here for my most recent post on Halligan and the NYC bar report on indefinite detention.) You might think that Media Matters would be a bit more cautious in its defenses of Halligan. But you'd be wrong.

In its latest, Media Matters purports to respond to the blog post in which I showed, through Halligan's own answers to written questions, that Halligan had never before her hearing expressed support for the “original intent” methodology or opposition to the use of foreign law in determining the meaning of the Constitution. The natural inference—especially given Halligan's long exposure to the debates over these matters—is that her testimony is not to be believed.

How does Media Matters contrive to rehabilitate Halligan? First, carefully avoiding the phrase “original intent,” it points out that “there are progressives who strongly believe that the text and history of the Constitution should form the basis of constitutional interpretation.” Indeed, there are.

But there is nothing—zilch, nada—in Halligan’s record to suggest that she is one of them. Also, “progressive” advocates of some form of originalism routinely (uniformly, I suspect) condemn the “original *intent*” species of originalism. For a progressive to talk favorably of “original intent” is rather like a supposed aficionado of baseball to talk of how many “points” a team has scored—in other words, a basic marker of fakery.

Second, in an apparent effort to show that some progressives also reject reliance on foreign law, Media Matters has the gall to cite Sonia Sotomayor’s confirmation testimony on the matter. As I have documented in detail, Sotomayor’s testimony was obfuscatory, evasive, and downright deceptive—and her bottom-line position, once the cameras were off, was in conflict with the excerpt that Media Matters quotes. In other words, Sotomayor’s testimony may indeed have been a model for Halligan’s, but in a very different way than Media Matters contends.

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