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THEY SAID IT

After George Bush was elected, people started talking about “the MBA presidency.” It wasn’t always a compliment. But it may be that it’s the secret of his success. In the past week, Mr. Bush brought two more businessmen into the upper reaches of his administration – former CSX head John Snow to run Treasury and Donaldson, Lufkin & Jenrette founder Bill Donaldson to take over the SEC. A lot’s being made now of the fact that this is starting to look like the Gerald Ford Alumni Association – Dick Cheney, Donald Rumsfeld and now John Snow, a Transportation deputy undersecretary, and Bill Donaldson by way of the Kissinger State Department....

If you are going to presume to run the government of the United States in an age such as ours, it might be useful if you brought to the job something other than what one might call “Beltway brilliance.” Beltway brilliance is clearly something that Dick Cheney, Don Rumsfeld and John Snow had back in the 1970s. But surely there is also something important to be gained from bearing some personal responsibility, every day, for making decisions for Halliburton in Houston, G.D. Searle in Skokie, Ill., or a railroad company in Richmond, Va....

The MBA President seems to have a knack for surrounding himself with people who’ve proven good at absorbing the best lessons from both worlds, and producing results in both. Maybe that’s why his presidency is working rather than floundering.

--Daniel Henninger, “Secrets of the MBA Presidency,” *The Wall Street Journal*, December 13, 2002.

WHY DID HE DO IT?

There is little doubt at this point that the nomination of White House Counsel Harriet Miers to the Supreme Court is an unmitigated political disaster. Indeed, given the rift that it has precipitated among conservatives and the criticism it has generated from the President’s erstwhile allies, I suspect that every single person in the White House – save one – would gladly take a mulligan on this shot. Of course, that one exception is crucial, since it would be the fiercely loyal and notoriously stubborn president himself who would certainly choose to re-nominate Miers over and over again, irrespective of the political consequences.

The question is why President Bush would choose to do so, particularly since Miers is hardly a giant of conservative jurisprudence and, in fact, is a nominal nominee at best, with credentials that are, by any objective reading, underwhelming to say the least.

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It is hard to imagine that the President or his advisors failed to foresee that conservatives would be at least mildly unhappy that they had been denied the opportunity to see one of the nation's great conservative legal minds elevated to the highest court. And certainly, they would have to have been similarly aware that the President's explanation that he has a long history with Ms. Miers and "knows her heart" would provide insufficient justification, particularly given the cloud of "cronyism" that has hung over the administration since former FEMA Director Michael Brown was exposed as a less-than-adequate administrator who got his job because of his political connections.

Naturally, it is difficult to play presidential pop-psychologist with any accuracy. But the question posed above demands an answer, so here goes. In my estimation, the most reasonable and legitimate explanation for the President's decision to nominate Ms. Miers centers on the President's comfort with her and his fundamental discomfort with the legal intellectuals who comprised the remainder of his "short list."

It has been obvious since that early primary debate back in 1999, when then-Governor Bush declared that his favorite political philosopher was "Christ," that, Ivy League education and blue blood notwithstanding, George W. Bush is relatively unique among the nation's political elites in that he tends not to be particularly enamored by or particularly comfortable with intellectual elitism.

Unlike the vast majority of those who aspire to "greatness" in politics, including both of his opponents in his presidential runs, President Bush appears unconcerned with being acknowledged as "great thinker" or a brilliant political mind. He is, in short, an "anti-intellectual," or at least he has a partiality toward anti-intellectualism. And the decision to nominate Harriet Miers is, in my opinion, part and parcel of this.

Now, certainly the idea that President Bush is an "anti-intellectual" is hardly new. The charge has been used both to belittle and to extol him since his first appearance on the public stage in Texas in the mid-1990s. But the issue of his anti-intellectual tendencies has never been more relevant, nor more contentious than it is right now, with a seat on the Supreme Court on the line.

Yet, despite the apparent relevance of the President's anti-intellectualism, its roots are rather poorly understood. Most politicians who exude an air of anti-intellectualism are populists, who like Ross Perot, stake their claim to power on the fact that they are better suited to represent "real" Americans than are the pointy-headed Washingtonians and assorted other East Coasters who generally run things. But given his genealogy, his education, and, most importantly, his political tendencies, Bush hardly qualifies as a populist. Indeed, he has, thankfully, never represented himself as a "man of the people," working hard to help the average man while fighting the entrenched powers that be. All of which is to say that in addition to being an atypical politician, in that he occasionally exhibits anti-intellectual tendencies, he is also an atypical anti-intellectual.

A handful of observers have suggested that they understand the source of the President's issues with intellectuals, though these explanations have generally been largely unsatisfactory, riddled as they are with clichés and misleadingly selective readings of the President's record. These interpretations of the President's anti-intellectualism are typically condescending, tending to explain it not as a political condition, but as an indication of the President's purportedly infamous low intelligence. Bush chose Miers, the argument goes, for the same reason that he does everything he does, because he is intellectually unserious. Typical of this line of argument was a piece penned last week by *Washington Post* columnist Harold Meyerson, who rather gleefully suggested that the right was slowly coming to realize about Bush what the sophisticated folks in the world had always known. He wrote:

[T]he conservative intellectuals have misread their president and misread their country. Four and a half years into the presidency of George W. Bush, how could they still entertain the idea that the president takes merit, much less intellectual seriousness, seriously? The one in-house White House intellectual, John DiIulio, ran screaming from the premises after a few months on the job. Bush has long since banished all those, such as Army chief of staff Gen. Eric Shinseki, who accurately predicted the price of taking over Iraq. Yet Donald Rumsfeld -- with Bush, the author of the Iraqi disaster -- remains, as do scores of lesser lights whose sole virtue has been a dogged loyalty to Bush and his blunders. Loyalty and familiarity count for more with this president than brilliance (or even competence) and conviction.

The irony here is that a more “intellectually” dishonest case regarding the President’s anti-intellectualism would be exceptionally difficult even to imagine. Setting aside the insinuations about the President’s inferior intelligence – insinuations which the political left and the mainstream media will embrace eternally, regardless of any evidence to the contrary – Meyerson’s description of the Bush presidency and particularly of the decision to invade Iraq are wholly unsupported by fact. Either Meyerson himself is intellectually unserious and has refused to look beyond the anti-war pabulum he has been spoon fed by his fellow liberals, or he has made an intentionally dishonest argument simply to cast the President in as poor a light as possible.

The fact of the matter is that anyone wishing to make the argument that Bush is “anti-intellectual” should stay as far away from Iraq as possible, since Iraq is the key Bush policy that refutes the charge. Perhaps Meyerson doesn’t know any better, but the term “neocon” isn’t merely anti-war left and paleo-right slang for “Jew” or “Zionist provocateur.” Neoconservatism was, in fact, one of the most

important conservative intellectual movements of the last century and remains the most important intellectual influence on the Bush administration and its foreign policy calculus.

Meyerson would have us believe that Bush and Rumsfeld were the architects of the administration’s Iraq policy, yet he conveniently ignores the man who is actually acknowledged as the architect of the war on terror, former Deputy Secretary of Defense Paul Wolfowitz. Wolfowitz, you may recall, was a disciple of Allan Bloom’s at Cornell and later received his PhD in 1972 from the University of Chicago where he was a protégé of mathematician and international relations theorist Albert Wohlstetter.

Given all of this, Wolfowitz is nearly universally acknowledged to be one of the most prominent and most successful adherents of the late political philosopher, Leo Strauss, who was unarguably one of the intellectual giants of the last century. Wolfowitz’s actual connection to Strauss is tenuous at best, given that his contact with him was limited to two courses, but the current head of the World Bank is nevertheless generally acknowledged as one of the principal political and foreign relations “intellectuals” of the current age.

Meyerson may find it comforting to believe that the Bush administration’s policies in Iraq are anti-intellectual, but he’s flat wrong. Regardless of what one thinks of those policies, or of the man who largely developed those policies, or even of the philosophical tradition to which those policies are most often traced, the suggestion that any of this can be labeled “anti-intellectual” is categorically absurd.

Actually, even Meyerson’s broader point, that Bush’s anti-intellectualism has led him to embrace a whole host of stupid policies is rather absurd. Meyerson argues that John DiIulio, the former director of the President’s faith-based initiatives was the “one in-house White House intellectual,” but that’s substantively untrue.

Many of the President's key advisors and many of the architects of the policies most acutely associated with this presidency are rooted strong intellectual traditions. In addition to the faith-based initiatives (DiIulio) and the war on terror (Wolfowitz), the President's most trusted advisor and co-architect of his foreign policy, Condoleezza Rice holds a PhD and was an academic and provost at Stanford University. The principal designer of the President's tax policy – and the second tax cut in particular – was former chairman of the President's Council of Economic Advisors and current Dean of the Graduate School of Business at Columbia University, R. Glenn Hubbard. And even the President's Social Security reform initiative has a strong intellectual heritage, springing largely from the efforts of the Cato Institute, which has been chaired for the last 20 years by William Niskanen, one of the true giants of American public administration and author of the true classics of bureaucratic/organizational theory, *Bureaucracy and Representative Government* and *Bureaucracy and Public Economics*.

Clearly, then, President Bush's purported anti-intellectualism is hardly the clichéd byproduct of intellectual laziness that Meyerson and others on the left and in the mainstream press would have us believe. But if it is not that, and if it is not the product of an earnest populism, then where does it originate and what does it say about the President's governing style and state of American politics?

This is not an easy question to answer obviously, but my best guess is that the President's anti-intellectualism more than anything springs from a preference for managerial capacity over intellectual capacity. President Bush is hardly threatened by intellectualism, but appears to prefer that his policies – whether intellectually grounded or not – be administered by people with a demonstrated history of managerial skill.

With the exception of the aforementioned Ms. Rice, the people on whom the President relies the most all have considerable managerial experience. Dick Cheney, for example was the youngest White House chief of staff ever, was one of the most respected

Secretaries of Defense in recent memory, and later was CEO of one of the largest energy and infrastructure companies in the world. Donald Rumsfeld, the man tasked with implementing the war on terror, was, prior to his stint in the Bush administration, ambassador to NATO, White House Chief of Staff, the youngest ever Secretary of Defense (under President Ford), the CEO of two Fortune 500 companies, and was named “Outstanding Chief Executive Officer in the Pharmaceutical Industry” by *Wall Street Transcript* (1980) and *Financial World* (1981) for his management of G.D Searle & Co.

The story is much the same for a great many of the President's closest advisors and cabinet members. Whereas most presidents have opted to put “intellectuals” in key positions in their administrations, President Bush has largely populated the top ranks of the his bureaucracy with people who have demonstrated managerial talent on a large stage (think Treasury Secretaries John Snow and Paul O'Neill) or who have been his close friends and advisors for many years and have demonstrated managerial capacity to him personally (think Alberto Gonzales).

Harriet Miers clearly fits the pattern President Bush has followed throughout his presidency. Interestingly enough, so does John Roberts. While Roberts dazzled opponents and supporters alike and pleased most Republicans to no end, he is hardly the intellectual giant most of the unhappy conservatives say they wish President Bush had nominated in Miers' place. Like Miers, Roberts spent most of his legal career in private practice. Like Miers he demonstrated a capacity both for practicing law and for managing the business of law. And like Miers, Roberts' principal prior government experience was as a functionary in the White House counsel bureaucracy.

This is not to belittle Roberts, of course, who has clearly demonstrated that he will be a formidable Chief Justice. But it is to say that President Bush's tendency to pass over intellectuals in favor of successful “managers” is hardly confined to Miers and, in fact, likely played a role in the President's previous Supreme Court nomination, though nary a peep of complaint was heard at the time.

Near the conclusion of his piece on the “new political paradigm” last week, Mark noted that one of the principal characteristics of this still-developing paradigm is the “quest for competence” and a desire for “administrative acumen.” The nomination of Harriet Miers and, indeed, the entire presidency of George W. Bush make more sense with this mind.

When Bush was first elected, much was made of the fact that his would be the first “MBA presidency.” But while that description has largely been ignored since, it actually says quite a bit about the way this White House is run. Bush tends to manage “his people” as he would if he were running a business, putting not the smartest or the best educated into all of the key positions, but those who have demonstrated to him that they have the necessary administrative skills.

Certainly, one may argue that Bush has not managed the presidency particularly well, misreading a number of his appointments and keeping less than competent people in place too long. And if Harold Meyerson had couched his critique of the Miers nomination in those terms, I’d be more likely to treat it as a serious analysis. Indeed, a number of conservatives would be sympathetic to such an argument.

In any case, the fact that this President places more emphasis on managerial skill than on intellectual capacity is not a sign of indolence, but merely a reflection of his own education and experiences and, more to the point, a reflection of the role of the Chief Executive in the new political paradigm.

Is that to say that conservatives should be happy with the Miers nomination and should therefore back off the criticism? Actually, no. Conservatives are justifiably upset, though perhaps their anger is misdirected.

The attacks against Ms. Miers are, in fact, surrogates for attacks against Bush. And these, in turn, are surrogates for attacks against the state of American government. Despite their hopes and desires, conservatives are likely to be disappointed about the state of government, no matter who is running the

show. As Max Weber put it many years ago, in an increasingly technological age where specialization of knowledge continues to grow, the bureaucratic apparatus necessary to manage the functions of the state will also continue to grow. Conservatives may believe that they are mad at Bush for poorly managing the business of government, but in truth, they’re mad that it needs to be managed at all.

SOME THOUGHTS ON MS. MEIRS.

It seems to me that there are two distinct perspectives from which to view and assess President Bush’s appointment of Harriet Meirs to the Supreme Court, and they tend to get mixed up in the commentary of the various pundits. The first concerns whether the appointment was the best of all possible selections. In my opinion, the conclusion that one must draw when viewing the nomination from this perspective is that it was not, that it was indeed a very poor choice.

Without question, there are many other candidates out there who are much better qualified by virtue of their education, experience, and solid, unquestionably conservative credentials. In addition, it seems to me that the Republican Party would have benefited from a knock-down-drag-out fight with Democrats over the appointment of a dignified, highly educated African-American or Hispanic. Finally, I think the appointment created a potentially damaging schism within the Party for what was arguably no apparent gain on any front other than to provide a loyalty reward to one of the President’s friends.

As such, I would not be unhappy if Ms. Meirs’ nomination were to fail to win Senate support and President Bush were forced to choose another candidate. This was, indeed, an opportunity for the President to score a big political hit against Democrats, rally his party around a “cause” that virtually all members could support, and assure that the Supreme Court would remain in intellectually substantial, conservative hands for years to come. And he blew it. It is right to fault him for this.

However, when viewing this nomination purely from the perspective of whether it represents a lethal blow to conservatism in the United States, I would say that it does not. The wildly extravagant histrionics of Judge Bork, Charles Krauthammer, Bill Kristol, George Will, and other conservative critics of Ms. Meirs notwithstanding, conservatives need not seek out a molehill to sit upon, like a dejected Henry VI, and ponder abandoning leadership for the life of a “homely swain.”

Ms. Meir’s nomination is not the beginning of America’s final days. It does not signal that Alaric has breached the Salarian Gate. Her nomination was a missed opportunity by President Bush to do something great. It was unfortunate. Some might even call it another stupid mistake by the Bush White House. But it was not a “disaster on every level” as Judge Bork described it, or “scandalous” to use Krauthammer’s term, or a “crowning absurdity,” as George Will said it was.

The woman is a conservative, for goodness sake, as generally defined in this day and age. She has a solid record as being pro life. She is an Evangelical Christian. She is, according to one of the nation’s leading gun rights advocates, Dave Kopel, a strong supporter of the right to bear arms. Indeed, according to her old boy friend, Judge Nathan Hecht of the Texas Supreme Court (as cited by Mark Steyn), she packs a .45 caliber Smith & Wesson, which may not be as fine a choice of sidearm as a .40 caliber Sig Saur or even a Glock, but it is American made, which indicates that she is not only a conservative but a buy-American, patriotic conservative as well. Given these factors, it seems to me that the chances of her being a closet liberal are exceedingly remote.

Furthermore, if President Bush, who has worked with her for years, knows her well, and knows people who know her well, says she is a conservative, then she is a conservative, once again as generally defined in this day and age. And if she is a conservative at 61 years of age, she is very likely to remain a conservative throughout the rest of her life and bring her conservatism to the Court.

So what exactly do the above-mentioned opposition conservatives think that the little lady is going to do as a member of the Supreme Court that is so frightfully awful that each has felt the need to publicly perform his own imitation of Greta Garbo playing the death scene from *Camille* or Lillian Gish on the ice flow?

Is she likely, if confirmed, to turn into some sort of rabid, anti-constitutionalist version of Mr. Hyde, who will declare war on babies and property rights and grease the nation’s descent into decadence and lawlessness with a host of radical, left-wing judicial outrages? I don’t think so. I think she will prove to be an intelligent, thoughtful conservative Supreme Court Justice. In fact, I think she is probably both conservative enough and smart enough to become a very good and possibly even an excellent conservative Supreme Court Justice in the mold of Clarence Thomas.

I mean, how hard can this be? The nation’s most brilliant lawyers come before the Supreme Court to plead their cases. They state their position and defend it with extensive arguments based on their interpretation of the Constitution. The Justices listen to both sides, ask questions, and then decide who is right. If it were me, I’d ask my new found best friend Antonin Scalia what he thinks, and when he told me, I’d say, “Isn’t that amazing, I think the same thing.” And then I’d go to my law clerks, who happen to be the best law clerks in the world, and tell them to write up my views, which, I would tell them, happen to be the same as Justice Scalia’s, sagely remarking that great minds think alike.

Would I be the best Supreme Court Judge that ever lived? No. Would I go down in the history books with Marshall and Holmes? No. Would conservatives everywhere and of every stripe proclaim me to be a great addition to the court? You bet.

If you must worry about Bush’s Supreme Court nominees, from the perspective of whether they will be reliably conservative, I would suggest that you worry a little about whether the brilliant, new Chief Justice Roberts will overthink something one

day and deliver a solid blow to the conservative solar plexus based on some crackpot interpretation of the Constitution that a plain, old, off-the-shelf conservative would never have considered. Say, just for sake of argument, that he came up with the idea that the “heart” of *Roe v. Wade* is “settled as a precedent of the court, entitled to respect under principles of *stare decisis*” and then “respected” it by confirming it as the law of the land.

My guess is that such an occurrence is not among the “mistakes” that a Justice Meirs is likely to make. She would be much more likely, I believe, to recall a conversation she once had with a group of abortion rights activists, at a time when she sat on the Dallas City Council. According to the *Washington Post*, the conversation went as follows: “Four of the women in attendance said in interviews that Miers was immovable. ‘She said, well, I’m sorry, it’s murder, and that’s that.’ There was no room for discussion.” Apparently, “*stare decisis*” never came up in the conversation.

George Will maintains that it would be preferable to have someone with strong “constitutional reasoning” skills that have been acquired from “years of practice sustained by intense interest.” And he may be right. He often is. But, as the song goes, it ain’t necessarily so. As numerous commentators have noted over the past week or so, less than half of all the individuals who have served on the Supreme Court had no prior experience as judges. I think that one can assume from this that few if any of these had “years of practice sustained by intense interest” in “constitutional reasoning.” Yet, more than a few have gone down in history as having been fine Supreme Court justices. These would include William Rehnquist, Earl Warren, John Marshall, Joseph Story, William Douglas, Felix Frankfurter, and Louis Brandeis.

In fact, I believe a case could be made, contrary to Will’s assertion, that the high court would benefit from having members with a variety of non judicial life experiences, possibly in the realm of business, or perhaps an extensive knowledge, acquired from

“years of practice sustained by intense interest,” of one or more of the “soft” disciplines, say history, economics, or sociology. Perhaps it would be useful to have someone who has served in local government, earned a living as a trial lawyer, been head of a large, successful, big city law firm, and then held a key policy position at the side of the President of the United States during a tumultuous period in the nation’s history.

Conservatives are fond of piously stating how dedicated they are to the principle of “strict interpretation of the constitution.” To put himself on an intellectual plain above all others on this matter, Judge Bork insists on using the awkward term “originalist” to denote the kind of judge who strictly interprets the constitution as opposed to those whom he describes as “judicial activists.”

This is all very good, of course, because it lends to the conservative side of the argument an aura of being in sync with the founding founders, which is no small thing when it comes to politics. But as a practical matter, it is a gross oversimplification of how the system works. If all that were required to make the correct decision in a complicated, constitutional dispute were to follow the dictates of the founders as written in the constitution a computer could do it,

The fact is that the law, even constitutional law, changes with the times and all judges, from the low courts to the high, conservative and liberal, reflect these changes in their deliberations and rulings, along with their prejudices, life experiences, religious beliefs, and legal philosophies. Oliver Wendell Holmes, Jr. was the first great American jurist to note this circumstance. He did it in both of his most famous works, *The Common Law* and *The Path of the Law*. I can’t decide which essay states the proposition best, so I will provide pertinent quotes from both. The first comes from *The Common Law*.

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public

policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

And then there is this from *The Path of the Law*.

The fallacy to which I refer is the notion that the only force at work in the development of the law is logic . . . This mode of thinking is entirely natural. The training of lawyers is a training in logic . . . The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing

legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for the determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's "Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors."

So, if Holmes is right, and I think he is, the crucial issue for conservatives regarding the Meirs nomination is not whether she has had "years of practice sustained by intense interest" in "constitutional reasoning," or whether she qualifies as an "originalist." As I said earlier, the first would be nice and to be regarded as the second would be a boon. The crucial question is whether the experiences, intuitions, prejudices, personal reflections, and views on the "felt necessities of the time" that she brings to the bench will lead her to decide cases in keeping with conservative notions of society and governance. My guess is that they will.

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