

She's No Roberts

The biggest impediment to Harriet Miers' confirmation may be the man who preceded her onto the Court.

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One individual stands between Harriet Miers and a seat on the U. S. Supreme Court, and it's not Chuck Schumer, Joe Biden, or Teddy Kennedy. It's newly confirmed Chief Justice John Roberts.

Miers is no less qualified for a seat on the high court than were a host of recent justices. In 1981, Sandra Day O'Connor's résumé as an Arizona judge and former state legislator was far from overwhelming. Ditto for David Souter's little-known New Hampshire pedigree in 1990, to say nothing of Clarence Thomas's record in 1991. In 1971, William Rehnquist was plucked from obscurity in the U. S. Department of Justice, and Lewis Powell, nominated at that same time, had, like Rehnquist, no judicial experience whatsoever. Go back a bit further and the list grows: Abe Fortas' primary qualification in 1965 was his special-buddy status with President Lyndon Johnson, and in 1962, Byron White was best known as a former football star who'd worked on John F. Kennedy's 1960 presidential campaign. Ever heard of Charles Evans Whittaker? Probably not, but Dwight Eisenhower put him on the Court soon after Earl Warren and William J. Brennan.

Historically speaking, then, no one can argue that Miers is unqualified, or even underqualified, to be a Supreme Court justice. What's more, her record of professional accomplishment as a Texas attorney is undeniably striking, and comparing her to O'Connor as a female trailblazer is credible; being the first woman to head the Dallas and Texas bar associations may not seem like a big deal nowadays, but Texas, like Arizona, was certainly not the easiest place to be a young female lawyer back when women law students were a rare breed. Miers has worked loyally and discreetly for George W. Bush during both his presidency and his governorship, but Bush has done Miers no favor whatsoever in nominating her to the Court on the very same day that Roberts took his seat.

No matter how you feel about the merits of Roberts' selection, there's no denying that Miers' résumé looks awfully thin in comparison to his. Roberts graduated from Harvard Law School (notwithstanding just an "A-" from Laurence Tribe in constitutional law), Miers from Southern Methodist. Roberts clerked for then-Justice Rehnquist, Miers for Dallas federal district Judge Joe Estes. Roberts went to work for U. S. Attorney General William French Smith and then President Reagan; Miers worked at a large Dallas law firm. Roberts became a top attorney in the solicitor general's office and went on to argue 39 cases before the U.S. Supreme Court; Miers has never argued a single case before the Court. Roberts moved from being a premier Supreme Court advocate to being a judge on the top-drawer U. S. Court of Appeals for the District of Columbia Circuit; Miers moved from being head of the Texas Lottery Commission to being White House staff secretary and then counsel.

It's no put-down of Harriet Miers to say that she's no John Roberts. Once Roberts' nomination was announced, Supreme Court insiders from the justices on down praised the qualifications of someone they all knew well. Miers, however, is a complete unknown, not only at the Court but to everyone else in Washington outside of the White House staff.

Roberts' nomination benefited tremendously from the high regard hundreds of elite Washingtonians had for him; Miers has no comparable friendship network whatsoever on which she can draw. Miers may very well receive public encomiums from leading Texas lawyers of all political stripes, and it's likely that the American Bar Association will likewise pronounce her qualified for confirmation. And Democratic opposition to Miers will be badly hamstrung by her almost complete lack of any "paper trail," and efforts to portray her as a partisan Bush lackey will be significantly undercut by her past campaign contributions to Al Gore and Lloyd Bentsen. But Miers' biggest hurdle lies in how extensively she'll be compared to Roberts, especially once her hearings before the Senate Judiciary Committee get under way.

Roberts had the benefit of 25 years' immersion in the cases and doctrines that come before the high court, and it showed during his testimony; Miers will begin her confirmation process with no such knowledge or expertise. However many weeks pass before her hearings commence, Miers will need to burn the midnight oil night after night in order to get herself up to speed for questions that Roberts confronted almost effortlessly. While it's true that, in theory, Miers has little to fear from Judiciary Committee Democrats (with the possible exceptions of Joe Biden and Russ Feingold, none has the legal wherewithal to make any nominee seem embarrassingly unschooled), she nonetheless ought to view her hearings with considerable dread. The questions may be easy. But if she comes across as having dramatically less legal expertise and self-assurance than Roberts, Senate Democrats will pounce on her simply in order to grievously wound the president who's nominated her.

Think back, if you're old enough, to those weeks in 1990 after then-President George Bush Senior nominated Souter but before Souter's Senate testimony began. Virtually no one, aside from Souter's personal friends in New Hampshire, had any great confidence that the unknown nominee would impress, or indeed wow, dubious and ambivalent senators. Yet within the first two days of Souter's testimony, it became clear to the vast majority of onlookers, and senators, that Souter possessed the intellectual acumen and thoughtfulness expected of a justice.

That's the question that will hang fire until Miers first begins speaking before the Senate Judiciary Committee. In the weeks ahead we'll learn much about the cases she handled as a private attorney, about her work for Bush in Texas, and about her bipartisan campaign contributions, but it's unlikely that the fate of this nomination will be any clearer the day before the hearings begin than it is now. Instead, everything -- or almost everything -- will hinge on Miers' performance before the committee. Once those hearings begin, everyone will know in a matter of hours whether or not she'll be confirmed.

If, like Souter, Miers demonstrates that she possesses the legal depth and intellectual firepower expected of a justice, that, plus her lack of a paper trail, could produce a Senate confirmation margin not too different from Roberts' own 78-to-22 tally. But if she seems hopelessly out of her

depth when compared to Roberts, it's imaginable that support for her nomination could collapse so quickly and widely that she'll withdraw. Either scenario is plausible.

Miers may win popular accolades, or she may become a painful embarrassment to an already badly weakened president. Bush certainly believes he knows Miers well enough that there's no doubt about the outcome, but to the rest of us, her nomination is a role of the dice. Only one thing is certain: Miers holds the outcome to this mystery in her own hands. She will either succeed, like Souter and Roberts, or she will crash and burn. A good bit of history's verdict on the Bush presidency hangs in the balance.

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