Reflections on Harriet Miers Nomination to the Supreme Court

Eugene H. Hawkins

October 10, 2005

Reflections on Harriet Miers Nomination to the Supreme Court

(This essay was started before Ms. Miers withdrew)

Given what is known about Ms. Miers' qualifications, there must be a number of extremely capable lawyers who are equally qualified for a Bush nomination to the Court, even if some of them would readily admit they are not in the same league with John Roberts. Meanwhile, President Bush's greatest impact on the lives of ordinary Americans will no doubt result from his appointments to the Supreme Court. Two openings have already occurred with a third in the offing before the president retires in January 2009 since one of the more liberal Justices, John Paul Stevens, is about to turn 86. However, when it comes to the Miers nomination the following reservations, expressed by George Will (a titan among conservative intellectuals) are worth noting. Thus:

> The president's "argument" for Miers amounts to: Trust me. There is no reason to, for several reasons. Bush has neither the inclination nor the ability to make sophisticated judgments about competing approaches to construing the Constitution. Few presidents acquire such abilities in the course of their pre-presidential careers, and this president particularly is not disposed to such reflections**.** Furthermore, there is no reason to believe that Miers's nomination resulted from the president's careful consultation with people capable of such judgments.

Still, the President and Ms. Miers have a few tricks up his sleeves. For example, as recently reported in the Washington post, "Supreme Court nominee Harriet Miers once pledged that she would 'actively support' a constitutional amendment banning abortions except to save a mother's life and participate in antiabortion rallies...Meanwhile confusion persists regarding what Miers said during a closed meeting Monday with Arlen Specter. Shortly after the session, Specter told reporters that Miers had embraced the 1965 case Griswold v. Connecticut [protecting a woman's right to contraceptives] an important predecessor to the 1973 Roe ruling. *Miers phoned Specter on Monday night to say she had not endorsed Griswold***."**

So here we have a female opponent of Griswold whose notion of "family values" apparently embraces the eighteen-member Duggar family of Arkansas and finds no constitutional protection for a woman's right to the privacy of her own womb -- that is, the right to choose contraception, or if need be an abortion, as the saner alternative to accidental and/or runaway procreation?

Bear in mind the U.S. Constitution consists of only 14 pages (7,700 words) laying out the blue print for an entire system of government comprised of Legislative, Executive and Judicial branches. In addition, it articulates a number of *vague/abstract legal principals* that the nation's entire body of law (91,000 statues and rising) must conform to and/or not contradict.

Meanwhile, the one-page Bill of Rights contains a mere 462 words and the critical Fourteenth Amendment only 52 words. But in order to get the "correct" interpretation of these 514 words, Republican conservatives are seeking a constitutional scholar with the right judicial "philosophy and/or ideology" who can write convincing opinions on a number of issues including the absolutely critical one of overturning Roe.

To quell the revolt in his party over the Miers nomination Bush needs to replace her with a highly qualified attorney, or sitting judge, with a well known judicial philosophy/ideology that virtually insures a favorable vote on the hot button issues that inflame his base. Here are a number of bottom-line conclusions from the Court that the base is after:

> A woman can only have an abortion if it is medically necessary to save her life; School prayer, with the right to remain silent if one chooses, is permitted; The Defense of Marriage Act is constitutional; Display of the ten commandments and other religious symbols on government property is permitted; All sections of the Violence Against Women Act are constitutional; A federal statue making malicious desecration of the flag a crime is permitted; Doctor assisted suicide is not permitted; The taking of private property to pump up the tax-base is not permitted; Race can no longer be considered as a factor in college or graduate-school admissions; Lawrence v. Texas (invalidating all anti-sodomy statues in the America in 1983) is reversed.

Although the Constitution only contains 14 pages, Planned Parenthood v. Casey, restricting a woman's right to have an abortion, is 60 pages of dense legalese. Thus, it will take more than a constitutional dilettante to compose the verbiage necessary to "reasonably and objectively" justify the Court's razor thin 5/4 decisions that will radically change the lives of 300 million Americans if the above cases are decided in line with President's Bush's gut-instincts for interpreting the Constitution (not to be confused with John Roberts' metaphor, 'I'm just an umpire calling balls and strikes in Pitcher v. Batter').

Thus, if you are an outstanding attorney with a well documented, rightward leaning judicial philosophy/ideology, the job could be yours for the asking. Parenthetically, it might help if you are a crony of you know who.

POSTCRIPT: Nominations to the Supreme Court invariably result in references to a candidate's judicial philosophy (constructionist, originalist or "other"), her judicial ideology (conservative, moderate or liberal) and her position on judicial activism (a.k.a. legislating from the bench).

From the president's perspective, an ideal candidate for the Court is one with the right judicial philosophy (a strict-constructionist/originalist!) who deftly tilts her legal reasoning in the direction of her core judicial ideology (conservative!) while loudly proclaiming that she is "objective and true" -- or, to quote Roberts again, "merely an umpire calling balls and strikes." Presumably the ideal Bush candidate is opposed to judicial activism (of whatever political stripe) and does not believe in legislating from the bench.

Note that a nominee's so called "judicial temperament" is not to be confused with either her philosophy or ideology. The American Bar Association defines temperament as including such qualities as "compassion, open-mindedness, patience, tact and understanding." While such attributes seemed to be an obsession with Senators Feinstein, Schumer, Kennedy and Durbin during the Roberts hearings it is unclear how much emphasis President Bush places on them.

Meanwhile, over the last 215 years the Supreme Court has issued over 5,000 decisions to be enforced from the turret of a tank, if necessary. In reality these 5,000 opinions are the de facto equivalent of amendments to the Constitution. Thus, they are just as binding on the nation as if they had been approved by both houses of Congress and 3/4 of the states. If you don't believe this, just ask the pro-life lobby about the durability of Roe v. Wade and the reality of 48 million abortions since 1973.

Thus, every opinion/decree of the court carries the same legal weight as the Sixteenth Amendment authorizing the income tax (with a million soldiers behind it) while it only takes a consensus (5 "right" / 4 "wrong") of unelected, life-tenured justices to pull it off. Quite simply, they amend the Constitution by taking the *vague/abstract words and phrases* embedded in the text and decreeing what the words actually mean (to them, the majority) in terms of who has the power (or lacks it) to do what to whom. Whose liberty must be suppressed so that another's may find expression, and so forth.

And, of course, there are always dozens of brilliant and objective legal observers on either side of every case before a five vote (or better) majority of the Court renders a virtually irreversible decision. One of the great myths in American politics (fading rapidly) is that well-meaning, impartial and objective lawyers/judges are able to discern fundamental truths regarding the law that have always been embedded in the Constitution.

Once again, this harkens back to Chief Justice Roberts "umpire analogy." But that's becoming a hard sell these days as evidenced by the 100% of democrats who voted for arch-conservative Anthony Scalia's confirmation in 1986 versus the 50% of Democrats who voted for the moderately conservative John Roberts in 2005. In this regard, it is no trivial matter that Roberts may possess one of the half-dozen best legal minds to surface in America within the past 200 years. It is also noteworthy that nominees to the Court did not even appear before the Senate Judiciary Committee until 1925.

Meanwhile, it only takes one born-again evangelical president with two (possibly three) votes on the Supreme Court to empower a silent revolution in American constitutional law -- the 500 volume rule book of Court decisions whereby we disassociate ourselves from our cave dwelling past. In those less civilized times, brute strength determined who promulgated the law whenever there was a conflict between the personal liberty of one clan member with that of another.

In our modern democracy (with majority rule and minority rights) elected leaders of the state only resort to brute force when a *voter* disobeys the law and resists arrest or if someone is found guilty of a capital crime. Nonetheless, a minimum of five High Priests on the Supreme Court of the United States (no more golden arm bands, please) have been granted the power, largely by default, to do with language what Alpha-males in the stone age used clubs and fists to achieve.

VOICES FROM THE PAST

To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps.....If this opinion [Marbury v. Madison, 1803] be sound, then our Constitution is an act of suicide. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation. The Constitution according to this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please**.**

Thomas Jefferson 1819

Our liberties are not neatly engraved in the constitution. They are the creation of Supreme Court Justices playing variations on themes stated in that document with notable brevity and looseness.

Richard Posner - U.S. Court of Appeals for the Seventh Circuit.

The great generalities of the Constitution have a content and a significance that vary from age to age. The method of free decision sees thru the transitory particulars and reaches what is permanent behind them.

Supreme Court Justice Benjamin Cardozo

Of the current justices on the Supreme Court, three are strong conservatives, two are sometime right-leaning centrists and four are liberals, they are all activists who boldly use federal judicial power to displace decisions by elected officials and state courts that offend their *personal, philosophical or political values*.

Stuart Taylor, Jr. - Newsweek, December 2000