

History of the Nomination of Harriet Miers

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Introduction

On 3 October 2005, President George W. Bush nominated Harriet Miers to the seat on the U.S. Supreme Court occupied by the retiring Justice Sandra Day O'Connor. As Justice O'Connor was the first woman justice on that Court, her seat is now conventionally regarded as belonging to women.

I prepared this document when the transcripts were current and easy to obtain, with my expectation that the transcripts at my website would be a useful resource for students and citizens in future years, long after the nomination of Ms. Miers was confirmed by the U.S. Senate and the controversy over her nomination had been forgotten, when people might ask "Why was Justice Miers appointed?" When Ms. Miers *unexpectedly* withdrew her nomination on 27 Oct 2005, I decided to post this collection of quotations that I had already assembled, as a case study in how *not* to nominate a justice to the U.S. Supreme Court.

This document collects some of the representations that President Bush made to the American people about Harriet Miers. I did a cut-and-paste of the text of the transcripts that were posted at the White House website, in order to get the official version of what Bush said about Ms. Miers. To clearly indicate the source, I have set the President's press conferences in 12 point Clarendon font, and the President's press secretary's press briefings in 10 point Times Roman font.

I have also done a cut-and-paste of text at other websites, to present a more complete picture of why she was nominated. To comply with the fair-use exemption from copyright protection, I have only made short quotations from newspapers, the Associated Press articles, and other proprietary sources.

I have tried to concentrate on the major issues, and ignore the minor items.¹

¹ She was captain of the girls tennis team in high school. Twice, she did not pay her bar dues on time. Although she was never married, has no children, and lives alone, she purchased a 4000 sq. ft. house in north Dallas in 1988.

Readers who are interested in this topic may also be interested in two of my other essays:

1. <http://www.rbs0.com/judact.pdf> is my terse criticism of politicians (e.g., President Bush) who demand that justices interpret the U.S. Constitution according to the original meaning, or original intent, of the authors. When President Bush condemns judges who “legislate from the bench”, he is condemning what other politicians have called “judicial activism”.
2. <http://www.rbs0.com/sctjustices.pdf> contains three items: (1) terse review of the history of mediocre appointments to the U.S. Supreme Court during the Twentieth Century, (2) terse review of the history of conservative presidents who appointed justices who later became liberals, and (3) suggests credentials for nominees to be a justice.

my opinion of Miers’ credentials

Ms. Miers advised or represented George W. Bush in various matters in Texas since 1994. Ms. Miers worked in the White House, serving President Bush since 2001. From what Bush himself said, he nominated her because he knows her well. Apparently, Bush does *not* personally know any expert in constitutional law. Miers spent nearly all of her career in private practice representing corporate clients in antitrust and trade regulation,² which is a tiny part of the legal issues that regularly come before the U.S. Supreme Court.

Miers also has two years of experience on the Dallas city council (1989-1991), and five years of experience on Texas state lottery commission (1995-2000), neither of which qualifies her to be a justice of the U.S. Supreme Court.

Unlike many of her critics, I am *not* bothered by the fact that she had never been a judge. History shows that several law professors who had never been a judge became outstanding justices. However, Miers has never been a law professor and she has never written any scholarly articles on constitutional law. Looking at the credentials of Ms. Miers, I have some doubt as to whether she has ever read an *entire*³ U.S. Supreme Court opinion on privacy law or freedom of speech. I see nothing in her background that indicates her understanding of constitutional law. My cynical opinion of her avoiding reading entire Court cases comes from my experience working with busy attorneys, most of whom rely on what are euphemistically called “secondary sources”, instead of taking the time to read the actual opinions of the Court.

² In early October 2005, in Ms. Miers’ entry in the Findlaw online legal directory, she listed her areas of practice as “Antitrust & Trade Regulation; Litigation & Appeals”.

³ By reading the *entire* case, I mean reading not only the majority opinion, but also reading the concurring and dissenting opinions, and following the important citations back to earlier cases.

3 Oct 2005

Here is the entire text of President Bush's announcement that he would nominate Harriet Miers, and the entire text of her acceptance.

THE PRESIDENT: In our great democracy, the Supreme Court is the guardian of our constitutional freedoms and the protector of our founding promise of equal justice under the law. Over the past five years, I've spoken clearly to the American people about the qualities I look for in a Supreme Court Justice. A Justice must be a person of accomplishment and sound legal judgment. A Justice must be a person of fairness and unparalleled integrity. And a Justice must strictly apply the Constitution and laws of the United States, and not legislate from the bench.

This summer I nominated an individual to the High Court who embodies all these characteristics. And this morning our nation can be proud when John Roberts opens a new Supreme Court session as the 17th Chief Justice of the United States.

It is now my duty to select a nominee to fill the seat that will be left vacant by the retirement of Justice Sandra Day O'Connor. Once again, I considered a wide variety of distinguished Americans from different walks of life. Once again, we consulted with Democrats and Republicans in the United States Senate. We received good advice from more than 80 senators. And once again, one person stood out as exceptionally well suited to sit on the Highest Court of our nation.

This morning, I'm proud to announce that I am nominating Harriet Ellan Miers to serve as Associate Justice of the Supreme Court. For the past five years, Harriet Miers has served in critical roles in our nation's government, including one of the most important legal positions in the country, White House Counsel. She has devoted her life to the rule of law and the cause of justice. She will be an outstanding addition to the Supreme Court of the United States.

Harriet was born and raised in Dallas, Texas. She attended public schools. When illness struck her family during her freshman year in college, Harriet went to work to help pay for her own education. She went on to receive a bachelor's degree in mathematics and a law degree from Southern Methodist University.

Over the course of a distinguished legal career, Harriet has earned the respect and admiration of her fellow attorneys. She has a record of achievement in the law, as well as experience as an elected member of the Dallas City Council. She served at high levels of both state and federal government. Before state and federal courts, she has tried cases, and argued appeals that covered a broad range of matters. She's been a

leader in the American Bar Association, and has been recognized by the National Law Journal as one of the most powerful attorneys in America.

Harriet's greatest inspiration was her mother, who taught her the difference between right and wrong, and instilled in Harriet the conviction that she could do anything she set her mind to. Inspired by that confidence, Harriet became a pioneer in the field of law, breaking down barriers to women that remained even after a generation — remained a generation after President Reagan appointed Justice O'Connor to the Supreme Court.

Harriet was the first woman to be hired at one of Dallas's top law firms, the first woman to become President of that firm, the first woman to lead a large law firm in the state of Texas. Harriet also became the first woman president of the Dallas Bar Association, and the first woman elected president of the State Bar of Texas. In recognition of her achievements paving the way for women lawyers, Harriet's colleagues in Texas have honored her with numerous awards, most recently the Sandra Day O'Connor award for professional excellence.

Harriet has built a reputation for fairness and integrity. When I came to office as the governor of Texas, the Lottery Commission needed a leader of unquestioned integrity. I chose Harriet because I knew she would earn the confidence of the people of Texas. The Dallas Morning News said that Harriet insisted on a system that was fair and honest. She delivered results.

Harriet has also earned a reputation for her deep compassion and abiding sense of duty. In Texas, she made it her mission to support better legal representation for the poor and under-served. As president of the Dallas Bar, she called on her fellow lawyers to volunteer and staff free neighborhood clinics. She led by example. She put in long hours of pro bono work. Harriet Miers has given generously of her time and talent by serving as a leader with more than a dozen community groups and charities, including the Young Women's Christian Association, Child Care Dallas, Goodwill Industries, Exodus Ministries, Meals on Wheels and the Legal Aid Society.

Harriet's life has been characterized by service to others, and she will bring that same passion for service to the Supreme Court of the United States. I've given a lot of thought to the kind of people who should serve on the federal judiciary. I've come to agree with the late Chief Justice William Rehnquist, who wrote about the importance of having judges who are drawn from a wide diversity of professional backgrounds. Justice Rehnquist himself came to the Supreme Court without prior experience on the bench, as did more than 35 other men, including Byron White. And I'm proud to nominate an outstanding woman who brings a similar record of achievement in private practice and public service.

Under the Constitution, Harriet's nomination now goes before the United States Senate for confirmation. The American people expect Harriet's hearings to be handled with the same respect and civility that characterized the last three Supreme Court confirmations — those of Chief Justice Roberts, Justice Breyer and Justice Ginsberg.

In its consideration of Chief Justice Roberts' nomination, the Senate made it clear that a well-qualified nominee, committed to strictly interpret the law, can be confirmed promptly, and by a large bipartisan majority. As the new Chief Justice said at his swearing in last week, the Senate vote affirmed the bedrock principle that judging is different from politics. I believe that senators of both parties will find that Harriet Miers' talent, experience and judicial philosophy make her a superb choice to safeguard the constitutional liberties and equality of all Americans.

Harriet Miers will strictly interpret our Constitution and laws. She will not legislate from the bench. I ask the Senate to review her qualifications thoroughly and fairly, and to vote on her nomination promptly.

This morning I again thank Justice O'Connor for her 24 years of service on the Supreme Court, including some additional time that she had not planned on. In selecting a nominee, I've sought to find an American of grace, judgment and unwavering devotion to the Constitution and laws of our country. Harriet Miers is just such a person.

I've known Harriet for more than a decade. I know her heart, I know her character. I know that Harriet's mother is proud of her today, and I know her father would be proud of her, too. I'm confident that Harriet Miers will add to the wisdom and character of our judiciary when she is confirmed as the 110th Justice of the Supreme Court.

Harriet, thank you for agreeing to serve. Congratulations.

response by Ms. Miers

MS. MIERS: Thank you, Mr. President, thank you very much. I am very grateful for the confidence in me that you have shown by this nomination, and, certainly, I am humbled by it.

From my early days as a clerk in the federal district court, and throughout almost three decades of legal practice, bar service and community service, I have always had a great respect and admiration for the genius that inspired our Constitution and our system of government. My respect and admiration have only grown over these past five years that you have allowed me to serve the American people as a representative of the executive branch.

The wisdom of those who drafted our constitution and conceived our nation as functioning with three strong and independent branches have proven truly remarkable. It is the responsibility of every generation to be true to the founders' vision of the proper role of the courts in our society. If confirmed, I recognize that I will have a tremendous responsibility to keep our judicial system strong, and to help ensure that the courts meet their obligations to strictly apply the laws and the Constitution.

As White House Counsel, I have enjoyed the opportunity to work with the members of the Congress. And that experience has given me an eager — even greater appreciation for the role of the legislative branch in our constitutional system.

And now I look forward to the next step in the process that has begun this morning, including the Senate's consideration of my nomination. I look forward to participating in that process.

And now I want to pause and thank all of those whose love and friendship and support have brought me to this moment. No one reaches a point in time such as this without tremendous sacrifice, help and encouragement of family and friends and colleagues.

I'm immensely grateful to the support and love that I feel for my brothers Harris, Robert, and Jeb, and their families, and the love and support that I knew from my father and my sister, Kitty — and the love and support I feel from her family.

I have a special note this morning for my mom: Thank you for your faith, your strength, your courage, your love and beauty of spirit.

And thank you, Mr. President, for this tremendous honor by your nomination.

4 Oct 2005

Immediately after Bush nominated Ms. Miers, right-wing Christians began a firestorm of protest, because there was apparently nothing in her background to indicate that she would vote to overturn *Roe v. Wade*. Approximately 27 hours after President Bush nominated Ms. Miers, Bush held a press conference, part of which is quoted below.

Good morning. Yesterday I nominated an outstanding individual to serve on the Supreme Court of the United States. Over the past three decades, Harriet Miers has built a stellar record of accomplishment in the law. She's been a model of service to our country and to our citizens. I've known her for more than 10 years. I know her character; she's a woman of principle and deep conviction. She shares my philosophy that

judges should strictly interpret the laws and the Constitution of the United States, and not legislate from the bench.

I appreciate the reception that Harriet has gotten on Capitol Hill. I expect the Senate to conduct fair hearings, and to hold an up or down vote on Harriet's nomination by Thanksgiving.

[President's remarks on hurricanes Katrina and Rita deleted, and terse remarks on fighting terrorism and other topics also deleted.]

With that, I'll be glad to take some questions. Tom.

Q. Thank you, Mr. President. Mr. President, of all the people in the United States you had to choose from, is Harriet Miers the most qualified to serve on the Supreme Court?

THE PRESIDENT: Yes. Otherwise I wouldn't have put her on.
[another question interrupts the President]
One —

THE PRESIDENT: Let me — please, please. I've known Harriet for over a decade. I've worked with Harriet. She's a woman of principle and character. She's highly intelligent. She has been a pioneer in the field of law in my state of Texas. She was the first woman hired by her law firm — first woman partner, I mean, by the law firm. She managed a law firm. She was the first head of the Dallas Bar — first woman to head the Dallas Bar; first woman to head the State Bar of Texas. She's an enormously accomplished person who's incredibly bright.

Secondly, she knows the kind of judge I'm looking for — after all, she was a part of the process that selected John Roberts. I don't want somebody to go on the bench to try to supplant the legislative process. I'm interested in people that will be strict constructionists, so we — and I've told that to the American people ever since I started running for office. I said, vote for me, this is the kind of judges I'll put on the bench. And there should be no doubt in anybody's mind what I believe a judge — the philosophy of a judge. And Harriet Miers shares that philosophy.

Thirdly, I know her well enough to be able to say that she's not going to change, that 20 years from now she'll be the same person with the same philosophy that she is today. She'll have more experience, she'll have been a judge, but, nevertheless, her philosophy won't change. And that's important to me. It was important to me when I picked Chief Justice Roberts; it's important for me in picking Harriet Miers.

Finally, I got some interesting suggestions. I actually listen to the senators when they bring forth ideas. And they brought forth some really interesting ideas during the course of our conversations, some told me directly, many brought to me by people on my staff. And one of the most interesting ideas I heard was, why don't you pick somebody

who hasn't been a judge? Why don't you reach outside the — I think one senator said, the "judicial monastery."

I thought it was an interesting idea. And I thought long and hard about it. I obviously looked at whether or not other Presidents had done — made that decision; they had. And so, recognizing that Harriet will bring not only expertise, but a fresh approach, I nominated her. And she'll be a really good judge. And as I said, I appreciate the reception she's gotten at Capitol Hill. After all, they're going to — they'll decide.

Adam.

Q. Thank you, Mr. President. Some conservatives have said that you did not pick someone like Scalia and Thomas because you shied away from a battle with the Democrats. Is there any truth to that? And are you worried about charges of cronyism?

THE PRESIDENT: Well, I just described to you why I picked Harriet. I'd be glad to go over it again if you like. In other words, she's eminently qualified. She shares my judicial philosophy. She is a pioneer when it comes to the law. She's an extraordinary woman.

The decision as to whether or not there will be a fight is up to the Democrats. They get to decide whether or not the special interests will decide the tone of the debate. Look, I'm upbeat about the tone of the hearings, but except I'm mindful of the fact that somebody as eminently as qualified as John Roberts did have — half the Democrat caucus voted against him.

I picked the best person I could find. People are going to be amazed at her strength of character and her intellect. But the tone will be set by the people who conduct the hearings and give the speeches and run the television ads. When it's all said and done, the American people are going to know what I know, though: This woman deserves to be on the bench, and she'll be credit — and she'll bring credit to the bench and to the law.

Q. The issue of cronyism?

THE PRESIDENT: I just answered, I picked the best person I could find. People know we're close. But you got to understand, because of our closeness, I know the character of the person. It's one thing to say a person can read the law, and that's important — and understand the law. But what also matters, Adam, is the intangibles. To me, a person's strength of character counts a lot. And as a result of my friendship with Harriet, I know her strength of character.

It's important to me — again, I'll repeat to you, I don't want to put somebody on the bench who is this way today, and changes. That's not what I'm interested in. I'm interested in finding somebody who shares

my philosophy today, and will have that same philosophy 20 years from now. And after spending a lot of time thinking about this nomination, there's no doubt in my mind that's — that's the way Harriet Miers — there's no doubt in my mind it's the way Chief Justice John Roberts is, as well.

Q. Thank you, Mr. President. You've taken time to express that you know her heart, her character, you've emphasized your friendship. So it seems reasonable that over the course of the years you've known her, perhaps you have discussed the issue of abortion. Have you ever discussed with Harriet Miers abortion? Or have you gleaned from her comments her views on that subject?

THE PRESIDENT: I have no litmus test. It's also something I've consistently said: There is not litmus test. What matters to me is her judicial philosophy; what does she believe the role — the proper role of the judiciary is, relative to the legislative and the executive branch. And she'll be asked all kinds of questions up there, but the most important thing for me is what kind of judge will she be? And so there's no litmus tests.

Q. Sir, you've already said there was no litmus test —

THE PRESIDENT: Correct. And I'll say it again: There is no litmus test.

Q. But she is not someone you interviewed for the job that you didn't know. You've known her a long time. Have you never discussed abortion with her?

THE PRESIDENT: In my interviews with any judge, I never ask their personal opinion on the subject of abortion.

Q. In your friendship with her, you've never discussed abortion?

THE PRESIDENT: Not to my recollection have I ever sat down with her — what I have done is understand the type of person she is and the type of judge she will be.

[The next question dealt with the topic of the war in Iraq. Later, the topic of U.S. Supreme Court occurred again.]

THE PRESIDENT: Baker. You're next.

Q. Thank you, Mr. President. You said several times now, sir, that you don't want a justice who will be different 20 years from now than she is today. Given that standard, I wonder in hindsight whether you think the appointment of Justice David Souter, then, was a mistake? And even —

THE PRESIDENT: You're trying to get me in trouble with my father, Baker. (Laughter.)

Q. Well, I'm trying to understand what informed your choice this time?

THE PRESIDENT: Call him. (Laughter.) Go ahead. Sorry to interrupt you.

Q. Well, the second part of my question is, if there's no litmus test, regardless of who serves on the Supreme Court, would you like to see the Supreme Court overturn *Roe v. Wade*?

THE PRESIDENT: You know, I'm not going to interject that kind of issue in the midst of these hearings. Harriet Miers will stand on her own. I made my position very clear in the course of my campaigns, my position, and I'm a pro-life President. Harriet Miers is going to go up to the Senate, and they're going to look at her and determine whether or not she's got the temperament, the intelligence, and the philosophy to be an excellent Supreme Court judge. And she will be. She will be.

[The next question concerned employees at the White House who may have leaked the name of a CIA agent to journalists. Later, the topic of U.S. Supreme Court occurred again.]

THE PRESIDENT: Unless you don't want to be heard in New York, your question.

Q. Well, there's always that possibility. Many conservative women lawyers have expressed their extreme distress that you chose as a woman nominee for the Court someone whose credentials did not come close, in their view, to the credentials of John Roberts. They feel as though it's kind of old-fashioned affirmative action, women don't have the same credentials. I wonder if you could address that.

THE PRESIDENT: Sure, thanks. I would ask them to watch the hearings of Harriet Miers. I think they will become as impressed with her as I have become. She is plenty bright. She — as I mentioned earlier, she was a pioneer in Texas. She just didn't kind of opine about things, she actually led. First woman of the Texas Bar Association; first woman of the Dallas Bar Association; first woman partner of her law firm; she led a major law firm. She was consistently rated as one of the top 50 women lawyers in the United States — not just one year, but consistently rated that way — and as one of the top 100 lawyers.

Secondly, I can understand people not knowing Harriet. She hasn't been one of these publicity hounds. She's been somebody who just quietly does her job. But when she does it, she performs, see. She's not a person -- in Texas -- saying, look at me, look at how stellar I have been. She just did it, and quietly, quietly established an incredibly strong record.

And I know her, I know her heart. I know what she believes. Remember, she was part of the search committee that helped pick Roberts. In other words, she went through the deliberations and the -- talking to these different candidates about what they believe. She knows exactly the kind of judge I'm looking for. And I know exactly the kind of judge she'll be, which is an excellent judge.

And so I know people are jumping to all kinds of conclusions, and that's fine; that's part of our process, you know. People are quick to opine. The thing I appreciate is that she's gotten a good reception on the United States Senate. People can opine all they want, but the final opinion is on the floor of the United States Senate. That's where it's going to be decided whether or not she is a Supreme Court judge. And I'm hopeful she'll get confirmed. I certainly don't want to prejudge the senators. Somebody asked me about trying to avoid conflict. That's up to them, to decide how they're going to treat this good woman. That's up to them, if they're going to be willing to give her a fair look at her credentials, and to listen carefully to her view of what it means to be a judge. That's up to them to make that decision. It's up to them to decide whether or not they want to reject all the special interest money that seems to want to try to influence the outcome of certain issues here in Washington, D.C. It's up to them if they want to bring dignity to the process. I will assure you this: Harriet Miers will bring dignity to the bench.

Ann. Ann, first.

Q. Following up on that. For ten years you've been on the receiving end of paperwork from Harriet Miers, but the rest of the American people haven't seen either her command of constitutional issues or her philosophy. Will you release some of her, or the bulk of her White House legal work, and not claim executive privilege?

THE PRESIDENT: Listen, there is a — there is a lot of — first of all, this is part of the Roberts debate. People talked about executive privilege and documents. Secondly, it is important that we maintain executive privilege in the White House. That's part of the deliberative process. That's how I'm able to get good, sound opinions from people.

And so, you know, I'm sure they're going to try to bring this up. I happen to view it as — as a distraction from whether or not Harriet Miers is capable of answering the questions she's asked. She can — all the questions they want. It's a distraction from whether or not she will be a good judge.

But we -- this part of the process was part of the Roberts process. We handled this issue, and I just can't tell you how important it is for us to guard executive privilege in order for there to be crisp decision-making in the White House.

[The next question concerned the selection of the next chairman of the Federal Reserve. Later, the topic of Harriet Miers occurred again.]

THE PRESIDENT: Joe.

Q. Thank you, sir. You said a few minutes ago that you're proudly conservative, but there was a lot of hand-wringing when you made your nomination yesterday on Harriet Miers. Bill Kristol said he was "depressed and demoralized," and Rush Limbaugh said it was a "nomination out of weakness." What do you say to these critics, specifically, and how can you convince them that she is as conservative as Justices Scalia and Thomas?

THE PRESIDENT: I guess I'll start over. I hope they're listening. First, she's a woman of enormous accomplishment. She is — she understands the law, she's got a keen mind, she will not legislate from the bench. I also remind them that I think it's important to bring somebody from outside the system, the judicial system, somebody that hasn't been on the bench and, therefore, there's not a lot of opinions for people to look at.

Harriet Miers will testify; there's going to be a lot of attention paid to her testimony. First of all, she will go meet with the senators, individually, and then she'll answer questions. And people will get to see not only her strength of character, but will get a sense of her judicial philosophy. I'm hopeful she'll get confirmed, and then they'll get to read her opinions. And what I believe, and what I know is important, is that she doesn't change over the course of time. And had I thought she would change, I wouldn't put her on there. And I recognize that if you pick somebody from outside the judicial system — in other words, you pick somebody that's not a judge and they didn't — hadn't written a lot of opinions — then people are going to guess, and they're going to speculate.

I don't have to guess and speculate about Harriet. I know her character, I know her strength, I know her talent, and I know she's going to be a fine judge.

[The remainder of the questions were about topics other than Harriet Miers.]

my opinion

In my opinion, President Bush made three remarkable assertions about Ms. Miers:

1. In *three* separate paragraphs, Bush asserted that Miers will *not change* her philosophy. It is a characteristic of intelligent people with an open mind that they change their opinions as they continue to learn and to think. If Miers is really too rigid to contemplate changing her philosophy, then I believe that she is unfit to be a judge at *any* level.
2. Above at page 10, Bush claims that he *never* discussed the abortion issue with Mr. Miers. Bush has consistently characterized himself as pro-life (i.e., anti *Roe v. Wade*). The overruling of *Roe v. Wade* is the single most important issue for the right-wing Christians who enthusiastically supported George W. Bush's political campaigns for president and, in return, they expect Bush to nominate a justice who will overrule *Roe v. Wade*. I find it *incredible* that Bush would assert that he never discussed this uniquely important issue with Miers during the more than ten years that he has known her.
3. In *two* separate paragraphs, President Bush explicitly said he "picked the best person" that he could find. In a nation with hundreds of highly qualified experts on constitutional law, there is no single "best" person. There are thousands of judges and attorneys who are knowledgeable about constitutional law, who might make an acceptable justice. And then there is Harriet Miers, with *zero* qualifications in constitutional law.

8 Oct 2005

President Bush devoted his entire weekly radio address to the topic of his nominee to the U.S. Supreme Court. Here is the entire transcript of that Saturday morning broadcast.

THE PRESIDENT: Good morning. This week, I nominated an exceptional individual to replace retiring Justice Sandra Day O'Connor on the Supreme Court of the United States. Harriet Miers is a remarkable woman and an accomplished attorney. She has wide experience in the courtroom and at the highest levels of government. And she will be an outstanding addition to our nation's highest court.

Harriet Miers was born and raised in Dallas, Texas, where she attended the public schools. When illness struck her family, Harriet went to work to help pay for her own college education. She stayed close to home in Dallas to attend Southern Methodist University, and received a Bachelor's Degree in mathematics.

She remained at SMU for law school and earned a place on the law review. After graduation, she was hired for a prestigious two-year clerkship for a federal trial judge. From there, she went on to an

extraordinary career in private practice and public service and became a pioneer for women lawyers.

She was the first woman to be hired at her law firm, the first woman to become president of that firm, the first woman to lead a large law firm in the state of Texas, the first woman head of the Dallas Bar Association, and the first woman elected as president of the State Bar of Texas.

In her law practice, Ms. Miers handled hundreds of cases in state and federal courts, from massive commercial litigation to criminal cases to civil disputes. She served in local government on the Dallas City Council, and later held office in state government, as well.

As Ms. Miers rose through the legal ranks, she also put in long hours of volunteer legal work on behalf of the poor and underprivileged, and served as a leader for more than a dozen community groups and charities. Beginning in the 1990s, Harriet Miers was regularly rated one of the top 100 lawyers in America, and one of the top 50 women lawyers in the country.

Because of her skill and record of remarkable achievement, in 2001, I asked her to work in my administration. For the past five years, Harriet Miers has served our nation in critical roles, including White House Counsel, one of the most important legal positions in the country. As counsel, Ms. Miers addresses complex matters of constitutional law, serves as the chief legal advisor during regular meetings of the National Security Council, and handles sensitive issues of executive-congressional relations, among many other essential duties. She has led the effort to help nominate outstanding judges for the federal judiciary. She was in charge of the process that resulted in the appointment of Chief Justice John Roberts.

Harriet Miers would come to the Supreme Court with a background in private practice and high-government service, and this puts her in strong company. Indeed, since 1933, 10 of the 34 justices came to the Supreme Court directly from positions in the executive branch, such as the one Ms. Miers now holds. And no Supreme Court nominee in the last 35 years has exceeded Harriet Miers' overall range of experience in courtroom litigation, service in federal, state and local government, leadership in local, state and national bar associations, and pro bono and charitable activities.

Throughout her life, Ms. Miers has excelled at everything she has done. She's been a leader and a trailblazer for women lawyers, and her work has earned the respect of attorneys across the nation. I chose Harriet Miers for the Court both because of her accomplishments, and because I know her character and her judicial philosophy. Harriet Miers will be the type of judge I said I would nominate: a good conservative judge.

She shares my belief that judges should strictly interpret the Constitution and laws, not legislate from the bench. She understands that the role of a judge is to interpret the text of the Constitution and statutes as written, not as he or she might wish they were written. And she knows that judges should have a restrained and modest role in our constitutional democracy. Like Justice William Rehnquist and Justice Byron White,⁴ who were also nominated to the Supreme Court directly from legal positions in the executive branch, Harriet Miers will be prudent in exercising judicial power and firm in defending judicial independence.

When she goes before the Senate, I am confident that all Americans will see what I see every day: Harriet Miers is a woman of intelligence, strength, and conviction. And when she is confirmed by the Senate, I am confident that she will leave a lasting mark on the Supreme Court and will be a justice who makes all Americans proud.

Thank you for listening.

The New York Times reported that the Chairman of the U.S. Senate Judiciary Committee criticized Harriet Miers' lack of knowledge of constitutional law. The President's remarks in his Saturday morning radio broadcast

... came as Senator Arlen Specter, the chairman of the Senate Judiciary Committee, who presides over confirmation hearings, offered a blunt assessment that was yet another sign that the nominee faced an uphill battle on Capitol Hill. Though Mr. Specter called Ms. Miers "intellectually able," he said she had a "fair-sized job to do" to become fluent in the language of constitutional law, which will be essential for senators who want to examine her judicial philosophy in deciding whether to confirm her.

"She needs more than murder boards," Mr. Specter, Republican of Pennsylvania, said in an interview, referring to the mock question-and-answer sessions most nominees use to prepare for their confirmation hearings. "She needs a crash course in constitutional law." Sheryl Gay Stolberg, Richard W. Stevenson, "Bush Works to Reassure G.O.P. Over Nominee for Supreme Court," *New York Times*, (9 Oct 2005)

⁴ Note by Standler: Justices White and Rehnquist were the only two dissenting votes in *Roe v. Wade*. I think it is not an accident that President Bush remembers them fondly.

12 Oct 2005

During a public appearance with the President of Poland on 12 Oct 2005, President Bush was asked by a journalist about Harriet Miers.

Q. Thank you, Mr. President. Why do people in this White House feel it's necessary to tell your supporters that Harriet Miers attends a very conservative Christian church? Is that your strategy to repair the divide that has developed among conservatives over her nominee?

PRESIDENT BUSH: People ask me why I picked Harriet Miers. They want to know Harriet Miers' background; they want to know as much as they possibly can before they form opinions. And part of Harriet Miers' life is her religion. Part of it has to do with the fact that she was a pioneer woman and a trailblazer in the law in Texas. I remind people that Harriet Miers is one of the — has been rated consistently one of the top 50 women lawyers in the United States. She's eminently qualified for the job. And she has got a judicial philosophy that I appreciate; otherwise I wouldn't have named her to the bench, which is — or nominated her to the bench — which is that she will not legislate from the bench, but strictly interpret the Constitution.

So our outreach program has been just to explain the facts to people. But, more importantly, Harriet is going to be able to explain the facts to the people when she testifies. And people are going to see why I named her — nominated her to the bench, and she's going to make a great Supreme Court judge.

[The next question concerned Poland. There were no more questions about Miers in this brief press conference.]

Reassurance from White House

1. her religion

During 5 Oct to 12 Oct 2005, the White House sought to reassure conservative Christians that Harriet Miers was opposed to *Roe v. Wade*, because of her religion. In 1979, Ms. Miers became a member of an evangelical Christian church in Dallas. Ms. Miers personal religion became a public political issue during a broadcast on 12 Oct 2005, when a pro-life leader James C. Dobson said:

And the issue that's propelled this unprecedented interest in something that I've said is my conversation with Deputy White House Chief of Staff, Karl Rove, that occurred on October 1st, just a few days ago. And that was the day before President Bush made his decision to nominate White House Counsel, Harriet Miers, to be the next Justice of the Supreme Court.

....

What did Karl Rove say to me that I knew on Monday that I couldn't reveal? Well, it's what we all know now, that Harriet Miers is an Evangelical Christian, that she is from a very conservative church, which is almost universally pro-life, that she had taken on the American Bar Association on the issue of abortion and fought for a policy that would not be supportive of abortion, that she had been a member of the Texas Right to Life. In other words, there is a characterization of her that was given to me before the President had actually made this decision.

....

We did not discuss *Roe v. Wade* in any context or any other pending issue that will be considered by the Court. I did not ask that question. You know, to be honest, I would have loved to have known how Harriet Miers views *Roe v. Wade*. But even if Karl had known the answer to that and I'm certain that he didn't, because the President himself said he didn't know, Karl would not have told me that. That's the most incendiary information that's out there and it was never part of our discussion.

Copied from "rough, unedited transcript" of 12 Oct 2005 broadcast of *Focus on the Family* program at <http://www.family.org/welcome/press/a0038214.cfm> .

Dobson's statement that "... Harriet Miers is an Evangelical Christian, that she is from a very conservative church, which is almost universally pro-life," and President Bush's statement on 12 Oct "part of Harriet Miers' life is her religion" were both widely criticized as a religious test for a U.S. Supreme Court justice. Importantly, the criticism came from both liberal Democrats and conservative Republicans.

Some critics of President Bush pointed out some inconsistency or hypocrisy in touting her religion. If Miers strictly interprets the Constitution according to the original intent or original meaning — as Bush promised that she will — then her religion is irrelevant. However, if Miers is

a “judicial activist” — either a conservative activist or a liberal activist — then her personal political and religious opinions may be relevant.

Because it is taboo to speak of a judicial nominee’s opinion about *Roe v. Wade*, I believe her Evangelical Christian religion became a surrogate indication that she was pro-life and opposed to *Roe v. Wade*. However — and this is important — her alleged personal opposition to abortion leaves *unanswered* the question of whether she would vote to overrule *Roe v. Wade*, which is what President Bush’s pro-life supporters *really* wanted to know.

Incidentally, in early October, journalists quoted Texas Supreme Court Justice Nathan Hecht as saying that Harriet Miers had been raised in a Catholic family.⁵ However, on 21 Oct, the Catholic Diocese of Dallas issued a statement that the Miers’ family had never been a member of the Catholic Church.⁶ If Hecht, who described himself as a close friend of Harriet Miers, was wrong about her religion, how much more public “information” from Miers’ supporters is wrong?

2. her alleged constitutional law experience

On 11 Oct 2005, an article by the Associated Press paraphrased U.S. Senate Judiciary Committee Chairman Arlen Specter, a Republican, as saying “she lacks experience in constitutional law”.⁷ That conclusion is obvious from looking at her resume and the areas of law in which she has worked (i.e., antitrust and trade regulation).

On Friday, 14 October 2005, the White House changed their defense of Miers from touting her Evangelical Christian religion to touting her knowledge of constitutional law. The *Washington Post* newspaper explained:

The White House, caught off guard by the intensity of the conservative backlash to Supreme Court nominee Harriet Miers, plans to try to refocus the debate over the next week onto her legal qualifications and away from issues such as her religion, senior presidential advisers said yesterday.

Acknowledging that the campaign for Miers had slipped out of their control, the advisers said they will seek to validate her credentials for the high court through a series of media appearances, newspaper opinion pieces and letters of support from various people who have

⁵ See, e.g., “Miers possesses qualities important to Bush: loyalty, trustworthiness,” *Chicago Tribune*, (3 Oct 2005).

⁶ Patricia Zapor, “Contrary to reports, Harriet Miers was not raised as a Catholic,” *Catholic News Service* (21 Oct 2005).

⁷ See, e.g., Kimberly Hefling, Associated Press, “Specter decries Bush ‘pummeling’ on Miers,” *Seattle Post-Intelligencer* (11 Oct 2005 20:48 EDT).

known the White House counsel during her previous career as a corporate lawyer and bar association leader in Texas.

The effort, which got started yesterday with an endorsement signed by three former chief justices of the Texas Supreme Court, represents a shift in tactics for a White House that spent most of the week on the defensive talking about Miers's faith. Conservative leader James C. Dobson reported that White House Deputy Chief of Staff Karl Rove had reassured him that Miers was an evangelical Christian and a member of a conservative and "almost universally pro-life" church, triggering criticism that Bush's aides were using her faith to send coded messages.

"We have obviously been distracted by discussion of her religion and an intramural dispute with our conservative friends," said a White House official who was not authorized to speak for the record. "But the senators are going to vote on her qualifications, and we've just got to get back to that."

Peter Baker, "White House Shifts Its Lobbying Strategy," *Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/14/AR2005101401765.html> (15 Oct 2005).

The Reuters news agency reported the same story, but added a claim by the White House Press Secretary, Scott McClellan, that Ms. Miers had long experience dealing with constitutional issues.

Struggling to quell a conservative rebellion, the White House said on Friday Supreme Court nominee Harriet Miers' had long experience dealing with constitutional issues while serving as White House counsel.

....

Ever since Bush nominated Miers for the lifetime appointment October 3, some conservative opinion leaders have said Miers lacks the intellectual weight needed to handle the type of constitutional issues that the Supreme Court considers.

"She has deep knowledge of the constitution and constitutional law," McClellan countered.

As examples, Miers has dealt daily with laws governing war powers, commander-in-chief powers, pardons, executive privilege, the First Amendment to the constitution — which protects freedom of speech and religion — and other areas, he said.

Steve Holland, "Facing revolt, White House touts Miers 'experience'," *Reuters*, (14 Oct 2005 16:25 EDT).

In looking at the transcript of the 12 Oct 2005 press briefing at the White House website, I found that Mr. McClellan said about Harriet Miers:

Let's talk about the last five years and talk about constitutional experience. She has served at the highest levels of government. She has served as Counsel to the President. She deals on a daily basis with complex constitutional issues here at the White House. For the past five years she is someone the President has been looking to and saying, what do you recommend, and she has had to answer those questions. She is someone who is well-versed in knowledge of the Constitution. And she has expressed those views to the President during the course of the past five years in those high positions of government. And I think very few lawyers, men or women, have had that kind of experience.

In looking at the transcript of the 13 Oct 2005 press briefing at the White House website, I found that Mr. McClellan said:

She has great experience. She has a lot of experience in constitutional law, at the highest levels of government. She is someone that the President for the last five years has looked to for her recommendation when it comes to dealing with complex legal issues involving our Constitution, and he has turned to her and said, what is your recommendation.

And she is well-versed in constitutional law. You have to be when you serve at the highest levels of government. She has served as the President's General Counsel, which she is doing right now; as his Deputy Chief of Staff; and as Staff Secretary. And those are three of the highest positions within the White House. And I would submit to you that there are very few lawyers, men or women, who have that kind of experience at that level.

In looking at the transcript of the 14 Oct 2005 press briefing at the White House website, I found that Mr. McClellan said:

She has deep knowledge of the Constitution and constitutional law. Among the constitutional law matters that a White House Counsel has to deal with on a daily basis include laws governing war powers, Commander-in-Chief powers, pardons, executive privilege, the appointments clause, the commerce clause, the 1st Amendment, 4th Amendment, which relates to the Patriot Act, the 14th Amendment, and many other areas. So these are issues that a White House Counsel deals with on a daily basis. These are complex constitutional issues that a White House Counsel has to deal with.

However, her alleged experience dealing with constitutional issues was not really long at all. According to her official biography at the White House website, she has served as the President's Counsel only since February 2005, which is a mere seven months of experience.⁸ Miers went to Washington DC to work in the White House, as Assistant to the President, beginning 20 Jan 2001, which would give her a total of 4.1 years of experience in that job, before being promoted to Counsel. Furthermore, because of executive privilege and attorney-client privilege, any memoranda prepared by Miers are confidential and *not* available the U.S. Senators who are asked to confirm her as a justice, so the quality of her alleged constitutional law work can not be ascertained.

Experience in constitutional law is normally expressed in either: (1) briefs to federal courts in cases involving constitutional issues; (2) judicial opinions in cases involving constitutional issues; or (3) articles published in law reviews, which are found in legal libraries. The first two are public documents, the third is available in law libraries at law schools and some courthouses. Miers has *none* of these public credentials in constitutional law. It would seem to be a mistake to tout Miers' meager and *unverifiable* experience in constitutional law.

⁸ Compare her seven months of alleged experience in constitutional law with that of Chief Justice John Roberts, who clerked for Justice Rehnquist in 1980, and had approximately 15 years of experience in appellate law, including personally arguing 39 cases before the U.S. Supreme Court. And there are judges in the U.S. Courts of Appeal and law professors with even more experience in constitutional law than Justice Roberts!

Coverage of the Miers' nomination by journalists seemed to decline on the weekend, 15-16 Oct, perhaps because the White House had neither press briefings nor press conferences then, and the President spent Saturday in seclusion at Camp David.

Other Criticisms

1. "first woman to ..."

When he nominated Ms. Miers, President Bush expressed admiration for her, because she was allegedly a trailblazer for women. See, for example, Bush's remarks when he announced her nomination on 3 Oct 2005, quoted above at page 5, as well as the following excerpts from her official biography posted in October 2005 at the White House website:

- In 1972, Ms. Miers became the *first woman* hired at Dallas's Locke Purnell Rain Harrell.
- In March 1996, her colleagues elected her the *first female* President of Locke, Purnell, Rain & Harrell, at that time a firm of about 200 lawyers. She became the *first female* to lead a Texas firm of that size.

....

- Throughout her career, she has been very active in the legal community and has blazed a trail for other women to follow.
 - In 1985, Ms. Miers was selected as the *first woman* to become President of the Dallas Bar Association.
 - In 1992, she became the *first woman* elected President of the State Bar of Texas. Ms. Miers served as the President of the State Bar of Texas from 1992 to 1993.

Biography of Harriet Miers, posted at www.whitehouse.gov on 3 Oct 2005. I have added the italics for emphasis.

On 12 October 2005, Ann Coulter, a conservative columnist and attorney, wrote a scathing criticism of the touting of Ms. Miers alleged feminist credentials. Ms. Coulter began with the observation that the President's wife, Laura, had suggested⁹ that criticism of Ms. Miers was "sexist" and then Ms. Coulter wrote:

The only sexism involved in the Miers nomination is the administration's claim that once they decided they wanted a woman, Miers was the best they could do. Let me just say, if the top male lawyer in the country is John Roberts and the top female lawyer is Harriet Miers, we may as well stop allowing girls to go to law school.

Ah, but perhaps you were unaware of Miers' many other accomplishments. Apparently she was THE FIRST WOMAN in Dallas to have a swimming pool in her back yard!
And she was THE FIRST WOMAN with a safety deposit box at the Dallas National Bank!

⁹ Jim vande Hei, "Laura Bush Echoes Sexism Charge in Miers Debate," *Washington Post*, (12 Oct 2005) (Speaking on the *Today* television program for 11 Oct, Laura Bush "... also said it's 'possible' that questions about Miers's intellectual qualifications are sexist in nature, a charge other defenders of Miers have made publicly and in private conversations with conservatives opposed to the nomination.").

And she was THE FIRST WOMAN to wear pants at her law firm! It's simply amazing!
And did you know she did all this while being a *woman*?

I don't know when Republicans became the party that condescends to women, but I am not at all happy about this development. This isn't the year 1880. And by the way, even in 1880, Miers would not have been the "most qualified" of all women lawyers in the U.S., of which there were 75.

By 1950, there were more than 6,000 women lawyers, three female partners at major law firms and three female federal judges. She may be a nut who belonged to a subversive organization, but Ruth Bader Ginsburg graduated first in her class from Columbia Law School — and that was before Harriet Miers was applying to law school.

Women have been graduating at the top of their classes at the best law schools for 50 years. Today, women make up about 45 percent of the students at the nation's top law schools (and more than 50 percent at all law schools).

....

Despite the astonishing fact that Miers was THE FIRST WOMAN to head the Texas Bar Association — a dumping ground for losers, by the way — Miers has not had the sort of legal career that shouts out "Supreme Court material"! That is, unless you think any female who manages to pass the bar exam has achieved a feat of unparalleled brilliance for her gender.

There are more important things in life than being Supreme Court material, but — oddly enough — not when we're talking about an appointment to the Supreme Court. According to the Associated Press, Sen. Arlen Specter defended Miers on the grounds that "Miers' professional qualifications are excellent, but she lacks experience in constitutional law" — and Specter ought to know. This is like recommending a plumber by saying, "He's a very professional guy, but he lacks experience in plumbing."

Ann Coulter, "Does this Law Degree Make My Resume Look Fat?,"

<http://www.townhall.com/opinion/columns/anncoulter/2005/10/12/171097.html> (12 Oct 2005).

Laura Bush was not the only person calling criticism of Ms. Miers "sexist". Senator Diane Feinstein, a Democrat on the U.S. Senate Judiciary Committee, is reported to have said:

"The way she's being beaten up by the far right is very sexist. People should hold their fire and give people an opportunity to come before a hearing," Feinstein, D-Calif., said on CNN's "Late Edition."

Hope Yen, "Rice: Criticism of Miers Is Unfounded," Associated Press, (16 Oct 2005 14:07 EDT).

Feinstein also called some of the conservative criticism of Miers' qualifications sexist, adding, "I do not believe they would do that to a man."

David D. Kirkpatrick, "Miers gets chance to answer critics. Supreme Court nominee expected to respond to Senate questionnaire, meet with Feinstein, others," *San Francisco Chronicle*, (17 Oct 2005).

Obviously, Feinstein forgot what her Democratic party colleagues did to Judge Robert Bork during his confirmation hearings in the year 1987.

Other prominent people, including two liberal women, were also calling the criticism of Ms. Miers “sexist”:

Early on, Ed Gillespie, former head of the Republican National Committee, said the opposition carried “a whiff of sexism.” First Lady Laura Bush agreed “that’s possible,” while grousing “people are not looking at her accomplishments.”

Some liberals joined in, such as Eleanor Smeal, head of the Feminist Majority Foundation, who exclaimed: “Does she have the mental capacity? Give me a break. Would they say that about a man?” Maryland Democratic Sen. Barbara Mikulski professed to be “shocked at the sexism and double standard coming out of the far right.”

If this is the best Miss Miers’ defenders can do, she must be worse than anyone thought. Conservatives weren’t crazy about Ruth Bader Ginsburg when Bill Clinton nominated her to the court, but nobody ever said she lacked the requisite brainpower. Only three Republican senators voted against her, and none on the basis of her IQ.

Steve Chapman, “Victim of sexism?,” *Washington Times*, (17 Oct 2005).

my opinion

While Ms. Coulter’s criticism may seem a bit strident and overly sarcastic, remember that Harriet Miers is being nominated to be one of nine justices on the U.S. Supreme Court, which is the final arbiter of constitutional disputes in the USA, *without* any evidence that Miers actually understands constitutional law. To pretend that Ms. Miers is qualified to be a justice because Miers was the “first woman” to do some things in Texas (all of which are *unrelated* to constitutional law), ignores the fact that while Miers was being a success in Texas, other women (and many hundreds of men) were working in constitutional law, as judges on the U.S. Courts of Appeal, as professors of constitutional law, as judges on state supreme courts, and as attorneys who brief and argue cases before the U.S. Supreme Court.

To label criticism of Miers as “sexist” essentially asserts that women are inferior to men, therefore a woman can not be expected to have the same credentials as a male candidate. In my opinion, Ann Coulter is correct to find such a “sexism” defense as insulting and condescending toward women. On the other hand, Harriet Miers is *not* to blame for the fact that President Bush is advocating the wrong reasons to believe that she is well qualified to be a justice of the U.S. Supreme Court.

During the early 1990s, people made many *unkind* remarks about the stupidity of Vice-President Dan Quayle. No one suggested that he should get a free pass because he was male. And, so, in the spirit of equality, when an *unqualified* female appears, she must not be allowed to hide behind her gender and avoid criticism.

2. her writing lacks substance

On Thursday, 13 Oct, a conservative columnist wrote in *The New York Times*:

Of all the words written about Harriet Miers, none are more disturbing than the ones she wrote herself. In the early 90's, while she was president of the Texas bar association, Miers wrote a column called "President's Opinion" for *The Texas Bar Journal*. It is the largest body of public writing we have from her, and sad to say, the quality of thought and writing doesn't even rise to the level of pedestrian.

Of course, we have to make allowances for the fact that the first job of any association president is to not offend her members. Still, nothing excuses sentences like this:

"More and more, the intractable problems in our society have one answer: broad-based intolerance of unacceptable conditions and a commitment by many to fix problems."

....

Or this: "When consensus of diverse leadership can be achieved on issues of importance, the greatest impact can be achieved."

....

Or, finally, this:

"We have to understand and appreciate that achieving justice for all is in jeopardy before a call to arms to assist in obtaining support for the justice system will be effective. Achieving the necessary understanding and appreciation of why the challenge is so important, we can then turn to the task of providing the much needed support."

I don't know if by mere quotation I can fully convey the relentless march of vapid abstractions that mark Miers's prose. Nearly every idea is vague and depersonalized. Nearly every debatable point is elided. It's not that Miers didn't attempt to tackle interesting subjects. She wrote about unequal access to the justice system, about the underrepresentation of minorities in the law and about whether pro bono work should be mandatory. But she presents no arguments or ideas, except the repetition of the bromide that bad things can be eliminated if people of good will come together to eliminate bad things.

David Brooks, "In Her Own Words," *The New York Times*,

<http://select.nytimes.com/2005/10/13/opinion/13brooks.html> (13 Oct 2005).

On Saturday, 15 Oct, an article in the *Washington Post* described the discovery that Harriet Miers had written many platitudes.

Bush may have enjoyed being told by Miers in 1997, "You are the best governor ever — deserving of great respect." But in 2005 such fawning remarks are contributing to suspicion among Bush's conservative allies and others that she was selected more for personal loyalty than her legal heft.

Combined with columns she wrote for an in-house publication while president of the Texas Bar Association — critics have called them clumsily worded and empty of content —

Miers may be at risk of flunking the writing portion of the Supreme Court confirmation test, according to some opponents.

....

Earlier in the week, the *[New York] Times's* conservative columnist David Brooks savaged the columns Miers wrote in the early 1990s as president of the State Bar of Texas. "The quality of thought and writing doesn't even rise to the level of pedestrian," Brooks wrote. Passages he called typical of her "vapid abstractions" included: "More and more, the intractable problems in our society have one answer: broad-based intolerance of unacceptable conditions and a commitment by many to fix problems."

Charles Babington, "**Miers Hit on Letters and the Law: Writings Both Personal and Official Have Critics Poking Fun,**" *Washington Post*, page A7, (15 Oct 2005).

my comments

Unfortunately, one of the ways to get ahead in business and politics is to avoid taking a firm position on controversial issues. Every firm position alienates some people who don't agree with that position. And after firm positions on a few dozen major issues, one won't have enough supporters to elect them to managing partner of a law firm, elect them to president of the Dallas Bar Association, and elect them president of the Texas State Bar Association. While writing vague platitudes is a way of succeeding in business and politics, it is the wrong way for a judge — and certainly the wrong way for a justice of the U.S. Supreme Court — who must take a position in deciding each dispute before the court.

But, as President Bush shrewdly observed with the nominations of both John Roberts and Harriet Miers, having written no judicial opinions, no published articles in law reviews, and having written no books, means that the nominee is a "stealth candidate," with *unknown* views on the important issues of the day. Such stealth candidates are much easier to confirm in the contentious and highly partisan environment in the U.S. Senate that has existed at least since 1987, when the nomination of Judge Robert Bork was rejected by the Senate, on the basis of Bork's extensive legal writings.

3. Ann Althouse's editorial

In an editorial written in the Milwaukee newspaper, Ann Althouse, a professor of constitutional law at the University of Wisconsin, wrote a cogent review of the situation.

By contrast [with John Roberts], Bush seems to have picked Miers solely because she's an old crony of his.

....

Now, they felt sure they would get one of the avowedly conservative jurists who currently sit on the federal appeals courts. They recognized the importance of appointing a

woman to replace the first female Supreme Court justice, but there was a well-identified set of women judges to choose from.

Instead, Bush picked a woman who had no record of adherence to conservative judicial ideology. Betrayed, they protested and continue to protest.

Bush has bumbled in response. He seemed blindsided by the opposition. He had no ready answer. For days, he had little to say other than "I know her heart." In other words, trust me.

Discussion focused heavily on the issue of abortion, and Bush spokespersons seemed to assume that all they needed to do was to assure pro-life constituents that Miers was herself personally pro-life.

Clumsily, the evidence given as assurance that Miers is pro-life was her membership in an evangelical Christian church.

These efforts to defend Miers only dug a deeper hole. For one thing, a judge's personal beliefs are not supposed to produce the outcome in a legal case.

And since Miers has never been a judge, those who complain about her lack of credentials had all the more reason to worry. Was she just going on the bench to vote for outcomes?

According to the assurances Bush's people were offering, she wasn't going to act like a judge. For another thing, making the nominee's religion the central qualifying factor not only concedes the lack of other qualifications, it meshes government and religion in an outrageous way.

Thus, the defense of Miers antagonized even more of those who might have been willing to accept Bush's choice.

When I heard the nomination, my concerns were not, like the initial set of critics, whether Miers would join Scalia and Thomas and whether she would vote to overturn *Roe vs. Wade*.

My concern was that she lacked background in the interpretation of constitutional law.

The efforts to defend Miers only exacerbated the doubts I had. And these efforts did not appease the conservatives who wanted a judge with a well-developed judicial philosophy.

Even the pro-life contingent — for whom the defense was tailored — was not convinced.

Meanwhile, the Senate Democrats have not decided if they want to fight, but they can't find all that much to like, other than the fact that she isn't someone even worse.

At this point, no one is very happy with the Miers nomination.

But Bush is not the sort of person who backs down easily. And if the nomination is not withdrawn, it's hard to see how it will not make it through the Senate (unless some truly damaging information emerges or Miers makes some blatant blunders at the hearings).

So the odds are we will soon be saying "Justice Harriet Miers" and something along the lines of: How did that happen?

Ann Althouse, "Who is Harriet Miers? She's a candidate hardly anyone is happy with — and here's why," *Milwaukee Journal-Sentinel*, <http://www.jsonline.com/news/editorials/oct05/363133.asp> (15 Oct 2005).

To help answer Prof. Althouse's final question — to help people understand why Harriet Miers was appointed — I began to prepare this collection of historical material one day before Althouse's editorial appeared.

Four Revelations About Miers

On Tuesday morning, 18 Oct 2005, there were four important revelations about the opinions and experience of Harriet Miers.¹⁰

1. In response to written interrogatories from the U.S. Senate Judiciary Committee, Miers disclosed that, in the year 1989, while campaigning for a seat on the Dallas city council, Miers answered a questionnaire from a pro-life group (Texans United for Life). Miers gave anti-abortion responses to all ten questions on that questionnaire. In particular, Miers supported an amendment to the U.S. Constitution that makes abortion illegal, except when to save the life of the pregnant woman.
2. In private meetings on Monday with Senator Arlen Specter, the chairman of the Judiciary Committee, and separately with Senator Schumer, a Democrat on the Judiciary Committee, Miers assured each of them that no one knew her position about overruling *Roe v. Wade*.
3. After the meeting with Senator Specter on Monday, Specter announced that Miers had agreed with the right of privacy expressed in the case *Griswold v. Connecticut*, 381 U.S. 479 (1965). Miers telephoned him on Monday night and asserted that she did *not* agree with *Griswold* during their meeting. Senator Specter office then released a statement that said “Sen. Specter accepts Ms. Miers' statement that he misunderstood what she said.”¹¹
4. In response to written interrogatories from the U.S. Senate Judiciary Committee, Miers disclosed that she had tried *only eight* civil cases in court to a verdict (and she was either lead counsel or sole counsel in only *four* of those), and that she had personally done the appeals of only *four* cases in federal courts and three cases in state courts:
 - *Jones v. Bush*, 244 F.3d 144 (5th Cir. 2000), *cert. denied*, 531 U.S. 1062 (2001);
 - *Thanksgiving Tower Partners, et al. v. Anros Thanksgiving Partners*, 64 F.3d 227 (5th Cir. 1995);
 - *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985);
 - *In re Grand Jury Proceedings*, 712 F.2d 973 (5th Cir. 1983);state courts:
 - *Disney Enterprises, Inc. v. Esprit Finance, Inc.*, 981 S.W.2d 25 (Tex.App.-San Antonio, 1998);

¹⁰ See, e.g., Jesse J. Holland, “Miers Backed Ban on Most Abortions in '89,” Associated Press, (18 Oct 2005 13:38 EDT); Amy Goldstein and Charles Babington, “Miers Once Vowed to Support Ban On Abortion,” *Washington Post*, (19 Oct 2005).

¹¹ Maura Reynolds and Edwin Chen, “Interpretations Differ After Talks With Miers,” *Los Angeles Times*, (18 Oct 2005); Maeve Reston, “Specter rescinds comments on Miers,” *Pittsburgh Post-Gazette*, (18 Oct 2005); Amy Goldstein and Charles Babington, “Miers Once Vowed to Support Ban On Abortion,” *Washington Post*, page A1, (19 Oct 2005).

- *Microsoft Corp. v. Manning*, 914 S.W.2d 602 (Tex.App.-Texarkana 1995);
- *Southwest Securities, Inc. v. Sungard Data Systems, Inc.*, 2000 WL 1196338 (Tex.App.-Dallas 2000).

Miers also represented clients in *three* cases involving appeals to the U.S. Supreme Court, but the Court denied her certiorari petitions in all three cases, so she never argued a case before the U.S. Supreme Court: *Jones v. Bush* 531 U.S. 1062 (2001); *Ware v. Schweiker*, 455 U.S. 912 (1982); *Popeko v. U.S.*, 423 U.S. 917 (1975).

Senator Dianne Feinstein, who only two days earlier had called criticism of Miers “sexist”, released the following statement about Miers’ support for the proposed anti-abortion amendment to the U.S. Constitution:

Today, I received a copy of the April 11, 1989, questionnaire submitted by Texans United For Life to Harriet Miers during her campaign for the Dallas City Council and her responses to these questions.

The answers clearly reflect that Harriet Miers is opposed to *Roe v. Wade*. This raises very serious concerns about her ability to fairly apply the law without bias in this regard. It will be my intention to question her very carefully about these issues.

Press Release (18 Oct 2005), copied from Senator Feinstein’s webpage, <http://feinstein.senate.gov/05releases/r-miers1018.htm> .

18 Oct White House Press Briefing

Scott McClellan, President Bush’s Press Secretary, responded to questions from journalists in the early afternoon of Tuesday, 18 Oct 2005:

Q Scott, the material that the White House sent to the Senate today about Harriet Miers' nomination included a 1989 questionnaire that said that she supported a constitutional amendment to ban abortion except to — when the life of a mother is at stake. Do you take that 1989 statement to be a conclusive statement of her position on abortion?

MR. McCLELLAN: Well, what we take that to be is a candidate expressing her views during the course of a campaign. The role of a judge is very different from the role of a candidate or a political office holder. And what she was doing in that questionnaire was expressing her views during the course of a campaign. The role of a judge is to apply the law in a fair and open-minded way. That means looking at the facts, and then applying the law.

Q So are you saying that what her — what she registered there might not be how she might vote as a judge?

MR. McCLELLAN: Well, I think, a couple of things. One, the President looks at someone's qualifications and experience and judicial temperament when he's appointing people to the bench. He has a long record of appointing — or nominating people to the bench that have a conservative judicial philosophy. He believes very strongly that we should have strict constructionists on the Court, people who will strictly interpret our Constitution and our laws, and not try to make law from the bench.

And one of the qualities that you look for in someone who is going to serve on the bench, particularly our -- the highest court in the land, is are they someone who is fair and open-minded, and that will look at the facts of a case and then apply the law. Harriet Miers, just like Chief Justice Roberts, recognizes that personal views and ideology and religion have no role to play when it comes to making decisions on the bench. Your role as a judge is to look at all the facts and then look at the law and apply the law to that case.

Q And you separate the questionnaire as a —

MR. McCLELLAN: I would also — I think Senator Schumer indicated to you all yesterday that Harriet Miers said that no one knows how she would view on any particular case.

Q So then we should regard this — or the Senate should regard this just as a personal view, not as an indication of her judicial philosophy?

MR. McCLELLAN: Well, her judicial philosophy is how I just described it. And she'll be talking more about it as she moves forward on the confirmation process. She's already visited with some 18 senators before today as part of the courtesy visits. She's visiting with an additional two senators today. And she will continue those visits in the coming weeks -- through the remainder of this week, and in the coming weeks as they move forward toward the confirmation hearings. And then at the confirmation hearings, senators will have an opportunity to visit with her and ask her questions about her views and her experience and her judicial philosophy. And she looks forward to the opportunity to answer those questions at that time.

Q Was that document a part of the vetting process and the package of materials that the President reviewed prior to selecting Harriet Miers?

MR. McCLELLAN: Well, in terms of the President, they did not discuss this particular issue -- I think we've already indicated that -- or any other issue that may be viewed as controversial. The President doesn't have a litmus test, and that -- what we said before still stands. The President appoints people to the bench based on their qualifications and their experience and their judicial temperament. And that's what he makes the decision on.

Now, in terms of the vetting process, there's a very thorough process that goes on for people to the President Supreme Court and people to other judicial vacancies, and it was a thorough vetting process.

Q Would that have included providing that kind of documentation to the President? Whether there was discussion, he could have simply read the --

MR. McCLELLAN: I'll see if there's more information on that. But, no, the President, as we have indicated, doesn't have a litmus test, so those are not questions he discusses with his nominees. And I'll see if there's any additional --

Q But did he read it, is what I'm asking. Was he aware of it prior to --

MR. McCLELLAN: That's what I said -- I'll see if there's any additional information to add.

Q Is it the expectation of the White House, though, that a document such as this will send a message to people who care about the issue that that is something she believes and, therefore, it might reasonably --

MR. McCLELLAN: No, the expectation is that it's Harriet Miers responding -- it's Harriet Miers responding to a questionnaire from the Senate Judiciary Committee so that they can look at her background and her record and her experience. She is someone who is uniquely qualified to serve on our nation's highest court. And the decision and the standard should be based on qualifications. And that's what we have always emphasized. That's the precedent that has been set over many years. It should be based on is this person qualified to serve on our nation's highest court. She is extremely well-qualified to serve on our nation's highest court.

Q So including that in the information packet that you sent up, you would deny that you're trying to send any kind of message?

MR. McCLELLAN: That's part of providing the Senate Judiciary Committee information that they have requested.

[The next question was on the war in Iraq. Later, there was another question about Miers.]

Q One question on Harriet Miers. So your position is that her support of a constitutional amendment that would ban abortion in every instance except when the life of the mother is provably at risk -- in other words, a woman who might be rendered infertile by being forced to carry to term a child would not, under Harriet Miers' political views, have access to have an abortion. That has nothing to do, and will have nothing to do, with how she judges cases?

MR. McCLELLAN: Well, I think she's indicated to members of the Senate that she's visited with that no one knows how she would vote on any particular cases that may come before the Court, because the role of a judge is not to prejudge the outcome of those cases. The role of a judge is to stand back and to hear the facts, to look at those facts, and then apply the law. She is someone who, anyone you talk to that knows her will say, is very fair-minded. I've known her well for the last few years. She is someone who is very fair and open-minded. And that's an important qualification you need when you're a judge.

She's also someone that is firmly committed to strictly interpreting our Constitution and our laws, not trying to make law from the bench. That's what the American people want on the bench. Now, we all have personal views and certain ideological backgrounds that we come from, and some of us have religious backgrounds, as well. But all those issues have no role to play when you're a judge making a decision based on the Constitution and our laws.

Q Why is it that most judges who have the personal view that abortion ought to be legal end up finding in the law that it should be legal, and most judges who have personal views, religious or otherwise, that it's wrong, and shouldn't be legal, end up finding in the law that it's illegal?

MR. McCLELLAN: I don't know which specific instance you're referring to. I mean, I haven't done that kind of analysis myself. But I know what the American people want. The American people want judges that are going to interpret our Constitution and our laws and not make law from the bench. That's what the role of a judge is. The role of a judge is to look at the facts and look at the law and then apply the law. And Harriet Miers is someone who recognizes that ideology and religion have no role to play when you're making decisions on the bench. That's what the American people expect in a Supreme Court nominee or any judicial nominee.

[The next question was on the simplification of the Income Tax Code. Later, there were some questions about the vetting process inside the White House for the Miers nomination, which I am omitting because I believe the vetting process is *irrelevant* to determining whether Miers should serve as a Justice. Later, Mr. McClellan recognized a reporter named "Les":]

Q I was grateful for your gracious recognition yesterday. You have your job to do, and we have ours, which is to ask questions, like this question: Can you rule out any possibility that the President is considering possible replacement nominees, should the Senate reject Harriet Miers?

MR. McCLELLAN: We're confident that Harriet Miers will be confirmed to our nation's highest court, Les. The President made that very clear last week. And no one that knows her would make any such suggestion because they know that she is uniquely well-qualified to serve on the nation's highest court. If you look at her record and experience and compare that to previous justices who have been confirmed, I would submit to you that her qualifications and experience exceed — either the same as, or exceed many of those.

[There was one question about homeland security, then the following question about Miers.]

Q Scott, what did Harriet Miers tell Arlen Specter yesterday about the right to privacy?

MR. McCLELLAN: Well, they had a lengthy discussion yesterday. This was the second time that she sat down and visited with Senator Specter in person about her nomination. And as a general rule, just like Chief Justice Roberts, Harriet does not get into talking about specific cases, if that's what you're asking. But these are --

Q I'm asking more about the generalized constitutional right to privacy.

MR. McCLELLAN: These are courtesy visits that she's having with members of the United States Senate. As I said, she's -- by the end of the day will have visited with some 18 to 20 members of the United States Senate. She will be having confirmation hearings in a few weeks. I know people in this room would like to get on with those confirmation hearings, but this is a process that is moving along. And there will be many issues that come up during the time of the confirmation hearing --

Q It would be helpful to us in writing a story, actually, if we could get a clearer understanding of what, exactly, it was she said. Arlen Specter said, "She believes there is a right to privacy in the Constitution." Dan Coats was quoted in *The Washington Post* saying that she cited the liberty clause as implying the right to privacy in the Constitution. And White House spokesman Jim Dyke, who was briefed about this meeting, said that she was asked about privacy and she cited the Constitution's liberty clause.

So we have two White House people saying that she spoke to the liberty clause with respect to privacy. We have a senator, the Chairman of the Judiciary Committee, saying that she thought there was a right to privacy. What did she say?

MR. McCLELLAN: Okay, Bill, let me respond to your question, because I was coming to the answer to that question. I appreciate that you want to write stories and there will be plenty of opportunity to write stories about Harriet Miers' views and her experience and her judicial philosophy as the confirmation process moves forward. These are courtesy visits. As I said, as a general rule, Harriet has not gotten into discussing specific cases. Now, there will be confirmation hearings that will be taking place. These are issues that I fully expect will come up during the course of those confirmation hearings before the Senate Judiciary Committee. Harriet looks forward to answering the questions that they bring up and talking about these matters, and let's let those confirmation hearings take place.

[The next questions were on Iraq and Palestine. Later there was a question about Miers' brief suspension of her license to practice of law in the District of Columbia because she had overlooked several notices to pay her \$165 bar association dues in mid-2004. Then the following question occurred:]

Q In her lengthy recitation of her legal background, she does mention very limited experience in trials that went to verdict or judges. She notes, by the nature of her practice, many things get settled. I think the number may have been as few as four or five cases actually tried to verdict. Is that a whole [sic] in the resumé [sic] of a Supreme Court nominee?

MR. McCLELLAN: I don't know about that, Ken. I'd have to double-check that, but she has litigated many cases in state and federal courts, and appellate courts, as well. And if you look at her legal experience, it is diverse legal experience. She has litigated cases to verdict and represented a broad range of clients in antitrust, securities, intellectual property and product liability cases, among others. Two examples, as you're aware, the cases she handled for Microsoft and Disney.

She is a highly respected attorney. That's why she was elected by her peers to serve as the first woman president of the Texas Bar Association. That's why she was chosen by her peers through the *National Law Journal* as one of the top 50 women attorneys in the United States. That is the kind of experience that the President was looking for — and someone who has clerked for a federal judge, as well, and someone who has served as the highest levels of our government addressing constitutional issues on a daily basis. She brings a lot of diverse experience to the bench, and a diverse perspective to the bench that will be important, as well, because she has real-life experience trying cases, litigating cases, and serving in public positions, as well.

Q And one brief follow-up. In the answer to the question about constitutional experience, she cites her experience here. How much documentation was submitted in conjunction with that question?

MR. McCLELLAN: The questionnaire?

Q Yes.

MR. McCLELLAN: Well, that's available publicly for you all so you can go and look at that. It's all available to you publicly.

[The next question was about opinion poll results, which showed President Bush's job approval at below 40%. There were no further questions about Miers.]

my opinion

Regarding the four revelations on 18 Oct 2005 (see page 28, above), in my opinion:

1. Miers' anti-abortion opinion in 1989 is entirely consistent with her Evangelical Christian religion, as touted by her supporters, see above, beginning at page 18. It appears accurate to use her personal religious faith as a surrogate for her opinion on abortion (see page 19, above).
2. Given the intensity of Miers' pro-life views (i.e., supporting an amendment to the U.S. Constitution is an extraordinary step), it is remarkable that she never discussed abortion law with any of her friends, colleagues, or President Bush. If it is true that she never discussed abortion law with anyone, then that is strong evidence that she was *not* interested in constitutional law, because abortion law has been one of the hottest topics in constitutional law in the past thirty years.
3. Refusing to take a position on *Griswold* hints that she is not only anti-abortion, but also opposes use of contraception. If she truly opposes legal contraception for married couples (i.e., the issue in *Griswold*), then her views are way out of the mainstream.
4. President Bush and Mr. McClellan repeatedly touted her litigation experience. For example, as quoted above, on 8 Oct, President Bush said: "In her law practice, Ms. Miers handled hundreds of cases in state and federal courts, from massive commercial litigation to criminal cases to civil disputes. And no Supreme Court nominee in the last 35 years has exceeded Harriet Miers' overall range of experience in courtroom litigation," Now, her actual credentials reveal that she has tried only eight civil cases to a verdict, and she was the lead attorney in *only four* of those cases. Further, she was involved in *only seven* cases in appellate litigation. It is clear that President Bush greatly exaggerated her litigation experience.

Miers' Interrogatory Responses

The following text of the Senate Judiciary Committee's questions and Miers' answers is copied from a public document available at the *Washington Post* website: "Miers's Responses to Senate Judiciary Committee Questions,"

<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101800616.html>
(18 Oct 2005 11:05 EDT).

Interrogatory Nr. 17 asked:

Constitutional Issues: Please describe in detail any cases or matters you addressed as an attorney or public official which involved constitutional questions.

Part of Miers' response was:

While I was an at-large member of the Dallas City Council, I dealt with issues that involved constitutional questions. For instance, when addressing a lawsuit under Section 2 of the Voting Rights Act, the council had to be sure to comply with the proportional representation requirement of the Equal Protection Clause. Likewise, everyday city council issues potentially implicate constitutional rights, including zoning decisions, voting redistricting, eminent domain, and police activities.

Several law professors (e.g., Cass Sunstein, Jonathan Turley) immediately commented that Miers had wrongly confused the one-man one-vote requirement under the Equal Protection Clause with the separate concept of proportional representation.

Interrogatory Nr. 18 asked:

Legal Activities: Describe the most significant legal activities you have pursued,

Miers had a long response, including:

My experience on the City Council helps me understand the interplay between serving on a policy making board and serving as a judge. An example, of this distinction can be seen in a vote of the council to ban flag burning. The Council was free to state its policy position, we were against flag burning. The Supreme Court's role was to determine whether our Constitution allows such a ban. The City Council was anxious to encourage minority and women-owned businesses, but our processes had to conform to equal protection requirements, as well.

Several bloggers commented on her sentences: "An example, of this distinction

... its policy position, we were against flag burning." The comma after "example" is wrong.

In the second sentence there is an awkward shift from a singular "Council" to a plural "we".

And the U.S. Supreme Court has firmly stated that desecration of the flag, including burning, is protected speech under the First Amendment, although the Dallas City Council arrogantly disagreed. The last sentence, about minorities and women, has nothing to do with the flag-burning issue in previous three sentences.

Miers on "Judicial Activism"

Interrogatory Nr. 28 from the U.S. Senate Judiciary Committee asked:

Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society, generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. a tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. a tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. a tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Ms. Miers' entire written answer on 17 Oct 2005 was:

The role of the judiciary in our system of government is limited. While its role and its independence are essential to the proper functioning of our tripartite system of government, the courts cannot be the solution to society's ills, and the independence of the courts provides no license for them to be free-wheeling. And, of course, parties should not be able to establish social policy through court action, having failed to persuade the legislative branch or the executive branch of the wisdom and correctness of their preferred course. Courts are to be arbiters of disputes, not policy makers. As has been said many times, the role of the courts is to interpret law and not to make it. My own beliefs about these issues have been formed over many years, and find their roots in the beginning of my legal career.

Beginning during my two years as a Federal district court clerk, I was taught by the judge for whom I clerked, Judge Joe E. Estes, the importance of Federal courts' keeping to their limited role. His first task — and therefore mine in assisting him — in every case before him was to examine whether the case was properly in court. Was there a party with standing? Did subject matter jurisdiction exist? Was venue proper? These were all questions — and all related questions going to whether the court had subject matter jurisdiction — that he wanted answered before any others. If the answer was "no" to any of them, the case was dismissed promptly. These basic rules of Article III impose a clear responsibility on courts to maintain their limited role.

"Judicial activism" can result from a court's reaching beyond its intended jurisdiction to hear disputes that are not ripe, not brought by a party with standing, not brought in the proper court, or otherwise not properly before the court because of the case's subject matter. An additional element of judicial restraint is to be sure only to decide the case before the court, and not to reach out to decide unnecessary questions. The courts have the essential role of acting as

the final arbiter of constitutional meaning, including drawing the appropriate lines between the competing branches of government. But that role is limited to circumstances in which the resolution of a contested case or controversy requires the courts to act.

As I entered private practice, I grew to appreciate even more the importance of predictability and stability in the law, and came to believe that those values are best served by a rigorous and focused approach to the law. For the legal system to be predictable, the words are vital -- whether they are agreed upon by parties to a contract or are the product of legislative compromise. Many times in practice I found myself stressing to clients the importance of getting the words exactly right if their interests were to be protected in the future. Legal practice also taught me the importance of stability in the law. A lawyer must be able to advise her clients based upon the existing case law. Courts should give proper consideration to the text as agreed upon, the law as written, and applicable precedent. Then our system of justice can achieve appropriate stability, clarity, and predictability. Those values cannot be effectively pursued unless the law and the facts determine the outcome of a case, rather than the identity of the judge before whom a case is brought. Time and again, I saw that principle in real world cases. The importance of the rule of law, as opposed to peculiarities of specific judges, was just as critical in small matters involving individuals as it was big litigation involving millions of dollars.

"Judicial activism" can occur when a judge ignores the principles of precedent and stare decisis. Humility and self-restraint require the judiciary to adhere to its limited role and recognize that where applicable precedent exists, courts are not free to ignore it. Mere disagreement with a result is insufficient to justify ignoring applicable precedent, but reconsideration under appropriate circumstances is also necessary. There are clear examples, like *Brown v. Board of Education*, where revisiting precedent is not only right, it is prudent. Any decision to revisit a precedent should follow only the most careful consideration of the factors that courts have deemed relevant to that question. Thus, whether the prior decision is wrong is only the beginning of the inquiry. The court must also consider other factors, such as whether the prior decision has proven unworkable, whether developments in the law have undermined the precedent, and whether legitimate reliance interests militate against overruling.

As my career progressed, I became an elected official charged with legislative power. In that role, I was able fully to appreciate the difference between the role of those who are to make the law and those who are to interpret it. On the Dallas City Council, we dealt frequently with the legal issues facing the City, and with the legal and constitutional implications of our actions. We set policy for the City by, among other devices, passing ordinances. We understood our role, and we expected the courts to understand theirs — part of which was to respect the policy-making prerogatives of the City Council. There was a vast difference between our vote as a policy matter to prevent the desecration of the American flag, and the job of the courts (including the Supreme Court) to rule whether such an ordinance was constitutional.

Finally, my time serving in the White House, particularly as Counsel to the President, has given me a fuller appreciation of the role of the separation of powers in maintaining our constitutional system. In that role, I have frequently dealt with matters concerning the nature and role of the Executive Power. And by necessity my work has required that I deal with the power of Congress in relation to the Executive. The remaining, and essential, component in our system is of course the power of the Judiciary. The Judicial Branch has its own role to play in the separation of powers. It is part of the system of checks and balances.

In interpreting the law in the course of deciding contested cases and controversies, the Supreme Court holds the Executive and Legislative Branches to their respective constitutional roles.

Judicial review by the Supreme Court, including determining the meaning of the Constitution and declaring unconstitutional the actions of another branch of government, is a tremendous power exercised by judges who are not accountable to the electorate. Because their power is so great, and because it is largely unchecked, judges must be vigilant in exercising their power in a humble, prudent, and limited way. The courts must always be ready to decide cases according to the Constitution and laws of the United States, and to do so fairly and without regard to the wealth or power of the litigants before them. But it is just as important for the courts to stand ready not to decide in instances that do not call for a decision.

My experience working for Judge Estes provided another valuable lesson. He decided every case according to the law and facts, and he did not worry about the potential for a negative reaction to his decisions. He felt no pressure to please anyone. His only lodestar was the law. The example of Judge Estes helped to instill in me an appreciation for the importance of judicial independence that has only grown stronger over time. Criticism of courts that overstep their role is justified. We must zealously guard, however, the independence of the courts. While legitimate criticism of judicial activism is healthy, even essential, we must be wary of unduly criticizing judges merely because we disagree with the result in a particular case. Judges are given life tenure and independence to shield them from the potential tyranny of the majority. While life tenure and independence should not be a license to usurp the rule of law in favor of a rule of man, they provide an essential structural protection to ensure that judges are able to make decisions based only on the fundamental vision of the Founders — the rule of law.

my opinion

Notice that she talks mostly about *her* experience, including a substantial amount of words about her clerking for Judge Estes during 1970-72 (she mentions his name *three* times in two paragraphs), but she cites only *one* court case, and she seems to avoid answering the question about “judicial activism”. Most experts on constitutional law would cite *Madison v. Marbury*, the first U.S. Supreme Court case to consider the role of the judiciary in the USA. Instead, Miers cited *Brown v. Board of Education*, which is actually a good example of liberal judicial activism, where the justices of the U.S. Supreme Court ordered schools desegregated, despite the wishes of [racist] state and local governments. I am pleased that Miers approves of *Brown*, but if liberal activist judges can effect social change in *Brown*, why can’t those same liberal activist judges effect social change in *Roe v. Wade*? Of course, Miers does *not* tell us the answer.

Her remark:

The Judicial Branch has its own role to play in the separation of powers. It is part of the system of checks and balances. In interpreting the law in the course of deciding contested cases and controversies, the Supreme Court holds the Executive and Legislative Branches to their respective constitutional roles.

sounds like vague generalities from a high school student's essay examination. Miers does *not* explain *how* the "system of checks and balances" shapes the role of the U.S. Supreme Court, although this system is truly an integral part of understanding the role of judges in the USA.

A few days after Miers submitted her answers, Senator Arlen Specter, the Chairman of the Senate Judiciary Committee and Senator Patrick Leahy, the ranking Democrat on the Senate Judiciary Committee sent a letter to Ms. Miers asking her to redo her answers to several interrogatories. Senator Leahy characterized the comments he had heard from other Senators on the Judiciary Committee about Miers' answers: "The comments I have heard range from incomplete to insulting."¹² Miers agreed to provide revised answers by 18:00 EDT on Wednesday, 26 Oct 2005. White House staffers submitted 59 pages of revised answers at 23:40 on Wednesday.¹³ However, about three hours before the revised answers were submitted to the Senate Judiciary Committee, Miers had asked the President to withdraw her nomination, as explained below, beginning at page 46, so her revised answers were never considered by the Senate.

20 - 26 Oct 2005

20 Oct 2005

At a brief press conference on 20 Oct welcoming the Palestinian leader to the White House, the following exchange occurred:

Q Thanks very much, sir. Senator Specter called the rollout of the Miers nomination "chaotic." Is that a fair criticism? Are you satisfied with the way the nomination has been handled? Would you be willing to release any more documents about her if it would help?

PRESIDENT BUSH: First of all, it's an unusual nomination because she's never been a judge. And so, generally, people are used to looking at different court opinions and how one ruled on this case, or how one ruled on that case. That's not the case with Harriet.

¹² Charles Babington and Michael A. Fletcher, "Senators Assail Miers's Replies, Ask for Details," *The Washington Post*, page A01 (20 Oct 2005) <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/19/AR2005101902402.html> ; Jesse J. Holland, "Senators Say Miers' Answers Inadequate," *Associated Press*, (19 Oct 2005 22:59 EDT).

¹³ Peter Baker and Amy Goldstein, "Nomination Was Plagued By Missteps From the Start," *Washington Post*, (28 Oct 2005 09:42 EDT).

I picked Harriet for a lot of reasons. One reason was because she had never been a judge. I thought it made a lot of sense to bring a fresh outlook of somebody who has actually been a very successful attorney — and not only a successful attorney, but been a pioneer for women lawyers in Texas. I remind you that she was one of the top 50 women lawyers in the United States; she's consistently ranked that way. And so this is a little different process than the norm. I understand that.

Secondly, the questionnaire that she filled out is an important questionnaire, and obviously they will address the questions that the senators have in the questionnaire — or as a result of the answers to the questions in the questionnaire. But one thing the questionnaire does show — if people look at it carefully — is Harriet's judicial philosophy. And it's the main reason I picked her to serve on the bench, if confirmed, and that is that she is not going to legislate from the bench. She will strictly interpret the Constitution.

I said that when I ran for President — I said, if you elect me, I will name people that will have that judicial philosophy. I've now had two chances — one, John Roberts, and now Harriet Miers. And they share the same judicial philosophy. That's what the questionnaire says.

And so Harriet will answer all the questions asked, and — but out of this will come a clear picture of a competent, strong, capable woman who shares the same judicial philosophy that I share.

my comments

First of all, nominating a person who has never been a judge is *not* “unusual”. President Bush himself said so on 3 Oct (see page 5, above). Second, if you had a pain in you eye, would you consult a dermatologist instead of an ophthalmologist, in order to get a “fresh approach”? Miers has no credentials in constitutional law.

24 Oct 2005

On Monday morning, 24 Oct 2005, President Bush met with some reporters at the White House, for five minutes at the beginning of a Cabinet Meeting. Bush said he was *not* providing copies of memoranda that Harriet Miers prepared for him, during her service at the White House. Senator Arlen Specter, Chairman of the Senate Judiciary Committee, had requested copies of documents that were allegedly (according to Senator Specter) not covered by either executive privilege or attorney-client privilege.

Q Mr. President, as a newspaper¹⁴ reported on Saturday, is the White House working on a contingency plan for the withdrawal of Harriet Miers' nomination?

THE PRESIDENT: Harriet Miers is — is an extraordinary woman. She was a legal pioneer in Texas. She was ranked one of the top 50 women lawyers in the United States on a consistent basis. She is — look, I understand that people want to know more about her, and that's the way the process should work.

Recently, requests, however, have been made by Democrats and Republicans about paperwork and — out of this White House that would make it impossible for me and other Presidents to be able to make sound decisions. They may ask for paperwork about the decision-making process, what her recommendations were, and that would breach very important confidentiality. And it's a red line I'm not willing to cross. People can learn about Harriet Miers through hearings, but we are not going to destroy this business about people being able to walk into the Oval Office and say, Mr. President, here's my advice to you, here's what I think is important. And that's not only important for this President, it's important for future Presidents.

Harriet Miers is a fine person, and I expect her to have a good, fair hearing on Capitol Hill.

Thank you all for coming.

Later in the morning of 24 Oct, a press briefing was held at the White House, at which the following questions about Harriet Miers were asked:

Q The President seemed to rule out releasing any internal White House documents about Harriet Miers this morning. Is there any room for compromise there? Are there any documents that might — that might fit the — that he might be able to —

MR. McCLELLAN: Well, we're working very closely with the Senate Judiciary Committee and Senator Specter and others to make sure that the Senate has the information they need to do their job. The confirmation process is still in the early stages. Two weeks from today, Harriet Miers will be going before the Judiciary Committee and beginning the hearings process. She has visited with 23 senators as part of the initial courtesy visits, so that they can get to know her a little bit better. She is continuing those visits today and this week. She looks forward to going before the Judiciary Committee and answering their questions. I'm sure they'll have a lot of questions and there will be hours of testimony, and it will be an opportunity to explore her qualifications and her experience and talk more about her judicial philosophy. She has outlined that judicial philosophy very clearly in the questionnaire that she previously responded to.

When it comes to White House documents, the President made it very clear that there's an important principle involved: It is a matter of separation of powers. The President depends on his staff to

¹⁴ I believe the reference is to: Ralph Z. Hallow and Charles Hurt, "Insiders see hint of Miers pullout," *Washington Times*, <http://washingtontimes.com/national/20051021-101749-1597r.htm> (21 Oct 2005). This article begins with the sentence: "The White House has begun making contingency plans for the withdrawal of Harriet Miers as President Bush's choice to fill a seat on the Supreme Court, conservative sources said yesterday."

receive open and candid advice as he moves ahead on the decision-making process. It would be unprecedented for a sitting President to release deliberative decision-making documents while they are in office. That is unheard of. It would have a chilling effect on the ability of the President to continue to receive sound and open and candid advice from his advisors.

Q Scott?

MR. McCLELLAN: Go ahead.

Q Well, it seems like this is heading toward the showdown, then it's -- if the Judiciary Committee says, we don't go anywhere unless we have some documents from the White House, would that be a cause for withdrawal of Harriet Miers?

MR. McCLELLAN: Well, "if" you could ask me that question at that point, "if" they start saying that --

Q I mean, it seems to be going that way.

MR. McCLELLAN: -- but I think the President has previously emphasized the importance of this principle and stated the reasons why that principle is in place, and the importance of protecting it.

Q So, again, just to make sure there's absolutely no --

MR. McCLELLAN: Well, I'm not aware of any official requests that have come our way at this point regarding what you're referring to, so I wouldn't want to speculate on it. The President is confident that Harriet Miers is going to be confirmed. Harriet Miers is someone who is exceptionally well qualified to serve on our nation's highest court. I would encourage you to go and look at her qualifications and experience and compare that to previous justices who did not come from the court that have been confirmed to our nation's highest court.

Go ahead, Terry.

Q This is a bipartisan request, it's not a partisan attack on the nominee. And the senators of both parties are saying they need this information in order to make a decision. Why is the President --

MR. McCLELLAN: Well, again, I'm not aware of any official request that has come to our attention. I've seen some of the comments that senators have made. So let's see if those official requests come, and what they may be. But I think the President was making very clear, yet again, what our position is when it comes to those documents.

Q But you accept this as a good-faith request from bipartisan representatives?

MR. McCLELLAN: Again, I'm not aware of any official request that has come our way at this point. We're going to continue to work closely with the Judiciary Committee to make sure they have the appropriate information to be able to carry out their duties. And we're also going to look forward to the confirmation hearings. Harriet Miers is looking forward to that. That will be an opportunity for her to discuss a lot of these issues directly with the senators and directly with the American people, who will, I'm sure, tune in to watch those hearings.

[The next question was about Syria's role in Lebanon. Later the following question about Miers occurred.]

Q Scott, I've got a two-part. The Washington Post reports that after Senator Specter told reporters that nominee Harriet Miers had endorsed *Griswold*, she telephoned him to say that she had not endorsed *Griswold*. And my question: Since the case of *Griswold versus Connecticut* resulted in the court overturning Connecticut's law against selling or even counseling about contraceptives, isn't her opposition to this as serious in the President's mind as her expressed disagreement with what is his support of abortion in cases of rape and incest?

MR. McCLELLAN: I think Senator Specter put out a statement last week. Harriet Miers had a further discussion with him. And that issue was clarified how it was originally reported.

And in terms of her views on various issues, that's what the confirmation hearings are for. There will be a number of questions that will come up, I'm sure along the lines of what you're bringing up now. Harriet Miers looks forward to answering those questions when she goes before the Judiciary Committee. I think that the American people will see that she is someone who is exceptionally well qualified and someone who has a conservative judicial philosophy. She has outlined that philosophy in the questionnaire that she's already responded to. She is someone that has deep respect for our Constitution and our laws, and believes that we should look at the law and apply the law; we should not be — judges should not be making law from the bench.

[The next question was on illegal immigrants entering the USA. Later the following occurred.]

Q Scott, is protecting executive privilege and not doing anything that might be perceived as weakening it more important than winning confirmation for Harriet Miers?

MR. McCLELLAN: Well, we're confident that Harriet Miers will be confirmed.

Q Which is more —

MR. McCLELLAN: I don't accept the premise, because we're confident that she'll be confirmed.

Q Well, we have senators saying it could —

MR. McCLELLAN: It's not either/or.

Q We have senators saying it could be a deal-breaker if they don't see some paperwork.

MR. McCLELLAN: It's not an either/or I don't think.

my opinion

I appreciate that the President wants to keep *all* advice to him confidential, in order to encourage advisers to speak candidly and frankly to him, instead of only saying what is suitable for open publication. The problem is that the White House itself touted Ms. Miers's experience advising the President as evidence of her understanding of constitutional law.¹⁵ But now the White House refuses to disclose any of that evidence of her alleged understanding of constitutional law.

In litigation, there are many situations in which evidence may be *inadmissible* at trial, because the evidence is privileged. However, *if* the party with the privileged evidence chooses to put the privileged matter in issue, then, in fairness, that party has waived its privilege and must fully disclose the evidence.¹⁶ One can not selectively disclose parts of evidence that are favorable and

¹⁵ See above, beginning at page 19.

¹⁶ For example, a plaintiff may not sue for physical injury (thus putting the extent of their injury and their prognosis in issue) and also assert physician-patient privilege to make confidential their medical records about that alleged injury. Either the plaintiff grants the defense access to the plaintiff's relevant medical records or the plaintiff's claim will be dismissed.

withhold the other parts that are not favorable: fairness demands that either all or none of the evidence be presented.¹⁷ Because President Bush never attended law school, he would not know such rules of evidence, but Miers should have explained it to him. Strictly speaking, a rule of civil litigation is *not* applicable in the confirmation of a nominee by the Senate. The President can deny access to the information and take the risk that the Senate may refuse to confirm his nominee. However, I argue that considerations of fairness are the same in civil litigation and in politics: the President should *not* make a claim of competence and experience for his nominee and then refuse to disclose documents that allegedly support his claim of competence and experience.

There is another side to this issue of Ms. Miers' privileged advice to President Bush. During the next few years, we can expect the U.S. Supreme Court to hear cases involving indefinite detention of alleged terrorists, the detention of "unlawful combatants" at the U.S. Navy Base in Guantanamo Cuba, the Patriot Act, and other items on which Miers may have given legal advice to President Bush. Because of her prior involvement in these policy issues, Miers would need to recuse herself when those issues come before the U.S. Supreme Court. It would be better to nominate a justice who would not have such conflicts of interest.

Ironically, given Miers' support for an anti-abortion Constitutional amendment and her membership in an Evangelical Christian church, nearly all of the criticism of Miers is coming from pro-life activists, conservative commentators who are pro-life, and Republican politicians who are pro-life. Both the Democratic party (with the exceptions of Senator Charles Schumer of New York, and Senator Patrick Leahy of Vermont, who is the ranking Democrat on the Senate Judiciary Committee) and pro-choice activists have been largely silent on the Miers nomination. The response of liberal democrats seems to be accurately described by a comment I saw in a blog:

And the Democrats? Each day they resemble a 7-Eleven employee who has been told that if there's a robbery, don't resist but give them what they want because resisting could only make things worse.

Joe Gandelman, "More Problems For Harriet Miers,"

<http://www.themoderatevoice.com/posts/1129796950.shtml> (20 Oct 2005).

Nonetheless, I find the silence from the pro-choice activists strange, because if Miers is confirmed, Miers would apparently vote to overrule *Roe v. Wade*. Surely the pro-choice advocates know that the recent abortion cases in the U.S. Supreme Court have mostly been decided by 5 to 4 votes, making the constitutional right to abortion hanging by a margin of a single-vote. The possibility of Miers becoming a Justice should be a *serious* concern to the pro-choice activists, and *not* a reason to remain silent.

¹⁷ Federal Rules of Evidence, Rule 106.

25 Oct 2005

The White House Press Briefing for 25 Oct contained only one question about Miers:

Q Sure. New York Congresswoman Carolyn Maloney and 31 other members of the House issued this statement yesterday: “We have a Supreme Court nominee who won't even say if she supports a 40-year-old Supreme Court decision affirming women's right to access birth control, and it is important the President tells the nation whether or not he opposes birth control, too.” And my question: Can you clarify whether or not he opposes birth control, too? Yes or no?

MR. McCLELLAN: Les, I think the President has made his views known on this issue.

Q Why don't you just clarify, yes or no?

MR. McCLELLAN: And what the focus has been from this administration is on promoting abstinence programs, that that ought to be on the same level as the education funding for teen contraception programs. And that's what the President's position has been, and I've stated to that previously. You've asked this question before. I disagree with the statement that was made regarding Harriet Miers. She is going to be going before the Senate Judiciary Committee in less than two weeks. She looks forward to answering their questions. And I think that people should not try to rush to judgment on it.

For the record, the *Griswold* case was about the right of married adults to use contraception, which is *irrelevant* to Mr. McClellan's reply about contraception for *unmarried* teenagers.

26 Oct 2005

The White House Press Briefing for 26 Oct contained only one series of questions about Miers:

Q I'm going to divert momentarily. Harriet Miers — there's a picture emerging, despite the fact that the President keeps trumpeting her qualifications, that she appears in meetings with Republican senators to be singularly unimpressive. Why is that the case, do you think? And what are you prepared to do about it?

MR. McCLELLAN: I don't know that I would agree. She has had 28 courtesy visits now with members of the Senate.

Q You can count them, but the Republicans are saying publicly that they're not prepared to throw their weight behind her yet.

MR. McCLELLAN: I think you're seeing a lot of members of the Senate saying, we want to hear what she has to say in the hearings, before they make a judgment. And remember, with Chief Justice Roberts, he had gone through confirmation hearings before. A couple years before he had been confirmed to the Supreme Court, so there was a familiarity with his views and his experience and his judicial philosophy.

With Harriet Miers, there are many in the Senate that simply did not know her previously, although she is widely respected within the legal profession. She is someone who is highly qualified and in a unique position to bring a different perspective to the United States Supreme Court. This is still early in the confirmation process. The hearings will give people an opportunity to ask her questions where she can talk in more detail about her experience and her background and talk about her judicial philosophy. It's a philosophy that is based on interpreting our Constitution and our laws, and not making law from the bench. And we're confident that senators, as they come to know her, will recognize that she will make an outstanding member of the United States Supreme Court.

Q But first impressions matter, too, and they're not just first impressions, because numerous lawmakers have had some experience with her as — in her role here at the White House, and she does not seem to be making —

MR. McCLELLAN: Not numerous. I mean, I think some have, but not to a large extent. And certainly, the senators from the state of Texas know her well and they are strongly supportive of her, and as others come to know her, I think they will be, as well. But these are courtesy visits. This is an opportunity for her just to start to get to know the members of the Senate and for them to start to get to know her. She is also providing additional information. She'll be sending some additional responses to questions to the Senate today. And then she looks forward to going before the Judiciary Committee and answering their questions.

Q Everything is A-okay on this —

MR. McCLELLAN: Well, we're continuing to move forward on the confirmation process. I think what you're seeing is the confirmation process play out. And senators who don't know her are reserving judgment. And we respect that. That's part of their role to play.

Q Just real quick on the questionnaire that's being sent up. Will there be additional documentation going back up with this questionnaire like there was last time?

MR. McCLELLAN: Well, it's being finalized and it will be going up later today. And we'll get you all —

Q Are you releasing —

MR. McCLELLAN: Well, the Judiciary Committee will provide all that information to you once it goes out. I don't have all the information in front of me to talk to you about.

Q But it will be documentation, not just the questionnaire?

MR. McCLELLAN: Well, they're working to get — in terms of additional documentation that you talk about, we want to make sure the Senate Judiciary Committee has the information they need to be able to move forward on the confirmation process. The President talked about the important principle that needs to be respected, but we're going to continue to work with them as they move forward.

Washington Post article, 26 Oct

The front-page article in the *Washington Post* for Wednesday, 26 Oct 2005, revealed a speech that Ms. Miers had given in 1993. The obvious conclusion from this speech was that Miers would be a liberal judicial activist.

In a 1993 speech to a Dallas women's group, Miers talked about abortion, the separation of church and state, and how the issues play out in the legal system. “The underlying theme in most of these cases is the insistence of more self-determination,” she said. “And the more I think about these issues, the more self-determination makes sense.”

In that speech and others in the early 1990s when she was president of the Texas Bar Association, Miers also defended judges who order lawmakers to address social concerns. While judicial activism is derided by many conservatives, Miers said that sometimes “officials would rather abandon to the courts the hard questions so they can respond to constituents: I did not want to do that — the court is making me.”

....

In an undated speech given in the spring of 1993 to the Executive Women of Dallas, Miers appeared to offer a libertarian view of several topics in which the law and religious beliefs were colliding in court.

"The ongoing debate continues surrounding the attempt to once again criminalize abortions or to once and for all guarantee the freedom of the individual women's [sic] right to decide for herself whether she will have an abortion," Miers said.

Those seeking to resolve such disputes would do well to remember that "we gave up" a long time ago on "legislating religion or morality," she said. And "when science cannot determine the facts and decisions vary based upon religious belief, then government should not act.

Jo Becker, "In Speeches From 1990s, Clues About Miers Views: Nominee Defended Social Activism," *Washington Post*, (26 Oct 2005)

<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/25/AR2005102502038.html>

Miers Quits

In an op-ed piece published on Friday, 21 Oct 2005, Charles Krauthammer suggested a way for Harriet Miers to gracefully exit.

The president's mistake was thinking he could sneak a reliable conservative past the liberal litmus tests (on abortion, above all) by nominating a candidate at once exceptionally obscure and exceptionally well known to him.

The problem is that this strategy blew up in his face. Her obscurity is the result of her lack of constitutional history, which, in turn, robs her of the minimum qualifications for service on the Supreme Court.

So, imagine the hearings. First she will have to pass an implicit competency test. As case upon case is thrown at her on national television, she dare not respond, as she apparently did to Sen. Chuck Schumer while making the rounds, that she will have to "bone up on this a little more." Then there will be the withering fire of conservatives such as Sen. Sam Brownback who will try to establish some grounds to believe that (a) she has a judicial philosophy and (b) it is conservative.

And then there will be the Democrats who, in their first act of political wisdom in this millennium, have held their fire on Miers, under the political axiom that when your opponent is committing suicide, you get out of the way.

....

Finally, a way out: irreconcilable differences over documents.

For a nominee who, unlike John Roberts, has practically no record on constitutional issues, such documentation is essential for the Senate to judge her thinking and legal acumen. But there is no way that any president would release this kind of information — "policy documents" and "legal analysis" — from such a close confidante. It would forever undermine the ability of any president to get unguarded advice.

That creates a classic conflict, not of personality, not of competence, not of ideology, but of simple constitutional prerogatives: The Senate cannot confirm her unless it has this information. And the White House cannot allow release of this information lest it jeopardize executive privilege.

Hence the perfectly honorable way to solve the conundrum: Miers withdraws out of respect for both the Senate and the executive's prerogatives, the Senate expresses appreciation

for this gracious acknowledgment of its needs and responsibilities, and the White House accepts her decision with the deepest regret and with gratitude for Miers's putting preservation of executive prerogative above personal ambition.

Faces saved. And we start again.

Charles Krauthammer, "Miers: The Only Exit Strategy," *The Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102001635.html> (21 Oct 2005).

At 20:30 EDT on Wednesday, 26 Oct 2005, Harriet Miers is reported to have asked President Bush to withdraw her nomination for the reason suggested five days earlier by Krauthammer.

Miers' Letter

Here is the text of the letter that Ms. Miers gave to the President on Thursday morning, 27 Oct:

Dear Mr. President:

I write to withdraw as a nominee to serve as an Associate Justice on the Supreme Court of the United States. I have been greatly honored and humbled by the confidence that you have shown in me and have appreciated immensely your support and the support of many others. However, I am concerned that the confirmation process presents a burden for the White House and our staff that is not in the best interest of the country.

As you know, members of the Senate have indicated their intention to seek documents about my service in the White House in order to judge whether to support me. I have been informed repeatedly that in lieu of records, I would be expected to testify about my service in the White House to demonstrate my experience and judicial philosophy. While I believe that my lengthy career provides sufficient evidence for consideration of my nomination, I am convinced the efforts to obtain Executive Branch materials and information will continue.

As I stated in my acceptance remarks in the Oval Office, the strength and independence of our three branches of government are critical to the continued success of this great Nation. Repeatedly in the course of the process of confirmation for nominees for other positions, I have steadfastly maintained that the independence of the executive Branch be preserved and its confidential documents and information not be released to further a confirmation process. I feel compelled to adhere to this position, especially related to my own nomination. Protection of the prerogatives of the Executive Branch and continued pursuit of my confirmation are in tension. I have decided that seeking my confirmation should yield.

I share your commitment to appointing judges with a conservative judicial philosophy, and I look forward to continuing to support your efforts to provide the American people judges who will interpret the law, not make it. I am most grateful for the opportunity to have served your Administration and this country.

Most respectfully,
Harriet Ellan Miers

"Text of Miers's Letter to President Bush," *Washington Post*, (27 Oct 2005)
<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102700680.html> .

President Bush

President Bush released the following statement on the morning of 27 Oct:

Today, I have reluctantly accepted Harriet Miers' decision to withdraw her nomination to the Supreme Court of the United States.

I nominated Harriet Miers to the Supreme Court because of her extraordinary legal experience, her character, and her conservative judicial philosophy. Throughout her career, she has gained the respect and admiration of her fellow attorneys. She has earned a reputation for fairness and total integrity. She has been a leader and a pioneer in the American legal profession. She has worked in important positions in state and local government and in the bar. And for the last five years, she has served with distinction and honor in critical positions in the Executive Branch.

I understand and share her concern, however, about the current state of the Supreme Court confirmation process. It is clear that Senators would not be satisfied until they gained access to internal documents concerning advice provided during her tenure at the White House — disclosures that would undermine a President's ability to receive candid counsel. Harriet Miers' decision demonstrates her deep respect for this essential aspect of the Constitutional separation of powers — and confirms my deep respect and admiration for her.

I am grateful for Harriet Miers' friendship and devotion to our country. And I am honored that she will continue to serve our Nation as White House Counsel.

My responsibility to fill this vacancy remains. I will do so in a timely manner.

White House Press Gaggle

There was a 12 minute long “Press Gaggle” in the White House, beginning at 09:04 on 27 Oct 2005, of which the entire transcript follows.

MR. McCLELLAN: Good morning, everybody. You have the letter from Harriet Miers and you also have the statement by the President. I'm here to kind of answer whatever other questions you might have. I also want to give you a couple of tick-tock items.

She called the President last night at 8:30 p.m. He was in the residence when she called him, to inform her -- inform him of her decision. This morning, shortly after 8:30 a.m., she walked into the Oval Office and handed the President her letter of resignation, which you have a copy of in your hand.

And I think probably it's best just to go to questions from there.

Q What was the real trigger for her withdrawing? Was it the issue of documents and the fight that you're going to have in the Senate over executive privilege, or was it all of the opposition she was taking from the right? What was it?

MR. McCLELLAN: I think you hit on it in the beginning of your question. I mean, she recognized that the process was headed toward an unresolvable impasse. There are a combination of factors that created what is now an unresolvable conflict. She recognizes she cannot reveal confidential advice or documents during her time serving in the executive branch. She cannot answer questions on specific issues in Supreme Court cases that previous nominees, like Chief Justice Roberts, Justice Ginsburg and others have, rightly, declined to answer, and even those who didn't come from the court, as well.

And senators had made it clear that she would be required to cross those lines in the confirmation process, given her different and unique record that she has and the fact that she does not have a judicial record or other substantial public writings, opinions or briefs on constitutional matters. And she has -- and the President talks about it again in his letter -- her legal experience is primarily as a practicing attorney and as a high-level government official. Much of her constitutional experience is confidential and protected from disclosure by the executive branch. And given today's confirmation process, I think it's those combination of factors that are almost unique to her record that have created this conflict. And we recognize --

Q Couldn't you just --

MR. McCLELLAN: No. She recognized this, and we recognized this from her meetings with senators and other discussions that the White House team had with members of the Senate. And we recognized that she would be required to cross those lines that should not be crossed in order to satisfy senators about her judicial philosophy. And so it was --

Q How could you not see that coming, though? I mean, if you knew that all of her legal background was confidential --

MR. McCLELLAN: Well, again, one of the things the President took into consideration was the -- in consultation with senators -- was that you should look outside the court. And there are people who have come from outside the court that have previously gone through this process. But I think that we recognize that today's confirmation process, the culture of today's confirmation process makes it very difficult for somebody with a different background from those who have served on the bench, or who have worked on constitutional issues --

Q Scott, what's the President's reaction? And what does he do now?

MR. McCLELLAN: He is deeply disappointed in the process. He will move forward in a timely manner to name a new nominee, as he indicated in his letter -- or as indicated in his statement.

Q Would that be Miers? Would she maintain her role as the person to seek out --

MR. McCLELLAN: She is going to continue as White House Counsel, and as she indicates in her letter to the President, she looks forward to continuing to help him select people to the bench that have a conservative judicial philosophy, so I fully expect her to be involved, as she was before.

Q Is he also deeply disappointed in the way some of his own allies have treated her and him?

MR. McCLELLAN: We've always been focused on the Senate, not on the outside commentary or outside groups. Our focus has always been on the United States Senate. And it was the discussions that we had had, and the meetings that Harriet Miers had had with senators that led us to the belief that this was simply a conflict that could not be resolved.

Q You can't ignore what the Bill Kristols, the Charles Krauthammers, people who were supportive of him on so many other things have said about this. Has it had -- are you just calling this background noise, has it not had any effect on this?

MR. McCLELLAN: The focus was always on the Senate. And it was Harriet Miers that came to this decision. She made a courageous decision, and the President has only grown deeper in his admiration and respect for her during this process.

Q Did he talk about this with her at all before?

MR. McCLELLAN: Sorry?

Q Did he talk about this at all --

MR. McCLELLAN: No, this was a decision that she came to.

Q He never -- it never came up?

MR. McCLELLAN: No, she was not asked to -- this was a decision she came to.

Q Why is he disappointed with the process --

MR. McCLELLAN: And I think it shows the type of person that she is. She is someone who is very selfless and wise, and she recognized that it was more important to protect this important separation of powers and principle than it was to move forward on her personal ambition.

Q Scott, why is the President disappointed with the process? Because it's inconceivable that you could put forward a nominee whose background and expertise in constitutional law you can't illuminate to the people who have to confirm her.

MR. McCLELLAN: Harriet Miers is an extraordinarily well-qualified individual. And the President reiterated that in his statement that you all now have. And there have been people who have not previously served on the Court that have been confirmed to the nation's highest court. They --

Q Right -- can look into their background.

MR. McCLELLAN: There are people -- well, no, I just pointed out that even previous nominees like -- I mean, look at Chief Justice Rehnquist, or Justice White, or Justice Powell. I mean, they were people that didn't come from the court and they weren't required to answer certain questions. But senators were making it clear to us that because of her unique record that they were going to require her to cross certain lines, and she was not willing to cross those lines.

Q It was specifically in the meetings with the senators that kind of tipped things --

MR. McCLELLAN: Meetings and discussions. It was both her meetings and discussions that members of the White House staff had with senators, as well, as part of your consultations during the confirmation --

Q That gave you an indication that she would have to cross that line?

MR. McCLELLAN: -- during the confirmation process. But, remember, one of the things the senators emphasized at the beginning to the President was that he should look for a different perspective on the court, someone from outside the court. So that's what -- and he is -- he has a lot of respect and admiration for Harriet Miers, and that has only grown by her decision.

Q Scott, forgive me if you did this before I walked in, but as recently as yesterday, you know, you were really standing by this thing. When did she make this decision --

MR. McCLELLAN: Last night, at 8:30 p.m. she called the President. He was in the residence and she called him to inform him of her decision. And then I also mentioned at the top of this gaggle that she walked into the Oval Office shortly after 8:30 a.m. this morning and personally handed him the letter of resignation that you have.

Q What was his reaction? What was his reaction? What did he say? Did any --

MR. McCLELLAN: It's what I just said. I mean, he is --

Q -- what he said to her?

MR. McCLELLAN: Well, I think he just has tremendous respect for Harriet Miers and expressed that to her, as well.

Q So she's going to continue as White House Counsel --

MR. McCLELLAN: Yes.

Q -- as long as she wants?

MR. McCLELLAN: She is continuing as White House Counsel.

Q Is he sorry that she had to go through this?

MR. McCLELLAN: Everybody serves as -- at the pleasure of the President.

Q Well, I mean --

MR. McCLELLAN: So I don't want to --

Q -- basically, she's got her old job back?

MR. McCLELLAN: That's right. It's still her current job, her current job.

Q Right, no harm, no foul.

MR. McCLELLAN: But now she'll be able to return to the day-to-day responsibilities.

Q Is he sorry she had to go through this, Scott?

Q Are we going to hear from the President, himself, in person, on this? And, two, does this mean that you're not going to nominate someone from outside the judicial world to fill that vacancy now? Are you chastened by this experience?

MR. McCLELLAN: The President is going to move forward in a timely manner. He's going to select someone who he feels is the best person for the position. And I don't want to speculate before that, but as I indicated, we fully recognize the culture of today's confirmation process. And we have gone through this experience and that is taken into account, I think.

Q Is he going to speak on it -- is he going to speak on it?

MR. McCLELLAN: I don't expect him to at this point.

Q Not today?

MR. McCLELLAN: That's why we put out the statement from the President. But I'll keep -- I'll be with him, so I'll keep you posted.

Q So he met with her last night at 8:30 p.m., that's when he learned --

MR. McCLELLAN: She called him last night.

Q She called him?

MR. McCLELLAN: Yes. He was in the residence.

Q What about this whole idea that Harriet was a stalking horse for an ultra-conservative nominee that will now be named?

MR. McCLELLAN: That's an interesting conspiracy theory. The President nominated her because he believes she was the best person to fill the position and based on the consultations he had with members of the Senate, who said he should look outside the court.

Q Scott, how much of a difference did it make in this that some of the President's own staunchest supporters didn't want to fight for her or even --

MR. McCLELLAN: I had said, I think before you walked in, Terry, that our focus was always on the Senate, not on the outside commentary.

Q Scott, it was quite an ordeal for her. Is he sorry that she had to be raked through this the way she was? So many things came up and --

MR. McCLELLAN: Well, I think all of us here at the White House share the President's sentiment and are deeply disappointed by the process, because we all know Harriet Miers very well and all of us that know her have only the deepest respect for her and know what an extraordinarily capable individual she is. We look forward to continuing to work with her here at the White House.

Q Has it taken a toll on the President and on her, personally, the questions raised about her intellect and her law firm and everything else that has come up?

MR. McCLELLAN: The President is well-aware of the political environment here in Washington, D.C., and his job is to continue to move forward on what the American people care about. And that's what he's going to do. And he will move forward quickly to fill this vacancy.

Q Is it safe to say the next nominee is not going to be a White House employee? (Laughter.)

MR. McCLELLAN: He will let you know who the next nominee is in due course.

Q And, Scott, just to be clear, she is going to take on the job that she had before, to help the President vet the next candidate, the next nominee?

MR. McCLELLAN: I haven't had a discussion with her about it in any detail, but I fully expect her to continue to be involved like she was before.

Q Scott, had Republican senators, senior Republicans urged the President or urged Harriet Miers to turn down this nomination, stop this nomination?

MR. McCLELLAN: I'm sorry?

Q Had he heard, or had she heard from any of the senior Republican senators to do this, not to go forward with this nomination? Was this at the urging of any --

MR. McCLELLAN: Let me check on that. I don't know that we had specifically heard that from members of the Senate. I mean, obviously, they had expressed their views publicly. I think that those are the same views that they were expressing privately to us during the confirmation process. And that's what became clear to us in the consultations that members of the team that were supporting her confirmation heard, and that she heard in some of her meetings with members of the Senate --

Q Well, what did they say --

Q Withdraw?

MR. McCLELLAN: -- so I don't know of any such request.

Q Well, what did they say, basically, if we can't get this information there's no sense in going --

MR. McCLELLAN: No, I mean, senators -- it's what I said earlier, that senators had made it clear that they were going to require her to cross certain lines that we don't think should be crossed.

Q But did some senior senators on your side say, if you can't give us this information, there's no sense in even taking this any further? I mean, that sort of suggestion to withdraw her?

MR. McCLELLAN: I've not heard that. I've not heard it characterized that way.

Q -- like saying -- did they sort of couch it in --

MR. McCLELLAN: No, John, I just said I've not heard it characterized that way. I mean, if I find out differently or additional information, I'll keep you posted.

Q Did anyone on the Hill know that you were withdrawing her nomination?

MR. McCLELLAN: Thanks.

Q Thanks, Scott.

Senator Schumer

Senator Charles Schumer, a Democrat on the Judiciary Committee, released the following terse statement at his website on 27 Oct 2005:

Harriet Miers is a fine and capable person, but this was clearly the wrong position for her. Her gracious withdrawal saves Harriet Miers and the nation from a difficult and agonizing process and decision.

There is now one clear path for the President, to choose a knowledgeable and mainstream successor in the mold of Sandra Day O'Connor. These are very difficult times for the country and the nation cries out for unity. Mr. President, this is a time for leadership, please help bring America together with a choice that unites, not divides us.

I think "mainstream" is a code word: Schumer is urging that President Bush nominate a liberal democrat to the U.S. Supreme Court. Schumer's "mainstream" candidate would be an "extremist" to Bush, and vice versa. Schumer's call for "unity" is an illusion: the liberal democrats want *Roe v. Wade* to continue to be the law, while the right-wing Christians want *Roe v. Wade* overruled — there is no way that *both* groups will be satisfied with some kind of "unity".

The Economist

The Economist, an international news magazine published in London, England, summarized the nomination of Harriet Miers in two paragraphs:

This week, Mr Bush suffered one hefty blow to his authority and prepared to receive another. On October 27th Harriet Miers, his personal lawyer, whom he had foolishly nominated to the Supreme Court, withdrew. The excuse given was that she could not answer the questions asked of her by increasingly indignant senators without breaking rules about client privilege. In fact, her nomination was in trouble with politicians of all persuasions for the simple reason that she was woefully underqualified for the highest court in the land. Even social conservatives objected to a born-again Christian who opposed abortion on the ground that she looked like a presidential crony.

It was also a personal humiliation for Mr Bush. He had vouched for her character. His basic pitch on her behalf had come down to two words: trust me. But many senators

were not inclined to do so. They saw a woman with little experience of constitutional law, whose main qualification seemed to be a fawning admiration for "the most brilliant man she had ever met". Ms Miers's written answers to the Judiciary Committee were so embarrassing that senators from both sides asked her to resubmit them. This was clearly an exercise in nepotism rather than careful selection.

“Storm Damage,” *The Economist*, Vol. 377, p. 13, (29 Oct 2005).

Conclusion

The dispute over privileged documents was only a way of saving face, as suggested by Mr. Krauthammer above. There are two real reasons why the nomination of Harriet Miers was in difficulty:

1. she had no publicly verifiable credentials in constitutional law (i.e., she was *unqualified* to be a justice) and she displayed her ignorance during “courtesy visits” with Senators.
2. her personal views on political and social issues were *unknown*. There was some evidence that she was anti-abortion¹⁸ and some evidence that she would be a liberal judicial activist,¹⁹ but mostly she seems to have rarely expressed an opinion about these important issues. Although the evidence about her opinions is meager (i.e., she was a stealth candidate), I conclude²⁰ that Miers told people what she thought they wanted to hear: in 1989 she agreed with pro-life advocates, and in 1993 she told a presumed feminist audience at a meeting of the Executive Women of Dallas what appears to be a liberal, pro-choice position.

Moreover, President Bush grossly exaggerated her litigation experience.²¹

On 27 Oct 2005, Senator Trent Lott is reported to have said: “Let's move on. In a month, who will remember the name Harriet Miers?”²² Well, if we are to learn anything from history, politicians should learn from this debacle: (1) stop nominating stealth candidates who have little or no paper trail and (2) do *not* exaggerate a nominee's credentials and experience.

¹⁸ See above, at page 28.

¹⁹ See above, at page 45.

²⁰ See also my comments above, at page 26.

²¹ See above, at page 33.

²² Terence Hunt, “Miers Withdraws Under Mounting Criticism,” *Associated Press*, (27 Oct 2005 12:01 EDT); David Espo, “President pulls the plug on Miers nomination,” *Chicago Sun-Times*, (28 Oct 2005).

Finally, on 27 Oct 2005, *The San Francisco Chronicle* had an unscientific online poll on their website's homepage that asked:

What do you think of Harriet Miers' withdrawal?

(A) Good, she wasn't qualified.

(B) Bad. Bush bowing to right wing.

(C) I can hardly wait to see who he dredges up next.

Of a total of 1215 votes by midnight Pacific Time, 27% chose (A), 12% chose (B), and a whopping 61% chose (C). This terse poll response seems to summarize the disillusioned mood of the public in the USA.

Links

The following links are *not* a bibliography for this document. I collected the following links on 29 Oct 2005, *after* the above document was completed.

<http://www.loc.gov/rr/law/miers.html> Library of Congress list of articles by Miers (mostly in the *Texas Bar Journal*) and links to other webpages about Miers.

<http://library.law.smu.edu/miers/index.htm> Southern Methodist University Law Library bibliography about Miers. Miers attended law school at SMU.

<http://www.law.umich.edu/library/news/topics/miers/miersindex.htm> University of Michigan Law Library's comprehensive list of material about Miers, including many links.

<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/03/AR2005100300305.html> *The Washington Post* collection of links to its own stories, as well as copies of documents.

<http://www.npr.org/templates/story/story.php?storyId=4933926> National Public Radio links to 82 stories between 3 Oct 2005 and 29 Oct 2005.

This document is at **www.rbs0.com/miers.pdf**
created 14 Oct 2005, revised 1 Nov 2005

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