

KEEPING SCORE: THE UTILITY OF EMPIRICAL MEASUREMENTS IN JUDICIAL SELECTION

DAVID C. VLADECK*

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I. INTRODUCTION

The debate played out in the pages of this Symposium is a critical and timely one. The fight over judicial selection, especially over nominees to the federal courts of appeals and the U.S. Supreme Court, has become so politically polarized that, even during a time of one-party rule, it is a quagmire that many nominees fail to navigate successfully. My limited contribution to this Symposium is to offer the perspective of a full-time litigator who, for quite parochial reasons, is deeply invested in the quality of the federal appellate bench. In my view and in the view of most of the litigators with whom I have discussed this matter, the current approach to judicial selection—which places preeminent importance on a candidate’s ability to pass certain political litmus tests—has and will continue to erode the quality of the federal bench and the public’s confidence in the courts.

What politicians and academics often lose sight of is that litmus-test issues which make or break judicial appointments, particularly of appellate judges, determine the outcome of only a small proportion of the cases that reach the courts of appeals. Admittedly, these litmus-test issues comprise a higher percentage (but by no means all) of the cases before the Supreme Court. Competence, not political orien-

* Associate Professor of Law and Co-Director, Institute for Public Representation, Georgetown University Law Center. Prior to joining the Georgetown faculty, I was a staff attorney at, and then director of, Public Citizen Litigation Group, a nonprofit public interest law firm in Washington, D.C. During my twenty-six year tenure there, I argued several cases in the United States Supreme Court, nearly fifty cases in the courts of appeals, and eight cases before state courts of last resort. I also supervised a heavy volume of appellate litigation. The comments in this Essay are drawn from my litigation experience and from extensive discussions on judicial selection issues I have had with lawyers engaged in civil litigation in law firms, corporate law departments, the Department of Justice, and the public interest bar. I make no pretense of speaking on their behalf; but I believe that the sentiments expressed in this Essay are widely shared within the litigation bar.

tation, is what litigators and their clients most want from judges. This view is shared even by litigators who handle highly visible and often politically charged cases. Spare us the inept, plodding, or even mediocre judges appointed because they can be trusted to be the faithful guardians of whatever political issue is the cause du jour (fill in the blank: the fate of *Roe v. Wade*,¹ affirmative action, the death penalty, same-sex marriage, states' rights, judicial "activism," and so on). Give us instead smart judges who will make an effort to put ideology aside and decide cases on the merits. After all, most lawyers believe (or have persuaded themselves to believe) that smart, fair-minded judges will decide the case in their favor. They do not believe they need the edge that ideologically sympathetic judges might give them, and they are wary of judges who seem to be ideologically out of step with the position they are asserting. Partisanship has no legitimate place in the courtroom.

This Symposium explores whether the identification of, and systematic and overt reliance on, a set of objective criteria would help those engaged in the appointment process² better evaluate sitting federal court judges for elevation to higher judicial office. Studies have shown that Presidents are increasingly turning to the federal court bench to fill court of appeals and Supreme Court vacancies,³ in part because the nominees' judicial records make predicting their fidelity to crucial political norms easier and more accurate. The subtext, of course, is that focusing on empirical measures of competence rather than single-issue political tests might help break the ideology-above-all-else logjam that has paralyzed the appointment process.⁴ I have no illusion that the President or the Senate will ever put politics aside in judicial appointments; but shifting the locus of the de-

1. 410 U.S. 113 (1973).

2. Those involved in the appointment process include the President, his staff, members of the Senate, their staffs, the staff of the Senate Judiciary Committee, and interest groups concerned with judicial selection.

3. See, e.g., Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003).

4. This is not an accusation directed at only one side of the fight. For instance, President George W. Bush has said that *Roe v. Wade* was wrongly decided, that he opposes abortion, and that he wants to appoint judges who agree with that sentiment. It is hardly surprising, therefore, that the Democrats on the Senate Judiciary Committee routinely try to pin down nominees on *Roe*. For example, during the confirmation hearings on Miguel Estrada, Senator Dianne Feinstein asked Mr. Estrada a series of questions about *Roe*, culminating with, "Do you believe that *Roe* was correctly decided?" Jeffrey Toobin, *Advice and Dissent: The Fight over the President's Judicial Nominations*, NEW YORKER, May 26, 2003, at 42, 46. When Mr. Estrada provided what the Democrats viewed to be an unsatisfactory and vague answer, they demanded that the White House turn over memos Mr. Estrada had written while serving in the Solicitor General's office that addressed *Roe* and ultimately blocked his nomination by sustaining a filibuster. *Id.* at 46-47. Both sides, of course, blamed the other for politicizing the appointment process.

bate, even at the margins, to nonpolitical issues would be a welcome step forward.

Having said that, I remain skeptical that all of the attributes we want to see in a judge (intellect, industry, integrity, impartiality, open-mindedness, judgment, compassion, and, at least for appellate judges, collegiality) are “objective” in the sense that they may be measured and quantified. For this reason, I see the suggestion that we engage in what Professors Stephen Choi and Mitu Gulati describe as a “Tournament of Judges”⁵ in Swiftian, not literal, terms. Choi and Gulati acknowledge they have no expectation that the President, Congress, and the States will agree to amend the Constitution to select Supreme Court Justices through the use of an algorithm rather than the President’s Article II appointment power.⁶

Even if they did seriously advocate such an approach, the criteria that Choi and Gulati would employ in constructing their formula seem ill-suited to the job of predicting top-notch judicial performance, especially for Supreme Court nominees. On this point, my views are closer to those of my Georgetown colleague Professor Steven Goldberg, who argues that the talents one needs to be a superior Supreme Court Justice are light years apart from those needed to stand out on the courts of appeals, and thus even a stellar performance on the court of appeals is no predictor of success on the high court.⁷ Nonetheless, I agree with the fundamental insight of Choi and Gulati’s theory, namely, that there are real possibilities for measuring the performance of appellate judges to shed light on their suitability for the Supreme Court and that these possibilities should be explored

5. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004) (distilling the selection criteria for Supreme Court appointment into a mathematical model based on objective criteria).

6. Indeed, they suggest that they simply “advance a normative claim” but “see nothing unconstitutional about the president voluntarily looking to a set of objective measures to back up his claim regarding a candidate’s merit” or “anything problematic with the Senate looking to such measures as part of the fulfillment of its role.” *Id.* at 303 n.11.

7. Steven Goldberg, *Federal Judges and the Heisman Trophy*, 32 FLA. ST. U. L. REV. 1237 (2005). While I agree with Goldberg’s thesis, I think that the illustration he has chosen to make this point—the relative lack of success of Heisman Trophy winners in professional football—is ill-suited for his purpose. As Goldberg acknowledges, the Heisman Trophy is not awarded based on objective performance measures of the sort that Choi and Gulati champion (for example, yards gained for a running back, sacks for a defensive end) but is instead a beauty contest in which nearly a thousand sports writers vote on the basis of whatever criteria each sportswriter deems relevant. *See id.* at 1243 n.27. Indeed, given the lackluster performance of Heisman winners in professional ranks, perhaps the Downtown Athletic Club of New York, which awards the Heisman Trophy, should take a page from Choi and Gulati and adopt a selection system that relies on quantitative measures of excellence rather than the subjective judgments of sportswriters.

carefully if for no other reason than that the alternative—perpetual partisan bickering and gridlock—is so unappealing.⁸

There also is an intuitive appeal to Choi and Gulati's claim that at least some aspects of judicial quality can be measured. After all, other institutions—from large corporations to professional baseball teams—use empirical measurement to make hiring and advancement decisions.⁹ Other countries base their judicial systems on a professional corps of judges who are selected, rewarded, and promoted based, in part, on empirical measures. And, for that matter, those involved in the enterprise of selecting judges in the United States have long used empirical data of one sort or another to evaluate candidates for judicial office.¹⁰ There is no a priori reason why we should not consider adding to those measures if possible, but as I make clear below, I have real doubts that Choi and Gulati's approach is ready even for a test run.

II. THE JUDICIAL SELECTION QUAGMIRE

Political strife over judicial nominees is nothing new. According to Professor Stephen Carter, "Inquiry into the nominee's substantive legal positions became the order of the day in the wake of *Dred Scott v. Sandford* when all nominees were for a time called upon to prove their antislavery convictions."¹¹ Recent appointment decisions have been overtly political, even, at times, at the expense of competence.¹² None of this should be surprising. Nearly ninety percent of

8. This is not an idealistic or Utopian conception of the appointment process. Even if it were possible for the President and the Senate to simply block out ideological considerations, and it is not, I do not contend that ideology is an inappropriate factor for the President to consider in selecting nominees or for the Senate to consider in performing its advice and consent function. Ideology is inevitable, and ideology matters. A person's ideology may well influence how that person will vote on important matters. And it is therefore entirely appropriate for the President and the Senate to evaluate the likely impact an appointment will have. See Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619 (2003). What I object to, and what Choi and Gulati decry, is the obsessive and often exclusive focus not on a candidate's ideology or overall judicial philosophy but on one or a few discrete battleground political issues, often to the exclusion of the candidate's qualifications for office.

9. See *infra* notes 65-66 and accompanying text.

10. See *infra* notes 67-70 and accompanying text.

11. Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1189 n.9 (1988) (citation omitted); see also Richard D. Friedman, *Balance Favoring Restraint*, 9 CARDOZO L. REV. 15, 19 (1987) (noting that the "Reconstruction Era was probably . . . the period in which the Senate most actively rejected Supreme Court nominees on ideological and other overtly political grounds"); Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 944 (1983).

12. One engaging account of the Supreme Court selection process comes from John Dean's book on President Nixon's appointments to the Supreme Court. JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* (2001). Dean's book is an unusually rich historical source because not only was Dean personally involved in the selection process, but he also had ac-

the Justices appointed to the Supreme Court have been members of the President's own political party, and there is copious evidence attesting to the importance of ideology when Presidents recruit and screen potential appointees and when the Senate considers nominations.¹³ There is every reason to believe that the battle over judicial nominations will only become more intensely partisan,¹⁴ with sev-

cess to all of the Nixon papers and audiotapes relating to the appointments. *Id.* at xv. Dean focuses on five weeks in the fall of 1971, between the time that Justices Hugo Black and John Harlan announced their retirements and President Nixon selected Lewis Powell and William Rehnquist to replace them. Among the candidates Nixon seriously considered were Virginia Congressman Richard Poff, a well-respected, conservative member of the House Judiciary Committee, who had virtually no experience practicing law, *id.* at 34, 39; Hershel Friday, a lawyer from Little Rock, Arkansas, who handled only bond work and had no litigation experience, *id.* at 166-68; and Mildred Lillie, who was an experienced trial and appellate court judge from California, *id.* at 175-77. None of these candidates were pushed because of his or her qualifications for the job; and no one would have argued that they were the best candidates to serve on the Supreme Court. They were serious contenders because of their political orientation; their connection to senior administration officials; and for Poff and Friday, their status as Southerners, and for Lillie, her gender. *Id.* Tennessee Senator Howard Baker, who at the time was new to Washington, D.C., was offered a seat on the Court, even though Nixon knew only that he was moderately conservative and had some legal experience. *Id.* at 203-07. His status as a respected Southerner and his relative youth were seen as key attributes justifying his appointment. *Id.* Dean's book makes it clear that while Nixon wanted competent appointees, he cared far more about their political credentials than anything else. Perhaps Rehnquist made this point most eloquently. During the White House's search for candidates, a reporter asked him whether he was a possible nominee. Rehnquist said no: "I'm not from the South, I'm not a woman, and I'm not mediocre." *Id.* at 191 (internal quotation marks omitted); *see also* Alan B. Morrison, *The Rehnquist Choice*, 55 STAN. L. REV. 1457, 1465 (2003) (book review).

13. James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 153 nn.10-12 (2003).

14. One way to measure the intensity of the partisanship over judicial selection is to examine the rhetoric used by opponents of candidates nominated for what their opponents believe are overtly political reasons. For example, the People for the American Way, a liberal group, warns members that:

Right-wing radicals have made it clear what the filibuster fight is really about—it's about more than a few federal nominees—it's about changing the rules when the rules don't suit, it's about the desire for absolute control, and it's about what the Right Wing sees as the ultimate prize, the Supreme Court.

Over the past few months, the right-wing rhetoric has escalated: from the power-hungry assault on the filibuster to the more recent attacks on judges and judicial independence itself.

See Independent Judiciary, The Judiciary and the Right Wing: Attacks on Independence, People for the American Way, at <http://www.pfaw.org/pfaw/general/default.aspx?oid=18471> (last visited June 1, 2005). Another liberal organization that works on judicial selection issues, the Alliance for Justice, has issued a similar action:

"The president's intention to renominate these highly controversial candidates ensures that the confirmation process will remain divisive," said [Alliance for Justice Director] Aron. "One would think the Bush administration would want to bring the country together after such a contentious reelection" "If the president tries to pack the courts with conservative extremists beholden to special interests and committed to turning back the clock on Americans' rights, fair-minded senators must invoke their constitutional "advise and consent" responsibility and stand firm against such nominees," added Aron.

See Press Release, Independent Judiciary, Alliance for Justice Dismayed over Bush's Intention to Renominate Highly Controversial Judicial Nominees (Dec. 30, 2004), at

eral Supreme Court vacancies likely to come open in the next few years.¹⁵

Compounding the problem, partisan confirmation battles—once generally reserved for Supreme Court nominees—are now the norm for nominees to the lower federal courts.¹⁶ This, too, should be no surprise. Historically, Presidents have appointed lower court judges from their own political parties,¹⁷ and at least since the first Reagan Administration, Presidents have selected nominees based on publicly announced ideological criteria—President Reagan sought to appoint conservative judges who were not judicial activists, while President Clinton wanted judges who would be “strong supporters of *Roe v. Wade*.”¹⁸

<http://www.independentjudiciary.org/news/release.cfm?ReleaseID=148> (last visited June 1, 2005). In fairness to these organizations, when President Clinton was making appointments, the rhetoric of conservative groups opposed to his nominees, like the Committee for Justice, was every bit as harsh, and their criticism of liberal groups is, by any measure, strident:

This radical coalition and its Senate allies, which cut its teeth attacking Supreme Court nominees Robert Bork and Clarence Thomas, has declared war on President George W. Bush’s nominees to the federal courts, especially to the important Circuit Courts of Appeal. While they cannot block every nominee, they have convinced Senate Judiciary Committee Democrats to attack and delay many of the brightest and most talented nominees, particularly those who are young minorities and women, to prevent them from becoming future potential Supreme Court candidates.

The Judicial Confirmation Battle, The Committee for Justice, at <http://committeeforjustice.org/contents/confirmations> (last visited Apr. 2, 2005). My point here is not to take sides in this battle or to criticize the work of these organizations, but it is simply to point out that the major combatants in the judicial selection battle see the fight in overtly political terms.

15. Chief Justice Rehnquist’s battle with cancer has only fueled speculation that a vacancy on the Court will arise as early as the summer of 2005. Accompanying the news of the Chief Justice’s illness has been a rising debate within the Senate about the propriety of using a filibuster to block a floor vote on judicial nominees. Many in the Senate leadership have suggested that changes should be made to the Senate’s rules to forbid the use of a filibuster on judicial appointments, although any change to longstanding Senate rules is likely to engender deep partisan divisions, so much so that the proposal is now referred to as the “nuclear option.” See, e.g., Charles Babington, *Frist Likely to Push for Ban on Filibusters; Failure Risks Conservatives’ Ire; Success May Prompt Legislative Stalemate*, WASH. POST, April 15, 2005, at A4; David D. Kirkpatrick, *Lobbying Heats Up on Filibuster Rule Change*, N.Y. TIMES, Apr. 3, 2005, at A24; Patricia A. MacLean, *Bush’s Nominees Likely to Put Stamp on Circuits; GOP Judges May Go From 60% to 85%*, NAT’L L.J., Mar. 28, 2005, at 1.

16. See, e.g., Toobin, *supra* note 4, at 42 (reporting on the Senate Judiciary Committee Hearing on the nomination of Leon Holmes for a district court judgeship in Arkansas and noting the strong objection of Committee Democrats because Holmes had publicly opposed the availability of abortion for rape victims on the ground that “conceptions from rape occur with the same frequency as snow in Miami”).

17. See Brudney, *supra* note 13, at 154 & nn.13-14.

18. *Id.* at 155 n.18 (emphasis added) (internal quotation marks omitted). President Carter formed the United States Circuit Judge Nominating Commission in 1977, which was an effort to place an emphasis on qualifications and diversity in the judicial selection process. The Commission had a bipartisan membership and did not apply avowedly political criteria in identifying candidates for court of appeals appointments, although it was

The heightened partisanship over lower court appointments has weakened the traditional system for nominating lower court judges—which placed principal reliance on selection by home state Senators.¹⁹ I do not suggest that Senators selected judicial candidates without reference to ideology. But there were countervailing factors. Not only were some Senators politically more moderate than the President, but also the selection process generally involved consultation between the home state Senators in an effort to reach an accommodation. After all, because one home state Senator could always “blue slip” (automatically block) a colleague’s appointment, there were substantial incentives to reach an agreement on nominees. These factors placed a check on purely ideological appointments.²⁰ While home state Senators still have considerable influence in selecting lower court nominees, the White House now spearheads these selections to ensure that the President’s nominees are on board with him ideologically.²¹

charged with engaging in outreach to women and minority communities. *Id.* at 154-55 & nn.16-17.

19. This tradition is described in detail in SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 12* (1997), and KEVIN L. LYLES, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* 58-59 (1997). *See also* Brudney, *supra* note 13, at 154 & n.15. In addition to giving home state Senators an important role in picking nominees, this practice also gave home state Senators a virtual veto power over nominees they opposed. A home state Senator from either party who objected to a nominee would simply mark “objection” on the blue slip sent to them by counsel for the Senate Judiciary Committee, which would effectively kill a nominee’s chances of confirmation. *Id.*; GOLDMAN, *supra*, at 12. Although the blue slip procedure is still in place, it is no longer the absolute barrier to confirmation that it was in the past.

20. Perhaps the clearest examples of this tempering effect are the First, Second, and Third Circuits. The states that comprise these Circuits are politically diverse, even to the point where, in states such as Connecticut, New York, and New Jersey, there were often Senators from both parties.

21. In their provocative contribution to this Symposium, Lee Epstein, Jeffrey A. Segal, Nancy Staudt, and René Lindstädt claim that they “demonstrate empirically that the process leading to the appointment of (at least) Supreme Court Justices may not be the ‘mess’ [critics like Choi and Gulati] suggest.” Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145, 1145 (2005). As I understand it, their point is that when one uses hard data to cut through the rhetorical fog that enshrouds the appointment process, it is not a “mess” because the Senate takes into account both ideology *and* competence when screening Supreme Court nominees.

While I do not doubt the accuracy of their impressive statistical case, I think it is important to underscore its limits, one of which is suggested by the qualifier the authors use—namely that their conclusions apply to “(at least) Supreme Court Justices.” *Id.* First, their data does not cover nominees to lower courts, and I have real doubts that a similar inquiry into lower court nominees would yield similar findings. Second, just as the use of aggregate data can mask troubling disparities, general statistics on judicial selection matters can obscure troubling appointments, or troubling trends, which can lead, and I believe has led, to a Court dominated by Justices of the same ideological stripe. For instance, as I pointed out above, there is a strong argument that Richard Nixon selected Supreme Court nominees

III. PARTISANSHIP'S IMPACT ON THE COURTS

Unrestrained partisanship in the judicial selection process has had a number of adverse effects on the judiciary, apart from creating gridlock and long-unfilled judicial vacancies, which take their own toll.²² For one thing, the intensely partisan nature of today's appointment process is a serious disincentive for even the most highly qualified individuals to throw their hat into the judicial-appointment ring. Not only does the process threaten to be emotionally bruising, but many nominees also have to place their careers on hold for a year or more while the process grinds ahead, only to be rejected for political reasons or to see their nominations lapse because Congress goes out of session or the President's term expires.²³

Out-and-out partisanship also breeds friction in the courts, which, in turn, breeds disrespect for the law. Consider the fractious history of the D.C. Circuit in the five years from 1986 to 1991. During that time, the political balance on the court was in flux and ultimately shifted from a majority of Democrat-appointed judges to one of Republican-appointed judges. Relations among the judges became strained and reached their nadir when Judge Laurence H. Silberman, during a post-argument conference, told Judge Abner Mikva that "[i]f you were ten years younger I would be tempted to punch you in the nose."²⁴ According to press accounts, Judge Sil-

more for reasons of ideological orientation than qualification—a conclusion not inconsistent with that of Professor Epstein and her colleagues.

Finally, even conceding that the Senate generally is sensitive to the qualifications of Supreme Court nominees, that conclusion hardly supports the contention that the process is not a "mess." The partisanship that infects the appointment process cannot be parsed that finely; there is no separate appointment process for Supreme Court nominees. To be sure, if one looks just at *outcomes* for Supreme Court appointments—are the men and women confirmed highly qualified?—the system appears to work tolerably well (putting aside, as do the authors, whether one believes that competence rather than excellence is the right standard). But if one examines the political *cost* of the appointment system for all judicial nominees, the descriptive "mess" is a euphemism, not an overstatement.

22. See Stephanie K. Seymour, *Remarks: The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691, 705 (2004).

23. *Id.*

24. Ann Pelham, *Silberman, Dogged by Story, Provides Details of Outburst*, LEGAL TIMES, Mar. 11, 1991, at 7 [hereinafter Pelham, *Silberman Provides Details of Outburst*] (internal quotation marks omitted) (printing a letter sent to *The New York Times* by Judge Silberman about the incident). Relations between these two judges remained strained and once again flared up while Judge Mikva was serving as Chief Judge. After a leak of information about a draft affirmative action opinion written by then-Judge Clarence Thomas, Judge Silberman called for a formal investigation—a request Chief Judge Mikva rejected. Judge Silberman then released a public request for a formal hearing, which criticized Judge Mikva's handling of the matter. The request was signed by the other Republican appointees on the court. See Ann Pelham, *Gloves Off as Judges Get Personal*, LEGAL TIMES, Feb. 24, 1992, at 7. The feud continued, even to the point that eight years later, Judge Silberman and the other Republican appointees on the court boycotted the D.C. Circuit's dedication ceremony of Judge Mikva's official portrait. See Jonathan Groner, *Partisan Gap at Mikva Ceremony*, LEGAL TIMES, Oct. 23, 2000, at 8.

berman was not kidding.²⁵ The bickering within the court was so heated that it did not remain behind closed doors.²⁶ The judges used increasingly acerbic language in their opinions to criticize the views of their colleagues.²⁷ The drastic increase of en banc rehearings and calls for rehearings en banc reflected the shifting political orientation of the court,²⁸ further impaired the court's collegiality, and

25. See Pelham, *Silberman Provides Details of Outburst*, *supra* note 24.

26. Neil A. Lewis, *An Ideological Flap Ruffles a Court's Two Wings*, N.Y. TIMES, Mar. 13, 1992, at B16.

27. See, e.g., Stuart Taylor Jr., *Ideological Feud Erupts in a Key Appeals Court*, N.Y. TIMES, Aug. 15, 1987, at A7 (pointing out caustic nature of the judges' opinions); Associated Press, *Court Upholds Tougher Fuel Ratings*, N.Y. TIMES, May 18, 1988, at A18 (noting that the opinions "[d]isplay[ed] a bitter ideological split").

28. See Stephen Wermiel, *Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law*, WALL ST. J., Mar. 22, 1988, at 70 (noting that Reagan appointees "are making greater use of [en banc review] in some parts of the country . . . to overturn precedents that they don't like" and quoting D.C. Circuit Chief Judge Patricia Wald as saying that "[t]here is increasing resort to en bancs to overrule venerable, heretofore respected . . . precedents" (second omission in original)); Nancy Lewis, *Factions' Squabbling Rocks U.S. Court of Appeals Here*, WASH. POST, Aug. 1, 1987, at A1.

I have not systematically tracked all of the en banc cases in the late 1980s and early 1990s that came before the D.C. Circuit, but even a quick LEXIS search for 1986-1988 reveals a steady stream of en banc cases and dissents from denial of en banc rehearing, many of which were quite acrimonious. For a sample of en banc cases and dissents in 1986, see *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc); *Church of Scientology v. IRS*, 792 F.2d 153 (D.C. Cir. 1986) (en banc); *Ramirez de Arellano v. Weinberger*, 788 F.2d 762 (D.C. Cir. 1986) (en banc); *Telecomms. Research & Action Ctr. v. FCC*, 806 F.2d 1115 (D.C. Cir. 1986) (Mikva, Edwards, Robinson, Starr, and R.B. Ginsburg, JJ., dissenting from denial of rehearing en banc); *Durns v. Bureau of Prisons*, 806 F.2d 1122 (D.C. Cir. 1986) (Wald, C.J., and Robinson, Mikva, and Edwards, JJ., dissenting from denial of rehearing en banc); and *Hohri v. United States*, 793 F.2d 304 (D.C. Cir. 1986) (Bork, Scalia, Starr, Silberman, and Buckley, JJ., dissenting from denial of rehearing en banc). For a sample of en banc cases and dissents in 1987, see *Save Our Cumberland Mountains, Inc. v. Hodel*, 830 F.2d 1182 (D.C. Cir. 1987) (en banc); *N. Natural Gas Co. v. FERC*, 827 F.2d 779 (D.C. Cir. 1987) (en banc); *Tavoulaareas v. Wash. Post Co.*, 817 F.2d 762 (D.C. Cir. 1987) (en banc); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987) (en banc); and *Bartlett ex. rel. Newman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987) (Bork, Starr, Buckley, Williams, and D.H. Ginsburg, JJ., dissenting from orders vacating orders granting rehearing en banc). For a sample of en banc cases and dissents in 1988, see *Ctr. for Auto Safety v. Thomas*, 847 F.2d 843 (D.C. Cir. 1988) (en banc); *Chatman-Bey v. Thornburgh*, 864 F.2d 804 (D.C. Cir. 1988) (en banc); *Hotel & Rest. Employees Union, Local 25 v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc); *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768 (D.C. Cir. 1988) (en banc); *Wilkett v. Interstate Commerce Comm'n*, 857 F.2d 793 (D.C. Cir. 1988) (Starr, Williams, Buckley, D.H. Ginsburg, and Sentelle, JJ., dissenting from denial of rehearing en banc); *Inmates of Occoquan v. Barry*, 850 F.2d 796 (D.C. Cir. 1988) (Wald, C.J., and Robinson, Mikva, Edwards, and R.B. Ginsburg, JJ., dissenting from denial of rehearing en banc); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 859 F.2d 237 (D.C. Cir. 1988) (Starr, Williams, D.H. Ginsburg, and Sentelle, JJ., dissenting from denial of rehearing en banc); *Hammon v. Barry*, 841 F.2d 426 (D.C. Cir. 1988) (Wald, C.J., and Robinson, Mikva, Edwards, and R.B. Ginsburg, JJ., dissenting from an order vacating an order granting rehearing en banc); and *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891 (D.C. Cir. 1988) (Wald, C.J., Mikva, Robinson, and Edwards, JJ., dissenting from denial of rehearing en banc).

brought about wholesale changes in the law on issues both important and trivial.²⁹

Unfortunately, the acrimony that marked this period for the D.C. Circuit was not an isolated occurrence. Recently, the Sixth Circuit experienced its own bout of internecine warfare. In an en banc decision in *Grutter v. Bollinger*,³⁰ the court upheld the University of Michigan Law School's use of affirmative action policies in admission, but two conservative members of the court dissented. Judges Danny J. Boggs and Alice M. Batchelder, both Republican appointees, dissented in part to accuse Boyce F. Martin, Jr., the Chief Judge of the Court and a Democratic appointee, of jury-rigging the composition of the court that would consider the case en banc.³¹ Judges Boggs and Batchelder alleged that Chief Judge Martin delayed the circulation of en banc petitions in violation of Sixth Circuit procedures until two conservative judges, who might have tipped the balance on the court in favor of the dissenters, took senior status and were therefore ineligible to participate in en banc proceedings.³² Judge Boggs described what occurred as "very significant and obvious violations of rights of members of [the] court."³³

Chief Judge Martin did not respond to these charges. But Judge Karen Nelson Moore did, calling the accusation "shameful"³⁴ and noting that it "marks a new low point in the history of the Sixth Circuit," which "will irreparably damage the already strained working relationships among the judges of [the] court."³⁵ Judge Eric L. Clay also responded to the accusation, chiding the dissent for having "chosen to stoop to such desperate and unfounded allegations"³⁶ that "unjustifiably distort" what transpired.³⁷ This was not the first time that partisan battles had poisoned the atmosphere in the circuit.³⁸

29. Many of the court's en banc decisions wrought major changes in the law. *See, e.g.*, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (changing the standards that govern public availability of business information submitted to the government). But some of the court's en banc cases involved questions that were remarkably trivial, such as whether nonprevailing plaintiffs in actions under the Freedom of Information Act, 5 U.S.C. § 552 (2000), were liable for taxable costs under Rule 54 of the Federal Rules of Civil Procedure, which at most amount to \$50 to \$100. *Baez v. United States Dep't of Justice*, 684 F.2d 999 (D.C. Cir. 1982) (en banc).

30. 288 F.3d 732 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003).

31. *Id.* at 810-14 (Boggs, J., dissenting); *see also id.* at 815 (Batchelder, J., dissenting).

32. *Id.* at 810-14 (Boggs, J., dissenting); *id.* at 815 (Batchelder, J., dissenting).

33. *Id.* at 815 n.49 (Boggs, J., dissenting).

34. *Id.* at 753 (Moore, J., concurring).

35. *Id.* at 758.

36. *Id.* at 772 (Clay, J., concurring).

37. *Id.* at 758.

38. *See, e.g.*, *Memphis Planned Parenthood, Inc. v. Sundquist*, 184 F.3d 600 (6th Cir. 1999) (order denying rehearing en banc); *id.* at 607 (Boggs, J., separate statement) (arguing that colleagues' remarks directed at him are "unwarranted and unprofessional"); *id.* at 608-09 (Batchelder, J., separate statement) (admonishing Judge Keith for resorting to "an

Partisanship also affects outcomes, which I suppose is entirely the point, but in ways that unjustifiably destabilize the law. I start from the premise (perhaps naively) that members of the federal judiciary strive, by and large, and generally with success, “to decide cases in accord with the law rather than with their own ideological or partisan preferences.”³⁹ To be sure, there are exceptions (generally the cases I lose). Most litigators believe, however, that panels composed entirely of judges appointed by one President are more likely to vote on ideological grounds than mixed panels. Professor Erwin Chemerinsky makes the point well: “When I talk to a lawyer who is about to have an argument before a federal court of appeals, the first question I always ask is: who is your panel? That is because ideology matters so much in determining the result in so many cases.”⁴⁰ Emerging empirical research suggests that political dominance on any court encourages judges to act on the basis of ideology rather than principle, especially when there is no countervailing influence on a panel and little or no likelihood of further review, by either the full court or the Supreme Court.⁴¹ Professor Richard Revesz demonstrated that the D.C. Circuit’s approach to environmental cases during the mid-1980s

ad hominem attack on specifically named members of [the] court”); *id.* at 604 (Keith, J., dissenting) (criticizing the “seemingly careless fashion in which the majority recklessly disregards the constitutional rights afforded to minor girls, a group of people who are the least able to defend their rights”). The recent en banc practice in the Sixth Circuit has been the subject of a number of academic studies. *See, e.g.*, Pierre H. Bergeron, *En Banc Practice in the Sixth Circuit: An Empirical Study, 1990-2000*, 68 TENN. L. REV. 771 (2001).

39. Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 838. Not surprisingly, judges insist that this is the case. *See id.* at 838 (acknowledging nonetheless that it is not “entirely clear . . . that partisan politics and ideological maneuvering have no meaningful influence on judicial decisionmaking”); *see also* Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 645 (1994). Many academics, however, believe that any suggestion that judges can put ideology aside in ruling on cases is a fairy tale:

The argument is that ideology has to be hidden from the process to limit the likelihood that once on the bench judges will base their decisions on ideology. This argument is based on numerous unsupportable assumptions: it assumes that it is possible for judges to decide cases apart from their views and ideology; it assumes that judges do not already often decide cases because of their views and ideology; it assumes that considering ideology in the selection process will increase this in deciding cases. All of these are simply false. Long ago, the Legal Realists exploded the myth of formalistic value-neutral judging.

Chemerinsky, *supra* note 8, at 630-31.

40. Chemerinsky, *supra* note 8, at 628.

41. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) [hereinafter Revesz, *Environmental Regulation*]; Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998). For a dissenting view, see Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1336 (1998) (arguing that “the Revesz data are consistent with the view that collegiality is alive and well in judicial decision making on the D.C. Circuit”). For Professor Revesz’s reply, see Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999) [hereinafter Revesz, *Reply*].

through early-1990s depended heavily on the composition of the panel hearing the case, with panels having two or three Republican appointees far more likely to invalidate EPA action than panels composed of two or three Democratic appointees.⁴²

Professor Cass Sunstein's more recent research similarly shows that "a panel of . . . like-minded judges tends to go to extremes."⁴³ Sunstein dubs this process "ideological amplification" and contends that "[i]n many areas, an individual Republican appointee sitting with two other Republican appointees is far more likely to vote in the stereotypically conservative fashion than an individual Republican appointee who sits with one Republican and one Democrat."⁴⁴ Sunstein summarized his research to Senate staffers as follows:

Republican nominees really are different from Democratic nominees. And when you get three Republican nominees sitting together . . . they get really conservative. We had a large enough sample, so that we could see proof of this in affirmative action, campaign finance, the Americans with Disabilities Act, judicial review of environmental regulations, and sex discrimination.⁴⁵

Sunstein acknowledges that the amplification effect applies to Democratic appointees as well.⁴⁶ He argues, and I agree, "that a high degree of diversity on the federal judiciary is desirable, that the Senate is entitled to promote reasonable diversity, and that without such diversity judicial panels will inevitably go in unjustified directions."⁴⁷ Revesz and Sunstein's work, important as it is, is descriptive; they leave unaddressed the question of how to accomplish these goals, which Choi and Gulati take as their starting point.

42. Revesz, *Environmental Regulation*, *supra* note 41, at 1741-44. Unlike Sunstein, Revesz does not find the presence of a Democratic appointee on a panel with two Republican appointees to be a significant moderating factor. *Id.* at 1761-63 & n.83.

43. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 166 (2003).

44. *Id.* at 167.

45. Toobin, *supra* note 4, at 42 (internal quotation marks omitted); *see also* SUNSTEIN, *supra* note 43, at 168-76.

46. SUNSTEIN, *supra* note 43, at 167.

47. *Id.* at 190. My experience is consistent with the evidence amassed by Revesz and Sunstein, although I am inclined to agree with Sunstein's observation that mixed panels tend to be more cautious than panels composed entirely of one party's appointees. But I think that both Revesz and Sunstein miss one point that perhaps defies measurement: judges are not fungible and cannot be counted on to act in accordance with the ideology of the President who appointed them (which is why President Eisenhower reportedly said that appointing Chief Justice Earl Warren was his "biggest mistake" and that appointing Justice Brennan was his "second biggest mistake"). My intuition is that judges appointed mainly because of their partisan views maintain that approach on the bench and more reliably vote in a partisan manner, while judges selected mainly for their merit, but are viewed as ideology safe, tend to put ideology aside far more often. *See* Choi & Gulati, *supra* note 5, at 318 n.48; Kenneth L. Manning et al., *George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?*, 85 JUDICATURE 278 (2002). My submission, of course, is that we should find a way to tilt the judicial selection process to favor the latter category of judges and weed out the former.

IV. CAN EMPIRICAL MEASURES COMBAT JUDICIAL PARTISANSHIP AND ENHANCE QUALITY?

By now it should be clear that I believe that the judicial selection process is tilted too heavily toward political factors. I recognize that there are nominees who both share the President's views on important political issues and are exceptionally well qualified for the federal bench.⁴⁸ But that is far from universally true. Too many judges are selected not because they are excellent candidates *and* the President is certain that they will vote the "right" way on the key issues, but because they are perceived to be loyal protectors of the President's ideological goals. Even if I am wrong and the roster of judges appointed for reliability reasons alone is short, it is still too long.

Consider one example. The most devastating indictment of a judicial appointee I have seen was published by an unlikely source: *The New Yorker*. Its "Talk of the Town" column critiqued President George H.W. Bush's final appointment to the Second Circuit, Dennis Jacobs.⁴⁹ After calling Judge Jacobs' appointment a "curious choice," the column said that Judge Jacobs "has none of the qualifications that the public and, certainly, most lawyers assume are required for a federal judgeship as important as one on the Second Circuit."⁵⁰ Judge Jacobs had spent his entire career with a large New York law firm engaged in "the narrow field of reinsurance litigation," where the cases, "while important to the companies involved, are of little importance to the public."⁵¹ The column also pointed out that

[h]e was never a judge on a lower court, a criminal prosecutor, or a defense attorney. He never worked for the government or per-

48. Consider the only two appointees to the D.C. Circuit in the past seven years. Judge Merrick Garland was appointed by President Clinton and confirmed by the Senate on March 19, 1997. Judge John Roberts was appointed by President Bush and confirmed by the Senate on May 8, 2003. Prior to their appointments, both had spent considerable time at the Justice Department—Judge Garland as a prosecutor and Judge Roberts as a senior lawyer in the Solicitor General's office—both had been members of major law firms in the District of Columbia, and both had sterling academic credentials, including Supreme Court clerkships. Although both were identified with their respective parties, neither was seen to be especially partisan, which cleared the path for their appointments. Indeed, Senator Orrin Hatch spoke at Judge Garland's investiture. It is, of course, telling that Judge Garland was President Clinton's final appointment to the D.C. Circuit even though several vacancies remained unfilled. Elena Kagan, now the Dean of the Harvard Law School, was nominated by President Clinton to the D.C. Circuit, but never had a hearing; nor did Alan Snyder, a highly regarded former civil rights advocate who was then a partner in a major D.C. law firm. By failing to act on President Clinton's other nominees—distinguished in their own right—the Republican-controlled Senate managed to ensure that the Republicans on the court maintained a 5-4 advantage over Democrat-appointed judges. More recently, Senate Democrats have blocked other Republican appointments to the D.C. Circuit.

49. *The Talk of the Town: George's Choice*, NEW YORKER, Jan. 18, 1993, at 31-32.

50. *Id.* at 31.

51. *Id.*

formed any kind of public service. He never participated in a civil-rights case or in any case where constitutional issues played a major role. And, unlike many federal judges, he has shown no interest in legal scholarship.⁵²

As *The New Yorker* put it, Judge Jacobs' submissions to the Senate Judiciary Committee "provide a picture of a prosperous lawyer of limited interests and little distinction."⁵³ The "single clue to why he was nominated," *The New Yorker* added, was that he identified the Federalist Society as the only organization to which he belonged. *The New Yorker* noted that President Reagan had earlier appointed a number of distinguished judges to the Second Circuit, including Yale Law School Professor Ralph Winter and the well-regarded "law-and-order trial judge[] . . . George C. Pratt."⁵⁴ Bush's appointment of Jacobs, said the magazine, showed that "the ranks of conservatives who were both eminent and reliable had thinned" and that "President Bush was ultimately forced to settle for reliability alone."⁵⁵

To me, settling for reliability alone is a nonstarter. Judging today is a challenging enterprise. Long gone are the days (if they ever existed) when complex statutory cases were the exception and not the rule, when oral argument stretched on for hours, and when there was time for leisurely reflection. Even apart from the crushing caseloads that make reflection a luxury, a substantial percentage of the cases coming before federal judges are enormously complicated. Judges are routinely called upon to unravel the mysteries of the complete preemption doctrine in ERISA cases⁵⁶ and resolve questions as esoteric as whether an expired statute nonetheless had the force of law.⁵⁷ Judges must also confront the shifting tides in Eleventh Amendment jurisprudence,⁵⁸ decide when a statute enacted by Congress applies retroactively, even when Congress itself gave the question not a mo-

52. *Id.*

53. *Id.*

54. *Id.* at 31-32.

55. *Id.* at 32.

56. *See, e.g.*, *Aetna Health Inc. v. Davila*, 548 U.S. 200 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Ky. Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Pegram v. Herdrich*, 530 U.S. 211 (2000).

57. *See Wis. Project on Nuclear Arms Control v. United States Dep't of Commerce*, 317 F.3d 275 (D.C. Cir. 2003); *see also id.* at 285 (Randolph, J., dissenting) (observing that, according to the majority, "[t]he statute has expired but its legislative history is good law"). Having served as co-counsel for the losing party in the case, my view of course is that the case was wrongly decided.

58. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

ment of thought,⁵⁹ and deal with a perennial source of judicial irritation—the Sentencing Guidelines—which, even in this post-*Booker*⁶⁰ environment will be the subject of continuing judicial attention.

Judging today calls for bright, tenacious, energetic lawyers who can work collegially and commit themselves to the endeavor of resolving difficult problems in a reasonable period of time.⁶¹ These are attributes that are easy to label, hard to define, and harder still to measure. The problem with the debate on judicial selection is that it often proceeds along these lines—quality is elusive, subjective, and therefore defies measurement. Another variation is that, although perhaps the quality of lawyering can be measured to some extent, it is far from clear that the qualities that make a good lawyer make a good judge, or a capable court of appeals judge worthy of a seat on the Supreme Court.

Choi and Gulati see these as defeatist arguments. They concede that there are many attributes judges should have that are subjective, but they contend that there are many objective factors that reflect the quality of judges that can be quantified and measured. Choi and Gulati are not alone in this conviction. Some industrialized democracies do not draw judges from the ranks of lawyers but instead select and train an independent judiciary. Germany, for example, has

59. See, e.g., *Miller v. French*, 530 U.S. 327 (2000); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

60. *United States v. Booker*, 125 S. Ct. 738 (2005) (holding the Sentencing Guidelines unconstitutional under the Sixth Amendment, but directing lower courts to nonetheless take them into account in sentencing); see also Patricia A. MacLean, *Circuits Wrestle with the Fallout from “Booker,” A Flurry of Differing Calls on Sentencing*, NAT’L L J., Feb. 14, 2005, at 1; *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

61. Several of my Georgetown colleagues have challenged the assertion that litigators want “smart” judges. They argue that rational litigators want judges ideologically in sync with the arguments they assert, which they believe—and Revesz and Sunstein’s research supports—maximizes their chance of success. Perhaps if all the lawyers cared about was winning one case, there might be force to this argument. But that is rarely so. Most litigators concentrate in certain areas, often for repeat clients. It is myopic to believe that these lawyers and their clients always, or even generally, care about one case to the exclusion of those that will follow. Poorly reasoned decisions may be great fodder for academics, but they are stumbling blocks for litigators who seek to shape the law. Indeed, the only thing worse than losing a case for the wrong reason is winning a case for the wrong reason.

Moreover, this argument overlooks that ideological dominance is a two-way street. I would prefer smart judges to overtly political judges in part because I am far more likely to see appellate panels composed of a majority of judges appointed by Republicans than Democrats, who my colleagues would forecast would be more sympathetic to the cases I litigate. But given the ideological swings that mark the courts, most litigators believe that they would be better off with stability and predictability, rather than the dramatic shifts in the law that occur when courts undergo an ideological transition. Indeed, nothing is quite as fleeting as success bestowed by an ideological panel; as soon as the ideological pendulum swings in the other direction, these gains are quickly transformed into losses. See, e.g., *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (splitting on political lines and overturning longstanding precedent).

a professional corps of judges who are selected from recent law school graduates on the basis of an exam: “[O]nly the graduates with the best examination results have any chance of entering the judicial corps.”⁶² German judges are promoted on the basis of an “‘efficiency rating’ [that] is based in part upon objective factors, such as caseload discharge rates and reversal rates, and in part on subjective peer evaluation.”⁶³ The judicial selection and promotion process in Japan appears to be similar.⁶⁴ Large law firms, corporations, and other institutions use objective measures in making hiring and promotion decisions.⁶⁵ Even managers of professional baseball teams have turned to objective criteria in player selection; this approach is epitomized by Billy Beane’s striking success in raising the lowly Oakland Athletics to playoff contenders by relying on hard data on player performance rather than the intuition and judgment of scouts in drafting and trading for players.⁶⁶

Those engaged in judicial selection have also used objective measures to evaluate judges, although not in the systematic way proposed by Choi and Gulati. For sitting district court judges, the Administrative Office of the U.S. Courts maintains extensive case-specific statistics about each judge’s caseload, disposition rate, the time motions have been pending, and so forth—information that speaks volumes about a judge’s productivity.⁶⁷ Similar statistics are compiled on the performance of circuit court judges.⁶⁸ Other statistics available through LEXIS and Westlaw show the number of opinions a judge

62. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 849 (1985) (alteration in original) (quoting Manfred Wolf, *Ausbildung, Auswahl und Ernennung der Richter*, in HUMAN JUSTIZ: DIE DEUTSCHEN LANDESBERICHTE ZUM ERSTEN INTERNATIONALEN KONGRESS FÜR ZIVILPROZESSRECHT IN GENT 1977, at 73, 77 (P. Gilles ed., 1977)) (internal quotation marks omitted).

63. *Id.* at 850 (footnote omitted).

64. See, e.g., Elliott J. Hahn, *An Overview of the Japanese Legal System*, 5 NW. J. INT’L L. & BUS. 517, 533-36 (1983).

65. See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991).

66. See MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003); see also Note, *Losing Sight of Hindsight: The Unrealized Traditionalism of Law and Sabermetrics*, 117 HARV. L. REV. 1703 (2004); *Supreme Stats: What if Supreme Court Justices Were Picked Based on Their Career Numbers Instead of Their Politics?*, LEGAL AFFAIRS, Sept./Oct. 2004, at 32; Benjamin Weiser, *Judge’s Decisions Are Conspicuously Late*, N.Y. TIMES, Dec. 6, 2004, at A1 (using statistics from the Administrative Office of the U.S. Courts to show that one district judge sitting in the Southern District of New York had 289 motions in civil cases pending for more than six months, the highest in the nation by far, and more than three times the number of any of the judge’s colleagues on the Southern District).

67. Although the statistics are available on the Internet in aggregate form only, they are compiled and available to judges, and presumably Senate Judiciary Committee staffers, for each judge. See, e.g., *Federal Court Management Statistics 2004: District Courts*, at <http://www.uscourts.gov/cgi-bin/cmsd2004.pl> (last visited Apr. 7, 2005).

68. See, e.g., *Federal Court Management Statistics 2004: Courts of Appeals*, at <http://www.uscourts.gov/cgi-bin/cmsa2004.pl> (last visited Apr. 7, 2005).

writes, how that number compares to the productivity of other judges on the same court, how often the judge is affirmed and reversed, how often a judge's opinions are cited by his colleagues, and so forth. The Senate Judiciary Committee has long used a detailed form to collect basic information about nominees that includes a wide range of objective information—including all of the information that *The New Yorker* thought was lacking with the elder Bush's final appointee to the Second Circuit.⁶⁹ So there is at least some readily available objective data that sheds light on a judge's qualifications for higher office.⁷⁰

Choi and Gulati identify three criteria that would also tell us a good deal about possible Supreme Court nominees, although they hedge by saying that “[c]rafting a fully specified system of objective factors that may be used to rate judges . . . is beyond the scope of [their article].”⁷¹ The criteria they identify for preliminary inquiry are the following: (a) the quality of the judicial product; (b) caseload performance; and (c) independence.⁷² In the abstract, of course, these are all important factors that bear on a judge's suitability for elevation. Nonetheless, I have reservations about Choi and Gulati's selection of these factors for appellate judges who act collaboratively, and I believe that substantial refinements would be needed to make each of these criteria useful measures for appellate judges.

A. *Quality of the Judicial Product*

In defining what they mean by the “quality of the judicial product,” Choi and Gulati point to two main factors: (a) the extent to which a judge's opinions are cited, not just in judicial opinions, but in academic writings and even casebooks (with adjustments made for favorable and unfavorable treatment of the opinion); and (b) a judge's reversal rate (with recognition that such a measure “may unfairly penalize judges with different political views from those on the Court”).⁷³ I am skeptical that either of these factors will tell us as

69. See *supra* notes 49-55 and accompanying text.

70. Make no mistake, data of this sort are also used for overtly partisan purposes. Much of the debate over Judge Bork's nomination to the Supreme Court was based on “objective” data about his extensive voting record while a judge on the D.C. Circuit. Compare THE WHITE HOUSE REPORT: INFORMATION ON JUDGE BORK'S QUALIFICATIONS, JUDICIAL RECORD & RELATED SUBJECTS (1987), and OFFICE OF PUB. AFFAIRS, U.S. DEP'T OF JUSTICE, A RESPONSE TO THE CRITICS OF JUDGE ROBERT H. BORK (1987), with COMM. ON THE JUDICIARY, U.S. SENATE, RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD (1987), and PUB. CITIZEN LITIG. GROUP, THE JUDICIAL RECORD OF JUDGE ROBERT H. BORK (1987). An abridged version of the White House report and full versions of the other three reports (with the exception of their respective appendices) are all reprinted in 9 CARDOZO L. REV. 185-508 (1987).

71. Choi & Gulati, *supra* note 5, at 305.

72. *Id.* at 305-13.

73. *Id.* at 306-07.

much about judicial quality for court of appeals judges as Choi and Gulati theorize.

1. Citations

Let us start with the basics—not all citations are created equally. For the most part, my sense about citations is summed up by Judge Leventhal’s famous line about resort to legislative history: it is “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”⁷⁴ For routine citations—standards of review and settled legal propositions—most judges simply cite the most recent circuit precedent or their own most recent opinion. It is hard to ascribe any significance to citations of that sort. Where a citation is needed for a more controversial point, judges tend to cite the opinions of judges who they know and trust. But familiarity is hardly a proxy for quality.

Moreover, cases are often cited not because of the trenchancy or novelty of their judicial analysis but because of either their memorable language or their ability to distill a complicated legal issue down to a multifactor test that judges and lawyers embrace for the sake of convenience. For instance, without disputing for a moment Judge Learned Hand’s greatness, I would suggest that his opinions are cited at least as often for the nimbleness of his pen as they are for the force of his logic.⁷⁵ Consider Judge Hand’s famous line in *Cabell v. Markham*⁷⁶—an otherwise unremarkable case:

It is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to ac-

74. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (remarking on Leventhal’s use of this metaphor in regard to legislative history); see also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 & n.143 (1983). Although this description is universally attributed to Judge Leventhal and appears in countless opinions, albeit with minor variations, it does not appear that Judge Leventhal himself ever used it in a judicial opinion.

75. Judge Posner has suggested that one measure of Judge Hand’s greatness was his “gift of verbal facility that enables a familiar proposition to be expressed memorably, arrestingly, thus enforcing attention, facilitating comprehension, and, often, stimulating new thought (in which case the expressive dimension of judicial greatness merges with the creative).” Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 524 (1994) (book review). It may be that one measure of a Judge’s greatness is his or her verbal dexterity, but surely elegant writing, without more, is not the makings of a great judge.

76. 148 F.2d 737 (2d Cir. 1945), *aff’d*, 326 U.S. 404 (1945).

comply, whose sympathetic and imaginative discovery is the surest guide to their meaning.⁷⁷

This passage was hardly a pathbreaking moment in the law. Other judges had made the same point, although less eloquently than Judge Hand. Nonetheless, according to LEXIS's Shepard's service, *Cabell v. Markham* has been cited no fewer than 331 times, including ten times by the Supreme Court. It may be that superior writing skills are indeed a fair measure of judicial performance, as Judge Posner claims in his defense of Hand's greatness.⁷⁸ But if that is Choi and Gulati's thesis, they ought to say so.

There are also citations that are repeated time and again simply because they mark the distillation of existing circuit law into a formula that can easily be used by litigants and courts. For example, every circuit has one key case that reduces the requirements of a preliminary injunction into a familiar four-part test. In the D.C. Circuit, it is Judge Leventhal's decision in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*,⁷⁹ which, according to LEXIS's Shepard's service, has been cited over 1200 times. Again, while I admired Judge Leventhal, I do not believe that his authorship of *Holiday Tours*—and especially the fact that it is cited frequently—demonstrates his excellence as a judge. *Holiday Tours* simply refined slightly the analysis the court had laid out years earlier in *Virginia Petroleum Jobbers Ass'n v. FPC*,⁸⁰ another widely cited decision.⁸¹

Choi and Gulati are plainly correct that there are many opinions that are heavily cited because they break new legal ground. Perhaps they are right that these opinions are true measures of judicial quality and that it is fair to give the credit to the opinion's author, and not the other judges who served on the same panel. But nothing in Choi and Gulati's proposal would help us differentiate those opinions, which might speak volumes about the talents of the author, from other equally widely cited cases that do not.

A citation-dependent inquiry as to judicial quality would also not account for significant variations in the caseloads among the circuits, which is a problem that would need to be addressed. Choi and Gulati assume for statistical purposes that the circuits have comparable cases. But that is not so. The D.C. Circuit, for example, bears the brunt of record-heavy administrative law cases because the District

77. *Id.* at 739.

78. See Posner, *supra* note 75.

79. 559 F.2d 841 (D.C. Cir. 1977).

80. 259 F.2d 921 (D.C. Cir. 1958).

81. According to LEXIS, *Virginia Petroleum Jobbers* has been cited over 1440 times. See also Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1334 n.67 (2005).

of Columbia is the seat of government, because the court is a convenient forum for those affected by regulation, and because a number of statutes assign exclusive jurisdiction to the D.C. Circuit. This leads to two consequences; one is that judges on the D.C. Circuit hear fewer cases than their counterparts elsewhere (about half the number of cases heard by judges on the Seventh and Eighth Circuits), and the other is that their opinions, which often address specialized issues, are less likely to be cited outside of the D.C. Circuit.⁸² Other circuits—like the Sixth—also fall outside the mainstream in terms of caseloads. Thus, unless adjustments are made for these variations, the judges on these circuits would be at a significant disadvantage if frequency of citation were a key measure of judicial quality.

Finally, measuring frequency of citation overlooks a core and perhaps lamentable fact about the way most courts of appeals do business. The overwhelming majority of cases today are resolved in unpublished opinions. Published opinions represent only about twenty percent of the courts' dispositions.⁸³ Enough ink has already been spilled over the rule-of-law and fairness concerns related to unpublished decisions.⁸⁴ But whatever one's views are on those issues, the presence of unpublished opinions has to be addressed by Choi and Gulati. If quality is to be measured by examining the work product of judges, we cannot simply ignore the bulk of their work product because it is unpublished and hard to compile. There ought not to be two tiers of justice in the United States. A judge who garners high marks for his or her published opinions should be held to an equally high standard for unpublished opinions. But, unless Choi and Gulati refine their approach, looking just to published opinions would give judges a free pass with respect to their unpublished rulings, only adding to existing incentives for judges to shortchange opinions that will not be published.

2. Reversal Rates

I am also skeptical that reversal rates would tell us much about the quality of court of appeals judges, but not solely for the reasons that Choi and Gulati mention.⁸⁵ My concern is that most cases are reviewed by the Supreme Court only when a "mature" circuit split arises. Rarely does the Court grant review when just one circuit

82. See William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 278 tbl.1, 279 n.21 (1998).

83. Brudney, *supra* note 13, at 152 & nn.8-9.

84. *Id.*

85. They recognize that court of appeals opinions are collaborative products, and thus it might be unfair to attribute the ruling only to its author. And they acknowledge that such a measure "may unfairly penalize judges with different political views from those on the [Supreme] Court." Choi & Gulati, *supra* note 5, at 307.

parts company from its sister circuits. The Court generally lets these “immature” circuit splits simmer in the hope that the circuit courts will ultimately resolve their disagreement and come to a uniform position. By the time the Supreme Court grants review, there are generally several circuits that have taken sides on the issue and often there are several decisions within each circuit applying circuit law. At some point, of course, the Supreme Court grants one case to review. But it is more a matter of serendipity (or, if Choi and Gulati have their way, bad luck) than legal error for a judge to author a court of appeals decision that gets reversed by the Supreme Court. He or she is no more culpable than any of the other, and there may be many, court of appeals judges who have written opinions saying precisely the same thing. If reversal rates mean anything, then we need to apportion the “blame” more equitably and charge each circuit judge who backed the losing side with whatever demerit we assign.⁸⁶

Nor am I persuaded that the Supreme Court always has the better argument. As Justice Jackson famously noted, “We are not final because we are infallible, but we are infallible only because we are final.”⁸⁷ Indeed, there are times that even a Supreme Court opinion is not the last word on a legal question. Congress occasionally overrules the Court on statutory matters,⁸⁸ and the Court, at times, reverses itself on constitutional issues.⁸⁹ In those cases, would Choi and Gulati give the court of appeals judge who is ultimately vindicated extra credit?

B. Caseload Performance

Choi and Gulati next point to factors that might reveal the effort a judge puts into his or her job. For a Supreme Court Justice, Choi and Gulati theorize that a Justice exerting “maximal effort” would use “clerks minimally, dissent as often as would be warranted, and vote

86. Consider just one example. By the time the Supreme Court decided *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), at least six federal circuit courts had concluded that the Federal Cigarette Labeling and Advertising Act preempted all state law tort claims brought by cigarette smokers, *id.* at 508-09 nn.2 & 3. No circuit court took a different view, although a number of state courts had ruled that the Act did not preempt tort suits. *Id.* Is it fair to make Judge Edward Becker, the highly distinguished judge who authored the Third Circuit’s opinion that was reversed in part in *Cipollone*, shoulder all of the blame, especially since the Third Circuit applied what was then fairly settled law on the preemption issue?

87. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

88. See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991) (holding that the authorization for attorney’s fees and costs in 42 U.S.C. § 1988 did not authorize payment of expert fees in civil rights cases), *overruled by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 113(a)(2), 105 Stat. 1071, 1099 (codified as amended at 42 U.S.C. § 1988(c) (2000)).

89. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)).

to grant certiorari in as many cases as is possible.”⁹⁰ They argue that to get an insight on how a court of appeals judge might perform on the Supreme Court, we should look at the number of opinions a judge authors, whether the judge or law clerks were the main authors, and the overall number of cases the judge played a part in deciding in a specified period of time.⁹¹ My problem with Choi and Gulati’s suggestion is *not* the measures of productivity they want to examine (although I am not sure I see the premium on judges rather than law clerks writing first drafts of opinions).⁹² Indeed, as I suggest earlier, I think that there are many measures of productivity that are worth exploring. After all, we want energetic and diligent judges, and there are many measurements available that bear on those attributes.

My concern is not with Choi and Gulati’s interest in *measuring* productivity but is instead with how they would *define* it, namely, that it is in the “public interest” for the Supreme Court to hear more cases than the eighty or so a year that currently make up its docket. The size of the Supreme Court’s caseload is an issue that has sparked enormous debate, especially as the Court has reduced its docket from approximately 150 cases per year to about 80 in the span of just a few years.⁹³ With Justice White’s retirement, there is no longer a Justice on the Court who insists that it grant review every time a circuit split arises. While there are forceful arguments on both sides of the debate, I think that the burden rests with Choi and Gulati to defend the proposition that it would be, as they claim, “in the public interest” for the Court to “grant certiorari in as many cases as is possible.”⁹⁴

90. Choi & Gulati, *supra* note 5, at 309.

91. *Id.* at 309-10.

92. I recognize that Choi and Gulati’s contribution to this Symposium is an extended explanation of why they believe that it matters whether judges draft their own opinions. I have doubts that it is necessarily the best use of a judge’s time to draft opinions word-for-word or to write first drafts of opinions. I am sure that many conscientious judges transform first drafts written by clerks into their own product through editing and revision. Writing is an idiosyncratic process, and I assume that judges find the right balance that works for them. Rather than trying to disentangle whether it is the judge or the law clerks responsible for opinion writing, it may be preferable to simply evaluate the quality of the final product. If a judge is not fully engaged in the opinion writing process, the final product is likely to suffer. I do, however, agree with Choi and Gulati that a judge’s disengagement from the opinion writing process is a warning sign that the judge is not acting diligently.

93. See, e.g., Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 336 (2002); Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 738 (2001); Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984).

94. Choi & Gulati, *supra* note 5, at 309.

There are sound reasons that cut in the other direction. One is that a less interventionist Court is not necessarily a less effective or influential Court.⁹⁵ Although this Court hears fewer cases than its immediate predecessors, it has honed its selectivity and expanded use of the GVR⁹⁶ process to orchestrate sweeping changes in the law. It would be hard to contend that a reduced caseload has diminished the current Court's oversight of the law. Another reason is that the Court has plainly made a conscious decision that it is better to allow circuit splits to become mature before intervening, thereby reducing the number of cases the Court reviews. Whether the Court does so to ensure full percolation of the legal issues before the Court intervenes, to see whether the problem resolves itself, or to avoid dealing with an issue that is too trivial to justify the Court's time is a matter for debate. While one could disagree in principle with those judgments, they are surely worthy of some response by Choi and Gulati.

C. Independence

Choi and Gulati's final criterion is judicial "independence." They explain that "part of the judicial mission is to decide cases impartially"—"independent of political ideology."⁹⁷ To determine independence, they propose to measure "the frequency with which the judge is in opposition to another judge selected by the same president (or a president from the same political party)," because "[j]udges who are systematically more willing to disagree with politically like-minded judges are . . . more unbiased in their approach to individual cases."⁹⁸ I agree with Choi and Gulati that independence is a key attribute for judges and that examining dissents may tell us something about independence. But the test that Choi and Gulati propose is too crude to tell us much about a judge's independence, and, as I explain, there are better measurements available.⁹⁹

95. Justice Brandeis apparently remarked often that "[t]he most important thing we do is not doing." See ANTHONY LEWIS, *GIDEON'S TRUMPET* 252 n.21 (Vintage Books ed. 1989) (1964) (explaining that Justice Brandeis' former law clerk, Harvard Law Professor Paul A. Freund, recalled Brandeis frequently making this comment) (internal quotation marks omitted); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

96. GVR stands for grant, vacate, and remand, which is the order the Supreme Court enters when it sends a case back to a lower court for reconsideration in light of a recent ruling.

97. Choi & Gulati, *supra* note 5, at 310.

98. *Id.*

99. Choi and Gulati's use and definition of the word "independence" injects a degree of confusion. "Independence" in describing a judge can mean one of two things: a judge's independence from the ideology of the President who appointed the judge; or independence from other judges appointed by the same President, or a President of the same political party, which is the meaning Choi and Gulati appear to ascribe to the word. In my view, for the word "independence" to be synonymous with "impartiality," it must mean independence from the appointing President, a point I develop below.

First, their test does not screen out cases that are apolitical, such as a breach of contract case between two large companies. Many cases decided by the courts of appeals carry no ideological freight, and thus the fact that judges appointed by the same President are on opposite sides of the question tells us little about the impartiality and independence of either judge. They just disagree. But their disagreement does not show a willingness to challenge orthodoxy or turn away from the political orientation of the President who appointed them.

Second, their test does not focus on cases in which judges depart from the ideological views of the Presidents who appointed them, let alone in those cases in which one might reasonably expect ideology to matter. Compounding the problem, even when the case does have clear ideological implications, the fact that the judges disagree does not mean—as Choi and Gulati suggest—that they should *both* be given credit for independence.¹⁰⁰ It seems to me that the opposite is true; that is, the judge who departs from the position one would predict based on the ideological orientation of the appointing President is entitled to credit for independence, not the judge who toes the line regardless of whether he or she is in the majority or in dissent.

There are, to be fair, rare cases in which judges in both the majority and the dissent deserve credit for independence. Consider *Wisconsin Project on Nuclear Arms Control v. United States Department of Commerce*,¹⁰¹ a Freedom of Information Act (FOIA) case brought by an arms control group to get information from the Department of Commerce regarding the licensing of “dual-use” commodities (products that can be used for civilian and military purposes) for overseas sales.¹⁰² The government claimed the information was shielded from disclosure by virtue of an expired provision of the Export Administration Act that had been in effect only intermittently since 1977 and was not in effect at the time the information request was filed or the case litigated.¹⁰³ The panel majority, Circuit Judge Judith Rogers (a Clinton appointee) and Senior Circuit Judge Stephen Williams (a Reagan appointee), concluded that, even though the Act had lapsed, it nonetheless barred disclosure of the records.¹⁰⁴ Judge Raymond Randolph (a Bush appointee) dissented, chiding his colleagues: “The statute has expired but its legislative history is [still] good law. So say my colleagues, in a most curious opinion.”¹⁰⁵

100. Choi & Gulati, *supra* note 5, at 310 & n.29.

101. 317 F.3d 275 (D.C. Cir. 2003).

102. *Id.* at 278.

103. *Id.* at 278-79.

104. *Id.* at 281-85.

105. *Id.* at 285.

From Choi and Gulati's standpoint, much more curious than the opinion is the lineup of the judges. Judge Rodgers authored the majority opinion and had been appointed by President Clinton, who was committed to openness under FOIA,¹⁰⁶ while Judge Randolph had been appointed by President George H.W. Bush, who quickly reversed the openness policies of his predecessor.¹⁰⁷ If one is measuring independence, then it would seem only fair that both Judge Rodgers and Judge Randolph get high marks for their views in this case, because both took positions that were at odds with the views of the Presidents who appointed them.

On the other hand, there are cases in which only one judge is, in fact, acting "independently," albeit not as Choi and Gulati use that term. Consider the Fourth Circuit's denial of the petition for en banc rehearing in *Hamdi v. Rumsfeld*.¹⁰⁸ Hamdi was seeking a rehearing of the Fourth Circuit's prior decision rejecting this petition for a writ of habeas corpus.¹⁰⁹ The panel opinion, written by Chief Judge J. Harvie Wilkinson (a Reagan appointee) and joined by Judges William Wilkins and William Traxler (appointed by Reagan and Clinton, respectively), upheld the government's position that the detainees imprisoned at the Guantanamo Naval Base in Cuba were not entitled to a hearing and directed that Hamdi's petition for a writ of habeas corpus be dismissed.¹¹⁰ Dissenting from the denial of Hamdi's petition for an en banc rehearing, Judge J. Michael Luttig (a Bush appointee) argued that the government could not make its case for detention without giving Hamdi a chance to be heard.¹¹¹ Judge Luttig's position was directly at odds with that taken by a Republican President in a case all about ideology. While it would make sense to

106. William J. Clinton, Memorandum on the Freedom of Information Act (Oct. 4, 1993), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 1685 (1993) (directing agencies to "renew their commitment" to the "principles of government openness"); Memorandum from Janet Reno, Attorney General, U.S. Dep't of Justice, to Heads of Departments and Agencies (Oct. 4, 1993), http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (directing agencies to adopt policies that provide maximum responsible disclosure of government information).

107. Memorandum from John Ashcroft, Attorney General, U.S. Dep't of Justice, to Heads of All Federal Departments and Agencies (Oct. 12, 2001), <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm> (rescinding Reno Memorandum and assuring agencies that the Department will defend agency withholding decisions "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records").

108. 337 F.3d 335 (4th Cir. 2003).

109. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 124 S. Ct. 2633 (2004).

110. *Id.*

111. *Hamdi*, 337 F.3d at 357-68 (Luttig, J., dissenting from denial of rehearing en banc). Judge Diana Gribbon Motz, a Clinton appointee, also dissented. *Id.* at 368-76. Because her dissent is presumably in keeping with the ideology of the President who appointed her, it is hard to see why she should get credit for independence, even though her dissent put her on the other side of the issue from Judge Robert King, the other Clinton appointee on the Court, who did not dissent from the court's denial of rehearing en banc.

credit Judge Luttig for his independence (especially if he harbored hopes of ascending to the Supreme Court), the same certainly cannot be said for Chief Judge Wilkinson, whose opinions in the case adhered faithfully to the party line. Nonetheless, under Choi and Gulati's test, they would be given equal credit for independence.

Finally, there are cases in which judges demonstrate independence even when they are in the majority and there are no dissents. Consider *Public Citizen v. Burke*,¹¹² which was a politically charged case brought to challenge a Department of Justice Office of Legal Counsel (OLC) interpretation of regulations issued by the National Archives and Records Administration under the Presidential Recordings and Materials Preservation Act of 1974¹¹³—the law that empowered the government to take possession of the records of the administration of Richard M. Nixon. The OLC had issued an opinion requiring on constitutional grounds that the regulation be interpreted as obliging the archivist to acquiesce in *any* claim of executive privilege asserted by the former President to block release of the materials—an opinion that would apply not just to Nixon's records but to the records of any former President. The case was heard by Circuit Judges Laurence Silberman and David Sentelle (both Reagan appointees) and District Judge Harold Greene (appointed by President Carter), sitting by designation. In a unanimous opinion written by Judge Silberman, the court held the OLC memorandum could not justify deferral to privilege claims by former Presidents, finding the OLC position to be based on a “misunderstanding of the Constitution.”¹¹⁴ Once again, if one is measuring a judge's willingness to take a stand on an important legal question that has evident ideological overtones, then one has to give credit at least to Judge Silberman for his opinion in *Burke*, and perhaps as well to Judge Sentelle, because he did *not* dissent but instead joined with Judge Silberman in opposing a measure strongly supported by President Reagan.

The upshot of this discussion underscores my initial point: Dissents can (but not always) tell us something about independence, but only a small part of the story. The better way to evaluate independence is to determine when, and how frequently, judges depart from the position that is ideologically aligned with that of the Presidents who appointed them in cases where both ideology and outcome matter. To me, that is the true measure of independence, especially for a judge being considered for higher judicial office.

112. 843 F.2d 1473 (D.C. Cir. 1988).

113. 44 U.S.C. § 2111 (1982).

114. *Burke*, 843 F.2d at 1474-75.

V. CONCLUDING THOUGHTS

At bottom, my heart is with Choi and Gulati because I share their distaste for the current partisan logjam that we call the judicial selection process. It is brutal and unfair to nominees. It undermines collegiality. It breeds distrust of the legal system. And it is woefully inefficient. Judicial vacancies go unfilled for years or more, clogging dockets, crowding courts, and delaying justice. So I want Choi and Gulati to be right; there must be a better way to select judges. But my mind says not yet. They propose a “Tournament of Judges,” but at this point, they have no satisfactory way of keeping score. A tournament needs a clear-cut winner. To be sure, there are measures of judicial quality and productivity available for social scientists to review and perhaps use to rank judges on these attributes, as Professor Landes¹¹⁵ and others have done. But those measurements are nowhere as comprehensive or as accurate as would be needed to run the sort of tournament Choi and Gulati propose, let alone to displace the more judgment-laden selection process that is now employed. And in fairness to Choi and Gulati, they make no pretense otherwise.

Rather, they want to debate whether it is worthwhile to try to shift the emphasis from partisanship to quality in judicial selection and whether it is realistic to believe that the intensely political process now used to select judges will yield to a less partisan approach. I do not have an answer to either question. But there is, of course, a middle ground. There is no reason why efforts like Choi and Gulati’s to identify objective measures of judicial quality cannot be used now to enrich the often arid debate over judicial selection and to shift focus away from single-issue litmus tests. Choi and Gulati have shown that, with some fine-tuning, we might be able to examine factors like citations, reversal rates, opinions issued, opinions authored, and the like, and draw conclusions about judicial quality, productivity, and independence. Why not look to these measures when scrutinizing nominees? This approach would fall short of Choi and Gulati’s stated goal of a rank-order tournament from which one clear winner would emerge, but it might accomplish their real goal of focusing the judicial selection process on hard facts rather than harmful rhetoric.

And isn’t that the point. No one—not even Choi and Gulati—believes that it is possible to take the politics *out* of judicial appointments (even if we wanted to). The real question is what can be *added* to the debate to ensure that concerns about quality and competence are not sacrificed amidst the political infighting over nominees. “Demonstrated excellence, not merely promise, is what must be re-

115. See *supra* note 82.

quired for the most demanding legal job in the land.”¹¹⁶ Here Choi and Gulati’s insight that we must formulate and evenhandedly apply a consistent set of criteria for judicial selection is irresistible. And in many ways, the questions posed by *The New Yorker* to evaluate Judge Jacobs’ appointment seem suitable additions to those proposed by Choi and Gulati: has the nominee (1) served in the government as a judge or a prosecutor or served as a defense lawyer; (2) engaged in litigation on constitutional issues or questions of importance to the public; (3) participated in legal scholarship or other academic pursuits; (4) had a varied legal career; (5) performed community service; and (6) demonstrated the intellect, industry, impartiality, and judgment that we should require for judicial appointees.¹¹⁷ I do not suggest that the presence of these factors guarantees greatness. I do suggest that the *absence* of these factors is a danger signal that the President has selected the nominee for reasons of “reliability alone,” and that the Senate would be well served to challenge the nominee’s qualifications for service, not for political reasons but simply on the basis of merit.

116. Alan Morrison, *Accept No Substitutes: Only the Best*, LEGAL TIMES, Oct. 7, 1991, at 26.

117. *The Talk of the Town: George’s Choice*, *supra* note 49, at 31.