

# Are apex court judges politically biased?

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The question whether judges are politically biased is highly disputed. Some consider it a heresy even to ask the question, while others believe it to be a self-evident truism. If we look at how controversial the nomination procedures for new justices to the U.S. Supreme Court are, we see that most participants in the U.S. political process at least believe that justices are influenced by their political ideology.

There is some empirical evidence confirming this belief. The seminal contribution on this issue is a study by Jeffrey Segal and Albert Cover.<sup>1</sup> The authors construct an ideology score for Supreme Court Justices, which is based on newspaper reports regarding these judges prior to their election to the Court. The study finds a high correlation between the voting behavior of the individual justices and this score. A conservative justice tends to support conservative positions, while a liberal justice usually casts votes that favor liberal positions. This does not mean that political ideology is the only predictor of judicial decisions of the Supreme Court. In fact, there is a controversial discussion to what extent other factors, such as legal norms and legal doctrine, play a role. However, it is largely accepted and has been confirmed by subsequent studies that political ideology plays at least a significant role in the decision-making of the U.S. Supreme Court.

The more difficult question is whether the U.S. Supreme Court is representative of other apex courts or whether it is rather an expression of U.S. exceptionalism. On the one hand, it could be an indicator that legal decision-making on constitutional matters is highly political so that judges cannot decide without being influenced by their political conviction. On the other hand, it has to be taken into consideration that the nomination procedure for justices to the U.S. Supreme Court is highly polarized and the political ideology of the nominated judges is very salient. In legal systems in which nominations are less controversial, expectations towards the judge might vary and consequently reduce the influence of political ideology.

Testing these hypotheses is difficult – at least in Civil Law jurisdictions. From the viewpoint of an empirical researcher, it is an advantage of the U.S. Supreme Court that the voting behavior of each individual judge in every decision is publicly known. This is not the case in most Civil Law jurisdictions. The German Federal Constitutional Court, for example, publishes the number of judges who supported the decision and potential dissenting opinions. However, it does not publish the individual votes of each justice, except in split decisions with 4-to-4 votes. Certainly, you can infer that a judge who writes a dissenting opinion opposed the judgment. However, judges are not forced to publish a dissenting opinion if they disagree with the majority. Therefore, if the court takes a 5-to-3 decision with two judges publishing dissenting opinions, the latter two are the only ones of whom we certainly know how

they voted. Nevertheless, without consulting the (mostly secret) trial records, we cannot infer how the other six judges voted.

Two rather recent studies try to work around this problem by making use of the information that is revealed by the authorship of dissenting opinions. [A conference paper authored by Susumo Shikano and Verena Mack](#) applies a statistical item response model to map dissenting opinions of the judges of the German Federal Constitutional Court. This model shows that judges nominated by the Social Democrats tend to be oriented towards one end of the political spectrum, while judges nominated by the Christian Democrats have tendencies towards the other end. However, this correlation is by no means perfect. Therefore, we can rather interpret the results as an indicator for a moderate political orientation.

The second study was authored by a team of political scientists around Thomas Gschwend and a legal academic of the University of Mannheim.<sup>2</sup> The authors use a network analysis based on dissenting opinions to map how close the positions of different judges are to each other. The study mostly confirms the results of Shikano and Mack. Gschwend and colleagues look at the decision-making of the second senate over a specific period and observe a moderate political orientation of the judges: In decisions, in which dissenting opinions are published, conservative judges tend to vote with conservative judges, while liberal or left-leaning judges tend to vote with other left-leaning judges.

Certainly, these results give us only part of the picture. Both studies focus on decisions, in which dissenting opinions were published. Since such decisions usually concern highly salient questions of significant political importance, one might expect political ideology to have its strongest influence, if there is any. This effect might therefore disappear if we also include the less controversial day-to-day cases with whom the court predominantly deals, but which do not provoke any dissents.

However, one tendency emerges: Judicial decision-making in Germany is less politicized than in the U.S. If even highly political cases only show a moderate political orientation of judges, then the influence of political ideology seems to be significantly less important than in the U.S. Supreme Court. We can only speculate about the reasons: It might be due to the nomination procedure which is much more consensus-oriented in Germany than in the U.S. Or it might be due to the legal culture: In Germany, the myth of judges as norm-applying technocrats is still widely accepted (and might thus also shape the judges' self-understanding), while it has been largely disenchanted by the legal-realism and critical-legal-studies movements in the U.S. Whatever the reason, the question certainly merits further research.

