George W. Bush Presidential Library

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THE LANGUAGE OF JUDICIAL NOMINATIONS

OVERVIEW: AN ISSUE OF TIMING

Telling Americans that the judicial system is broken is easy. Telling Americans that the political system is too partisan and too political is easy. Telling Americans that they should hold Democrats accountable for holding up the judicial process is quite difficult. Much of the Republican language and most of your arguments against the Democrat strategy and tactics have fallen on deaf ears. In fact, there are some rank-and-file Republicans who actually believe Senate Democrats are well within their rights to hold up nominations – just as Senate Republicans did to Clinton judicial nominations.

But the silver bullet in this effort – the one argument that consistently turns voters against the Democratic strategy and tactics – is **timing**. More precisely, ***virtually no one believes a nominee should have to wait more than six months for a vote – and a year-long wait is simply unconscionable.***

Unfortunately, much of the Republican judicial rhetoric has been focused on areas that have little or no public appeal or comprehension. Conversely, the Democrats have been sharpening their legislative strategy and public messages in preparation for a battle over Supreme Court nominees. So far, they have the upper hand. The filibusters they've already launched have emboldened them. They are well aware that they have brought the entire judicial approval process to a halt with little or no political fallout. While Americans may not like the filibuster, the Democrats have been successful making their stalling tactics seem like an issue of principle rather than of justice delayed and denied.

We tested seven individual themes and more than a dozen articulations. Unfortunately, only a few are strong enough to cut through the political clutter. We also saw firsthand how a single word or phrase can often mean the difference between effective speech and ineffective rhetoric. With a Supreme Court vacancy approaching, you need to get it right … NOW.

Here's what we recommend:

1) **Your Best Argument: "As a matter of principle, judicial nominees deserve a simple up or down vote."** Americans expect and want the Senate confirmation process to be thoughtful and thorough, but they certainly don't think it should drag on month after month. Even rank-and-file Democrats agree: when the investigation is completed, as a matter of principle an up or down vote must be guaranteed. In the words of the American people themselves, *"At some point these nominees have to have a vote up or down... we can't leave them hanging **forever.**"* This sentiment is universally shared, Democrat and Republican alike. Heads will nod in agreement when you pointedly add *"it should not go on forever"* to any statement in support of bringing a confirmation decision to a final resolution.

2) **Make this an issue of accountability. Give this a *"public's right to know"* context.** Talk about how senators should be held accountable for their positions and that *"they should make their views of a nominee known by way of a vote instead of hiding behind a filibuster. The public has a right to know exactly where each senator stands."*

> **WORDS THAT WORK**
>
> **"It is a core fundamental principle of the American judicial system that justice is blind – that people can get a fair hearing regardless of who they are, where they come from or what they look like. Surely nominees to the federal bench deserve the same rights to a fair hearing as any of us.**
>
> **"Americans have a right to know where their senators stand. Americans have a right to hold their senators accountable. If a senator opposes any nominee, they should vote against them, but they should vote. They should not hide behind Senate rules and parliamentary loopholes to block a vote."**

3) **The Next Best Argument: After six months, enough is enough.** Americans are patient, but even patient people have limits. Nothing is more effective in convincing voters that the Democrats are playing politics than telling them that investigators had not six weeks but *six months* or longer, and yet some nominees have still not received a simple up-or-down vote. There is a simple linguistic exercise here. Ask a lot of rhetorical questions:

> **WORDS THAT WORK**
>
> **Is three weeks sufficient for a vote? What about six weeks? Three months? Six months? A year? A full year -- that's how long it has taken and still there is no up-or-down vote. How much longer must they wait? How much longer will politics be played? How much longer will justice be delayed?**

4) **Justice Delayed is Justice Denied.** We have all heard this tagline before, but the reason it is so prevalent is because it just plain works. This is the logical follow-up principle to the "how long is too long?" rhetorical questions.

- *It is too long when the shortage of judges delays justice for victims of crime in America.*
- *It is too long when our courtrooms sit unused while the caseload piles up.*
- *It is too long when the judges we do have are overworked and unable to meet the demands on their courtrooms.*
- *It is too long when there is work to be done and no judges to do it.*

These are clean, short, declarative sentences, all of them hard to argue with, and all of them focused not just on the amount of lost time but the damage being done. Too many Republicans have been using too many complicated arguments with fractured sentence structure. Keep it clear, keep it simple, and keep it focused. And again, justice delayed is justice denied.

5) ***Personalize*** **how the dearth of judges negatively affects Americans on an individual basis.** Then explain how appropriate (rather than quick) action on the President's nominees can have a positive impact. If you turn the confirmation delay into an issue of *personal, human cost, you are effectively raising the stakes and raising public impatience with the Democrats.* Find individual cases – people with names and compelling stories whose lives have been negatively impacted by a clogged judicial system. Point to these individuals as evidence of a problem that has been caused by an unnecessary year-long delay by a minority of Senators.

WORDS THAT WORK

"Our sense of what is right for the country tells even the most political among us that it is imperative to keep our courts in working order. And common sense tells us that many of America's highest courtrooms don't have judges to run them, and, as a result, the legal system simply can't function."

6) **Talk about *"politics,"* not *"partisanship."*** One of the more interesting findings in this research is that the individual or political party that complains about the partisanship of the other side is itself perceived as being overtly partisan. The public will have a more favorable response to the Republican Senate position if the Democrats are accused of political maneuverings rather than partisanship – that the politics of Senate Democrats have no place preventing the fair and efficient administration of justice in America.

WORDS THAT WORK

"Congress is a very powerful institution with the necessary ability to check and challenge much of what the President does, but when it comes to the courts and to interpreting laws and regulations, politics needs to give way.

"This nation has so many other issues that need so much attention from our lawmakers and our president. Playing politics should have no place when it comes to our system of justice."

MORE WORDS THAT WORK

"We deserve unfiltered, unfettered access to a functioning legal system. We already have too much politics in America. We already have too much politics in our legal system. It's just not right. It's time to set aside political differences and do what's right for America."

7) **In any history lesson, the Constitution matters but the Founding Fathers don't.** I say this with respect and deference to Madison, Jefferson, and Hamilton but the framers *don't* matter – and referring to them is at best irrelevant to today's audiences and, at worse, a turn-off. **Again and again, *the authority of the Constitution trumped the intent of the framers themselves.***

This is an important finding that may play a key role in an eventual Supreme Court confirmation hearing. The American people respect the Constitution for its longevity, its impartiality, and its protection of the separation of powers. ***They trust it more than they trust the framers who debated and authored it, and they certainly trust it more than the politicians and judges who today work within its framework.*** So at the outset of any discussion on the nomination process, it is incumbent upon you to tap into the impartial authority of the Constitution to make your case and establish that you share the public's trust in, and commitment to, the Constitution. It will definitely make a difference in the receptivity to all your other arguments.

WORDS THAT WORK

"Presidential responsibility for picking vacant positions on our federal courts is spelled out in the Constitution and it's one of the most important duties and obligations that comes along with occupying the White House. The judicial branch of government is an essential component in protecting our rights under the Constitution. The President has maintained this power for over 200 years – and it is an essential part of separation of powers."

8) **"Let's keep politics out of the courts."** Americans want the courts to remain as untainted by politics as possible, and they view the Constitution as the least political of all the elements of American government. The public will rally around the Constitution because it is so non-political and unifying -- a cherished symbol of consensus building. This is a simple statement and a simple concept, but it resonates universally regardless of political or partisan outlook.

WORDS THAT WORK

"The spirit of the Constitution should mean something. The spirit of compromise and cooperation should mean something. Let us at least agree that our common purpose for now is restocking our federal courts with judges so that our judicial system can function. Let us put our Constitutional responsibilities ahead of our political priorities."

9) **The argument about achieving a natural historic and political balance of the judiciary with each change in the White House does not work.** Average listeners will hear this as a reason to support efforts by a president to put forward nominees with a single ideology and will reject it as such. More sophisticated audiences will hear this and cite FDR's efforts to unbalance a hostile court as a reason why today's Congress should reject overly conservative Bush nominees. Either way, this is not a good argument to make.

WORDS THAT DO *NOT* WORK

"Our Founding Fathers could have given the judicial selection responsibility to Congress, but they didn't. They wisely anticipated the politicization of the judicial selection process if put into the hands of Congress – but they still wanted a check on presidential powers.

"They knew that each president would pick judges with ideas and principles similar to his own, but that the next president would tilt the balance in a different direction – and with each election, balance would be maintained."

Much of our effort was spent uncovering language and arguments that do not resonate or that engender opposition. Here are a few other historical and/or context arguments to **avoid**:

- **The "Until Now" Argument.** You cannot successfully argue that the confirmation process has been without rancor and the judicial system without stress before the current crisis. The public just won't buy it. Americans have grown up to believe that Republicans and Democrats have always fought and today is no different.

WORDS THAT DO *NOT* WORK

"Until now, Congress has served as a check to insure the suitability of judicial appointments – which it should do. Today, Congress allows politics to drive the judicial selection process – which it shouldn't do.

"Until now, Congress has voted up or down based on qualifications, not politics – which it should do. Today, Congress allows partisanship to drive the selection process – which it shouldn't do.

"Until now, judicial vacancies have been filled in a timely fashion because Congress has voted up or down in a timely fashion – which it should do. Today, Congress is deliberately stalling, obstructing, filibustering . . . refusing to vote."

- **The George W. Bush Attack Argument.** Some Republicans are trying to say that Senate Democrats are delaying judicial nominations only to attack George W. Bush. While it is certainly true, and while rank-and-file Republicans will undoubtedly agree, this is a highly partisan message that will not win over a majority of Americans. This is not about George W. Bush. This is about the Constitution and about the need to maintain a functioning judiciary that acts in a timely fashion.

- **The Radical and/or Destructive Democrats Argument.** Can you successfully argue that a minority of Senators are dragging their feet on these nominations? Absolutely. Can you argue that they are putting undue stress on the judicial system? Probably. But can you accuse them of trying to change or obstruct the Constitution itself? Not likely. Yes, Americans believe that the Senate has historically granted an up or down vote on all nominees, and they do believe Senate Democrats are dragging their feet. But that's as far as they are willing to go. Suggesting that it is they who have *"gone nuclear"* not only isn't credible but will surely earn you a very harsh rebuke from your independent constituents.

AN ASSERTION THAT WILL *NOT* WORK

"For the past four months a minority of Senators, all of them Democrats, have been trying to change the Constitution."

10) **<u>It is essential to define the term "qualified."</u>** The ABA endorsement will be of little help to you here (more on this later). Educational institutions matter even less. If you'll forgive the grossly simplified comparison, a qualified judge to Americans is sort of like pornography to the Supreme Court. They will know it when they see it. Unfortunately, while we have the general context for the nomination process (see below), we do not yet have the full language to convey a sense of qualification.

WORDS THAT MATTER

"A judicial nominee's qualifications should matter most, and that nominee's qualifications should be the sole criteria for approving or blocking a nomination. The focus should be on these candidates and their legal knowledge and experience. It should not be reduced to a partisan battle over politics or ideology.

"The essential principle for picking a federal judge should be their commitment to the law. We need judges who put the law before personal philosophy, ideology or politics. That's what separates the judiciary from the legislative branch.

"Senators should not inject politics into the process, and nominees should keep their politics out of the process as well."

We tested brief biographies of nominees **(please don't call them "candidates")** Estrada, Owens, and Kuhl to see what in their record, histories and personages made the best case for their fitness to serve. There were stark contrasts in how the participants reacted to each of the nominees' curriculum vitae:

- **<u>Miguel Estrada:</u>** This was the least well-liked nominee. Predictably he scored well among Republicans and mediocre at best among Democrats. The qualifications listed (Columbia & Harvard grad, Supreme Court clerk, and an ABA "well-qualified" rating) do not overly impress the general public. One person in the group even rejected his Hispanic credentials because he was too Americanized.

- **<u>Priscilla Owen:</u>** She fared better than Estrada, although not by much. Americans value previous bench experience in the selection of a judicial nominee, and the fact that she has served on the Texas Supreme Court for four years distinguished her. Surprisingly, winning re-election to the bench with 80% of the vote received a tepid response. The public appears to trust judges that were nominated to their positions over those who were elected because they seem less influenced by politics. *(This conclusion needs further testing.)*

- **Carolyn Kuhl:** This nominee scored the best of the three, including and especially among Democrats. Not even they could argue with her qualifications: nine years of experience as an *appointed* state court judge, Princeton and Harvard grad, and an endorsement from 100 fellow judges, both Democrats and Republicans alike.

11) **A key component of what makes a judge qualified in the eyes of the American people is *judicial experience in a non-partisan context.*** This is important. Additional factors like length of time on the bench, endorsements from bi-partisan groups (especially fellow judges), and other exemplary accomplishments help add weight, but previous [successful] service on the bench trumps everything else.

12) **The ABA endorsement provides minimal cover. In and of itself, a *"well-qualified"* rating from the ABA does not convince Americans that a nominee is in fact well-qualified.** This has been a core component of many Republican arguments on the Senate floor, yet it seems to carry relatively little weight among the public. In some circles, notably conservative Republicans, the endorsement may actually be a liability. *The moment you get bogged down explaining what goes into an ABA rating, you have lost your audience.* Speak to them in a real-world context. How long has the judge served? How did the judge reach his or her position? What is unique about their experience? Frankly, the public would rather hear about real-world experience and other distinctive career milestones.

WORDS THAT DO *NOT* WORK

"The American Bar Association does not bestow the maximum positive rating lightly. Only the most experienced, the most thoughtful, the most intelligent nominees earn such a high evaluation. Even people with exemplarily legal careers often fail to receive an endorsement of this magnitude.

"The highest rating is reserved only for those whom are truly the best at what they do. And the rating is determined by people for whom the integrity of this country's judicial system is not only important, but absolutely necessary. There is no way they would ever jeopardize it by allowing politics to interfere or by endorsing people who they felt might not excel – which is why so few nominees receive their highest rating."

Truth is, the ABA probably needs its own image consultant and language doctor. The credibility of any association of lawyers is at an all-time low. Now is *not* the time for Republicans to be trumpeting a lawyerly endorsement.

13) **The battle for the Supreme Court will be waged over two words: LITMUS TEST.** This is the Pandora's Box of the judicial nominees fight. Just mention the words and you grossly polarize an already politically charged issue. The moment you criticize Democrats for imposing litmus tests on nominees, you open yourself up to counter-criticisms. The public knows the respective party bases demand that their leaders pick candidates that will very likely follow a specific set of social principles. To claim otherwise is to destroy your own credibility. The following language may be an accurate description of the Bush White House but it has no credibility whatsoever:

WORDS THAT DO *NOT* WORK

"The President has no litmus test for his nominees. He and his staff never ask the nominees questions about individual issues and cases. They understand that if they did that, they would be jeopardizing the independence and fairness of the courts and compromising the integrity of the nominee. Any nominee who shares personal views about issues that may come before the court when he or she is a judge risks pre-judging the case and being unfair to the parties."

No matter how much you protest, the public will always expect presidents in general, and this President in particular, to use a litmus test for his nominees. And while the public believes this is wrong in the abstract, everything changes when the issue under consideration is abortion.

Similarly, the public does not want to subject a nominee to questions that might prejudice a subsequent case. But when pressed on issues like affirmative action and *especially* abortion, positions change and the public does want to know. **All the Democrats have to do is merely *mention* abortion in this debate and your job becomes exceedingly more difficult.** The litmus test debate must be avoided.

That being said, the nominees themselves will be forced to address the litmus test issue. Below is one possible response that defuses the question effectively.

WORDS THAT WORK

"I will not state my personal beliefs because I will not take a position on a hypothetical argument. The facts of every lawsuit and argument are different. Out of respect for the law, I cannot and will not issue a judgment without knowing the actual facts of the actual case. I will gladly explain the process by which I would come to a decision but I will not pre-judge that decision."

14) **<u>The nuclear option could well lead to a nuclear winter.</u>** The strategy of forcing a procedural change to smooth the judicial nominations process will NOT play well among the American public. If you use this "nuclear approach," be prepared to cope with Chernobyl-like after-effects. Yes, Americans believe the current system is imperfect and voiced frustration that it takes so long for nominations to be considered and positions to be filled. ***But they do not want to give up on a system that they feel has more or less worked for over 200 years.***

Americans – incorrect though they may be – think that the filibuster is a natural part of the process and even a constitutionally protected component. They have trouble differentiating between Senate rules and procedures and Constitutional mandates. While retired 8th grade civics teachers across the nation shake their fists in frustration, the pervading lack of knowledge among American adults makes it impossible to communicate this component.

Americans rightfully expect and demand that we have the most effective, timely and fairest judicial system in the world. But instead of turning the American people against you by aggressively altering the process, aim to build consensus:

- **<u>The *"double standard"* is the strongest linguistic argument when on the attack.</u>** The American people expect a standard process to be followed in important matters such as judicial appointments, and they will not accept the politicization of that process. The phrase *"double standard"* evokes exactly what Americans wish to prevent and it can be applied in multiple ways to what's happening or not happening on the Senate floor. It can also link you to more favorable Democrat treatment of judicial nominees in the past as a contrast to today.

- **<u>Avoid the *"obstructionist"* label when referring to Senate Democrats.</u>** You can engender more support if you use language that addresses the human cost of delays in the process. "Obstruction" refers only to the frustration within the Senate chambers. Instead, ***preface any talk of Senate procedure with the gaping holes in the federal judiciary.*** This is a *judicial emergency* issue, not an *obstructionism* issue. The public needs to see you as fixing the system rather than beating up the Democrats…

- **<u>In fact, praise some Democrats – those willing to "go on record" and "take a stand."</u>** The traditional political approach is to condemn the motives of the opposition. The better approach is to embrace your opponents (at least a few of them) and use that embrace to build public credibility against the rest of the delegation. Identify individual Democrats by name and praise them for putting the country ahead of politics – and only then go after *"the radical minority of Democrats"* but out of disappointment rather than anger.

A FINAL WORD

Language matters. Context matters. Tone matters.

Some Senate Republicans have understood from the outset that the battle for judicial confirmations is not a process issue but an effective governing issue. They have correctly focused on the result and impact of the standoff rather than the cause. Unfortunately, others have either been too partisan, too political or too procedural. It is therefore not surprising that your situation has failed to achieve much media traction.

All that will change with the first Supreme Court vacancy. At that point, you will receive an abundance of media attention – more than you can imagine. Unfortunately, by that point it will also be too late to establish language, tone and context. It needs to be done now, before the media circus begins. This memo is only a first attempt – more needs to be done.