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**By Facsimile to 202/224-9102
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The Honorable Arlen Specter, Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

I write in favor of the nomination of Harriet Miers. I have known Ms. Miers for the more than seven years that I have served as Dean of the SMU Dedman School of Law. Having observed her in various capacities, I know her to be a person who is a careful analytical thinker, who is extremely sensitive to the factual context of the issues before her, who is a consensus builder and leader, who listens well, and who is open-minded and impartial. Ms. Miers is also unassuming and sincere. She is compassionate, having played a leading role in establishing legal services for the poor in Dallas and having represented pro bono clients herself, even while serving in leadership roles in various bar associations and as managing partner of her law firm.

By way of background, I have taught and written in the field of constitutional law for 24 years. I co-author a casebook and a treatise on constitutional law with Norman Redlich, the former dean of the New York University School of Law; the late Bernard Schwartz also of NYU; and now Joel Goldstein, a Rhodes Scholar who teaches at St. Louis University School of Law. I have written many articles about constitutional law in various journals including the *University of Chicago Law Review*, the *New York University Law Review*, the *Georgetown Law Journal*, and the *American Journal of Comparative Law*.

For more than twelve years, I have been privileged to have organized numerous conferences with courts from other countries in which seven of the Justices of the Supreme Court have participated at one time or another. Some of these conferences occurred before my current position at SMU. Others are documented by photographs on our web site (www.SMU.law.edu). Some of these conferences and discussions were opened to the general public while others were behind closed doors with only some professors from SMU and other schools (e.g., NYU, Oxford, Yale) participating. I have also had the opportunity to observe Ms. Miers in some of her roles as a bar leader, alumni leader of this University, award recipient, and managing partner of a major law firm. I have heard her speak in public on several occasions. As a constitutionalist, I have no doubt that Harriet Miers is extremely well-qualified to be a Justice of the Supreme Court of the

United States.

Ms. Miers' legal career began as a law student at SMU. The Law School's mission is to train leaders. Currently our alumni include nine federal District Court judges and two members of Congress. Six of SMU's alumni have served on the Texas Supreme Court and one on the Supreme Court of Missouri; countless have served as state judges. Three have been justices on the Japanese Supreme Court and others have served on the highest courts of the Philippines, Indonesia, Thailand, Taiwan, Egypt (Vice-President), and Korea. Our graduates work in over 70 countries. Many have become CEO's or presidents of companies like State Farm Insurance, Kroger, Texas Oil & Gas, Worldwide Shipping, Cathay Insurance, Stewart Title, Texas Utilities, 7-11 (Southland Corporation), Compaq Computer (Vice Chairman), Omni Hotels, Austin Industries, Transport Life Insurance, the Hart Group, and ClubCorp International; General Counsels of corporations like PepsiCo (Deputy), Fossil, Frito-Lay, Sammons, Brinker International, Dr. Pepper/7-Up, Hunt Oil, Fedex/Kinko's, Belo Corporation, and Neiman Marcus; bar association leaders; and managing partners and named partners of some of the largest law firms in the country and the world. Others have become government ministers, presidents of parliaments, members of Congress, MP's, ambassadors, and chiefs of staff of presidents.

Among these alumni, Harriet Miers stands right at the top, having received the law school's Distinguished Alumni Award in 1997, well before she entered the White House. As a student, Ms. Miers also distinguished herself, having served as comments editor of the *Southwestern Law Review* (now the *SMU Law Review*) and as a member of the Order of the Barristers, the preeminent service organization at the school which admits fewer than 10 people per class based on service and academic achievement.

The Law School has been an innovator in legal education since 1925. We have been among the first schools in the nation to offer a master's degree in international and comparative law, a master's degree in tax, and a doctor of juridical science degree. The School also was among the first in the nation to sponsor legal clinics serving low-income citizens in the community. In partnership with Senator Hutchison and the State Department, we organize the Rule of Law Forum which brings high level leaders to the United States to meet with counterparts. Among the leaders who have participated in one or more of the first four delegations are: the Vice-President, seven Senators, three Supreme Court Justices, the Deputy Secretary of State, and the President of the New York Federal Reserve Bank. We are the headquarters of the Appellate Judicial Education Institute, perhaps the preeminent provider of continuing education for appellate judges in the United States.

This year's full-time students had a median LSAT of 162 and an undergraduate GPA of 3.73. We had 2,420 applicants to enroll 181 students in our day program. Our faculty includes scholars like Joseph Norton who holds honorary doctorates at the Universities of Stockholm and London and Marc Steinberg who has organized conferences for Fortune 500 and other corporations, and for the New York Stock Exchange. Marc Steinberg, Alan Bromberg, and many other faculty are frequently quoted in publications like the *Wall Street Journal* and the

New York Times. We also have visiting professors like Judges Patrick Higginbotham and the late Richard Arnold of the United States Court of Appeals. Our publications include *The International Lawyer*, the most widely distributed U.S. international law review in the world.

Of course, many lawyers have had great legal educations. The fact that Ms. Miers had a great legal education is only one of many factors which qualify her to be a Justice of the Supreme Court of the United States. What kinds of qualities does the country need in a Justice of the Supreme Court of the United States? That depends on one's conception of the role of the Court. What was the Framers' conception of the Supreme Court of the United States? As you know, the debates at the Constitutional Convention tell us little about their conception of the responsibilities of that institution which after all has become the centerpiece of the American conception of the rule of law. In *Federalist* number 78, Alexander Hamilton said that the judiciary's only power is "JUDGMENT" as the Congress has the power of the purse and the President, the power of the sword. Hamilton also articulated a theory of judicial review in *Federalist* number 78: he said that a conflict between the "manifest tenor" of the Constitution and a Congressional act must be "irreconcilable" before the Court can act to invalidate the statute. This would appear to imply a narrow power of judicial review, at least with regard to Congressional legislation. I am not suggesting that the Supreme Court has ever followed this narrow view of judicial review articulated by Hamilton, but only that one prominent framer of the Constitution argued for a narrow power in the *Federalist Papers*.

Early in our history, Chief Justice John Marshall staked out a broader power of judicial review, at least with regard to Congressional legislation. In *McCulloch v. Maryland*, the State of Maryland challenged the power of Congress to establish a Bank of the United States arguing that the Bank is nowhere listed in Congress's powers under Article I, section 8. Marshall responded with a broad interpretation of the power of Congress to establish the Bank; this power is nowhere to be found in Article I, section 8. Marshall famously opined that "it is a constitution we are expounding."

Like Hamilton, Marshall and James Madison, Ms. Miers has had the unusual privilege of having been part of constitutional moments, those pivotal times when constitutions are drafted, and those involved in that process have to think deeply about the most difficult and foundational constitutional questions imaginable. These questions generally are far more difficult than all but a few and arguably any cases a Justice of the Supreme Court of the United States will face in her entire tenure. I have been privileged to have witnessed such moments although at a far less deep level than Ms. Miers undoubtedly has. For example, I organized what to my knowledge is the first visit of the Russian Constitutional Court to the United States and their first visit with Justices of our Supreme Court. I have team taught with the founding Vice-President of the South African Constitutional Court, with drafters of that new South African Constitution, and with the Deputy of the Supreme Soviet of the Soviet Union who drafted the Estonian constitutional reforms. The pressure of these moments on the key players involved is palpable. Ms. Miers must have thought about such issues, although she appropriately will almost surely not admit to it because of national security reasons and the attorney-client privilege of serving the current President. She had to have thought about them in a way that Supreme Court Justices think about

them. The difficult, complex constitutional questions justices on new highest courts face are out of all proportion to a justice on a highest court in a mature constitutional system. An even greater pressure is faced by those who participate in the drafting process.

That view is shared by Justices of highest courts in developed rule of law systems including federal and state judges and Justices in the United States. I have heard many judges and Justices express such views, sometimes publicly and other times behind closed doors. As counsel to the President, Ms. Miers must certainly have faced many such issues. After all, during her tenure, many discussions must have occurred in the White House regarding the difficult issues the Iraqi people were facing in drafting their new Constitution. Similarly difficult issues surrounded the Afghan people putting into action their new Constitution. These are historic moments. As White House Counsel sits in on National Security Council meetings, Ms. Miers must certainly have been involved in these historic constitutional discussions. She also has undoubtedly been involved in the many other complex constitutional and statutory interpretation issues routinely faced by those who have served in this job. Indeed, on October 16 in the *New York Times*, Kristin Silverberg (a former White House official who clerked for Justice Thomas, spent part of 2003 in Baghdad, and is now Assistant Secretary of State) was quoted as saying that “Ms. Miers’s work at the highest levels of the White House had exposed her thoroughly to the many ‘monumental, life-changing issues’ that come before the court, and that she would be well-suited to grappling with them.”

For a number of years, even before she was White House counsel, Ms. Miers played a substantial part in vetting candidates for the federal judiciary. As White House Counsel and before that as Deputy Chief of Staff, Ms. Miers sat on the White House Judicial Selection Committee. She subsequently sat on the committee that vetted nominations for the Supreme Court including that of Chief Justice Roberts.

Obviously, both *a priori* and empirically, it is simply a caricature of Ms. Miers’ high-powered career to suggest that she has not dealt with the most complex of legal issues, both constitutional and statutory--issues which resemble those which Justices of the Supreme Court of the United States continually face. The names of her predecessors as White House Counsel are storied: Alberto Gonzales, Beth Nolan, Charles Ruff, John Quinn, Abner Mikva, Lloyd Cutler, Bernard Nussbaum, C. Boyden Gray, Arthur Culvahouse and Fred Fielding. Some of these people were close friends of the Presidents whom they served; some were not, but all were great lawyers. Any President would put himself in grave legal and political danger by selecting his lawyer based on ‘cronyism.’

Ms. Miers’ service as White House counsel has been only the latest evolution of a distinguished career. She served as Deputy Chief of Staff in the White House focused on domestic policy and before that as Staff Secretary to the President coordinating, in a critically analytical way, all document flow into and out of the Oval Office. Again, because of the trying times which this administration has faced in connection with the war against terrorism and the new Constitution drafted by the Afghans, many of these documents have had to involve constitutional issues. According to that same article in the *New York Times* on October 16, Brett

M. Kavanaugh, her successor as staff secretary noted that “her critics had overlooked the breadth of issues she had addressed in the White House. ‘For any lawyer in the country to be called upon by the president over the course of the past five years to provide advice on a full range of subjects,’ Mr. Kavanaugh said, ‘from national security law, to the Patriot Act, to any issue that may cross his desk, is a very significant role for any lawyer to play.’” Perhaps Ms. Miers’ chief flaw is her intense respect of the attorney-client privilege which deters her from revealing what must unavoidably be a considerable record of constitutional work.

Many great Justices of the Supreme Court had relatively little experience in constitutional issues before coming to the Court. Three examples are Chief Justice Earl Warren, Justice Byron White, and Chief Justice William Rehnquist. Chief Justice Rehnquist's only opportunities to have dealt with constitutional issues occurred while he clerked for the Supreme Court and during his brief stint as Assistant Attorney General. Otherwise, he worked in a small law practice and then in solo practice in Arizona. For that matter, Chief Justice Marshall himself--whom Chief Justice Rehnquist frequently alluded to as the greatest of all Chief Justices--also spent much of his time working in private practice before going to the Court. Apart from this experience, he spent two years in the House of Representatives, several months representing the United States in France, and about a year as John Adams’ Secretary of State.

Beyond clerking for the Supreme Court and spending one year as Deputy Attorney General of the United States, Justice White had virtually no constitutional law experience, having been in private practice at a Denver, Colorado law firm for virtually his entire career. Chief Justice Warren said the following about his time before going to the Court: “Since becoming governor, I had not been engaged in handling legal matters As Attorney General, my work was largely administrative Most of my practice at all times had been in the state courts. My experience with federal courts had been very limited. With the independent regulating agencies . . . it was almost nil.” Yet eight (September - May) months later he pens the magisterial decision of *Brown v. Board of Education*. And Supreme Court nominees do not acquire much in the way of constitutional experience by having worked for short periods of time on the federal Court of Appeals. As you know, Chief Justice Roberts participated in few constitutional cases while serving on the United States Court of Appeals for the District of Columbia. His vast constitutional knowledge came from the privilege of having practiced so much constitutional law for much of his distinguished career.

Just as important as the constitutional law experience that Ms. Miers surely has is her litigation experience. Harriet Miers brings a long and distinguished practice career to the Court, which was focused on litigation and managing the complexities of a large law firm. Both of these experiences should help her immeasurably on the Court. At the end of the day, the Supreme Court decides cases. It does not do philosophy. In my own constitutional law classes as well as in my casebook and treatise, I emphasize the importance of the law and the record to the decision-making process of the Supreme Court of the United States. In my view, perhaps the biggest mistake that law students and even practitioners before the Court make is to fail to recognize the importance of the factual record that is before the Court, including the procedural context in which the case comes before it. As a distinguished former litigator, Ms. Miers is

highly unlikely to make either of these mistakes. More important, she will contribute to the Court in adding greatly to the experiences that some of the Justices have in the field of litigation.

As the first woman managing partner of one of the largest law firms in Dallas, she also will bring her skills as a consensus builder to the Court, a skill that you and some of the Senators emphasized during the Roberts' hearings and a skill for which her predecessor Justice O'Connor is widely acclaimed. As the first female managing partner of a major law firm in Dallas, Ms. Miers was forced to hone this skill to a fairly high level of excellence. She further honed it in leading a merger with a large Houston firm.

Ms. Miers also developed her leadership, policy-making, and consensus building skills in her role as a bar leader. As you know, she rose to be the first woman President of the Dallas Bar Association and the first woman President of the Texas Bar Association, Chair of the Board of Editors of the *Journal of the American Bar Association*, Chair of the Multi-jurisdictional Practice Commission of the ABA, and Chair of the powerful Rules and Calendar Committee of the ABA House of Delegates. When she went to the White House, she withdrew her candidacy for chair of the House of Delegates, a position which generally leads to President of the ABA, the most notable position which Lewis Powell held before being appointed to the Court. Again, virtually all of these positions routinely involved making or commenting on complex policy issues. Ms. Miers' steady advancement to roles of greater and greater responsibility as a bar leader attest to her skill in policy-making and consensus building, qualities which will serve her well in the Supreme Court.

Ms. Miers rose to these various positions of authority despite the barriers encountered by professional women. Ms. Miers' achievements have been constantly recognized by the many awards that she has received. As you are undoubtedly aware of the awards which she has received, I will not repeat them here. In addition to her awards, she has been named as one of the hundred most powerful lawyers in the United States.

Before I conclude, I wish to comment on a dangerous notion that is springing up in our Republic. Some have articulated the view that we should appoint Justices of the Supreme Court by plebiscite. Some have remarked that the current nominee is taking the "O'Connor seat" on the Court. Some had even remarked that since candidates for the Senate must disclose their views on particular issues, candidates for the Supreme Court must disclose their views as well. Reducing the nominations process to selecting judges whose views mesh with the current popular will is a paradoxical mixture of perniciousness and folly. Presidents and Senators are constantly disappointed by the decisions of the Justices whom they appoint and confirm for life to that office. During the confirmation of Chief Justice Roberts, many Senators remarked that the Chief Justice would likely sit on the Court for 30 years or more. How can one project the decisions, or even the issues, that will be faced by a Justice over that time frame?

However, the far greater danger to our Republic lies in the possibility of tethering the views of Justices of the Supreme Court of the United States to the current will of the Senate, the public, or for that matter the President. However, the Senate bears a particular responsibility in this connection because the questions during the hearing process are public and therefore difficult to eschew and irrevocably on the record. By its nature, the Supreme Court is designed not to be responsive to, but to be a check on the popular will. It is functionally designed to protect the politically helpless and to referee the political processes.

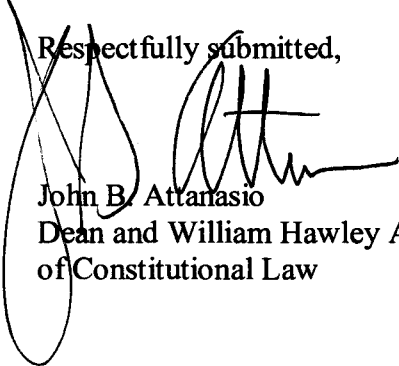
Chief Justice Roberts invoked the metaphor of a neutral umpire to describe his conception of the role of judging. If the Court is tethered through plebiscites to the will of the governing political majority, it simply cannot be neutral. Under the circumstances, judicial independence, impartiality, and the rule of law itself are all threatened. As you know, the landmark case of *Brown v. Board of Education* was decided by a unanimous Court. Had judicial nominees been subjected to the current confirmation process in the 1930s, 1940s and '50s, I fear that it may have come out unanimously the other way.

Obviously, the Senate has a responsibility to the public to insure that judicial nominees can effectively carry out the complex duties of this high office. Inevitably, however, if Ms. Miers is subjected to a week long constitutional law examination of various precedents and her views on these precedents, her views will be tethered and judicial independence impaired. In *Federalist Paper No. 51*, James Madison expressed considerable dismay about legislative encroachments on judicial independence:

“It is equally evident that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.*” [emphasis added].

Thus, in fashioning his conception of the Supreme Court of the United States, the principal draftsman of the Constitution knew, just as Chief Justice Roberts knew, that the Supreme Court must be independent. Judicial independence helps to ensure that judges will listen to the litigants before them and decide the case in front of them on its facts and on the law, rather than on their own ideological preconceptions or predilections, just as Ms. Miers has said she will. At the conclusion of this important process, I have no doubt that you will be satisfied that Harriet Miers is an outstanding and well-prepared addition to the Supreme Court of the United States. Thank you for your consideration of these ideas.

Respectfully submitted,

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of Constitutional Law