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## D.C. Circuit Nominee Caitlin Halligan's Testimony on Report on Indefinite Detention—Part 2

By Ed Whelan

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Some observations on D.C. Circuit nominee Caitlin Halligan's testimony about her role—or, more precisely, what she recalls as her not having had any role—in the City Bar report on indefinite detention of enemy combatants (and related issues):

1. Asked by Senator Kyl whether her name is “listed as an approver of the report in any way,” Halligan states:

[T]he 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.*

In stating that the fact that her name is on the report merely “reflects my membership on the committee” that produced the report, Halligan is contesting that the listing of her name at the end of the report signifies her approval of the report. But what Halligan fails to acknowledge is that the names of four other members of the committee are accompanied by a footnote call (a superscript +) that leads to a footnote that states: “Abstained from consideration of this report.” The clear implication is that all the remaining listed members of the committee participated in consideration of the report.

Now I readily acknowledge that it's possible that the committee operated on an opt-out basis, so that a committee member would have to make an affirmative request to be listed as having “[a]bstained from consideration” of the report. So I am not contending that the listing of Halligan's name *proves* (or even offers compelling evidence) that Halligan in fact approved the report. For present purposes, I'll limit myself to the modest proposition that the listing of her name would signify to a reader of the report that Halligan approved the report.

2. Halligan listed the City Bar report in response to a request in the Senate questionnaire for “any reports, memoranda or policy statements you prepared or contributed in the preparation of on

behalf of any bar association, committee, conference, or organization of which you were or are a member.” In listing the report, Halligan did not state that she played no role in the report. Indeed, she clearly implied the opposite. In including the City Bar report in her list of ten reports and public statements issued by the Federal Courts Committee of the City Bar during her service on that committee [Questionnaire response, pp. 9-10], Halligan stated:

I do not recall personally contributing or participating in these reports *other than as a member of the Committee approving them*. [Questionnaire response, p. 9.]

That statement is naturally read as Halligan's acknowledging that she did participate in the listed reports as a member of the committee approving it. It's particularly odd that, if Halligan believed she played no role in the report and was “taken aback” by its substance and tone, she didn't see fit to note in her questionnaire response that she believed she played no role in the report.

3. Things get even odder. Asked by Senator Kyl whether, “prior to this hearing, you took the opportunity to make that point”—i.e., that Halligan does not recall playing any role in approving the report—Halligan answers, “No, Senator.”

If I'm understanding Halligan's testimony correctly, she's testifying that after being “very surprised” to discover her name on the report and after being “taken aback” by the substance and tone of the report, Halligan never saw fit to point out to anyone that she believed that she played no role in the report. That's a very strange non-reaction. I would think that any lawyer with concern for her professional reputation would be upset to discover that her name had been appended to a report that “does not reflect [her] work or [her] views” and would be eager to take steps to set the matter right. All the more so for any lawyer about to be nominated to a federal judgeship.

Yet Halligan not only never raised the point with anyone; she even completed her questionnaire response in a manner that indicated that she had taken part in approving the report.

4. In light of the above, I think it's fair to wonder whether Halligan first came to believe that she had played no role in the City Bar report only *after* controversy over the report arose earlier this week in connection with her nomination.

5. Halligan's testimony, accepted at face value, invites either of two possibilities: (a) Halligan in fact had no role in the City Bar report; or (b) Halligan had some role but has no recollection that she did. (Every negative response to a question of the form “Did you do X?” entails the possibility that the responder simply doesn't remember having done X. Halligan's own testimony acknowledges this possibility: “I have no recollection of being apprised of the fact that the report was being drafted ....”)

With a quick investigation, it ought to be a relatively easy matter to establish from the e-mail trail of City Bar committee members what role, if any, Halligan in fact played in the report, including, say, whether she agreed with the positions that she now distances herself from or whether she authorized her name to go on a report that she had barely bothered to skim. The results of this investigation might well bear significantly on her fitness for the seat to which she has been nominated, so I trust that chairman Leahy will ensure that the investigation is undertaken promptly.

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