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D.C. Circuit Nominee Caitlin Halligan's Testimony on Report on Indefinite Detention—Part 1

By Ed Whelan

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A few days ago, I called attention to the fact that D.C. Circuit nominee Caitlin Halligan was a signatory to a lengthy report issued by the Association of the Bar of the City of New York's Committee on Federal Courts, titled "The Indefinite Detention of 'Enemy Combatants': Balancing Due Process and National Security in the Context of the War on Terror." I pointed out that the report embodies the sort of left-wing extremism that the courts have rejected and that the Obama administration has had to retreat from.

It turns out that someone else who says that she was (in her words) "taken aback" by the substance and tone of the NYC Bar report is Halligan herself. Here's her interesting testimony on the matter from her confirmation hearing on Wednesday, in an exchange with Senator Coons (emphasis added):

I first became aware of the existence of that report this summer [summer 2010], when I went to the City Bar Association. In responding to this committee's questionnaire, I wanted to make sure that I had done full diligence, and I knew that I had been a member of the committee that you referred to. And so I went through the bar association's files and I discovered this report.

I was, frankly, taken aback by it, for a couple of reasons. First of all, the Supreme Court has clearly said that indefinite detention is authorized by the AUMF statute. And so the notion that the President lacks that authority, I think, is clearly incorrect.

I was also a little bit taken aback by the tone of the report. I think that the issues of indefinite detention and any issues in the national security realm are very serious ones, and I think that approaching those issues as respectfully as possible is the most productive way to proceed.

But the bottom line is that the report does not represent my work. It does not reflect my views.

And here's her follow-up exchange with Senator Kyl (emphasis added):

Kyl: Could I, first of all, ask you, when you talked about the New York City Bar report, you said, "It

does not reflect my views." Was that just with respect to the indefinite detention of enemy combatants issue or other aspects of that report?

Halligan: Senator, the issues that that report touched on are not ones that I have studied closely. What was clear to me is that that point, in particular, was flatly contradicted by the Supreme Court. I must say I do not 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.

Kyl: But you were a signatory to the report; is that correct?

Halligan: Senator, *I was a member of the committee. I have no recollection of being apprised of the fact that the report was being drafted, and 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. But I learned about it for the first time this summer.*

Kyl: Well, is your signature affixed to it or your name listed as an approver of the report in any way?

Halligan: When I identified the report this summer, the report indicates that it comes from the Federal Courts Committee. *There is a list of names at the end and mine is one of them, which reflects my membership on the committee.*

Kyl: *Do you remember participating in any of the deliberations of the committee?*

Halligan: *Not with regard to this report. I did not even recall that it had been written. I was very surprised when I saw it.*

Kyl: So it is accurate to summarize that you do not remember participating in any of the deliberations of that committee relative to the report we are talking about of 2004.

Halligan: That is correct, Senator.

Kyl: *And let me just ask you if, prior to this hearing, you took the opportunity to make that point or to criticize any aspect of the report.*

Halligan: *No, Senator.*

As I will discuss in my Part 2 post, Halligan's answers raise more questions than they resolve—including some troubling ones—and they warrant a prompt investigation that will resolve those questions.

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