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Miers has Backed Wide Executive Role

WAS ON TEAM THAT DEVELOPED PATRIOT ACT

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WASHINGTON -- As President Bush's counsel, Harriet E. Miers continued the expansive interpretation of presidential powers favored by her predecessor, Alberto Gonzales, who backed Bush's authority to hold terrorist suspects without trial, as well as the White House's right to withhold more administration documents from public disclosure than in the past.

Miers has also been outspoken in her support of reauthorizing the Patriot Act, which gave the executive branch new powers of surveillance over US citizens.

Now, Miers is Bush's choice to join the Supreme Court, to replace Sandra Day O'Connor.

That selection determines how much power a president can wield under the Constitution. Her nomination, announced Monday, followed the confirmation of Chief Justice John G. Roberts Jr., who supported broad war powers for the president in a case he heard during his brief tenure as an appellate judge.

The two appointments, both of lawyers with extensive White House experience, have raised alarm among critics of the Bush administration's broad reading of executive branch authority.

"The fact that the president is now seeding the Supreme Court with people who have been handmaidens in his efforts to increase the power of the executive without any check or oversight whatsoever is very disturbing," said Bill Goodman, legal director of the Center for Constitutional Rights, which sued Bush on behalf of prisoners at the US facility at Guantanamo Bay, Cuba.

Supporters of Miers, too, have invoked her work on Bush's terrorism policies to assuage fears among some conservatives that she may be too moderate.

"In her work respecting the War on Terror and the threats posed to our country by misuse of foreign and international law, Ms. Miers has applied the Constitution as the Framers wrote it," wrote Leonard Leo of the conservative Federalist Society.

A New York University law professor, David Golove, said executive power is emerging as a defining issue for the Supreme Court in the post-Sept. 11, 2001, era. In case after case, the Bush administration has argued that it has the authority to take measures it deems necessary to stop terrorists, while others have insisted on maintaining checks and balances.

"Executive power issues are going to be coming before the court that are of tremendous significance," Golove said, pointing to challenges to Patriot Act surveillance powers, the treatment of Guantanamo Bay prisoners, and the case of Jose Padilla, a US citizen being held without trial under the authority asserted by Bush to imprison anyone whom the government suspects of being a terrorist.

As the lineup of the Supreme Court evolves, so may its rulings on how much power the Constitution gives the president. That prospect has sent analysts hunting for clues in the records of Bush's nominees.

This summer, for example, when Roberts was still an appeals court judge, he was part of a three-judge panel that ruled that Bush could bypass the Geneva Conventions, which require that prisoners of war be given court-martials, and could instead try a detainee before a military commission. Their holding reversed a district court's finding that the president had exceeded his authority.

And in a speech in April 2005, before a GOP lawyers' group, Miers said that reauthorizing the Patriot Act was "critical," because it "has been used in so many ways to help protect this nation and its people and in the war on terror."

Miers made her speech in the context of bipartisan calls to amend the law with checks on new surveillance powers.

Miers was also part of the administration's legal team when it developed both the Patriot Act and the detention policy for suspected terrorists. Her role in those internal deliberations, however, is unknown to the public.

Some conservatives wonder whether Miers personally supports the administration's approach or is just backing her client's official policy.

Among those raising questions is John Yoo, a former Justice Department official who helped to draft the Patriot Act and who wrote a memo arguing that Bush could authorize aggressive interrogation techniques, despite laws against torture.

Yoo, now a law professor at the University of California at Berkeley, wrote in an article appearing yesterday in The Washington Post that Miers might shore up conservative support if the White House disclosed her private advice to the president about the extent of his executive power.

"She may be one of the key supporters in the Bush administration of staying the course on legal issues arising from the war on terrorism," Yoo wrote. "But it is hard to see how the administration could reveal Miers's position on these issues, given its tough, five-year struggle to preserve the confidentiality of executive-branch deliberations."

Years ago, Miers argued against expanding government powers in the face of despite security threats. In July 1992, as the president of the Texas Bar Association, Miers warned against responding to a courtroom shooting spree by infringing "on precious, constitutionally guaranteed freedoms."

"The same liberties that ensure a free society make the innocent vulnerable to those who prevent rights and privileges and commit senseless and cruel acts," Miers wrote in Texas Lawyer. "Those precious liberties include free speech, freedom to assemble, freedom of liberties, access to public places, the right to bear arms, and freedom from constant surveillance. We are not willing to sacrifice these rights because of the acts of maniacs."

With no one sure where Miers would stand on executive power as a justice, the ranking Democrat on the Senate Judiciary Committee, Patrick Leahy of Vermont, said he will question her on the issue to make sure she is capable of "judicial independence."

As she prepares for such questions, Miers may look to Roberts's testimony last month. Promising the Senate that he would bring an impartial look to cases that involve challenges to executive power, Roberts cited the late Justice Robert Jackson as a role model.

Before he joined the Supreme Court, Jackson was attorney general under President Franklin D. Roosevelt.

In 1940, before the US was involved in World War II, Jackson adopted an expansive reading of executive power by arguing that Roosevelt had the authority to defy the Neutrality Act by sending destroyers to Britain for use against Nazi Germany, Golove said.

Yet years later, as a justice on the court during the Korean War, Jackson ruled that President Harry Truman lacked the authority to seize steel mills in the name of national security, even in wartime.

"The Constitution is the only interest I have as a judge," Roberts said. "The notion that I would compromise my commitment to that principle that has been the lode star of my professional life since I became a lawyer . . . is one that I reject entirely. That would be inconsistent with the judicial oath. And Justice Jackson is a perfect example of that."