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SUPREME COURT SELECTION AS WAR

*Michael J. Gerhardt**

I. INTRODUCTION

The most popular metaphor for describing the process by which Supreme Court Justices are selected is war. The voluminous commentary on and records of Supreme Court appointments are replete with characterizations of events in different phases of the process in militaristic terms.¹ One need look no further for confirmation of the continuing pull of the metaphor than to a recent article in the *New York Times* on the likely dynamic in the next Supreme Court confirmation proceeding: Neil Lewis' headline reads, *From Quiet Nomination to Noisy Test for Future Battles* and he employs the term "battles" five times, besides the headline, to describe what to expect when the next vacancy on the Court arises.²

It is tempting to think that, after September 11, the bellicose rhetoric about Supreme Court selection as war would dissipate. At the outset of George W. Bush's presidency, some prominent Democratic Senators, strategists, and commentators had warned that there would effectively be a "war" if, after the Supreme Court's controversial opinion in *Bush v. Gore* effectively awarding the presidency to him, Bush tried to claim a mandate to nominate a conservative ideologue outside of the mainstream of constitutional jurisprudence.³ After September 11, some have suggested that the war against terrorism obliges Senators (and others) to give the President special deference on his judicial nominations because of their importance for maintaining domestic tranquility and ensuring a fully staffed judiciary available to properly monitor and process criminal proceedings coming out of the war against terrorism.⁴ Some explain that the President's judicial nominations generally require

* Arthur B. Hanson Professor of Law, William & Mary Law School. This Article is an extended version of my talk delivered at Drake Law School as part of its recent Symposium on the selection of Supreme Court Justices. I am grateful to Professor Thomas Baker for the opportunity to participate in the Symposium and particularly to him and Stephen Carter for helpful comments on an earlier draft. This Article is the first of at least two articles on federal judicial selection generally as war.

1. See, e.g., ETHAN BRONNER, *BATTLE FOR JUSTICE* (1989).
2. Neil A. Lewis, *From Quiet Nomination to Noisy Test for Next Battles*, N.Y. TIMES, Feb. 26, 2002, at A17.
3. See, e.g., *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman ed., forthcoming June 2002).
4. See, e.g., Editorial, *A New Presidency*, WALL ST. J., Sept. 19, 2001, at A20.

substantial deference so that he is not forced to squander on them the time and political capital he needs to wage the war effort successfully.

The structure of the Constitution is plainly, however, designed to invite conflict. Anyone familiar with the Supreme Court appointments process knows just how combative, brutal, nasty, and vitriolic it can be. The structure of the Constitution pits Presidents and Senators against each other in the federal appointments process, and the framers fully expected (even hoped) conflicts would ensue from this design. Their expectation was that the checks and balances of the Constitution, including the distribution of authority on judicial appointments, were designed, in Madison's famous phrasing, so that "ambition must be made to counteract ambition."⁵ The framers viewed conflicts over appointments as inevitable and even desirable, as the branches each sought to aggrandize their respective powers at the expense of the other. The likelihood if not inevitability of friction would prevent one branch from becoming tyrannical.

Yet, the structure of the Constitution invites not only conflict but also accommodation. In relatively short order, Presidents and Senators developed informal accommodations or informal arrangements to reduce the inevitability of conflict and yet preserve some realm of discretion with respect to each Supreme Court appointment. These accommodations, expectations, or arrangements are what I call norms.⁶ Following the norms of the Supreme Court appointments process promises not sanctions but peaceful coexistence between the branches.

My thesis is relatively simple: I suggest hostilities break out in the Supreme Court selection process when the President, Senators, and/or nominees violate some longstanding practices or expectations (some but not all of which constitute institutional norms), *or* the governing norms are in flux.⁷ I suggest this is true regardless of whether the nation is at war. To be sure, the number of times that Presidents in the midst of war have had vacancies on the Court to fill have been relatively small, so small in fact that I think one should hesitate to draw any firm lessons about such circumstances. History generally suggests, however, that a fundamental dynamic in Supreme Court selection is Presidents' and Senators' respective efforts to achieve short- and sometimes long-term objectives in the particular circumstances in which vacancies on the Court have arisen. How well Presidents and Senators achieve their respective objectives and discharge their all-important duties relating to Supreme Court appointments depends on their

5. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1982).

6. Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1690-96 (2001) [hereinafter Gerhardt, *Norm Theory*].

7. For some prior discussions of this view, see MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2000) [hereinafter GERHARDT, APPOINTMENTS]; Gerhardt, *Norm Theory*, *supra* note 6, at 1696-98, 1710-14.

compliance with and coordination of the governing norms and expectations at the times 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 part of the context of present times, but its relevance is not—and will likely not be—understood in precisely the same ways or precisely from the same perspectives by Presidents and Senators. A vacancy on the Court is surely an opportunity, but it is an opportunity that Presidents and Senators are likely to view differently depending on the context. The context might well include not just war but also the possibility of influencing or solidifying a shift in the Court's direction, a possibility that neither Presidents nor Senators are likely to discount for any reason. Indeed, trying both to understand and define the social, political, and historical context in which a vacancy has arisen are among the basic challenges in the process of Supreme Court selection. How well political leaders manage the opportunities they perceive within a given context is a significant measure of their performance and success.

My purpose in this Paper is not to be exhaustive but rather to illustrate some significant patterns in Supreme Court selection. In characterizing these patterns, I draw on two fields of study that have not yet figured prominently in the study of Supreme Court selection: military strategy and institutional norms. Throughout my Paper, I hope to demonstrate how synthesizing some of the lessons or insights from these two fields helps to illuminate the dynamics of Supreme Court selection, particularly how heated conflict is often the consequence of Presidents' attempts to change or failures to accommodate the existing norms, longstanding practices, or prevailing expectations regarding Supreme Court appointments.

In the first part of this Article, I will briefly clarify some basic features of my framework for analyzing Supreme Court selection. I will clarify some basic terminology, discuss the relevance of statistics, and identify some of the basic norms in the Supreme Court selection process. These norms possibly include, among others, senatorial courtesy (especially robust in the form of a nomination of a Senator to the Court), good faith consultation with the Senate, nominees' fitting the basic ethical and professional expectations of the times, timing and pace of nominations (including avoiding them in election years), and responsible rhetoric in framing the terms of initial debate.

With this general framework in mind, I posit two basic models of conflict in Part II. In each, there is an imperial Senate desirous of primary control over Supreme Court appointments. The first model is the conflict between an imperial Senate and "warrior" Presidents who welcome hostilities as defining moments for themselves, the process, and/or their political opposition. Warrior Presidents expect (and even invite) war as a consequence of their deliberate attempts to shape or reshape the norms or longstanding practices involved in Supreme Court selection. Warrior Presidents have had mixed records of success (that is, getting their nominees

confirmed under such circumstances), depending on a number of variables. Prime examples of successful “warrior” Presidents are Andrew Jackson, Woodrow Wilson with his nomination of Louis Brandeis, and Lyndon Johnson with his nomination of Thurgood Marshall. President Reagan’s nominations of Rehnquist and Scalia, and President Bush’s nomination of Thomas also fit this pattern. Examples of less successful “warrior” Presidents who were bent on changing the norms of Supreme Court selection but suffered temporary setbacks are James K. Polk and Grover Cleveland.

The second model is the conflict between an imperial Senate and Presidents who have failed to adequately heed or account for a relatively robust institutional norm or longstanding practice or expectation regarding Supreme Court selection. In my opinion, most failed nominations fit into this category. As one might expect, the reasons for these failures are varied, including the basic failures to meet senatorial expectations and to learn from history (or predecessors’ or even a given President’s own mistakes), overconfidence, and emotionalism. Examples that fit this pattern include Lyndon Johnson’s nominations of Fortas and Thornberry, and Richard Nixon’s nominations of Haynsworth and Carswell.

The third Part consists of models in which war over Supreme Court selection has largely been avoided. The first is capitulation or presidential abdication of authority. The two Presidents who fit this model were Ulysses Grant and Herbert Hoover. The second model consists of a spectrum of accommodating Presidents and/or Senators who have manipulated or employed institutional norms to their advantage or matched their nominations to fit prevailing expectations. Prime examples include almost all of President Lincoln’s Supreme Court nominees, Franklin D. Roosevelt’s choice of Hugo Black as his first Supreme Court nominee, and both of President Clinton’s choices. This Part concludes with a discussion of the importance of a President’s recognition of the opportunities that chance presents him, so that with the right timing, appreciation of the “framing” effect of rhetoric, and consolidation or cultivation of political support, a President without a mandate of his own can nevertheless peacefully work to shift or reshape either norms or expectations, as occurred with Chester Arthur’s nominations of Horace Gray and Samuel Blatchford, and Theodore Roosevelt’s nomination of Oliver Wendell Holmes.

In the final part, I briefly discuss two patterns that can be inferred from a survey of these four models in operation. The first involves the rhetoric employed in Supreme Court confirmation contests, which tends to track the rhetoric of war. The second involves the nominations made in times of war or those that might be considered most closely analogous. Under such circumstances, Presidents have been able to achieve relatively conflict-free confirmation proceedings for their Supreme Court nominees when *they* rather than the Senate have been willing to bend or compromise in either defining or trying to fill their criteria for selection.

II. THE TERMS OF ENGAGEMENT

A few introductory clarifications are in order. The first is about the relevance or significance of statistics. To date, roughly one in five Supreme Court nominations has failed.⁸ In his excellent study of the Supreme Court selection process, David Yaloff notes that in the twentieth century eighty-nine percent of Supreme Court nominees have been confirmed, and “twelve of fourteen nominees between 1970 and 1994 have garnered Senate approval.”⁹ For Yalof, these statistics underscore the huge importance of the nomination phase of the Supreme Court appointment process.¹⁰

There are, however, two caveats I would add to Yaloff’s analysis. First, one would be wrong to infer that success can be so narrowly defined as confirmation of a nominee. Sometimes, getting a nominee confirmed can be a Pyrric victory. For instance, the Senate confirmed Clarence Thomas in the narrowest vote yet for a successful Supreme Court nominee, but the fight was so bruising as to cost President Bush more political support than he had hoped to gain. Even though the Senate overwhelmingly confirmed President Clinton’s two Supreme Court nominees, it is hard to say Clinton came out of the process cost-free, for he had acted so indecisively in choosing nominees that his political foes learned that he could be easily rolled into avoiding troublesome nominations and pushed toward making ones more agreeable to them.

Secondly, 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 simply have more limited 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 almost the entirety of the appointments process.¹¹

Third, the basic terms of war and norms need to be defined. With neither do I mean to rely on strict terms of art. I sometimes loosely use battle and war, though I recognize the importance differences between them. Indeed, it is useful to keep in mind that a Supreme Court contest is more like a battle than a war, for it generally reflects or is waged against a backdrop of a larger contest among national political leaders. One important mechanism in these battles consists of institutional norms, by which I mean the informal understandings or arrangements among the leadership of

8. GERHARDT, APPOINTMENTS, *supra* note 7, at 354 n.45.

9. DAVID A. YALOF, PURSUIT OF JUSTICES viii (1999).

10. *Id.*

11. John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 652-59 (1993).

national institutions developed over time and deviations from which often trigger sanctions or disapproval.¹²

Fourth, it is helpful to recognize the likely norms applicable in the Supreme Court appointments process. The most robust of these is senatorial courtesy, which manifests itself in at least two ways.¹³ The first is the deference usually (but admittedly not always) given by Senators to the nomination of a colleague to the Supreme Court. The Senate confirmed all six Senators nominated to the Court in the twentieth century—Edward Douglass White as Chief Justice, and as Associate Justices George Sutherland, Hugo Black, Jimmy Byrnes, Harold Burton, and Sherman Minton.¹⁴ The other robust norms, in my judgment, include good faith consultation with the Senate, matching nominees to prevailing ethical and professional expectations of the times, responsible or credible rhetoric in characterizing nominees' credentials, and timing. These norms are evident from the conflicts surveyed or reviewed in the next Part.

III. MODELS OF WAR

This Part surveys the two basic models of conflict in the Supreme Court appointments process. In turn, I consider warrior Presidents who have invited conflict and other Presidents who have ignored or discounted appointments norms at their or their 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."¹⁵ The other is that the side that knows when to fight and when not will take the victory. "There are routes not to be followed, armies not to be attacked, citadels not to be besieged."¹⁶ One has to wonder why any President would disregard either of these, but many seem to have done so. So, one obvious question with which to begin an analysis of the models of conflicts within the Supreme Court appointments is why some Presidents seem to welcome a fight? For it is clear that some Presidents—I call them the warrior

12. *See id.* at 652-59.

13. For a general discussion, see GERHARDT, APPOINTMENTS, *supra* note 7.

14. Even people who have served in the House 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.

15. SUN TZU, THE ART OF WAR vii (Thomas Cleary trans., 1988).

16. *Id.* at 125.

Presidents—make certain nominations with the expectations of heated opposition, but do so because they conceive such contests as opportunities to define themselves or their political opposition or to consolidate political support. So much the better if the Presidents can also prevail in the end. In other words, sometimes Presidents are eager to do battle.

The warrior Presidents in American history tend to have one important thing in common—they deliberately enter into or invite heated conflicts over nominees for the sake of shaping or reshaping the basic norms or expectations in the process. Some successful Presidents who have done just that are Andrew Jackson, Woodrow Wilson, and Lyndon Johnson. Jackson purposefully set out to secure more presidential discretion or control over Supreme Court nominations.¹⁷ Like every other nineteenth century President, Jackson confronted an imperial Senate bent on maintaining its dominance or primacy in the appointments of Supreme Court Justices,¹⁸ but, unlike most other nineteenth century Presidents, Jackson sought to reshape this basic balance of power. Consequently, he consulted little with Senate leaders (including several who wanted to embarrass him) and made nominations that he knew would trigger dramatic—and, he thought, sharply defining—conflicts. The best known of these nominations was Roger Taney as an Associate Justice (following his rejection as Treasury Secretary) and later as Chief Justice. President Jackson used the rejections of his nominees to tarnish his opposition on the campaign trail, and by the time he nominated Taney as Chief Justice he had managed to help a slim majority of his party to take control of the Senate. Thus, it was with great delight he could watch, on his last morning as President, his Vice President Martin Van Buren—who only a few years before had his nomination as Ambassador to Great Britain rejected by the Senate—succeed him as President and be sworn into the presidency by none other than Taney.

The next two examples are President Woodrow Wilson's nomination of Louis Brandeis and Lyndon Johnson's nomination of Thurgood Marshall. Separated by almost five decades, the two nominations were alike in that in each the President sought to break a glass ceiling in making the appointment. In other words, both nominations were made for the sake of a larger principle for which the President signaled unambiguously his willingness to fight. Wilson sought to nominate the first Jew to serve on the Court,¹⁹ while Johnson's objective was to nominate the first

17. GERHARDT, APPOINTMENTS, *supra* note 7, at 52.

18. See generally STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS* (1994).

19. I hasten to add that Judah Benjamin was the first Jew considered seriously for appointment to the Court. After failing to get other nominees confirmed to the Court, President Millard Fillmore made known his interest in nominating Benjamin to the Court. Senate leaders made known their willingness to confirm Benjamin who had recently been elected to the Senate. Benjamin asked Fillmore not to nominate him to the Court because he preferred at the time to serve in the Senate.

African-American to the Court. As Johnson famously put it upon making the nomination, "I believe it is the right thing to do, the right time to do it, the right man and the right place."²⁰ It was the right time in part because the President's party controlled the Senate, and so the challenge for Johnson, as it was for Wilson, was to keep his party firmly in line behind the nomination. Northern Democrats, liberals, and moderates rallied in defense of the nomination, so, in spite of the nastiness and bigotry of some Southern Democrats the Senate confirmed his nomination, 69-11.

The final example of a warrior President is Ronald Reagan in 1986. Near the height of his popularity, Reagan was willing, as Roosevelt and Wilson before him, to expend his popularity for the sake of marking a shift in the Court's direction. His dual nomination of Rehnquist and Scalia was a bold move—indeed, it constitutes the first and only time in history that a President has successfully nominated at the same time someone as Chief Justice and another as an Associate Justice. It was particularly bold, because the last time it had been tried it had failed miserably when the Senate forced Lyndon Johnson's friend, Abe Fortas, to withdraw his nomination as Chief Justice in 1968.²¹ Nevertheless, Reagan and his staff calculated correctly that the Rehnquist nomination would not only get through the Senate but run interference for the Scalia nomination. They figured that Democratic Senators who were likely to be disposed against both of the nominees would not have the political capital to oppose both, so they would have to choose one to contest. They chose Rehnquist, who received the most negative votes ever cast against a nominee for the chief justiceship; but, having failed to defeat his nomination, Democratic Senators had nothing left to contest the nomination of the first Italian-American ever to the Court.²²

There have been, however, examples of warrior Presidents who have fared not so well. Any great military strategist will tell you, war is risky, and thus an assault on an institutional norm carries no guarantees of success. For example, two other Presidents—James K. Polk and Grover Cleveland—deliberately invited hostilities in the hopes of diminishing or thwarting the norm of Senatorial courtesy in the nineteenth century. The practice in place at the time was that Senators expected Presidents to consult with them before nominating people from their states to the Court. Polk, perhaps emboldened by the example of his mentor Jackson a few years before, deliberately challenged the norm. In 1846, he nominated George Woodward to a vacancy on the Court that the Senate had blocked his predecessor John Tyler

ELI N. EVANS, JUDAH P. BENJAMIN: *THE JEWISH CONFEDERATE* 83-84 (1988). It is of course telling that Fillmore would have been able to overcome the political opposition to his making a Supreme Court appointment as well as any of the prejudice of the times against Jews through senatorial courtesy.

20. YALOF, *supra* note 9, at 90.

21. *See id.* at 94.

22. *Id.* at 155.

from filling in 1844. Though Woodward was from Pennsylvania, Pennsylvania Senator Simon Cameron was decidedly against the nomination not only because Polk had refused to get his consent to the nomination before making it but also because Polk had not consulted James Buchanan, another powerful Pennsylvanian who was serving as Polk's Secretary of State, to sign off on it beforehand. With Buchanan and Cameron incensed about being cut out of the nomination process, the nomination lacked critical support in the Senate. Cameron took the lead in opposing it in the Senate, and he prevailed in part because other Senators figured their defense of the prerogative would work to their institutional advantage.²³

Almost five decades later, Grover Cleveland in 1893 found himself fighting a similar battle. In his second term, Cleveland got his third chance to make a Supreme Court appointment. Because the retiring Justice was from New York, the expectation was that President Cleveland would fill a seat with a New Yorker agreeable to the senior Senator from his party. Cleveland turned twice to New Yorkers, each of whom were widely considered to be eminently qualified but each had not been cleared with New York's senior Senator David Hill who, like Cameron before, gathered his colleagues to defend the prerogative of senatorial courtesy. Cleveland had been willing to cater to the prevailing practice of filling a vacancy with someone from the retiring Justice's state, but he was not disposed to cater to Hill, who led an anti-Cleveland faction of New York Democrats. Rather than nominate yet another New Yorker after the Senate had rejected two of his nominees at Hill's bidding, President Cleveland turned to a different norm to defeat Hill's claim; he nominated Louisiana Senator Edward Douglass White, whom the Senate quickly unanimously confirmed.

Interestingly, when Justice Howell Jackson, a Southerner, died unexpectedly in 1895, President Cleveland did not turn to a Southerner. Instead, he turned to a New Yorker. This time, he asked for Senator Hill's approval, which Hill gave.²⁴ In so doing, Cleveland was able to diminish the strength of the longstanding expectations that a President would replace a retiring Justice with a nominee from the same state. In other words, Cleveland had found a way to employ existing norms to divide and conquer expected opposition.

B. *Mistakes in War*

Much more often than not, the Presidents who have failed have done so because they have failed to follow or heed institutional norms or longstanding

23. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 109 (Oxford Univ. Press, 3d ed. 1992).

24. *Id.* at 146.

expectations or practices. I mention only two of the more dramatic such failures. The first is the dual nominations to which I just referred—Johnson's nominations of Fortas as Chief Justice and Homer Thornberry to replace Fortas.²⁵ There was a lot that went wrong with these nominations. The most serious problems were Johnson's failures to adhere to basic norms. The first was that he had failed to consult with Senate leaders over his rather unorthodox nominations. Indeed, Johnson's dual nominations constituted the first time that a President was nominating a Chief Justice along with another nominee to the Court. Many Senators were not amused that Johnson was being so brash.

The second norm Johnson breached sealed his undoing because he made the nominations in an election year in which he was a lame duck. Had Johnson consulted history, he would have discovered that this was a period at which Presidents have tended to wield their lowest influence whatsoever in nominating Justices.²⁶

Surprisingly, Richard Nixon did not learn from Johnson's mistakes or history as Clausewitz suggests a good general should do.²⁷ Indeed, President Nixon failed to heed the warning of the events that brought about the vacancy he was trying to fill with the nomination of Clement Haynsworth. Fortas' nomination as Chief Justice failed in part because of his poor ethical judgment, and he left the Court under a cloud because of other ethical breaches brought to light after his failed nomination as Chief Justice. Nixon failed to foresee that Democratic Senators might have learned from Fortas' failure. In particular, Democratic Senators might have learned that a nominee's ethical breaches can torpedo his nomination—this was not a new lesson in the appointments process, but it had not been the focus of Supreme Court selection. President Nixon was perhaps led into a false sense of security by the fact that the Judicial Conference had not found Haynsworth had sat on some cases in spite of possible conflicts of interest; he could not have expected Democrats, on the heels of Fortas' debacle, to have been so generous. Bent on payback for the failure of the Fortas nomination, Democratic Senators regarded Haynsworth's ethical problems as bad as Fortas' and, at the same time, wanted to signal a new era in Supreme Court selection in which nominees could generally be expected to meet a higher ethical standard.

Interestingly, Presidents Johnson and Nixon both committed another fundamental mistake in nominating Justices. Clausewitz warns that commanders

25. For an excellent, recent analysis of the fates of these nominations, see YALOFF, *supra* note 9, at 91-94.

26. GERHARDT, APPOINTMENTS, *supra* note 7, at 123.

27. CARL VON CLAUSEWITZ, ON WAR 170-74 (Michael Howard & Peter Paret eds., Princeton Univ. Press 1984) (1832).

should refrain from making decisions based on emotions or the heat of the moment,²⁸ but Johnson and Nixon each allowed their emotions to get the better of them in making certain nominations. This was the case, of course, with the dual nominations of Fortas as Chief Justice and Thornberry to replace Fortas. The nominations not only signaled a degree of overconfidence on the part of Johnson that turned off some Senators, but Johnson did not bother to consult with Senators about his prospective choices. His loyalty to his friends got the better of him.

It was anger, not loyalty, that undid President Nixon's nomination of Harold Carswell. Angered by the Senate's rejection of Haynsworth, Nixon responded quickly with the nomination of Carswell in the hopes of catching some Senators off balance and in effect daring the Senate to alienate an important constituency.²⁹ Interestingly, President Reagan reacted to some extent in the same way in the immediate aftermath of Bork's rejection by waiting only a few days indicate his intention to nominate Douglas Ginsburg.³⁰ President Reagan hoped no doubt to secure a similar nominee ideologically but no more attractive (and in some ways more problematic) than the nominee just rejected. In the cases of Carswell and Ginsburg, the Senate moved relatively quickly against the nominees in part because of the offense felt by the majority at being dissed by the President.

It is even possible that a President fails to learn from history (or the past patterns of success) in the process he employs for choosing a nominee. Indeed, Clausewitz also suggests a general in times of war needs to make his chain of command as short as possible. In any event, in both times that Bill Clinton had to choose a Supreme Court nominee he failed both to learn from the prior practices of administrations in consolidating authority over nominations as well as the basic tactic of keeping his chain as short as possible. Instead, in choosing his nominee he shifted his criteria more than once and shifted authority and sought advice from different quarters when he was frustrated with the advice he was getting.³¹ The end results were painfully protracted processes for picking nominees coupled with the further painful practice of sometimes floating names publicly to get reactions and then dropping the names when public opposition began to coalesce. The lack of a clear hierarchy for making the decision invited turf wars over the people who would be responsible for advising the President.

One cannot conclude with a commentary on war over Supreme Court nominees without recognizing the special problems faced by an unelected President. With a few notable exceptions discussed in the next Part, vice presidents who have ascended to the presidency because of a President's death have encountered serious hostilities

28. *Id.* at 106-07.

29. *See* YALOFF, *supra* note 9, at 108-12.

30. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* 317 (1997).

31. *See* YALOFF, *supra* note 9, at 196-205.

when they have tried to assert a mandate different from the ones advanced by their predecessors. Without a mandate of their own, these unelected Presidents have run the risk of having no political base of support for their actions as President, including but not limited to nominating Justices. This was surely the case with both Tyler³² and Fillmore,³³ each of whom had not shared his President's political outlook and each of whom was viewed as a pariah by some important constituencies within the President's party. These circumstances would have perhaps counseled the Presidents to use nominations as an olive branch to their potential political foes, but neither did so; both made nominations for which they simply had no mandates. Moreover, without political futures in their futures, Senate leaders saw little downside to scuttling their nominees until a more agreeable President came along, with the Senate's rejecting five of Tyler's six nominations³⁴ and three of Fillmore's four nominations to fill vacancies arising during their respective presidencies.³⁵

IV. ACHIEVING PEACEFUL COEXISTENCE

In this Part, I consider two models in which serious combat over a Supreme Court nominee was averted. The first is presidential abdication of authority or simply giving the Senate carte blanche. The second is Presidents' deft manipulation of institutional norms to achieve both their short- and long-term objectives. After surveying both models, I suggest some lessons and implications to derive from a survey of both of them in operation.

A. *Presidential Abdication of Authority*

In American history, only two Presidents effectively allowed Senate leaders to choose Supreme Court nominees. In each case, the President lacked the political clout or support at the time a vacancy arose to assert his will over the process. The choice to fight or lay down, when it came, was easily made, because the President simply foresaw nothing but disaster if he did not abdicate his authority in filling the vacancy.

The first instance of abdication involved Ulysses Grant. Vacancies arose on the Court in both 1869 and 1870 for President Grant to fill. In 1869, he nominated his very able Attorney General Ebenezer Hoar to one. Hoar faced considerable and ultimately fatal opposition in the Senate, because he had relentlessly alienated Senate

32. For a discussion of Tyler's difficulties in the appointments process, see JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* (1953).

33. For a discussion of Fillmore's difficulties in the appointments process, see *id.*

34. ABRAHAM, *supra* note 23, at 40.

35. *Id.* at 110-12.

leaders by urging lower court appointments based on merit rather than patronage. Grant's eagerness to appoint Hoar, coupled with his deteriorating political strength, gave him virtually no leverage in making the nomination.³⁶ In the aftermath of the Senate's rejection of Hoar and Grant's request that the Senate reconsider Hoar's nomination, the President acceded to a petition signed by a large majority of the House and Senate urging him to nominate Lincoln's War Secretary Edwin Stanton for a second vacancy that had arisen in the meantime. Grant figured if he nominated Stanton, more a political foe than friend, to the one vacancy the Senate might agree to his preferred nominee Hoar for the other. He was wrong. The Senate quickly confirmed Stanton, but before it took any action to reconsider Hoar's nomination (which it had already rejected once earlier in the year) Stanton died of a heart attack. With Stanton dead, the deal, if it ever was on, was also dead, and the Senate refused to re-consider Hoar.³⁷

The second instance of abdication occurred in 1932.³⁸ By the time the vacancy arose, Hoover had largely squandered the support of the leadership of his own party, in part because he had sought to refuse to give them their customary control over lower court appointments. When Holmes announced his impending retirement from the Court, Hoover came up with a list of ten candidates, but the list proved futile. When Senate leaders learned of the list, they indicated that the only name they would consider was that of Benjamin Cardozo. With so many other domestic and international crises to handle, Hoover did not dally; he cut the deal, made the nomination, and moved on.

B. *The Pacifist or Noncombatant Presidents*

In contrast to the so-called warrior Presidents, the pacifist Presidents have employed institutional norms or longstanding expectations or practices to secure their desired objectives in the Supreme Court selection process. The first example is none other than Abraham Lincoln. Lincoln understood that on domestic matters the Congress generally considered itself supreme. In his early days in politics Lincoln was a Whig, a party dedicated to congressional supremacy on legislative policy. Lincoln was, in other words, no Jacksonian when it came to the domestic powers of the presidency. So, Lincoln commonly deferred to the Congress on domestic matters, including patronage appointments to all kinds of office. His deference was not, however, automatic or extreme; it was usually based on each side getting something

36. See generally HARRIS, *supra* note 32.

37. See ABRAHAM, *supra* note 23, at 127-28. Grant eventually found two other acceptable nominees, William Strong from Pennsylvania (who was enthusiastically supported by party leaders there) and Joseph Bradley, a Republican with good business connections and thus agreeable to Republican leaders for the new seat to which he had been nominated. *Id.*

38. See generally HARRIS, *supra* note 32.

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 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.

Though Bill Clinton's search for a Supreme Court nominee hardly followed the paths set by Lincoln and Roosevelt, he was able in the end to find nominees whom the Senate quickly and congenially accepted. He achieved these outcomes in part because he both consulted seriously with Senate leaders from both parties in the hopes of reaching accommodations with them and accepted the developing norm in the Senate to fill vacancies on the Court with sitting judges.³⁹ In making these accommodations, President Clinton did not, however, abdicate presidential authority.

Throughout his process he had sufficiently open, pliable criteria that could be met by any number of able people. By having a relatively open vetting process in choosing nominees, he made it possible for Senate leaders and others to shoot down problematic nominations before they could be made. In the end, President Clinton claimed victory in part by accepting the terms on which the Senate (and others) were laying down as indispensable to the nominations being made. He could claim the victory because the terms were consistent with the basic criteria he had set forth at the outset of his search.

39. See generally GERHARDT, APPOINTMENTS, *supra* note 7, at 301-14.

Even Presidents who have lacked the electoral successes of Lincoln, Roosevelt, and Lincoln have succeeded in maneuvering the Supreme Court selection process with little or no warfare. Two interesting examples are Chester Arthur's two Supreme Court appointments and Theodore Roosevelt before he was elected to the presidency in his own right.

Few if any Presidents have entered office with lower expectations than Chester Arthur, though few have wielded or maneuvered around the norms of Supreme Court appointments more ably than he did.⁴⁰ Several factors help to explain Arthur's success. First, he benefited enormously from lowered expectations. The only office of note held by Arthur prior to being selected as Garfield's running mate was the Collector of the Port Authority of New York. Both this position and his selection as Garfield's running mate were arranged by his mentor Senator Roscoe Conkling. So, when Arthur ascended to the presidency, most feared he would simply do Conkling's bidding. To the extent he made nominations that exceeded people's expectations, it was a pleasant and welcome surprise. Second, Arthur's attempt to fill one of the vacancies in 1882 with his old boss Conkling tracked rather than breached the norms of Supreme Court appointments, for, as a powerful Senator, Conkling was the beneficiary of the robust norm of senatorial courtesy. Though not widely elated, Senators overwhelmingly confirmed Conkling to the vacancy. When Conkling decided immediately after his confirmation not to serve on the Court, the vacancy passed again to Arthur, but this time Senators could heave another collective sigh of relief because they knew Conkling would no longer be a candidate. Third, Arthur appreciated and took advantage of the timing. Garfield's assassination by a frustrated office-seeker dramatized the need, long discounted by both parties, for a professional civil service. Arthur recognized that the time had come for such legislation, and became the first President to sign the Civil Service Act into law. Arthur took the additional step of raising the standards for appointments all around, including the Supreme Court.⁴¹ His two nominations, besides Conkling, were of first-rate, widely respected state court jurists. These appointments helped the Republican Party claim the political advantage in taking the lead on merit-based appointments, whose time had then come. Last but not least, Arthur's two Supreme Court appointees were ideologically and regionally agreeable to Senate leaders. This acceptability, coupled with the outstanding records of the nominees, ensured their smooth confirmation.

40. ABRAHAM, *supra* note 23, at 137-39. One reason Arthur might have acted contrary to expectations is the desire to deflect or combat rumors that he was somehow involved in Garfield's assassination. Even if this were a factor, it is an additional indication of Arthur's sensitivity to external pressure in making his Supreme Court nominations.

41. GERHARDT, APPOINTMENTS, *supra* note 7, at 277, 379 n.40.

The next vice president to ascend to the presidency as a result of a presidential assassination was Teddy Roosevelt in 1901.⁴² Like Arthur, he would have the opportunity to fill a vacancy on the Court shortly after taking office. At that time, Roosevelt was distrusted by many of the leaders of his own party, some of whom thought he was crazy, while many Democrats had little or no idea what to expect from him. Many Senators feared Roosevelt not just because of his brazenness but also his obsession with reform; they worried about the extent to which he would challenge prevailing norms, including those applying to appointments.

Though unelected and without a mandate of his own, Theodore Roosevelt succeeded masterly in making his first Supreme Court appointment his own. There are several reasons for this success. First, he set his model for a Supreme Court appointment extraordinarily high. As he pondered his choice, he explained to his patron Senator Henry Cabot Lodge that he wanted to appoint someone on the order of John Marshall.⁴³ President Roosevelt considered Marshall's greatness to have been his steadfast commitment to the broad constitutional principles of his political party, which Roosevelt thought history had proven as correct. Convinced that history would prove his own party's principles as the right ones for the country, Roosevelt wanted someone who both shared his party's principles and could stick to them as fiercely as Marshall did. As a practical matter, this meant he would look for someone who shared similar views as the retiring Justice, none other than Horace Gray of Massachusetts. In looking for such a nominee, Roosevelt could be certain to find a person agreeable to Republican leaders as well as someone from the state of the retiring Justice. Thus, the nominee enjoyed the support of Roosevelt's mentor Senator Henry Cabot Lodge. Second, President Roosevelt's choice was one of the leading jurists in the country, Oliver Wendell Holmes, Jr. The choice was astute in part because it could be guaranteed not only to appeal to those who would have wanted to see another person from Massachusetts appointed, but also to those who were interested in finding a like-minded jurist to replace Gray. Moreover, Holmes' stature guaranteed he would be a difficult (but admittedly not impossible) target. The question was whether the likely opposition to the appointment, even from within Roosevelt's party, was prepared to take on an icon. Third, in making the nomination, President Roosevelt signaled his willingness to fight. In some cases, as we have seen with President Clinton, signaling indecisiveness or ambivalence can invite attack, but Roosevelt wanted to squelch any attack by making clear his willingness not just to go to war with any opposition but to take his case to the American people. His models of the presidency were Lincoln and Jackson and so he was fully prepared to do battle if necessary. The opposition blinked, and Holmes was easily confirmed.

42. ABRAHAM, *supra* note 23, at 156.

43. *Id.* at 158.

V. LIKELY FUTURE PATTERNS OF CONFLICTS

My sketch of some of the models of Supreme Court appointments helps to focus attention on two other significant patterns in the process. The first involves the rhetoric employed in confirmation contests. At least two different rhetorical patterns are noteworthy in the process. On the one hand, presidential rhetoric literally can set the terms of debate. Their rhetoric thus can both help and hurt their nominees, because the process allows Presidents (and their nominees) to be held accountable for the expectations they raise through their comments about their nominees' qualifications. Thurgood Marshall and Ruth Bader Ginsburg both became rather formidable nominees in part because they were as good as the Presidents who nominated them claimed them to be,⁴⁴ but President George H.W. Bush's characterization of Clarence Thomas as "the most qualified person in the country" to replace Thurgood Marshall created problems for the nominee because Thomas was not yet up to matching that demanding description.⁴⁵

The second pattern involves the efforts of the contending sides to demonize each other in contests over Supreme Court appointments. 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*.⁴⁶ The article suggests that in a war national leaders tend to rally support by demonizing the enemy. The same holds true in judicial confirmation proceedings in which the contending sides follow a similar strategy. Bork was famously characterized as well outside the mainstream,⁴⁷ while a series of successful nominees have been defended as moderate or principled conservatives in the great tradition of justices whom most Senators are thought to admire and want nominees to resemble.⁴⁸

The second pattern of note is the one with which I began involving the likely relevance of war to the selection of a Justice. As one might expect, a great deal depends on the popularity of the war during which a President has nominated a justice. Only a few Presidents have made Supreme Court nominations in times of war, only two of which were fighting for a cause popular with most Senators. The two were Lincoln and Franklin D. Roosevelt. The point at which President Roosevelt's approach to Supreme Court selection most closely resembled President

44. See YALOF, *supra* note 9, at 89.

45. See CARTER, *supra* note 18, at 134-37.

46. Robert F. Worth, *A Nation Defines Itself by Its Evil Enemies*, N.Y. TIMES, Feb. 24, 2002, § 4, at 1.

47. See CARTER, *supra* note 18, at 120-21.

48. See *id.* at 128-33.

Lincoln's was the 1940s, the period in which of course the nation formally entered the Second World War. In these years, Roosevelt's nominees were Jimmy Byrnes in June 1941, Stone as Chief Justice also in June 1941 (the day on which the Senate confirmed Byrnes), and Wiley Rutledge in February 1943.⁴⁹ 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 take the time to know. In contrast to either Lincoln or Roosevelt, Richard Nixon never received any deference from the Senate because his nominations coincided with the ongoing Vietnam War. Nixon's refusal to consult with Senate leaders, combined with the increasing unpopularity of the war, ensured that his nominees received no special consideration once they reached the floor of the Senate.⁵⁰

VI. CONCLUSION

I have tried to suggest war is not inevitable in the Supreme Court appointments process. 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 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 Supreme Court 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 Supreme Court appointments, it is useful to ask, in a similar vein, "What are each of the sides fighting for, and what do these contests tell us about them and, more importantly, us?"

49. *See generally* ABRAHAM, *supra* note 23, at 54-55.

50. *See id.* at 9-16.