2007

The New Religion

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Publication: *Creighton Law Review*

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INTRODUCTION

In 2006, one chapter in the history of the Supreme Court came to a close, and a new one began. The Senate's confirmation of Samuel Alito, Jr., as the Supreme Court's 110th justice, signaled the formal end to the nearly twenty-five-year-long tenure of the first woman appointed to the Court, Sandra Day O'Connor. Justice Alito's appointment further marked the end to the second longest period in our nation's history without a vacancy arising on the Court. With Justice Alito's confirmation, Justice Stephen Breyer fell a couple months shy of the record for the longest serving junior justice in American history. The appointments of Chief Justice Roberts and Justice Alito also marked the first time since 1971 that two new justices joined the Court during the same Term.

My objective in this Essay is to explore the ramifications of these historic developments for the Supreme Court and particularly the judicial selection process. Initially, I will examine what was distinctive about President George W. Bush's Supreme Court nominations and the confirmation proceedings for those nominations. Many people worry that the confirmation process for Supreme Court nominations is broken and cite the Senate's rejection of Robert Bork's nomination to the Court as the watershed event signaling the demise of the confirmation process. Some people undoubtedly saw the confirmation proceedings for Roberts and Alito as restoring the Supreme Court selection process to proper working order. I will explain why I am skeptical that the proceedings marked a return of the process to what it had been during some previous supposedly golden era. While there was much to admire about the nominations of Roberts and Alito and the Senate's proceedings on those nominations, I remain concerned that a serious problem throughout the hearings was a disturbing, persistent lack of candor.

The Supreme Court confirmation process cannot be fixed – if fixed it need be – or even improved, as long as obfuscation and veiled rhetoric are encouraged and rewarded. I do not think the process is broken.

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It still largely functions as designed by inviting conflict or accommodation between the branches and even within the Senate and by subjecting the operations of the process to public scrutiny. But lack of candor does not make the process work better; it makes the process more frustrating. The confirmation process works best when it functions transparently and all parties may be held accountable for what they say and do.

I. WHY THE ROBERTS AND ALITO CONFIRMATION PROCEEDINGS WERE DISTINCTIVE

The confirmation proceedings for Chief Justice Roberts and Justice Alito were distinctive in at least three major respects. First, the proceedings were distinctive for the new rhetoric employed for describing proper judging. Chief Justice Roberts did not speak of judging in traditional terms. Instead, he used simple, colloquial, politically appealing language to describe his understanding of what judges should do. He suggested that a justice ought to act with "modesty"[1] and that judging was analogous to "umpiring."[2] He characterized himself as committed to "bottom-up" rather than "top-down" judging.[3] He was careful not to explain these references in any significant detail, and many senators followed suit. Senators supporting his nomination spoke admiringly of his intellectual abilities and academic achievements, his distinguished record of Supreme Court advocacy, and his "heart."[4] More than a few senators (and commentators) were dazzled by his eloquence, confidence, and endurance as a witness before the Judiciary Committee.[5] Similarly, Justice Alito avoided detailed discussions of his judicial philosophy. He spoke largely in platitudes about how he would perform his duties as a Supreme Court justice,[6]

1. Mike Allen and R. Jeffrey Smith, *Judges Should Have 'Limited' Role, Roberts Says; Statement to Panel Cites Need for Restraint on Bench; Prior Documents Question 'Right to Privacy'*, WASH. POST, Aug. 3, 2005, at A5 ("Roberts wrote in his statement to the committee that the proper exercise of the judicial role 'in our constitutional system requires a degree of institutional and personal modesty and humility' and said it is 'not part of the judicial function to make the law.'").

2. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate*, 109th Cong. 55 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

3. *See id.* at 159 (testimony of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

4. *See id.* at 53-54, 346 (statements of Sen. John Warner and Sen. Mike DeWine).

5. Marcia Davis, *The Unheard; On the First Day, John Roberts's Reserve is Confirmed*, WASH. POST, Sept. 13, 2005, at C1; John Hinderaker and Paul Mirengoff, *Why Alito's the Man for the True Conservative Agenda*, WASH. POST, Nov. 6, 2005, at B3.

6. *See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Committee on the Judiciary United States Senate*, 109th Cong. 593 (2006) [hereinafter *Alito*

and senators supporting his nomination emphasized his "heart," bipartisan accolades from his fellow judges and former law clerks, and his character.[7]

Second, John Roberts made history more than once during the summer and fall of 2005. He is the only person ever nominated for each of two concurrent vacancies on the Court. Recall that the Senate Judiciary Committee was just about to start its proceedings on Roberts' nomination as an Associate Justice when President Bush nominated him to replace Chief Justice William Rehnquist. (Had Rehnquist lived and Roberts been confirmed as Justice O'Connor's replacement, Roberts would have held the distinction of being the first person ever to have sat on the Court with the justice for whom he had clerked.) Roberts is the second youngest person to be appointed as Chief Justice and is the youngest person to have been nominated as Chief Justice since John Marshall was nominated at the age of forty-five in 1801. Appointed at the age of fifty as Chief Justice, Roberts has a good chance of becoming one of the longest serving justices ever.

Third, the Roberts and Alito confirmation hearings were distinctive for what was not said publicly. When he was running for re-election, President George W. Bush promised to appoint "strict constructionists" to the Court,[8] though he never explained what he meant by those terms. Before more than one audience of supporters, the President left the impression that Justices Scalia and Thomas would serve as models for his appointments, but he did not mention either as a model at the time he nominated Roberts or Alito. Nor did the President ever describe Roberts or Alito as a "strict constructionist." During their respective confirmation hearings, Roberts and Alito refrained from describing themselves as "strict constructionists," and none of the senators supporting their nominations described them as "strict constructionists." Nor did the nominees or their supporters suggest they were like, or in the mold of, Justice Scalia or Justice Thomas. Chief Justice Roberts jokingly dismissed the comparisons.[9]

Particularly conspicuous by its absence throughout the hearings was any extended discussion of the nominees' judicial philosophy. In the past, judicial nominees have gotten into trouble when they de-

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Confirmation Hearing] (statement of Sen. Edward Kennedy) (noting that Alito gave the Judiciary Committee "platitudes about Supreme Court precedent and the Constitution").

7. *See id.* at 573, 702-03 (statement of Sen. Tom Coburn) (noting Alito's great "character" as well as the judgment of fellow judges, who know Alito's "heart").

8. The First Gore-Bush Presidential Debate, Oct. 3, 2000 (unofficial debate transcript, *available at* http://www.debates.org/pages/trans2000a.html).

9. *See Roberts Confirmation Hearing*, *supra* note 2, at 378 (testimony of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) ("I will be my own man on the Supreme Court. Period.").

scribed themselves as originalists or as rigidly committed to original meaning or neutral principles. Chief Justice Roberts explicitly refused to put a label on his approach to deciding cases. He rejected any commitment to a "grand" theory of constitutional law requiring construing the Constitution in terms of a single unifying concept, such as originalism.[10] One looks in vain in Roberts' and Alito's confirmation hearings for any description of them as "originalists" or as approaching cases in a manner like Justice Scalia or Justice Thomas. While a few senators and supportive witnesses described the nominees as "conservative,"[11] the label was left largely unexplained,[12] and most supporting senators and witnesses studiously avoided labeling the nominees at all.

Almost all the Republican senators on the Judiciary Committee encouraged the nominees to refrain from answering questions about specific issues remotely likely to come before them; and some cited Justice Ruth Bader Ginsburg as a model for not answering specific questions about what she would do if confirmed to the Court.[13] A few senators went further. Some, such as Senator Mike DeWine, R.-Ohio, suggested shortly after Alito's nomination that his confirmation would help to bury the Senate's rejection of Bork as a precedent. Senator Brownback, R.-Kansas, expressed pleasure with the nomination early and often on the basis of the approach he expected Justice Alito to follow in interpreting the Constitution.

It is easy to understand why the nominees and their supporters had no incentive for discussing their judicial philosophies in detail. With fifty Republicans in the Senate, President Bush had the numbers on his side: As long as most Republicans kept in line, his nominees were going to be confirmed. Only a really stupid blunder or stupendous revelation might have derailed either nomination, but, not surprisingly, neither occurred. Moreover, the possibility of a filibuster was never serious. Earlier in the year, the so-called Gang of 14 in the Senate had averted the "nuclear option" by agreeing not to allow any judicial filibusters except in "extraordinary circumstances." A few Re-

10. *See Roberts Confirmation Hearing*, *supra* note 2, at 158 (testimony of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) ("Like most people, I resist the labels. . . . I prefer to be known as a modest judge.").

11. *See Alito Confirmation Hearing*, *supra* note 6, at 14, 748, 762 (statements of Sen. Charles E. Grassley; Katherine L. Pringle, Partner, Friedman Kaplan Seiler & Adelman, L.L.P, and Rep. Debbie Wasserman Schultz). *See also Roberts Confirmation Hearing*, *supra* note 2, at 36, 40, 506, 512, 513 (statements of Sen. Lindsey O. Graham; Sen. Charles E. Schumer; Sen. Dianne Feinstein; and Peter B. Edelman, Professor of Law, Georgetown University).

12. *See, e.g.*, *Alito Confirmation Hearing*, *supra* note 6, at 1176-79 (statement of Anthony Kronman, Sterling Professor of Law and Former Dean of Yale Law School).

13. *See Roberts Confirmation Hearing*, *supra* note 2, at 42 (statement of Sen. John Cornyn) (encouraging Roberts not to abandon "the Ginsburg Standard").

publican members of the Gang of 14 openly declared they did not believe either the Roberts or Alito nomination met their understanding of the "extraordinary circumstances" required by the agreement for a judicial filibuster. Consequently, any senators contemplating filibustering either nomination knew at the outset of the hearings they almost certainly lacked the requisite support to mount a successful filibuster or to defeat the nuclear option. With the knowledge that a judicial filibuster was extremely unlikely, Roberts and Alito erred on the side of saying too little rather than too much in their respective hearings. No nominee has ever been rejected for saying too little to the Committee; Bork was a dramatic example of the problems a nominee could cause for himself by talking too much. The nominees made themselves the smallest targets possible in their respective hearings, and each succeeded.

Moreover, the nominees distanced themselves from the few potentially embarrassing public documents they wrote as Justice Department officials. They vowed to keep an "open mind"[14] and dismissed the potentially embarrassing (if not revealing) statements within those documents as nothing more than the work of paid advocates. They repeatedly distinguished their duties and responsibilities as Supreme Court justices from those they had as Justice Department lawyers. The distancing techniques helped to smooth their relative paths toward confirmation, though they never erased the suspicion some observers had that the potentially troublesome documents were a significant reason for their selection as nominees.

The persistent refusals to address hypotheticals and to discuss judicial philosophy at length effectively shifted the burden of persuasion to the opposition. Had the numbers in the Senate been different – say, the Senate had been evenly divided or the Democrats had controlled the Judiciary Committee – a different strategy might have been in order. But, with the numbers being what they were, the nominees could not only afford to be reticent in answering questions but also expect their reticence to place upon the Democrats the burden to demonstrate some lack of fitness to serve on the Court. Obviously, that burden was never met.

The final subject not discussed in any meaningful detail in the Roberts and Alito proceedings was religion. Almost nothing was said in the hearings about the possible relevance of the nominees' religion,

14. *See Roberts Confirmation Hearing*, *supra* note 2, at 56 (testimony of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) ("If I am confirmed, I will confront every case with an open mind."). *See also Alito Confirmation Hearing*, *supra* note 6, at 322 (testimony of Samuel A. Alito, Jr., Nominee to be an Associate Justice of the Supreme Court of the United States) (stating that he would approach questions beyond that of stare decisis with an "open mind").

either to their selections, or to their approaches to constitutional interpretation. (Interestingly, Jay Sekulow, who advised the White House on the appointments of Roberts and Alito and who strongly supported both nominations, published a book arguing that the best and most courageous justices have been the ones who have allowed themselves to be guided, in part, by their religious convictions.[15]) Roberts and Alito became the fourth and fifth Roman Catholics on the Court, respectively. The Roberts Court, at least in its first year, has had the largest number of Roman Catholics ever to sit on the Court at one time. The percentage of the Court that is Roman Catholic far exceeds the percentage of Roman Catholics in the United States. More than a few people may wonder whether it is a coincidence that all five Roman Catholics on the Court – including Roberts and Alito – are Republican appointees. Although some senators probably felt that questioning nominees about their religious convictions or affiliations should have no place in the confirmation process, others might have wondered whether the nominees' religious commitments had any relevance to their selection. Moreover, shortly after being nominated by President Bush, Alito told one senator he thought that the Court had made a mistake in not allowing more religion into public life. Yet, no senators pressed Alito on the statement. The hearings left unclear whether senators avoided questions about Alito's statement because they agreed with him or because they feared that challenging Alito in this area would have made him more, not less, sympathetic.

II. EXPLAINING HARRIET MIERS

It is not possible to fully understand the significance of the confirmation proceedings that occurred from the beginning of July 2005 through January 2006 without explaining Harriet Miers. As we all know, John Roberts and Samuel Alito, Jr., were not the only people nominated by the President to replace Justice O'Connor. Roberts was the first, Alito was the third, but Harriet Miers was the second. Miers' nomination was unusual, not just because it failed, but also because it provoked greater candor – more transparency, if you will – from the White House and some Republican senators. Neither the rhetoric nor the strategy employed on behalf of the nominations of Roberts and Alito worked, or were used, for Miers. The White House's defense of her nomination and its ultimate failure may clarify what the White House and many senators may have been trying to obscure with the appointments of Roberts and Alito.

15. *See generally* JAY ALAN SEKULOW, WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS (2006).

Miers' failure is mystifying because she is only the second Supreme Court nominee to be forced to be withdrawn during a period of unified government. The last time a Supreme Court nomination failed in a period of unified government was Abe Fortas' nomination as Chief Justice.[16] It did not appear, at least at the time of the withdrawal of Miers' nomination, that she had the kinds of monumental problems that brought Fortas down – a nomination by a lame duck president, ethical lapses, demonstrated lack of judicial temperament, and a filibuster.[17] Nor, for that matter, did she appear to have Fortas' rather daunting credentials, including highly regarded Supreme Court advocacy.[18]

I believe there were at least five reasons for the failure of Miers' nomination to the Supreme Court. To begin with, it became a liability for her not to measure up to Roberts. It was not just that she lacked Roberts' elite credentials. Unlike Roberts (or Alito, later), she was not well known among the conservative or political elite at the time of her nomination to the Court. The people who knew her best were not in the nation's Capitol but back home in Dallas, where she had practiced law and become President of the Texas Bar. She had never appeared on *anyone's* short list of Republican Supreme Court nominees, whereas Roberts (and again, Alito, later) had appeared on virtually every such list. The fact that neither Roberts nor Alito needed much, if any, introduction to the Senate, worked to their benefit; whereas, it worked against Miers that she had to be introduced to the public *and* to those who were being asked to support her.

Secondly, Miers was hurt badly by the White House's initial defense of her nomination. The President's initial defense was that he knew her "heart."[19] In trying to sell her nomination to conservative religious leaders, White House adviser Karl Rove stressed her religious faith.[20] By the White House's own apparent admission, her religion appears to have been a factor in her selection as a nominee to the Supreme Court. Conspicuously absent from the initial defense of her nomination was any reference to a specific judicial philosophy or to her professional accomplishments.

Commentators, as well as several senators, wasted no time in denouncing the White House's strategy. A loud and persistent chorus

16. *Assessing Harriet Miers*, WASH. POST, Oct. 13, 2005, at A22.

17. U.S. Senate: Art & History, Filibuster Derails Supreme Court Appointment, http://www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm (last visited Feb. 26, 2007).

18. Michael A. Fletcher, *White House Counsel Miers Chosen for Court; Some Question Her Lack of Experience as a Judge*, WASH. POST, Oct. 4, 2005, at A1.

19. *Id.*

20. Peter Baker, *White House Shifts Its Lobbying Strategy*, WASH. POST, Oct. 15, 2005, at A7.

reminded the White House that religion was not an appropriate basis for any federal appointment, including a seat on the Supreme Court. Indeed, the Constitution expressly forbids a religious test for a federal appointment. It was hard for the White House to credibly deny that religion had been a factor in its selection of her when White House personnel spoke openly of her religious convictions in response to inquiries about her qualifications for the Court. It became harder still when one of her key supporters, a Texas Supreme Court justice, tried to put some conservative interest group leaders at ease by describing the critical events culminating in her becoming an Evangelical Christian and his certitude about how her faith dictated how she would rule on abortion rights questions on the Court.[21]

If we look back at all four of President Bush's Supreme Court nominations (Roberts twice, Miers, and Alito), we can see that at least one thing they all share is a strong Christian faith. It is possible this common link was not coincidental. President Bush, his advisers, and many Repubican senators believe that the appointments of Sandra Day O'Connor, Anthony Kennedy, and David Souter were mistakes because these justices were not rigidly committed to the right kind of judicial ideology. It is possible that President Bush and his advisers considered a nominee's religious faith as pertinent insofar as it may have constituted an inflexible anchor or foundation of their approach to deciding cases as justices. It may not have been enough for President Bush or his advisers that prospective nominees espoused the right kind of philosophy or even had long track records of service to the party or commitment to the right kind of judging. Justices Kennedy and Souter had relatively long track records as judges and made the right kinds of statements when screened for the Court, but both, insofar as many conservatives are concerned, failed to fulfill their promise as genuinely conservative justices. In their critics' judgment, both justices proved susceptible to liberal influences. That Roberts, Alito, and Miers may have espoused judicial philosophies that were appealing to the White House may have mattered to their selection, but their religious convictions, when coupled with their espoused ideological commitments, may have helped to clinch their nominations. At the very least, those convictions probably made these nominees appealing to the various religious leaders who had publicly supported President Bush's efforts to transform the federal courts, including the sponsors of Justice Sunday I and II.

21. Michael Grunwald, Jo Becker, & John Pomfret, *Strong Grounding in the Church Could Be a Clue to Miers's Priorities*, WASH. POST, Oct. 5, 2005, at A1 (discussing her belief that "life begins at conception").

The third problem with the Miers nomination was that Miers lacked the qualifications to serve on the Supreme Court. Nothing could be done to rectify this deficiency. One could look at the résumé of either Roberts or Alito and imagine that an appointment to the Supreme Court was a possible, logical, and natural next step for either or both of them. One could not do the same for Miers. One could not look at her résumé and figure that a seat on the Supreme Court was the next, logical step for her.

This is not an elitist judgment. It has nothing to do with where she went to law school or with where she practiced law. (I hasten to say that I like Dallas and SMU. My mother and brother live in Dallas, and my father is buried there.) Miers' qualifications became suspect from the outset because her professional experience was not the initial basis on which the White House defended the nomination. Saying, in effect, that her religion was her first qualification for serving on the Supreme Court implied that Miers' other qualifications were secondary; and they may have been secondary because they could not, and did not, speak for themselves. Miers was a Managing Partner of a major Dallas law firm, but it is not entirely clear how that translates into qualifying her for a seat on the Supreme Court. Nor had she litigated, much less argued, major cases before the Supreme Court – indeed, the Court had never been the focus of her professional work.

Even worse for Miers, she badly flubbed her interviews with senators. Meetings with senators were especially important for Miers because, as an unknown commodity, she had to sell herself. Yet, more than a few senators found her underwhelming. She could not answer some basic questions. For instance, she had a hard time telling Senator Leahy who her favorite justice was[22] – not a hard question, given that it is asked to virtually every Supreme Court nominee and some answers – Justices John Marshall Harlan the Younger – are safer than others. Her choice – Warren Burger – was odd, at best, because he is not usually on people's lists of favorite justices. Even Miers had a hard time explaining her choice. Worst of all, Senator Arlen Specter, the Chair of the Judiciary Committee, acknowledged that Miers needed "a crash course in constitutional law" before the hearings.[23] This was not an auspicious start, to stay the least.

Imagine someone interviewing with a Board of Directors to be the CEO of a company. If that person needs a "crash course" on what the company does before she can answer its questions, that person had

22. Michael A. Fletcher & Shailagh Murray, *Warren? Or Burger? A Matter of Judgment*, WASH. POST, Oct. 12, 2005, at A4.

23. 151 CONG. REC. S11953 (daily ed. Oct. 27, 2005) (statement of Sen. Arlen Spector).

better like her current job. She stands no chance of being selected to run the company. The same was true of Miers. She could not make the case for her own appointment.

Another problem with the Miers nomination was the fact that she lacked a demonstrable commitment to the kind of judicial ideology that many Republican senators (and conservative interest group leaders) desired for Justice O'Connor's replacement. Some senators were openly skeptical of Miers' judicial philosophy.[24] Without a long history in the conservative movement or of championing conservative judicial decisions, Miers was a wild card for these senators. The support for her nomination among the conservative elite (and the President's core constituents) weakened when the press published some liberal-sounding statements she had made as the Texas Bar President.[25] President Bush's assurances did not alleviate the concerns of many of his supporters about her position on abortion rights, school prayer, and all the other matters likely to come before her on the Court.

A final reason Miers' nomination failed is that the President simply did a poor job of vetting her nomination. In nominating her, he had made the mistake of deviating from the thorough vetting he had required for every other prospective nominee. If he figured that his vouching for her would be a sufficient safeguard against any surprising revelations, he was wrong. He – or his staff – failed to learn the painful lesson to be derived from President Reagan's nomination of Douglas Ginsburg to the Court. In a rush to nominate someone in the wake of the Senate's rejection of Robert Bork, President Reagan did not wait for the usual background check before nominating Douglas Ginsburg to the Court. Ginsburg was forced to withdraw from consideration just nine days after the President had nominated him to the Court because of embarrassing revelations about drug use that had not up until that moment become public or known within the administration. Miers lasted a little longer than nine days, but it is possible had more people been consulted or more people been given the opportunity to ensure the soundness of the President's preference, Miers might either have not been nominated or she would have been nominated with a better strategy to secure confirmation.

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24. *See* Michael A. Fletcher & Charles Babington, *Conservatives Escalate Opposition to Miers; Web Sites and Ad Campaign Seek Nominee's Withdrawal*, WASH. POST, Oct. 25, 2005, at A2. *See also* Press Release, Rep. Lois Capps, Congresswoman Capps' Statement on Nomination of Harriet Miers for U.S. Supreme Court (Oct. 3, 2005) (on file with author), *available at* http://www.house.gov/list/press/ca23_capps/pr051003_miers.html.

25. Jo Becker & Sylvia Moreno, *Miers Backed Race, Gender Set-Asides; Nominee Made Diversity a Texas State Bar Goal*, WASH. POST, Oct. 23, 2005, at A5.

With so many problems, one is left to wonder why Miers was nominated to the Court. Her nomination is all the more confounding because the stated reason for the withdrawal – the concern that executive privilege would prevent her from answering questions posed by Judiciary Committee members about her work as Chief White House Counsel – was easily foreseeable before she was ever nominated.[26]

I seriously doubt that the President nominated Miers with the intention of withdrawing her nomination soon thereafter. It is hard to imagine a president willingly squandering a Supreme Court nomination. It seems especially unlikely that this President would have squandered the nomination given how much it meant to him and his party. Nor, for that matter, was it a sure thing that Miers' nomination would have failed. Given that the Minority Leader Harry Reid had suggested the nomination to the President,[27] many Democrats might have viewed her as the best for which they could hope, and some Republicans would have deferred to the President's choice.

I have no inside information, and can only speculate about the reasons for Miers' nomination. My guess is that she was the woman candidate who was most acceptable to President Bush. Before the President nominated Miers to replace Justice O'Connor, he had nominated John Roberts twice – first to fill Justice O'Connor's seat and second to fill the seat vacated because of Chief Justice Rehnquist's death. At that point, the President could not turn to a John Roberts again. Turning to another white man might not have been politically wise. The additional problem was that there were not a lot of women who were both "strict constructionists" and had the credentials of a John Roberts. There might have been some women – Judge Edith Jones, for example – who had the right kind of judicial ideology but were nevertheless quite controversial; and there might have been some women – Maureen Mahoney, for instance – who had stellar credentials but supposedly did not have the kind of judicial ideology preferred by the White House. (Apparently, Mahoney's successful defense of the University of Michigan's affirmative action program in the Supreme Court was widely viewed as a negative among those responsible for judicial selection in the Bush administration.) And, of course, whoever the President chose had to be confirmable. Thus, from the President's perspective, Miers had an edge: He believed she had the right kind of judicial philosophy and that she could be confirmed with relative ease. The fact that she did not have a paper trail as an ideologue was, from his perspective, a strength, not a weakness.

26. *The Letter of Withdrawal*, WASH. POST, Oct. 28, 2005, at A7.
27. *The President's Choice*, WASH. POST, Oct. 4, 2005, at A22.

If none of that were enough, President Bush had an added incentive of hoisting the Democrats on their own petard because Minority Leader Senator Harry Ried had suggested Miers' nomination to the President. Recall the silence – maybe, it was discomfort – of Democrats during the short period in which she was the President's nominee. We do not know what Democrats would have done had they been forced to vote on her nomination.

This is all pure speculation. Without the White House's records (which will not be public for many years), we need to be careful about reaching any conclusions about the reasons for Miers' failed nomination. We only know a part of the story. The part we know seems to put some blame on the President for not employing the same process for vetting her nomination that he had used for other possible nominees. Had he done so, the story goes, Miers would have made it through. But, based on what we know, much of the blame for the failure of the Miers nomination goes to Miers herself. It was unusual, to say the least, that with the President's party in charge, Miers could not command enough support to keep her nomination viable until she could at least make an appearance before the Senate Judiciary Committee. Her withdrawal of her nomination to the Court was one of the fastest in history. The twenty-four-hour news cycle and the Internet, no doubt, contributed to the swiftness of her fall as a Supreme Court nominee. Moreover, the swiftness of Miers' fall may tell us something about the strengths of her nomination – namely, that it had few. She did not have enough going for her to outweigh the doubts and negatives cropping up shortly after nomination. The few strengths of the nomination could not make up for what Miers lacked professionally and ideologically.

III. THE HEARINGS AS PRECEDENT

The remaining question is what the confirmation proceedings for Roberts, Miers, and Alito portend for the future of the Supreme Court selection process. More than once during the hearings for Roberts and Alito, senators cited some past proceedings as possible precedents. Roberts declared shortly after being sworn in as Chief Justice that he construed his confirmation as demonstrating the Senate's approval of judging as distinct from politics.[28] Some senators suggested Alito's confirmation set an important precedent for the appointment of justices with "conservative" judicial philosophies to the Court. It is not entirely clear why this should be so, given that Alito never described

28. Associated Press, *John Roberts Sworn in as 17th Chief Justice*, Sept. 29, 2005, *available at* http://www.msnbc.msn.com/id/9521047.

his philosophy as "liberal' or "conservative" and many senators refrained from labeling his jurisprudence.

Whatever happened during the confirmation proceedings for Alito, Miers, and Roberts, the likelihood is that their significance will depend much more on how senators subsequently describe the proceedings than on what senators said or did at the time. In spite of all the efforts at orchestration, it is already apparent they could be construed in at least several ways.

First, the appointments of Roberts and Alito extend the trend of appointing sitting judges to the Court. Each of the last ten appointees to the Court was a sitting judge prior to his or her appointment. The last time there was a successful Supreme Court nominee without judicial experience was 1971, the year in which President Nixon nominated Lewis Powell and William Rehnnquist to the Court. Miers would have been the first person, since Powell and Rehnquist, to come to the Court from a position other than a sitting judgeship. That she failed could be taken as further evidence of the importance of prior judicial experience as an important prerequisite for a successful appointment to the Court. It is likely many key decision-makers feel that the distinction between judging and politics is best appreciated by people who have been judges, though most Supreme Court appointees were not judges prior to their appointments to the Court. A track record as a judge may have become, at least for many people, the best evidence of their appreciation of what judges ought to do. I share, with some others, the belief that some of our most distinguished justices – Charles Evans Hughes, for example – could appreciate not only the distinctive responsibilities of judging but also the special challenges confronting other constitutional actors.

A second way to construe the Supreme Court confirmation proceedings during 2005 and 2006 is establishing yet another precedent for the pertinence of politics and judicial ideology in the nomination and confirmation of justices. Prior to 2005, all but 17 of the 147 nominees for positions on the Supreme Court belonged to the same political party as the president at the time of nomination. All three of President Bush's nominees were Republicans (though Miers once had not been); and President Bush's two successful nominees were both Republicans and both had served as political appointees in Republican administrations.

Moreover, judicial philosophy was an obvious factor in his choice of nominees. It was not merely coincidence that he interviewed and ultimately selected as nominees people who had demonstrated – in some way – a record of commitment to the preferred judicial philosophy. For their part, senators clearly took judicial ideology into ac-

count in voting on Roberts and Alito. Lee Epstein and Jeffrey Segal determined that, prior to 2005, "senators are most likely to vote for nominees who are ideologically close to them and least likely to vote for nominees who are ideologically distant from them. . . ."[29] This pattern held true in the Roberts and Alito hearings; twenty-two senators voted against Roberts on purely ideological grounds, while forty-two voted against Alito on such grounds. It is possible a few senators – Ben Nelson and Arlen Specter, for instance – may have voted for the nominees in spite of their likely judicial ideologies, and possibly because of possible shifts in their own ideological positions. Of the seventy-eight senators voting for Roberts and the fifty-eight voting for Alito, it's not hard to see that statements made in these or other hearings (and circumstances) reflect their ideological proximity to the nominees.

The confirmation proceedings further confirmed Epstein's and Segal's finding that "Senators will most certainly vote for candidates who are ideologically close and well qualified, and they also will almost certainly vote against candidates who are distant and not qualified."[30] Strong qualifications clearly make it harder – but not impossible – for senators to vote against nominees with stellar credentials. It is possible that if there were a few more Democrats in the Senate, Alito might have faced some serious trouble in the confirmation process. Whether he would have suffered a fate like Bork's is impossible to know. At least thus far, Bork is that rare nominee whose stellar credentials could not move enough senators from their preferred ideological positions to approve him in spite of the undeniable transformative potential of his appointment.

One thing to keep in mind is that while Alito replaced O'Connor, who had been a swing vote in so many cases, Justice Anthony Kennedy is now the Court's swing justice. As someone who voted to reaffirm *Roe v. Wade*[31] and to overturn *Bowers v. Hardwick*[32] in *Lawrence v. Texas*,[33] Justice Kennedy is not a model for the Bush White House or most Republican senators. If Justice Stevens or any other justice on the supposedly "liberal" wing leaves the Court, the balance of the Court will be as much at stake as it was when Kennedy replaced Lewis Powell. This alone will make the next hearings excruciatingly intense for Democrats and Republicans. If the next vacancy were to

29. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 109 (2005).

30. *Id.* at 114.

31. Roe v. Wade, 410 U.S. 113 (1973).

32. Bowers v. Hardwick, 478 U.S. 1039 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

33. Lawrence v. Texas, 539 U.S. 558 (2003).

arise in a time of divided government, the fight over the nomination within the Senate will be all the more intense. It is hard to imagine that either Republicans or Democrats will be indifferent to the nominee's likely judicial ideology at such a time. More to the point, would Republican senators treat a Democratic president's Supreme Court nominee the same as they treated either Roberts or Alito, especially if they knew the ideological balance of the Court were at stake?

Nor can we overlook the significance of the consultations between presidents and senators prior to the selection of Supreme Court nominees. The pre-nomination consultation is a significant way by which to filter out nominees with unacceptable judicial philosophies. Prior to President Bush's selection of Roberts as his nominee to replace Justice O'Connor, he received recommendations from most senators. He received recommendations from more than seventy senators before he chose Miers and Alito. One of the factors used by President Bush to narrow his selection was judicial philosophy, and every senator knew that. It is disingenuous for anyone to say that Roberts or Alito were picked without any consideration of his judicial philosophy; the focus just occurred prior to the formal announcement of the nomination. The fact that the confirmation process operates more smoothly, or more seemly, when the focus on judicial philosophy occurs in a less public phase of the process does not mean that key decision-makers have ignored judicial philosophy.

A third way to construe the Senate's approvals of Roberts and Alito is as a precedent for emphasizing nominees' moral character and not their judicial philosophies. For this construction to work, the references to nominees' "heart" and "character" have to be understood as referring to something specific about the nominees – namely, that their characters were somehow morally distinctive. Prior to these hearings, some constitutional scholars urged the Senate to focus on nominees' moral character rather than their likely judicial philosophies. As these scholars (and the senators who agree with them) will tell you, this focus has several supposed advantages over an emphasis on nominees' judicial philosophies: It supposedly would keep senators from interfering with the independence of each nominee to retain his or her discretion to decide cases or controversies free from political pressure or political retaliation. Furthermore, moral character has the advantage of being constant; no matter what cases arise in the future – and it is difficult if not impossible to predict the kinds of cases likely to arise decades from now – we can expect that the justices will retain their morally distinctive characters over time. Moral character is important because the moral authority of each justice is instrumental to fostering public respect for what he or she decides. Indeed, the

supposition is that justices earn respect for their decisions by virtue of their moral characters, not by the force of their reasoning.

The focus on nominees' moral character is, however, potentially problematic in several respects. The first is that senators may not be sincere in discussing a nominee's "heart" or "character." The references could be either subterfuge or misleading. The President and others may have opted for a discussion of "heart" or "character" as a means to signal what the nominees would do without having to discuss their judicial philosophies in specific terms. A disturbing development over the last several years is the emergence of a code or secret language to convey what justices may do. Presidents and senators do not need to openly discuss certain attributes of nominees if these are already known or may be conveyed by other means. But, it is hard to see how this signaling helps the process; it merely forces people construing the significance of the events to dig deeper for answers rather than to stop looking for them. The primary relevance of the discussion of Miers' religion and "heart" may have been that they were meant to convey something about her fitness to serve on the Court, that she had the kind of judicial ideology we might expect someone with her "heart" and "character" to have.

The second problem with construing the hearings as a precedent for emphasizing nominees' moral characters is that it undercuts the claim made by some senators that the hearings should be considered as a different kind of precedent – namely, one standing for the Senate's confirming "conservative" justices. The problem is senators cannot have it both ways: They cannot claim the irrelevance of the nominees' judicial philosophies as a basis for their confirmation while at the same time arguing that their confirmations actually established precedents for confirming justices with particular judicial philosophies.

Third, construing Roberts' and Alito's confirmations will constitute a precedent for primarily focusing on nominees' moral character only if a similar focus can be maintained in a time of divided government as well. Moral character ought not to be the monopoly of either of the major parties. If it were not a basis for approving justices nominated by presidents of both parties, it would lose any claim to neutrality, and it cannot claim to be a principled focus if it only works to the advantage of one party's nominees.

Fourth, there is substantial uncertainty and lack of consensus over what constitutes the requisite moral character for the Court. To be sure, there is a lot to be said about Supreme Court justices meeting exacting standards of integrity and temperament. But, focusing on moral character could become problematic if there were no clear stan-

dard. The challenge for senators is to define beforehand their preferred moral character for the Court, not to make up the requisite qualities as they go along. Moreover, judging does not depend solely on moral character. Presumably, we want nominees with first-rate legal credentials, with the right kinds of skills and temperament. Moral character might be one, but hardly the only, appropriate factor to consider in confirmation proceedings.

The final problem with focusing on nominees' moral character is that the claim that justices command public respect because of their moral character may not be empirically sound. Most Americans still do not know the names of most justices, much less accurate information about their respective character. Public respect for the Court may not depend on the justices' character. Instead, it is possible that the justices' moral character may be more important to cultivating the respect of the leaders of other public institutions than it is for ensuring the public's respect for what the Court does.

Most troubling about construing these recent appointments as precedents is, however, allowing religion to be taken into account as a basis of selection. The explicit references to Miers' nomination were disturbing because the Constitution expressly forbids using a religious test for federal appointment. The references were hard to square with the White House's repeated assurances that Roberts' Roman Catholic faith and his wife's work for Catholic pro-life organizations were irrelevant to his selection. For many, the references to Miers' faith signaled an inappropriate mixing of church and state; the references confirmed the possibility that Miers and perhaps Alito and Roberts were chosen in part because of, rather than in spite of, their respective religious convictions.

It is not hard to imagine why the White House may have considered Miers' and perhaps other nominees' religious faiths pertinent. We know the White House wanted, perhaps more than anything else, to nominate justices who would not "evolve" on the Court, as supposedly O'Connor, Souter, and Kennedy had done. They wanted people who would decide cases on the basis of judicial philosophies that would not change over time. Saying the "right thing" in interviews with the President or other executive officials, and even performing on the lower courts in a manner agreeable to the White House, was not good enough. The Bush White House wanted someone whose judicial philosophy was both predictable and durable. The nominees' religious convictions may have been at least as pertinent as heart or character as the inflexible, immutable anchors of their judicial philosophies.

Forcing Miers' withdrawal does not necessarily establish a precedent against explicitly considering nominees' religious convictions as a

basis for their selection. Her forced withdrawal may simply be a lesson to maintain the practice with greater secrecy to do so below radar, so to speak.

It remains to be demonstrated, as an empirical matter, what the respect for the Court from either the public or other branches really depends on. In this day and age, it seems that many political leaders have difficulty acknowledging the possibility of principled differences among the justices. Far too often, public leaders denounce any opinion or decision with which they disagree as grounded on political, or partisan, grounds. The effort to focus on the moral character of Supreme Court nominees may well have the salutary effect of reducing explicit consideration of nominees' judicial philosophy, but it is naïve to think judicial philosophy was irrelevant to either their nominations or their confirmations.

I cannot close without discussing another possible precedent set by the Roberts and Alito appointments. Roberts and Alito have something else in common with Justices Thomas and Scalia other than religion. Like Scalia and Thomas, Roberts and Alito were political appointees in Republican administrations. Indeed, Roberts, Alito, Scalia, and Chief Justice Rehnquist were all political appointees in the Justice Department, and all were evidently involved in making a number of politically charged decisions at the Justice Department.

They were all political appointees in the Justice Department chosen at times when the only people picked as judges or justices had to have the right kinds of credentials and ideological convictions. There was every sign, well before the appointments of any of these justices, they were true believers in a constitutional vision, and there was nothing to suggest that any had ceased to be at the time of appointment. Charles Fried, who was the Solicitor General under whom both Alito and Roberts once worked, quipped that he was confident there was not a dime's worth of difference in their judicial philosophies.[34] One wonders what the basis for his confidence is. More than a few documents that Alito and Roberts produced working at the Justice Department (and, in Roberts' case, the White House counsel's office) reflect the kind of approach to constitutional interpretation that President Bush clearly favors. One can only imagine what other documents that were not produced might demonstrate about the constitutional philosophies and commitments of Roberts and Alito.

Once the Bush White House records become public, we might discover that the apparent emphasis on nominees' religion mattered but

34. Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006, §4, at 1 (quoting Charles Fried as saying, "I don't think there's a great deal of daylight between Alito and Roberts on privacy.").

not as much as the work product these nominees produced while working as political appointees in the Justice Department. In fact, their appointments extend the precedent of appointing people whose constitutional opinions became known while working as political appointees in the Justice Department. It is possible, if not likely, that middle-level officials, as Roberts and Alito were, were encouraged and rewarded for pushing the constitutional philosophies they shared with the President and others in the Reagan and Bush administrations. It is well known that the Justice Department became highly politicized at the time Roberts and Alito worked there as political appointees. Moreover, the Justice Department, in those days and since, was a feeder for federal judgeships. It was not just happenstance that Roberts and Alito were nominated by President Bush's father to the federal courts of appeal. (Recall Roberts was first nominated as a judge – to a seat on the D.C. Circuit—by President Bush's father.) He was trying to extend the practice, begun under President Reagan, of transforming the federal courts. The tough screening of prospective nominees ensured that the only people who merited judicial appointments had to have proven their ideological commitments in demonstrable ways. The Judicial Department was an ideal place to demonstrate such commitments.

CONCLUSION

I hope, like so many people did during those uncomfortable moments when the White House seemed to exult over Harriet Miers' religious convictions, that religion is not a pertinent criterion for judicial selection. I suspect that strong religious convictions may have been more than a coincidental link connecting Roberts, Miers, and Alito. I suspect that the objective in President Bush's searches for Supreme Court nominees was evidence of being a true believer, by which I mean someone with a fervent, unshakeable conviction in how the Constitution ought to be interpreted in every case. Service in the Justice Department, particularly in highly sensitive political posts, may turn out to be good evidence of true belief. It may turn out, once the Bush White House's records become public, that the new religion that matters for elevation to the nation's highest Court is fervent service to the cause and not just to the party.