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And why those rules need to change

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And why those rules need to change

by Daniel E. Witte Esq.

President George W. Bush recently nominated his White House Counsel, Harriet Miers, to be an Associate Justice for the United States Supreme Court. Bush's nomination broke "the rules" established by Beltway Conservatives over the course of the last twenty-five years. The result has been an intra-party Republican uproar on the eve of Miers' confirmation hearing.

However disturbing Harriet Miers may or may not prove to be as a nominee or a justice, people of all political stripes should be very concerned about the overreaching arguments being advanced by Beltway Conservatives in order to engineer her defeat. These arguments put at issue the very nature of the judiciary and therefore have implications far beyond one nomination.

This article attempts to convey the patronizing, elitist tone of these arguments and then explains why the objections are disingenuous.

1) Harriet did not go to Harvard Law School.

Six justices on our current Supreme Court attended Harvard for their primary law degree (Ruth Bader Ginsberg finished her last year at Columbia), two went to Stanford or Yale. The remaining justice, John Paul Stevens, is an octogenarian Northwestern alum who was nominated during a long-lapsed political era. Not a single justice graduated from a public law school, a church-sponsored law school, or a law school in a Red State. Some "conservatives" prefer to perpetuate this status quo.

Ann Coulter has articulately summarized the argument for Miers' loudest critics, who, as Brit Hume observed, seem to be disproportionately drawn from the ranks of graduates from the Ivy League. Coulter complains that "Harriet Miers went to Southern Methodist Law School, which is not ranked at all by the serious law reports and ranked No. 52 by *US News and World Report*. . . . Being a Supreme Court justice ought to be . . . only for super-nerds trained in legal reasoning like John Roberts. . . . I think we want the nerd from an elite law school. . . . [W]hen you find a conservative from an elite law school you have really got something." According to Coulter, law graduates from Red-State institutions lack the expertise to cope with the "tropes and tricks" employed by clever Ivy Leaguers.

In truth, one of the strongest arguments for Harriet Miers is that she was educated somewhere other than in the Ivy League or any geographic region where Ivy League graduates tend to congregate. The Court desperately needs intellectual diversity, meaning nourishment from new schools of legal thought. One or two Harvard justices do not necessarily pose a problem, but it is dangerous to allow one law school to define the entire pool of potential nominees for the Supreme Court. The current state of affairs places far too much power in far too few hands, creating a class of self-serving philosopher kings who interact in a self-defined echo chamber.

As inconceivable as it may be to Beltway Conservatives, there are many, many bright people who attend other law schools because they choose to, not because Harvard has rejected their application. Some people dislike living in the northeast. Starting at least as early as Benjamin Franklin, some people are simply allergic to the atmosphere at Harvard and refuse to play the game required to study or teach at Cambridge. Others are from families of modest means and need to avoid incurring a heavy debt load. Some may prefer to study where they can live closer to their families or maintain a semblance of normal life. Due to its legacy and affirmative action policies, Harvard does not even admit all of the highest achieving or most credentialed applicants who do apply.

Studying outside the Ivy League may be the only way to study certain legal materials, participate in conservative research or writing, or avoid other opportunity costs associated with study in the Ivy environment. Harvard entirely banishes certain ideas, topics, source materials, and instructors from the realm of consideration. Mental, emotional, and spiritual anemia occurs for many of the "conservatives" who choose to put themselves on a three-year starvation diet at the Crimson law school. All too often the result is a graduate who can express flawed ideas in impeccable English.

If Harriet Miers is confirmed, let us hope that she will continue to refrain from excessively entangling herself with the Ivy League. Let us hope that she will instead reach out to law schools in Red States by visiting their faculties, teaching their

students, and recruiting their graduates to serve as law clerks. Let us hope she will set an example by engaging and recruiting qualified people with a wide variety of backgrounds, including a variety of religious faiths. Let us hope she will work hard to make the Supreme Court an equal-opportunity employer.

2) Harriet did not work for the right people.

Ann Coulter complains that Harriet Miers has not worked as part of the "farm team of massive legal talent" controlled by "Ed Meese, Antonin Scalia, Robert Bork and all the founders of the Federalist Society." Along similar lines, John Yoo has written that Miers is not entitled to the same benefit of the doubt as John Roberts received "because of . . . the people he'd worked for. . . . [such as] William Rehnquist, William French Smith, Fred Fielding and Kenneth Starr." Edward Morrissey is fine with a private woman attorney as a nominee if she has "clerked for William Rehnquist" and served as "chair of the Supreme Court Fellows Commission." In other words, what really matters is not whether you are a crony, but whose crony you are.

The Federalist Society, alongside many other unaffiliated organizations and individuals, has indeed made a very important contribution to American law. However, a de facto requirement that a Supreme Court nominee ***must*** work for the Federalist Society or any particular circle of legal professionals would be just as offensive and improper as imposing Senator Charles Schumer's rule that all members of the Federalist Society must be ***disqualified*** from the rolls of legitimate judicial nominees. Constitutional criteria for service in office should not be overlaid or supplanted with rigid associational litmus tests conformity is the worst enemy of principled judgment. A judicial cabal on the right is no more acceptable than a judicial cabal on the left.

Quite aside from their inherent propriety, associational litmus tests frequently prove to be unreliable. It was William Rehnquist and Kenneth Starr, after all, who both helped clear the way for the selection of Sandra Day O'Connor, the very justice Beltway Conservatives are so eager to replace with someone other than Harriet Miers.

3) Harriet is an Evangelical Christian.

The dispute over Harriet Miers is tainted by a distasteful religious subtext. To understand why, try this exercise. Compile a list of the justices who have been added to the Supreme Court since 1980, and the religious affiliation of each. Make a second list of Miers' fiercest public critics, and the religious affiliation of each. Add a third list of Miers' most ardent public defenders, and the religious affiliation of each. A rather striking pattern of correlation emerges, and whatever the explanation for that pattern may be, it is not particularly conducive to interfaith good will within the Republican Party or conservative circles.

Harriet Miers, an Evangelical Christian, violates the unspoken Beltway rule that certain religious and philosophical backgrounds are unacceptable for the Court. Many Beltway Conservatives believe that Evangelical Christians, Baptists, and Mormons exist only to lick envelopes and knock doors at election time. Libertarians, who do not appeal to any special interest groups and tend to pipe up at inconvenient times, are similarly unacceptable for key government posts. Or, to put it in geographical terms, southerners and westerners, the people from "flyover country," should vote in administrations who will enthrone "conservatives" from coastal and Beltway areas to do all the decision-making.

This rule has Peggy Noonan fretting that "By the time of the hearings [Miers will] have been painted as the Church Lady," and adding, "There's a great old American tradition of not really liking Church Lady." (Being the right kind of Church Man is apparently just fine, as John Roberts recently demonstrated). For her part, Ann Coulter growls that "[Bush] was elected to represent the American people . . . . Among the coalitions that elected Bush are people who have been laboring in the trenches for a quarter-century to change the legal order in America."

But isn't it true that Evangelical Christians are one of the largest segments of both the Bush coalition and the American electorate? Why is it that, in the words of John Woo, "[t]he appointment of a woman matters a great deal" and is "entirely welcome," but religious diversity on the Court is irrelevant? The degree of religious polarization surrounding the Miers' nomination is disquieting and incredibly destructive. Miers' late-life conversion to Evangelical Christianity seems to have added to the tension, although the point is raised by the media in only an oblique way.

This is *not* to suggest that we need a quota system of any kind for Court nominations. It is to suggest that we need to be aware of the thinly-veiled religious bigotry in Washington. Religious bigotry is repugnant and counterproductive, regardless of the instigator or the recipient.

On the flip side of the coin, it should also be said that President Bush risks exacerbating the religious tension when his aids offer up Miers' religious affiliation as a core justification for Bush's confidence in her. John Roberts was not *openly* promoted on the basis of his devout Catholicism so Harriet Miers cannot plausibly be promoted on the ground that her devout Evangelical Christianity will overtly shape her judicial decisions. (Incidentally, Rich Lowry inaccurately insinuates in a recent article that the devout church-attendee card has been played to the Republican base only for Miers and not for Roberts or other nominees as well). President Bush must be consistent in his reasoning in order to credibly demand consistency and fairness

from Miers' detractors.

The Miers nomination has shown that religious suspicion and prejudice continues to exert a powerful influence upon insiders on both sides of the political aisle. The gracious, intellectually-honest people who can be found in virtually every faith need to step up to the plate and aggressively work to solve this ongoing problem.

4) Harriet is not a constitutional scholar or federal circuit judge.

Many Beltway Conservatives believe that a Supreme Court nominee should be a renowned professor (preferably from the Ivy League), a prominent federal judge (preferably from the federal D.C. Circuit Court of Appeals), or a federal government litigator (preferably from the Department of Justice). Anyone else is apparently unacceptable regardless of their intelligence—never mind the extensive pedigree of very able justices who have served without these "essential" experiences (41 of the 109 justices in the history of the Supreme Court had no previous judicial experience).

As a result, Charles Krauthammer complains about "[the nonexistence] of Miers' constitutional scholarship, experience, and engagement." And George Will agrees: "[P]resumptive opposition to Miers' confirmation flows from the fact that constitutional reasoning is a talent – a skill acquired, as intellectual skills are, by years of practice . . . . not usually acquired in the normal course of even a fine lawyer's career."

Admittedly, Miers is not a constitutional scholar. But a large proportion of the Court's typical docket revolves around *non-constitutional* issues, especially interpretations of statutes and regulations pertaining to corporate, environmental, intellectual property, state government, treaty, and civil rights concerns. Many of these more mundane cases do not receive significant popular press but are tremendously important to the smooth functioning of our society.

The current Court is, if anything, overstocked with constitutional scholars, former judges, and federal-agency types. As Justice Antonin Scalia recently acknowledged in a television interview, what the Court sorely lacks is someone with practical experience in private business, private litigation, or local government. Miers fits the bill in all three respects and may be able to educate the other justices about the practical consequences of their ivory-tower edicts.

5) Harriet was not famous before she was nominated.

"I don't like it that she's obscure," sniffs Peggy Noonan in regard to Miers. Edward Morrissey prefers someone who has received "recognition from the *National Law Journal* as one of America's top 50 female litigators." Rejoins George Will: "there is no reason to believe that the Miers' nomination resulted from the president's careful consultation with people capable ['of making sophisticated judgments about competing approaches to construing the Constitution'][, and] [i]f 100 such people had been asked to list 100 [potential quality nominees] . . . Miers' name probably would not have appeared in *any* of the 10,000 places on those lists." Evidently President Bush, who has nominated so many other "acceptable" judges, does not qualify as a person capable of "making a sophisticated judgment."

Moreover, must one be *always* be a talk-circuit favorite, a wealthy individual, a prominent activist, a perennial political ladder-climber, a television regular, a Georgetown cocktail party favorite, a partner at a national mega-firm, or a professional glory-hound in order to be considered for a top job in Washington? We need not disparage any of the aforementioned pursuits in order to wonder what has happened to the cherished notion of ordinary, quiet citizens stepping forward to serve in civic life.

The money dynamic in our political culture has led to a situation where most Presidents, most Congressmen, and most justices are now millionaires, professional politicians, celebrities, or all three at once. This warped culture, which is bipartisan in nature, is now so firmly entrenched that it openly sneers at any ordinary citizen or political foot-soldier who dares to participate in political life and thereby invade allegedly privileged territory. We do not need more so-called experts to run our government, we need more honest brokers and independent thinkers. Miers is a small step forward towards addressing the problem.

Americans should resist any norm that requires Court nominees to spend all or most of their legal careers in Washington (Miers has, if anything, been in Washington *too long*). It should not be prerequisite that potential nominees structure their careers to curry favor and reputation with players inside the Beltway. We need more, not fewer, nominees who have actually lived, studied, and privately practiced in Red-State America. Texas is as good a place as any to start with an effort to inject well-grounded people into our political system.

Technically speaking, a person need not even be an attorney to serve as a Supreme Court justice. Moreover, at the time of the Framers, the vast majority of attorneys studied law through local apprenticeships, not law school. Our nation would benefit from a collective pause to consider why it was that the Framers of the Constitution declined to insert elaborate "expert" requirements in the Constitution for positions of political or judicial leadership. With his nomination of Harriet Miers,

President Bush has afforded us all an opportunity for meaningful reflection.

6) Harriet won the nomination through cronyism.

According to critics such as William Kristol, Charles Krauthammer, and Jonah Goldberg, "cronyism" explains the nomination of Miers. But federal judicial nominations are made by politicians and approved by other politicians. The process was intended to be, and always has been, primarily political in nature. As a result, the preeminent factor for every nominee has always been, and will always be, who they know and who knows them.

Like many other attorneys, including the other current justices on the Court, John Roberts has spent his entire career jockeying for the influence and social position needed to secure a judicial nomination. In order to catch President Bush's eye, Roberts' strategy was to cultivate a network of connections with surrogates who had access to the Oval Office (including, in all likelihood, the retiring Chief Justice William Rehnquist, who hired Roberts as a law clerk and reportedly also persuaded President Reagan to nominate Sandra Day O'Connor, Rehnquist's classmate and old flame at Stanford Law School). Why is a direct connection in Miers' case any less noble than Roberts' use of carefully-cultivated, orchestrated surrogate contacts? Why are we so arbitrary about the forms of ambition we choose to accept? As Jonah Goldberg subsequently acknowledged, the difference between an "insider" and a "crony" is often in the eye of the beholder.

As Justice Scalia once noted in a written opinion, "Many justices have reached this Court precisely because they were friends of the incumbent President or other senior officials." In law, politics, and life, quirky happenstance and connections often trump "most qualified" status (assuming that it is even possible to identify the "most qualified" candidate at all, a dubious proposition and a standard not demanded of previous nominees). This phenomenon did not begin with Miers and will not end with her.

Nomination should not be, as Ann Coulter has implied, an entitlement earned by—or owed to—any particular public servant or any particular group of political supporters. Nomination is not an award given out for having the best legal resume, the highest grades in law school, the highest score on an LSAT or Bar Admissions test, or the longest tenure in an advocacy organization. A nomination should be treated as a calling of public service to the person the President (and a bare majority of the Senate) believe can best *serve the public* under a given set of practical circumstances. The second objective often has little or no overlap with the first.

Washington has never been a meritocracy based upon intellect, virtue, qualification, competence, or any other similar inherent quality. If Washington was a meritocracy, most justices (not to mention most presidents, congressman, and bureaucrats) would be out of a job. If Beltway Conservatives truly had a principled objection to President Bush on the basis of his alleged "cronyism," they would long ago have spoken forcefully against his modus operandi of promoting from within. Up until now, Bush's emphasis on loyalty and personal intuition has been trumpeted with admiration. Rest assured that the real reason for Beltway Conservatives' objection to Miers is to be found elsewhere.

Clinging to a general proposition that Washington is a meritocracy is naïve. Selectively brandishing a pseudo-meritocratic ideal is disingenuous. Throwing a fit because a Texan woman has defeated one at your one's clever game is sour grapes.

7) Harriet is a cipher.

"Miers may prove to agree with Justices Antonin Scalia or Clarence Thomas," laments John Yoo, "but conservatives have no reason to think so." Yet the same could be said of John Roberts, who had a Souter-like paper trail, and yet most Beltway Conservatives voiced little or no objection to him (except, to be fair, Ann Coulter).

George Will argued that President Bush was entitled to deference for his judicial nominations. But with Harriet Miers, who does not meet with Will's ideological approval, "the presumption . . . should be that her nomination is not a defensible exercise of presidential discretion to which senatorial deference is due." George Will writes an eloquent article to try to rationalize his inconsistent positions, but even his considerable rhetorical skills cannot paper over his obvious reversal.

Make no mistake, the lack of a paper trail for any nominee is indeed a serious drawback and a legitimate basis for voting against a nomination. What is troubling here is the striking degree of *differential treatment* between Souter and Roberts on one hand and Miers on the other. One cannot help but wonder why there is such a sudden change of attitude by certain Beltway Conservatives. It is difficult not to ascribe such behavior to a Beltway Conservative sentiment that Harriet Miers has failed to accord them adequate obeisance and that they feel her personal background is unacceptable.

Nominees should be held to a consistent standard. Filibusters should be eliminated so that nominees of both parties with paper trails can be confirmed by a simple majority of the Senate. Cipher candidates are a manifestation, not a cause, of this underlying systemic problem caused by the threat of filibuster.

Like John Roberts, Harriet Miers may well go on to justify conservatives' fears that she is someone in the mold of O'Connor, Kennedy, or Souter instead of Scalia or Thomas. However, Texas Democrats such as Miers (who is now a Republican) are frequently more conservative than northeastern Beltway Republicans like John Roberts, so the selective angst of Beltway Conservatives may be misplaced.

This author's own armchair prediction is that Miers will be more conservative than Roberts on important Red-State social issues such as gay rights, abortion, religious liberty, parental rights, and certain aspects of state sovereignty. Roberts will be more conservative than Miers in cases dealing with affirmative action, criminal-law, and certain aspects of economic commerce. Both Roberts and Miers will promote deference to the Executive Branch and a restrictive interpretation of the Establishment Clause.

Conclusion

At the end of the day, Harriet Miers deserves a fair hearing. Barring an unknown skeleton in her past, Miers' fate is now in her own hands. If she manages to come across as a likeable, competent individual, the public will support her and she will ultimately be confirmed. Any overreaching senatorial attacks or hazing along the way will only serve to anger the public by conjuring up images reminiscent of *Mr. Smith Goes to Washington*.

Beltway Conservatives would do well to remember that their own fate is intertwined with Red-State conservatives. A successful coalition between the East-Coast/Wall-Street culture and the Heartland/main-street culture depends upon mutual cooperation and compromise. As now demographic trends unfold, Red-states are no longer content to simply sit at the back of the judicial bus. Elitism, bigotry, and vitriol yield short-term gain but inflict long-term damage. Everyone should act on their conscience, but let those who wish to vote against Miers advance some principled arguments for doing so.