THE WALL STREET JOURNAL.

FRIDAY, OCTOBER 7, 2005 - VOL. CCXLVI NO. 72 - ★★★★ $1.00

Obscure Texas Case Offers Peek Into Role Of Court Nominee

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Amid 2000 Election Turmoil, Harriet Miers Took On A Constitutional Battle

By Jess Bravin

WASHINGTON—President Bush cites many accomplishments of Harriet Miers to explain her nomination to the Supreme Court. One the White House doesn't mention is her successful argument during the disputed 2000 election that Dick Cheney is definitely not a Texan.

The way she did that was striking: Her legal team successfully persuaded a judge to take what her brief described as a "broad and inclusive" reading of the Constitution. That runs counter to a conservative tradition of legal interpretation that calls for a relatively narrow reading of constitutional texts. President Bush has long championed that philosophy, and much of his conservative base—now hungry for clues about the little-known Ms. Miers—has been eager for a Supreme Court nominee in that mold.

Harriet Miers

Because Ms. Miers, now the White House counsel, has so rarely tackled big constitutional issues in her career, the case offers an unusual—if limited—glimpse into her legal background.

The section of the Constitution at issue is the relatively obscure 12th Amendment, overshadowed by its neighbor, the 13th, which abolished slavery after the Civil War. Ratified after the disputed 1800 election, the 12th lays out a number of regulations for the Electoral College. The rule in question says a state's delegation can't vote for presidential and vice presidential candidates who are both from electors' home state.

The 12th Amendment sat silently on the books for 196 years until the Bush-Cheney ticket, after falling 543,895 votes short of the Gore-Lieberman ticket, nevertheless stood poised to claim 271 electoral votes to the Democrats' 266.

Annoyed by that prospect, three Texas voters filed suit under what they

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called the Constitution's Habitation Clause, seeking to prevent the state's 32 electoral votes from going to the Republicans. George W. Bush, then the state's governor, didn't deny his Texas standing, despite being born in Connecticut. But the plaintiffs also alleged that Mr. Cheney lived in Dallas as chief executive of Halliburton Co. Mr. Cheney contended he was a Wyomingite.

With Bush v. Gore heading to the U.S. Supreme Court, few took notice of Jones v. Bush when it was filed Nov. 20 in Dallas's federal courthouse. Mr. Bush understood the stakes and dispatched his crackerjack legal counselor Ms. Miers.

How far one can read Ms. Miers's views in the way the case unfolded isn't clear. A footnote amid the tumultuous 2000 presidential election, Jones v. Bush came at an unusual time of legal and political confusion.

For its part, the White House cautions against reading too much into it. "This case is a factual dispute regarding residency, and Harriet Miers vigorously represented her client," White House spokeswoman Dana Perino said yesterday. "Arguments an attorney makes on behalf of a client do not necessarily reflect how one would rule as a judge."

Ms. Miers was head of the legal team that appeared before U.S. District Judge Sidney Fitzwater. Her name is atop briefs filed for the co-defendants.

Like any good defense lawyer, Ms. Miers first fought to keep the case from being heard, arguing that the voters had no legal standing. According to transcripts of a telephone conference call with Judge Fitzwater and attorneys seven days later, Ms. Miers said she was speaking "on behalf of Governor Bush."

According to court papers, Mr. Cheney bought a home and registered to vote in Dallas in 1995. After that date, he also held a Texas driver's license, paid Texas taxes and claimed the state's homestead tax deduction.

Mr. Cheney seemed aware of his Habitation Clause problem. In July 2000, shortly after deciding to run for vice president, he switched his voter registration and driver's license back to Wyoming. That detail formed part of his defense in the case, along with the fact that he had attended the University of Wyoming, represented Wyoming in Congress and owned a vacation home in Jackson Hole, Wyo.

Mr. Cheney also owned a Cadillac and a Lexus registered in Texas. He registered a Mercedes-Benz in Virginia, where he owned a townhouse, and a Jeep in Wyoming. The Miers team noted that Mr. Cheney put his Dallas home up for sale while the plaintiffs pointed out a listing describing it as "owner-occupied."

Ms. Miers's brief contended that for constitutional purposes, the relevant date was Dec. 18, 2000, the date the Electoral College was scheduled to meet. By that time, Mr. Cheney would have fully severed his Texas ties.

Noting that Mr. Cheney's wife Lynne had not switched her voter registration to Wyoming from Texas, the plaintiffs proposed to ask Mr. Cheney if he intended to live with his wife. "While I'm happy to say quite publicly that the marriage is good," said Mr. Cheney's lawyer David Aufhauser during a telephone conference, that question is "singularly offensive."

Mr. Aufhauser, Ms. Miers's co-counsel, suggested that whatever the 12th Amendment might have meant in 1804, the provision's meaning had, in effect, evolved with modern society. "Differences between the year 1800 and 2000 is more than two centuries, it's light years," said Mr. Aufhauser, noting the "rapidity with which each of us have changed addresses from schools and college to various marriages and jobs."

That's a style of legal interpretation more commonly associated with liberal-leaning judges. Mr. Bush later appointed Mr. Aufhauser general counsel of the Treasury Department. He is now global general counsel of UBS AG, an investment bank. In an interview, Mr. Aufhauser says his argument is "perfectly reconcilable with an orthodox reading of the Constitution."

William Berenson, a Fort Worth lawyer representing the voter plaintiffs, insisted on a tighter interpretation of the clause, something more typical of the right. "I don't think that these Founding Fathers...had in mind last-minute shenanigans where someone could start discarding baggage just at the last minute." The plaintiffs' brief noted that the Bush-Cheney ticket "promised to only appoint judges who would *strictly* interpret the Constitution."

Judge Fitzwater, a Reagan appointee, sided with Ms. Miers's earlier argument that the plaintiffs lacked standing. On Dec. 1, he ruled that their "general interest in seeing that the government abides by the Constitution" fell short of the requirement that they have an "an injury in fact to them personally."

He went to opine that Mr. Cheney, for constitutional purposes, was a Wyomingite. "It is undisputed that he was born, raised, educated and married in Wyoming and represented the state as a member of Congress for six terms," Judge Fitzwater wrote, perhaps unaware that Mr. Cheney lists his birthplace as Lincoln, Neb.

The plaintiffs appealed to the Fifth U.S. Circuit Court of Appeals in New Orleans where Ms. Miers again argued on behalf of Mr. Bush, recalls Jerry Clements, a partner at Ms. Miers's former law firm, Locke Liddell & Sapp, who worked with her on the case.

Rather than wait weeks, the thre Republican-appointed judges returne in minutes with a decision for the Bus Cheney ticket. Ms. Clements attribute the instant ruling in part to Ms. Miers "great presentation."

"When I hear that Ms. Miers doesn have any constitutional-law experienc that one really comes to mind," say Ms. Clements. Of the nine Suprem Court justices, Ms. Miers "might be th only one who's argued a 12th Amen ment case before an appellate court."

Keith Whittington, author of "Const tutional Interpretation: Textual Mea ing, Original Intent, and Judicial R view," notes that the Habitation Claus "is one of those provisions of the Const tution that just became irrelevant." Th purpose was to prevent deadlock cr ated by every delegation voting for i favorite son, he says. That problem di appeared as political parties becam dominant.