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## Holder of 'Vacant' Seat Still Making Her Mark

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WASHINGTON -- President George W. Bush's pledge "to fill this vacancy" in a "timely manner" failed to acknowledge the reality that there is no actual vacancy on the U.S. Supreme Court.

In spite of the administration's failed battle to win Harriet Miers a place on the court, Justice Sandra Day O'Connor - in accordance with her announcement on July 1 that she will retire "upon the nomination and confirmation of my successor" - is still there.

And she may well be there for months to come, a fact that has implications both for the court and for the 75-year-old justice, who commented ruefully to an audience of cadets at the U.S. Military Academy a week ago that "I did my best to retire from the Supreme Court this summer."

Recalling the telephone call in early September from Bush, informing her that he was redesignating John Roberts Jr., her intended successor, for the position of chief justice, O'Connor told the cadets, "They say your country calls sometimes, but I didn't know they meant it called on the telephone!"

Her continued tenure, which is now likely to stretch into the new year, means that she will participate in the initial stage of many more cases than had at first appeared likely. If she sits through Dec. 7, the court's last argument day before a four-week holiday recess, she will have heard arguments in 31 cases. These include the Oregon assisted-suicide case that was argued Oct. 5, as well as an abortion case from New Hampshire that raises an important procedural issue, to be argued on Nov. 30.

While she will cast a post-argument vote in all the cases she hears, along with the other justices, her vote will count in the end only if she is still on the court when the decision is issued. If she is gone by then, the decision will be issued without her. In the event of a 4-to-4 tie, not unlikely given O'Connor's position in the middle of the court, the remaining justices will decide whether to schedule a new argument or to announce the tie, a disposition that affirms the lower court's opinion without setting a precedent for future cases.

It is evident from her active participation during the new term's argument sessions that she is doing her homework. She also has maintained a busy off-the-bench schedule. She went on network television to promote her newly published children's book. She has agreed to serve as grand marshal for the Rose Parade in Pasadena, California, on Jan. 2. She is organizing a conference on the legal profession.

Despite her thwarted plans and her ailing husband, O'Connor projects energy and good humor. Further, it is obvious that she does not intend to fade quietly from the scene. At West Point, New York, to accept the military academy's Thayer Award, her brief remarks were far from the bromides that public figures often turn to on such occasions. Instead, she presented a pointed and timely critique of the failure by the White House and Congress to set clear rules for the treatment of detainees.

"What law governs the detention and interrogation of terrorist suspects?" the justice asked the future military officers. "And how are you to know what standards apply?" Playing off the West Point motto of "Duty, Honor, Country," she continued, according to the text made available by the court: "What does your duty demand? What does your honor demand? And what does your

country demand? It is hard enough to answer the first two questions, but harder still when the nation's elected leaders are silent about the last."

She referred to two cases the court decided in June 2004, one rejecting the Bush administration's position that the federal courts had no jurisdiction over conditions for detainees at Guantánamo Bay, Cuba, and the other, in which she wrote the controlling opinion, insisting that U.S. citizens had a "meaningful opportunity" to challenge the basis for their detention.

These were "modest" and "limited" decisions, she said, adding: "This is where we expect Congress to step in. But it has done surprisingly little to date to clarify United States policy towards prisoners in the war on terror." She said, "I think it is not too much to say that I believe some clarity from Congress and the president would be welcomed by our armed forces."

These were such unusual remarks for a sitting justice as to raise the question of whether O'Connor, in the oddly prolonged twilight of her tenure, might now be feeling liberated from convention and free to speak her mind. If so, Americans may come to know Sandra Day O'Connor better in the coming months than in the past 24 years.