

FOREWORD

ADVICE TO THE NEXT CONSERVATIVE PRESIDENT OF THE UNITED STATES

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I am honored to be invited to submit this Article offering my advice to the next President of the United States and to discuss what I have learned from conservative governance in the White House. I approach this topic both as a former member of the Reagan and first Bush Administrations¹ and as a Northwestern law professor who teaches constitutional law. My experience, my academic writing, and my teaching all have been focused on the Presidency and on the role of the federal courts.² I therefore want to discuss five lessons we might learn from the Reagan-Bush years about conservative governance in the White House and five additional lessons we might learn from those years about the federal courts. Many of the points I will discuss are not wholly new, but novelty is something that I think the modern world greatly over-rates. My advice is directed to the next *conservative* President of the United States because conservative governance is the subject I know best from personal experience and academic reflection. I am absolutely delighted that the recipient of my advice is President George

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2. My two major articles on the presidency are: Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). Articles on the role of the Federal Courts include: Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255 (1992); Steven G. Calabresi, *Relimiting Federal Judicial Power: Should Congress Play a Role?*, 13 J.L. & POL. 627, 629-38 (1997).

W. Bush, whose candidacy I signed on to support as an advisor in May, 1999.

First, the twelve year experience of the Reagan and Bush Administrations showed us the tremendous importance of public speeches that laid out a clear agenda in bold primary colors and not in pale pastels. Some of Ronald Reagan's greatest successes as President came from his ability to use public speeches to change the agenda and alter the direction of our national political life.³ President Reagan did this by taking bold and principled positions, by explaining his positions in a clear and understandable way, and by speaking over the heads of the hostile media directly to the American people in a way the people could understand. Reagan's first Inaugural Address, his speech at the Berlin Wall, and his speech at the beaches of Normandy are but a few of the many powerful vignettes we all now carry with us.

Reagan's speeches as President built on his speeches as a candidate for the Presidency and on the ideas to which he was committed. He was as consistent in his themes as he was clear in his choice of words. Reagan's consistency and clarity, which was his hallmark, allowed him to rally the members of his Administration, the Republican Party, and ultimately the country itself to the causes of anti-communism and of limited government. One of the Presidency's greatest powers is that it offers "a Bully Pulpit" to those can use it. The first President Bush unfortunately was not able to claim and harness the power of the Bully Pulpit. This played a significant role in his loss of control over the policy-making agenda and ultimately in his loss of the 1992 election.

Conservatives governing from the executive branch have a special need to be able to reach over the heads of the media to rally their parties and the country itself. This can only be done by consistently, clearly, patiently, and cheerfully painting a conservative agenda in bold colors day after day.

A second lesson of the Reagan-Bush presidencies is the great importance of the first two years of any Administration. The modern Presidency—for better or worse—is something of a lightning rod. Presidents have little constitutional power in

3. Many of President Reagan's best speeches are published in RONALD REAGAN, *SPEAKING MY MIND: SELECTED SPEECHES* (1989).

peacetime, and they can advance a domestic agenda only with support in Congress. For decades, presidents like Reagan have had the most support in Congress in the first two years of their term and have watched it dwindle with every subsequent election. While Reagan did not lose the 1982 midterm elections as badly as Clinton lost the 1994 midterm elections, he did nonetheless accomplish much less in the last six years of his term. Since 1934, every first mid-term election has turned out the President's opponents in higher numbers relative to his supporters than had occurred two years earlier.

The first two years are not only relevant to the President's support in the House of Representatives and the Senate, but also to his levels of support in state-houses across the country. Well over thirty States, including California, New York, Texas, Florida, Illinois, Ohio, Michigan, and Pennsylvania elect their Governors and state legislators during the off year midterm cycle. It is no accident that Republicans picked up a majority of governorships in 1994, for the first time since the 1960's, precisely as the Democrats had controlled a majority of governorships during the Reagan-Bush and Nixon-Ford years. One of the costs of winning the Presidency is that your party can expect to lose strength in Congress and in gubernatorial races.

This weakened status means two somewhat contradictory things. First, it is important to make the first two years of any conservative Administration in the White House really count. In fact, there is not a moment to spare. Nor is there any time to develop an agenda if you were not elected with one. Successful Presidents must have a successful first 100 days or at least a successful first 8 months. There is no time to lose at the beginning of an Administration.

At the same time, it is also desirable not to scare the public and make yourself even more of a lightning rod than the Presidency naturally tends to be. President Clinton made this mistake in his first two years in office with his badly thought out policy proposals on gays in the military and on socialized medicine. Clinton—like George Bush senior—had no clear agenda on election day for his first year in office, and he quickly floundered. President Reagan, on the other hand, came in with a clear agenda, executed it against formidable odds, and then stayed the course for the next six years, as his

opponents tried at every turn to undo what he had already set in motion. We need to work hard to make sure that the new President Bush accomplishes as much as possible in these first two years, while not losing vital strength on marginal sideshows.

A third and related lesson from the Reagan-Bush years involves the creation of an Administration. One of the President's greatest and most unappreciated powers, after the power of the Bully Pulpit, is the Appointment Power. A newly elected president like Ronald Reagan after November of 1980 has to create something very quickly that history will call the "Reagan Administration" and that will endure and linger long after he has left office. That Administration consists not just of the Vice President and chief Cabinet Secretaries—as to whose identities the President elect may have given some thought—but also of hundreds of sub-Cabinet officers and members of the White House staff as well as thousands of lower ranking schedule C appointees in non-confirmation executive branch posts.⁴

We all know of course that personnel is policy and that this is part of why President Reagan succeeded where previous Republican Presidents failed. But, think for a moment about just how hard the task of staffing an Executive Branch inherently is. We do not have term limits yet for Congress or for most other important political posts, but we have had them for the Executive Branch going back to Andrew Jackson.⁵ Every four to eight years, almost without fail, the whole Cabinet, sub-Cabinet, White House staff and all of the thousands of schedule C political appointees get replaced. It is a great feature of our democracy that each new President-elect draws hundreds of fellow citizens from the private sector into government while disgorge back those his predecessor had brought in before him.

4. For more discussion of the importance of properly constituting an Administration and of the role of government lawyers, see Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 *LAW & CONTEMP. PROBS.* 61 (1998).

5. For discussion of the removal policies of the first seven Presidents up through the Jackson Administration, see Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 *CASE W. RES. L. REV.* 1451 (1997).

As I just discussed, it is critical that this be done very fast and very well. One mistake with a Cabinet level nominee—a Janet Reno or a John Tower—and a big price is paid. Some mistakes lead to costly confirmation fights that distract from the President's policy agenda during the critical first 100 or 200 days. Other mistakes lead to the confirmation of someone to an important post—and they are all important—who does not share the President's policy vision or who is incompetent.

President George W. Bush has been successful in assembling his Cabinet rapidly and now must continue to fill the lower ranking positions in his Administration. This is critical because the President cannot do everything himself nor can his key Cabinet Secretaries and White House staffers. Good hires beget more good hires and bad hires do likewise. Building an Administration during the weeks between election day and inauguration day and getting top people who are good quickly into place is critical to having a successful first year and Presidency. Equally critical is having a really good personnel office that can help your Presidency regenerate as people leave office. Again, President Reagan offers us a model, which the next conservative President would do well to emulate.

A fourth aspect of the modern Presidency which challenges us as conservatives is the press's and the public's desire for constant action and entertainment. Journalists make their living by selling newspapers, articles, magazines, and TV shows with advertisements. They have an insatiable appetite for "news," gossip, and entertainment both because of their need to satisfy the public and because of their competition with one another. The emergence of the intensely competitive 24-hour news cycle and of new media has made this phenomenon worse than ever. We seem slated to go from news frenzy to news frenzy—from O.J. to Princess Diana to Monica to Jon Benet to Elian Gonzales to the feverish coverage of last fall's Florida election recounts.

This disgusting aspect of modern life poses special challenges for a conservative President. Conservatives by temperament often dislike flurries of proposals, action for its own sake, and government action in particular. And, yet, the public today has very little tolerance for inaction. A key problem faced by George Bush senior and by Gerald Ford before him was the public sentiment that they were "not doing anything." While I personally preferred Bush/Ford inaction to

what happened when Jimmy Carter and Bill Clinton started doing something, for much of the public there was and still is a great yearning to see a steady flow of proposals, speeches, and programs coming out of the White House. President Bush has effectively laid out key proposals in his first few weeks, but he must realize that the pressure does not ever let up.

A conservative President who sits back even briefly, as the elder Bush and Ford did, gets defined by his opposition and is forced to play defense. And, that is not the way to prevail. The President has to play offense and to lead and the public rightly expects that much. Ronald Reagan succeeded because he led with a vision of where both the country and the world ought to go and he always spoke and worked toward those ends of limited government.⁶ George W. Bush must do likewise, or he will rapidly find that he has permanently lost the initiative to his Democratic opposition.

A fifth and final lesson of the Reagan-Bush years for the next conservative President is the critical importance of defending and using the institutional powers of the Presidency effectively. The President has substantial ability on his own authority to make at least some important policy changes. Through Executive Orders, regulations and rule-makings, and signing statements at the time a Bill becomes law, the President can importantly affect many areas of public policy.⁷ Ronald Reagan's Executive Orders on OMB oversight of the regulatory agencies, on federalism, on takings of private property, and on abortion counseling were all important uses of this power. This is made clear by President Clinton's repeal or rewriting of each of these Reagan initiatives with one repeal occurring in his first twenty-four hours as President. Of similar importance was President Reagan's initiative on signing statements, which Reagan launched and which President Bush continued. Under this initiative, detailed presidential history was added for the

6. For a discussion and defense of Reagan's limited-government agenda, see Steven G. Calabresi, "*The Era of Big Government is Over*", 50 STAN. L. REV. 1015 (1998) (reviewing ALAN BRINKLEY ET AL., *NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* (1997)).

7. For a discussion on the ways in which a President can implement his agenda for constitutional reform, see Calabresi, *supra* note 4. For a discussion of the substance of President Reagan's agenda, see Steven G. Calabresi, *An Agenda for Constitutional Reform*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 22 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

first time into the record every time Reagan or Bush signed a bill into law.

A new conservative President would need immediately to assign staffers to figure out what can be done and should be done by the President unilaterally on his first day or days in office. President Bush has implemented a freeze on late Clinton Administration regulations, but now must follow through in reviewing and superseding them. This is an important opportunity to seize the honeymoon window and make the most of it and to lay out an agenda for others to follow.

George Bush senior did a superb job at using unilateral presidential powers and prerogatives effectively and in this area surpassed Reagan himself. He used the veto resolutely and effectively and had a big policy impact as a result. He also made aggressive use of signing statements. Lastly, he stood up and vetoed the efforts to re-enact the Independent Counsel law thus defending presidential power to execute the laws from an unconstitutional, congressional assault.⁸

Standing up for the Presidency as an institution is something many Presidents may be reluctant to do. It costs time, energy, and political capital, and it often seems as if the benefits go to your successor rather than to yourself. But, it is a duty of the President to preserve, protect and defend his office, which is, of course, a creation of the Constitution itself. The President takes an oath to uphold that Constitution and the public judges him, and ought to judge him, by his vigilance in fulfilling that oath.

I want now to turn from the Presidency—which is my main area of expertise as a law professor—to the federal courts which is a second area of expertise I have as a teacher of a course we lawyers call “Federal Courts.” Here again let me quickly discuss five lessons from the Reagan-Bush era and from scholarship with respect to conservatives and the federal courts.

A first lesson from the Reagan-Bush era is the importance of nominating Justices and judges who are firmly committed to the enforcement of the Constitution and to judicial restraint. Both Presidents Reagan and Bush made an unprecedented

8. For a discussion and critique of the Independent Counsel Law, see Steven G. Calabresi, *Some Structural Consequences of the Increased Use of Ethics Probes as Political Weapons*, 11 J.L. & POL. 521 (1995).

effort to find prospective Justices and judges who were originalists, who would follow the text of the Constitution and laws, and who understood that Court decisions were not to be a function of results or consequences but that they were to be faithful to the law. They appointed judges who understood, as President Bush once said, that they should not be running around all over the front pages of the newspaper leading a campaign for social change.⁹

Presidents Reagan and Bush did much better on this score than had the three preceding Republican Presidents—Presidents Ford, Nixon, and Eisenhower.¹⁰ In the wake of the Warren and Burger Court fiascoes, Presidents Reagan and Bush made heroic efforts to show their respect for the separation of powers by avoiding litmus tests, while appointing judges who believed in the separation of powers itself. Judges who understood the difference between judging and making laws from the bench. This heroic judicial selection effort was both required by their oaths of office to defend the Constitution and was at the same time very difficult. While the final result was better than had been achieved by Nixon, Ford or Eisenhower, some judicial appointments were bitterly disappointing, especially the appointments of David Souter and to a lesser extent Sandra Day O'Connor and Anthony Kennedy.

The obvious question is how does the next conservative Administration build and improve on this record? How do we make sure that the Court is filled with Rehnquists, Scalias, and Thomases who follow the law rather than with Souters and Kennedys who either make it up or who waffle at critical junctures? The answer to that query is as easy to state as it is hard to accomplish. Hold on to a solid majority in the U.S. Senate.

The key moment at which the Reagan-Bush drive to appoint law-respecting Justices stalled out was the Bork confirmation fight.¹¹ Imagine that Robert Bork or another comparable rule of

9. For more discussion, see Calabresi, *supra* note 4, at 64-73.

10. The Reagan strategy for judicial appointments is discussed in this Issue by Ed R. Haden in *Judicial Selection: A Pragmatic Approach*, 24 HARV. J.L. & PUB. POL'Y 531, 539-41 (2001).

11. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (describing and critiquing the Bork confirmation fight).

law jurist had been confirmed by a Republican Senate to Lewis Powell's seat. Imagine now that then-incoming President Bush senior still had had a Republican Senate and had not been bruised by the John Tower nomination defeat at the very outset of his Presidency. At that point, Bush senior and his top aides would have been much less likely to throw the disastrous and ill-conceived Hail-Mary pass that was the David Souter nomination. They would have been much more likely instead to nominate any of a number of able conservatives like Douglas Ginsburg on the U.S. Courts of Appeals, who had a clear pro-Rule of Law track record.

Conservatives have to remember that even a popular President of the United States can only do so much without support in Congress and, in this case, in the Senate. From 1986 to 1992, Presidents Reagan and Bush did not have that senatorial support, and they faced vicious well-funded opposition from groups financed by Hollywood and by Big Labor. The left was and remains highly dependent on the Supreme Court to protect its agenda of legal abortion, legal pornography, and of keeping religion out of public life. Left-wing groups will again fight viciously against pro-Rule of Law judicial nominees. And, if there is a Democratic majority in the Senate obtaining a pro-Rule of Law majority it will be very difficult unless there are an extraordinary number of vacancies and appointments. Had George Bush senior won a second term, then, perhaps with the retirement of Justices White and Blackmun, a pro-Rule of Law majority might have coalesced. But, we should have no illusions about how hard it was or will be again to appoint Constitution-respecting Justices to the Court. This is the single thing the Left cares most about, and, as the Bork and Clarence Thomas hearings show, they will fight hard and dirty against good and decent judicial nominees.

The first thing the Reagan-Bush experience teaches us, then, is that a conservative President must at all costs keep nominating one pro-Rule of Law Justice or judge after another. If the Left has a majority in the Senate or if the Senate is closely divided or if nominees are smeared, we will have, and should expect, losses. The only solution is to keep coming back with more good nominees. As Reagan was once forced grimly to say, the Senate cannot defeat them all. And, that is true. In fact, many Senators hate judicial confirmation fights and they may

tend, having voted against a President, to be with him the next time even if the two nominees are not all that different. The first key to success is for the President and his staff to have a *long* and *good* list of choices.

A second key lesson is the importance of fighting hard for a good Supreme Court nominee like Robert Bork. Confirmation battles like the Bork or Thomas battles are nothing less than mini-presidential campaigns with national fundraising, polling, and mobilization.¹² It is hard to find a good lawyer who would make a good Justice, and who is also a compelling figure in such a fight. Mobilizing the Administration and supporters on behalf of that nominee is harder still. But, it is critical that the President fight and fight hard for his nominees, even if he loses. Presidents Reagan and Bush, by and large, did this, and President Clinton—as Zoe Baird and Kimba Wood quickly learned—did not. It is critical to a conservative President's success in reorienting the courts that he fight hard to confirm his judicial nominees.

A third lesson from the Reagan-Bush era that bears on the federal courts is the tremendous importance of the lower federal courts—both district courts and federal circuit courts of appeals.¹³ The U.S. Supreme Court today decides only approximately 80 of the several hundred thousand cases a year that are filed in the federal courts.¹⁴ This means that as a practical matter for the overwhelming majority of litigants and of cases, more than ninety-nine percent, a district or circuit judge has the final word. Both Presidents Reagan and Bush made a determined effort to screen prospective lower federal court judges to insure that they would be appointed with the same care as Supreme Court Justices.

Such an effort for the lower federal courts requires a large staff based in the Department of Justice, not the White House, so that it can be done professionally and thoroughly. Everything written or published by a nominee needs to be read carefully by several well-trained individuals to help identify the best candidates. Reading a prospective nominees prior opinions, articles, briefs, or other writings is the best way to

12. *See id.* at Part III.

13. *See* Calabresi, *Relimiting Federal Judicial Power*, *supra* note 2, at 630.

14. *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 81 (1996).

determine whether they have an understanding of what distinguishes the role of a judge. Had David Souter's New Hampshire Supreme Court opinions been read more carefully by more people under less time pressure, the indicia of his activism and lack of understanding of the proper judicial role would have been discernible.¹⁵

A fourth point of critical importance is the quality of the litigation effort presented by the Department of Justice in the U.S. Supreme Court and in the lower federal courts on key constitutional issues. This effort in turn depends greatly on the ability and jurisprudential philosophy of the Solicitor General, of the key assistant Attorneys General, and of the Attorney General himself. The Reagan and Bush litigation efforts were continuously set back by recalcitrant career lawyers in the Solicitor General's office and in other litigating divisions of the Department of Justice.¹⁶

The briefs the Administration files in the Supreme Court or in the lower courts on major constitutional issues are critically important. They provide much of the raw material and sometimes all too much of the reasoning that goes into the final judicial opinions. Those briefs must be first rate and jurisprudentially sound.¹⁷ A conservative Administration cannot rely on pro-Rule of Law judges to save the country from the Administration's own lawyers. Good constitutional decisions or opinions or, if need, be dissents are aided by hiring terrific lawyers who file terrific briefs. Twenty years ago it was hard to find enough good pro-Rule of law lawyers to write such briefs. Today, it should be no problem at all.

Fifth, and lastly, the Reagan and Bush Administrations missed one important opportunity to restore the federal courts to their proper constitutional function. Fifteen years ago, these courts were swamped by a crushing avalanche of new case filings. The courts are even more swamped today and it threatens to overwhelm even many of our best, hardest-working and most dedicated judges.¹⁸ This problem threatens

15. *See, e.g., Tenn v. 889 Assocs., Ltd.*, 500 A.2d 366 (N.H. 1985) (per Souter, J.) (adopting nuisance doctrine to adjudicate conflicts over light and air rights and recognizing common law interests in light and air).

16. *See Calabresi, supra* note 4, at 77.

17. *See id.* at 71.

18. *See POSNER, supra* note 14, at 53-55.

the quality of justice in all our federal courts in some acute and unappreciated ways. For example, in some Circuit Courts of Appeals very large numbers of cases are decided without a written opinion being formally published and sometimes there is also no oral argument. This would have been unheard of 30 years ago, but today it is common place because of the demands of the caseload. At the same time judges are busier than they have ever been and less able to devote the time and energy they once could to each individual case.

The next conservative pro-Rule of Law Administration needs to put court and jurisdictional reform on its agenda for serious review.¹⁹ We need to consider altering some of the main jurisdictional statutes so fewer cases are brought in federal court or at least to ensure that more of the important cases get full oral argument and a published opinion as was once commonplace.²⁰ Large unwieldy circuit courts like the Ninth Circuit must be split into two or three smaller circuits.²¹ Specialized courts to hear social security cases may be necessary.²² This issue sounds mundane, but conservatives need to appreciate that forty years of left-wing rights creation and congressional lawmaking has strained our federal court system beyond recognition. Something will have to change.

In closing, I have tried to suggest ten things the new conservative President may do bearing on the executive and judicial branches growing out of the experiences of past Administrations and relying upon what I have learned from studying, writing about and teaching constitutional law. The task ahead will be challenging but it has been made much easier as have so many things by Ronald Reagan who showed us all how governance from the White House could be done right.

19. For some relevant suggestions in this Issue see Victor E. Schwartz, *White House Action on Civil Justice Reform: A Menu for the New Millennium*, 24 HARV. J.L. & PUB. POL'Y 393 (2001).

20. See Calabresi, *Relimiting Federal Judicial Power*, *supra* note 2, at 636.

21. See *id.* at 638.

22. See POSNER, *supra* note 14, at 260.