2008

The Utility of Opacity in Judicial Selection

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THE UTILITY OF OPACITY IN JUDICIAL SELECTION†

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INTRODUCTION

Does too much transparency in the selection of judges undermine the independence of the judiciary? This Article seeks to provide insight into answering this question by focusing on the opaque process by which federal bankruptcy judges are selected. Part I begins with an account that anchors the concepts of judicial independence and judicial accountability to the concept of judicial quality. It proceeds to situate within this account the selection process, suggesting that the process can serve as a form of judicial accountability, albeit one that diminishes judicial quality in those instances where the process becomes politicized. A brief discussion follows regarding the concept of transparency in the context of the selection process, with emphasis on the distinction between transparency of the process itself and transparency of the judicial candidates. I then explain how process transparency may reduce the utility of a candidate transparency requirement and thus undermine judicial quality. Part II suggests that moving to an opaque process may solve this problem and uses the selection of bankruptcy judges as an example. The Article concludes that process opacity may prevent candidate transparency from being co-opted for political ends, thus improving judicial quality. Although the scope of the Article is limited to discussing appointment systems, rather than election systems, my hope is that it will shed new light on proposed selection reforms in both systems by prompting others to consider the utility of opacity in judicial selection.

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† This Article is an elaboration on remarks given by Professor Rafael I. Pardo at the 2008 Symposium of the *New York University Annual Survey of American Law* (March 11, 2008). The Symposium was entitled *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?* Professor Pardo spoke on the panel entitled "Transparency and the Selection of Judges."

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I.
THE JUDICIAL QUALITY FUNCTION

Judicial independence envisions that judges will be unconstrained, either by popular will or by other branches of government, when interpreting the law and deciding cases.[1] Judicial independence does not mean, however, that judges have license to abuse their power with impunity. For this reason, judicial accountability serves as an external control on judges when they improperly carry out their judicial and administrative duties.[2] The implementation of independence and accountability mechanisms, and the manner in which they are balanced relative to one another, will ultimately produce a certain level of judicial quality.[3] One might therefore conceive of judicial quality as a function of judicial independence and judicial accountability (the "judicial quality function"). Producing the optimal level of judicial quality is a context-sensitive task that "depends upon the goals of those responsible for institutional architecture with respect to a particular court or court system."[4] Thus, when asking what changes in the transparency requirements of a selection process ought to occur, it is essential that

1. *See* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 592–93 (2005); *cf.* THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. . . . [I]n a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.").

2. *See* Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 912 (2007); *see also* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 88 (2006) ("If judicial independence had been an unqualified value or purpose of Article III, the Constitution could simply have given judges an absolute life tenure, unconstrained by any good-behavior condition—or even, for that matter, the possibility of impeachment. The Framers did not do that, obviously, because the value of judicial independence was qualified by, and was to an extent in conflict with, the need to ensure that judges behaved responsibly and to hold accountable judges who fell short of that requirement.").

3. *See* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431–32 (2004). I take the view that the "excellences of intellect and will that are required for good judging," such as judicial intelligence, civic courage, temperance, and judicial temperament, Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 675 (2005), are factors that predispose an individual to be independent minded and thus fall under the umbrella of the independence variable in the judicial quality function.

4. Burbank, *supra* note 2, at 912.

one establish a nexus between the recommended changes and the institutional goals that they will serve.[5] With this in mind, the discussion shifts to explain how judicial selection relates to the judicial quality function.

Simply put, judicial selection may at times serve as an accountability mechanism,[6] thereby affecting the output of the judicial quality function. To flesh out this idea, consider the distinction between *ex ante* and *ex post* accountability mechanisms. One example of an *ex ante* accountability mechanism is a confirmation hearing where judicial candidates articulate their views on a variety of issues, such as approaches to judging, the role of courts, and the state of the law.[7] The idea here is that the selecting group will seek a precommitment from the candidate regarding the manner in which he or she would carry out the duties of office (both judicial and administrative). If the selecting group places a great deal of emphasis on the candidate's answers as a selection qualification, and if the group is particularly adept at identifying candidates who will adhere postselection to what they have said during the selection process, then the process will function as an accountability mechanism prior to the judge taking office. This approach has been referred to as "the prejudging of judges," an approach that may diminish the need for postselection accountability.[8] An *ex post* accountability mechanism, on the other hand, focuses on holding

5. *See* Resnik, *supra* note 1, at 589 ("[W]hen claims for change in selection methods are made, one needs to focus on what kinds of problems are prompting calls for change. . . . Revisions in procedures need to be driven by specific problems and provided through tailored solutions.").

6. *See* Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2172 (2006) ("It is also possible, however, to use the judicial selection process as a substitute for holding judges directly accountable.").

7. For a discussion regarding the role that the ideology of judicial candidates ought to play in the selection process, see, for example, Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619 (2003); Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005); Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463 (2005); Solum, *supra* note 3, at 663–73.

8. *See* Nash, *supra* note 6, at 2173 ("[T]he prejudging of judges is a way to hold judges accountable a priori. In other words, prejudging a judge obviates to some extent the need to be able effectively to judge the judge during his or her tenure on the bench."). A recent empirical study of the confirmation hearings of Supreme Court nominees, however, casts some doubts on whether nominees can be prejudged effectively. *See* Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 159 (2007) (concluding that the study's findings "offer little support for the common senatorial practice (or desire) of trying to predict judicial behavior by asking questions about judicial philosophy or interpretive methodology").

judges accountable for their behavior after they have ascended to the bench. Such mechanisms include discipline (e.g., censure, reprimand, suspension),[9] removal,[10] and reappointment.[11] In setting the accountability variable in the judicial quality function to its desired level, the option exists to choose between some mix of *ex ante* and *ex post* accountability mechanisms. Properly implemented, such mechanisms will have the effect of improving judicial quality.[12]

Determining the emphasis that ought to be placed on an *ex ante* accountability mechanism would seem to turn on the structural mechanisms for judicial independence that inhere in the office that the candidate seeks—perhaps none more important than the term of office. As an appointment term becomes longer, the opportunities for holding a judge accountable for performance that is suboptimal, but that does not warrant discipline or removal, become less frequent.[13] Thus, the more structural independence a

9. *See* 28 U.S.C. § 354(a)(2)(A) (2000). For a recent report on the disciplining of federal judges, see STEPHEN BREYER ET AL., THE JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 (2006), *reprinted in* 239 F.R.D. 116 (2006), *and available at* http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf.

10. This postselection mechanism has rarely been used with respect to federal judges with life tenure. *See infra* note 15. The same appears to be true for federal bankruptcy judges. *See* Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 B.C. L. REV. 105, 107 (2005) (listing reasons for departure from the bench for the 115 bankruptcy judges who did so in the decade prior to 2005, but not mentioning removal as one of those reasons).

11. Reappointment, of course, only applies to judges without life tenure who serve limited terms, such as federal bankruptcy judges and magistrate judges. *See* 28 U.S.C. § 152(a)(1) (Supp. V 2005) (providing that bankruptcy judges are appointed for terms of fourteen years); *id.* § 631(e) (2000) (providing that full-time magistrate judges are appointed for a term of eight years). This postselection mechanism has rarely been used with bankruptcy judges. *See* Mabey, *supra* note 10, at 107 (noting that of the 115 bankruptcy judges who left the bench in the decade prior to 2005, only ten did so as a result of not being reappointed).

12. In this regard, consider Alexander Hamilton's views on the Senate confirmation process (i.e., an *ex ante* accountability mechanism):

> To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, *and would tend greatly to prevent the appointment of unfit characters* from State prejudice, from family connection, from personal attachment, or from a view to popularity.

THE FEDERALIST No. 76 (Alexander Hamilton), *supra* note 1, at 457 (emphasis added).

13. For example, the opportunity to hold federal magistrate judges accountable arises more frequently than for federal bankruptcy judges since the former serve eight-year terms and the latter serve fourteen-year terms. 28 U.S.C. § 152(a)(1) (Supp. V 2005); *id.* § 631(e) (2000).

judge's term of office provides, the more important it becomes for an *ex ante* accountability mechanism to play a role in the judicial quality function. When considering the most robust form of independence regarding term of office—the case of life tenure—it perhaps becomes imperative that judicial candidates be asked a range of questions about the manner in which they expect to carry out their duties.[14] For such judges, absent the implementation of an *ex ante* accountability mechanism, only the *ex post* accountability mechanism of impeachment remains—a mechanism that has been infrequently used.[15]

Implementing an *ex ante* accountability mechanism, however, potentially comes at a cost. Although structural mechanisms may be in place to safeguard the independence of judges in interpreting the law, the possibility exists that those mechanisms may be compromised, and thus fail to achieve their intended purpose, if the selection process becomes politicized.[16] In such a case, judicial candidates are likely to be drawn from a group of individuals whose

14. *See* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 55 (1994) ("And given the awesome constitutional authority that our Supreme Court wields, the notion of a wild card, a Justice whose philosophy and therefore whose votes cannot easily be predicted, is frightening. We the people grant the judicial commission for life, after all; the least those who seek it can do is tell us how they plan to exercise it."); Chemerinsky, *supra* note 7, at 628 ("[T]he judicial selection process is the key majoritarian check on an antimajoritarian institution. Once confirmed, federal judges have life tenure. A crucial democratic check is the process of determining who will hold these appointments."); Nash, *supra* note 6, at 2173 ("It is more important to prejudge appointed judges who will enjoy life tenure than elected judges who, if they do not perform as the electorate would like, can be put out of office in a future election."); Resnik, *supra* note 1, at 631 ("Life tenure is a rare event in any democracy, and those selected and confirmed to serve must, therefore, be individuals in whom confidence is shared. . . . [G]iven how few judges are impeached, the only moment for popular input is at the time of selection.").

15. Of the thirteen federal judges impeached since 1789, only seven suffered removal from office. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 336 & n.14 (1993). For the argument that federal judges may be removed from office by means other than impeachment, see, for example, Prakash & Smith, *supra* note 2, at 128–35. *But see, e.g.*, James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1230 (2007) (arguing that impeachment constitutes exclusive means by which federal judges may be removed from office).

16. *See* CARTER, *supra* note 14, at 114–15 ("[T]o wrap the armor of countermajoritarian independence around individuals selected on the basis of predictions about how they will vote represents the enshrinement, through life tenure, of the popular political judgments of particular eras about the proper scope of constitutional protections—a peculiar fealty to pay to the notion of a written Constitution. Interpretation of a written Constitution should reflect a dispassionate search for

values and thinking reflect those of the dominant political group.[17] Such candidates, if selected, may feel compelled to exercise their judicial function in a manner that comports with the ideology of their political patrons.[18] This will produce an ideological judiciary, rather than an independent judiciary,[19] with the concomitant effect of reducing judicial quality.[20] Given that the federal appointments process has become increasingly politicized,[21] one might conclude that the use of an *ex ante* accountability mechanism under such cir-

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fundamental principles (whatever their source) that transcend the most deeply felt popular passions of a given political moment.").

17. *Cf.* Nash, *supra* note 6, at 2172 ("[T]he hurdle of 'prejudging' may encourage . . . some people to seek, and discourage others from seeking, judicial office, whether elected or appointed.").

18. *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1678 (2003) ("[I]f an appointee joins the court feeling committed to the political party that ensured the appointment, the judge's instinct may be to vote in a block with other perceived conservatives or liberals."); *cf.* Nash, *supra* note 6, at 2173 ("Judges who have been prejudged may feel some obligation to see that their performance on the bench is consistent with the statements they made during the confirmation process or election campaign, or that their performance on the bench is consistent with some overarching judicial philosophy to which they indicated allegiance during the confirmation process or election campaign."). *But see* Chemerinsky, *supra* note 7, at 630–31.

19. *See* CARTER, *supra* note 14, at 85–88; Nash, *supra* note 6, at 2174 (noting that judges who have been prejudged are "more likely to be less independent and, indeed, more biased").

20. *Cf.* Nash, *supra* note 6, at 2173 ("The increased judicial accountability that prejudging judges offers is offset by decreases in judicial independence."). *But cf.* Johnsen, *supra* note 7, at 475 ("[T]he thrust of Senate questioning in past confirmation hearings has not come close to threatening judicial independence, in part because the nominees themselves frequently cite judicial independence concerns as a basis for declining to answer questions, and in part because the hearings are open and subject to public review.").

21. *See, e.g.*, Charles R. Shipan, *Partisanship, Ideology, and Senate Voting on Supreme Court Nominees*, 5 J. EMPIRICAL LEGAL STUD. 55 (2008) (demonstrating through statistical modeling that the Supreme Court confirmation process has become increasingly partisan over time); David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (reviewing CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS (2007)) ("For a variety of structural, external, and judicial reasons, however, the politics of federal judicial appointments have fundamentally changed in the last eighty years, especially since the 1980s. Today, for the Supreme Court and United States circuit courts of appeals, the appointments process is high-stakes, explosively partisan, and often nasty." (footnote omitted)); *see also* Solum, *supra* note 3, at 661 (noting that "[r]ecent events [in the federal appointments process], particularly the filibuster of several judicial nominees and the use of recess appointment power to circumvent the filibusters, may constitute a downward spiral of politicization"). For an account explaining the reasons for the increased focus on the ideology of recent federal judicial nominees, see NANCY

cumstances would be undesirable. But dispensing with such a mechanism may be tantamount to throwing out the baby with the bathwater. For example, the information gleaned from an *ex ante* accountability mechanism can be used to identify candidates who ought to be disqualified on the basis that they lack the essential qualities of a good judge.[22] Thus, the issue becomes one of finding a way to implement an *ex ante* accountability mechanism in a politicized selection process without undermining judicial quality.

All of this raises the question of the degree of transparency that ought to inhere in the judicial selection process. Here, a crucial distinction needs to be made between the transparency of the selection process itself and the transparency of the judicial candidates. First, we might ask the extent to which the decision-making process of the selecting group should be visible to judicial candidates and the public ("process transparency"). Second, we might ask the extent to which a candidate's views should be made visible ("candidate transparency") and to whom. In determining whether to make a judicial selection process require candidate transparency, it is important to note that process transparency and candidate transparency need not operate in concert. One could have an opaque selection process that demands candidate transparency.[23] Conversely, one could have a transparent selection process that does not demand candidate transparency. In this latter vein, the Senate Judiciary Committee generally did not question Supreme

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SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005); Chemerinsky, *supra* note 7, at 626.

22. *See* Solum, *supra* note 3, at 674–75 ("[N]o sensible normative account of judicial selection provides good reasons to reject the normative implications of the thin theory of judicial vice. No one wants stupid, foolish, corrupt, cowardly, or hot-tempered judges.").

23. Here, the opaque process by which the President has selected judicial nominees comes to mind. *See* Stras & Scott, *supra* note 21, at 1896 ("Most academic research focuses on the confirmation stage of the judicial appointments process—the factors that influence the Senate's consideration of judicial nominees. The dearth of research on the selection side is due in no small part to the tiny group of close advisors that are privy to the selection methodologies employed by Presidents." (footnote omitted)).

It seems safe to assume that the President does implement a candidate transparency requirement when screening potential nominees. *See, e.g.*, Gerhardt, *supra* note 7, at 355 ("[W]e strongly suspect, based on leaks and outcomes that President [George W.] Bush is considering different sets of judicial nominees than President Clinton did. The differences in these nominees go beyond mere party affiliations or allegiances; they reflect differences in experience, political commitments and service, and attitudes about how to decide constitutional cases.").

Court nominees in the early twentieth century.[24] Ultimately, one needs to recognize that process transparency may facilitate holding an appointing body accountable,[25] and that the degree of process transparency may in turn influence the degree to which we ought to require candidate transparency in the selection process.

The distinction between process transparency and candidate transparency gives us better purchase on answering the question of how to implement candidate transparency without reducing judicial quality. Perhaps this can be accomplished by abandoning process transparency.[26] Although transparency is generally viewed as a positive quality that improves the manner in which processes function,[27] the politicization of the appointment process arguably has resulted because of transparency. As judicial appointment has become an increasingly high-stakes political game witnessed by the nation, appointing politicians may increasingly feel the need to satisfy constituencies who either are responsible for or will facilitate their re-election.[28] In this regard, appointing politicians become less in-

24. *See* EISGRUBER, *supra* note 21, at 2; Resnik, *supra* note 1, at 623; CARTER, *supra* note 14, at 65 (observing that, "[t]he notion that the nominee must appear and answer hard questions about difficult precedents was an invention of segregationists in their political effort to undo *Brown v. Board of Education*").

25. *See* SCHERER, *supra* note 21, at 7 ("Interview testimony from key political activists involved in confirmation politics reveals that they uniformly express the need to know which senators from their affiliated parties stand by them and which are willing to compromise ideological values—information that they will later use to mobilize voters behind the politician in the next election, to mobilize voters against the politician, or perhaps not to mobilize voters at all."); Resnik, *supra* note 1, at 590 (discussing the accountability of appointing politicians and noting the possibility that "the issue of a politician's vote on a particular judge [may have] sufficient saliency to result in defeating that politician").

26. Another possibility would be to move to a character-based approach to judicial selection that relegates consideration of the candidate's ideology to a minor role. *See* Solum, *supra* note 3, at 673–78. Although not formally circumscribing candidate transparency, it seems that this would be the substantive effect of such a move—both because the selecting body would question the candidate less about matters relating to ideology, and because the candidate would not feel compelled to answer such questions in detail due to the new norm.

27. *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 894 (2006) ("As a general matter, proponents make two claims on behalf of transparency: first, a government that is more transparent is therefore more democratic; and second, a government that is more transparent will operate in a more effective and efficient manner, and will thereby better serve its citizens . . . .").

28. *See* CARTER, *supra* note 14, at 20 ("But a confirmation fight, like a nomination decision, is an opportunity for our elected representatives to signal us, the voters, on their own ideological bona fides. And presumably, since we are the ones who elect them, this is precisely what we want them to do."); SCHERER, *supra* note 21, at 11–27 (proposing a theory of elite mobilization pursuant to which politicians

dependent in deciding who is an appropriate candidate to be appointed to the bench.[29] This loss of independence distorts the decision-making process and may end up compromising judicial quality by creating an ideological judiciary.[30]

The independence of appointing politicians might be restored by making the selection process itself more opaque insofar as the questioning of judicial candidates is concerned. Uninhibited by constituency pressures, politicians could have a free and frank discussion with candidates, the contents of which would remain undisclosed to individuals outside of the appointing body.[31] I readily

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utilize lower federal court appointment process to "score points" with elite constituents); Chemerinsky, *supra* note 7, at 626 ("Democratic voters want Democratic Senators to block conservative nominees and Republican voters want Republican Senators to block liberal nominees. This creates a political incentive for Senators to do so, and means that they certainly do not risk alienating their core constituency by using ideology in evaluating judicial nominees."); Gerhardt, *supra* note 7, at 373 ("Some senators might choose contests over some judicial nominations because they believe the conflicts can improve their standing with important constituencies or can underscore their own political commitments."); Resnik, *supra* note 1, at 622–23 ("[A]s the process for selection has evolved, with its inclusion of a public inquiry by the Senate, judicial appointments are frequently used as a means to speak to various constituencies."); Stras & Scott, *supra* note 21, at 1888–89 ("[S]tructural and external factors, in addition to judicial factors, have driven a fundamental transformation of the judicial appointments process over the last eighty years. Structurally, the Seventeenth Amendment and the advent of roll-call votes and public hearings on judicial nominations have made Senators directly accountable to their constituents for every vote on Supreme Court nominees. In addition, external pressure from interest groups and the media has increased the visibility and the political consequences of those votes. Senators are under considerable pressure to cast a vote consistent with their own 'policy brand' because interest groups and constituents pay close attention to votes on judicial nominations. The combined effect of these changes has been intense political pressure on Senators to deliver, or to block, Justices with particular ideological views." (footnotes omitted)).

29. *See, e.g.*, Kate Zernike & Jeff Zeleny, *Obama in Senate: Star Power, Minor Role*, N.Y. TIMES, Mar. 9, 2008, at A1 (reporting that Senator Barack Obama "wanted to vote to confirm John G. Roberts Jr. for the Supreme Court, for example—he thought the president deserved latitude when it came to appointments—but [Obama's chief of staff] advised against it, pointing out that Mr. Obama would be reminded of the vote every time the court made a conservative ruling that he found objectionable").

30. *Cf.* Johnsen, *supra* note 7, at 475–76 ("[W]ith the stakes so high, strong incentives exist against consistency, clarity, and nonpartisanship, including incentives for Presidents, Senators, and others (such as advocacy groups) involved in the appointments process to sacrifice principled and open debate in favor of arguments likely to maximize the number of desired appointments.").

31. I offer this proposed reform for improving the judicial selection process with the hope that it adequately responds to the clarion call sounded by Professor Johnsen. *See id.* at 476 ("The possibilities for eventual improvement, though,

acknowledge that such a reform may not have the desired effect—that is, notwithstanding the implementation of a veil between the public and the appointing body, the process would remain politicized and still yield an ideological judiciary.[32] If this were the case, then such a reform ought not be implemented. Rather, that politicization should be openly acknowledged and not hidden from the public.[33] I am cautiously optimistic, however, that opacity would foster a better environment for implementing a candidate transparency requirement, and that this would produce more independent-minded jurists. I base my optimism on the success of the opaque process for appointing bankruptcy judges, which I will now discuss.

II.
PROCESS OPACITY IN THE SELECTION OF BANKRUPTCY JUDGES

In using the case of bankruptcy judges as an example by which an opaque selection process may improve judicial quality, some may be inclined to dismiss this example as inapt on the basis that bankruptcy is a hypertechnical, code-based, number-crunching field of law where ideology has no role to play.[34] This critique echoes the

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would be enhanced to the extent that participants in this debate seek ways to encourage and reward candor and principle on the part of those entrusted with the power to nominate and appoint judges."). There are, of course, other contexts where the opacity of a process is considered to facilitate the candor of its participants and thus improve substantive results—for example, the internal deliberations of courts, juries, and administrative agencies. One of the most significant historical examples of process opacity is the decision by the Founders to conduct their deliberations privately during the Constitutional Convention based on the view that such a rule would be necessary for a successful Convention. *See* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 135–39 (1928).

32. *Cf.* Charles E. Schumer, Op-Ed., *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19 ("The not-so-dirty little secret of the Senate is that we do consider ideology, but privately.").

33. *See* Nash, *supra* note 6, at 2206; Solum, *supra* note 3, at 664 & n.15.

34. *See* David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1072 (2008) (reviewing JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007) and BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006)) ("If the federal courts decided issues solely of technical federal law, such as tax, bankruptcy, and even federal-preemption cases, the judicial appointments process would hardly be controversial except in extreme and rare cases."); *cf.* Chemerinsky, *supra* note 7, at 627–28 (noting both that at the Supreme Court level, "[d]ecisions in statutory cases . . . are a result of the ideology of the Justices," and that ideology plays an equally robust role in the lower federal courts). *But see* Nancy Staudt et al., *The Ideological Component of Judg-*

view of legal historian Charles Warren, who observed in 1935 in his history about bankruptcy in the United States that "[t]he law of bankruptcy is a dry and discouraging topic."[35] This, however, is an inaccurate characterization. Bankruptcy is at its essence about forgiveness of debt, and the questions of who ought to be afforded such relief and what the scope of that relief ought to be are questions that evoke visceral reactions fueled by particularized views on the ethic of personal responsibility. To confirm this, one need look no further than the most recent round of bankruptcy reform undertaken by Congress, which culminated in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[36] The legislation focused a great deal on restricting the scope of relief available to consumer debtors and sought to accomplish this, in part, by stripping bankruptcy judges of their discretion to act as gatekeepers of the bankruptcy system.[37] When one considers the members of Congress who cast votes on the bill, support for and opposition against the legislation occurred mostly along party lines. All congressional Republicans voted for it, and sixty-two percent of congressional Democrats voted against it.[38] This example illustrates

ing in the Taxation Context, 84 WASH. U. L. REV. 1797, 1799 (2006) ("Lawmaking in the context of taxation, bankruptcy, securities, antitrust, and corporate law, to name just a few examples, is highly political in both the legislative and executive branches, as many empirical scholars have documented. For this reason, we seriously question the claim that judges are unique in that they have no political or ideological preferences when it comes to business and finance."). A recent empirical study of U.S. Supreme Court tax cases—implementing coding protocols for case outcomes adopted by prior researchers in the study of judicial decision making—found a statistically significant association between the political preferences of the Justices and the outcomes of corporate tax cases. *See* Staudt et al., *supra*, at 1815–21. While no such association was found in individual tax cases or in the aggregate of all cases (i.e., both individual and corporate), the study's authors surmised that the effects of systematic errors in the coding protocols were concentrated in the individual tax cases, thereby accounting for the nonassociation. *See id.* If the authors are correct that their "simple models suggest we should reject the null hypothesis that politics plays no role in judicial decision making that involves business and finance," *id.* at 1820, then a reassessment is warranted by those who would characterize bankruptcy law as nonideological.

35. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 3 (Beard Books 1999) (1935).

36. Pub. L. No. 109-8, 119 Stat. 23. For a comprehensive account of the BAPCPA's legislative history, see Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

37. *See* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471 (2007).

38. *See* Final Vote Results for Roll Call 108, http://clerk.house.gov/evs/2005/roll108.xml (last visited July 9, 2008) (House of Representatives vote on S. 256, 109th Cong. (2005)); U.S. Senate Roll Call Votes 109th Congress—1st Session,

how the scope of substantive relief in bankruptcy and the role of judges within the bankruptcy system are partisan issues.[39]

Notwithstanding that the law routinely calls upon the bankruptcy bench to resolve ideologically charged issues, a general perception exists that bankruptcy judges are nonideological.[40] Unfortunately, very little research exists that has empirically examined whether decisionmaking by bankruptcy judges can be characterized as ideological.[41] The research that does exist on the subject provides limited and mixed evidence that prevents a definitive conclusion from being drawn either way.[42] The views ex-

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http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_1.htm (follow "Vote 00044" hyperlink) (last visited July 9, 2008) (Senate vote on S. 256, 109th Cong. (2005)). For a discussion of the role that ideology played in BAPCPA's legislative process, see A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1885–1900 (2006).

39. *See* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 16 (2001) ("Partisan politics have also figured prominently in bankruptcy history. Much of creditors' influence has been in the Republican party, whereas most pro-debtor lawmakers have been Democrats. The political divide was especially pronounced in the nineteenth century, but the interaction of the three principal forces in U.S. bankruptcy law and the two political parties continues to be an important theme, even today."). While the example discussed is from the consumer bankruptcy context, it should be noted that ideology also has played a role in the business bankruptcy context. *See, e.g.*, Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129 (2005); *cf.* David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1378 (1998) ("Ideology may also have played an indirect role in the 1978 Code. Recall that two sometimes clashing ideological threads tend to come together in bankruptcy—a general antipathy toward large businesses and the desire to give failed businesses a second chance. By the 1970s, the former concern played little role . . . . Congress was thus less troubled by the elimination of SEC oversight than it might otherwise have been, and the general background sentiment favoring reorganization of troubled businesses counseled for the more flexible reorganization provisions that eventually passed."). For further evidence that ideology plays a role in voting on bankruptcy legislation, see Stephen Nunez & Howard Rosenthal, *Bankruptcy "Reform" in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. ECON. & ORG. 527 (2004).

40. *See infra* note 61.

41. *See* Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401, 423 (2006) ("We know little about patterns of judicial behavior in the bankruptcy context. Although a variety of projects in the bankruptcy field have focused on judicial decision-making in particular doctrinal contexts, just a few have focused on the perceptions, behaviors, and motivations of bankruptcy judges.").

42. One empirical study of the role of bankruptcy judges in case administration found that, for a limited sample of judges (i.e., thirty-one judges), the political party of the judge was not predictive of how the judge managed his or her caseload, even when controlling for either (1) age and experience or (2) age and gender. *See* Stacy Kleiner Humphries & Robert L. R. Munden, *Painting a Self-Por-*

pressed by other bankruptcy scholars, however, suggest that the bankruptcy bench is unlikely to be ideological.[43]

On the assumption that bankruptcy judges routinely engage in neutral decisionmaking, even though faced with a subject that lends itself to ideological bent, I contend that an opaque appointment process produces this type of jurist. By way of example, consider the regulations for the appointment of bankruptcy judges in the Ninth Circuit,[44] which accounts for slightly more than one-fifth of the bankruptcy judgeships that have been permanently author-

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trait: A Look at the Composition and Style of the Bankruptcy Bench, 14 BANKR. DEV. J. 73, 101 & n.70, 103–04 (1997). On the other hand, another survey study of bankruptcy judges found some evidence suggesting a relationship between political party affiliation and *hypothetical* case outcomes. *See* Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1257–58 (2006).

43. Professor A. Mechele Dickerson has theorized that docket management more likely motivates bankruptcy judges than does a desire to impose ideological preferences. *See* A. Mechele Dickerson, *Approving Employee Retention and Severance Programs: Judicial Discretion Run Amuck?*, 11 AM. BANKR. INST. L. REV. 93, 105 (2003); *see also* Humphries & Munden, *supra* note 42, at 73–74 (documenting that three-quarters of bankruptcy judges considered themselves case managers due to excessive case loads); Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329, 1330 (1993) ("The fundamental truth which is the basis for this article is that the bankruptcy caseload in many districts in this country is so overwhelming that the bankruptcy judges are sorely pressed in the struggle to cope with it."). Professor Todd Zywicki has surmised that "[a]lthough some judges may be motivated by the desire to impose their ideological worldview on society, this seems a highly unlikely motivation for a bankruptcy judge, at least with respect to Chapter 11 cases (although perhaps more plausible for consumer bankruptcy cases)." Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1182 (2006). Finally, Professor Lawrence Ponoroff has suggested that bankruptcy judges may have formalist tendencies that would make them disinclined to decide matters based on their beliefs about what the law should be:

> Llewellyn's admonitions, and the legacy of the realist tradition, have unquestionably had a profound impact on the way in which judges think about their role and carry out their obligations of office. Nevertheless, too often, I think, judges in bankruptcy cases have abdicated their responsibility to balance alternative solutions to particular legal problems in light of competing interests, values, and policies, in short to make ethical value judgments. No better example of this tendency can be found than in the adherence to 'plain meaning' that has characterized the Supreme Court's bankruptcy jurisprudence for more than a decade, an attitude that has predictably, and no doubt as intended, seeped its way down into the manner in which lower court judges approach their cases in bankruptcy.

Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 208 (2000) (footnotes omitted).

44. JUDICIAL COUNCIL OF THE NINTH CIRCUIT, REGULATIONS GOVERNING THE APPOINTMENT OF U.S. BANKRUPTCY JUDGES (2001), *available at* http://207.41.19.15/

ized nationwide.[45] The selection process begins with interested candidates submitting an application for the bankruptcy judgeship position that has been advertised nationally by the circuit and that will likely have been advertised locally by the federal judicial districts within the circuit.[46] A local merit-screening committee (the "merit committee") reviews submitted applications and subsequently recommends no more than five applicants for consideration to the Court-Council Committee on Bankruptcy Appointments.[47] The membership of the local screening committee consists of (1) the chief judge of the federal judicial district in which the bankruptcy judge is to be appointed; (2) the president of the state bar association; (3) the president of one or more local bar associations within the district; (4) the dean of a law school located within the district; (5) the administrative circuit judge of the circuit geographical unit in which the bankruptcy judge is to be appointed; and (6) the chief bankruptcy judge of the district in which the bankruptcy judge is to be appointed.[48] The membership of the Court-Council Committee, which cannot consist of more than five members, always includes three circuit court judges.[49] While all members of the merit committee vote on an applicant's candidacy,[50] the circuit court judges on the Court-Council Committee are the only members from that committee entitled to vote.[51] The Court-Council Committee recommends by report to the Ninth Circuit Judicial Council a candidate for appointment.[52] That report, in turn, is deemed to be the Judicial Council's recommendation to the Court of Appeals absent a determination by the Judicial Council that the Court-Council Committee should reconsider its recommendation.[53] Upon a majority vote of the members of the Court of Appeals, the candidate is appointed.[54]

Web/OCELibra.nsf (follow "Bankruptcy" hyperlink; then follow "Regulations Governing the Appointment of U.S. Bankruptcy Judges" hyperlink).

45. Nationwide, there are currently 316 permanently authorized bankruptcy judgeships. *See* 28 U.S.C. § 152(a)(2) (Supp. V 2005). Of those 316 judgeships, 68 have been authorized for the Ninth Circuit. *See id.*

46. *See* JUDICIAL COUNCIL OF THE NINTH CIRCUIT, *supra* note 44, §§ 2.01, 2.02.

47. *See id.* § 3.03(c)(1).

48. *See id.* § 3.02(a).

49. *See id.* § 3.04(b).

50. *See id.* § 3.03(e).

51. *See id.* § 3.04(b).

52. *See id.* § 3.04(c)(5).

53. *See id.* § 3.05(a).

54. 28 U.S.C. § 152(a)(3) (2000).

Several aspects of the appointment process for bankruptcy judges are worth noting. First, throughout the process, all deliberations and reports remain confidential and are not disclosed to the candidates or the public.[55] Undeniably, this is an opaque process. Second, other than at the initial merit-screening stage, circuit court judges wield exclusive control over the appointment process. This is particularly salient at the Court-Council Committee stage, where three circuit court judges are responsible for the recommendation made to the Judicial Council. At this stage, the power of selection is extremely concentrated. While there is no way to know whether the Court-Council Committee implements a candidate transparency requirement when it interviews the applicants recommended by the merit committee,[56] there is every reason to believe that it would given that more information is better than less. Assuming that the Committee does implement such a requirement, here would be a prime opportunity for essentially a three-judge panel of circuit court judges, using the information gleaned from candidates' answers, to maximize their ideological preferences in recommending a judicial candidate to the Judicial Council—a candidate who will be deemed to be the Judicial Council's recommended candidate to the entire Court of Appeals. Given this backdrop, why has the selection process seemingly yielded nonideological bankruptcy judges?

The answer may be the norm of collegiality that thrives in an opaque setting. Circuit Judge Harry T. Edwards of the U.S. Court of Appeals for the D.C. Circuit has argued that "collegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways."[57] If Judge Edwards is correct that collegiality allows judges to reach consensus in pursuing their common interest of getting the law right when deciding cases, we might equally assume that collegiality would allow such judges to reach consensus in pursuing another common interest—namely, that of appointing independent-minded jurists to the bankruptcy bench.[58] We might further assume that it is the opacity

55. *See* JUDICIAL COUNCIL OF THE NINTH CIRCUIT, *supra* note 44, §§ 3.03(f), 3.05(b).

56. *See id.* § 3.04(c)(3).

57. Edwards, *supra* note 18, at 1645.

58. Given that the task of selecting bankruptcy judges constitutes part of the institutional mission of the courts of appeals, *see* 28 U.S.C. § 152(a)(3), it seems reasonable to conclude that circuit court judges' sense of loyalty to the federal

of the selection process that allows collegiality to flourish. Were the process transparent, the selecting judges would perhaps be less inclined to work toward consensus and more inclined to use the selection process, including the questioning of candidates, as a platform to signal ideological orientation and allegiance.[59] Thus, we might view process opacity as a way to preserve the utility of a candidate transparency requirement with the result of improving judicial quality.[60]

Some may argue that my account mistakenly attributes the success of the selection process for bankruptcy judges to its opacity and counter that it is the nature of the membership of the selecting body that has been responsible for producing positive results. In other words, a selection process that involves judges selecting judges necessarily lends itself to nonpoliticization.[61] This view,

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judiciary, *see* Edwards, *supra* note 18, at 1663, will create an incentive for them to select independent-minded jurists who will enhance the functioning of the bankruptcy system, *see id.* at 1662–64 (discussing the manner in which collegiality furthers the institutional mission of the judiciary).

59. *Cf.* Edwards, *supra* note 18, at 1663 ("I believe that the mere presence of a 'neutral,' even silent, observing anthropologist or sociologist in our deliberations would change the character and course of the deliberations among judges.").

60. Yet another argument in favor of process opacity, at least as it relates to the federal appointments process, is that it would help level the playing field between the President and the Senate, the former who has enjoyed the advantages of opacity in screening candidates for nomination. *See* Johnsen, *supra* note 7, at 475 ("Presidents make judicial selections with relative secrecy regarding their individual thought processes, as compared to the more public nature of the Senate confirmation process in which one hundred Senators reach a joint decision on a specific individual. Presidents far more easily can avoid admitting the extent to which their selections reflect ideological considerations, while Senators participate in a detailed public inquiry with regard to each of the Presidents' nominees."); *cf.* Stras & Scott, *supra* note 21, at 1917 ("All proposals that depend on effective resistance by the Senate must also overcome the substantial institutional strength of the Presidency."). For the argument that process opacity will fail to improve the federal appointments process, see CARTER, *supra* note 14, at 190–91, 194–95.

61. *See* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 576, 623–24 (1998) ("[T]he appointment and reappointment by the court of appeals fosters another important element of judicial independence—having judges with high qualifications. It is likely that judges are more capable of selecting competent bankruptcy judges, and are less likely to take into account political considerations than the President, acting with the input of the local political establishment."); Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 112 (1997) ("I am very skeptical of the traditional assumption that the process for selecting Article III judges necessarily produces the most 'qualified' bench. All too often, individuals are recommended by Senators or nominated by Presidents for political reasons having little to do with judicial ability. Indeed, a merit selection system such as that generally used in selecting bankruptcy judges or magistrate judges would seem better designed to

however, does not square with the current understanding that circuit court judges are ideological.[62] If the politicized appointment

ensure quality."); Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 670 (2002) ("Turn first to the advantages of judicial appointment of judges. As a few details of current practices illustrate, the judiciary has selected a high-quality and relatively nonpolitical corps of judges . . . ."); Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 840–41 (2006) ("The chief advantage of the Judicial Vesting Option might be that Article III courts, enjoying salary protection and tenure during good behavior, are more insulated from exogenous political pressures than the President and the U.S. Senate. This insulation might permit the selection of excellent jurists, irrespective of their likely votes on legal outcomes favored by vying interest groups as these latter would be unable to influence life-tenured and salary-protected federal judges with reelection threats and campaign finance contributions."). Professor Jonathan Nash and I have theorized elsewhere that the use of merit-selection panels in the appointment of bankruptcy judges may curb the influence of ideology in that context. *See* Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1768 n.91 (2008). The use of merit-selection panels elsewhere in the federal judicial system, however, appears not to have had such an effect. By virtue of President Carter's use of nominating commissions for the federal courts of appeals, scholars have had the opportunity to explore the relationship between selection methods and judicial performance—specifically, by comparing the voting patterns of the Carter appointees to the voting patterns of circuit court judges appointed by other presidential administrations (both Democratic and Republican). That research suggests that the use of nominating commissions either (1) did not generally reduce ideological voting by the Carter cohort, *see* Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165 (1983), or (2) increased ideological voting by the Carter cohort, *see* Sue Davis, *President Carter's Selection Reforms and Judicial Policymaking*, 14 AM. POL. Q. 328 (1986). Perhaps these results can be attributed to the fact that the nominating commissions themselves were not immune from politics. *See* CARTER, *supra* note 14, at 190 ("The Carter Administration panels, although they produced some of the finest federal judges in the country, also faced criticism on the ground that politics rather than merit was too often decisive."); Gottschall, *supra*, at 173 ("Carter's initial pledge of non-partisan judicial selection was reduced in practice to merit selection among Democrats . . . .").

62. *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007) (finding that ideology is a determinant of circuit court decisionmaking but that its effect is small); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (finding evidence that judges of the same political party on an appellate panel are more likely to vote ideologically); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (finding evidence of ideological voting on federal courts of appeals in the context of civil rights and civil liberties cases). Even Judge Harry T. Edwards of the U.S. Court of Appeals for the D.C. Circuit—who has vigorously rejected the argument that the ideology of judges is a major factor that accounts for circuit court decisionmaking—has expressly acknowledged that judges

process by which circuit court judges have been selected has produced ideological judges, one might expect that circuit court judges would inevitably allow their ideology to influence whom they select as bankruptcy judges.[63] Consider the incentives that circuit judges have to do so. First, they will inevitably hear appeals from matters initially decided by the bankruptcy judges whom they selected.[64] By appointing like-minded bankruptcy judges, circuit judges may potentially reduce their workloads if bankruptcy judges consistently resolve matters in a manner similar to the way the circuit court judges would resolve those matters.[65] Second, and perhaps more importantly, selecting like-minded bankruptcy judges may allow circuit judges to create a judicial culture within the circuit that approaches bankruptcy matters from a particular perspective. Lest one think that circuit judges would not be so inclined, consider the case of Circuit Judge Edith H. Jones of the U.S. Court of Appeals for the Fifth Circuit. Judge Jones was one of nine commissioners appointed to the National Bankruptcy Review Commission authorized by Congress in 1994 to evaluate and recommend revisions to the Bankruptcy Code.[66] While the Commission's final report did not take a position on means-testing in bankruptcy,[67] a concept that would curb the scope of relief available to consumer debtors while simultaneously reducing the discretion available to bankruptcy judges, Judge Jones lambasted the Commission's inaction and filed a dissenting view that vociferously advocated for

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do have ideological preferences, which have the potential to affect case outcomes. *See* Edwards, *supra* note 18, at 1645.

63. *But cf.* Plank, *supra* note 61, at 623 (noting that circuit court judges "are more likely to understand and respect the need for judicial independence and therefore less likely to allow their views of the outcome of decisions of the bankruptcy judge to influence their decision on the question of whether to reappoint the judge").

64. *See* 28 U.S.C. § 158(d) (Supp. V 2005).

65. In an empirical study of decision making by the U.S. Courts of Appeals, Professor Frank Cross found that, in instances where a circuit court affirms a district court, a circuit court panel whose ideology is unaligned with the district court's ideology will write a statistically significantly longer opinion than a panel whose ideology is aligned. CROSS, *supra* note 62, at 66. In interpreting the finding, Cross commented that "[o]ne could hypothesize that longer opinions in this circumstance are meant to limit the scope of the holding and its precedential effect because the outcome apparently does not align with judicial ideological preferences." *Id.*

66. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 603, 108 Stat. 4106, 4147.

67. *See* 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 272 (1997).

means-testing.[68] Today, by virtue of BAPCPA, means-testing has been incorporated into the Bankruptcy Code.[69] Because of poor drafting, interpretive difficulties have arisen in applying the statutory test and diverging judicial opinions have resulted, some which facilitate debtor relief and others which do not.[70] Given Judge Jones's views on means-testing, one might imagine that, when voting on candidates for bankruptcy judgeships, she would look to vote for candidates who would be predisposed to decide means-testing issues from a pro-creditor perspective.

The idea of circuit court judges basing their selection criteria on the ideology of the judicial candidate is not an idea of recent vintage. This theory was raised in 1988 by an incumbent bankruptcy judge who sought injunctive relief against the Judicial Council of the District of Columbia Circuit for failing to reappointment him. In that action, the bankruptcy judge asserted that his "'pro-debtor' leaning" was one of the reasons contributing to the denial of his reappointment.[71] Regardless of the veracity of the assertion, the perception clearly existed that ideological orientation played a role in the selection process. The noncynical take on this story would be that the circuit court of appeals denied the bankruptcy judge reappointment because of his lack of impartiality. The cynical take, on the other hand, would be that the circuit court judges preferred to appoint a judicial candidate with a pro-creditor leaning.[72] For the reasons I have set forth above, I believe in the noncynical story—that is, circuit court judges, in spite of their ideology and the ideology of bankruptcy, have selected impartial bankruptcy judges by virtue of process opacity that preserves collegial decisionmaking.

CONCLUSION

On balance, it seems reasonable to conclude that a candidate transparency requirement in the selection of judges is a good thing—the more information one has about a judicial candidate,

68. *See* Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, *in* 1 BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 67, at 1123, 1131–49.

69. *See* 11 U.S.C. § 707(b)(2)(A) (2006).

70. *See* Pardo, *supra* note 37, at 479–83.

71. Bason v. Judicial Council of the D.C. Cir., 86 B.R. 744, 750–51 (D.D.C. 1988).

72. *Cf.* Rachlinski et al., *supra* note 42, at 1259 (noting that "it might be easier for the appointing authority to predict the decisions of specialized judges than generalized judges" and that, accordingly, "it is possible that greater specialization might lead to greater politicization of the judiciary").

the greater the likelihood of improving judicial quality. We ought to be cautious, however, in implementing such a requirement if the selection process is susceptible to politicization. While judicial candidates should not have "autonomy from scrutiny before taking office,"[73] it is imperative to ensure that the worthwhile goal of candidate scrutiny does not get co-opted for political ends. An opaque selection process may help us accomplish this goal with the result of improving the quality of the judiciary.[74]

73. Chemerinsky, *supra* note 7, at 630.

74. I recognize that an opaque appointment process has potential costs that may ultimately be deemed to outweigh its benefits. First, opacity in the selection of judges may engender public distrust of the process, *see* CARTER, *supra* note 14, at 194 ("Opponents would be certain that a deal was being struck behind closed doors; supporters would insist that their candidate was being trashed in secret."); *cf.* Stras, *supra* note 34, at 1055 ("Without confirmation hearings, Americans would lose one of their exceedingly rare opportunities to learn and hear about the function and operations of the court system, exacerbating the existing cloistered perception of the federal Judiciary."), ultimately undermining confidence in judicial institutions. Second, the confidentiality of an opaque selection process may create inordinate difficulties for judicial candidates who seek redress on the basis that appointment (or reappointment) was improperly denied. *See, e.g.*, *In re* United States, 463 F.3d 1328, 1337–38 (Fed. Cir. 2006) (granting mandamus relief to the U.S. government in an action brought by a former bankruptcy judge asserting entitlement to reappointment and observing that, without such relief, "the internal deliberations of the Third Circuit [relating to the reappointment decision] could be subject to discovery," which "would cause a concrete and imminent harm that cannot be remedied after the fact"). In my view, however, these potential costs need to be evaluated in greater detail before concluding that an opaque appointment process would be undesirable. Moreover, I echo the call of one commentator for empirical research that answers whether the process for judicially appointed judges is "as 'political' or 'ideological' as the advice and consent process, and if so, [whether] the process [is] 'political' in a sense that jeopardizes judicial independence." Samahon, *supra* note 61, at 846.