

What We Know About How Judicial Bias Can Influence Rulings

By **Drury Sherrod** (September 30, 2020, 3:26 PM EDT)

"I _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

This is the oath that future U.S. judges must promise to uphold before taking office. Yet impartiality is hardly a goal in picking justices for the U.S. Supreme Court, as the struggle to replace Justice Ruth Bader Ginsburg makes clear.

Instead of impartiality, justices are chosen precisely because of their consistently liberal or conservative rulings on lower courts, as well as their likely sentiments on future Supreme Court cases. And when they deviate from expected rulings, they are assailed from all sides.

When Chief Justice John Roberts parted with his conservative colleges and joined the liberal wing of the court in several recent rulings, Sen. Ted Cruz, R-Texas, said Justice Roberts was "lawless" and his ruling "contrary to the judicial oath that each of the nine justices has taken." [1]

Just as Supreme Court justices reliably vote in liberal blocks or conservative blocks, so do judges on federal appellate courts, which sit just below the Supreme Court.

A few months ago, 38-year-old then-U.S. District Judge Justin Walker, with little judicial experience but active support from the conservative Federalist Society, was confirmed by the U.S. Senate as a judge on the U.S. Court of Appeals for the District of Columbia Circuit. Republican senators voted in favor of now-U.S. Circuit Judge Walker's appointment, hailing him as "young, brilliant and conservative," [2] while Democratic senators opposed his appointment, saying he "won't be able to separate his political beliefs from his judicial opinions." [3]

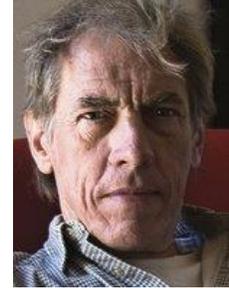
Is justice in U.S. courts as blatantly political as these recent court rulings and judicial appointments seem?

President Donald Trump famously tweeted that a judge whose ruling he disliked was an "Obama judge."

Justice Roberts responded, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."

The president countered, "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are charged with the safety of our country." [4]

More recently, Senate Democrats released a report highlighting how Republicans are "packing the courts with right-wing ideologues." [5]



Drury Sherrod
(Photo by Vicki Laszlo)

Are judges lawless ideologues or people who try their level best to "do equal right to the poor and to the rich" among those appearing before them? Fortunately many studies in political science and social psychology provide clear answers to the question of whether federal judges are biased in their rulings.

I have been asked on numerous occasions to conduct research to help predict a judge's likely rulings in a bench trial. These are trials where a judge, not a jury, hears the evidence in a case and decides if a defendant is liable for breaking the law or not. One of these bench trials involved a contract dispute between a company that launched satellites into orbit and a company that made the satellites. The satellite manufacturer said the launch company had promised several dates for rocketing the satellites into space and then reneged and offered the dates to another satellite maker.

To find out how a judge might rule in such a case, we recruited 12 retired judges who were similar to actual judges in the venue. They listened to the evidence, reached a verdict, and filled out a questionnaire about how they reached their verdicts. At the end of the day, the judges split 50-50 on their verdicts, with half of the judges favoring the satellite maker and half supporting the launch company.

When the judges explained the reasoning behind their verdicts, one who favored the satellite maker said "the contract's language was unclear and open to interpretations." In contrast, a judge who favored the launch company said that although the contract was "poorly drafted," the history of the negotiations favored the rocket launcher.

In another simulated bench trial, a number of mom and pop businesses sued a company that ran a computer search engine, claiming they had been overcharged when someone clicked on their websites during a search. After hearing the evidence, a panel of 10 retired judges split 6-4 in favor of the search engine company.

A judge who favored the small businesses said a "reasonable consumer would have been deceived" by the search company's billing policy. In contrast, a judge who supported the search company said that "consumers were not misled" and the small businesses "knew when they got their bill what was going on."

What explains why half of the experienced judges viewed the evidence in a satellite launching case differently than the other half? And why would 40% of the judges in a web search case conclude that the search engine's billing policies were deceptive, while 60% said the small businesses were not misled? Did the opposing judges see the evidence through different lenses and thus create different stories to explain which side was right and which was wrong?

The fact is, Supreme Court judges disagree among themselves in two-thirds of the cases that come before them.[6] Justices appointed by Republican presidents are often at odds with justices appointed by Democratic presidents, particularly on ideologically tinged cases involving civil rights, civil liberties, affirmative action or individuals suing the government.

Likewise, appellate court judges appointed by Republican presidents are about one-third more likely to reach conservative decisions on abortion, affirmative action, campaign finance, capital punishment, disability, discrimination and environmental regulation cases than judges appointed by Democratic presidents.[7]

When appellate judges serve on three-judge panels, as they generally do when reviewing a

case, judges of both stripes are highly influenced by views of like-minded fellow judges on the same panel. A panel of three Democrat-appointed judges becomes more extreme in its ruling than a panel of two Democrat-appointed judges and one Republican-appointed judge, or than one Democrat-appointed judge and two Republican-appointed judges. Panels composed of Republican-appointed judges behave the same way.

Beyond the strong influence of a judge's ideology on his or her rulings, a judge's demographics, identity and life experiences also influence legal rulings.

After controlling for a judge's ideology, Black district court judges were found to award shorter criminal sentences than non-Black judges, and Black appeals court judges are more likely than non-Black judges to vote favorably on affirmative action programs, employment discrimination cases and racial harassment claims.

Meanwhile, female appellate court judges rule differently than male judges in employment discrimination cases and other gender-related cases, and appeals court judges who have a daughter, as opposed to a son, are more likely to reach a liberal verdict on gender-related cases such as reproductive rights and employment discrimination.[8]

Other personal and professional characteristics also affect a judge's rulings.

Older judges are more likely to support age discrimination claims than younger judges; evangelical judges issue more conservative rulings on social issue cases than do mainline Protestant, Catholic and Jewish judges; Jewish judges are more likely to favor LGBT issues than Catholic judges; and in organized drug crime and weapons-related cases, Republican-appointed district judges sentence Black defendants to longer prison terms than Democrat-appointed judges.[9]

So, who's view of judicial decision making is more correct? Trump, who charges certain Supreme Court justices with "animus" against him? Or Justice Roberts, who famously told the Senate during his nomination hearings, "I have no agenda. My job is to call balls and strikes, and not to pitch or bat." The studies cited above suggest that federal judges do indeed have agendas and life experiences that lead them to pitch and bat differently from each other.

But is the agenda conscious? Is it a deliberate bias or an unconscious world view? The dictionary defines bias as "a prejudice for or against one person or group, especially in a way considered to be unfair," and world view as "a particular philosophy of life or conception of the world." Consequently, whether we view court rulings as reflecting a bias or as revealing a world view may reflect our own biases or world views. And there's the rub.

If we acknowledge that federal judges' life experiences and agendas do indeed reflect the judges' biases and world views, then appointing a judge may be viewed as similar to selecting a juror. Both judges and jurors bring a history of life experiences and world views that affect how they interpret each case they consider.

Both judges and jurors will tell stories about the evidence that reflect their life experiences and world views. The stories told by both judges and jurors will influence how they process, recall and embellish the evidence. And both judges and jurors will be subject to mental shortcuts, such as hindsight, that influence their decisions.

Consequently, appointing an "unbiased" judge who vows to "administer justice without respect to persons" and "impartially discharge and perform all the duties incumbent upon

me under the Constitution" is much like selecting an "unbiased" juror. Biases and world views cannot be eliminated. But their influence can be minimized by appointing judges with diverse and inclusive world views that allow their judicial rulings to represent the views of "a fair cross section of the community," no more and no less than what the courts expect of jurors.

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[1] https://www.cruz.senate.gov/?p=press_release&id=5200.

[2] <https://www.nytimes.com/2020/05/05/us/politics/justin-walker-mcconnell-judicial-nomination.html>.

[3] <https://www.politico.com/news/2020/06/04/justin-walker-mcconnell-confirmation-300785>.

[4] <https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts/>.

[5] <https://www.democrats.senate.gov/dpcc/press-reports/dpcc-report-stabenow-schumer-whitehouse-unveil-report-detailing-gops-big-money-assault-on-the-constitution-our-independent-judiciary-and-the-rule-of-law>.

[6] Epstein, Lee, William M. Landes, and Richard A. Posner. 2013. The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice. Harvard University Press.

[7] Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman. 2004. Ideological Voting on the Federal Court of Appeals: A Preliminary Investigation: Virginia Law Review. 90 (1): 301-54.

[8] Allison P. Harris and Maya Sen. Bias and Judging. 2019. Annual Review of Political Science. Vol 22: 241-259.

[9] Op.cit.