

Judicial Selection Controversy at the Federal Court of Justice

Suggested Citation: *Judicial Selection Controversy at the Federal Court of Justice*, 2 German Law Journal (2001), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=69>

[1] The election in February of two *Landgericht* (Regional Court) judges to seats at the *Bundesgerichtshof* (BGH [Federal Court of Justice]) has set off, amidst fierce political posturing, a wave of controversy and legal and legislative action. This article recaps the controversy surrounding the promotion of Mannheim Regional Court Judge *Birgit Vezina* and *Wolfgang Neskovic*, Presiding Judge of the Lübeck Regional Court. The article outlines Germany's constitutional and statutory scheme for appointing federal judges (with the exception of the justices of the Federal Constitutional Court) and will then close with commentary on some of the fundamental values at stake in the hotly contested election of Judges Vezina and Neskovic.

A. The Controversy

[2] The BGH is Germany's federal court of last resort and its decisions finally resolve legal proceedings in general civil and criminal matters, after consideration by the state courts.(1) As with all German courts, the BGH has the authority to find an action, decision or law in compliance with the *Grundgesetz* (Basic Law or Constitution) but the authority to find an action, decision or law violative of the Basic Law rests exclusively with the *Bundesverfassungsgericht* (BVerfG [Federal Constitutional Court]), a federal court with jurisdiction that lies outside and completely separate from the ordinary course of legal proceedings.(2) The BVerfG thus has the final say on all constitutional matters while the BGH is the true court of last resort with respect to the substantive dispute in general civil and criminal matters. *German Law Journal* presented a sketch of the BGH's important case-law and history on the Court's fiftieth anniversary in Vol. 1; No. 2/2000, 1 November 2000.

[3] The BGH presides in Karlsruhe with 12 civil senates and 4 criminal senates. A fifth criminal senate sits in Leipzig. Each senate is 7 (occasionally 8) judges strong, with a total of 123 judgeships.

[4] For the 14 vacancies at the BGH that would open during 2001, 37 candidates were presented for election to the *Richterwahlausschuss* (Judicial Selection Committee), which is chaired by the Federal Minister of Justice and composed of the 16 State Justice Ministers and 16 participants selected by the Federal Parliament. Among those elected, by simple majority of the Judicial Selection Committee, were Mannheim Regional Court Judge Birgit Vezina and the Presiding Judge of the Lübeck Regional Court, Wolfgang Neskovic.

[5] The flash-point of the controversy surrounding the election of Vezina and Neskovic is the fact that both were adjudged to be "professionally unsuited" for service at the BGH by a committee of BGH judges. The law makes provision for the review of candidates by a committee of BGH judges, known as the *Präsidentialrat* (Presiding Council), but the evaluation is non-binding on the Judicial Selection Committee and Judges Neskovic and Vezina are not, therefore, the first judges to be elected to the federal bench after receiving failing marks from the Presiding Council.(3)

[6] The entire affair has strong political overtones. The state Baden-Württemberg was in the midst of a tight state election campaign, with the incumbent state government led by the Christian Democratic Union fending off a strong challenge from the opposition Social Democratic Party. The Baden-Württemberg election, along with the state election in Rheinland-Palatine, were being trumpeted as important tests of the political strength of the Federal Government's SPD/Green governing coalition.(4)

[7] The fact that Judges Vezina and Neskovic had not been approved by the BGH judges' committee should not have been publicized, but the Baden-Württemberg State Justice Minister, Ulrich Goll (whose Free Democratic Party was and remains (after the election) in a governing coalition with the Christian Democratic Union in Baden-Württemberg) leaked the information about the BGH's evaluation of the two judges, who had been nominated to candidacy by opposition parties (Vezina is not a party member but has the support of the Baden-Württemberg Social Democratic Party and Neskovic is a member of the Greens in Schleswig-Holstein). State Justice Minister Goll is now under investigation for violating the confidentiality of the BGH's review.

[8] The judiciary, however, has not left criticism of the election of Vezina and Neskovic to the politicians. One of the 37 candidates for a position at the BGH who was not selected by the Judicial Selection Committee - despite receiving higher marks from the reviewing committee of judges at the BGH - has sued to halt the appointment of Neskovic in a temporary-injunction/civil-service proceeding called *Konkurrentenklage* (Competitor's Complaint), which is based on the guarantee to equal access to civil service positions found in Article 33 of the Basic Law. Two professional associations with ties to the BGH (the *Richterrat* [Judges Council] and the *Verein der Richter und Bundesanwälte* [Association of Judges and Federal Attorneys]) issued a letter protesting the election of Vezina and Neskovic. Judge Gerda Müller of the BGH's Sixth Civil Senate was quoted in the press as saying: "clearly we cannot lock someone in

a closet, but we feel ourselves incapable of working with one of the two new colleagues." (5) The Press Secretary of the BGH followed-up on Judge Müller's statements by insisting that the Court was prepared to honor the lawful election of Vezina and Neskovic.

[9] The chief criticism of the two candidates is that neither has served as a judge beyond the first instance courts (Regional Courts), especially that neither has served in a *Oberlandesgericht* (OLG [Higher State Regional Court]) which functions as an appeals court with duties similar to the BGH's and which is a traditional, though not a formal, prerequisite to service at the BGH. The complaint, in essence an alleged lack of experience, has less force with respect to Judge Neskovic than with Judge Vezina. Neskovic has served as the Presiding Judge of the Lübeck Regional Court since 1990. During his tenure in Lübeck, Neskovic performed more than three years of service in the Regional Court's *Berufungsprozess* (the Regional Court's appellate review of the *Amtsgericht* [District Court] decisions).

[10] In defense of his Presiding Judge, the President of Lübeck Regional Court published an open letter in which he stirred the ire of OLG judges by arguing that it is a mystery why service at an OLG is necessary to demonstrate competence for service at the BGH. (6) Behind the strictly professional criticism of Judge Neskovic's experience lies his controversial reputation as one of Germany's most liberal judges, best represented by his repeated decisions seeking to decriminalize, or at least minimize the criminal liability for, minor drug offenses. A Neskovic judgement that was popularly characterized as establishing a "*Recht auf Rausch*" ("right to be high"), which compared the intoxicating effects of the use of (illegal) marijuana with (legal) alcohol and stressed this inconsistency in decriminalizing the minor use of marijuana, was stridently dismissed by the BGH but later upheld on constitutional grounds by the BVerfG. Neskovic's unconcealed political interests have also been a focus of the criticism of his candidacy. Neskovic, once an active member of the SPD and its judicial affairs committee, very publicly switched to the Green party and has since openly criticized that party's endorsement of Germany's participation in the NATO-led Kosovo bombing campaign.

[11] Opposition to the candidacy of Judge Vezina has, on the other hand, emphasized her professional qualifications. After initial claims that she is an active member of the SPD and its judicial affairs committee were refuted, attention turned to the fact that Judge Vezina, after ten years of service at the Mannheim Regional Court, has never been promoted above an entry level position. It has also been publicized that Judge Vezina was once before proposed as a candidate for election to the BGH and was then, as again this time, adjudged to be unqualified by the BGH's Presiding Council. Judge Vezina was, however, a clerk to the now retired Justice Thomas Dieterich during his tenure at the BVerfG and he has publicly and strongly supported her qualifications and candidacy.

B. The Legal Framework for Judicial Appointments

[12] The Basic Law sets out the values that govern judicial authority in the German federal scheme, including the appointment of judges. The constitution establishes the strict separation of judicial authority from the other branches of government (Article 92) and demands judicial independence (Article 97). The Basic Law, in detail, creates the Federal Constitutional Court and provides for, as a constitutional matter, the unique appointment of its justices and its unique jurisdiction. (Articles 93 and 94). The constitution marks out the distinction between federal and state jurisdiction, as well as the various federal subject matter jurisdictions (see footnote 1 above), but leaves the finer details of the federal judiciary to the legislature. (Articles 95 and 96).

[13] The constitution, in Article 95.2, makes specific provision for the Judicial Selection Committee, which combines the interests of the federal and state executives (the Federal Justice Minister and the Justice Ministers of the states) with the interests of the parliament (an equal number of participants elected by the parliament) in the selection of judges for the federal high courts (excluding the Federal Constitutional Court, which, as noted above, has its own constitutionally-directed appointment process).

[14] The *Deutsche Richtergesetz* (German Judiciary Act) controls the particulars of state and federal judicial service. The qualifications for judicial service are outlined in general terms (and have become the guiding structure for all German legal education) and include a basic course of study, a lengthy and varied training period and success in two comprehensive state examinations. (Section 5, and following, of the German Judiciary Act). The majority of judges have life tenure, except for those serving limited terms (as in the case of judges at the Federal Constitutional Court) and within the terms of mandatory retirement rules. (Sections 10 to 24 of the German Judiciary Act). Judicial independence is secured through limitations on the manner and grounds for dismissal and transfer of judges. (Sections 25 to 37 of the German Judiciary Act) and through the creation of a special entity (*Dienstgericht des Bundes* [Federal Judicial Service Court]) responsible for administering judicial discipline and for reviewing complaints regarding judicial tenure and dismissal (Sections 61 to 68 of the German Judiciary Act).

[15] The specifics regarding appointment to the federal bench are controlled by the straightforward and relatively simple *Richterwahlgesetz* (Judicial Selection Act). Sections 1 and 2 of the Judicial Selection Act reiterate Article 95.2

of the Basic Law, which establishes a Judicial Selection Committee consisting of the Federal Minister of Justice (with no vote in the Committee), the state Justice Ministers and an equal number of participants elected by the parliament. The meetings of the Judicial Selection Committee are not public. (Section 9 of the Judicial Selection Act). The members of the Judicial Selection Committee, including the Federal Minister of Justice, have the right to propose candidates for the federal bench (Section 10 of the Judicial Selection Act) and the Committee's selection of a candidate is to be based on the candidate's personal files and the presentation of two reporting members of the Committee (Section 10 of the Judicial Selection Act), with the objective of "testing whether a candidate for a judgeship has the professional and personal qualifications to hold the position." (Section 11 of the Judicial Selection Act). The Committee acts through a majority in a secret ballot, with the approval of the Federal Minister of Justice and the eventual, *pro forma* appointment by the Federal President. (Sections 12 and 13 of the Judicial Selection Act).

[16] The parliament did, however, make provision for the (non-binding) involvement of the judiciary in the process of selecting its membership. Sections 54 through 57 of the German Judiciary Act establish and outline the duties and authority of a *Präsidentialrat* (Presiding Council) in each of the federal courts, consisting of (at the BGH) the court's President, Vice President and five other judges of the court. (Section 54.1(1) of the German Judiciary Act). The Presiding Council's primary function is to "participate", at the invitation of the Judicial Selection Committee, in the appointment or selection of judges to the court, giving consideration to a candidate's "past career and of his [or her] qualifications." (Sections 55 and 56 of the German Judiciary Act). While Section 57 of the German Judiciary Act preconditions promotion of a candidate to the issuance of an opinion (or failure to issue an opinion within two months) of the Presiding Council, the Presiding Council's opinion is clearly non-binding.

[17] Finally, the unwritten but firmly observed tradition with respect to judicial appointments (in both the BGH and the BVerfG) seeks the proportional representation of the political parties, the federal states and even the two major Christian traditions (Catholic and Protestant) in the federal courts. Thus, the candidates are nominated in a revolving order from each of the federal states with the parties alternating in the nominations, according to the proportion of their representation in the federal or state parliaments. As a result of this tradition, much of the work of the Judicial Selection Committee is negotiated between the parties prior to the formal meeting and vote of the Committee, a fact that is presumed to be true of the election of Judges Neskovic and Vezina as well and would have included the participation or acquiescence of Baden-Württemberg State Justice Minister Goll.

[18] Proposals for reform of the process have surfaced in Berlin, including the proposal of Baden-Württemberg Justice Minister Goll that would place considerably more power in the hands of the Presiding Council, granting that entity, in essence, a veto power over the Judicial Selection Committee's election of a candidate by prohibiting the Judicial Selection Committee from electing a candidate whom the Presiding Council deemed unsuited for service.

C. The Values: Judging Politics

[19] In 1998 there were 20,969 state and federal judges in Germany.⁽⁷⁾ Assuming a population of 85 million, there is nearly one judge for every 4,000 residents of Germany. By comparison, the United States, in 1998, claimed 28,172 state and federal judges. With a population of 284 million, even in the reputedly over-litigious American society, there is only one judge for every 10,000 Americans. The impressive size of the German judiciary, when compared to the American bench, can be partially accounted for by the significant difference in the roles played by the judiciary in a continental/ code/inquisitorial/professional judgeship model like Germany's and a common law/adversarial/jury model like the United States'. That explanation, however, should do nothing to minimize the resounding fact that the judiciary plays an extraordinarily important role in the function of German society. It is not necessary to question the appropriateness of such (over)dependence upon the judiciary to conclude that the issue of who becomes judges (whether Vezina and Neskovic in this case) and how they enter the judiciary (should political entities control that process or should the judiciary have the power to shape its membership) should be of premier importance in the German political discourse.

[20] The German constitutional and statutory scheme for the appointment of the federal high court judges acknowledges the difficult balance that must be struck between such oft competing values as professional qualifications, judicial independence, separation of powers and democratic legitimacy. And behind the resulting, complicated scheme is the implicit admission that, while politics are necessary for the democratic legitimacy of the judiciary, too much politics poses an equal threat to society's confidence in the fairness and objectivity of the legal process. Thus, Germany demands, as a constitutional norm, independence from its judges who, meanwhile, have been selected by a largely political entity (the Judicial Selection Committee).

[21] Thirty years ago Professor *Fritz Baur* addressed tensions over the process leading to the appointment of federal judges by defending the mixed political/executive form of the Judicial Selection Committee. At that time the push was to exclude the politically "tainted" elements of the Committee (the participants selected by and usually serving as members of the parliament) and to vest the power to appoint solely in the Federal Minister of Justice. The complaints

then were that the involvement of the politicians politicized the process in a way that the separation of powers was meant to prevent. *Professor Baur* argued, relying on the case law of the Federal Constitutional Court, that a mixed entity like the Judicial Selection Committee did not violate the principle of separation of powers because that principle enjoyed its full scope within the framework of the Committee where the executive and legislative interests still found themselves in healthy, competitive conflict.(8)

[22] More important to the present controversy than *Professor Baur's* defense of the structure of the Judicial Selection Committee is his insistence on (in fact, his embrace of) the politics inherent in the act of selecting judges. *Professor Baur* argued that one can do nothing to prevent the parties charged with selecting judges from bringing their professional, political and personal values to bear on the selection, whether legislator or justice minister.(9) *Professor Baur's* admission must be repeated again today, as the judges of the BGH appear to be reaching for decisive (if not controlling) influence over the selection of its membership. *Professor Baur's* maxim holds true for the claims of the BGH judges, though masked in the terminology of "professional qualifications": they, just like the justice ministers or legislators in the Judicial Selection Committee, bring to the selection process their political biases. The judges of the BGH challenge this notion and appear to seek to carve out an aura of professional, apolitical objectivity when, in the context of the Neskovic and Vezina appointments, they express concern for the harm done to the public's confidence in the judicial apparatus when "unqualified" candidates – by their unarticulated standards – are selected for service on the federal bench.

[23] While *Professor Baur* saw the politicization of the process by which judges are selected (whether imposed by the judiciary, executive or parliament) as a way of guaranteeing the diversity of the bench so that it reflects the society it serves, this argument only stands if the parties to the selection process are responsible to the democratic process in a way that the life-tenured judges at the BGH are not. This point, repeated in the commentary about the Neskovic/Vezina controversy, is of the gravest importance in Germany where the judiciary plays such an exaggerated role in society. As Law Professor *Gerd Roellecke* noted in an editorial in the *Frankfurter Allgemeine Zeitung*: "'State's Authority' usually means politics. Therefore, only with difficulty can one imagine that the jurisprudential authority of the people should be an exception."(10)

[24] The admission that the judicial selection process is inherently political implies that the act of judging itself is inherently political. Few examples better underscore this claim than the politically divided 5-4 vote of the U.S. Supreme Court in its resolution of last fall's election recount case. The German system does not, however, enslave the judiciary to its political constituencies in the way that many popularly elected American judges (at the state level) are. The Basic Law demands judicial independence and the law provides German judges with life tenure, allowing them to make controversial decisions (like Neskovic's marijuana decision) without fear of electoral ramifications. *Professor Roellecke* argued that judicial independence does not find its roots in the selection process, but in the organization of the system (with qualities like life tenure and panels of several judges sitting together) and the professional socialization of the participants.

[25] The nomination and election of Judges Neskovic and Vezina should be seen as political acts, undertaken by political entities. That is the system the Basic Law dictates. The parties responsible for the selection of Judges Neskovic and Vezina must account for their decisions in the next election. The greater risk, in a Germany society uniquely dependent on the judiciary, is to be seduced by the representations of the BGH judges and their supporters who argue that locating the power to select judges in the judiciary itself will divorce the politics from the process and produce an objective and independent bench. The devil in that bargain lies in the fact that, as *Professor Baur* noted thirty years ago, whether they admit it or not, the judges, too, are acting politically and there's little the people can do to influence their work in what BGH Judge Müller called a "closet".

(1) There are four other federal high courts, each serving a specific jurisdictional field: *Bundesverwaltungsgericht* (Federal Administrative Court), *Bundesfinanzhof* (Federal Financial/Tax Court), *Bundesarbeitsgericht* (Federal Labor Court) and *Bundessozialgericht* (Federal Social Security Court).

(2) Article 100.1 of the Basic Law stipulates: "If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision obtained from the Federal Constitutional Court where the Basic Law is held to be violated."

(3) Claus Arndt, Letter to the Editor, *Frankfurter Allgemeine Zeitung*, 03 March 2001.

(4) The Christian Democrats made a stronger showing in the election than pollsters had predicted.

(5) Jochen Gaugele "Aufstand der Richter am BGH," *Welt am Sonntag*, 25 Februar 2001.

(6) Hans-Ernst Böttcher "Dies erinnert bedrückend an vergleichbare Kampagnen in der Weimarer Republik", *Frankfurter Rundschau*, 06 march 2001.

(7) Bundesministerium der Justiz, Referat für Presse- und Öffentlichkeitsarbeit, 11015 Berlin, 30 September 2000, <>

(8) *F. Baur* "Richterwahl und Gewaltenteilung", 49 DEUTSCHE RICHTERZEITUNG 1971, p. 401, at 403.

(9) *Id.* at 404.

(10) *Gerd Roellecke* "Der Charme des elften Bewerbers", FRANKFURTER ALLGEMEINE ZEITUNG, 12. March 2001.