

**Judicial Philosophy and Political Reality:
President George W. Bush's Appointments to the
United States Supreme Court**

By James Petros
May 8th, 2014

In an article written for *The Weekly Standard* in July 1999, the executive Editor-in-Chief, Fred Barnes, reported that Presidential candidate and current Governor of Texas George W. Bush's ideal candidate for the United States Supreme Court would be modeled after Justice Antonin Scalia¹, a Ronald Reagan appointment from 1986. Scalia, a staunch conservative on the Court, believes the duty of the court is to interpret the Constitution as it is written and not legislate from the bench. The article cited Governor Bush's contention that the President's job was to appoint strict constructionists and limit judicial activism. Judges are meant to determine the constitutionality of laws, not impose new ones. When Governor Bush won the election in 2000, he won the right to make such an appointment if a current justice were to retire. His first term would not see any vacancies on the Court, but after his reelection in 2004, he would finally get his chance to place a strict constructionist on the Court. This project will examine whether President George W. Bush was able to realize this goal. The nominations of John Roberts, Jr., in July 2005, to first replace Justice Sandra Day O'Connor, and later Chief Justice William Rehnquist and Samuel Alito in October 2005 to fill O'Connor's spot were two successful appointments to the Supreme Court. However, President Bush had nominated his White House Counsel, Harriet Miers, in early October for one of the two spots, which later provoked a standoff with some Republican Senators over her views on certain issues.

Harriet Miers's nomination exposed the politics of presidential nominations; a number of Republican Senators vehemently opposed her nomination due to her obscurity outside of the White House. Her nomination was controversial and provides deep insight into how President Bush processed his selections for the Court. Her nomination, and the

¹ Barnes, Fred. "Bush Scalia." *weeklystandard.com*. The Weekly Standard. July 5, 1999.

nomination of Samuel Alito, also make it evident the United States Senate greatly politicized President Bush's nominations to the Court. Regardless of whether either nominee held a strict constructionist philosophy, the Senate resolved the finality of each nominee's "conservative" factor.

The Roberts nomination received wide bi-partisan support, while it appears Miers withdrew her nomination so the President could appease the hard-right wing of the Republican Party. The Miers nomination has a clear connection to the Alito nomination, as the vote on Alito's appointment was more partisan. In addition to determining if these nominees were "strict constructionists," of the Senate had an important role in Bush's decisions as well and will also be examined. Supreme Court Justices are appointed for life and remain an important part of a presidential legacy decades after that President has left office. An attempt of this research is to establish what that legacy exactly is for President Bush, while also exploring the conflict Miers had with the Senate as it politicized the nomination process. It should be further noted that the account to be given is drawn mostly from journalistic sources; most of the archived documents relating to this subject are still not available and will not be for a number of years. It is also with great appreciation that I must commend the George W. Bush Presidential Library and Museum for allowing me this opportunity. I am extremely grateful for both Carina Morgan and my docent mentor, Heather Schaefer. I also am grateful for the support and guidance of Dr. Charles Sullivan, whose phenomenal recommendation letter and sponsorship was a major part of my application process.

On July 1, 2005, Sandra Day O'Connor announced she would be stepping down from her position on the Supreme Court; eighteen days later President Bush officially

nominated John Roberts, Jr., as her replacement. The President already had a shortlist of candidates, composed after his election victory in 2000. Alberto Gonzales, who was White House Counsel at the time, along with numerous White House lawyers developed the list of possible nominees. In *Decision Points*, President Bush affirms that he wanted his selection process to be as open as possible: “ I told him [Alberto Gonzales] the Supreme Court list should include women, minorities, and people with no previous experience on the bench. I made it clear there should be no political litmus test. The only tests in my mind were personal integrity, intellectual ability, and judicial restraint.”² Bush, in *Decision Points*, confirms what Fred Barnes wrote in that 1999 *Weekly Standard* article: “I subscribed to the strict constructionist school: I wanted judges who believed the Constitution meant what it said.”³ The President also mentions the division amongst his advisors when vetting candidates to be nominated for the position. Vice President Dick Cheney, for example, was supporting Judge Michael Luttig because he had a solid record as a conservative jurist. But, after conferring with Chief of Staff Andy Card and Senior Advisor Karl Rove, the President decided to go forward with Roberts because he appeared to be the most capable of strategic thinking and natural leadership. Roberts liked to use the analogy of a baseball umpire to describe the roles of a judge. A good judge, like a good umpire, makes the calls as he sees them on the field. An umpire does not rule if a player is good or bad, he just tells him if he is safe or out. The same applies to a judge, who does not say if a law is good or bad, but rather if that law is constitutional

² Bush, George W. *Decision Points*. New York: Crown Publishers, 2010. 97.

³ *Ibid.*

or not.⁴ Other scholars have concurred his approach to judicial philosophy to work in this way.

Lawyer and columnist, Jeffrey Toobin wrote a lengthy piece on Roberts in 2009. In part, the article explores parts of Roberts' life during his work under the Reagan Administration. Toobin concluded from interviews he conducted with colleagues of Roberts during this time period that Roberts never was a part of the "originalist" judicial philosophy that was promulgated under Reagan's Attorney General Edwin Meese. Abortion is one example where Roberts approach is different from someone like Clarence Thomas. Toobin references Professor Akil Reed Amar of Yale Law School. Amar states an "originalist" would argue the Constitution never mentions abortion and cannot be legal. Roberts, as a constructionist, would take a different approach. Amar states Roberts will rather look upon certain abortion restrictions in certain cases and uphold the restrictions rather than outlaw abortion.⁵ It was apparent to President Bush Roberts was the person for the position.

Upon being nominated in July, Roberts began to prepare for his hearings before the Senate, which were scheduled for sometime in early September of 2005. Three days before Roberts's confirmation hearings began, Chief Justice William Rehnquist succumbed to terminal cancer. President Bush now had two vacancies on the Court to fill simultaneously. In a personal interview, Southern Methodist University Political Science Professor and noted Supreme Court expert Joe Kobylka, confirmed that President Bush had immediately decided that Roberts was the perfect fit to assume the role of Chief

⁴ Bush. *Decision Points*. 98.

⁵ Toobin, Jeffrey. "No More Mr. Nice Guy." *newyorker.com*. The New Yorker. May 25, 2009.

Justice. President Bush's reasoning was simple, Roberts already had prepared for his confirmation hearing, and a large majority of the Senate would also confirm him since Bush was replacing a conservative, like Rehnquist, with another conservative, like Roberts. The final vote was also bipartisan with Roberts being confirmed 78-22. The Democrats held the minority with 44 seats and their vote was split 22-22. All Republicans, in the majority with 56 seats, voted for Roberts to be confirmed. Roberts was confirmed because Republicans viewed Roberts, as a consistent conservative who they believed would overturn decisions like *Roe v. Wade* if the Court were presented with the ability to do that. The *Washington Post* noted this upon Roberts' confirmation on September 30, 2005. An article by Charles Babington and Peter Baker they stated the split vote amongst Democrats was due to whom Roberts replaced. Rehnquist had a conservative voting record, so certain Democrats in "red states" voted for Roberts because he was replacing an already conservative vote on the Court. The article also cites Senator Dianne Feinstein claiming the next nominee will receive more scrutiny from Democrats because he or she will be replacing O'Connor, who had a liberal record on most social issues.⁶ Journalist Jan Crawford Greenburg solidifies Roberts's conservative record in her book *Supreme Conflict*. She writes that Roberts had "demonstrated solid enough conservative views as a lawyer in the Reagan and Bush administrations to pacify conservatives fearful of another disastrous appointment."⁷ However, Bush at least appears to make it clear in *Decision Points* that he was not attempting to pack the court⁸

⁶ Babington, Charles and Peter Baker. "Roberts Confirmed as 17th Chief Justice." *the washingtonpost.com*. The Washington Post. Sept. 30, 2005.

⁷ Greenburg, Jan Crawford. *Supreme Conflict*. New York: Penguin Group, 2007. 187.

⁸ Bush. 97.

nor did the Bush legacy on the Supreme Court did not end with the Roberts appointment. O'Connor's position was still vacant and needed to be filled.

Sandra Day O'Connor had fully approved of Roberts in every way with only one exception: Roberts was a man, not a woman.⁹ She was disappointed with the selection for that reason alone, but the unfolding of events after Rehnquist's death allowed Bush to have another opportunity to appoint a woman to the Court. It was around this time that Miers's name would be thrown around amongst advisors. Alito's name was always in the mix when the replacement for O'Connor was being discussed; in fact, Miers supported Alito over Roberts to fill O'Connor's seat. Bush wanted a woman on the Court instead and was even more encouraged by First Lady Laura Bush. Greenburg, however, states finding a woman for the Court was no easy task for Bush: "The White House's difficulty in finding a woman or minority was due in no small part to the Senate Democrats' success in eliminating candidates who would have been the top contenders."¹⁰ The Democrats controlled the Senate for all of 2001 and 2002, when they blocked and filibustered multiple Bush appointments to lower courts claiming they were too "ideological."¹¹ Thus President Bush attempted to approach his second nomination in a different way.

The two most likely women to be nominated to the Supreme Court, Priscilla Owen and Janice Rogers Brown, were finally confirmed as appellate judges, but the Democratic Senate Minority Leader Harry Reid warned the Republicans to prepare for an

⁹ Landers, Rich. "O'Connor: Roberts 'good in every way except he's not a woman'." *spokesman.com*. The Spokesman Review. July 20, 2005.

¹⁰ Greenburg, 253.

¹¹ Lewis, Neil. "Bush Nominates 11 to Judgeships Today." *nytimes.com*. The New York Times. May 9, 2001.

all-out fight if either one were to be nominated to the Supreme Court. A group of fourteen Republican Senators concurred with Senator Lindsey Graham telling the White House Bush should not nominate either one. Greenburg also reports Bush had been weighing the Miers option since O'Connor made her retirement announcement.¹² On September 21, 2005 Bush had a breakfast meeting with key Senate leaders wherein Reid confided to President Bush that Miers was an excellent choice. Bush liked Miers and they were understood to be good friends since well before Bush became President. He writes in *Decision Points*: "There was no doubt in my mind that she shared my judicial philosophy and that her outlook would not change. She would make an outstanding justice."¹³ Bush and his advisors were also unsure and not confident in any of the other possible nominees other than Luttig and Alito. The President's personal friendship with Miers, combined with an absence of any form of resistance from other advisors within his circle is what led to her nomination. This professional relationship, along with almost no serious concerns from Democrats, ensured the President was confident Miers would breeze through the confirmation process. He made that clear in his public remarks on October 3, 2005, claiming: "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."¹⁴

Greenburg emphasizes that Bush knew Miers for fifteen years and she claims Bush thought Miers was in the mold of Scalia.¹⁵ Scalia had a record on the Court that

¹² Greenburg. 256.

¹³ Bush. 100.

¹⁴ Bush. "President Nominates Harriet Miers as Supreme Court Justice." Speech. October 3rd, 2005.

¹⁵ Greenburg. 266.

overwhelmingly tilted conservative, especially on social issues. In an interview with Piers Morgan in 2012, Scalia defended his opposition to *Roe v. Wade*: “Regardless of what my views as a Catholic are, the Constitution says nothing about it...the Constitution, in fact, says nothing at all about the subject.”¹⁶ Social issues have long been a platform for a majority of Republicans in Congress, especially since the *Roe v. Wade* decision. Roberts is also a Catholic and his views on *Roe* were at issue due to a legal brief he wrote for President George H.W. Bush in 1990 in which he stated *Roe* should be overturned. These policies and where a nominee stands on social issues are extremely important in the confirmation process. While Bush was extremely confident he had made the right decision, neither he nor his advisors would foresee the amount of backlash Miers would receive from Senate conservatives.

Upon President Bush’s announcement to nominate Harriet Miers to the Supreme Court, there was immediate opposition from social conservatives, bringing the politicization of the Supreme Court into full-view. The conservative movement at the time was outraged. O’Connor had been more liberal on social issues than originally expected, and conservatives believed her retirement could lead to a shift on the Court with a lasting right-wing legacy. The Senate Republicans and conservative pundits wanted to see a paper trail of “constitutionalism.” Greenburg claims they wanted to see a paper trail of consistent conservative principles from each nominee:

“The paper trail mattered to conservatives. It showed a nominee had taken a stand on something and could endure the criticism. It showed that a nominee had a philosophy or theory about laws. As conservatives knew, history proved all too well what happened to Republican nominees without paper trails or clear legal philosophies once they got on

¹⁶ Berry, Susan. “Justice Scalia: ‘The Constitution Says Nothing About Abortion.’” *breitbart.com*. Breitbart. July 21, 2012.

the Court. They drifted left. Every time.”¹⁷

In other words, Republicans wanted a litmus test applied and only wanted nominees who agreed with them on political issues, not the constitutionality of laws. It did not matter to them if the President was claiming Miers to be the next Scalia; they wanted a judicial record from her to prove it. It only took hours for some of these pundits to start blasting the Bush administration. Bill Kristol, editor of the *Weekly Standard*, immediately began claiming President Bush was backing down from a fight with Democrats over judicial philosophy.¹⁸ Radio host Laura Ingraham came out in opposition as well along with former Bush speechwriter David Frum.¹⁹ Greenburg says Bush picked Miers due to their personal ties. She also compares the Miers nomination to the elder President Bush’s selection of David Souter, a judge who quickly shifted to the left on the Court.

President George H.W. Bush had done something similar with his choice of David Souter in 1990. John Sununu, the Chief of Staff at that time, had placed Souter on the state Supreme Court for New Hampshire when Sununu was the states governor. Souter had a consistent conservative record at the time and did not take the normal liberal approach of interpreting the Constitution as a “living” document.²⁰ Bush 41 nominated him and he was easily confirmed without a serious fight from the Democratic-led Senate. However, as Souter spent his days on the Court he grew more and more liberal as time went on, especially in *Casey v. Parenthood*, a 1992 ruling which reaffirmed *Rove v. Wade*. Conservatives were disillusioned with Souter as time went on and, with

¹⁷ Greenburg. 272.

¹⁸ Kristol, Bill. “What is to Be Done...About the Harriet Miers Nomination.” *weeklystandard.com*. The Weekly Standard. October, 17. 2005.

¹⁹ Greenburg. 271.

²⁰ Greenburg. 96.

O'Connor's retirement, they finally had a chance to re-stock the Court with consistent conservatives. The Miers nomination seemed to bring back memories of Souter, and the response was the politicization of her potential appointment by Senate Republicans.

An analysis of some of the primary sources from the American Founding can explain why the Miers nomination floundered. The American Founders never intended for factional politics to be a factor in the confirmation process for those nominated to the Supreme Court. Alexander Hamilton elaborates on this point in Federalist No. 76, "The Appointing Power of the Executive": "I proceed to lay it down as a rule that one man of discernment is better fitted to analyze and estimate peculiar qualities adapted to particular offices than a body of men of equal or perhaps even superior discernment."²¹ The "one man" is a reference to the President and Hamilton argued the power of judicial appointments belonged within the executive branch because the President will have a much stronger sense of duty because of his sole power with respect to appointments. Hamilton also claims the President will have stronger obligations to make a responsible, qualified appointment and "to prefer with impartiality the persons who may have the fairest pretensions to them."²² Hamilton also warns about factional influence in these types of decisions and in some ways predicts the standoff, which occurred with the Miers nomination. He addresses this problem by giving his account of what happens when assemblies and not individuals make similar decisions:

"The choice which may at any time happen to be a made under such circumstances will of course be the result either of a victory gained by one party over the other, or of compromise between the parties. In either case, the intrinsic merit of the

²¹ Hamilton, Alexander. "Federalist 76," in *The Federalist Papers*. Ed. Clinton Rossiter. New York: Signet Classics, 2003. 454.

²² Ibid.

candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party will be more considered than those which fit the person for the station. In the last, the coalition will commonly turn upon some interested equivalent: 'Give us the man we wish for this office, and you shall have the one you wish for that.' This will be the usual condition of the bargain."²³

Hamilton had great foresight into a problem with executive appointments. An individual making these types of decisions, at times, can make it less political and based more on merit; Hamilton also has correctly concluded the integral role party politics can play in these types of decisions. The Miers nomination seems to clearly reveal this Hamiltonian concept in full.

The resentment Senate Republicans had over Miers's nomination had little to do with her qualifications or inexperience as a judge. Instead the result came down to a political ploy by Republican members of the Senate who felt like they had been prevented from packing the Court with more conservatives. The divide within the Republican Party would be fully demonstrated with this event. They ended up directing their anger at the President. Greenburg explains that Bush's logic was simple: "You can trust her because you can trust me."²⁴ He wanted to try something different with his second pick. He did not just want a woman on the Court, but also wanted someone from outside of the judicial "monastery" as he relayed that same message in an interview with Matt Lauer over his nominee:

"Well, you know, I made a decision to put somebody on the Court who hadn't been a part of what they call the judicial monastery. In other words— I listened, by the way, to people in the Senate who suggested, "Why don't you get somebody from the outside." And I figured that people are going to kind of question whether or not it made sense to bring somebody from outside the court. I would remind those, one, that Harriet is an extraordinary, accomplished woman who has done a lot. As a matter of fact, she has

²³ Hamilton. "Federalist 76." 455.

²⁴ Greenburg. 273.

consistently ranked as one of the top 50 women lawyers in the United States, that she has broken the glass ceiling. She has served as a great example. She is a brilliant person. And that just because she hasn't served on the bench doesn't mean that she can't be a great Supreme Court Justice.”²⁵

The firestorm of criticism and controversy would continue to deepen for President Bush. Only four Republican Senators publicly supported Miers. On October 28, she would formally withdraw from the nomination process, citing her respect for the White House in relation to a request from the Senate to intercept personal memoranda she had written. She would remain in her role as White House Counsel until January of 2007. President Bush would now have to nominate another person to fill the O'Connor vacancy.

Samuel Alito had been sitting on the United States Court of Appeals since 1990 and, unlike Miers, he had an extensive paper trail of “constitutionalism” and a tendency to rule in favor of more conservative views. In a memo written and published by the American Center for Law and Justice, Chief Counsel Jay Sekulow points out this paper trail describing Alito's history of court rulings on abortion during his tenure on the Court of Appeals. Sekulow emphasizes that Judge Alito consistently disagreed with positions taken by Justice O'Connor. One specific example is in *Hodgson v. Minnesota* where Alito argued parental notification of their daughter receiving an abortion is legal. O'Connor would disagree and argue this law would create an “undue burden” on teenage pregnancies.²⁶ The Alito nomination was a clear departure from the Miers one and it was also a nomination which had bona-fide, conservative credentials behind it. President Bush does not write much about his selection of Alito in *Decision Points* or elsewhere, but he makes it clear he had to get this nomination happily approved by Republicans.

²⁵ Matt Lauer. Interview with President Bush. *presidency.ucsb.edu*. 11 Oct. 2005.

²⁶ Sekulow, Jay. “The Judicial Philosophy of Supreme Court Nominee, Samuel Alito.” *aclj.org*. American Center for Law and Justice. Web.

Alito had been on the shortlist to fill the O'Connor vacancy back in July and the President felt there was no one more qualified to fill the still vacant seat on the Court. President Bush would announce the nomination of Samuel Alito only on October 31, 2005. President Bush was confident that the Republican majority within the Senate would immediately support the nominee and would have no problem confirming him as the next Justice on the Supreme Court. He also knew the Democrats would attempt to smear the reputation of Alito in any way possible, but took the risk knowing Alito would have enough votes to be confirmed.²⁷ Alito would go through the nomination process and be confirmed by a highly partisan vote, 58-42, on January 31, 2006. It was the second closest confirmation vote in the history of the Supreme Court as Justice Clarence Thomas was confirmed 52-48 in 1991. Only four Democrats would join in confirming Alito to the Court while all the other Democrats voted against him. According to the *New York Times* the mostly partisan vote on the Alito confirmation came down to his views on abortion: "In a news conference after the vote, some Republicans noted the partisan fight that had ensued over the Alito nomination, especially over the concern about how the judge would rule on cases involving abortion rights."²⁸ The Alito confirmation continued to reveal the political reality that had arisen out of the Miers nomination. Alito, unlike Miers, had the paper trail of conservative values the Senate Republicans wanted in a Supreme Court Justice. The political reality of the situation had become clear. Alito was only confirmed because Republicans had the majority in the Senate to confirm him and they approved of his nomination because he had developed a staunch conservative record, while Miers was

²⁷ Bush. *Decision Points*. 102.

²⁸ Stout, David. "Alito is Sworn in as Justice After 58-42 Vote to Confirm Him." *nytimes.com*. The New York Times. January 31, 2006.

a complete unknown who did not have that record.

President George W. Bush had attempted to appoint Justices to the Supreme Court who would strictly interpret the Constitution with the judicial philosophy of strict constructionism. The political reality of his nominations, however, makes it somewhat difficult to determine whether this was achieved. The confirmation of John Roberts as Chief Justice demonstrates bi-partisan approval of Roberts with little politics involved with the process. However, the nomination of Harriet Miers presented a different scenario, as President Bush genuinely believed he was nominating a strict constructionist who was a bona-fide conservative only to later face backlash from Senate Republicans. Her nomination illustrates the politicization of the Supreme Court by the Senate. She withdrew her nomination because Senate Republicans would not confirm her over her own political views and not over her ability or inability to interpret the Constitution as a constructionist. Her withdrawal and the nomination of Samuel Alito only solidify this point as Alito had a proven conservative judicial philosophy and his confirmation was rigidly partisan. With respect to President Bush's legacy, his appointments to the Supreme Court will be one of his most lasting decisions as both Roberts and Alito were relatively young when they were appointed to the Court, and their life on the Court could possibly last decades. Their presence could drastically influence judicial philosophy and the role of the Supreme Court in the future.

Works Cited:

- Babington, Charles and Peter Baker. "Roberts Confirmed as 17th Chief Justice." *thewashingtonpost.com*. The Washington Post. Sept. 30, 2005.
- Barnes, Fred. "Bush Scalia." *weeklstandard.com*. The Weekly Standard. July 5, 1999.
- Berry, Susan. "Justice Scalia: 'The Constitution Says Nothing About Abortion.'" *breitbart.com*. Breitbart. July 21, 2012.
- Bush, George W. *Decision Points*. New York: Crown Publishers, 2010.
- Hamilton, Alexander. "Federalist 76," in *The Federalist Papers*. Ed. Clinton Rossiter. New York: Signet Classics, 2003.
- Greenburg, Jan Crawford. *Supreme Conflict*. New York: Penguin Group, 2007.
- Kristol, Bill. "What is to Be Done...About the Harriet Miers Nomination." *weeklstandard.com*. The Weekly Standard. October, 17. 2005.
- Landers, Rich. "O'Connor: Roberts 'good in everyway except he's not a woman.'" *spokesman.com*. The Spokesman Review. July 20, 2005.
- Lauer, Matt. Interview with President Bush. *presidency.ucsb.edu*. 11 Oct. 2005.
- Lewis, Neil. "Bush Nominates 11 to Judgeships Today." *nytimes.com*. The New York Times. May 9, 2001.
- Sekulow, Jay. "The Judicial Philosophy of Supreme Court Nominee, Samuel Alito." *aclj.org*. American Center for Law and Justice.
- Stout, David. "Alito is Sworn in as Justice After 58-42 Vote to Confirm Him." *nytimes.com*. The New York Times. January 31, 2006.
- Toobin, Jeffrey. "No More Mr. Nice Guy." *Newyorker.com*. The New Yorker. May 25, 2009.