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Information and the Selection of Judges: A Comment on "A Tournament of Judges"

Ahmed E. Taha
aet@awt.com

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A COMMENT ON "A TOURNAMENT OF JUDGES"

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INFORMATION AND THE SELECTION OF JUDGES:
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AHMED E. TAHA*

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I. INTRODUCTION

Choi and Gulati’s proposal for a tournament of judges,¹ with appointment to the U.S. Supreme Court as the prize, has generated a furor and, more importantly, this law review Symposium. In response to an earlier version of their article, I raised a number of concerns with their proposal.² In this Essay, I will expand upon some of these concerns and discuss how Choi and Gulati address them in the final version of their article.

Choi and Gulati correctly view the nomination and confirmation of Supreme Court Justices as driven largely by politics.³ Although they do not oppose politics playing some role in the selection of judges,⁴ they object to arguments about a judge’s political views being disguised as arguments about a judge’s nonpolitical qualifications, which they refer to as a judge’s “merit.”⁵ They argue that such mischaracterization delays the confirmation process by allowing political battles to be fought under a more respectable, nonpolitical pretext and unfairly tarnishes the reputation of nominees by encouraging insincere objections to their merit.⁶

To solve this problem, Choi and Gulati present an interesting proposal: all judges on U.S. courts of appeals will receive a ranking that reflects their merit.⁷ The ranking will be based solely on a number of quantitative, objective criteria that are correlated with a judge’s merit, such as the number of opinions the judge has published and

* Assistant Professor of Law, Wake Forest University School of Law. J.D., Ph.D., Stanford University, 1996; B.A., B.S., University of Pennsylvania, 1988. I am grateful to Michael Green, David Logan, Alan Palmiter, and Ronald Wright for helpful comments.

1. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004).

2. Some of these concerns were summarized in my contribution to a Jurist online symposium on the judicial confirmation process. See Ahmed E. Taha, *Information and the Selection of Judges*, Jurist, at <http://jurist.law.pitt.edu/forum/symposium-jc/choi-gulati-orth-taha.php> (Apr. 15, 2004).

3. Choi & Gulati, *supra* note 1, at 299.

4. See *id.*

5. *Id.* at 301-02.

6. *Id.* at 299.

7. *Id.* at 303.

the number of times his or her opinions are cited by other judges or by legal scholars.⁸

Of course, if those involved in the judicial nomination and confirmation process still wished to support or oppose a Supreme Court nominee for political reasons, they could nonetheless use the guise of a merit-based argument by claiming that the ranking is a flawed measure of merit. They will allege that a more accurate measure would have led to a different conclusion regarding the nominee's merit and will claim to support or oppose the candidate on such alternate merit-based grounds, although they are truly motivated by political considerations. To prevent such subterfuge, Choi and Gulati propose—as an extreme version of their proposal—that the President and Senators not be permitted to put forth merit-based rationale other than the ranking.⁹

They suggest, as more modest reforms, simply publicizing judges' merit rankings and/or the judges' scores in the criteria that underlie the ranking.¹⁰ They argue that this publicity would encourage the use of such factors in nominating and confirming judges and would pressure the President and Senators to provide an explanation when their support of, or opposition to, a particular nominee does not conform to such objective measures of merit.¹¹

In addition, Choi and Gulati argue that a ranking system would encourage desirable judicial behavior.¹² Judges who have Supreme Court aspirations will seek to improve their rankings,¹³ and even judges who are not motivated by such hopes will seek high rankings to build their reputations as good judges.¹⁴

Although I do not believe that the current judicial selection process should be replaced with a tournament, Choi and Gulati's proposal is valuable because it encourages discussion focused on identifying the characteristics of a good judge and how to measure those characteristics. In addition, when refined, such measurements could provide useful information to persons involved in the judicial nomination and confirmation process. Nevertheless, when it comes to a tournament, the devil may be in the details. Although Choi and Gulati believe that even a flawed tournament would be better than the current selection process,¹⁵ a seriously flawed ranking system could

8. *Id.*

9. *Id.* at 313.

10. *Id.* at 322.

11. *See id.* at 312.

12. *Id.* at 313-15.

13. *Id.* at 314-15.

14. *Id.* at 313-14.

15. *Id.* at 304.

create undesirable incentives for judges and could actually make the judicial selection process, and the judiciary itself, more political.

In this Essay, therefore, I wish to discuss some reservations regarding the tournament proposal. These fall under two broad categories: the effect of rankings on the judicial nomination and confirmation process and the effect of rankings on judges' behavior. In addition, I argue that the case for a tournament of judges is stronger for positions in U.S. courts of appeals than on the U.S. Supreme Court. Federal appellate judges often come from the ranks of federal district judges, and a ranking of federal district judges would avoid many of the problems that might be created by ranking appellate judges. In addition, federal district judges are more likely than federal appellate judges to respond to the incentives created by a tournament.

II. EFFECT ON THE SELECTION OF JUDGES

The effect of a ranking system on the judicial nomination and confirmation process depends upon the extent to which the President and Senate take the ranking seriously. If the ranking is perceived as a largely flawed measure of judicial merit, it is unlikely to influence significantly the selection of judges, even if citing alternative measures of merit is prohibited. Opponents of a particular judge's ranking will point out the ranking system's serious defects and may persuasively argue that the ranking should be ignored.

Thus, Choi and Gulati's proposed gag rule on alternative merit arguments makes it even more important that the ranking be well regarded by those persons involved in the nomination and confirmation process. If the ranking is perceived as a very weak measure of merit and the President and Senate are prevented from pointing to other indicators of merit, the selection process might place even less weight on judicial merit than it does currently.

Ultimately, then, the effect of a ranking system may depend upon how accurately the ranking is perceived to measure judicial merit. Of course, any ranking based on objective measures will be imperfect. It is beyond the scope of Choi and Gulati's article to specify exactly which criteria should be included in the ranking and, as important, the weight that each criterion should receive in calculating the ranking. Nevertheless, they discuss several criteria that might be included in the ranking, including a judge's publication rate,¹⁶ the number of citations by other judges and by legal scholars to those decisions,¹⁷ and how often the judge is reversed.¹⁸ However, an analysis

16. *Id.* at 303.

17. *Id.*

18. *Id.* at 307.

of these criteria demonstrates the limitations of any ranking methodology.

As Choi and Gulati note, the fact that a U.S. court of appeals generally decides cases in panels of three judges limits the usefulness of any objective measure of the quality of a particular judge, including the number of opinions the judge publishes.¹⁹ For example, deciding which panel member will write the majority opinion—and whether an opinion should be written or published at all—is a group decision.²⁰ Thus, the number and topics of opinions that a judge publishes and the resulting total number of citations to a judge's opinions are partly determined by the publication preferences of other judges in the circuit.

Intercircuit comparisons of judges are less meaningful than comparisons within a circuit. Each U.S. court of appeals has adopted its own criteria for the publication of opinions, and these criteria may affect the number of opinions judges in that circuit publish.²¹ Intercircuit differences in the number and types of cases filed might also affect the number of cases a particular judge hears or the judge's publication rate.²² The total number of citations to a judge's opinions should also be higher if the judge publishes more opinions. Also, the effects of deciding cases in three-judge panels likely differ across circuits. For example, a judge in a circuit where other judges disfavor frequent publication of opinions may publish less than she would if she were in a circuit where the other judges favor publishing.

The difficulty of intercircuit comparisons is not fatal for a ranking system. For example, a criterion in the ranking could be how many opinions a judge has published, relative to the average number of published opinions by other judges in the same circuit. However, that adjustment would discount the effort of judges in circuits where publication is more favored. Although such issues do not mean that a ranking will not contain valuable information regarding judicial merit, they do suggest that any objective measure of merit will be subject to valid criticisms. Such criticisms would certainly be made by those persons in the judicial selection process who support a judi-

19. *Id.* at 308-09.

20. Usually the panel's presiding judge decides who will write the majority opinion, but this decision is greatly influenced by the wishes of the panel's other judges.

21. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 86-91 (2001).

22. For example, researchers have found that cases involving certain subject matters (such as civil rights and new areas of the law) are more likely to result in published decisions by federal district courts. Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 790-91 (1992); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1156 (1990).

cial nominee with a low ranking or who oppose a nominee with a high ranking.

Unfortunately, even if an objective ranking is constructed that fairly and accurately measures merit, it might not significantly affect the judicial selection process. Most of the ranking criteria that the authors suggest are already easily accessible. For example, the President's or Senators' staffs already can search Westlaw or LEXIS to calculate the number of opinions a judicial nominee has published and the number of citations to those opinions. Indeed, a judge's opinions are already read as part of the selection process. The fact that neither the number of opinions a judge publishes nor the number of citations to those opinions is currently used in the debate over nominees indicates that those involved in judicial selection do not believe these measures are relevant to the selection decision. Thus, we should not be confident that they will pay attention to rankings that are based on such criteria.

More generally, all participants in, and most observers of, the judicial selection process know that politics play a large role. The President rarely nominates candidates outside of his party,²³ and when there is significant disagreement in the Senate about a candidate, the vote splits largely on party lines.²⁴ Also, the vocal interest groups that get involved in the selection process are typically seeking a judge who supports their positions on particular political issues.²⁵ The fact that the President has the opportunity to fill any Supreme Court vacancies that arise has even been a campaign issue in recent presidential elections.

This raises another important limitation of a ranking system. A main purpose of Choi and Gulati's proposal is to encourage honesty and transparency.²⁶ No longer could preferences regarding a judge's political or judicial ideology be hidden behind merit-based arguments. However, the ranking system will not reduce some of the major related problems that they identify.

Choi and Gulati lament the primary role politics plays in the confirmation process and point out the frequent hypocrisy exhibited by those involved in the process. They endorse Erwin Chemerinsky's observation that when it is in a preferred candidate's interest, many participants in the confirmation process switch their own stated posi-

23. Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 624 (2003).

24. For example, two recent controversial nominees to U.S. Courts of Appeals—Texas Supreme Court Justice Priscilla Owen and U.S. District Court Judge Charles Pickering—were rejected by the Senate Judiciary Committee on party-line votes. Helen Dewar, *Senate Panel Rejects Bush Court Nominee*, WASH. POST, Sept. 6, 2002, at A1.

25. *Id.*

26. Choi & Gulati, *supra* note 1, at 312-13.

tions regarding whether a nominee's political views are relevant.²⁷ This inconsistency may contribute to the cynicism that many Americans have about their elected officials and about the judicial selection process.

However, a ranking system will not reduce this problem. Even in its most extreme form—which prohibits other merit-based arguments—their proposal will prevent only disputes about a judge's merit. Participants in the confirmation process will still argue about—and take inconsistent positions regarding—the relevance of a nominee's political views. In addition, there will still be intense debates about whether a judge actually has extreme political views.

Although there might be some increase in transparency by forcing such political debate from behind a “merit” mask, this effect may not be great. Indeed, as the debates surrounding Chief Justice Bird and Judge Bork illustrate, politicians are willing to make explicitly political arguments regarding a judicial nominee. This also suggests little cause for optimism that a ranking system would cause the judicial nomination and confirmation process to take place more rapidly. All the parties involved in confirmation battles likely know they are principally battles about politics, not about merit, even if they are sometimes phrased in merit terminology. Although a ranking system may make these confirmation battles more explicitly about politics, these battles will probably remain as intense and protracted as they are currently.

Ironically, if a ranking system does increase the emphasis that the confirmation process places on a judge's merit, it might have another undesirable effect: it may allow a President to nominate more politically extreme candidates who happen to have high merit rankings. This could lead to an even more protracted and heated confirmation process, as well as a more politically extreme or splintered Supreme Court.

27. *Id.* at 322 n.6. Specifically, Chemerinsky observed that [i]n California, in 1986, conservatives argued that [Chief Justice Rose] Bird, and two other Justices . . . should be rejected because of their liberal views and prior votes, especially in death penalty cases. Liberals in California argued that assuring judicial independence required that evaluation be limited to the justices' competence; that the individual's ideology and prior votes should play no role in the retention process. But the sides were reversed a year later in a battle over the [Judge] Bork confirmation. It was the liberals who argued that Bork should be rejected because of his conservative views and prior votes as a court of appeals judge. Conservatives argued that evaluation should be limited to the nominee's competence—that his ideology and prior votes should play no role in the Senate's confirmation decision.

Chemerinsky, *supra* note 23, at 624.

III. EFFECT ON JUDICIAL BEHAVIOR

In addition to addressing the effect of a judicial ranking system on the judicial selection process, Choi and Gulati raise important issues regarding the effect of a ranking system on judges' behavior. There is substantial recent evidence that federal judges respond to incentives, including the opportunity to be appointed to a higher court.²⁸ Therefore, the judicial incentives created by a ranking system must be considered.

A ranking system that rewards the publishing of opinions may cause some judges to publish more opinions. However, it is probably not desirable for judges to spend their (and their clerks') time writing publishable opinions for legally insignificant cases. Such an incentive problem might be reduced by also including as a criterion the average number of citations to the judge's opinions, because insignificant opinions are unlikely to be cited.²⁹ However, including the average number of citations might encourage judges to use novel reasoning or reach atypical conclusions so as to increase the number of citations to their opinions. Choi and Gulati discount the possibility that judges will react this way. They argue that novel opinions are less likely to be cited by other judges.³⁰ This is likely true in absolute terms; fewer judges are likely to agree with an unusual opinion. However, an opinion that takes a common approach to an issue will have much more competition. Judges can choose to cite either that opinion or, instead, to cite one of many other opinions making the same point. By definition, however, an unusual approach is one that has not been adopted by many courts, and thus a judge wishing to cite to such an opinion will have fewer to choose among. Because fewer such opinions exist, they may be more likely to be cited than an opinion that adopts a widely shared view.

For the same reason, even if no judges respond to a ranking system by publishing more novel opinions, including the number of cita-

28. S. Scott Gaille, *Publishing by United States Court of Appeals Judges: Before and After the Bork Hearings*, 26 J. LEGAL STUD. 371 (1997) (finding that federal appellate judges reduced their publication of books and articles after the confirmation hearings for Judge Bork's Supreme Court nomination focused negatively upon parts of his publications); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1465-70 (1998) (finding that federal district judges with a higher chance of promotion to a U.S. court of appeals were more likely to find the politically popular Federal Sentencing Guidelines constitutional); Ahmed E. Taha, *Publish or Perish? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 15, 22 (2004) (finding that federal district judges with a higher chance of promotion were more likely to publish their opinions regarding the Federal Sentencing Guidelines' constitutionality).

29. Choi and Gulati suggest that using the number of citations as a criterion may be a solution to the similar problem of judges writing numerous low-quality opinions quickly to boost their publication rate. Choi & Gulati, *supra* note 1, at 311-12.

30. *Id.* at 311 n.30.

tions as a criterion might result in creative judges receiving higher merit rankings. Although creative thinking is desirable in many fields, it may not be desirable in the judiciary. In fact, “exceptionably able” judges are viewed suspiciously by their peers, who suspect that such judges have an agenda.³¹ This suspicion may be unwarranted, but novel opinions are not necessarily better opinions. However, a ranking system that rewards frequency of citation may implicitly make that assumption.

Other criteria that likely would be included in the ranking also could create unintended and undesirable incentives. For example, Choi and Gulati suggest as a criterion the percentage of the judge’s decisions that are reversed by the circuit en banc or by the Supreme Court.³² Reversal rate may provide useful information regarding how frequently a judge commits errors. However, using it as a ranking factor also provides an incentive for a judge to make decisions that the majority of the other judges in the circuit and the current majority of the Supreme Court will agree with, rather than what the judge thinks are the correct decisions. In addition, using reversal rate will unfairly disadvantage a judge who has a political or judicial philosophy different from that of the majority of the rest of the circuit and of the Supreme Court.

Choi and Gulati acknowledge this problem and thus suggest giving more weight to reversals by judges with the same political orientation as the judge.³³ For example, a Democratic judge who is reversed by a court with a majority of Democratic judges would have her ranking reduced more than if she were reversed by a court with a majority of Republican judges.³⁴ Although Choi and Gulati do not suggest it, one could imagine a similar adjustment for the number of citations to a judge’s opinions: unfavorable citations of a Democratic judge by other Democratic judges would adversely affect that judge’s ranking more than would unfavorable citations by Republican judges.

However, such adjustments might actually increase the political partisanship of the judiciary. For example, if error is assumed when a judge disagrees with other judges of the same party, then judges will feel pressure to decide cases consistently with how other judges of the same party do. For example, a particular Republican judge may generally make politically conservative decisions, except on criminal procedure cases. A ranking system that penalizes him more for reversals of his decisions by other Republican judges than by De-

31. RICHARD A. POSNER, *OVERCOMING LAW* 110 (1995).

32. Choi & Gulati, *supra* note 1, at 307.

33. *See id.* at 310 n.29.

34. The phrase “Democratic judge” refers to a judge appointed by a Democratic President, and “Republican judge” refers to a judge appointed by a Republican President.

mocratic judges will create an incentive for him to also make politically conservative decisions on criminal procedure cases.

Choi and Gulati recognize the importance of judges' political independence. In fact, they suggest that the rankings should reward judges who rule differently from other judges who were appointed by a President of the same party.³⁵ However, as just noted, this would also be inconsistent with giving more weight to reversals by judges of the same political party. This inconsistency illustrates another difficulty in constructing a valid ranking system: some objective measures of merit are subject to multiple, and even contradictory, interpretations.

Another reason to be concerned by a ranking system is its interjection of competition into an appellate judiciary which relies upon cooperation and collegiality. Competition might undermine collegiality in a circuit. Many federal appellate judges have written about the importance of collegiality among judges on a court.³⁶ As Judge Edwards points out, "In a collegial environment, divergent views are more likely to gain a full airing in the deliberative process—judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached."³⁷

The effect of collegiality can be seen in recent empirical scholarship on U.S. courts of appeals verifying that interaction with colleagues affects judges' decisions. In fact, in some areas of the law, the political orientation of the other two judges on a three-judge panel is at least as good a predictor of a judge's vote as is the judge's own political orientation.³⁸ For example, a Republican judge sitting on a three-judge panel with two Democratic judges is more likely to vote

35. Choi & Gulati, *supra* note 1, at 310.

36. FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 172 (1980) ("[C]ollegiality has much to do with the flavor, quality, and—at their best—the wisdom of appellate opinions . . ."); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1640-41 (2003) ("[C]ollegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions."); Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 456 (2000) ("The product of a collegial court, its opinions, are 'better in substance, style, and tone' than those of a court which expends little effort to harmonize diverse views." (quoting FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 228 (1994) [hereinafter COFFIN, *ON APPEAL*])); Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, in *THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY* 171, 178 (Cynthia Harrison & Russell R. Wheeler eds., 1989) (calling collegiality "all important" to appellate courts).

37. Edwards, *supra* note 36, at 1646.

38. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 317 (2004).

to uphold an affirmative action program than is a Democratic judge sitting on a panel with two Republican judges.³⁹

This collegiality could be undermined if judges respond to the incentives created by a tournament. For example, imagine that Judge *A* is on a three-judge panel with Judges *B* and *C*, and Judge *C* is assigned to write the majority opinion in a noteworthy case that is likely to be cited by other courts. If Judge *A* joins the majority opinion, she will receive no credit in the rankings for citations to that opinion, even if her comments were crucial in shaping Judge *C*'s opinion.⁴⁰ However, if Judge *A* instead writes a concurring or dissenting opinion, then Judge *A* might be cited by other courts and have her ranking increased.

Choi and Gulati argue that because judges hear multiple cases together, such uncooperative behavior will be deterred, because other judges may retaliate by engaging in similar conduct when the uncooperative judge must write the majority opinion. Indeed, the fact that judges on the same court are repeat players with each other may deter some uncooperative behavior. However, this is likely more true in circuits that have relatively few judges. In these smaller circuits, the judges hear cases with the same judges more often than in larger circuits, and thus the effect of repeated interactions should be greater.⁴¹ As Judge Coffin states, "The difference in the collegial atmosphere between sitting with all of one's colleagues each month and sitting with each only once or twice or even three times a year is enormous."⁴²

In addition, repeated interaction cannot be expected to prevent all judges from attempting to manipulate their rankings. Despite the benefits of working together collegially, even under the current system, some courts are more collegial than others. The incentives cre-

39. Sunstein et al., *supra* note 38, at 319; *see also* Revesz, *supra* note 38, at 1719 (finding that in environmental regulation cases before the U.S. Court of Appeals for the D.C. Circuit, "the party affiliation of the other judges on the panel has a greater bearing on a judge's vote than his or her own affiliation"). Note that this also indicates that judges frequently cross party lines, a practice, as argued above, that could be deterred by a rating system.

40. COFFIN, ON APPEAL, *supra* note 36, at 221 (recalling that "on a significant number of occasions [upon receiving a draft opinion from a colleague], responding judges have been able to present a new way of looking at a case, or a hitherto overlooked case authority, or some undervalued fact or procedural point, and . . . a writing judge has gracefully changed course").

41. Because cases in U.S. courts of appeals are generally heard by three-judge panels, a judge is typically sitting with two other judges. Because the composition of these panels rotates, judges in circuits with fewer judges will hear cases with a particular judge more often than if they were both in a circuit with more judges. For example, a judge sitting in a circuit with only six judges would sit on a panel with another particular judge approximately forty percent of the time. In a circuit with twelve judges, a judge would sit with another particular judge only approximately eighteen percent of the time.

42. COFFIN, ON APPEAL, *supra* note 36, at 216.

ated by a ranking system would create additional pressure on collegiality.

Finally, any incentive effects of a ranking system are limited by the fact that few judges have a realistic chance of being appointed to the Supreme Court. For many judges, the chance of nomination is so remote that it will not affect their behavior.⁴³ However, Choi and Gulati point out that a ranking system might still provide positive incentives for those judges as well. They argue that those judges may be motivated to compete on these criteria simply out of concern that their ranking might affect their reputation.⁴⁴

Most judges care about their reputation, “both with other judges, especially ones on the same court . . . [,] and with the legal profession at large.”⁴⁵ However, this concern may not translate into judges being motivated by a ranking system, especially if judges and the broader legal profession do not believe that the ranking is an accurate measure of a judge’s quality.

Currently, a judge’s reputation is primarily based upon the impressions of those who work with the judge, litigate in front of the judge, or read the judge’s opinions.⁴⁶ One must question whether these impressions of a judge’s quality would be significantly altered by an imperfect ranking system. This is particularly true if, when the rankings are made public, some highly regarded judges have lower rankings than lesser-regarded judges.

Choi and Gulati respond that, nevertheless, a ranking might motivate judges because law students who are potential law clerks may prefer to work for a higher-ranked judge.⁴⁷ Law students generally lack familiarity with particular judges and thus are more likely than others to be influenced by the rankings. To secure the most desirable law clerks, a judge might be motivated to take actions that increase his ranking.

This raises the possibility that a ranking will become influential not because it is accurate but because it is the only information available to uninformed law students. We have seen this phenome-

43. POSNER, *supra* note 31, at 111. Choi and Gulati note that the high value of the tournament’s prize—a spot on the Supreme Court—may still motivate some judges who have only a small chance of winning. Choi & Gulati, *supra* note 1, at 314-15. This may be true of some judges; however, many other judges in the middle of the rankings and below will be aware that they do not have any realistic chance of winning the tournament and thus likely will not be affected by the tournament.

44. Choi & Gulati, *supra* note 1, at 313-14.

45. POSNER, *supra* note 31, at 119.

46. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629 (2000).

47. Choi & Gulati, *supra* note 1, at 314.

non before: despite being heavily criticized as being inaccurate,⁴⁸ the annual *U.S. News and World Report* law school rankings are important.⁴⁹ Their importance results largely from the great attention they are given by prospective law students, who have little other basis for comparing law schools. These rankings lead some schools to take actions to unfairly manipulate their rankings.⁵⁰ We should be reluctant to create a similar situation in the federal judiciary.

IV. A TOURNAMENT OF U.S. DISTRICT COURT JUDGES?

For many of the reasons discussed above, a stronger case exists for a tournament for positions on U.S. courts of appeals than for a tournament for positions on the U.S. Supreme Court. U.S. court of appeals judges often come from the ranks of U.S. district court judges, and a tournament of U.S. district court judges would lack many of the problems of a tournament of U.S. court of appeals judges. In addition, federal district judges should be more likely than U.S. court of appeals judges to respond to the incentives created by a tournament.

Many of the problems of measuring merit are less likely to affect a tournament of U.S. district court judges. Because federal district judges generally make decisions alone,⁵¹ their opinions are less likely to be affected by the preferences of their colleagues. In addition, they have almost complete discretion over choices such as whether to publish an opinion in a particular case.⁵² Thus quantitative measures of judicial performance will be measures only of a particular judge's behavior rather than also of the influence of other judges on a panel.

Also, unlike U.S. courts of appeals, the U.S. Supreme Court has almost complete control over its own docket. Thus, Supreme Court decisions are more likely to reflect policy judgments than are the decisions of courts of appeals. This means that reversals of federal dis-

48. A critical study of the ranking was commissioned by the Association of American Law Schools (AALS). See Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, ASSOCIATION OF AMERICAN LAW SCHOOLS, at <http://www.aals.org/validity.html> (Feb. 18, 1998).

49. Julia E. Vaughan, *Addressing Law Student Dishonesty: The View of One Bar Admissions Official*, 45 S. TEX. L. REV. 1009, 1012 (2004) (“[A] hyper-competitive environment exists both for the aspiring law student and for law schools aspiring to improve their overall [U.S. News law school] ranking . . .” (footnote omitted)).

50. For example, some schools have allegedly temporarily hired recent graduates to inflate the percentage of graduates who are employed, which is one component of the ranking. For other examples of how some law schools have attempted to manipulate their *U.S. News* rankings, see Dale Whitman, *Doing the Right Thing*, NEWSLETTER (Ass'n Am. Law Sch., Washington, D.C.), Apr. 2002, at 1, 1-4.

51. U.S. district courts occasionally hear cases in three-judge panels. See 28 U.S.C. § 2284 (2000). In addition, on rare occasions, U.S. district courts have sat en banc to decide a case. See, e.g., *United States v. Bogle*, 689 F. Supp. 1121 (S.D. Fla. 1988).

52. Taha, *supra* note 28, at 4.

district courts are less likely to reflect political disagreements than are reversals of federal appellate courts. Thus, the rate at which a judge is reversed would be a better—though still imperfect—measure of the merit of federal district judges than of federal appellate judges.

In addition, although collegiality can affect the operation of U.S. district courts,⁵³ it is more important at the appellate level; U.S. district judges generally decide cases alone. Thus, concerns about the possible adverse effects of a tournament on collegiality are less important for U.S. district courts.

Finally, a federal district judge's chance of promotion to a U.S. court of appeals is much higher than a federal appellate judge's chance of promotion to the U.S. Supreme Court. There are 167 authorized judgeships in the twelve geographic circuits and only nine Supreme Court Justices, a ratio of almost 19 to 1. However, there are 676 authorized U.S. district court judgeships, which means that there are only about four district court judgeships for every U.S. court of appeals judgeship.⁵⁴ This lower ratio means that federal district judges have a more realistic chance of promotion to a U.S. court of appeals than do federal appellate judges to the U.S. Supreme Court. Thus they would be more likely to respond to the incentives created by a ranking system.⁵⁵

V. CONCLUSION

Although the Supreme Court Justices should not be chosen by a tournament of judges, Choi and Gulati may have started a valuable process. Their proposal has focused attention on defining the characteristics of a good judge and on how to measure those characteristics. Although objective measures of merit will always be limited and imperfect, I share Choi and Gulati's optimism that even flawed measures of merit will encourage the development of better measures. As these measures improve, they may provide valuable information to the judicial selection process. One can envision these measures eventually supplementing, though not replacing, the subjective ratings given to judicial nominees by the American Bar Association's Standing Committee on the Federal Judiciary.⁵⁶ The development of a well-

53. Ahmed E. Taha, *How Panels Affect Judges: Evidence from U.S. District Courts*, 39 U. RICH. L. REV. (forthcoming 2005).

54. Because federal district judges are typically promoted to the U.S. court of appeals that covers the district they are in and court of appeals judgeships are normally reserved for a judge from a particular state, the true ratio facing a particular district judge will differ. Sisk et al., *supra* note 28, at 1424.

55. Of course, if U.S. court of appeals judges value a position on the U.S. Supreme Court more than federal district judges value a position on a U.S. court of appeals, then the effect of this higher probability of winning the tournament will be at least partially offset.

56. The ABA evaluates a judicial nominee's integrity, professional competence, and judicial temperament by reading the nominee's legal writings, conducting exten-

regarded, objective ranking system might pressure Presidents to explain why they nominated low-ranked candidates and pressure Senators to explain why they oppose highly ranked candidates. As a result, the judicial nomination and confirmation process might eventually put more emphasis on nonpolitical factors.

sive interviews of persons who know the nominee, and considering comments that it receives from others. AM. BAR ASS'N, THE ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 5-7, 9-10 (2005), *available at* [http://www.abanet.org/scfedjud/Federal_Judiciary%20\(2\).pdf](http://www.abanet.org/scfedjud/Federal_Judiciary%20(2).pdf). Although they are subjective, the ABA's ratings of judicial nominees "are seen by most observers as a rough measure of how leading members of the bar and bench view the candidates for judicial positions." Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 245 (2001).