Will do? Selecting Judges on the Basis of Policy Preferences or Performance Indicators

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Introduction

The appointment of judges is a key instrument by which political institutions may influence the judiciary. In democratic theory, the possibility for elected representatives to select judges has been considered an important alleviation of the "counter-majoritarian difficulty" of judicial lawmaking in constitutional courts (Bickel, 1962; Dahl, 1957). For authoritarian regimes, on the other hand, packing constitutional courts with political allies has been a central tool for escaping the checks and balances of an independent judiciary (Bugarič and Ginsburg, 2016). Our paper studies judicial appointments to international courts, which are less well understood than nominations to domestic courts.

The core of our argument is that international judges are selected not only on the basis of their anticipated policy preferences, but also on their ability to obtain influence on the international bench. The ideal candidate will be both willing and able to pursue the government's policy agenda. Furthermore, we specify two implications that follow from this argument: First, because of the two-level structure of international organizations, governments may need

to trade national interests against party political ideology when nominating international judges. Second, governments' demand for influence may create incentives for judicial behavior that increases judges' performance. Both of these potential implications are contingent on the institutional design of the court.

While domestic judicial nominations are likely to be based on party political differences, international judicial nominations also reflect the inter-state competition that characterizes international organizations. The international dimension puts extra value on the potential ability of a judge to exercise influence over other (states') judges. This may affect both the governments' nomination choices as well as judges' behavior in office, depending on the information that is available to governments. If governments are able to observe how judges perform within the court hierarchy – in terms of achievements such as acquiring important positions or being trusted with important cases – they may factor that information into their choice.

We call this performance accountability, which is distinct from the political accountability that is more often discussed in the literature on judicial independence (Dunoff and Pollack, 2017). While the latter literature focuses on the information governments have about the direction of judges' votes and dissenting opinions, performance accountability is about the ability of judges to influence the outcome of the court. For courts with renewable terms and secret deliberations and votes, such as the Court of Justice of the European Union (CJEU), making information about performance available provides a powerful incentive for judges to do well within the court: Your chances of getting your mandate renewed, even if a new government with a different party leaning has come into place since you were first nominated, will increase if you can credibly show that you are a potential influencer for your state's interests within the court.

Furthermore, in the international context, governments pursue their interests both at the domestic party arena and in competition with other states.

This means that governments', when nominating international judges, may face a trade-off between two sources of preferences: party ideology and national interest. This applies in particular to international courts where judges have renewable terms and where information about their performance is available. Governments frequently choose between retaining the experienced and potentially influential incumbent judge that the domestic party opponent put in office, or replacing him with a more ideologically aligned newcomer whose future influence is uncertain. Two factors affect this choice: the salience of the domestic party-political conflict compared to the international conflict, and the reputational costs stemming from accusations of politicization of a judicial office that may occur if a government chooses to replace a potentially influential judge for partisan reasons.

Our argument contrasts with accounts of international judicial nominations as low-salient affairs in which governments are unlikely to engage strategically. It also differs from the theory of international judges as legal-professional trustees (e.g.: ?). Furthermore, we contribute to the literature on how courts may be designed in order to safeguard judicial independence and accountability. A strong argument in the literature is that transparency and accountability of judicial behavior do not go well together with judicial independence (Dunoff and Pollack, 2017). We nuance this argument by emphasizing that judicial accountability is multidimensional, including both policy and performance. Even though institutional designers choose to protect the independence of courts' decision-making, by restricting the transparency of the deliberations and votes, they may still provide other sources of information that may help governments hold judges accountable for their judicial performance on the bench.

The Court of Justice of the European Union (CJEU) provides an interesting case to test our arguments. Judges have six-year renewable terms, but the ability of governments to hold judges to account for their pursuit of policies is low due to secret deliberations. In contrast, the Court displays a

high degree of transparency in terms of judicial performance. Case management is highly individualized, and the allocation is done selectively by the Court's president. Important offices within the court hierarchy are elected by the collective of judges. Surprisingly, in spite of its status as the most powerful of international courts (Conant, 2007; Alter, 2008*b*), and motor of the much-debated judicialization of politics in Europe (Pollack, 2003; Kelemen, 2011; Schmidt, 2018), EU governments' selection of judges is a blank spot in current research.

We test – and find support for – our theory in a study of all 255 potential reappointment decisions to the Court since its creation in 1952. On the one hand, appointments tend to be political. Different governments prefer different judges, and this cannot be explained by voluntary retirements. In particular, turnover following the expiry of a mandate increases as preference divergence grows between appointing and reappointing governments, while no such relation exists for early retirements. On the other hand, we find ample support for reappointment based on performance in the Court's highest formation. Relying on information from 18257 case allocations, we find that governments are more inclined to keep judges who are elected into offices and whose judicial record accumulate salient cases. Performance is less indicative of retention in the lower level General Court, however, where the hierarchy of cases is less distinct.

The independence and accountability of the CJEU

To Dahl (1957) the political power of the judiciary posed a difficult democratic dilemma. Judicial review of legislative acts implies that the attitudes of a few unelected judges trump the will of the people, as expressed by parliament. However, Dahl found comfort in that this "counter-majoritarian difficulty" (as Bickel (1962) later called it) would be moderated by the ap-

pointment procedure. The fact that representative institutions select the judges would assure at least a crude preference convergence between the elected representatives and the judiciary. An appointment process in which judges are closely scrutinized with respect to their ideologies would imply that even if they act solely on their personal policy preferences, these would be roughly in line with those of the executive and legislature at the time of the nominations (Dahl, 1957).

Later empirical research on the selection of US judges has given support to Dahl's prediction. Although the preferences of the President and the Senate in the appointment process has proven to be rather complex (including factors such as patronage and interest group pressure) the ideology of the appointed Supreme Court justices have been found to be closely related to the ideologies of the President and the Senate (Segal and Spaeth, 2002, p. 222; Epstein and Segal, 2005).

Politicized courts have traditionally been seen as part of "American exceptionalism" (Lipset, 1996). In Europe, a more syllogistic view of judicial decision making, and courts as neutral interpreters of the law has been the norm (Ferejohn, 2002). However, in recent decades, the growing importance of supranational law has put the European approach under pressure. Litigating interest groups have increasingly sought to resolve questions in court that previously were reserved for political institutions. They have found their arguments in the European Convention of Human Rights and – in particular – in the development and "consitutionalisation" (Weiler, 1991) of EU law. Somewhat dramatically, Kelemen argues that the "American disease" of adversarial legalism, from which "for long, European countries were shielded, thankfully, by the Atlantic and by virtue of the sobriety of their legal cultures" (Kelemen, 2011, p. 7) has now spread to Europe. "Eurolegalism", according to Kelemen, is a trend in which political conflicts are increasingly being addressed by legal means and court litigation, rather than negotiation and compromise, which has been the traditional European way (ibid).

This tendency towards a "judicialisation of politics" is global, but it is nowhere stronger than in the European Union (Hirschl, 2008; Stone Sweet, 2004). The Court of Justice of the EU is often described as the world's most powerful international court (Pollack, 2003; Conant, 2007; Alter, 2009). The decisions of the CJEU have had highly controversial consequences on salient political conflict dimensions. The CJEU has been a driver of European economic integration, often against the views of baffled national governments. The result, according to some scholars, of the Court's "consistent, decades-long preference for European integration" (Pollack, 2012, p. 1268) has been an involuntary pressure on many member states to deregulate, liberalize, prohibit discrimination and changing national welfare systems (Scharpf 2010, Hopner and Schafer 2012).

The radical activism of the CJEU, as described in the previous literature, poses a puzzle: Why has the selection of judges – as it seems – not resulted in a Court that broadly shares the political ideologies and legal philosophies of the nominating governments? Have Europeans been too naive in their views of the judiciary, underestimating the political potential of a de facto constitutional court with a broad jurisdiction and an extremely vague "constitution" (i.e. the EU Treaties)? Or are the appointments – which take place under very non-transparent conditions – politicized after all?

Research on legal integration in Europe has failed to study the most important instrument, in Dahl's view, by which judicial independence and democratic accountability may be balanced: the appointment process. In Kelemen's words "there is shockingly little written on the process through which ECJ [CJEU] justices are appointed. " (Kelemen, 2012, p. 50; (see also Kenney, 1998, p. 104).). This paper aims to start filling this gap.

One of very few articles that addresses the selection of CJEU judges directly concludes that "there is no evidence [in the EU] of anything akin to the abortion litmus test of Reagan-Bush appointees to the US Supreme Court". However, "some anecdotal evidence suggests Member States sought

candidates who were perhaps less of a Euro-enthusiast in a general sense than their predecessors" (Kenney, 1998, p. 128). Researchers have furthermore found that members whose appointing governments hold similar preferences tend to cite each other more often (Frankenreiter, 2017). Indeed, a growing body of literature contends that members' preferences are distinguishable by the decisions they partake in (?Frankenreiter, 2018). It is reasonable to believe that these differences are traceable to the governments that appoint them.

There are two main contenders in the literature on how to understand the appointment of judges to international courts, such as the CJEU. According to the principal-agent perspective, such appointments are "highly political" (Voeten, 2013, p. 432). Elsig and Pollack argue that international judges are best theorized as agents of their nominating governments: "individual member-state principals will seek to influence international courts by nominating and appointing international judges whose nationality, judicial philosophy, and views on specific issues most closely approximate their own" (Elsig and Pollack, 2014, p. 393).

A competing claim, instead holds that European politicians were at least partly lured into a judicial trap by means of "the mask and shield of law" (Burley and Mattli, 1993, p. 72). The mask of law refers to the non-transparent nature of judicial discourse to non-legal experts. The CJEU has not been politicized, it is argued, partly because European politicians did not realize in time the political potential of the judiciary (Alter, 1998; Burley and Mattli, 1993).

The shield of law, on the other hand, refers to the protection that courts and legal decisions have as an effect of the strong normative legitimacy of the principle of rule of law. In Europe, courts have been considered untouchable, and politicization of appointments has been taboo. Alter has provided the most elaborated theoretical account of how the shield of law has made the European governments refrain from politicizing the appointments of judges

(Alter, 2008a, Alter, 2009, see also, Stone Sweet and Brunell, 2013, Majone, 2001). She argues that delegation of power to courts is qualitatively different, compared to delegation to other types of agencies, and that the CJEU therefore should not be considered an agent of the member states. Courts gain their legitimacy and authority not from loyalty to the values and interests of elected representatives or public opinion, but from the rational-legal expertise, personal competence and professional status of the judges. Therefore, judges should be – and are – conceived of as trustees, who are delegated the power to decide legal cases based on their best judgment: "Traditional agents are chosen because they are expected to be faithful to the Principal; they have delegated authority based on the Principal having authorized the Agent to act within a certain domain. "Trustees" are chosen because they personally, or their profession in general, bring their own source of legitimacy and authority" (Alter, 2008a, p. 39). The authority of trustees hinges on the view that these are "disinterested actors applying pre-existing rules in a like fashion across a body of cases, thereby imparting a perception of procedural justice and neutral fairness in their decisions" (ibid).

The principal-agent and trustee models of international courts provide different expectations regarding EU governments' appointments of CJEU judges. The former expects that screening and nomination of candidates is infused with political considerations concerning candidates' preferences with respect to the most salient policy dimensions. The trustee model, on the other hand, expects governments to leave political criteria outside, and focus on finding the most competent candidates based on professional legal merits and personal reputation in the legal community.

In the next section, we develop our theoretical argument, which is broadly in line with principal-agent theory. Empirical evidence that judges follow the preferences of those who appointed them, and that the governments select judges on political criteria, comes both from the European Court of Human Rights (Voeten, 2008), the International Court of Justice (Posner and de

Figueiredo, 2005) and the Appellate Body of the World Trade Organization (Elsig and Pollack, 2014). Given the fact that the CJEU is the most significant of international courts in terms of power and independence it is difficult to see why the European governments would be any less selective in their approach.

Furthermore, in contrast to the ICJ and the WTO AB, where there are fewer judges than member states, the ECtHR and the CJEU are full representation courts, i.e. all member states have one judge each. In this latter setting, we expect that judges more closely reflect the preferences of the appointing governments, as there is no need to make compromises with other member states in the appointment procedure.

However, selecting judges with the right political compass, from the government's point of view, does not necessarily mean ignoring legal competence and professional status. To the contrary, any government would prefer a candidate who is both ideologically committed to their agenda and possesses the authority to persuade other judges about the direction of the case law. In the next section, we outline our theory about how the selection of international judges is based on both policy preferences and performance.

Should (s)he stay or should (s)he go? Theorizing EU governments retention choices

The power to appoint judges may generate political influence over the judiciary in two ways. On the one hand, the appointing authority can *select* judges who share their preferences and have the appropriate skill set to effectively implement those preferences, thereby shaping the preferences of the members of the court *ex ante*. That is, even in the absence of monitoring and political reactions to judicial decisions we may expect that judges' behavior to some extent reflect their appointers' intentions. On the other hand, accountability may be exerted *ex post*. Reselection can be conditioned

on whether judges' previous behavior on the bench is deemed in line with the appointers preferences (Posner, 1993; Baum, 1983; Dubois, 2014). The anticipated *sanction* may induce judges to alter their behavior to avoid deselection. While these mechanisms are theoretically separable, they are often hard to distinguish empirically (Fearon, 1999).

The impact of anticipated sanctions with respect to reappointments has been effectively demonstrated by Shepherd (2009). Her study of US state supreme courts shows that the outcome of court cases where judges do not have life tenure tend to change when the ideology of the appointing authority changes. However, the effectiveness of anticipated sanctions as a tool for political influence depends on the institutional design of the court.

Two conditions are especially important: The first is whether there is a credible threat of deselection. When terms are renewable, reappointments may be conditioned on their past behavior on the bench. The second condition concerns the ability of the appointer to monitor the behavior of the judges. In particular, scholars have argued that if deliberations and voting on the bench is secret, judges become more insulated from political pressure as the appointers lack information to hold them to account (Dunoff and Pollack, 2017).

International courts are designed with the significance of these institutional features in mind (Dunoff and Pollack, 2017). For example, the European Court of Human Rights allows for public dissenting votes, while the judges currently sit for nine-year non-renewable terms. This means that although it is easy for governments to monitor judges voting behavior they lack the ability to deselect them on that basis. The WTO Appellate Body, on the other hand, has four-year renewable terms, but allows only for anonymous dissenting opinions and have an informal practice of unanimous decision-making. Thus, while the threat of deselection is high, it is more difficult for states to monitor the direction of the case law preferred by individual judges.

The Court of Justice of the European Union draws its political indepen-

dence from the secrecy of its deliberations. Although judges are selected for six-year renewable, both its deliberations and votes are secret. This norm was inherited from the French judicial system, and is broadly considered an important bulwark against improper political influence on individual judges (Saurugger and Terpan, 2017, p. 53-54, 69-70). [1]

In this study, we make two claims that secret voting in combination with renewable terms does *not* preclude. First, we show that secret voting does not necessarily protect judges from politically motivated adverse retention choices. In fact, it may well have the contrary effect. Second, the internal organization of courts may provide the appointer with other types of information that can be used for holding judges to account. We label this *performance accountability*. The argument we outline here applies directly to international courts with renewable terms, such as the CJEU and (to some extent) the WTO appellate body. In a nutshell, the argument is the following: When votes are secret, the choice to renew a judge's mandate is nevertheless determined by the policy preferences of both the previous and the present appointer. When information on performance is available, the reappointing governments evaluation is also determined by the judges record on the bench.

Political appointments in the absence of policy information

We assume that political actors with the power to select judges will choose candidates that they believe have similar policy preferences to their own on the policy dimension that is most salient to them. In cases where there is an open seat, for instance due to a self-chosen retirement, the nomination of a new judge is determined by a screening process of potential candidates based

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[1]The fate of Judge Manfred Zuleeg is frequently cited as an argument for secrecy. Judge Zuleeg sat at a time when the German constitutional court defined itself as a competitor to the Court of Justice (Grimm, 2009). In 1994, he was not reappointed by Chancellor Kohl at the expiry of his first mandate after his views were accidentally leaked (Dehousse, 1998, p. 12).

on their previous record and behavior in other positions.

In cases where a judge seeks a renewed mandate, on the other hand, the appointer may also consider the past behavior of the judge on the bench, if such information is available. If deliberations and votes are secret, the appointer has no information on the direction of case law that the judge has promoted during his or her term. In that case, a short cut to information about the preferences of the incumbent judge is to consider the preferences of the previous appointer, who made the initial selection. If the initial appointer has similar preferences as the current – as is the case when no change in government has occurred (i.e. the initial and present appointer is one and the same) – the latter may assume that the incumbent judge is likely to have preferences similar to its own. If the former appointer performed a reliable screening process – and assuming that a new screening process would be relatively costly – the current appointer's best choice will be to retain the judge. Secret voting in fact further increases the reliability of this choice: Since the initial appointer knows that it will not be able to monitor the decisions of the appointed judge, it is likely to make a more serious investment in the screening process.

One implication that follows is that even in presence of secret deliberations and voting – a shift in government that increases the preference distance between the initial and the current appointer, also decreases the chances that a judge is reappointed.

Hypothesis 1 *The probability of a judge not being reappointed increases with the distance in preferences between the appointing and the reappointing governments.*

This means that the role of secrecy is more nuanced than what is usually acknowledged. In fact – depending on how the judge evaluates a trade-off between legal quality, policy preferences and career concerns – secret voting may work against her job security: In contrast to the US state supreme

court judges studied by Shepherd (2009), career-oriented EU judges lack the ability to credibly signal a willingness to vote in favor of the new selector's preferences. Secrecy thus decreases the chances for opportunistic judges to secure their career concerns by being politically flexible. Any information they may give the reappointing governments in this regard resembles "cheap talk". Furthermore, while secrecy does protect less opportunistic judges from political sanctions based on their voting behavior, it does not protect them from a politicized retention choice in case of a change in government.

Performance accountability when information is available

An alternative way for a judge to increase her chances of re-nomination is to show that she is respected and trusted by the other judges on the bench. If the court makes available information about whether judges have been able to acquire important tasks and positions within the internal hierarchy of the court this may provide a credible signal to the nominating government that an incumbent judge is competent and possesses authority in the eyes of others.

In this respect, the organization of the CJEU provides several sources of information. First, case allocation is determined by the Court's President rather than through automatic (randomized and/or regulated) assignments, as in some other courts. Being repeatedly selected as the reporting judge on important cases may therefore be interpreted as a token of confidence in the eyes of the President. Second, since 2003 the CJEU is organized so that a number of leadership positions are elected by the majority of judges, rather than following a principle of rotation or inter-state negotiations. Being elected to such a position is a prestigious vote of confidence given by the judge's peers.

There are at least two reasons why we believe governments are likely to value past performance of incumbent judges within the court. First, a competent and trusted judge is more likely to be able to influence the votes

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of other judges on the bench. For a government that is policy seeking this means better chances of realizing its preferred direction of the case law. Second, denying a high-performing judge a renewed mandate may generate reputational costs, if it is interpreted by the electorate as an act of politicization of the judiciary.

Hypothesis 2 *The probability of a judge being reappointed increases with his or her past performance on the bench, in terms of achieving prestigious and important positions within the court.*

Finally, we also consider the situation where the appointing government needs to make a trade-off between an incumbent judge's preferences and performance. What role does past performance play in the case where there has been a change in government that makes for a significant preference distance between the initial and the present appointer?

On the one hand, one would expect that having a high-performing policy opponent on the bench, with a strong ability to influence policy, would be a worst-case scenario, and that such a judge would likely be removed. On the other hand, when it comes to international courts it is not clear that domestic party-political differences trump differences in national interests between states. Generally, our theory would predict that governments make their choices of appointing judges based on the most salient preference dimension. A high-performing judge may therefore still be retained if the government values his or her impact on the bench in terms of representing national interests more than any party-political differences that may also exist.

There are reasons to believe that in the context of the European Union governments will be hesitant to replace high performing judges even if they are appointed by their domestic opponents. As already mentioned, politicizing the nominations are likely to raise significant reputational costs in EU states where the norm of rule-of-law is strong. Furthermore, the policies that are decided at the EU level divide states more than parties. Research

on the inter-governmental negotiations in the Council of the EU has found a relatively weak impact of party ideology compared to national sector specific interests on states negotiation behavior (Thomson, 2011). Nevertheless, it is not evident whether national or party-political interests will be most salient to EU governments in their selection of judges to the CJEU. Rather than formulating a hypothesis, therefore, we leave as an open empirical question the possibility of an interaction effect between preference alignment between appointing and reappointing government and the performance of the incumbent judge.

Empirical strategy

To verify these expectations, we have compiled an original data set on all 393 appointment decisions made to both formations of the Court – the Court of Justice (CJ) and the General Court (GC) – over its entire history (1952-2019). Information on names, appointment dates, the duration of mandates as well as the cause of exit is collected from the *Official Journal of the European Union.*

Figure 1 reports the stated reasons for judges' exit. While many of the exit decisions (52%) coincides with the end of a mandate, a large number of judges also resigned before the due expiry date (38%). Early terminations have also occurred because the judge deceased (5%) or was promoted to other positions at the CJEU (5%).

We use this information to identify situations where the government had the opportunity to change the sitting judge. That is, we consider only potential *re*appointments. There are two reasons for this. First, we are interested in governments' selection criteria, but have no data on the alternative candidates. For each decision we therefore measure the difference in preferences between the appointing and reappointing governments. In this way, we can test whether two governments have different preferences over the same judge.

Second, we seek to isolate governments' decision to replace a judge from the judges' own decision to leave the Court. We therefore discard all exit decisions for which the government's approval is not required, retaining only decisions due to the expiration of a mandate. For the same reason, the analysis also includes a set of controls designed to capture the judges' career stage. We further verify the findings in a placebo test comparing judges' resignations with governments' retention decisions. We expect that the career-related controls have similar effects in both samples, while our explanatory variables – government preferences and judges' performance – have no bearing on decisions where governments are not involved (the placebo).

We end up with a final data set of 255 (re)appointment decisions to the Court of Justice (60%) and the General Court (40%), while the placebo test is conducted on a similar-sized sample of 239 decisions.

	Min.	1st Qu.	Median	Mean	3rd Qu.	Max.	Missing
Change of judge	0	0	0	0.24	0	1	0
Preference distance (economic issues)	0	0.06	0.18	0.34	0.48	2.46	27
Preference distance (integration issues)	0	0.02	0.12	0.19	0.24	1.75	27
Preference distance (general left-right issues)	0	2.11	7.34	12.18	19.96	66.88	27
Performance (cases in larger panels)	-1	-0.4	-0.06	-0.11	0.13	0.63	0
Performance (cases of interest to the legal community)	-9.8	-1.26	-0.48	-0.55	0.3	6.39	6
Performance (cases of member state interest)	-1.81	-0.11	0	-0.06	0	1.34	6
Performance (selective leadership positions)	0	0	0	0.22	0	1	0
Non-selective leadership positions	0	0	0	0.25	0.5	1	0
Change of prime minister	0	0	0	0.45	1	1	0
Age	35.38	53.9	59.7	60	65.69	143.47	0
Tenure	0.17	3	6	7.09	9.34	90.29	0
Change in attendance	-57	-5	4	5.03	14	66	36

Table 1: Descriptive statistics

Dependent variable: Change of judge

Our dependent variable, *Change of judge* is binary. It captures all member state decisions that may lead to a judge's exit from the CJEU and flags those resulting in a change. From the descriptive statistics in Table 1, we see that governments most often (76%) decide to renew the mandate of judges whose term has come to an end. In the placebo test, we rely on the same reference

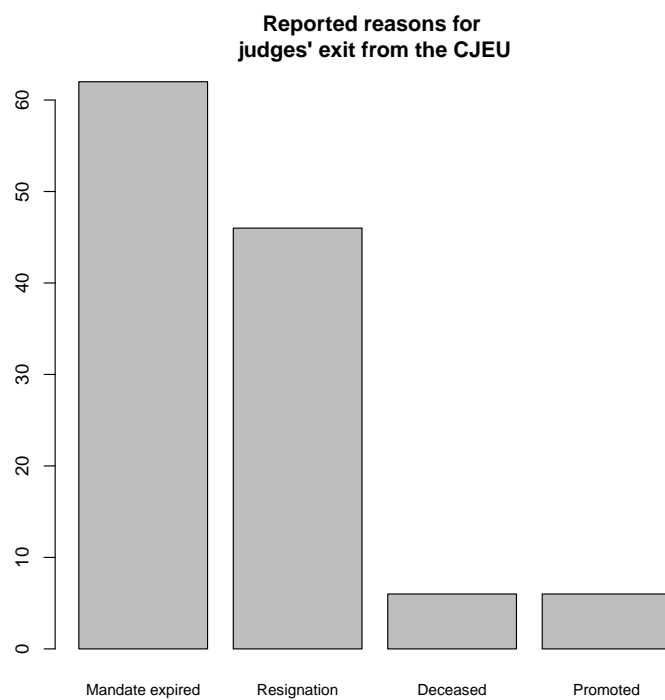**Reported reasons for
judges' exit from the CJEU**

Figure 1: The Official Journal of the EU reports several reasons for judges'
exit.

group – judges who are retained when their mandate expires – but consider instead voluntary exits (resignations). The univariate distribution remains very similar (81%).

Figure 2 illustrates the proportion of replacement decisions following the expiration of mandate over time. Although we can distinguish a certain drop from the earliest period, the overall propensity to replace incumbents has remained low. Due to increases in the membership following successive EU enlargements, most of the observations were made in the period after 1990 (80%). The results will therefore be driven by selection in the last three decades. For this reason, we also report alternative models in the appendix where we verify that the selection criteria have not changed substantially over time.

Explanatory variables

We have hypothesized that governments select judges based on prior information about their political preferences, while retention decisions also take into account new information about performance on the bench. We assume these two effects to be additive and linear.

Measuring preferences   In the absence of new information on preferences, successive governments will rely on past assessments of the judge. Thus, we expect that the probability of a change of judge increases with the distance between successive governments' preferences (H_1).

To test this hypothesis, we place governments in a single policy space using party manifestos covering the Court's entire 70-year history (Döring and Manow, 2018; Volkens et al., 2017; Gabel and Huber, 2000). We operationalize preference distance in three ways.

Preference distance - economic issues is a continuous measure of the distance between the appointing and the reappointing governments on economic issues. It is calculated as the absolute difference between the factor scores
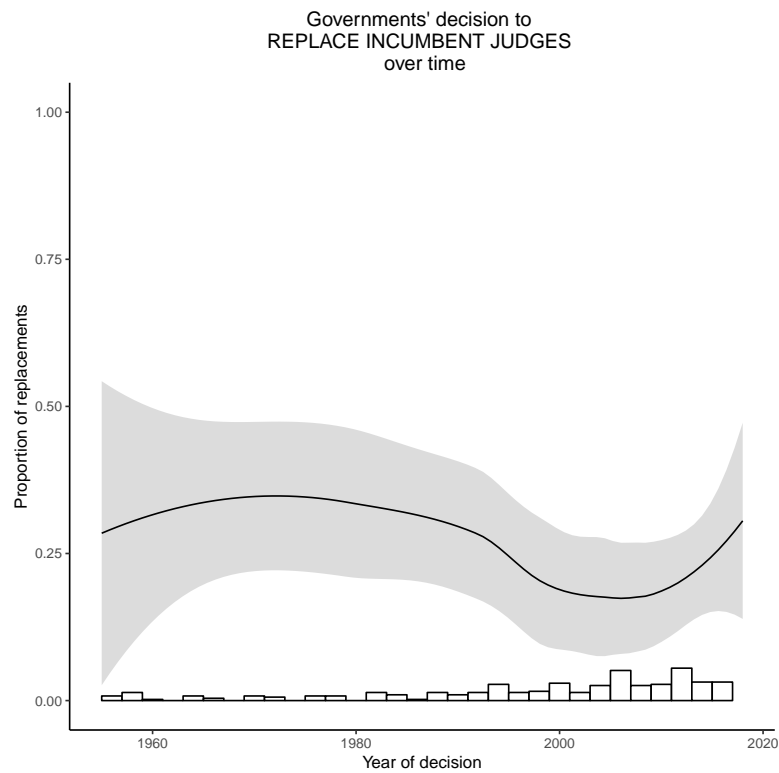
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Figure 2: Governments' decision to replace an incumbent judge has remained relatively low (Locally estimated scatter plot smoothing overlaid by a histogram showing the number of observations over time).

estimated from cabinet parties' electoral manifestos (Döring and Manow, 2018; Volkens et al., 2017; Gabel and Huber, 2000). The Court's most far-reaching and long-established case law has related to the common market, with profound implications for the state's role in economic governance. At the domestic level, it is also the main policy dimension dividing the government from the opposition. We therefore expect that governments emphasize economic issues when selecting policy makers for the future. The bivariate statistics already give an indication to that effect. While the median distance between governments in retention choices is 0.14, it increases to 0.36 when the incumbent is replaced.

Preference distance - general left-right issues reports the rile scores that differentiate successive governments. It is a continuous measure which theoretically ranges from 0 to 100 and captures preference distance on a generalized left-right axis. It subsumes economic questions but covers a broader range of issues less impacted by the Court's case law. If the selection is done on preferences in a policy space where the Court's output overlaps with the domestic debate, we can expect that the measure replicates imprecisely what we see clearly on economic issues.

Preference distance - integration issues relates to questions of international and European integration. It is calculated in a similar way as preferences on economic issues. A wide-spread assumption in the academic debate has been that integration is at the core of governments' interactions with the CJEU (Pollack, 2012). Following that argument, it might be that governments with different attitudes towards European integration prefer different judges. A bivariate comparison of choices provide marginal support for that claim: The median distance between decision-makers is 0.11 in retention choices against 0.16 when the incumbent is replaced.

Measuring performance While the CJEU keeps information on judges' votes secret, it is exceptionally transparent on the influence of individual

judges. We consider two important positions that judges may hold within the internal judicial hierarchy: The position as judge rapporteur and being part of the Court's leadership.

Case management in the Court has, from the outset, been selective and highly individualized. In contrast to many other courts where case allocation is randomized or highly regulated, the president of the CJEU allocates cases to the judge of his choice (RoP, 2012, Article 15(1)). The judge-rapporteur acts as an agenda setter, and – together with the chamber president – he has a leading role in the deliberations of the panel. In each specific case, the judge-rapporteur is the most important member of the Court. Holding this role in significant cases is therefore a signal of trust in the eyes of the President.

We measure case significance in three ways. Our first operationalization uses panel size to capture the court's own assessment. Second, we consider the level of attention that cases have attracted in the legal community. The third operationalization then considers the interest that policy makers have expressed during the Court's management of the case. The general level of these measures has changed over time and may furthermore vary according to the length of each judge's term of office. All variables are therefore centered so as to make performance comparable across judges. In the multivariate analysis, effects can be read as deviations from the mean in the relevant court within the relevant time frame. That is, we approximate the type of bench marking governments can reasonably do when assessing the incumbent's performance.

Performance - cases of interest to the Court reports the proportion of cases in a judge's portfolio that were decided by a panel of more than three judges. While the Court's reliance on small chamber formations has increased over time, the cases of least consequence have always been delegated to panels of three judges. To make the measure comparable, it is centered on the proportion of such cases concluded by the Court during the judge's term.

The distribution of PERFORMANCE
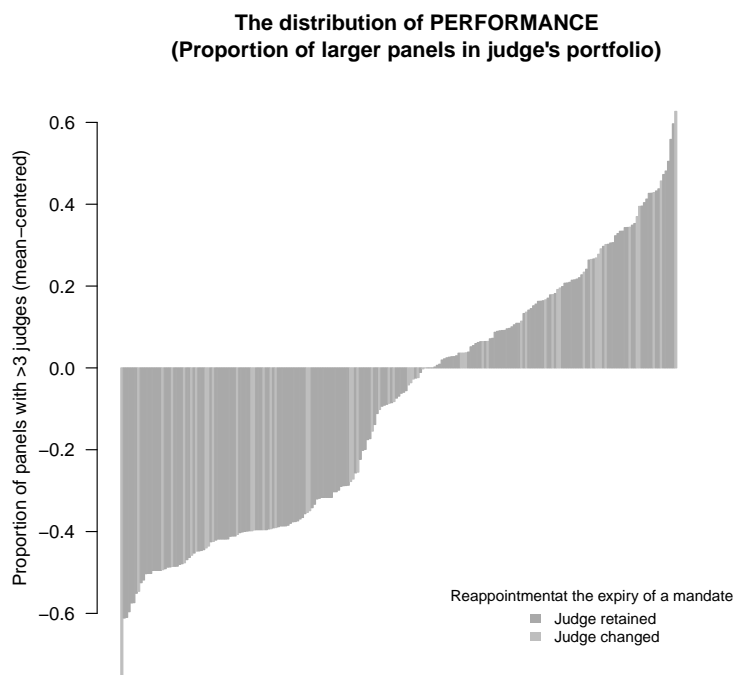**(Proportion of larger panels in judge's portfolio)**

Figure 3: There is substantial variation in judges' influence as measured by the proportion of salient cases they handle compared to the average member on the Court.

Figure 3 illustrates a substantial variation in judges' influence measured as in this way. Each bar represents a potential reappointment decision. Bars above the x-axis indicate judges whose portfolio includes disproportionately more cases of interest to the Court, while those below the axis indicate judges who handle disproportionately fewer such cases. According to H_2, we would expect this variation to transfer into different retention probabilities. Yet, when considering the bivariate statistics, there are few indications that member states prefer retaining high-performing judges. Dark grey bars indicate judges who were retained, while light grey bars indicate replacements. The replacement rate among the high performers was 24% which is only marginally less than the low performers (25%). One reason may be that senior members are more likely to garner influential positions. However, they are also more likely to retire. This is why the multivariate analysis is designed to distinguish these effects.

Performance - cases of interest to the legal community reports the mean number of annotations that a judge's portfolio of cases has attracted since his or her last appointment. The legal community regularly comment on judgments in academic journals. We do not argue that the annotations reflect the quality of the judgment per se. However, they are reflective of the academic salience of cases that the judge has been entrusted with. The number of legal journals and scholars have multiplied over the years and so has the interest in CJEU case law. For comparability, the final measure is thus mean-centered on the average number of annotations received by all judgments from the same period. Once again, the bivariate difference is minimal: While replacement rates among those whose cases are disproportionately more debated is 23.5%, the similar figure for those whose portfolio has attracted little attention is 24%.

Performance - cases of member state interest reports the mean number of amicus curia briefs the Court has received from governments where the judge has acted as rapporteur. During the preliminary reference procedure, EU

governments are invited to file their observations on the matter at hand. Not all cases attract such observations and member states vary in their propensity to use the opportunity. Among the 6804 preliminary reference cases that the Court has processed, 19% did not receive any member state observations. Their presence is indicative of the political salience of the cases that the judge has been trusted with (Dederke and Naurin, 2017). Models including this measure only consider the Court of Justice, since preliminary reference procedures have generally been in the exclusive competence of the Court's higher formation. Similarly to the previous measure, this variable is also mean-centered to control for variations over time. Following H_2 we expect that all three operationalizatoins have a negative effect on the odds of an exit.

Selective positions of influence are more informative of a judge's future performance than random assignments. Our fourth measure therefore tests the effect of rendering positions selective. Following the Court's reorganization in the wake of the Lisbon treaty (2003), the status of the presidents in chambers of five judges was substantially increased. While all chamber presidents prior to that point were appointed following a principle of rotation, they now became elected positions (RoP, 1991, Article 10(1); RoP, 2003, Article 10(1)). The presidents in chambers of five are now elected to their offices by their fellow judges, which is a signal of trust and competence. Again, we argue that this conveys information about judges' performance to the appointing governments.[2]

Performance - selective leadership positions is a binary variable that captures judges who have presided over deliberations with five or more judges after the 2003 reform. It is included in the analysis together with an indicator of all judges who have held such a position prior to the reform (labelled *non-selective leadership positions*). In total 21 of the 143 appointment decisions

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[2]The new higher status of chamber presidents applies only to presidents in the larger formations of five and not to chambers of three. The chambers of three (and their presidents) are in practice subsections of the larger chambers.

involved former elected leaders. We expect that only the selective positions have a significant and negative effect on the odds of replacing a judge. Yet, the bivariate statistics provide little indication to that effect with a replacement rate of 24% among former leaders against 22% among the rank-and-file members whose mandate expired post-Lisbon.

Controls

As the discussion about individual performance has made clear, there are a number of other factors that might affect either judges' decision to exit the CJEU or governments' assessment of the incumbent. The multivariate analyses account for these.

First and foremost, there are instances when judges might complete their term, but do not seek reappointment. Few positions for EU judges are more attractive than being a judge in the CJEU. Also, very few alumni have pursued high-ranking, work-intensive jobs upon their exit. Except for government de-selection, the most likely reason for a judge to leave the Court would therefore be retirement. Judges often signal their intent to their respective governments in a letter of motivation. While we do not have access to these letters, we control for the judge's career stage and judicial behavior immediately prior to the new appointment decision.

Thus, *Length of tenure* approximates the judge's career stage. The average tenure upon exit was 9.77 years, with the median judge sitting for 2 periods. Similarly, we control for a judge's *Age* at the time of the (re)appointment decision. The average age of judges exiting the court was 65 years. This can be seen in conjunction with the judge's retirement. At the next reappointment decision, the judge would be 71 years; well beyond the retirement age in most member states. Both variables are mean-centered and we expect them to correlate positively with the decision to exit. We furthermore control for changes in a judge's investment in his or her mandate. A judge who plans on an exit may decrease his or her participation in Court activities. *Change*

in attendance therefore measures the change in the number of deliberations in which a judge has partaken in the year immediately preceding the official exit decision (as compared to the previous year). The bivariate results already speak to the importance of judges' own effort to remain in office. The median member who remained in office increased his or her attendance by a median of 5 cases in the year prior to his or her reappointment. In contrast, those who exited the Court partook 2 fewer deliberations. In the multivariate analysis the variable is centered around the median judge, and we expect that when attendance decreases, the odds of change of judge increases.

All models also contain an indicator for whether there has been a change in the prime minister's party between appointments (*Change in PM*). The variable controls for the possibility that the ruling party uses CJEU appointments to distribute spoils to political friends. Models exploring judges' performance furthermore include an indicator of whether the judge held the position as President or Vice-President at the time of the (re)appointment (*(Vice-)President*), since these positions are clearly prestigous although the division of labor implies that they handle few cases themselves.

Model

An incumbent judge can either stay in office or exit the Court. Given that our dependent variable is binary, we use a binomial logistic model (Long, 1997, p. 34-84).

$$Pr(y_i = 1) \sim Bernoulli(\pi_i)$$
$$logit(\pi_i) = \alpha + \beta_k \times x_i + \beta_k \times Z_i$$

(1)

The substantial variable of interest, x, varies across models because we explore different operationalizations of the two hypothesized selection criteria; preferences and performance. A first series of models focuses on different measures of preference distance between successive governments. Our main

goal is to test H_1. A second series of models then expands the model to include different operationalizations of performance as hypothesized in H_2. All models include relevant controls, Z.

The results are obtained from Bayesian models with MCMC estimation (Plummer, 2003). Some observations lack information on governments' preferences, judges' birth or entry dates. These are imputed in parallel to the estimation of the main model. Furthermore, the results reported in the main part of the article are estimated on pooled data. However, we verify that these results hold also when we account for systematic variation that may be present in cross-sectional time-series. Overall, our results are robust to a range of alternative modelling strategies. Details are provided in the appendix.

Results

We have argued that governments seek to appoint judges who share their preferences and who will be in a position to forward them within the Court. In the presence of incumbent candidates, governments update their beliefs and adjust the choices previously made.

When no new information is available, a change of judge is likely to result from a change in government. This is the object of our first expectation. In the first series of analyses, we therefore compare the preferences of the appointing government with those responsible for the *re*appointment.

In contrast, when new information is at their disposal, governments weigh the advantages of retaining the incumbent against what they can reasonably expect from a newcomer. In the second series of analyses, the results are therefore driven by a comparison between the incumbent's judicial record and that of other members on the bench.
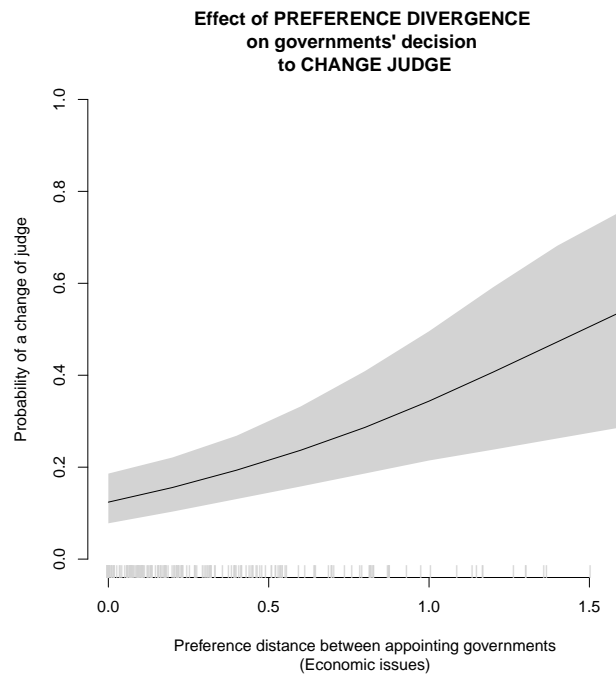
Figure 4: Predicted probability of a change in judge when there is a change in appointing government's economic preferences. Median effect and 95% highest posterior density interval.

Dependent variable: 'Change of judge'	Model 1	Model 2	Model 3
Intercept	-1.953	-1.854	-1.518
	(-2.454,-1.485)	(-2.375,-1.392)	(-2.01,-1.078)
Preference distance (economic issues)	1.308		
	(0.582,2.026)		
Preference distance (general left-right)		0.026	
		(0.003,0.051)	
Preference distance (integration)			-0.396
			(-1.812,0.776)
Change of PM party	-0.05	0.103	0.322
	(-0.694,0.536)	(-0.499,0.719)	(-0.26,0.914)
Length of tenure	0.122	0.109	0.119
	(0.057,0.186)	(0.048,0.175)	(0.057,0.182)
Age	0.108	0.101	0.1
	(0.067,0.152)	(0.063,0.144)	(0.061,0.142)
Change in attendance	-0.012	-0.012	-0.014
	(-0.028,0.004)	(-0.03,0.004)	(-0.031,0.001)
Number of observations	255	255	255
Proportion of correct predictions	0.729	0.725	0.722
Prop. of correct positive pred.	0.694	0.694	0.694
Prop. of correct negative pred.	0.741	0.736	0.731

Median effects with 95% HDI in parenthesis.

Table 2: Results from a logistic regression. The first model considers preference distance between successive governments on economic issues, the second considers European integration. Median effects with 95% credibility intervals reported in parantheses.

The effect of changes in the appointers' preferences (H_1)

We start by investigating the effect of the domestic context on governments' decisions. Specifically, we are interested in the effect of changes in government preferences. We consider three operationalizations. The results are reported in Table 2. Figure 5 furthermore illustrates the standardized coefficients for an explicit comparison of effects across policy domains.

We hypothesized that a shift in economic preferences between the initial and the present appointer would increase the chances of a change of judge. The first model provides ample support for this expectation. The size of the effect is illustrated in the upper pane of Figure 4, and it is non-trivial. Even a median change in a government's attitudes on economic policies would imply a 27% increase in the odds of a replacement. As a way to illustrate the

effect, we may consider situations where a member state has shifted between a conservative and a social democratic prime minister[3]. Such a shift would more than double the odds of a replacement.

The second model can be considered as a robustness check. It reports the effect of changes along the broader left-right cleavage present in European politics. As is apparent from the comparison in Figure 5, the direction is similar to that of economic questions, although the effect is more moderate. This is unsurprising, as the measure includes a number of secondary issues less relevant to CJEU case law. This might nevertheless evolve in the future. The broader the scope of issues solved at the supranational level, the larger the overlap between the domestic debate and the Court's output.

In contrast, the third model gives no support for a similar logic in questions of European integration. The previous academic debate has focused extensively on the cleavage between the institutional interests of the Court and the member states (Pollack, 2012; Larsson and Naurin, forthcoming). Yet, these results indicate that governments prioritize substantive economic left-right issues rather than national sovereignty in their selection of judges to the CJEU.

The effect of judges' performance (H_2)

When considering a potential reappointment, we expect that governments take the performance of judges into account. Replacing a judge who has obtained the confidence of his colleagues is costly. While this may allow the government to chose a judge whose political inclinations are more in line with their own, they also risk losing influence on the bench by relying on a more junior member to defend national interests. In the following, we extend the model to consider in total four different measures of past influence, assuming governments use the information provided to form beliefs about a judge's

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[3]There are 31 instances in the data where the prime minister party has shifted from social democratic to conservative (or vice-versa) between appointments. The median distance in their estimated economic preferences is 0.54.

**Effect of PREFERENCES in different POLICY AREAS
on governments' decision to CHANGE JUDGE**

Economic issues

General left–right (rile)

European integration

−1   0   1
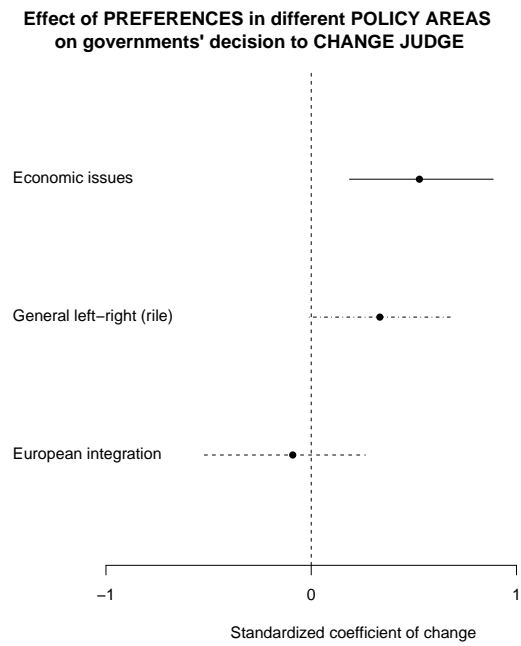
Standardized coefficient of change

Figure 5: The effect of a change in the appointing government's preferences is different in different policy areas. Coefficients are standardized for comparisons across models. Median effect and 95% highest posterior density interval.

Dependent variable: 'Change of judge'	Model 4	model 5	model 6	model 7
Intercept	-2.102	-2.045	-1.905	-1.615
	(-2.663,-1.605)	(-2.586,-1.561)	(-2.588,-1.281)	(-2.184,-1.074)
Preference distance (economic issues)	1.339	1.267	1.382	1.145
	(0.605,2.069)	(0.548,2.001)	(0.466,2.258)	(0.433,1.902)
Performance (cases of court interest)	-1.31			
	(-2.276,-0.467)			
Performance (cases of interest to legal community)		-0.16		
		(-0.309,-0.012)		
Performance (cases of MS interest)			-0.643	
			(-1.665,0.351)	
Performance (selective leadership positions)				-1.271
				(-2.126,-0.416)
Non-selective leadership positions				-0.191
				(-0.881,0.512)
Change of PM party	-0.006	0.011	-0.232	0.014
	(-0.65,0.592)	(-0.574,0.618)	(-1.068,0.539)	(-0.633,0.673)
(Vice-)President	-0.4	-0.281	0.776	-0.502
	(-1.588,0.704)	(-1.373,0.743)	(-0.652,2.099)	(-1.662,0.572)
Length of tenure	0.151	0.154	0.114	0.153
	(0.083,0.222)	(0.08,0.226)	(0.024,0.211)	(0.084,0.226)
Age	0.118	0.105	0.176	0.122
	(0.078,0.167)	(0.065,0.149)	(0.113,0.251)	(0.078,0.17)
Change in attendance	-0.012	-0.013	-0.015	-0.015
	(-0.029,0.004)	(-0.029,0.004)	(-0.038,0.005)	(-0.032,0.002)
Number of observations	255	255	154	255
Proportion of correct predictions	0.737	0.733	0.76	0.757
Prop. of correct positive pred.	0.694	0.694	0.738	0.726
Prop. of correct negative pred.	0.751	0.746	0.768	0.767

Median effects with 95% HDI in parenthesis.

Table 3: Change of judge as a function of performance. The models explore different operationalizations.

future sway. The results are reported in Table 3. In contrast to the bivariate statistics, the results provide ample support for H_2.

Our first measure considers the proportion of cases decided in a medium to large panel (with five or more judges). While the judge-rapporteur in conjunction with the advocate general suggest the panel size after having familiarized with the case, it is the Court's plenary that meets the final decision. The choice reflects the anticipated difficulty or importance of the case. Reversely, the court only resolves "routine" cases in panels of three judges (Prechal, 2015, p. 1281). The measure, therefore, can be seen as an expression of the frequency with which a judge is in the position to push new case law. The results are in the expected direction. The more non-trivial cases a judge has obtained as rapporteur, the more likely he is to remain in office. All things equal, judges whose portfolio contain 10 percentage points more medium- to large-panel cases than the panel distribution in the Court,

has a 12 % lower odds of replacement.

The second measure describes the number of cases that have attracted interest in the legal community. Specifically, Model 5 considers the mean number of legal annotations of cases where the judge has acted as rapporteur. The effect is illustrated in Figure 6. It is similarly substantial and in the expected direction. For each unit of increase in a judge's average annotations, the odds of a change decreases by 15%. More intuitively, if we consider the average difference between judges in their first and second term, the odds of a replacement decreases by 16%.

Our third measure distinguishes judges in the Court of Justice according to the political salience of preliminary reference rulings that they have delivered as reporting judge. The the direction of the results are similar as before. However, they fail to reach conventional levels of statistical significance.

According to our theory, the effect is not driven by expectations from the legal community or the direction of the judge's policy preferences *per se*. Rather, the cases were allocated by the President of the Court and provide an indication of who are the key architects behind CJEU case law. It also gives a cue about future influence. As such, the President's selection criteria have a direct sway on governments' choice to retain incumbent judges.

Our fourth measure of influence takes into account the collective choice of the judges at the Court. All deliberations are presided over by a (chamber) president. While most of these positions have formally or informally followed a principle of rotation over the course of the Court's history, a level of middle management positions occurred following the institutional reforms of 2003. Model 6 reports the effect of having presided over a deliberation with five or more judges (i.e. the more salient cases). The model distinguishes between those positions that were elected and those that were not.

Once again, the substantial effect is sizeable. The odds of replacing an elected chamber president of a five-sit is 71% lower than that of a rank-and-file judge. Figure 7 explicitly explores the difference in predicted probability
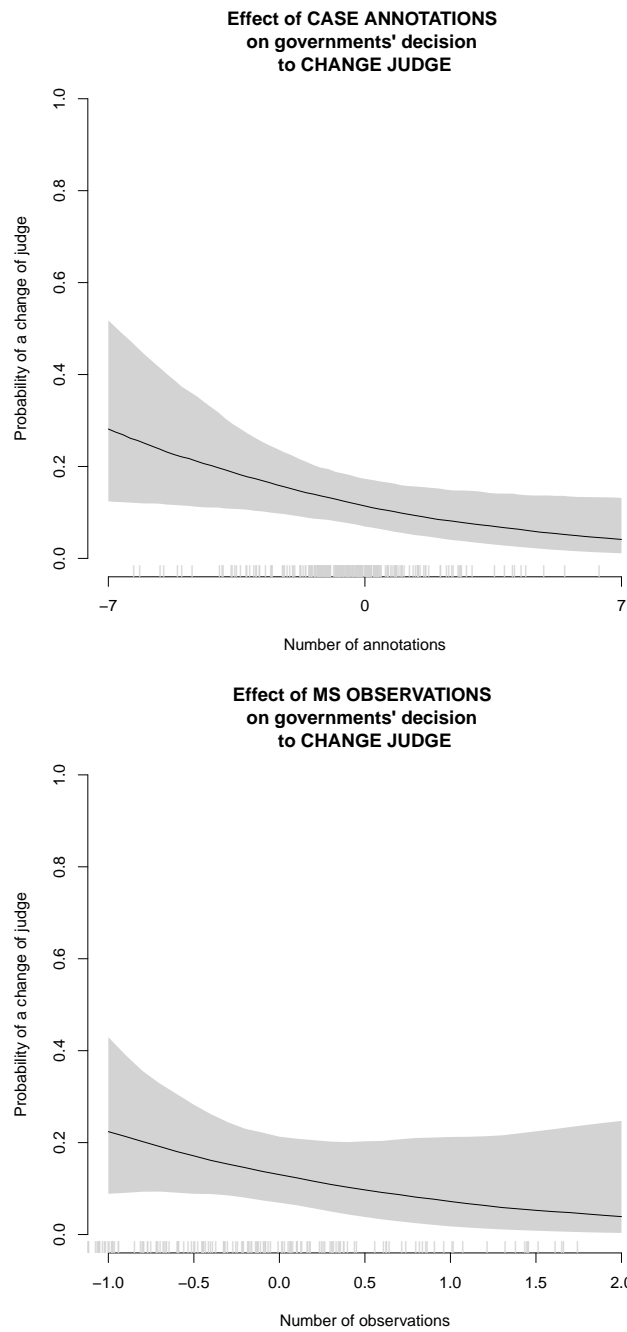
Figure 6: Predicted probability of a change in judge. Median effect and 95% highest posterior density interval.

**Effect of SELECTIVE LEADERSHIP positions
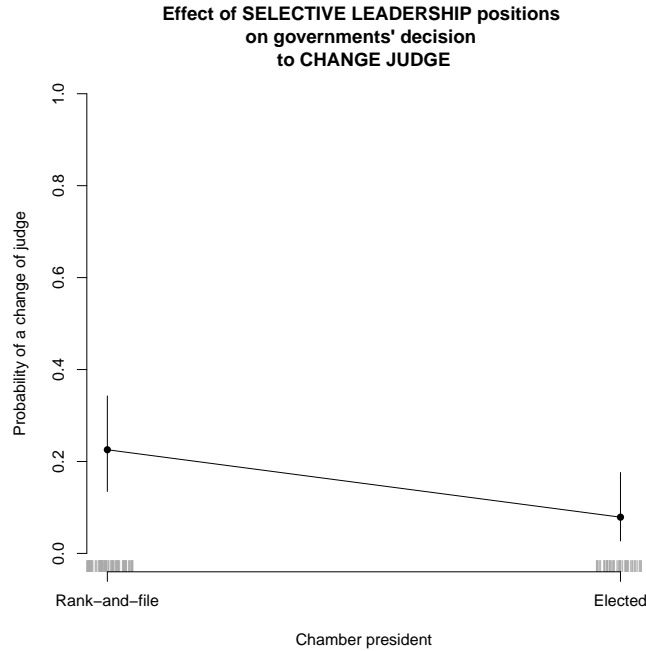on governments' decision
to CHANGE JUDGE**

Figure 7: Predicted probability of a change in judge. Median effect and 95%
highest posterior density interval.

of changing the judge when incumbent candidates have previously been en-
dorsed by their colleagues as compared to a rank-and-file member. In con-
trast – and as illustrated in Figure 8 – the effect of a non-elected office is
indistinguishable from zero.

Robustness of the results

How well do these models describe the data and how robust are the results
to alternative explanations?

The models seem to provide a fairly accurate description of the data with
an in-sample correct prediction rate of 74%. Notwithstanding the size of
the relative effect of both economic preferences and performance, it is worth
noting that the baseline likelihood of replacing judges remains fairly low,
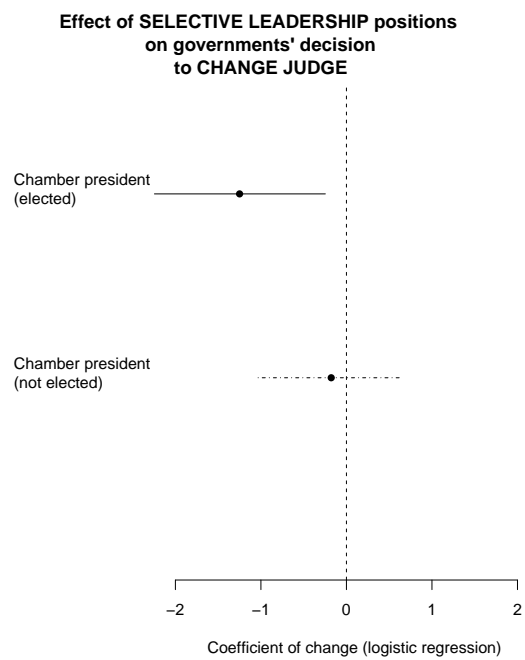however. It means that governments often leave judges in office.

Figure 8: Median effect and 95% highest density interval.

Dependent variable: 'Change of judge'	Mandate expired	Resignation
Intercept	-2.045	-1.733
	(-2.586,-1.561)	(-2.253,-1.266)
Preference distance (economic issues)	1.267	-0.442
	(0.548,2.001)	(-1.415,0.464)
Performance (cases of interest to legal community)	-0.16	0.03
	(-0.309,-0.012)	(-0.107,0.16)
Change of PM	0.011	0.001
	(-0.574,0.618)	(-0.632,0.619)
(Vice-)President	-0.281	-0.017
	(-1.373,0.743)	(-1.177,1.053)
Length of tenure	0.154	0.116
	(0.08,0.226)	(0.043,0.191)
Age	0.105	0.091
	(0.065,0.149)	(0.046,0.139)
Change in attendance	-0.013	-0.022
	(-0.029,0.004)	(-0.039,-0.006)
Number of observations	255	239
Proportion of correct predictions	0.733	0.72
Prop. of correct positive pred.	0.694	0.63
Prop. of correct negative pred.	0.746	0.741

Median effects with 95% HDI in parenthesis.

Table 4: Different exit causes: Reference level for both is instances where the term is expired and the judge is reappointed. Results from two logistic regressions.

Discussion

We have argued that appointments and reappointments of judges to international courts may be understood as a function of the information that nominating governments have regarding potential candidates policy preferences and ability to influence other judges while on the bench. That information, in turn, depends on institutional design features of these courts.

When dissenting votes and opinions are public, governments may update their beliefs about incumbent judges' policy preferences on a regular basis. If terms are renewable, this information may then be used to reward or sanction incumbent judges by allowing or denying them a new term in office. In courts where deliberations and votes are secret, on the other hand, as is the case in the Court of Justice of the EU and (to some extent) the WTO Appellate

Dependent variable: 'Change of judge'	Model 1	Model 2	Model 3
Intercept	-2.101	-2.138	-1.977
	(-2.671,-1.58)	(-2.716,-1.59)	(-2.682,-1.33)
Preference distance (economic issues)	1.337	1.412	1.493
	(0.634,2.074)	(0.625,2.248)	(0.524,2.426)
Performance (court interest)	-1.054		
	(-2.362,0.253)		
Preference distance (economic issues) * Performance (court interest)	-0.88		
	(-3.56,1.732)		
Performance (legal interest)		-0.211	
		(-0.396,-0.015)	
Preference distance (economic issues) * Performance (legal interest)		0.157	
		(-0.218,0.513)	
Performance (MS interest)			-0.353
			(-1.607,1.111)
Preference distance (economic issues) * Performance (MS interest)			-1.243
			(-3.945,1.421)
Change of PM	-0.062	0.022	-0.229
	(-0.736,0.578)	(-0.603,0.669)	(-1.119,0.604)
(Vice-)President	-0.406	-0.319	0.913
	(-1.548,0.744)	(-1.466,0.819)	(-0.689,2.414)
Length of tenure	0.151	0.155	0.111
	(0.08,0.226)	(0.081,0.228)	(0.016,0.206)
Age	0.123	0.106	0.185
	(0.08,0.173)	(0.063,0.15)	(0.116,0.26)
Change in attendance	-0.012	-0.013	-0.016
	(-0.03,0.004)	(-0.03,0.003)	(-0.038,0.004)
Number of observations	255	255	154
Proportion of correct predictions	0.741	0.718	0.766
Prop. of correct positive pred.	0.71	0.694	0.762
Prop. of correct negative pred.	0.751	0.725	0.768

Median effects with 95% HDI in parenthesis.

Table 5: Interaction effect between preferences and competence.

Body, reappointing governments need to look elsewhere for information on the policy preferences of the incumbent judge. A probable source is the policy preferences of the initially appointing government, whose screening of candidates is likely to have placed a judge with similar preferences on the bench.

This means that a change in government is bad news for incumbent judges even in courts where votes and opinions are secret. Our empirical findings in the case of the CJEU indicate that EU governments choose to replace incumbent judges based on their presumed preferences regarding economic policy. Since no voting records are available from the Court, governments have no other information on the policy preferences of the judge than what they can infer from the political ideology of the government who made the previous selection. In the event of a shift in government, therefore, the secrecy of the Courts deliberations in practice work against opportunistic

judge's chances of staying in office.

However, because governments are policy seekers, performance does matter for reappointment insofar as it signals future influence. Again, this depends on the courts institutional design. Two conditions have to be present: 1) Past performance has to be indicative of future influence. That is, positions cannot be randomly distributed but rather the result of a deliberate choice. 2) The information has to be available. The pre-reform ECtHR serves as a good example of a court that only satisfies the first of the two criteria. Although being a court with renewable terms where each case is allocated to a judge rapporteur in a non-random way, the name of that rapporteur is never published. Thus, while voting decisions were known, the relative influence of judges was not. In contrast, we have argued that the large variation in influence among judges of the CJEU is both informative and observable. Hence, performance – measured both through members portfolio of cases and leadership positions – has a substantive effect on judges likelihood of a reappointment to the CJEU.

Governments value not only that judges have similar policy preferences, but also that they have the ability to promote those preferences in competition for influence with judges from other states. Evidence that judges receive responsibility for important cases, or important positions within the courts internal organization, may signal confidence that the incumbent is respected by peers and in a position to influence others. Furthermore, governments may face reputational costs in the broader public if they are seen to remove a high performing judge for party political reasons.

Our empirical findings in the case of the CJEU indicate that EU governments choose to replace incumbent judges based on their presumed preferences regarding economic policy. Since no voting records are available from the Court, governments have no other information on the policy preferences of the judge than what they can infer from the political ideology of the government who made the previous selection. In the event of a shift in gov-

ernment, therefore, the secrecy of the Courts deliberations in practice work against opportunistic judge's chances of staying in office.

While secrecy of judicial votes increases the judicial independence in terms of political accountability judges may still be held accountable for their performance on the bench. Our results indicate that the internal organization of the CJEU provides valuable information to governments regarding the performance – and possible future influence – of incumbent judges. Those who are trusted with important positions within the court, by the president or their peers, are more likely to keep their job when their mandate expires.

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Appendix

Description of variables

The substantial name of each variable, as used in the main text of this paper, is reported in bold. The variable name, as used in the data set, is then reported in paranthesis. The unit of observation is individual terms in office. While the original data contains all mandates served, for the purposes of this paper the analysis is only conducted on terms that ended at the expiry of a mandate.

Change of judge (`Exit`) is a binary variable reporting whether a judge remains in office for another term (0) or exits the Court (1). We consider cases where the `ExitCause` is set to "Mandate expired". The information is collected from the announcement published in the *Official Journal of the European Union* that member states have appointed a new judge.

Preference distance - economic issues (`|FreeEconomy - FreeEconomy_ren|`) is a continuous variable reporting the absolute difference between the economic preferences of a judge's appointing and reappointing governments respectively. The government's economic preferences are calculated in the following way:

In the first step, we identify the government in power (`DecisionCabinet` and `DecisionCabinetExit`) at the time of the appointment decision (`DecisionDate` and `DecisionDateExit`) using the "Cabinet" data provided by the ParlGov Project (Döring and Manow, 2018).

In the second step, we identify the parties in government using the "Parties" data (Döring and Manow, 2018) and link these to the manifesto data provided by the Manifesto Project (Volkens et al., 2017).

In the third step, we estimate the economic preferences expressed in all party manifestoes using the vanilla method (Gabel and Huber, 2000).

The indicators we rely on are questions related to the economic preferences of parties ("per401", "per402", "per403", "per404", "per405", "per406", "per409", "per410", "per412", "per413", "per414", "per415" and "per416").

- "per401": Favourable mentions of the free market and free market capitalism as an economic model.

- "per402": Favourable mentions of supply side oriented economic policies (assistance to businesses rather than consumers).

- "per403": Support for policies designed to create a fair and open economic market.

- "per404": Favourable mentions of long-standing economic planning by the government.

- "per405": Favourable mentions of cooperation of government, employers, and trade unions simultaneously. The collaboration of employers and employee organisations in overall economic planning supervised by the state.

- "per406": Favourable mentions of extending or maintaining the protection of internal markets (by the manifesto or other countries).

- "per409": Favourable mentions of demand side oriented economic policies (assistance to consumers rather than businesses).

- "per410": The paradigm of economic growth.

- "per412": Support for direct government control of economy.

- "per413": Favourable mentions of government ownership of industries, either partial or complete; calls for keeping nationalised industries in state hand or nationalising currently private industries. May also include favourable mentions of government ownership of land.

- "per414": Need for economically healthy government policy making.

In the fourth step, we average the estimated preferences over all parties in government and link this to the appointing and reappointing governments in the main data frame. In the main text these preferences are weighted by the party size of each government coalition partner in parliament. To check the robustness of these results we also caclulate an alternative variable where preferences are not weighted.

Last, the preference distance between successive government is calculated during the estimation of models as the absolute difference between two ideal-points.

When information is lacking, we impute the variable with two variables drawn from the Chapel Hill Expert Survey trend file (Bakker et al., 2015; Polk et al., 2017).

- *Economic left-right preferences* (`lrecon`) ranges from 0 (extreme left) to 10 (extreme right) and classifies parties in terms of their ideological stance on economic issues. Parties can be classified in terms of their stance on economic issues. Parties on the economic left want government to play an active role in the economy. Parties on the economic right emphasize a reduced economic role for government: privatization, lower taxes, less regulation, less government spending, and a leaner welfare state.

- *Economic deregulation* (`deregulation`) ranges from 0 (strongly favors deregulation) to 10 (strongly opposes deregulation) and classifies parties in terms of their position on deregulation.

Preference distance - integration issues (|`Integration - Integration_ren`|) is a continuous variable calculated in a similar way as the previous measure. We rely on four indicators relating to international and European

integration from the manifesto data: "per107", "per108", "per109" and "per110".

- "per107": Need for international co-operation.
- "per108": Favourable mentions of European Community/Union in general.
- "per109": Negative references to international co-operation.
- "per110": Negative references to the European Community/Union.

When information is lacking, we impute the variable with two variables drawn from the Chapel Hill Expert Survey trend file (Bakker et al., 2015; Polk et al., 2017).

- *European integration* (`position`) ranges from 0 (strongly opposes) to 7 (strongly favors) and reports the overall orientation of the party leadership towards European integration
- *European Parliament powers* (`eu_ep`) ranges from 0 (strongly opposes) to 7 (strongly favors) and reports the overall orientation of the position of the party leadership on the powers of the European Parliament.

Preference distance - general left-right issues (|rile - rile_ren|) is drawn from the same data (Volkens et al., 2017) and reports the absolute distance in rile scores that differentiates the appointing and reappointing governments.

When information is lacking, we impute the variable with two variables drawn from the Chapel Hill Expert Survey trend file (Bakker et al., 2015; Polk et al., 2017).

- *General left-right* (`lrgen`) ranges from 0 (extreme left) to 10 (extreme right) and reports the overall ideological stance of the party leadership.

- *Redistribution preferences* (`redistribution`) ranges from 0 (strongly favors redistribution) to 10 (strongly opposes redistribution) and classifies parties in terms of their position on redistribution of wealth from the rich to the poor.

Performance - managing cases of legal interest (`Annotations.mean – Annotations.court.mean`) is a continous measure of the mean number of legal annotations that cases garnered in which the judge acted as a rapporteur during his mandate. It is centered on the mean number of annotations garnered by cases delivered by the Court in the same period. The variable thereby reports the difference between the actual performance of the judge and what the government could reasonably expect. Information is collected and provided by the CJEU itself.

Performance - managing cases of member state interest (`Observations.mean – Observations.court.mean`) is a continous measure of the mean number of amicus curia briefs from member states that cases garnered in which the judge acted as a rapporteur during his mandate. It is centered on the mean number of briefs garnered by cases delivered by the Court in the same period. The variable thereby reports the difference between the actual performance of the judge and what the government could reasonably expect. Information is collected from Eur-lex.

Performance - leadership positions (`Chamber5President`) reports whether the judge had precided over deliberations in panels with more than 5 participants during his mandate. The information is collected from the text of the judgments. In the analysis, the variable is contrasted with a subset of observations reporting all instances that have occured after the reform in 2003, labelled (*Performance - selective leadership positions*).

Coalition government (`CoalitionCabinet`) is a binary variable. It is cal-

culated from the number of cabinet parties as reported by ParlGov's "Cabinet" data (Döring and Manow, 2018).

Length of tenure (`Tenure`) is a continuous variable. It reports the cumulated sum of all the judge's mandates (`TermLength`).

Age (`AgeExit`) is a continuous variable reporting the difference between the judge's birth date (`Birth`) and the date of the member states' reappointment decision (`DecisionDateExit`). Information is collected from the judge's CVs, their profile at the Court's website (www.curia.eu) and the announcement of the next judge's appointment published in the *Official Journal of the European Union*.

Description of the statistical model

All models are Bayesian, estimated using MCMC in JAGS (Plummer, 2003). The Bayesian approach has two compelling features: First, unobserved information can be estimated in parallel to the main regression, possibly by inserting information from other sources (Gill, 2002, p. 43). Second, Bayesian models also provide a more robust approach to multilevel non-linear regressions (such as our logistic regressions), in particular when the number of countries (or time periods) is low (Stegmueller, 2013). While the results reported in the article are produced by a pooled model, we verify the results in this appendix using random intercepts.

In the following, we examplify with the estimation of model 4. It is a

binomial logistic regression:

$$Pr(Replacement_i = 1) \sim Bernouilli(\pi_i)$$
$$logit(\pi_i) = \alpha +$$
$$\beta_1 \times |Preferences\ gvt\ 1_i - Preferences\ gvt\ 2_i| +$$
$$\beta_2 \times (Annotations_i - Avg.\ Annotations_i) +$$
$$\beta_3 \times Coalition\ Status_i +$$
$$\beta_4 \times (Vice-)President +$$
$$\beta_5 \times Tenure_i - mean(Tenure) +$$
$$\beta_6 \times Age_i - mean(Age) +$$
$$\beta_7 \times Change\ in\ Attendance_i$$

(2)

The regression parameters have relatively vague prior distributions:

$$\alpha \sim N(0, 10)$$
$$\beta_k \sim N(0, 10)$$
$$\gamma_k \sim N(0, 10)$$
$$\delta_k \sim N(0, 10)$$

(3)

We let the model run through 500 iterations in adaptation mode to set the Monte Carlo step size and another 5 000 iterations of burn-in before starting the sampling. We then sample every 10th iteration for the next 10 000 simulations. The final sample shows no signs of no-convergence.

Imputation of missing information

Most variables contain no or few missing observations[4]. They are therefore treated as randomly missing and imputed through priors informed by the

---

[4]Tenure (0 observation, 0%) and Legal annotations (0 observation, 0%

mean and standard deviation among the observed units:

$$Economic\ left - right_i \sim N(\mu^{Economic\ left-right}, \tau^{Economic\ left-right})$$
$$Economic\ deregulation_i \sim N(\mu^{Economic\ deregulation}, \tau^{Economic\ deregulation})$$
$$Annotations_i \sim N(\mu^{Annotations}, \tau^{Annotations})$$
$$Avg.\ Annotations_i \sim N(\mu^{Avg.\ Annotations}, \tau^{Avg.\ Annotations})$$
$$Tenure_i \sim N(\mu^{Tenure}, \tau^{Tenure})$$
$$Age_i \sim N(\mu^{Age}, \tau^{Age})$$

$$(4)$$

Most of the missing observations come from our estimation of political preferences. Thus, we regularly lack information on the party positions of the appointing (13 observations, 5%) and the reappointing governments on economic issues (24 observations, 9%). In these cases, we impute values relying on information provided by the Chapel Hill expert survey trend file (Bakker et al., 2015; Polk et al., 2017). While only available from 1998, this supplementary data source nevertheless covers a substantial part of the missing observations (62% and 83% respectively). Missing information on government preferences is thus imputed through an ordinary linear model:

$$Preferences\ gvt\ 1_i \sim N(\mu 1_i, \tau_i)$$
$$\mu 1_i = \gamma 1_1 +$$
$$\gamma 1_1 \times Economic\ left - right 1_i +$$
$$\gamma 1_2 \times Economic\ deregulation 1_i$$

$$(5)$$

$$Preferences\ gvt\ 2_i \sim N(\mu 2_i, \tau_i)$$
$$\mu 2_i = \gamma 2_1 +$$
$$\gamma 2_1 \times Economic\ left - right 2_i +$$
$$\gamma 2_2 \times Economic\ deregulation 2_i$$

$$(6)$$

Results from these secondary regression models are reported in table 6,

while the two columns in table 7 compare results from the main model when preferences are imputed to model using listwise exclusion. In comparison to a listwise exclusion, the imputation allows us to estimate all remaining variables on the universe of cases. It also avoids making the assumption that missingness is independent of values on other covariates in the model. As is apparent, however, results remain largely similar across models.

Predictors	Model 1
Intercept (appointing gvt)	-1.557
	(-4.034,1.8)
Economic left-right preferences (appointing gvt)	0.044
	(-0.201,0.302)
Economic deregulation (appointing gvt)	0.061
	(-0.216,0.299)
Intercept (reappoiting gvt)	-0.941
	(-1.858,0.332)
Economic left-right preferences (reappointing gvt)	0.179
	(0.132,0.221)
Economic deregulation (reappointing gvt)	-0.142
	(-0.175,-0.082)
Number of observations	255

Median effects with 95% HDI in parenthesis.

Table 6: Results from secondary models imputing values of preferences.

Predictors	w/imputations	listwise exclusion
Intercept	-2.045	-1.988
	(-2.586,-1.561)	(-2.552,-1.484)
Preference distance (economic issues)	1.267	1.233
	(0.548,2.001)	(0.52,2.005)
Performance (legal interest)	-0.16	-0.115
	(-0.309,-0.012)	(-0.272,0.05)
Change of PM	0.011	-0.145
	(-0.574,0.618)	(-0.813,0.524)
(Vice-)President	-0.281	-0.089
	(-1.373,0.743)	(-1.287,1.053)
Length of tenure	0.154	0.145
	(0.08,0.226)	(0.069,0.224)
Age	0.105	0.101
	(0.065,0.149)	(0.057,0.15)
Change in attendance	-0.013	-0.017
	(-0.029,0.004)	(-0.034,0)
Number of observations	255	228
Proportion of correct predictions	0.733	0.737
Prop. of correct positive pred.	0.694	0.648
Prop. of correct negative pred.	0.746	0.764

Median effects with 95% HDI in parenthesis.

Table 7: Results from a logistic regression with imputations of preferences and with listwise exclusion respectively.

Alternative specifications

In this subsection, we control for other factors that may influence exit decisions. We first verify whether effects hold on in different subsets of the data. We then we proceed to a contextual validation of whether deselection can be attributed to governments' choice of judge rather than self-(de)selection by the incumbent.

Do results hold for different subsets of the data?

The results reported in the main article are estimated on a pooled data set. However, the dynamic of reappointments may vary over time and institutions – both national and supranational. We start by exploring different ways of treating the data as time-series cross-sectional, before we explore whether the results hold for both formations of the Court.

Variation over time and member states The data is cross-sectional time-series insofar as it covers 7 decades of the Court's history, and government appointment decisions are done in 28 member states. There may be national or time-dependent variations in appointment decisions, preferences and performance that invalidate the results.

First, there may be national differences in governments' propensity to change judges. For example, praxis in some member states – such as in the Netherlands – implies that judges are allowed to sit for two periods before a substantial reevaluation is done. We adress this concern by including varying intercepts for each member state. The intercepts capture residual variation. They also imply that results are driven not merely by national differences, but by within-group variation in how preferences and performance are assessed.

Main model 4 can therefore be written as:

$$
\begin{aligned}
Pr(Replacement_i = 1) \sim & Bernouilli(\pi_i) \\
logit(\pi_i) = & \alpha + \\
& \alpha_{nationality,i} + \\
& \beta_1 \times |Preferences\ gvt\ 1_i - Preferences\ gvt\ 2_i| + \\
& \beta_2 \times (Annotations_i - Avg.\ Annotations_i) + \\
& \beta_3 \times Coalition\ Status_i + \\
& \beta_4 \times (Vice-)President + \\
& \beta_5 \times Tenure_i - mean(Tenure) + \\
& \beta_6 \times Age_i - mean(Age) + \\
& \beta_7 \times Change\ in\ Attendance_i + \\
& \beta_8 \times Change\ in\ Attendance\ (median\ judge)_i
\end{aligned}
$$

$$(7)$$

Second, appointment decisions may have changed over time. In particular, the salience of appointments may have grown with the increasing influence of

the CJEU, thus prompting governments to pay more attention to appointments (Elsig and Pollack, 2014). We therefore fit an alternative model in which each decade of the Court's history is modelled as a random intercept similar to what was done for national variation in the model above. Once again, the strategy of partial pooling implies that regression coefficients are driven by variation within each decade (i.e. group), while drawing information between periods only to the extent that these two conform.

```
## Error in order(colnames(chain1)):  argument 1 is not a vector
```

Dependent variable: 'Change of judge'	Model 1	Model 2	Model 3
Intercept	-1.831	-1.723	-1.577
	(-2.325,-1.381)	(-2.199,-1.29)	(-2.085,-1.132)
Preference distance (economic issues)	1.421		
	(0.328,2.582)		
Preference distance (general left-right)		0.021	
		(-0.009,0.052)	
Preference distance (integration)			-0.017
			(-1.97,1.695)
Change of PM party	0.168	0.233	0.305
	(-0.425,0.734)	(-0.369,0.804)	(-0.253,0.875)
Length of tenure	0.116	0.111	0.114
	(0.056,0.178)	(0.052,0.174)	(0.054,0.18)
Age	0.1	0.099	0.101
	(0.06,0.143)	(0.06,0.14)	(0.062,0.141)
Change in attendance	-0.012	-0.013	-0.015
	(-0.029,0.004)	(-0.03,0.002)	(-0.031,0.002)
Number of observations	255	255	255
Proportion of correct predictions	0.741	0.739	0.741
Prop. of correct positive pred.	0.339	0.355	0.347
Prop. of correct negative pred.	0.87	0.863	0.868

Median effects with 95% HDI in parenthesis.

Table 8: Results from a logistic regression. Preferences are calculated weighing the party size in coalition parties. Median effects with 95% credibility intervals reported in paranthenses.

The non-random effects are reported in table 9. It shows that results from the different estimation strategies are similar. The random effects reported in figure 9 further show there is little residual variation between member states
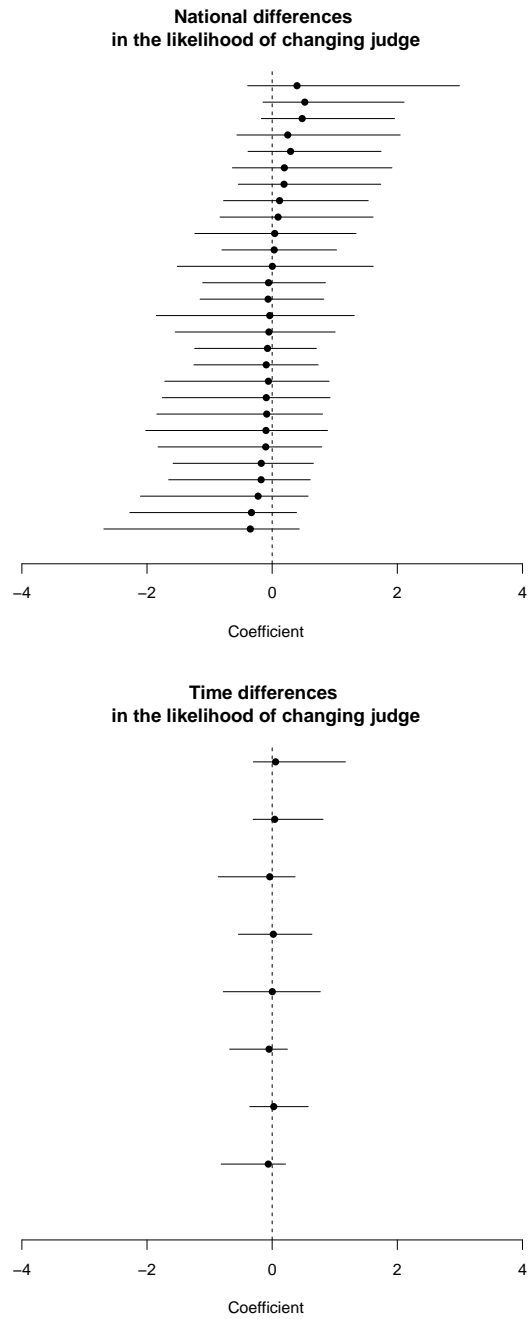
**National differences
in the likelihood of changing judge**

**Time differences
in the likelihood of changing judge**

Figure 9: The residual variation between member states and decades is negligable.

59

Dependent variable: 'Change of judge'	Model 4	Model 4 (nat.int.)	Model 4 (time.int)
Intercept	-2.045	-1.451	-1.789
	(-2.586,-1.561)	(-4.601,1.713)	(-3.998,0.762)
Preference distance (economic issues)	1.267	1.19	1.225
	(0.548,2.001)	(0.431,1.992)	(0.497,1.968)
Performance (legal interest)	-0.16	-0.142	-0.16
	(-0.309,-0.012)	(-0.296,0.008)	(-0.304,-0.011)
Change of PM	0.011	0.084	0.041
	(-0.574,0.618)	(-0.574,0.733)	(-0.6,0.654)
(Vice-)President	-0.281	-0.394	-0.315
	(-1.373,0.743)	(-1.575,0.775)	(-1.489,0.785)
Length of tenure	0.154	0.181	0.16
	(0.08,0.226)	(0.104,0.271)	(0.084,0.236)
Age	0.105	0.108	0.104
	(0.065,0.149)	(0.063,0.161)	(0.064,0.149)
Change in attendance	-0.013	-0.015	-0.014
	(-0.029,0.004)	(-0.033,0.002)	(-0.031,0.002)
Time		-0.016	
		(-0.036,0.004)	
Number of observations	255	255	255
Proportion of correct predictions	0.733	0.776	0.741
Prop. of correct positive pred.	0.694	0.742	0.694
Prop. of correct negative pred.	0.746	0.788	0.756

Median effects with 95% HDI in parenthesis.

Table 9: Results from alternative logistic regressions. The results remain largely similar to the models reported in the main text.

and between decades. From the table, we see that adding information on nationality or decade also only produces a minor increase in the proportion of correct predictions.

Do results hold for both formations of the Court?

Predictors	Both	CJ	GC
Intercept	-2.102	-1.8	-1.445
	(-2.663,-1.605)	(-2.469,-1.204)	(-2.835,-0.102)
Preference distance (economic issues)	1.339	1.389	1.651
	(0.605,2.069)	(0.461,2.29)	(0.352,3.047)
Performance (managing cases of court interest)	-1.31	-1.827	2.219
	(-2.276,-0.467)	(-3.249,-0.456)	(-0.665,5.268)
Change of PM	-0.006	-0.063	0.044
	(-0.65,0.592)	(-0.969,0.793)	(-0.987,1.156)
(Vice-)President	-0.4	0.597	-4.003
	(-1.588,0.704)	(-0.839,2.079)	(-7.729,-1.494)
Length of tenure	0.151	0.138	0.231
	(0.083,0.222)	(0.037,0.235)	(0.101,0.367)
Age	0.118	0.173	0.035
	(0.078,0.167)	(0.105,0.245)	(-0.043,0.116)
Change in attendance	-0.012	-0.017	0.025
	(-0.029,0.004)	(-0.038,0.003)	(-0.015,0.069)
Number of observations	255	154	101
Proportion of correct predictions	0.737	0.766	0.802
Prop. of correct positive pred.	0.694	0.714	0.7
Prop. of correct negative pred.	0.751	0.786	0.827

Median effects with 95% HDI in parenthesis.

Table 10: Change of judge in the two courts considered separately.

Is the effect of change in government preferences robust?

Dependent variable: 'Change of judge'	Preferences	Change in PM
Intercept	-2.045	-1.825
	(-2.586,-1.561)	(-2.817,-1.021)
Preference distance (economic issues)	1.267	
	(0.548,2.001)	
Change of Prime Minister	0.011	0.495
	(-0.574,0.618)	(-0.459,1.517)
Performance (legal interest)	-0.16	-0.149
	(-0.309,-0.012)	(-0.383,0.084)
Coalition cabinet		-0.093
		(-1.03,0.861)
(Vice-)President	-0.281	-0.688
	(-1.373,0.743)	(-2.803,1.207)
Length of tenure	0.154	0.236
	(0.08,0.226)	(0.105,0.37)
Age	0.105	0.036
	(0.065,0.149)	(-0.031,0.103)
Change in attendance	-0.013	-0.018
	(-0.029,0.004)	(-0.042,0.004)
Number of observations	255	109
Proportion of correct predictions	0.733	0.743
Prop. of correct positive pred.	0.694	0.6
Prop. of correct negative pred.	0.746	0.786

Median effects with 95% HDI in parenthesis.

Table 11: Model 2 only considers cases where the Prime Minister's party family is Social Democratic or Conservative. Results from two logistic regressions. Median effects with 95% credibility intervals reported in parantheses.

Have governments' selection criteria changed over time?

Dependent variable: 'Change of judge'	Main model	Change over time
Intercept	-2.0451	-0.1817
	(-2.5858,-1.5605)	(-1.919,1.3009)
Preference distance (economic issues)	1.2674	1.4863
	(0.5484,2.0011)	(0.597,2.5654)
Preference distance (economic issues) * Years (since 1952)		0.0367
		(-0.008,0.0847)
Performance (legal interest)	-0.1604	-0.1155
	(-0.3092,-0.0116)	(-0.266,0.0384)
Performance (legal interest) * Years (since 1952)		-2e-04
		(-5e-04,1e-04)
Years (since 1952)		-0.0317
		(-0.0552,-0.0068)
Change of PM	0.0112	0.0359
	(-0.5737,0.6177)	(-0.5879,0.7759)
(Vice-)President	-0.2808	-0.4168
	(-1.3733,0.7428)	(-1.4771,0.6316)
Length of tenure	0.154	0.1929
	(0.0805,0.2265)	(0.108,0.2704)
Age	0.1054	0.1063
	(0.0651,0.1489)	(0.0629,0.1651)
Change in attendance	-0.0126	-0.0158
	(-0.0289,0.0042)	(-0.0338,6e-04)
Number of observations	255	255
Proportion of correct predictions	0.7333	0.749
Prop. of correct positive pred.	0.6935	0.7258
Prop. of correct negative pred.	0.7461	0.7565

Median effects with 95% HDI in parenthesis.

Table 12: Selection criteria over time: Alternative model exploring the change over time in governments' selection criteria.