

# Judicial Selection as War

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\* Arthur B. Hanson Professor of Law, William & Mary Law School. In a separate article, I consider Supreme Court selection as war, while in this article I focus on the selection of lower court judges as war. I completed this article six months before the mid-term elections of 2002. Together, I trust these articles will serve as a useful overview of the general phenomenon of judicial selection as war. In these and other works, I have benefited enormously from the empirical studies of judicial selection done by other scholars, including three participants in this Symposium — Sheldon Goldman, Elliot Slotnick, and Carl Tobias. I am especially grateful to John Oakley and Carl Tobias for the opportunity to participate in this Symposium.

## INTRODUCTION

A popular metaphor for describing judicial selection is war. One need look no further for confirmation of the continuing pull of this metaphor than newspaper reports on the implications of the Senate Judiciary Committee's recent rejection of Charles Pickering's nomination by President George W. Bush to the U.S. Court of Appeals for the Fifth Circuit.<sup>1</sup> In one report, veteran reporter Neil Lewis of *The New York Times* employs the term "battle" six times, including in the headline, to describe the nature of the likely conflicts arising over judicial nominations in anticipation of the next Supreme Court vacancy.<sup>2</sup>

The Senate Judiciary Committee's rejection of the Pickering nomination — and its implications — seem to confirm the threat made at the outset of George W. Bush's presidency by some prominent Democrats. They warned that there would be a "war" if, after the Supreme Court's controversial opinion in *Bush v. Gore*<sup>3</sup> short-circuiting Vice-President Gore's challenge to the vote count in Florida, Bush tried to claim a mandate to nominate conservative ideologues outside of the mainstream of constitutional jurisprudence.<sup>4</sup> After September 11, 2001, some Republican senators and administration officials suggested, however, that the war against terrorism obliges senators to give special deference to the President's judicial nominees. Such deference would ensure a fully staffed judiciary available to properly monitor and process criminal proceedings coming out of the war against terrorism.<sup>5</sup>

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<sup>1</sup> See *Executive Business Meeting Summary, Senate Judiciary Comm.*, Mar. 14, 2002, available at <http://www.senate.gov/%7EJudiciary/summary/ex031402.pdf> (providing the votes not to report Charles Pickering's nomination favorably, unfavorably, and without recommendation).

<sup>2</sup> Neil A. Lewis, *From Quiet Nomination to Noisy Test for Future Battles*, N.Y. TIMES, Feb. 26, 2002, at A21.

<sup>3</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>4</sup> See *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman ed., 2002); Jack M. Balkin, *Bush's Negative Mandate Narrows His Nominees*, L.A. TIMES, Jan. 12, 2001, available at <http://www.yale.edu/lawweb/jbalkin/opeds/negativemandateoped1.htm> (suggesting that Bush's belief that he had such a mandate was illustrated by his nomination of Linda Chavez as Labor Secretary in January 2001).

<sup>5</sup> See *Hearing on Military Tribunals Before the Senate Judiciary Comm.*, 107<sup>th</sup> Cong. (2001), reprinted in FDCH Political Transcripts (Dec. 4, 2001), (statement by Sen. Orrin Hatch) (stating that "[the Senate Judiciary Committee] would better serve the public by looking for ways to help, instead of distracting the administration which has the enormous task on its hands and is doing a super job under very difficult circumstances. . .one obvious way we could help is to confirm the nominees languishing in this committee for important jobs including judgeships"); Ari Fleischer, *White House Press Briefing*, available at <http://www.whitehouse.gov/news/releases/2001/12/print/20011221-7.html> (stating that "the president deserves to have his team in place, particularly during a time of war . . . and

Moreover, it would ensure that conflicts over the nominees would not divert precious time and political capital the President needs to successfully wage the war.

Perhaps the most serious problem with this argument is that the structure of the Constitution is plainly designed to invite conflict.<sup>6</sup> Anyone familiar with the process of judicial selection knows just how combative and vitriolic contests over judicial appointments can be. Though not always short, their nastiness and brutality seem otherwise to exemplify the infamous conditions Thomas Hobbes described as existing within the state of nature.<sup>7</sup> The structure of the Constitution pits presidents and senators against each other in the appointments process. The framers fully expected, and even hoped, that conflicts would ensue from this design.<sup>8</sup> Their expectation was that the constitutional checks and balances, including the distribution of authority on judicial appointments, were designed so that "ambition must be made to counteract ambition."<sup>9</sup> The framers viewed conflicts as inevitable and even desirable. The ensuing friction would act to prevent one branch from aggrandizing power at the expense of others. It also would prevent one authority from becoming tyrannical.

Yet, the structure of the Constitution invites not only conflicts but also accommodations. In relatively short order, presidents and senators developed informal accommodations or arrangements to reduce the inevitability of conflict and yet preserve some realm of discretion with respect to judicial appointments. These accommodations, expectations, or arrangements are institutional norms.<sup>10</sup> Following institutional norms generally produces peaceful co-existence between presidents and senators rather than sanctions.

My thesis is relatively simple. Hostilities break out in the process for selecting lower court judges under two circumstances. The first is when the President, senators, and/or nominees violate some long-standing

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the American people deserve to have their government fully staffed and they deserve a court system that can fully carry out justice").

<sup>6</sup> See also MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000) (describing, *inter alia*, the dynamics resulting from the allocation of authority set forth in the Appointments Clause).

<sup>7</sup> Thomas Hobbes, *LEVIATHAN* 84 (J.C.A. Gaskin, ed., Oxford Univ. Press 1996).

<sup>8</sup> See U.S. CONST. art. II, § 2, cl. 2; GERHARDT, *supra* note 6, at 17-29 (describing framers' expectations regarding appointments).

<sup>9</sup> THE FEDERALIST NO. 51 349 (James Madison) (Jacob E. Cooke ed., 1982).

<sup>10</sup> See generally Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 n.3 (2001) (defining institutional norms)[hereinafter Gerhardt, *Norm Theory*].

practices or expectations (some but not all of which constitute institutional norms). Alternatively, hostilities break out when the applicable institutional norms are in flux. I suggest this basic dynamic persists regardless of whether the nation is at war.<sup>11</sup> History generally suggests that judicial appointments entail a give-and-take in which presidents and senators negotiate over their respective achievements of various short and long-term objectives. How well presidents and senators achieve their respective objectives and discharge their all-important duties relating to judicial selection depends on their compliance with and coordination of the governing norms and expectations at the time appointments must be made. Presidents and senators obviously do not perform in a vacuum; context is all important, but context does not guarantee particular outcomes. The fact that the nation is at war is, of course, an important part of the context of present times, but it is not, and likely will not, make a difference to the process of judicial selection. A judicial appointment offers presidents, and at least some senators, an opportunity to negotiate over their respective objectives. How presidents and senators will view their opportunity, however, will depend on their respective calculations of their short and long-term needs. These calculations depend a great deal on the context in which they are made, including the perennial needs for both presidents and senators to reward friends, penalize foes, influence the direction of the lower courts, or to effectuate trading or deals to facilitate other legislative priorities and objectives.

My purpose is not to be exhaustive, but rather to illustrate some significant patterns in federal judicial selection. In Part I, I will briefly clarify some basic terminology, discuss the relevance of statistics, and identify some basic institutional norms in federal judicial selection. These norms include, among others: senatorial courtesy; good faith consultation with the Senate; nominees' fitting the basic ethical and professional expectations of the times; making timely nominations; substantial senatorial discretion in pacing the confirmation process; following (or at least not altering) basic vetting procedures; and responsible rhetoric in framing the terms of initial debate.

With this general framework in mind, I focus in Part II on conflicts between senators and presidents who have failed to adequately heed or account for a relatively robust institutional norm, long-standing practice, or expectation regarding judicial selection. These conflicts have followed two patterns. The first has involved presidents' attempts to re-shape

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<sup>11</sup> For some prior discussions of this view, see GERHARDT, *supra* note 6.

some basic practices or procedures relating to judicial selection. Indeed, perhaps the most serious battle now occurring within the judicial appointments process is to develop a new norm or understanding regarding the requisite ideology for a judge. The second category of conflicts consists of presidents' failures to follow the governing norms in filling specific vacancies. The reasons for these failures have been varied, including over-confidence, negligence, competing priorities, and of course payback.

Part III consists of models of accommodation. The first is capitulation or presidential abdication of authority, as epitomized by the Harding administration. The second model consists of an overview of the strategies employed by presidents and senators to achieve their respective objectives through negotiation or management of various institutional norms. This model also encompasses the practices relating to appointing judges in the midst of war. As illustrated by a review of several war-time presidents (including Abraham Lincoln, Franklin Roosevelt, Lyndon Johnson, and Richard Nixon), presidents have been able to achieve relatively conflict-free confirmation proceedings for judicial nominees in the midst of war when *they*, rather than the Senate, have been willing to bend or compromise in defining the terms for judicial selection.

#### I. TERMS OF ENGAGEMENT

A few introductory clarifications are in order. First, my models reflect an important dynamic in the selection process. They are premised on the unusual power and opportunity that presidents have to set the terms of debate in a confirmation proceeding. Senators have more limited, though significant power to set or influence the agenda in a confirmation proceeding, because they are largely confined in the process to a defensive posture. In structural terms, this means that senators face the structural disadvantage of being in a defensive posture throughout the appointment process in which they are restricted to exercising a veto.<sup>12</sup> Senators have tried to compensate for their structural disadvantage through various means. One solution has been to develop various procedures and norms to facilitate the influence and input of individual senators and the Judiciary Committee leadership on judicial appointments.

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<sup>12</sup> See generally John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss & Sunstein*, 71 TEX. L. REV. 633 (1993).

Second, the basic terms of war and norms need to be defined. I do not mean to rely on strict terms of art for either term. I sometimes loosely use the terms “battle” and “war,” though I recognize the important differences between them. Indeed, it is useful to keep in mind that a contest over a particular judicial nomination is more like a battle than a war, for it is waged against a backdrop of larger contests among national political leaders. One important mechanism in these battles consists of institutional norms. Institutional norms refers to the informal understandings or arrangements among the leadership of national institutions developed over time, as well as the deviations from these arrangements which often trigger sanctions or disapproval.<sup>13</sup>

Finally, it is very important to recognize the institutional norms applicable to the process of selecting lower court judges. The first and most robust of these is senatorial courtesy. Senatorial courtesy takes at least two forms in the appointments process.<sup>14</sup> The first is the deference usually (but admittedly not always) given by senators to the nomination of a colleague to a federal judgeship. The Senate confirmed all six senators nominated to the Supreme Court in the 20<sup>th</sup> century — Edward Douglass White as Chief Justice, and as Associate Justices George Sutherland, Hugo Black, Jimmy Byrnes, Harold Burton, and Sherman Minton.<sup>15</sup> While presidents have generally succeeded in nominating many former members of Congress (particularly from the House) to lower federal courts,<sup>16</sup> only two of these nominees were senators. In both cases — Franklin Roosevelt’s nomination of Sherman Minton to the Seventh Circuit and Ronald Reagan’s nomination of James Buckley to the District of Columbia Circuit — the Senate overwhelmingly confirmed the nominees.<sup>17</sup>

The second form of senatorial courtesy is the deference given by presidents to the choices of the senators from their parties for filling vacant federal judgeships in their respective states. I examine conflicts arising from breaches of this norm in more detail in the next part.

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<sup>13</sup> See Gerhardt, *Norm Theory*, *supra* note 10.

<sup>14</sup> For a general discussion, see generally GERHARDT, *supra* note 6.

<sup>15</sup> Even people who have served in the House of Representatives seem to have had their nominations receive substantial deference from the Senate. In the twentieth century, the former House members successfully nominated to the Court include William Moody as Associate Justice and Fred Vinson as Chief Justice. See SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY (Melvin J. Umfsky ed., 1994).

<sup>16</sup> See GERHARDT, *supra* note 6, at 129-30.

<sup>17</sup> See 87 CONG. REC. S4207 (1941) (confirming nomination of Sherman Minton to the Seventh Circuit); 131 CONG. REC. S17737 (1985) (confirming nomination of James Buckley to the District of Columbia Circuit).

Another institutional norm is presidents' and senators' recognition of the importance of nominating people from their parties to lower court judgeships. In the 19th century, party affiliation increasingly became a useful proxy and demonstration of a nominee's loyalty to a president's (or key senators') preferred constitutional ideology and policy views. Kermit Hall's excellent study of nineteenth-century lower court judicial appointments demonstrates the increasing importance of partisanship in judicial appointments.<sup>18</sup> For instance, all of Grover Cleveland's lower court appointees were Democrats.<sup>19</sup> The statistical break down of the party affiliations for modern presidents' appointees to lower courts reflects similar degrees of significance of partisanship in their selection, including the following: Franklin Roosevelt (98.5% for district judges and 96% for circuit judges); Harry Truman (93.8% for district judges and 88.5% for circuit judges); Dwight Eisenhower (95.2 for district judges and 93.3% for circuit judges); John F. Kennedy and Lyndon Johnson (92.1% for district judges and 95.1% for circuit judges); Richard Nixon and Gerald Ford (89.6% for district judges and 93.0% for circuit judges); Jimmy Carter (90.6% for district judges and 82.1% for circuit judges); Ronald Reagan (91.7% for district judges and 96.2% for circuit judges); George H.W. Bush (88.5% for district judges and 89.2% for circuit judges); and Bill Clinton (87.5% for district judges and 85.2% for circuit judges).<sup>20</sup> Moreover, Sheldon Goldman calculates striking statistics to demonstrate the extent or percentage of a president's judicial appointments based on a "partisan agenda" or made "to shore up political support for the president or for the party."<sup>21</sup> According to Goldman, presidents from Truman through Clinton had percentages of circuit appointments made on the basis of facilitating their support within their respective parties ranging from a high of 100% for President Ford to a low of 25% for President Reagan, with every other president above 70%.<sup>22</sup>

There are several other norms in federal judicial selection. These norms include good faith consultation with the Senate; nominating

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<sup>18</sup> KERMIT L. HALL, *THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-61* (Univ. of Nebraska Press, 1979).

<sup>19</sup> GERHARDT, *supra* note 6, at 129-30.

<sup>20</sup> See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 *JUDICATURE* 282 (1993) [hereinafter Goldman, *Bush's Judicial Legacy*]; Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton's Judges: Summing Up the Legacy*, 84 *JUDICATURE* 228 (2001) [hereinafter *Clinton's Judges*].

<sup>21</sup> GOLDMAN, *supra* note 20, at 3.

<sup>22</sup> See *id.* at 208.

people who satisfy the prevailing ethical and professional expectations of the times;<sup>23</sup> responsible or credible rhetoric in characterizing nominees' credentials;<sup>24</sup> timing; and basic procedures for vetting and processing judicial nominations (including ratings of the quality of judicial nominees by the American Bar Association).<sup>25</sup> In the next two parts, I explore the significance of deviations from these norms.

## II. MODELS OF WAR

This Part surveys two basic models of conflict in lower court judicial selection. In turn, I consider warrior presidents, who have invited conflict, and other presidents, who have ignored or discounted appointment norms at their own or their judicial nominees' peril.

### A. *The Warrior Presidents*

In the classic *The Art of War*, Sun-Tzu makes two trenchant observations that one might imagine would resonate with most presidents in making Supreme Court nominations. The first is, "To win without fighting is best."<sup>26</sup> The other is, "The side that knows when to fight and when not will take the victory. There are roadways not to be traveled, armies not to be attacked, walled cities not to be assaulted."<sup>27</sup> One has to wonder why any president would disregard either of these, but many seem to have done just that. So, one obvious question with which to begin an analysis of the models of conflict within judicial selection is why presidents sometimes welcome fights? That some do

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<sup>23</sup> In his exhaustive study of federal judicial selection from Franklin Roosevelt through Reagan, Professor Goldman characterizes this norm as "the expectation that the president and his administration will ordinarily choose persons who have the education, experience, temperament, and reputation of legal acumen and integrity requisite for judicial office." *Id.* at 4 n.c.

<sup>24</sup> This institutional norm is especially evident in Supreme Court selection. It is often the case that each side in a judicial confirmation contest attempts to demonize the other. The objective of the supporters of a nomination has been to demonize people who oppose the nomination, while the opponents of a nomination have tended to demonize the nominee. Interestingly, the efforts to demonize opposition tracks the rhetoric employed in times of war. A recent headline in the *New York Times* suggestively reads, "A Nation Defines Itself by its Evil Enemies." Robert F. Worth, *A Nation Defines Itself by its Evil Enemies*, N.Y. TIMES, Feb. 24, 2002, at D1. The article suggests that in a war national leaders tend to rally support by demonizing the enemy. *Id.* The same holds true in judicial confirmation proceedings.

<sup>25</sup> Shortly after taking office, President George W. Bush discontinued the policy. See *infra* note 36 and accompanying text.

<sup>26</sup> SUN-TZU, *THE ART OF WAR* at vii (Thomas Cleary trans., 1988).

<sup>27</sup> *Id.* at 125.



welcome contests is beyond any doubt. Some presidents — I call them the warrior presidents — have deliberately taken approaches that have provoked conflict with the Senate. The warrior presidents in American history seem to have had at least one important thing in common: they have invited heated conflicts over nominees for the sake of either fortifying their prerogatives or re-shaping the basic norms of the process.

The most devastating defeats warrior presidents have had in the judicial selection process have involved their direct attacks to weaken or alter senatorial courtesy. At least three presidents, upon taking office, immediately set their sights on challenging senatorial courtesy in lower court judicial appointments. All three — Ulysses Grant, Herbert Hoover, and Jimmy Carter — paid enormous prices, particularly within their own parties, for their boldness.

Grant's first Attorney General, Ebenezer Hoar, angered Republican senators by refusing to grant them *carte blanche* in their recommendations for federal judges in their respective states. Instead, he insisted on higher standards for judicial nominees, and many senators balked.<sup>28</sup> This insistence eroded good will between many senators and the White House, and in the end it cost Grant and Hoar dearly when the Senate refused to confirm Hoar's nomination as an Associate Justice in retaliation for Hoar's conduct as Attorney General.

Interestingly, Herbert Hoover tried a similar tactic almost immediately after taking office in 1928. Hoover wanted to end patronage appointments, particularly to the federal courts. Thus, at the outset of his administration he released a statement that he intended to end the practice of awarding judicial appointments based solely on patronage. Instead, he planned to raise the standards and requisite qualifications for judicial appointments.<sup>29</sup> As Sheldon Goldman observes, "Herbert Hoover, with the aid of his attorney general, William Mitchell, attempted to break the grip that Republican senators had on lower court appointments in order to improve the quality of the appointees. This resulted in several battles with Republican senators and ultimately in an administration retreat."<sup>30</sup> The retreat was only part of the bigger story, for the battles helped to erode Hoover's relations with his fellow Republicans in the Senate, so that over time he wielded increasingly less influence over dictating both domestic policy and Supreme Court

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<sup>28</sup> See generally JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* (Univ. of California Press 1953).

<sup>29</sup> GERHARDT, *supra* note 6, at 146.

<sup>30</sup> GOLDMAN, *supra* note 20, at 9.

appointments. Before the end of his single term as president, he would find himself at the other extreme from which he started and acquiesce to the Senate's preferred candidate to replace Justice Oliver Wendell Holmes.<sup>31</sup>

In 1976, Jimmy Carter won the presidency based in part on his pledge to base high-level appointments on merit rather than patronage. Fulfilling his pledge required, *inter alia*, challenging senatorial courtesy for the sake of improving the quality and diversity of judicial appointments.<sup>32</sup> He tried through legislation, executive orders, and negotiations to have merit-select commissions established that would recommend a slate of qualified persons for each judicial vacancy. Over time, serious friction developed between Carter and various senators within his own party over their willingness to follow his criteria in recommending candidates for various judgeships. Friction also existed within Carter's own administration over the priorities for and means to achieve administration objectives. It hardly helped that Carter's chief rival for leadership of his party, Ted Kennedy, chaired the Judiciary Committee. Ted Kennedy used his powers as Chairman to try to implement new norms for judicial selection, and in some instances, to thwart or embarrass Carter. While Carter succeeded in appointing unprecedented numbers of women and minorities as federal district and appellate judges,<sup>33</sup> his success came at the enormous cost of fractured relations with senators from his own party.

In two other instances, presidents have challenged basic procedures for appointing judges other than senatorial courtesy generally. The first involved President George H.W. Bush's frustration over Judiciary Committee access to FBI reports.<sup>34</sup> Just as the Judiciary Committee was preparing to send Clarence Thomas' nomination as an Associate Justice of the Supreme Court to the full Senate for final consideration, the Judiciary Committee leaked Anita Hill's affidavit to the Justice Department. This leak led to an embarrassing turnaround by the Committee to re-open its hearings on Thomas. As part of the re-hearing,

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<sup>31</sup> See HARRIS, *supra* note 28.

<sup>32</sup> See generally GOLDMAN, *supra* note 20, at 236-84 (describing Carter's reform of judicial selection).

<sup>33</sup> On diversifying judicial appointments, see generally Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237 (1993); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996); Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861 (1994); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U.L. REV. 1257 (1993).

<sup>34</sup> See Goldman, *Bush's Judicial Legacy*, *supra* note 20, at 283-84.

the Committee called Hill and re-called Thomas in dramatic, televised appearances before the Committee to address her sexual harassment charges against him. Though the Senate ultimately confirmed Thomas by an extremely close vote,<sup>35</sup> President Bush announced shortly after the final vote that he had issued an order restricting the Committee's future access to FBI reports. The order provoked an impasse that lasted for three months while the Committee refused to process any pending judicial nominations until it could arrange for its own investigation of the backgrounds of nominees to substitute for the FBI reports. After three months, the administration changed course by restoring access for Committee members and staff to FBI reports, but with a stricter accounting of who would be allowed to read the reports. The delay was fatal to over two dozen subsequent judicial nominees, because the nominees' earliest opportunities for hearings would not have been until 1992 at which point the Senate slowed the process to a complete standstill pending the outcome of the presidential election.

More recently, President Bush's son, George W. Bush, openly challenged a different procedure. Shortly after taking office, President George W. Bush's White House Counsel announced the administration's intentions to curtail the practice of the American Bar Association to pre-screen possible judicial nominees.<sup>36</sup> Ever since the ABA gave a mixed rating to Robert Bork in his confirmation hearings, many Republicans have questioned the organization's claim that its ratings are based on professional credentials and not on the ideology of judicial nominees. In 1997, Senator Orrin Hatch, then the Chairman of the Judiciary Committee, concluded that these questions had sufficient merit to justify abandoning the ABA's privileged status in testifying about the quality of judicial nominees. In spite of this edict, President Clinton continued to consult informally with the ABA prior to making his judicial nominations. President Bush decided, however, to deny the ABA any privileged status in rating nominees. Democratic senators resented his decision. After regaining control of the Senate in May 2001, Democratic senators slowed down all pending judicial nominations to provide the ABA with the opportunity to rate the quality of the President's

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<sup>35</sup> See generally Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 970 (1992) [hereinafter Gerhardt, *Divided Justice*] (generally discussing the sequence of events culminating in Justice Thomas' confirmation proceedings).

<sup>36</sup> The ABA practice of screening possible judicial nominees began in 1946 and extended through the end of the Clinton administration. See Gerhardt, *Norm Theory*, *supra* note 10, at 1712.

nominees.<sup>37</sup>

Beyond the challenges that Presidents George H.W. and George W. Bush have made to certain procedures in judicial selection, they joined President Reagan in an attempt to establish a new norm of judicial selection. Over the past two decades, one of the most common reasons for opposing judicial nominees has been doubt about or opposition to their likely judicial ideologies.<sup>38</sup> The extremely low percentage of President Reagan's appellate court nominees made on the basis of partisan considerations reflects his administration's emphasis on ideology as an important, indispensable criterion for appointment.<sup>39</sup> With this emphasis, the Reagan administration introduced into the modern era an approach to judicial selection that effectively counted a candidate's likely ideology as the single, most important qualification for his or her appointment as a judge. Subsequent Republican administrations have tried to emphasize ideology to a similar degree in the nomination process. In addition, the vast majority of President Clinton's judicial nominees who experienced substantial or fatal delays in confirmation proceedings had their nominations opposed because of Republican senators' distrust of their likely ideologies.<sup>40</sup>

Both the Senate Judiciary Committee's rejection of Judge Charles Pickering,<sup>41</sup> and the slow pace of judicial confirmation proceedings,<sup>42</sup> reflect Democrats' dual concerns for payback and for opposing what they regard as extreme or outside-of-the-mainstream judicial ideologies. The ensuing focus of both sides on judicial nominees' likely ideologies reflects an important dynamic in judicial selection in which, in effect, Republicans and Democrats are vying to define or control the formation of a new norm of judicial selection. Rhetoric is an important weapon in this battle, as the contending sides have each tried to characterize the opposing sides' nominees in extremely unflattering terms. Each side casts its nominees as within the mainstream and many of the other side's nominees as well outside of it. In other words, Republicans and

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<sup>37</sup> See STUDY OF CITIZENS FOR INDEPENDENT COURTS (March 6, 2002) (indicating that judicial nominations have slowed down both to allow for ABA input on pending nominations and to address anti-terrorist legislation in the aftermath of the September 11, 2001 attacks against the United States).

<sup>38</sup> See generally CITIZENS FOR INDEPENDENT COURTS, UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS (2000). This report has been recently updated.

<sup>39</sup> See *id.*; Goldman, *supra* note 20, at 3.

<sup>40</sup> See 145 CONG. REC. S11918 (daily ed. Oct. 5, 1999) (providing vote on Ronnie White's nomination).

<sup>41</sup> See *supra* notes 1-4 and accompanying text.

<sup>42</sup> See *supra* note 37 and accompanying text.

Democrats are vying to define the standard that they each can use as a yardstick by which to measure the legitimate or appropriate ideologies for judicial appointments. In short, they are fighting to define the mainstream of constitutional law.

The fight to define the mainstream coincides strikingly with unprecedented delays in the nomination and confirmation phases of the judicial selection process. A recent report of Citizens for Independent Courts indicates that the process for filling judicial vacancies is taking longer than ever. The time for filling them has increased from 38 days during the first two years of President Carter's term to 226 days during the last two years of President Clinton's administration. The study further indicates a steady decline in the percentage of a president's first-year nominations confirmed by the Senate during that first year. The Senate confirmed 93% of President Reagan's first-year judicial nominations in 1981. In contrast, the Senate confirmed 44% of President George W. Bush's nominations in 2001. Additionally, the Senate took longer to confirm judges (an average of 112 days) in the first year of President George W. Bush's administration than it had taken during comparable periods of earlier administrations, with the exception of the first year of President Clinton's second term (an average of 133 days). The delays are due to various factors, including the change in Senate leadership in mid-2001 and the fact that the Democrats have been deferring Senate consideration of judicial nominations until they have been reviewed by the ABA.<sup>43</sup>

In numerous other instances, presidents have not launched broad-scale attacks on senatorial courtesy or challenged basic procedures. Instead, in the course of choosing particular nominees, presidents have breached various institutional norms. These breaches have given rise to the conflicts that I discuss in the next section.

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<sup>43</sup> The study further indicates, as I have suggested, that President George W. Bush (to date) has taken a shorter amount of time to make nominations than his three predecessors. On average, he nominated a candidate within 165 days of a vacancy (or the date he took office), while the corresponding average for Clinton's first year was 253, for President George H.W. Bush 193, and for President Reagan 191. Of course, one major difference between President Bush and his three predecessors is that he is the only one not to have allowed the ABA to rate the quality of the nominees prior to their formally being nominated. The additional time required for the ABA to provide its ratings accounts in part for both the quicker pace with which President Bush makes nominations and the slower pace with which the Senate has been considering them. *Id.*

### B. Mistakes in War

The most common source of conflicts over judicial selection involves presidents' failure to follow institutional norms or long-standing expectations or practices. Presidents have failed to follow institutional norms for numerous reasons. However, more often than not, these failures can be traced to the specific circumstances in which presidents choose, for political or other reasons, to prioritize other short- or long-term objectives.

The first significant failure, which every president has made, is not to consult with the senator(s) from his party in the state for the judgeship(s) he is trying to fill. This failure is almost invariably fatal to the nomination's success, and perhaps most surprising, triggers sanctions not from senators from the opposition party but from the President's own party.

These sanctions have been applied, regardless of the President's popularity. For instance, President Franklin Roosevelt was convinced that senatorial courtesy was an antiquated concept.<sup>44</sup> Consequently, he sometimes ignored it to pursue other priorities, though in these instances with virtually no success. For instance, in 1938, he nominated Floyd Roberts, a New Deal supporter, to a federal district judgeship in Virginia.<sup>45</sup> The state's governor, former governors, and one influential congressman supported both the New Deal and Roberts. Nevertheless, the state's two Democratic senators, who were philosophically opposed to the New Deal and thus to Roberts, effectively rallied other senators partly on the ground of preserving the prerogative of senatorial courtesy. Additionally, the two Virginia Senators helped spearhead the Senate Judiciary Committee's rejection of the nomination 15-3 as well as the full Senate's defeat of the nomination 72-9.

Interestingly, Roosevelt's subsequent strategy for filling the judgeship paid homage to senatorial courtesy. Roosevelt offered the judgeship to Armistead Dobie, then the dean of the University of Virginia School of Law. Though Roosevelt had not consulted Virginia's Senators before offering the position to Dobie, he did consult with them and got their approval before formally forwarding the nomination to the Senate.<sup>46</sup> With the Senators on board, the nomination easily and quickly was confirmed by the full Senate.

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<sup>44</sup> See GOLDMAN, *supra* note 20, at 43.

<sup>45</sup> *Id.* at 42.

<sup>46</sup> *Id.* at 43-44.

In 1943, President Roosevelt made an even bolder attempt to bypass senatorial courtesy, which failed. He nominated James Allred to fill a federal district judgeship in Texas.<sup>47</sup> Allred had the support of one Texas senator and other influential Democratic leaders in the state,<sup>48</sup> but he had also run unsuccessfully to unseat the other Texas senator, W. Lee O'Daniel. Not surprisingly, O'Daniel vigorously opposed nominating his rival to fill the judgeship, and the Judiciary Committee split evenly on recommending the nomination for the full Senate to consider. Allred subsequently asked that his nomination be withdrawn. Nonetheless, President Truman successfully appointed him as a federal judge after O'Daniel had left the Senate.

Although as a former senator, Harry Truman should have understood the importance of senatorial courtesy, he sometimes miscalculated and failed to take senatorial courtesy into account in making nominations. In one instance, he failed to consult with Georgia Senator Richard Russell before he nominated M. Neil Andrews to a federal district judgeship in Georgia.<sup>49</sup> Truman had figured that he did not have to consult with Russell on this appointment because he had already given Russell his due by agreeing to another choice of Russell's for a different judicial vacancy in his state. The problem was that Russell preferred a different candidate, William Boyd Sloan, and thus vigorously opposed the Andrews nomination. He initially helped to stall its consideration, precipitating the President into giving Andrews a recess appointment (just as Roosevelt had done with Roberts). Nevertheless, both the Judiciary Committee and the full Senate voted to reject Andrews' nomination. While Truman was not pleased with the rejection, he reluctantly agreed to nominate Sloan to the judgeship, and the Senate quickly confirmed him.

Another significant reason for frustrated or defeated judicial nominations is poor timing. As Sheldon Goldman explains, "Traditionally, minimal confirmation activity occurs during election years, especially when the Senate is controlled by one party and the White House by another."<sup>50</sup> Statistics amply demonstrate the robustness of this basic norm: for instance, at the end of 2000 the Senate had not acted on 32 district and eight circuit court nominations made by President Clinton; in 1992 the Senate had not acted on 42 district and five

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<sup>47</sup> *Id.* at 42.

<sup>48</sup> *Id.*

<sup>49</sup> See STUDY OF CITIZENS FOR INDEPENDENT COURTS at 71-72.

<sup>50</sup> See Goldman, *Bush's Judicial Legacy*, *supra* note 20, at 284.

circuit court nominations made by the first President Bush.<sup>51</sup>

Timing can make a big difference in judicial selection in a different form — the pacing of the confirmation process. Over the years, senators have developed numerous parliamentary mechanisms to facilitate their input on judicial appointments. Some of these have included: individual senators' prerogative to place any judicial nominations temporarily on hold; filibusters; the Judiciary Committee Chair's implied authority to control the scheduling of hearings, numbers of witnesses, and timing of votes; and the majority leader's authority to control everything that comes to the floor of the Senate.<sup>52</sup> The instances in which senators have used one or more of the means to frustrate judicial nominations are numerous. As one might expect, senators employ these mechanisms for many reasons, including protecting senatorial courtesy, rewarding friends, payback, logrolling, and enforcing conceptions about the proper qualifications for judicial appointments. Five examples dramatically illustrate the significance of these mechanisms over time.

First, in 1959 Lyndon Johnson became the first Senate Majority Leader ever to stall all pending judicial nominations until President Eisenhower agreed to nominate his preferred candidate for a judgeship in Johnson's home state.<sup>53</sup> Johnson's strategy worked; the President nominated Johnson's friend Joe Fisher to the judgeship, the Senate confirmed Fisher three days later, and the log-jam was broken.

Second, shortly after assuming the chairmanship of the Senate Judiciary Committee in 1979, Ted Kennedy introduced several innovations to judicial confirmation proceedings.<sup>54</sup> He announced that senators who withheld the "blue slips" of persons nominated for judgeships from their states could no longer rely on the Chair to kill those nominations.<sup>55</sup> Kennedy directed that every nomination would be discussed by the full Committee, and the Committee would determine whether to proceed with a nomination by holding a hearing.<sup>56</sup> In addition, Kennedy arranged for the Committee to adopt a questionnaire that all nominees would be required to complete and that, with the

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<sup>51</sup> See *id.* (stating that "[When the 102nd Congress adjourned in 1992], the Senate had not acted on 42 district and 10 appeals court nominations"); see also *Clinton's Judges*, *supra* note 20, at 234 (stating that "at the end of the 106th Congress, 40 [judicial] nominees languished in the Judiciary Committee. . ."); *id.* at 246 (stating that "[a]t the end of the 106th Congress, 18 [appeals court] nominations had not been acted upon").

<sup>52</sup> See generally GERHARDT, *supra* note 6, at 135-79.

<sup>53</sup> See *id.* at 138.

<sup>54</sup> See GOLDMAN, *supra* note 20, at 263.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



exception of a few questions, would be made available to the public.<sup>57</sup> The Committee also began to routinely publish its confirmation proceedings.<sup>58</sup> Moreover, Kennedy invited various groups to testify before the Committee and to rate judicial nominees.<sup>59</sup> An especially important innovation was the establishment of the Committee's own investigatory staff to examine the backgrounds of judicial nominees apart from Justice Department inquiries.<sup>60</sup>

Third, as Chairman of the Senate Judiciary Committee, Orrin Hatch had placed all judicial nominations on hold through the first half of 1999. Part of the reason why he did this was to wait for the outcome of President Clinton's impeachment trial in February 1999. He also wanted to pressure the President to nominate his preferred candidate — Ted Stewart — to a federal judgeship in his home state of Utah. Eventually, President Clinton and Senator Hatch choreographed an exchange.<sup>61</sup> President Clinton agreed to begin the vetting process for nominating Stewart, while Hatch agreed that as long as Stewart continued to progress through the appointments process, he would initiate hearings on some pending nominations. In October, the Senate confirmed Stewart, though most of the other pending nominations never reached the floor of the Senate for a final vote.

Fourth, in March 2002, the Judiciary Committee rejected, by a strict party-line vote, President Bush's nomination of Charles Pickering to a seat on the U.S. Court of Appeals for the Fifth Circuit.<sup>62</sup> The vote infuriated Republicans, including President Bush and Pickering's sponsor, Minority Leader of the Senate, Trent Lott, both of whom had lobbied hard for the judge's confirmation. By another strictly partisan vote, the Committee majority also rejected the President's and Senator Lott's pleas to allow the nomination to be forwarded to the floor of the Senate for a full vote.<sup>63</sup> Lott appealed in vain to the Senate Majority Leader Tom Daschle to intercede and forward the nomination to the Senate floor. Neither Daschle's and the Committee's refusals to forward the nomination were unusual. After all, as Majority Leader, Lott had consistently refused the same entreaties from Daschle when their roles

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See GOLDMAN, *supra* note 20, at 263.

<sup>60</sup> *Id.*

<sup>61</sup> See GERHARDT, *supra* note 6, at 141.

<sup>62</sup> See *infra* note 67.

<sup>63</sup> *Id.*

were reversed from 1994-2000.<sup>64</sup> Additionally, the Judiciary Committee for decades had not forwarded to the floor a nomination that a majority had refused to endorse.<sup>65</sup> Nevertheless, Republican senators, led by Trent Lott, retaliated immediately through a series of parliamentary maneuvers to impede other business in the Senate.<sup>66</sup> Lott also exacted revenge against Daschle by announcing he would no longer support Daschle's preferred candidate for a Democratic slot on the Federal Communications Commission, thus impeding the candidate's nomination.<sup>67</sup>

Fifth, after regaining control of the Senate last year, Democrats have succeeded in slowing down the pace of judicial confirmation proceedings. By the end of 2001, the Senate had confirmed only 28 of President Bush's 80 judicial nominations.<sup>68</sup> Moreover, of President Bush's first eleven circuit court nominations made in May of 2001, the Senate has not even held hearings on eight of them.<sup>69</sup> As of this writing, twenty-two circuit nominations are pending before the Committee, and President Bush has yet to nominate people for nine other vacancies on the federal courts of appeals.<sup>70</sup> Michigan's two Democratic senators also

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<sup>64</sup> At least two significant events in the fall and winter of 2002 changed the dynamics of judicial selection for the foreseeable future. First, the Republicans retook control of the Senate as a result of gains made in the mid-term elections. Second, Lott resigned his position as Majority Leader in December as a consequence of arguably racist remarks he had made on the occasion of Strom Thurmond's retirement from the Senate. Lott's successor as Majority Leader, Bill Frist, promised, like Lott before him, to make the confirmation of the President's judicial nominees a priority in the 108th Congress.

<sup>65</sup> See *Clinton's Judges*, *supra* note 20, at 235.

<sup>66</sup> See James W. Brosnan, *Federal Bench Nominees Left in Limbo: Bickering Curdles Senate into Inaction*, THE COMMERCIAL APPEAL, Mar. 23, 2002, at A1.

<sup>67</sup> See Al Kamen, *Comma-Kaze, Lott and Daschle at War*, WASH. POST, Apr. 5, 2002, at A21 ("A furious Lott vowed to retaliate [for failed nomination of Pickering] and blocked the appointment of Jonathon S. Adelstein, Daschle's top communications aide, to a Democratic vacancy on the Federal Communications Commission."); Michael Petrocelli, *Pickering Fallout Persists; GOP Shuts Down Committees in Retaliation for Snub*, HOUS. CHRON., Mar. 21, 2002, at A6; Ana Radelat, *Lott Facing Toughest Time Since Losing Control of Senate*, GANNETT NEWS SERV., Mar. 22, 2002.

<sup>68</sup> David G. Savage, *The World & Nation; Bush's Judicial Nominees Go 28 for 80 in the Senate*, L.A. TIMES, Dec. 31, 2001, at A1.

<sup>69</sup> The nominations in which the Senate had not acted by May 2001 include legal scholar Michael McConnell nominated to the U.S. Court of Appeals for the Tenth Circuit, John Roberts nominated to the U.S. Court of Appeals for the District of Columbia (almost a decade after the Senate had failed to act on his nomination to the same court by President George H.W. Bush), and Carolyn Kuhl nominated to the U.S. Court of Appeals for the Ninth Circuit. For the current status of federal court nominees before the Judiciary Committee, see *United States Senate Comm. on the Judiciary, Nominations to U.S. Courts of Appeals*, available at [http://www.senate.gov/~judiciary/nominations\\_appeals.cfm](http://www.senate.gov/~judiciary/nominations_appeals.cfm).

<sup>70</sup> See Brosnan, *supra* note 66.

have put holds on all three of the President's nominees to the U.S. Court of Appeals in retaliation against the Republicans' fatal blocks of two Democratic nominees to the same court.<sup>71</sup> Senator Patrick Leahy of Vermont, the outgoing Chair of the Senate Judiciary Committee,<sup>72</sup> has explained that the delays are due to some extent to the need to handle other priorities including anti-terrorist legislation. On the other hand, Republicans charge that the delays are attributable primarily to the preferences of Committee Democrats for liberal activist judges and hostility to qualified conservative judicial nominees. In all likelihood, the delays are payback for the Republicans' unprecedented delays of President Clinton's judicial nominations,<sup>73</sup> including 41 at the end of his administration.<sup>74</sup>

As these and many other examples amply illustrate, senators' opposition or resistance to judicial nominees is attributable to many different reasons, including but not limited to doubts about the nominees' qualifications. To be sure, there has never been any consensus in the Senate on the minimal qualifications for federal judges. Nor has there been any meaningful agreement in recent years on whether there is some objective measure or arbiter of judicial qualifications, with one major exception. The exception is that senators over the years have insisted that judicial nominees have, *inter alia*, the requisite integrity to serve as federal judges. Hence, nominees' ethical lapses are a frequently cited basis for rejecting or opposing many judicial nominations.<sup>75</sup>

Other common questions that have arisen about nominees' qualifications have to do with their trial practice (particularly for district judges), temperament, participation in activities unsuitable for judges (such as membership in discriminatory clubs), and judicial philosophy. Three dramatic illustrations of these concerns in practice are: (1) the Senate Judiciary Committee's close vote on former Connecticut Governor Thomas Meskill,<sup>76</sup> (2) the forced withdrawal of President Reagan's nomination of former Louisiana Governor David Treen to the

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<sup>71</sup> *Id.*

<sup>72</sup> As a consequence of the mid-term elections of 2002, Republican Senator Orrin Hatch became the Chair of the Judiciary Committee in January 2003.

<sup>73</sup> See generally GERHARDT, *supra* note 6.

<sup>74</sup> See Savage, *supra* note 68, at A1 (quoting Professor Sheldon Goldman).

<sup>75</sup> For many examples of rejections based on ethical concerns, see *Clinton's Judges*, *supra* note 20, at 236-37.

<sup>76</sup> President Nixon initially nominated Governor Meskill. President Ford re-nominated Meskill to the Second Circuit in spite of the ABA's rating of him as "not qualified." This led the Ford administration to avoid thereafter nominating other people rated by the ABA as "not qualified."

Fifth Circuit based on his past participation in the segregationist Louisiana States' Rights Party, and (3) the Judiciary Committee's negative vote on President Reagan's nomination of Jeff Sessions to a federal district judgeship in Alabama and split vote on forwarding it to the Senate floor (effectively killing it) based on several racially insensitive statements made by Sessions.

### III. ACHIEVING PEACEFUL CO-EXISTENCE

For presidents and senators to achieve peaceful co-existence in the appointment process is not easy, particularly in times of divided government. Even when the same party controls both the White House and the Senate, peaceful co-existence is hard to achieve. Woodrow Wilson and Bill Clinton both endured in the first years of their respective presidencies tense relations with their fellow Democrats for the same basic reason. Each became the first Democratic president after relatively long periods in which the other party had occupied the White House — sixteen for Wilson and twelve for Clinton. Thus, from the outset of these presidencies, many Democratic senators felt they were long overdue in having their preferred candidates fill the vacant judgeships in their respective states.<sup>77</sup> Clinton's difficulties clearly extended to the selection of Supreme Court justices. Even though Democrats controlled the Senate Judiciary Committee and the Senate, he did not want to expend precious political capital in defending his nominees in protracted confirmation proceedings. Instead, he preferred to expend these resources on legislative priorities.<sup>78</sup>

More generally, presidents have pursued at least three strategies to deal with the difficulties in achieving peaceful co-existence in judicial selection. More generally, the first is simply to abdicate presidential authority in choosing nominees and defer almost completely to senators' preferences. Such deference was relatively common throughout the nineteenth century, particularly when the same party controlled the White House and the Senate and judicial nominations were made on the basis of party affiliation and activity.<sup>79</sup>

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<sup>77</sup> See GERHARDT, *supra* note 6, at 98-99.

<sup>78</sup> See DAVID A. YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 196-207* (1999).

<sup>79</sup> Kermit Hall comprehensively examines the patterns of judicial appointments in the 19th century. He notes, for example, that Martin Van Buren's judicial appointments were "more party directed than [those made] during Jackson's administrations." Hall, *supra* note 18. Van Buren made 17 lower court nominations; and, unlike Jackson's, Van Buren's nominees, with only one exception, met no opposition in the Senate. *Id.* Similarly, in

In the twentieth century, the President who came closest to complete abdication was Warren G. Harding.<sup>80</sup> Indeed, the Republican party establishment backed Harding as President in part because it believed he would cede to its preferences for lower court judicial nominees and other important appointments. This is an inference from the fact that Republicans backed Harding in part because they believed they would have more authority with him as President. As President, Harding made clear from the outset his desire to return to “normalcy,” which in the area of judicial selection meant granting to the senators from his party their preferred choices to fill the judgeships in their respective states.

A second strategy is to accept, perhaps even to invite, some conflict over judicial appointments to demonstrate the President’s strength and to define the President and his enemies through such conflicts. Perhaps the most dramatic example of a nineteenth-century president who followed this strategy was Andrew Jackson. In the twentieth century, William Howard Taft<sup>81</sup> and, to a lesser extent, Ronald Reagan<sup>82</sup> and George W. Bush willingly fought with the Senate over some appointments.<sup>83</sup>

A third strategy entails negotiating and otherwise coordinating or managing the governing norms of judicial selection to achieve or maintain relatively peaceful co-existence.<sup>84</sup> Negotiations between presidents and senators have produced many different arrangements. Some of these arrangements have included: the creation of new

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making ten lower court judicial appointments as president, Zachary Taylor “wielded . . . judicial patronage in an outwardly party-directed fashion.” *Id.* The same was true later in the century for Republican presidents Hayes, Garfield, and Arthur; and Grover Cleveland based all thirty-four of his lower court appointments on party considerations. *Id.*

<sup>80</sup> HARRIS, *supra* note 28, at 116.

<sup>81</sup> *See id.* at 166-67; GERHARDT, *supra* note 6, at 100-01.

<sup>82</sup> *See generally* GOLDMAN, *supra* note 20, at 286-96.

<sup>83</sup> *See* Ari Fleischer, White House Press Briefing, *reprinted in* FDCH POLITICAL TRANSCRIPTS, Mar. 14, 2002 (stating that “the greatest consequence of this Senate committee killing this nomination if they do so will be injustice in America on delays in the court on the number of vacancies in the court. . . what’s so distressing about the process the Senate leadership has chosen to take [with respect to Judge Pickering is that it is] a partisan one, that defies bipartisanship. . .”); Joseph Curl, *Bush Links Vote on Pickering to Constitution*, WASH. POST, Mar. 14, 2002, at A10 (reporting that “[Bush says] today’s Senate Judiciary Committee vote on the nomination of [Judge Pickering] will illustrate whether Congress has a deep respect for the Constitution and for the president’s right and responsibility to nominate qualified judges”); Bill Sammon, *Bush Marshals Backers for Pickering*, WASH. TIMES, Mar. 7, 2002, at A3 (reporting that “[Bush calls] Pickering a fine jurist, a man of quality and integrity [and warned] against a Senate process that would malign a man such as him”).

<sup>84</sup> *See generally* GERHARDT, *supra* note 6.

judgeships over which presidents have greater latitude to fill;<sup>85</sup> appointing people from under-represented groups without taking opportunities away from established constituencies; senators' providing lists of names of acceptable candidates chosen pursuant to criteria set forth by an administration;<sup>86</sup> states with senators from both parties alternating in making recommendations to the President;<sup>87</sup> and making a trade in which a senator gets his or her preference for a judicial appointment on a court in exchange for the President's getting his preferred candidate appointed to the same (or some other) court.<sup>88</sup>

Some negotiations between presidents and senators are more visible than others, and the degree or extent of visibility is a factor in their success. For instance, President Dwight Eisenhower, who generally preferred to operate through a hidden hand,<sup>89</sup> set the guiding principles for judicial selection and charged the Justice Department with the responsibility for implementing them. His staff largely insulated him from the political pressures of the process. In practice, this meant that the Justice Department became "the locus of dealing with members of Congress,"<sup>90</sup> and neither Eisenhower nor his Justice Department ever directly challenged the Senate. Hence, the Senate did not reject any of

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<sup>85</sup> See *Clinton's Judges*, *supra* note 20, at 243-52. President Carter used this strategy to appoint people from under-represented groups without taking opportunities away from established constituencies. See, e.g., *id.* at 250.

<sup>86</sup> President Regan cut a deal with the Senate Majority Leader Howard Baker and the Chair of the Senate Judiciary Committee Strom Thurmond "to give the administration more flexibility in naming district judges while retaining senatorial influence." GOLDMAN, *supra* note 20, at 287-88. The plan was for Republican senators to provide the President with a list of three to five names for each judicial vacancy to be filled in their respective states. The recommendations were to be made pursuant to criteria set forth by the administration. While the plan was successfully implemented early in Regan's presidency, it eventually fell apart. *Id.* at 288-90. Some Republican senators chafed from the outset at having to meet any selection criteria and went back to recommending to the President only a single name for each vacancy in their states, while the slate of people recommended by other senators became meaningless because they simply signaled their preferences through other channels. *Id.*

<sup>87</sup> Variations of this practice were used by New York's senators from the 1970s through the 1990s, as well as by Washington's two senators from 1997 until the end of the Clinton administration. See Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 299 (1999); Gerhardt, *Norm Theory*, *supra* note 10, at 1710 n. 82.

<sup>88</sup> This arrangement was employed, for instance, by President Clinton and Washington's Senator Slade Gorton to fill two pending vacancies on the U.S. Court of Appeals for the Ninth Circuit. GERHARDT, *supra* note 6, at 140.

<sup>89</sup> See FRED I. GREENSTEIN, *THE HIDDEN HAND PRESIDENCY: EISENHOWER AS LEADER* 57-59 (Basic Books 1982).

<sup>90</sup> GOLDMAN, *supra* note 20, at 131.

his nominees. To be sure, there were conflicts, and Eisenhower could be embarrassed or coerced into accepting a senator's preference as he did with Lyndon Johnson in 1959. Yet, senators from both parties quickly came to realize and accept that most trading occurred below radar and thus without public awareness or scrutiny.

In contrast, Bill Clinton's negotiations with senators often became public, and the more public they became the more it became a liability for Clinton and his nominees.<sup>91</sup> Clinton's initial strategy was to avoid any public fights over judicial nominees. He reasoned that the fewer high profile contests the less likelihood of campaigns being waged for and against nominees for the sake of scoring political points.<sup>92</sup> In other words, lowering the visibility of the judicial selection process would help to de-politicize the judicial selection process, because it would increase the likelihood of a more professional, less politically explosive negotiation over the merits of particular appointments. Indeed, Clinton and his advisers invested less in nominating particular people than in nominating particular kinds of nominees. Their objective, which they believe they largely achieved, was to improve the quality and diversity of judicial appointments. They viewed many prospective candidates as fungible, allowing them to gravitate away from the candidates likely to promise trouble and towards those that seemed to hold greater promise of relatively easy confirmation.

Clinton's strategy and its implementation came at a price, besides its culminating in only one judicial nominee — Ronnie White — being formally rejected by the Senate.<sup>93</sup> First, the strategy contained the seeds of its own undoing. Clinton's hope to avoid high-profile contests over judicial appointments merely signaled to opposition senators that they were likely to prevail in any contest so long as they signaled their willingness to wage a highly visible campaign against a nominee. Once Clinton backed down early in his presidency when faced with such threats, he signaled the effectiveness of making the threat to wage a protracted, visible contest over a judicial appointment. Thus, senators recognized that the greatest leverage they had in negotiating with

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<sup>91</sup> See generally GERHARDT, *supra* note 6.

<sup>92</sup> See Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 256-57 (1997); Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 80 JUDICATURE 264, 284 (1999); Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 290-91 (1995).

<sup>93</sup> See *Clinton's Judges*, *supra* note 20, at 232. For the story of the confirmation contest over White's nomination, see *id.* at 232, 239-41.

Clinton over prospective nominees was threatening to make a public contest and thus forcing the President to decide whether or not he wanted to expend his political capital in such a fight.

Second, the bargaining phase of Clinton's judicial selection entailed an entirely new approach in the pre-nomination phase of judicial selection. Clinton and others began to see a perverse advantage to publicizing the pre-nomination phase of the process. While this practice helped the administration to settle on relatively strong nominees for many judgeships, it subjected many people to public evisceration. Indeed, the floating of possible candidates for judgeships became a substitute for the confirmation process because the administration would often make choices of nominees based on the extent to which they could survive such public vetting. Senators and interest groups figured they could influence the choices of possible nominees by quickly and publicly condemning or promoting certain nominees. In time, a relatively unseemly process evolved in which negotiations over nominees no longer occurred behind closed doors, as it had during the Eisenhower administration, but rather in newspapers and other public fora.<sup>94</sup>

Third, Clinton's bargaining was further complicated by his impeachment and other legislative priorities. Clinton needed to bargain in order to maintain or cultivate political support for other important initiatives, including his own survival in office. As a practical matter, this meant that he was often bargaining from a position of weakness. Thus, once made, his nominees could not rely solely on him for their success and thus languished when he had to expend his political coinage on other matters. As Sheldon Goldman reports, Republican staffers acknowledged that one important reason many of Clinton's judicial nominees languished in his final year in office is that no one — not even Clinton — seemed willing to expend any efforts to get them hearings much less floor votes.<sup>95</sup>

Interestingly, one tactic that helped Clinton and other presidents in the past (but notably not President George W. Bush in fighting for Pickering) was to take the initiative in making and fighting on behalf of a high-profile nomination. This tactic is extremely important for avoiding submission like that of President Harding. Moreover, this tactic has been used effectively by some presidents to clarify early on what they want and the preferences over which they will fight. Even though President Reagan clearly set the appointment of conservatives to the lower courts

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<sup>94</sup> See YALOF, *supra* note 78, at 196-207.

<sup>95</sup> See *Clinton's Judges*, *supra* note 20, at 230-31, 238.



as a major priority of his administration, he picked his fights carefully.<sup>96</sup> In spite of the extraordinary extent to which Reagan based his nominations on ideological rather than partisan concerns, Sheldon Goldman notes, “[a] characteristic of judicial selection during Reagan’s first term was the apparent reluctance to engage in a confirmation fight in the Senate even if it meant sacrificing a philosophically desirable candidate . . .”<sup>97</sup> Moreover, President Reagan was careful not to nominate people to the courts of appeals unless he (or his team) was satisfied “that the nominee shared the administration’s judicial philosophy. When a potential nominee had strong political backing but doubts were raised about the candidate’s philosophical reliability, the burden was on the candidate’s backers to demonstrate that the doubts were unfounded.”<sup>98</sup> This approach reflected respect for senatorial courtesy and negotiating while preserving and underscoring President Reagan’s basic commitment to making judicial appointments a high-profile priority of his administration. President Reagan’s willingness to use his popularity to fight for his nominees provided formidable leverage on their behalf, though it coincided significantly with his party’s control of the Senate.

Both Presidents Lincoln and Franklin D. Roosevelt were at least as equally interested in their judicial nominees’ philosophy as President Reagan, but they often engaged in deals to consolidate party support and to promote their domestic agendas, particularly during times of war.<sup>99</sup>

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<sup>96</sup> Of course, there were some high-profile contests over some judicial nominations. See GOLDMAN, *supra* note 20. The administration was apparently willing to fight over some but not other nominees because of the strength of the nominees’ likely political backing or because it was trying to effectuate or implement a deal or trade. *Id.*

<sup>97</sup> *Id.* at 299-300.

<sup>98</sup> *Id.* at 305.

<sup>99</sup> Lincoln’s deference was not, however, automatic or extreme; it was usually based on each side getting something out of the appointment. Lincoln’s Supreme Court appointments would prove to be different only in degree not in kind from the other appointments he made as president. Consequently, he generally deferred to congressional leaders on the candidates for filling vacancies with the primary condition that they met criteria set forth for their selection by the President. In all six appointments he made to the Court, Lincoln faced no serious conflict with senators but instead was able to find nominees agreeable to Republican leaders each time.

Franklin D. Roosevelt is a second example of a president adept at employing institutional norms to get his way. When he finally got an opportunity to fill a vacancy on the Court, it did not happen until the beginning of his second term. When the vacancy finally arose in 1937, it proved to be a pivotal one, for the retiring justice was one of the most ardent opponents to constitutional foundations of the New Deal — Willis Van DeVanter. There was no question there would be a fight, because the appointment, if confirmed, would produce for the first time in the Court’s history a critical mass of justices

Lincoln was notorious at employing patronage to secure support for party unity as well as his domestic agenda.<sup>100</sup> This is especially evident with his six Supreme Court appointments, all of which were made with significant input by party and Senate leaders.<sup>101</sup> Similarly, Franklin Roosevelt was acutely sensitive to prospective nominees' political backing throughout his presidency, particularly during World War II. As Sheldon Goldman further observes, "When the political backing was exceptionally strong and there were questions raised as to the candidate's fidelity to the New Deal, the benefit of the doubt was often given to the candidate."<sup>102</sup> Roosevelt's willingness to compromise stemmed from his recognition of the long-term benefits of agreeing to a particular senator's choices. Thus, he would often consider the impact his choice of a nominee would have on a senator's support for his administration.<sup>103</sup>

As the Lincoln and Roosevelt examples illustrate, a great deal depends on the popularity of the war during which judicial selection takes place. Only a few presidents have made Supreme Court nominations in times of war, and only Lincoln and Roosevelt were fighting for a cause popular with most senators. The point at which Roosevelt's approach to Supreme Court selection most closely resembled Lincoln's was the 1940s, the period in which the nation formally entered the Second World War. In these years, Roosevelt's nominees were Jimmy Byrnes in June 1941, Harlan Fiske Stone as Chief Justice in June 1941 (the day on which the Senate confirmed Byrnes), and Wiley Rutledge in February 1943. Byrnes was a former senator and thus able to take advantage of senatorial courtesy. Stone was a Republican whose nomination bespoke of bipartisanship and a desire on the part of the President to put aside party differences as best he could under the circumstances. Rutledge was a relatively inoffensive nominee whom most senators did not know or

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who opposed economic due process and supported greater judicial deference to congressional exercises of its Commerce Clause power. Roosevelt was not interested in a compromise. His nomination proved to be surprising not because he turned to a senator or an ardent supporter of the New Deal but rather he turned to someone who, as a senator, had not been known as a great constitutional thinker (like Sutherland) but as an ardent partisan. The views of his nominee, Hugo Black, were well known to his colleagues in the Senate, but the powerful norm of senatorial deference to the nomination of a colleague to the Court worked in Black's favor and led many senators who might have opposed him otherwise to accept his nomination begrudgingly.

<sup>100</sup> See DAVID HERBERT DONALD, *LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA* 173-74 (3d ed. 2001).

<sup>101</sup> See Michael J. Gerhardt, *Supreme Court Selection as War*, 50 *DRAKE L. REV.* 393 (2002).

<sup>102</sup> GOLDMAN, *supra* note 20, at 33.

<sup>103</sup> GOLDMAN, *supra* note 20, at 41.

take the time to know.

Other Presidents, who have made judicial nominations in times of war, have not had their judicial nominees receive special deference because their nominations coincided with an ongoing military conflict. It is possible one reason that none received special deference is that neither the Korean nor Vietnam conflict was popular (especially over time) with the American people. Another plausible reason they received no special deference is that senators drew a distinction between domestic and foreign policy and thus their support for the latter did not have any effect on their support for the former.

#### CONCLUSION

I have tried to suggest war is not inevitable in judicial selection. It can be avoided if political leaders choose to follow the norms they have developed over the years for guiding the process. War breaks out when national political leaders, particularly presidents, breach these norms.

Since war is, in Clausewitz' famous judgment, an extension of politics, one is left to wonder about the politics or motives driving combat over judicial appointments. In considering the reasons for combat, I cannot help but recall a question raised by Winston Churchill in the midst of World War II. When asked whether the East End of London should be shut down and theater productions stopped because of the bombing of the city, Churchill responded, "No. What the hell do you think we are fighting for?" As combats erupt over judicial appointments, it is useful to ask, in a similar vein, "What the hell are each of the sides fighting for, and what do these contests tell us about them and, more importantly, us?"

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