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Dear President Bush: Leaving a Legacy on the Federal Bench

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ESSAY

DEAR PRESIDENT BUSH: LEAVING A LEGACY ON THE FEDERAL BENCH

Carl Tobias *

The appointments of Chief Justice John Roberts and Justice Samuel Alito were milestones in your stated quest to transform the courts. Appreciating that a critical duty assigned to the president by the Constitution is nominating and, with Senate advice and consent, appointing judges, you vowed to recommend "strict constructionists." Selection has enhanced importance, given modern perceptions that judges are essentially the final arbiters of societal disputes, including such questions as terrorism and affirmative action. The *Hamdan v. Rumsfeld*[1] and *Grutter v. Bollinger*[2] opinions as well as the public school desegregation[3] and *Schiavo*[4] litigation trenchantly illuminate those notions.

You can still alter the courts, although only ten months are left. Other Justices could resign. You named three hundred appellate and district judges in the first seven years and may choose another fifty. Realization of your objectives necessitates finesse because losing the Senate majority, declining citizen approval, and rising politicization will exacerbate confirmation's already in-

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* Williams Professor, University of Richmond School of Law. I wish to thank Christopher Bryant and Peggy Sanner for valuable suggestions, Carolyn Hill and Tammy Longest for processing this piece as well as James Rogers and Russell Williams for generous, continuing support. Errors that remain are mine.

1. 548 U.S. 557 (2006).
2. 539 U.S. 306 (2003).
3. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).
4. Schiavo *ex rel* Schindler v. Schiavo, 403 F.3d 1223 (11th Cir.), *stay denied*, 544 U.S. 945 (2005); Bush v. Shiavo, 885 So.2d 321 (Fla. 2004), *cert denied*, 543 U.S. 1121 (2005).

tractable nature. Since 2001, the process has manifested divisive charges and recriminations among you, who tendered controversial nominees, the GOP, which supported them, and Democrats, who applied filibusters when blocking the candidates, even as Republicans pledged to limit this venerable device. If the situation remains acrimonious, it will compound appointments' grievously deteriorated condition, further undermining respect for the Executive, the Senate, and the judiciary—a phenomenon witnessed by the nomination of Harriet Miers. Thus, the nation's welfare dictates that you rise above politics and halt those corrosive dynamics.

You must expeditiously adopt bold, creative steps as your administration closes and approval ratings plummet, if you are to fill the court vacancies and burnish your legacy. Indeed, you may name several Justices and half the federal appellate and district judges, and they will be resolving cases long after you depart the White House.

I. A SELECTIVE HISTORY OF MODERN FEDERAL JUDICIAL SELECTION

When Jimmy Carter assumed office, few women or persons of color were judges.[5] President Carter rectified this dearth by using special initiatives to guarantee that female and minority attorneys were confirmed.[6] Emblematic was his request that senators tender additional women and people of color, as well as implement district nominating panels to foster their approval.[7] When President Carter left office, women constituted twenty percent of appointees, and persons of color twenty-one percent.[8]

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5. *See* Robert J. Lipshutz & Douglas Huron, *Achieving a More Representative Federal Judiciary*, 62 JUDICATURE 483, 484 (1979); Elliot E. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 271 (1983).

6. Lipshutz & Huron, *supra* note 5, at 484.

7. *See, e.g.*, ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES 31 (1981); *Federal Judicial Selection: The Problems and the Achievements of Carter's Merit Plan*, 62 JUDICATURE 463-510 (1979). *See generally infra* note 55.

8. *See* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 18–19 (2001). Diverse approaches yield varying conclusions about the statistics. Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322 tbl.2 (1989) (14.4% women, 13.9% African-American, 6.9% Hispanic, and 5% Asian); *see also* SHELDON

Ronald Reagan asserted that his 1980 election was a mandate to place conservatives on the bench.[9] He searched for and appointed numerous individuals with conservative views but designated few women and minorities. Not even two percent of jurists chosen were African Americans.[10] Once George H.W. Bush triumphed, he essentially honored Reagan's philosophy by seating many conservative nominees and tapping few minority lawyers, yet Bush recommended a plethora of women.[11]

After his 1992 ascendance, Bill Clinton emphasized competence and diversity over ideology, selecting talented jurists who augmented political balance and establishing records for women and people of color.[12] However, Republican and Democratic infighting left more than eighty judgeships unoccupied at the Clinton Administration's culmination.[13]

II. JUDICIAL SELECTION IN YOUR FIRST SEVEN YEARS

After your extremely narrow first victory, you promised to appoint strict constructionists.[14] The limited election mandate re-

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GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 236–84 (1997); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1259–61 (15.5% women and 14.3% African-American).

9. *See, e.g.*, LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 137–41 (2005); DAVID M. O'BRIEN, JUDICIAL ROULETTE 60–64 (1988).

10. *See* George, *supra* note 8, at 19 n.39; Goldman, *supra* note 8, at 322 tbl.2, 325 & tbl.4; *see also* Tobias, *supra* note 8, at 1269. *See generally* GOLDMAN, *supra* note 8, at 334–35; O'BRIEN, *supra* note 9.

11. *See* Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 877 (2005) [hereinafter Goldman, *Wars*]; Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 290–91 (1993) [hereinafter Goldman, *Final Imprint*].

12. *See* George, *supra* note 8, at 10–11, 19 & n.39; Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265, 276, 282 (1999); Rorie Spill Solberg, *Diversity and George W. Bush's Judicial Appointments: Serving Two Masters*, 88 JUDICATURE 276, 278–79 (2005). *See generally* Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 324–25 (1996).

13. Both parties share much blame. *See* Goldman & Slotnick, *supra* note 12, at 283–84; Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 827, 846 (2000); *see also* Lisa Holmes & Elisha Savchak, *Judicial Appointment Politics in the 107th Congress*, 86 JUDICATURE 232, 234–35 (2003).

14. *See, e.g.*, *Going Head to Head*, A.B.A. J., Oct. 2000, at 42, 42–43; E. J. Dionne, Jr., *Talking Sense on Court Choices*, WASH. POST, Nov. 23, 2004, at A29. *See generally* President's Remarks Announcing Nominations for the Federal Judiciary, 37 WEEKLY COMP. PRES. DOC. 724, (May 9, 2001) [hereinafter President's Remarks] (noting that every appointed judge will interpret the law, not legislate from the bench).

quired compromises, as Democrats' assumption of Senate control six months after the election changed the political landscape.[15] Your reduced reliance on longstanding, valuable American Bar Association ("ABA") input correspondingly provoked Democratic opposition, which stymied appointments.[16] The GOP's mid-term recapture of the Senate facilitated confirmation efforts.[17] However, when you nominated attorneys whom Democrats challenged as overly ideological, even resorting to filibusters,[18] appointments stalled.[19] The confirmation process, thus, yielded vicious accusations and retorts, invocation of strategic measures for partisan gain, and fractious behavior that devoured enormous resources. You chose three hundred judges over your initial seven years in office, but fifty positions are now empty, and Democrats recaptured the Senate in 2006.[20]

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15. *See, e.g.*, Neil A. Lewis, *Road to Federal Bench Gets Bumpier in Senate*, N.Y. TIMES, June 26, 2001, at A16; David Rogers, *Sen. Jeffords Defects from GOP, Creating Era of 'Tripartisanship,'* WALL ST. J., May 25, 2001, at A16. *See generally* Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 293–94 (2003).

16. *See* Letter from Alberto R. Gonzales, White House Counsel, to Martha W. Barnett, ABA President (Mar. 22, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html; *see also* Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready To Give Up on the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 37 (2001). *See generally* AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY—WHAT IT IS AND HOW IT WORKS 1, 1 n.1 (2007); Goldman et al., *supra* note 15, at 290–92.

17. *See* Neil A. Lewis, *G.O.P. Links Judicial Nominees To Thwart Opponents*, N.Y. TIMES, Jan. 30, 2003, at 21 (explaining the procedure of lumping nominee hearings together to make opposition more difficult); Richard Simon, *Senate OKs Long-Delayed Appeals Court Nomination*, L.A. TIMES, Nov. 20, 2002, at A22. *See generally* Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003).

18. *See generally Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right To Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. (2003); Michael Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445 (2004); Martin Gold & Dimple Gupta, *The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Overcome the Filibuster*, 28 HARV. J. L. & PUB. POL'Y 205 (2004).

19. Press Release, President George W. Bush, President Bush Says Senate Filibuster Decision a "Disgrace" (Mar. 6, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/20030306.html; *see also* John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 182–83 (2003); Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominees*, 26 CARDOZO L. REV. 331, 331 & n.2 (2005).

20. Robert Carp et al., *The Decision-Making Behavior of George W. Bush's Judicial Appointees*, 88 JUDICATURE 20 (2004); Goldman et al., *supra* note 15; *see also* Ruth Marcus, *Specter Unbound*, WASH. POST, Feb. 24, 2005, at A21; Jeffrey Toobin, *Blowing Up the Senate*, THE NEW YORKER, Mar. 7, 2005, at 42; Administrative Office of U.S. Courts, Vacancies in the Federal Judiciary—110th Congress, http://www.uscourts.gov/cfapps/webno

III. JUDICIAL SELECTION RECOMMENDATIONS FOR THE BALANCE OF YOUR PRESIDENCY

A. *Goals and Reasons for Achieving the Objectives*

1. Merit and Filling the Judicial Vacancies

Cementing a legacy necessitates that you articulate clear goals. Merit should be your touchstone. Strive to guarantee nominees who are exceptionally intelligent, diligent, and independent while possessing balanced temperament—attributes John Roberts exhibits. If the courts operate with able jurists and no vacancies, they can fairly and promptly treat growing, ever more complicated litigation; reduce a number of districts' civil backlogs; and quickly process appeals, which have increased exponentially.[21]

2. Political Ideology

De-emphasize ideology. You characterized Antonin Scalia and Clarence Thomas as your "favorite" Justices and named strict constructionists during the past seven years.[22] The electorate might have assumed you would select conservative jurists and offset Democratic appointees' putative liberalism.[23] For example, when then-Judiciary Committee head, Arlen Specter (R-Pa.), refused to question then-Judge Roberts during confirmation about reproductive freedom and declared that any nominee who would overturn *Roe* would face a challenge in the Senate, many excori-

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vada/CF_FB_301/archived/judgevac04_01_08.html (last visited Apr. 11, 2008).

21. JAMES C. DUFF, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 13, 15 (2007), *available at* http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf; JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 10–11 (1995), *available at* http://www.uscourts.gov/lrp/CVRPGTOC.HTM. *See generally* Michael Gerhardt, *Merit v. Ideology*, 26 CARDOZO L. REV. 353 (2005); Patrick Shin, *Judging Merit*, 78 S. CAL. L. REV. 137 (2004).

22. *See* Michael Kinsley, Commentary, *Fool Me Twice, Shame On Me*, L.A. TIMES, Jan. 16, 2005, at M5; Neil A. Lewis, *The 2000 Campaign: The Judiciary, Presidential Candidates Differ Sharply on Judges They Would Appoint to Top Courts*, N.Y. TIMES, Oct. 8, 2000, at A28; John Yoo, *High Court Peace Offering*, WASH. POST, July 21, 2005, at A23.

23. Senator Orrin Hatch (R-Utah) opposed President Clinton's efforts to pack courts "with liberal activists." Neil A. Lewis, *Utah Senator Scolds Critics of Prosecutor in Whitewater*, N.Y. TIMES, Nov. 16, 1996, at A12; *see also Judicial Activism: Assessing the Impact: Hearing Before the Subcomm. on the Constitution, Federalism and Property Rights, of the S. Comm. on the Judiciary*, 105th Cong. (1997); Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 744 (1997).

ated him.[24] Nominating conservatives is dogma for the Right, as the selection processes for Roberts, Miers, and Alito illustrate.[25]

If you continue to embrace ideology, analyze countervailing factors. No empirical data actually show that President Clinton recommended "activist," liberal jurists whom you must balance. Even were activism more felicitously defined, Clinton appointees and liberal judges are not its only practitioners, as the Supreme Court members you revere have demonstrated.[26] President Clinton tapped few activist or liberal jurists, downplayed ideology, stressed competence and gender and racial balance, and proposed numerous federal district and state judges.[27] He actually eschewed ideology and liberals' remonstrations to choose jurists who would offset GOP appointees.[28] If you explicitly focus on ideology, nonetheless, Democrats will level the same criticisms they did at prior Republican administrations. Too much emphasis will spark vociferous opposition and be counterproductive, worsening dysfunctional selection. Allegations and counter-charges will mount as the process spirals downward. Those activities will undercut regard for you, the chamber, and judges.

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24. Sheryl Gay Stolberg, *Senator Will Not Ask Roberts To Take a Stand on Abortion*, N.Y. TIMES, Sept. 11, 2005, § 1; *see* Maura Reynolds, *Specter Won't Limit Roberts Queries*, L.A. TIMES, Sept. 11, 2005, at A14; Jill Zuckman, *Arlen Specter, "The Smartest Lawyer in the Senate,"* CHI. TRIB., July 25, 2005, at 1; Toobin, *supra* note 20, at 2.

25. "No more Souters" is their rallying cry. *See* Lewis, *supra* note 22; *No More Souters*, WALL ST. J., July 19, 2005, at A14; David G. Savage, *Judge Battle Transcends Numbers*, L.A. TIMES, Apr. 17, 2005, at A1 (discussing the nominees' party labels and their effect on national policies).

26. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting); *id.* at 144–58 (Breyer, J., dissenting); *see also* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 4 (1999) (noting that Justice Thomas has helped rethink public law issues such as affirmative action, religious liberty, and federalism); DAVID ANDREW SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 82 (1996) (discussing how Justice Scalia has actively protected government institutions in his judicial decisions and opinions); KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 2–4 (2006); Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19; Schiavo *ex rel* Schindler v. Schiavo, 404 F.3d 1270, 1271 (11th Cir. 2005) (Birch, J., concurring). *See generally* Jess Bravin & Jeanne Cummings, *Roberts Shows Some Openness*, WALL ST. J., Sept. 16, 2005, at A4; Jess A. Velona, *Partisan Imbalance on the U.S. Courts of Appeals*, 89 JUDICATURE 25 (2005).

27. *See* Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH. L. REV. 849, 854 (2005); Goldman & Slotnick, *supra* note 12, at 267, 273–82.

28. Gerhardt, *supra* note 17, at 689–90; Ted Gest, *Disorder in the Courts?*, U.S. NEWS & WORLD REP., Feb. 12, 1996, at 40; *see* Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried To Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20. President Clinton's appointees fell between the conservatives tapped by Presidents H.W. Bush and Reagan and the liberals tapped by President Carter. Lewis, *supra*.

The last two federal elections are salient. Your 51-49 victory was a tepid "mandate" and evidenced little about citizen ideas on appointments, while Senate returns left the GOP without the votes for cloture and the 2006 results ended its majority.[29] Thus, these elections and low public approval suggest that you de-emphasize ideology, pick consensus nominees, treat statements about favorite Justices and appointees who do not legislate from the bench as campaign rhetoric, and extend overtures to the Democrats.

3. Diversity

Carefully assess gender and racial diversity. Some found your nominees as Governor lacked balance,[30] which echoes criticisms of the judges selected by Presidents Reagan and George H.W. Bush. In your first seven years, you appointed numerous female and minority lawyers, decisions that reflect how your father seated a number of women and how Clinton appointed an unprecedented number of females and minorites.[31] Both yours and your predecessors' work increased the gender diversity President Reagan neglected, while you and President Clinton addressed deficient racial balance that earlier GOP presidents sustained. Yet, only men received Supreme Court appointment, pressure from conservative activists led Ms. Miers to withdraw, and disparities remain because a few minority nominees' ideological conservatism delayed their review. One acute example is D.C. Circuit appointee Janice Rogers Brown, who was lauded for mocking the New Deal as the "triumph of our socialist revolution."[32]

Many ideas justify enhancing diversity. Numerous women and people of color would assist colleagues to understand and resolve

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29. Brian Faler, *A 51 Percent Mandate?*, WASH. POST, Nov. 11, 2004, at A6. *See generally* Janet Hook, *He's Not Walking Like a Lame Duck*, L.A. TIMES, June 3, 2005, at Al; Neil A. Lewis, *The New Democratic Majority Throws Bush's Judicial Nominations into Uncertainty*, N.Y. TIMES, Nov. 12, 2006, § 1.

30. Nicholas D. Kristof, *The 2000 Campaign: Running Texas*, N.Y. TIMES, Oct. 16, 2000, at A1; *see also* Jeffrey Toobin, *Women in Black*, THE NEW YORKER, Oct. 30, 2000, at 48 (assessing Bush's Texas judges).

31. For your father, see Goldman, *Final Imprint*, *supra* note 11, at 286 & tbl.1; Tobias, *supra* note 8, at 1273; Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 477 (1991). For President Clinton, see Beiner, *supra* note 27, at 851; Solberg, *supra* note 12, at 276–77, 283.

32. *See* Stuart Taylor, *Radical on the Bench*, LEGAL TIMES, May 2, 2005, at 70. *But see* Roger Pilon, *She's the Right Radical*, LEGAL TIMES, May 23, 2005 at 68–69. *See generally* Editorial, *Reject Justice Brown*, WASH. POST, June 7, 2005, at A22; Maura Reynolds, *Senate Approves Brown*, L.A. TIMES, June 9, 2005, at A1.

vexing questions, such as abortion and discrimination,[33] and would curtail gender and racial bias in the judicial process.[34] Their selection may demonstrate your amenability to improving conditions for women and minorities across the bar, the justice system, and the country. Having a federal bench that resembles the nation also inspires greater public confidence.[35] You might want to appoint highly competent, albeit less doctrinaire, jurists, whom Fourth Circuit Judges Roger Gregory and Allyson Duncan typify, as both easily won confirmation.

This survey indicates that you must fill the present fifty vacancies and the fifteen more that will open before your term concludes with extraordinarily able jurists, increase gender and racial balance, and diminish unproductive politicization. Continue to ventilate and refine objectives while announcing clear goals and devising salutary means to realize them.

B. *Procedures for Achieving Your Goals*

In both campaigns, you pledged to limit divisiveness and to request floor votes sixty days ahead of judicial nomination, and since 2001 you have attempted to effectuate these objectives.[36] Those are useful targets, but political and institutional realities, namely the consumption of time by selection entities, frustrate their achievement. These inherent obstacles and deficient resources mean that FBI background checks, ABA scrutiny, and Ju-

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33. *See, e.g.*, George, *supra* note 8, at 19–21, 25–26, 31–33; Marion Zenn Goldberg, *Carter-Appointed Judges: Perspectives on Gender*, TRIAL, Apr. 1990, at 108; *see also* Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 599–600, 610–17 (2003). *See generally* Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 491 (1979); Dahlia Lithwick, *John Roberts' Woman Problem*, SLATE, Aug. 19, 2005, *available at* http://www.slate.com/id/2124789.

34. *See, e.g.*, NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS: FINAL REPORT 65–66 (1997), http://207.41.19.15/ (follow "Ninth Circuit Task Force on Racial, Religious, and Ethnic Fairness-Final Report" hyperlink; then follow "finalrep.pdf" hyperlink). *See generally* Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237, 238 (1989).

35. *See* Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); *see also* Editorial, *The O'Connor Court*, WASH. POST, July 2, 2005, at A28 (noting how Justice O'Connor acted as a bridge between the left and right). *But see* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. AND LEE L. REV. 405, 481 (2000).

36. Maria L. La Ganga, *Bush Vows To Cure a Dysfunctional D.C.*, L.A. TIMES, June 9, 2000, at A14. *See generally* 151 CONG. REC. S4463 (daily ed. Apr. 28, 2005) (statement of Sen. Frist).

diciary Committee evaluation impose delays.[37] The urgency of other business and adherence to arcane rules prolong confirmation. Senators from areas having vacancies may also block nominees, unanimous consent enables one member to delay floor action, and cloture requires sixty votes. Notwithstanding such hurdles, the process might improve if you establish time frames, streamline analysis, and foster cooperation with Democrats—ideas akin to views which you championed in the 2002 elections and in January 2007.[38]

1. General Procedures

Restate your goals and practices through a national forum. This will inform aides and citizens. Explicate Department of Justice ("DOJ") roles, what selection officials do, and how much to respect input by senators from jurisdictions with openings. Your three predecessors named all Supreme Court and many appellate nominees, deferred to senators on trial court vacancies, and asked that serious candidates receive DOJ investigation, and you employed analogous regimens over your initial seven years. Nominating Justices and circuit judges warrants assessment, even though you will monopolize the choices, so ensure that staff effectuate your objectives and use dependable avenues to realize them. The designation of Justices also reflects uncontrollable dynamics, including the judicial philosophy held by the resignee and timing vis-à-vis the election cycle. Yet, the process's importance and drain on scarce resources, which otherwise would apply to circuit and district judgeships, require that you maintain a "short list."[39] The departure of Justice O'Connor and death of Chief Jus-

37. *See* Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 333–37 (1994); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 532–39 (1998); *supra* note 16 and accompanying text.

38. Mike Allen & Amy Goldstein, *Bush Has Plan To Speed Judicial Confirmations*, WASH. POST, Oct. 31, 2002, at A21; Edwin Chen & Henry Weinstein, *Election 2002: Liberals Bracing for Quick Judicial Action by Bush*, L.A. TIMES, Nov. 7, 2002, at A22; Neil A. Lewis, *Bush Drops Plans To Resubmit 3 Judicial Nominees*, N.Y. TIMES, Jan. 10, 2007, at A18; *see* Thomas O. Sargentich, Citizens for Independent Courts, *Report of the Task Force on Federal Judicial Selection*, 51 ADMIN. L. REV. 1031, 1038–48 (1999) (offering useful suggestions).

39. Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 25 (2004); Neil A. Lewis, *Court in Transition: Possible Nominees; In List of Potential Justices, Many Kinds of Conservative*, N.Y. TIMES, July 2, 2005, at A13; *see* Kenneth G. Manning et al., *George W.*

tice Rehnquist are instructive.[40] Her resignation arguably necessitated your selection of a moderate conservative, while his death prompted you to name Chief Justice Roberts. Justice Alito's success and the failed Miers nomination correspondingly epitomize politics's importance. Administrations with varied outlooks found similar techniques efficacious, so monumental change is not indicated.

Work assiduously with the Senate Judiciary Committee, which exercises lead responsibility for analyzing nominees, and its chair, Senator Patrick Leahy (D-Vt.), who schedules hearings and votes. Enlist his thinking generally and on the designees recommended. Consultation will also facilitate your activities. Thus, before nomination, derive insights from Senator Leahy, earlier chairs, and senators in locales with openings. Solicit help as well from the Majority Leader, Senator Harry Reid (D-Nev.), who regulates floor action.

Glean incisive perspectives from history. For example, consultation has improved appointments by tempering discord. President Clinton frequently broached with the GOP the nominees under review, senators asked for your consultation and they offered to designate lawyers whom your administration might name.[41] Republicans concomitantly ascribed delay to President Clinton's penchant for transmitting immediately before Senate recesses many attorneys, numbers of whom the GOP deemed unpalatable, and this frustrated confirmation.[42] You may address these concerns by steadily recommending numerous, highly qualified designees, a task the few vacancies ease. The White House might

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Bush's Potential Supreme Court Nominees: What Impact Might They Have?, 85 JUDICATURE 278, 279–80 (2002).

40. *See, e.g.*, Linda Greenhouse, *A Judge Anchored in Modern Law*, N.Y. TIMES, July 20, 2005, at A1; Louis Menand, *Decisions, Decisions*, THE NEW YORKER, July 11, 2005, at 33; *see also* Editorial, *Judge Roberts's Record*, WASH. POST, July 25, 2005, at A18; Editorial, *Justice O'Connor*, N.Y. TIMES, July 2, 2005, at A14.

41. MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 333 (2000); *see* Linda Greenhouse, *Picking Non-Justice Would Return to Tradition*, N.Y. TIMES, July 14, 2005, at A16; Carolyn Lochhead, *Bush Asks Senators for Advice on Court Pick*, S.F. CHRON., July 13, 2005, at A3.

42. *See* GERHARDT, *supra* note 41, at 123–26, 333; Tobias, *supra* note 13, at 843; *see also* Goldman & Slotnick, *supra* note 12, at 268; Orrin G. Hatch, *Judicial Nominee Confirmations Are Smoother Now*, DALLAS MORNING NEWS, June 27, 1998, at 9A. *See generally supra* notes 12 & 41.

also solicit the counsel of officials who have recruited judges during the past twenty years.[43]

The process will be delayed and scrutinized, as your administration ends, and politics will influence whom you choose. Last-term presidents, with ostensible mandates, have a reservoir of good will and substantial authority when forwarding names, but they may expend limited political capital on nominees.[44] One misstep can upset the whole selection regime, a phenomenon that the nomination of Harriet Miers exemplified.[45]

2. Special Efforts To Increase Diversity

Canvass fruitful means to increase gender and racial diversity. Helpful beginnings are earlier presidents' actions and specific work undertaken throughout your first seven years. You must investigate productive ways to redouble the various efforts you have taken thus far. For instance, President Carter applied merit selection bodies, while your father and President Clinton encouraged their parties' senators to identify numbers of women.[46]

Appointing trial judges deserves consideration, as senators where positions are vacant have great leverage.[47] You might request that officials institute or use available techniques, such as nominating panels, to designate and guarantee the confirmation of female and minority jurists.[48] Lawmakers and White House personnel also should elicit guidance from conventional sources, including bar associations, and less traditional organizations,

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43. Examples include Clinton Administration Assistant Attorney General Eleanor Dean Acheson and Deputy White House Counsel William Marshall, as well as Bush Administration White House Counsel Boyden Gray. *Shepherding the Next Court Nominee*, LEGAL TIMES, July 4, 2005, at 11; *see supra* notes 9–13.

44. *See, e.g.*, Gerhardt, *supra* note 17, at 689; Goldman, *Wars*, *supra* note 11, at 899; *see also* Hendrik Hertzberg, *Roe v. Rove*, THE NEW YORKER, Aug. 1, 2005, at 25, 26. *But see* Hook, *supra* note 29; Doyle McManus, *After Flagging Support, A Second Wind for Bush*, L.A. TIMES, July 10, 2005, at A1. *See generally* Elsa Walsh, *Minority Retort*, THE NEW YORKER, Aug. 8, 2005, at 42.

45. *See generally* Robin Toner et al., *Steady Erosion in Support Undercut Nomination*, N.Y. TIMES, Oct. 28, 2006, at A16.

46. *See* Tobias, *supra* note 31, at 479–80 (Bush request); Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10 (Clinton request); *supra* note 7; *infra* note 55 (Carter panels).

47. Recent Presidents have retained exclusive control over selection for the Supreme Court and considerable control over selection for the appellate courts. *See supra* notes 9–13.

48. *See supra* note 7 and accompanying text; *see also* text accompanying note 47.

namely women's and minority political groups, which know about candidates. Seek the assistance of female and minority legislators, who should urge their colleagues to delineate, and help approve, women and persons of color. Similarly valuable will be the talents and networking of female and minority attorneys, who represent one in three lawyers, as well as high-profile women and people of color, especially Secretary of State Condoleeza Rice and Secretary of Labor Elaine Chao.

3. Other Specific Actions

Survey, and perhaps apply, innovative concepts to fill all vacancies and enhance gender and racial balance. One direct method is tapping lawyers, including numerous women and persons of color, for every open seat. A related approach may be the creation of new judgeships.[49] This is defensible, as those requests are grounded on filings and workloads[50] that have multiplied since 1990 when a thorough statute last passed.[51] Bipartisanship would flourish if Democrats could offer nominees in exchange for approval of yours or judgeships, or for limited filibuster use and protracted, robust Senate debate, ideas the 2005 *Memorandum of Understanding* helps elucidate.[52]

Other bold strokes that would deemphasize politics's adverse impacts are elevating Clinton appointees, resubmitting his nominees, and advocating Democrats. Remember, you moved Barrington Parker to the Second Circuit and designated Judge Gregory, after President Clinton had named him the first African-American Fourth Circuit judge, with a recess appointment.[53] If you tender a

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49. *See* H.R. 3520, 110th Cong. (2007); S. 525, 110th Cong. (2007); H.R. 221, 110th Cong. (2007); *see also* Tobias, *supra* note 23, at 749. *See generally* WILLIAM REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2004); JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 21–23 (Mar. 13, 2007).

50. *See* JOHN G. ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9–15 (2007); Tobias, *supra* note 23, at 748–49. *But see* J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1161–63 (1994).

51. Federal Judgeship Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098. A bill appears futile without a better process. *See supra* note 37 and accompanying text.

52. *See Compromise in the Senate*, N.Y. TIMES, May 24, 2005, at A18 (reprinting the Memorandum after it was released); *see* Hendrik Hertzberg, *Filibluster*, THE NEW YORKER, June 13, 2005, at 63. Enhancing ABA input may be salutary. *See* Little, *supra* note 16.

53. *Senate Confirms Gregory to Seat on 4th Circuit*, WASH. POST, July 21, 2001, at A2; *see* U.S. CONST. art. II, § 2, cl. 3; Evans v. Stephens, 387 F.3d 1220, 1222–23 (11th Cir. 2004); United States v. Woodley, 751 F.2d 1008, 1009, 1012, 1014 (9th Cir. 1985); William

Clinton nominee whom the GOP Senate majority declined to analyze, the lengthy Sixth Circuit battle will end.[54] As profitable to address chronic impasses would be merit selection groups that recommend a few attorneys from whom you choose.[55]

You should attempt to devise relief for the chronic appointments problem; however, not even dramatic reform will deter Republicans and Democrats from incessantly seeking advantage. One way to break the relentless payback cycle is an accord that eliminates the vacancies and allows Democrats to furnish some judges, thus inaugurating a bipartisan confirmation process.[56] Assume a leadership role by emphasizing merit and downplaying ideology. At least refrain from conduct that perpetuates or escalates the unhealthy dynamic.

If these actions fail to halt gridlock, you should jettison less constructive remedies. A number of efforts that you deemed salutary in the past seven years were actually unproductive. Illustrative was reliance on your office as a bully pulpit to force the judicial selection conundrum and accuse Democrats of obstructionism, an exercise that intensified polarization. Equally confrontational were recess appointments.[57] This vehicle has minimal utility for confirming

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Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT 515, 516 (2003). *See generally* Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984).

54. 151 CONG. REC. S5030 (daily ed. May 12, 2005) (statement of Sen. Reid); Dawson Bell, *Judge Deadlock Closer to an End; Bush Nominees Include a Democrat*, DETROIT FREE PRESS, June 29, 2006, at 2. The same was true in the D.C. Circuit. *See* Helen Dewar, *Bush Calls for Limit to Senate Debates*, WASH. POST, Mar. 12, 2003, at A4; Neil A. Lewis, *Impasse on Judicial Pick Defies Quick Resolution*, N.Y. TIMES, Mar. 30, 2003, at A16.

55. Previous examples are one Carter panel, a Michigan 2001 proposal, a California 2001 district panel, and a High Court 2005 proposal. *See* Carl Levin & Debbie Stabenow, *Bipartisanship Can End Judge Stalemate*, GRAND RAPIDS PRESS, Dec. 5, 2001, at A15; Henry Weinstein, *Process of Judge Selection Set Up*, L.A. TIMES, May 30, 2001, at B1. *See generally* LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980) (discussing the commission, its procedures, and successes).

56. Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges To Cross*, 80 JUDICATURE 254, 271–72 (1997). This does raise the spectre of horsetrading. Variations on numerous suggestions which I have evaluated above are senators' provision of candidates who satisfy presidential criteria or provision of alternating recommendations in states with one senator from each party. *See* Gerhardt, *supra* note 17, at 688.

57. In 2004, you provided recess appointments for Fifth Circuit Judge Charles Pickering and for Eleventh Circuit Judge William Pryor. *See* Editorial, *Judicial Activism*, N.Y. TIMES, Feb. 21, 2004, at A14; Charles Yoo, *Pryor Finally Sworn In as Appeals Court Judge*, ATLANTA J.-CONST., June 21, 2005, at B4; *see also* Sheryl Gay Stolberg, *A Different Timpanist*, N.Y. TIMES, June 10, 2005, at A14. *See generally* Jonathan Turley, *The Not So Dirty Dozen*, N.Y. TIMES, Apr. 18, 2005; *supra* note 53.

judges; as nominees frequently decline the invitation, while the mechanism's employment infuriate potential opponents and raise delicate constitutional questions.[58] When you renominated appellate candidates whom Democrats blocked in recent years, that also exacerbated tensions, but your January 2007 decision against resubmission of three controversial nominees appeared promising.[59]

An unorthodox idea would be to explore amelioration of conflicts by decreasing the stakes through modification of life tenure.[60] Provocative notions include electing Justices and requiring set, lengthy terms.[61] In the final analysis, subverting the choice of judges for ephemeral political gain would be a mistake, because the action will diminish respect for the branches.[62]

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58. Appeals courts have held recess appointments constitutional but none occurred from 1981 to 1999. Evans v. Stephens, 387 F.3d 1220, 1223 (11th Cir. 2004); United States v. Woodley, 751 F.2d 1008, 1009 (9th Cir. 1985); *see also* Goldman, *Wars*, *supra* note 11, at 901 (favoring recess appointments). *See generally* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005) (discussing the constitutionality of recess appointments).

59. *See, e.g.*, Jonathan Groner, *Judiciary Battles Start Anew*, LEGAL TIMES, Jan. 13, 2003, at 10; Lewis, *supra* note 38; *see also* Michael A. Fletcher & Charles Babington, *Bush Tries His Luck Again with Judicial Nominees*, WASH. POST, Feb. 15, 2005, at A5. *But see* Editorial, *Benched Nominees*, WASH. POST, Jan. 10, 2007, at A12; Jonathan Turley, *Democrats' Disarray Muddies Court Fight*, BALT. SUN, July 14, 2005, at 21A; *supra* text accompanying note 38.

60. *See, e.g.*, Kevin T. McGuire, *Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court*, 89 JUDICATURE 8, 8–9 (2005); L.A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMMENT. 195, 195–97 (1995); Jeff Jacoby, *Don't Let Judges Serve for Life*, BOSTON GLOBE, May 26, 2005, at A19. *See generally* David G. Savage & Henry Weinstein, *Roberts Was Not Strictly Conservative*, L.A. TIMES, Aug. 20, 2005, at A12.

61. Were either of these notions constitutional, the disadvantages, particularly vis-à-vis judicial independence, might eclipse the benefits for the confirmation process. *See* PAUL D. CARRINGTON & ROGER C. CRAMTON, THE SUPREME COURT RENEWAL ACT: A RETURN TO BASIC PRINCIPLES (2005), *available at* http://zfacts.com/metaPage/lib/205-SUPREME-COURT.pdf; RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 170–72, 175 (2005). *But see* Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407 (defending the "constitutional system of life tenure"). *See generally* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. PA. L. REV. 1709 (2006) (evaluating novel methods for selecting the Chief Justice).

62. *See* Carl Hulse, *Filibuster Fight Is Bruising the Image of Capitol Hill*, N.Y. TIMES, May 22, 2005, § 1, at 24. You recognized similar propositions at the first term's outset and when you considered nominating Justice O'Connor's replacement. *See* President's Remarks, *supra* note 14; Greenhouse, *supra* note 41; Hertzberg, *supra* note 52; Lochhead, *supra* note 41.

CONCLUSION

As your presidency draws to a close, unoccupied judgeships will receive scrutiny. If you enunciate laudable objectives, namely having merit guide selection, use innovative, transparent devices to realize them, forge consensus with Democrats and reject politics for the nation's good, those measures will fill all vacancies with talented jurists, especially numerous women and people of color. How well you discharge this pressing, complex assignment will strongly influence the federal judiciary and profoundly affect your legacy.