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## Judgment Call

Did Christian conservatives receive assurances that Miers would oppose *Roe v. Wade*?



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Two days after President Bush announced Harriet Miers's Supreme Court nomination, James Dobson of Focus on the Family raised some eyebrows by declaring on his radio program: "When you know some of the things that I know--that I probably shouldn't know--you will understand why I have said, with fear and trepidation, that I believe Harriet Miers will be a good justice."

**James Dobson**

Mr. Dobson quelled the controversy by saying that Karl Rove, the White House's deputy chief of staff, had not given him assurances about how a Justice Miers would vote. "I would have loved to have known how Harriet Miers views *Roe v. Wade*," Mr. Dobson said last week. "But even if Karl had known the answer to that--and I'm certain that he didn't because the president himself said he didn't know--Karl would not have told me that. That's the most incendiary information that's out there, and it was never part of our discussion."

It might, however, have been part of another discussion. On Oct. 3, the day the Miers nomination was announced, Mr. Dobson and other religious conservatives held a conference call to discuss the nomination. One of the people on the call took extensive notes, which I have obtained. According to the notes, two of Ms. Miers's close friends--both sitting judges--said during the call that she would vote to overturn *Roe*.

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The call was moderated by the Rev. Donald Wildmon of the American Family Association. Participating were 13 members of the executive committee of the Arlington Group, an umbrella alliance of 60 religious conservative groups, including Gary Bauer of American Values, Richard Land of the Southern Baptist Convention, Tony Perkins of the Family Research Council, Paul Weyrich of the Free Congress Foundation and the Rev. Bill Owens, a black minister. Also on the call were Justice Nathan Hecht of the Texas Supreme Court and Judge Ed Kinkeade, a Dallas-based federal trial judge.

Mr. Dobson says he spoke with Mr. Rove on Sunday, Oct. 2, the day before President Bush publicly announced the nomination. Mr. Rove assured Mr. Dobson that Ms. Miers was an evangelical Christian and a strict constructionist, and said that Justice Hecht, a longtime friend of Ms. Miers who had helped her join an evangelical church in 1979, could provide background on her. Later that day, a personal friend of Mr. Dobson's in Texas called him and suggested he speak with Judge Kinkeade, who has been a friend of Ms. Miers's for decades.

Mr. Dobson says he was surprised the next day to learn that Justice Hecht and Judge Kinkeade were joining the Arlington Group call. He was asked to introduce the two of them, which he considered awkward given that he had never spoken with Justice Hecht and only once to Judge Kinkeade. According to the notes of the call, Mr. Dobson introduced them by saying, "Karl Rove suggested that we talk with these gentlemen because they can confirm specific reasons why Harriet Miers might be a better candidate than some of us think."

What followed, according to the notes, was a free-wheeling discussion about many topics, including same-sex marriage. Justice Hecht said he had never discussed that issue with Ms. Miers. Then an unidentified voice asked the two men, "Based on your personal knowledge of her, if she had the opportunity, do you believe she would vote to overturn *Roe v. Wade*?"

"Absolutely," said Judge Kinkeade.

"I agree with that," said Justice Hecht. "I concur."



Shortly thereafter, according to the notes, Mr. Dobson apologized and said he had to leave the discussion: "That's all I need to know and I will get off and make some calls." (When asked about his comments in the notes I have, Mr. Dobson confirmed some of them and said it was "very possible" he made the others. He said he did not specifically recall the comments of the two judges on *Roe v. Wade*.)

Judge Kinkeade, through his secretary, declined to discuss the matter. Justice Hecht told me he remembers participating in the call but can't recollect who invited him or many specifics about it. He said he did tell the group that Ms. Miers was "pro-life," a characterization he has repeated in public. But he says that when someone asked him about her stand on overturning *Roe v. Wade* he answered, "I don't know." He doesn't recall what Judge Kinkeade said. But several people who participated in the call confirm that both jurists stated Ms. Miers would vote to overturn *Roe*.

The benign interpretation of the comments is that the two judges were speaking on behalf of themselves, not Ms. Miers or the White House, and they were therefore offering a prediction, not an assurance, about how she would come down on *Roe v. Wade*. But the people I interviewed who were on the call took the comments as an assurance, and at least one based his support for Ms. Miers on them.



The conference call will no doubt prove controversial on Capitol Hill, always a tinderbox for rumors that any judicial nominee has taken a stand on *Roe v. Wade*. Ms. Miers meets today with Sens. Dianne Feinstein of California and Chuck Schumer of New York, both stalwart *Roe* supporters, who surely will be interested to learn more about her views. After Mr. Dobson's initial comments about "things . . . that I probably shouldn't know," Sen. Arlen Specter, the pro-*Roe* Judiciary Committee chairman, said, "If there are backroom assurances and if there are backroom deals and if there is something that bears on a precondition as to how a nominee is going

to vote, I think that's a matter that ought to be known." He and ranking Democrat Pat Leahy of Vermont threatened to subpoena Mr. Dobson as a witness.

Some participants in the Oct. 3 conference call fear that they will be called to testify at Ms. Miers's hearings. "If the call is as you describe it, an effort will be made to subpoena everyone on it," a Judiciary Committee staffer told me. It is possible that a tape or notes of the call are already in the hands of committee staffers. "Some people were on speaker phones allowing other people to listen in, and others could have been on extensions," one participant told me.

Should hearings begin on Nov. 7 as is now tentatively planned, they would likely turn into a spectacle. Mr. Specter has said he plans to press Ms. Miers "very hard" on whether *Roe v. Wade* is settled law. "She will have hearings like no nominee has ever had to sit through," Chuck Todd, editor of the political tip sheet Hotline, told radio host John Batchelor. "One slipup on camera and she is toast."

Should she survive the hearings, liberal groups may demand that Democrats filibuster her. Republican senators, already hesitant to back Ms. Miers after heavy blowback from their conservative base, would likely lack the will to trigger the so-called nuclear option. "The nomination is in real trouble," one GOP senator told me. "Not one senator wants to go through the agony of those hearings, even those who want to vote for her." Even if Ms. Miers avoids a filibuster, it's possible Democrats would join with dissident Republicans to defeat her outright.



There are philosophical reasons for Republican senators to oppose Ms. Miers. In 1987, the liberal onslaught on Robert Bork dramatically changed the confirmation process. The verb *to bork*, meaning to savage a nominee and distort his record, entered the vocabulary, and many liberals now acknowledge that the anti-Bork campaign had bad consequences. It led to more stealth nominees, with presidents hoping their scant paper trail would shield them from attack.

President Bush has now gone further in internalizing the lessons of the Bork debacle. Harriet Miers is a "superstealth" nominee--a close friend of the president with no available paper trail who keeps her cards so close to her chest they might as well be plastered on it. If Ms. Miers is confirmed, it will reinforce the popular belief that the Supreme Court is more about political outcomes than the rule of law.