Building legitimacy: strategic case allocations in the Court of Justice of the European Union

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Abstract

Does the President of the Court of Justice of the European Union (CJEU) make strategic use of his members? Despite its considerable independence, the Court demonstrates substantial self-restraint when confronted with member states' preferences. However, to date, studies in the separation-of-powers tradition have considered judicial behavior at the organizational level. In contrast, this paper focuses on how external strategic considerations translate to individual influence *within* the CJEU.

Influence in the Court is individualized and distributed at the leadership's discretion. All cases are prepared by a "judge rapporteur" who acts as an agenda setter. This study argues that the President seeks to build the Court's legitimacy by strategically allocating cases to select judges. I show that individual-level specialization is promoted and argue that it favors a consistent case law. I then argue that suspicions about judges' political accountability can polarize already politicized cases. The President shortcuts such dynamics by allocating cases to judges whose governments hold moderate political preferences.

I rely on original data on 9623 allocation decisions in CJEU (1980-2015). The results speak to the lingering effect of judges' renewable

terms – despite secret voting – as well as the importance of an autonomous internal organization for judicial independence.

Introduction

Since his appointment by the Bush administration, Chief Justice John Roberts has established a solid voting record among the conservatives on the US Supreme Court. However, in some of the Court's most politicized cases – touching questions such as the Affordable Care Act (NFIB v. Sebelius, 2012) and the right to abortion (Hellerstedt, 2016; Gee v. Planned Parenthood of Gulf Coast, Inc, 2018; June Medical Services, 2019) – he swung the Court towards more judicial restraint than what his and the majority of judges' preferences would indicate.

Commentators have suggested that Roberts relinquished immediate policy gains to maintain the Court's reputation as an institution above politics (e.g.: Crawford, 2012; Liptak, 2019; Leonhardt, 2019). While independent courts may occasionally go against the expressed wishes of elected leaders, these are moments when they cash in capital built up as an impartial and consistent interpreter of the law. This paper suggests that courts' legitimacy is built by its leadership already at the case-management stage. In particular, I look at two underresearched legitimation strategies: On the one hand, I look at attempts to depolarize politicized debates. On the other, I consider individual-level specialization as a means to obtain consistency.

Individual decision makers play a central role in the Court of Justice of the European Union (hereafter refered to as the CJEU, or the Court) and the leadership enjoys a large discretion in assigning it. Specifically, all cases are prepared by a "judge rapporteur" who acts as an agenda setter. The Court's President derives much of his influence from designating that judge. While he may use the priviledge to pursue a policy agenda of his own, the way he manages his staff also impacts the Court's ability to navigate its political

environment.

Judges are appointed by their governments and sit for six years renewable. The Court is nevertheless considered among the world's most independent international judiciaries. Its success has inspired the design of many new international courts (Alter, 2008, 2014). Yet, its internal workings have remained largely unexplored (Dunoff and Pollack, 2018, p. 86-87). If who makes decisions within courts matter for the outcome of cases and their reception, then studying how cases and judges are matched is essential to understanding judicial independence.

Judges' accountability to their political appointers is particularly delicate in a politicized environment where suspicions of undue pressure would polarize decision making further. The Court's case management therefore includes several measures intended to ensure judges' independence. All deliberations and votes are kept secret (Dunoff and Pollack, 2017). Similarly, no judge acts as the lead author in cases where he risks striking down his home government's policies. These steps may not be enough, however. I argue that the President is cognizant of the suspicion that judges may be partial. Relying on two different measures of politicization, I demonstrate that he allocates cases where member states have expressed opposing opinions to judges whose governments occupy a moderate position in the hopes of depolarizing the debate. I further show that considerations of domestic politics mainly spills over to the CJEU case management when its case law is not yet developed. The effect then decreases as the Court's interpretation crystalizes.

A coherent case law can therefore be seen as a strategy of self-binding in view of future conflicts. While previous research has focused on the effect of specialization on efficiency (Maltzman and Wahlbeck, 1996, 2004), I argue that it also alleviates coordination problems among judges and favors coherence within policy domains. Specialization can thus be an important asset for power-seeking courts. Yet, the CJEU has consistently rejected the

practice of specialized chambers that many courts operate with (Fabri and Langbroek, 2007). This study shows that the President instead promotes specialization at the individual level and argues that it provides flexibility to make strategic allocation choices. Thus, individual judges repeatedly obtain responsability for specific pieces of legislation, while its President remains in control over the Court's central players.

The Court's hybrid nature between an international court and a supranational adjudicator akin to domestic constitutional courts has given rise to a diverse literature on its powers and limitations. Its supremacy in the European judicial hierarchy has induced an overconstitutionalization that undoubtedly constrains governments' policy making (Blauberger and Schmidt, 2017; Schmidt, 2018). Yet, the Court also moderates its rulings in response to member states' signals (Carrubba et al., 2008; Larsson and Naurin, 2016). Similarly to international courts, its members are politically appointed by national governments (Bobek, 2015; Hermansen and Naurin, 2019) and the member states' executives are its main interlocuters both as legislators in the Council and during the implementation of policies. I consider the CJEU as an international court insofar as its actions are directed towards governments, and judges are assumed under the influence of different appointers. However, I draw on the well-established literature on the US Supreme Court to understand case allocation within the judiciary (Maltzman and Wahlbeck, 1996, 2004; Bonneau et al., 2007; Lax and Cameron, 2007; Lax and Rader, 2015; Ura and Flink, 2016). In both courts, cases are assigned to a lead author whose opinions carry additional weight and whose appointment is done by the leadership.

The paper makes two contributions. First, although voting in the CJEU is kept secret to shield judges from political pressure, I show that division of labor reintroduces elements of accountability which the Court's internal organization seeks to cut short. Second, the negative relationship between established case law and political considerations indicates that power-seeking

courts have an interest in building consistency as part of a legitimization strategy.

To conduct the study, I have collected information on 9623 cases brought before the CJEU in the period 1980-2015. The data includes information on the parties in government at the time of the allocation, each judge's experience adjudicating on similar topics, as well at the potential politicization of the case in question. In the following, I survey why specialization and political sensitivity are valuable to courts. I then describe the internal organization of the CJEU. Last, I formulate my expectations, describe the data and discuss the results.

Building legitimacy

Courts enjoy varying levels of diffuse support resilient to the ideological direction of specific rulings (e.g.: Gibson and Nelson, 2015). This support rests on a belief that courts are legalistic, impartial and inherently different from the political branches of government (Gibson, 2007; Gibson and Caldeira, 2011). However, when decisions are perceived as politically motivated (by ideology or strategy), overall institutional legitimacy decreases (Christenson and Glick, 2015). The public is also more likely to endorse the output merely to the extent that it aligns with their opinions (Bartels and Johnston, 2013). Politically debated cases are therefore moments where onlookers assess and update their beliefs about the Court's legitimacy (Christenson and Glick, 2015). We may say that a court's diffuse support is built up over time. Courts can contribute to this evolution by cultivating a legalistic reputation through consistent interpretation of the law and by avoiding polarizing already politicized cases.

Impartiality

When courts are called to resolve questions subject to political debate, this comes at the cost of appearing as political actors themselves. Judiciaries that enjoy a large discretion should therefore take care when politicized questions are brought before them, since they risk being perceived as overstepping their mandate (Ferejohn, 2002).

This is not to say that judges do not pursue an agenda of their own. Case allocation in the US Supreme Court is a top-down process similar to that of the CJEU. It offers an opportunity for the leadership to influence the outcome upstream by appointing the case's agenda setter (Lax and Rader, 2015). The prospect of designating the majority opinion writer thus regularly leads the Chief Justice to strategically change his initial voting choices in order to retain the priviledge (Bonneau et al., 2007; Lax and Cameron, 2007; Ura and Flink, 2016). However, while the literature on bargaining in the US Supreme Court is centered on internal strategic considerations (Spiller and Gely, 2008), the current study focuses on the external political context.

Policy-seeking judges are reliant on the Court's diffuse support to effectively forward their agenda. This may lead them to exert strategic self-restraint, and particularly so if they preside over the institution. In the example of Chief Justice Roberts, commentators have suggested that – rather than sacrificing his ultimate policy goals – he opted for an incremental change in the Court's case law. When he was in minority, Roberts voted in favor of restricting abortion rights (Hellerstedt, 2016). In contrast, his votes to deny certiorari in "Gee v. Planned Parenthood of Gulf Coast" (2018) and stay restrictions on "Louisiana abortion clinics" (2019) are generally seen as strategic delays whereby the Chief Justice awaits the appropriate occasion to overturn precedent. If so, he restrained himself *because* the Court was in an exceptionally powerful position and would be perceived as unduly political.

This study remains agnostic as to the President's policy preferences, but assumes the belief that his favored policies become more effective as the

Court's legitimacy increases. That support is built already at the case-management stage. Although appropriate decision making cannot in itself legitimize the outcome, a criticized process suffices to undermine it (Schmidt, 2013). In other words, judgments may be discredited merely by the way they are decided. This may lead the President to select adjudicators who are acceptable to a wider range of actors in instances where the Court's output may lead to controversy. The sensitivity is linked to the Court's status as an international judiciary.

Judges' perceived impartiality is key to effective adjudication. When they are politically appointed and sit on renewable terms, their impartiality may come under scrutiny (Voeten, 2008; Shepherd, 2009a,b; Elsig and Pollack, 2014; Dunoff and Pollack, 2017). The preferences of the current government thus reflect upon their judges. Regardless of whether pressure is in fact exerted, such suspicions reduce the legitimacy of the process. The impression applies equally to all adjudicators within an institution, but when decision making is collective, heterogeneity in the membership ensures some degree of checks and balances (Kelemen, 2012).

In contrast, when only a few members play a key role, the outcome sometimes changes (Spirig, 2019). Onlookers may thus suspect that judges' career concerns influenced the decision and be tempted to let their ideological congruence with the decision makers' government taint the assessment (Bartels and Johnston, 2013). When matching cases with particular judges, it is therefore beneficial to avoid delegating politicized tasks to judges whose appointers are polarizing.

Beyond the reputational aspect, the Court also cares about consensus among governments because it needs their support to make the judgment effective. No court – national or international – can enforce its own judgments (Staton and Moore, 2011). In direct conflict with an unwilling policy maker, courts are therefore reliant on third-party pressure for compliance. Higher domestic courts can appeal to the public to pressure their elected leaders

(e.g.: Vanberg, 2005; Staton and Vanberg, 2008; Clark, 2009; Carrubba and Zorn, 2010). The situation is not inherently different for international courts, where a well-argued judgment may impose domestic audience costs on the current government (Simmons and Danner, 2010).

International courts can furthermore rely on other member states for enforcement. However, the EU has a prohibition of unilateral retaliation (Phelan, 2017). Exerting pressure on non-compliers thus requires coordinated action among governments. A division between member states may therefore put the Court in a weak postition.

To sum up, the division of labor may reintroduce elements of accountability which secret voting is intended to avoid. The suspicion that judges might be under the influence of their current government is particularly delicate in cases where member states are already divided. In order to avoid polarizing such debates, the President may therefore seek to appoint judges whose government occupies a moderate position.

Consistency

Courts are set up to reduce the legal uncertainty inherent in all legislation and they draw legitimacy from fulfilling that purpose. However, such uncertainty also gives room for policy-oriented considerations. First, judges may willingly or unwillingly rely on their attitutes to guide interpretation (Segal and Spaeth, 1993). Second, external political actors may see it more beneficial to pressure the court when uncertainty is high. The potential gains are considerable because they can set the direction for future case law. The costs are also minimal, since there is no authoritative precedent that is overturned.

Judicial policy making is an iterative process by which judges repeatedly – and in the concrete – crystalize a set of rules (Lax, 2007). Uncertainty will typically be highest the first time a law is brought before the court and decreases for each interpretation. This has two implications. First, the political stakes are higher the first time a court interprets a legal text.

Second, a coherent case law is a central attribute for courts in search for legitimacy. It maintains the fiction that judicial decision making is merely technocratic (Burley and Mattli, 1993). Moreover, reducing uncertainty also reduces transaction costs for societal actors, thereby helping the court to fulfil its purpose (Pollack, 2003). Stated differently, a cohesive case law imposes a future cost on decision makers who seek to overturn extant practice; be it the Court itself or external political actors (Garrett et al., 1998). In the empirical part, I investigate the changing effect of government preferences on case allocations. As the same EU policy is brought before the Court several times, case law becomes more definite and we would expect that policial considerations decrease.

Cohesiveness may nevertheless offer coordination problems among judges. Although there is an expectation that precedent guides judicial decision making (Knight and Epstein, 1996), members also frequently overlook extant case law (Segal and Spaeth, 1996). Judges vary in their policy preferences, but also in their propensity to follow doctrine (Bailey and Maltzman, 2008). Relevant knowledge varies across members both relating to the case's policy domain and the Court's earlier decisions. Heterogeneity in judges' attributes adds to the complexity of deliberations and risk leading to inconsistent outcomes.

One way to promote consistency within a policy domain is to ensure specialization. Specialization provides the expertise needed to efficiently handle a substantial case load while still rendering high-valence judgments (Lax and Cameron, 2007). Yet, the CJEU has continued to reject the notion of specialized chambers arguing that it would lead to parochial decision making. In the words of judge Prechal, even sector-specific cases may touch upon horizontal issues or foundational principles of EU law. This should not be left to a subset of policy experts (Prechal, 2015, p. 1286-1287). The argument has parallels to the literature on the US Congress where committee-level specialization is sometimes presented as a means for log-rolling among policy makers with diverse preferences (e.g., Shepsle and Weingast, 1994). How-

ever, policy outcomes in this system would not reflect the preferences of the median member along any unified policy dimension. Rather, specific policies would be defined by high demanders, and budgets would be unbalanced. In a court, this would lead to inconsistent outcomes across policy domains. Gilligan and Krehbiel (1987) alternatively suggest that policy making is a case of imperfect information. Allowing members to specialize and share information increases the institution's decision-making capacity, but the plenary needs a way to control the outcome for policies to be representative. As a monitoring mechanism, committees must therefore be heterogeneous (Krehbiel, 1992). While the literature on Congress has focused on the plenary's ex post control mechanisms, the literature on the US Supreme Court has also highlighted the value of individual-level specialization at the case-allocation stage. As such, substantive expertise is a consistent predictor of majority opinion assignments in the US Supreme Court (Maltzman and Wahlbeck, 1996, 2004; Wahlbeck, 2006). When the same types of cases are repeatedly matched with the same decision maker, consistency is more likely to occur within that policy domain. The case-to-case approach to specialization further allows for two control mechanisms: The President remains free to allocate specific cases to the judge he deems most fit, while all rapporteurs are monitored by a heterogeneous chamber of judges.

The CJEU – matching judges with cases

Courts vary along two dimensions. Deliberations may be more or less inclusive, and allocations may be more or less left to the membership's discretion. However, most courts operate a system where at least parts of the information collection and drafting of judgments is done by a single judge. Both the CJEU and the European Court for Human Rights (ECtHR) have inherited their reliance on "judge rapporteurs" from the French judicial system. In other countries, the judgment is drafted by a member of the majority after

an initial discussion of the case. This is the case for the majority opinion writer in the US Supreme Court, for instance. In all of these examples, the delegation is done by the leadership.

Here, I argue that the President of the CJEU's most important task is to match judges with cases and that the identity of the appointee matters.

The judge-rapporteur is an agenda-setter

The involvement of judges varies depending on the institution and the stage of the process (see for example, Dunoff and Pollack, 2018, p. 101-102). Courts with a high case load will typically strive to divide labor, effectively increasing individuals' influence and visibility. This means that even when voting is secret, the identity of the agenda setter may not be. When terms are renewable, this can reintroduce elements of accountability.

The European Court for Human Rights (ECtHR) provides an interesting point of comparison. Both courts rely on a "judge rapporteur" to prepare the case and draft the final judgment. However, their institutional setting is diametrically opposite. In the CJEU, terms are renewable but no dissenting opinions are made public (RoP, 2012, Article 32). The rapporteur nevertheless signs the judgment and his name is published together with the text (Guide Pratique, 2017, Title IX(95)). Thus, although secret deliberations aim to protect judges from accountability (Dunoff and Pollack, 2017), the identity of the decision makers is disclosed. One reason may be that the rapporteur is appointed prior to the panel's first meeting and remains the same throughout the process. In other words, the rapporteur does not formally represent the majority of judges, but rather the panel as such.

In contrast, the ECtHR allows for dissenting opinions but has introduced term limits. This may not be enough to guarantee the independence that the Court seeks, however. Although the rapporteur is appointed early, he also occasionally desists from his role because of divergent opinions. By threatening to resign, the rapporteur can gain additional bargaining leverage. It is

not surprising, then, that the rapporteur's identity remains unpublished by the ECtHR and that practitioners have called for greater protection against retaliatory actions after their service has ended (e.g.: Keller and Meier, 2017). The example illustrates that the identity of the the rapporteur is sensitive because of the influence he has, and not merely due to the views he holds.

While research on the influence of the rapporteur in the CJEU is scarce, the internal guidelines for case management leaves room for him to frame the debate. In other words, the rapporteur acts as an agenda setter at different stages in the process (Saurugger and Terpan, 2017, p. 53).

In the higher formation of the CJEU (the "Court of Justice") the rapporteur is appointed already at the out-set, and the assignment of other panelists follows from his chamber affiliation (Guide Pratique, 2017, Title(IV)31).[1] This stands in contrast to practice in the ECtHR and the General Court of the EU where cases are allocated directly to chambers before the rapporteur is assigned by the chamber president. Early in the case, he communicates a preliminary report to the plenary meeting (RoP, 2012, Article 59). His report suggests how to deal with the case, the key questions involved and it may go far in outlining the outcome. The size and composition of the panel of judges is determined in this meeting. In parallel to the President's appointment of a rapporteur, the First Advocate General appoints an advocate general to flank the judge in his preparations. The advocate general is tasked with presenting the case in all its aspects in the absence of dissenting opinions and is often seen as a second agenda setter on the Court (e.g.: Frankenreiter, 2018a). In the plenary meeting it is decided whether such an opinion is required. The meeting is normally the first and last time most members see the case (Guide Pratique, 2017, Title IV(41)). It is a moment of coordination and collective control where members can flag related cases. However, the rapporteur acts with substantial autonomy already at this stage. A substan-

[1]Before the Nice treaty in 2003, chamber deliberations were the exception in the Court. Thus, the President either only appointed the rapporteur or both the rapporteur and the chamber (RoP, 1991, Article 9(2) and 9(3)).

tive debate often only occurs in the plenary if the rapporteur and advocate general disagree. Although the typical meeting agenda includes 15-20 cases, only a subset of them are flagged as "A-items" subject to plenary debate, leaving the remainder to the rapporteur's (and president's) discretion.

The rapporteur has a prominent role also during the oral hearing. 15 years ago, judges frequently came unprepared and without paying particular attention. However, the hearing has grown in significance, as the use of an advocate general is no longer mandatory. The proceedings begin with questions asked by the rapporteur. The questions may vary in style, but can sometimes be intended to provoke reactions from the parties and can appear as revealing as to the author's leanings. A substantive discussion only takes place later. In the absence of an advocate general, a short round-table is organized before the rapporteur produces a memo. In contrast, if an advocate general is assigned to the case, the discussion is postponed for several months pending his report. This does not prevent the rapporteur to sometimes begin drafting his proposal without the advocate general's formal input.

The final deliberations are based on the rapporteur's draft. All judges are requested to present their views and if no consensus is reached, the outcome is decided by a majority vote. There is no mechanism to ensure that the rapporteur adheres to the majority decision. However, as the lead author of the case, he is tasked with formulating the legal argument. Rapporteurs are typically more likely to cite earlier cases written by rapporteurs whose appointing governments hold similar views to their own (Frankenreiter, 2017).

Given the central role played by the rapporteur, we may assume that his designation is key to the institution's policy making. In courts where case assignment is discretionary, we may expect that choice to be strategic.

Allocations are at the President's discretion

Courts also vary in how much discretion they enjoy in assigning cases. The ability for the leadership to strategically adjust allocations is therefore a question of institutional design.

On one end of the scale are courts that follow a *completely random* case assignment. In US appellate courts, all three panelists are assigned by a random draw. The court thereby controls neither the combination of judges nor the match between judges and cases.

Other courts follow a system of *administrative* case assignments that approximates a random draw. Typically, panel compositions are predetermined, while cases are assigned following a rotation. This solution is used in several international courts. One reason may be that the system ensures some degree of representation among the decision makers. For example, chambers in the ECtHR are set up for a three year period to reflect the different legal systems among the member states as well as ensuring geographical and gender balance (ECtHR, 2018, Rule 25-1 and 2). Similar considerations apply informally in the CJEU. As an addition to the principle of rotation, some courts also include specific rules pertaining to the match between judges' and parties' nationality. All signatories of the ECHR are therefore guaranteed representation by their own appointed judge (ECtHR, 2018, Rule 26). These rules can be seen as attempts by treaty makers to constrain or enhance courts autonomy by providing checks and balances to the deliberations. However, courts often organize such restraints on their own initiative. Even when chamber assignments are left to the courts, they tend to produce more ideologically heterogeneous panels than what a random draw would indicate (Gschwend et al., 2016; Frankenreiter, 2018b).

On the other end of the scale are courts that allow for *discretionary case allocations*. This discretion can be exercised collectively and/or by the court's leadership. Once again, the higher formation of the CJEU constitutes an example of extreme leadership discretion. The President is free to designate

the rapporteur of his choice with one exception: Since the outset, no judge acts as rapporteur in infringement cases brought against his own government. Although the practice relating to preliminary reference cases has been less rigid, from the Nice treaty (2003), the President has consistently avoided such assignments as well. The member state government is not strictly speaking a party to the conflict. It may nevertheless have high stakes in the outcome, as its policies can be overruled and future policy-making constricted by the European Court.

The Gauweiler case (C-62/14) is a good example. The CJEU was seized by the German Constitutional Court to determine whether the Outright Monetary Transactions program led by the European Central Bank to adress the Eurozone financial problems fell within the Bank's competencies. The question was sensitive in two respects: First, the case played directly into the division between creditor and debtor states in the Eurozone, and the outcome would have a direct effect on the economic policies for governments on both sides of the divide. Second, the Court faced the possibility of an outright defiance on the part of the German Court. This was the first time the German court referred a preliminary question to the CJEU. It has from the outset been reticent to recognize the supremacy of EU law, and the formulation of its question clearly indicated its stance that the Bank had exeeded its competencies. The CJEU finally decided in favor of the Bank, following the direction set three years earlier in the Pringle case (C-370/12). The choice of the Danish judge as rapporteur, Lars Bay Larsen, can be seen as strategic. Larsen was at that time already a seasoned judge, and – more importantly – Denmark is not part of the Eurozone. The President thereby avoided appointing a judge with obvious double binds. The practice illustrates the delicacy of case allocation when influence is individualized and and publicly known, while terms are renewable.

A relevant question is how much information the President has before making the delegation. Although, the rapporteur is named as soon as possible

after the case is lodged (RoP, 2012, Article 15.1), this is only done upon the reception of additional information provided by the Court's administration (Guide Pratique, 2017, Section I(9-11)).

Following the lodging, the Registry prepares a preliminary memo. The document briefly describes the case and identifies similar cases and their authors – past or present – in order to facilitate the President's allocation decision (Guide Pratique, 2017, Section I(1 and 11)). Additionally, under the preliminary reference procedure, the Research and Documentation Directorate proceeds to a more thorough "pre-exmination". The document is authored by one of the Court's civil servants with local expertise[2] and is intended to provide relevant contextual information. It identifies the affected national and European laws as well as related case law. It may further include information on dissenting opinions, observations filed by the public prosecutor or debates around jurisprudential or doctrinal questions at the domestic level. The list is not exhaustive (Guide Pratique, 2017, Section I(4-5)).

With this information in hand, the President – with the help of his cabinet – proceeds to the appointment (Guide Pratique, 2017, Section I(9-11)).

Empirical expectations

Cases and judges are matched at the very beginning of the Court's decision-making process. The criteria for judicial self-restraint in view of a political attack are therefore unlikely to be present (Glick, 2009). The President may nevertheless look ahead and consider how the reception of the judgment may be. I assess two strategies which help build the Court's reputation as a predictable and impartial interpreter of the law: Specialization and depolarization.

[2]The internal guidelines suggest relying on nationals from the member state in which the case originated.

A coherent case law can be seen as a strategy of self-binding in view of future conflicts. Researchers have noted, for example, that the Court refers to a larger body of earlier decisions when it rules against the majority of member state observations than when the political environment is less hostile (Larsson et al., 2017). These arguments are built up in a series of consistent judgments prior to the conflict. Although the early steps in the case management provide relevant information on case law, the judges may still differ both in their level of knowledge and their political orientations.

Coordination problems are common in all decision-making bodies. Courts' internal organization therefore generally involves several measures to ensure consistency. It is useful in this respect to distinguish between consistency within and across issue areas. Specialization is a way of favoring coherent decision making *within* policy areas. However, chamber-level specialization poses a particular threat *across* domains.

Since the Nice treaty (2003) the default decision-making mode of the Court is chamber deliberations. To compensate for the potential fragmentation of case law, both the administration and the general meeting are tasked with identifying related cases. For the same reason, each chamber president sits on all cases treated by their chamber. Moreover, although chambers are generalist, a de facto specialization has developed at the individual level.

Yet, even an individual-level specialization involves a potential delegation problem for the Court. Highly specialized members can selectively transmit information to the other judges and therefore trick them into favoring outcomes they would not otherwise have opted for (Fischer and Stocken, 2001). A judge may signal to the President the type of cases he finds interesting. The case-to-case allocation implies, however, that it is up to the President to decide whether the wish can be satisfied. In the parliamentary context, Chiou et al. (2020) have demonstrated that such specialization yields diminishing marginal returns to experts. In other words, the leadership tends to prefer specialized members to generalists. However, when the gap between

members' varying specialization is sufficiently high, the most expert member may not necessarily be favored. The institution thereby builds up a pool of alternative experts on a topic. As a consequence, I formulate a first expectation that the President favors specialization by repeatedly delegating the same types of cases to the same judges although the effect decreases over time.

Hypothesis 1 *The president is more likely to appoint a rapporteur who has acted in the same role in previous cases related to the same topic.*

Courts benefit from a reputation as apolitical and impartial decision makers. However, the division of labor in the CJEU implies that the rapporteur is easily identified as an agenda setter. Furthermore, EU judges sit for renewable terms and are politically appointed. The preferences of the rapporteur's current governments may therefore reflect upon the judgment. When member state governments have expressed diverging opinions, the President may therefore be careful not to polarize debates further by appointing judges whose government holds an extreme position. Consequently, I expect that the President seeks to identify potentially politicized cases and avoids judges whose government would further accentuate the divide.

Hypothesis 2a *In cases where member states have expressed conflicting positions, the president is less likely to appoint a judge whose current government hold preferences far from the median.*

Politics are the most salient when the legal uncertainty is pronounced. Since case law is typically built up over time (Lax, 2007), it means that the first time a legislation reaches a higher court, the potential for political input is more substantial. Assuming the Court's case law has a constraining effect on political actors, I therefore expect that the President assesses the risk of politicization to decrease for each interpretation of a particular law. The effect of government preferences would thus decrease over time.

Hypothesis 2b *The effect of governmental preferences in cases where governments disagree decreases with the number of interpretations the Court makes of the same law.*

Overall, I expect that specialization is a consistent predictor in most allocations, while the effect of governments' political preferences is constrained to a subset of cases where governments have expressed disagreement and the legal uncertainty is substantial.

Empirical strategy

In the following I describe the basic data structure and justify my choice of model before giving an account of my operationalizations.

Data structure and choice of model

To better understand the President's allocation criteria, I have collected data on 9955 court cases (1980-2015). Its structure provides a realistic description of the alternatives faced by the President. For each case, I list the judges who were members of the Court. This constitutes the President's "choice set". The baseline data frame thus includes 227077 observations of a total of 86 judges nested in cases, while the dependent variable is an indicator of the *Rapporteur* in each case.

The statistical model is guided by the same realism. All results are obtained from mixed conditional logistic regression. The probability that a case is allocated to justice i in case j can be written as follows:

$$\mu_{j(i)} = \beta X_{j(i)} + \beta X_{j(i)} \times Z_j$$

The choice calls for some clarifications. First, the Court's membership has evolved continuously, presenting the President with an ever-changing

menu. The variation makes comparisons over time challenging, as the level of the predictors is substantially different. For example, the distance between member state preferences has varied substantially over time, with a peak in the 1980-ies when the Court's case-load was moderate. Other binomial logistic regressions would allow for choices outside of the President's menu, thus under-estimating the probability of allocations to policy-outliers. In the conditional logit model, irrelevant alternatives are excluded (McFadden, 1973). The overall level of variables may well vary across cases, but their effect is aggregated and correctly estimated (Long, 1997, p. 178).

Second, while most predictors ($(X_{j(i)})$) describe differences between judges nested within choice sets, I expect that the President's assessment also depends on contextual features that vary at the case-level (Z_j). Specifically, I expect the selection criteria change in politicized cases. These predictors are included as cross-level interactions. The model hence qualifies as a mixed conditional logit.

All results are obtained using MCMC simulation within a Bayesian framework. To retain a valid data sample that includes all judges in the choice set, values for some units are simulated. Most predictors to not contain missing observations. A notable exception is the measure of governmental preferences. A listwise exclusion would effectively remove judges from the President's choice set, thereby counteracting the realism implied in the conditional logit. Instead, I impute the missing observations through a linear regression estimated in parallel to the main model. While government preferences are measured using party manifesto data (Volkens et al., 2017), the imputations rely on information on the prime minister's party family (Döring and Manow, 2018). The Bayesian framework incorporates the additional information to the model while also inserting the uncertainty implied in the imputation (Jackman, 2009, p. 237-244). In total, depending on the model, some 7% to 8% of the observations rely on preferences imputed in this way. All models are run with 2 000 iterations burn-in to ensure convergence. I

then sample every tenth iteration for the following 5 000.

Variables

Regardless of the type of case filed, I expect the President seeks to build coherence through specialization (H_1). In addition, I expect that the preferences of a judge's member state have a bearing on allocations in potentially politicized cases (H_2).

Consistency through specialization

I rely on two different measures of specialization in a judge's portfolio as rapporteur at the time of the allocation.

Specialization – overlap in affected legislation captures the overlap between legal texts – treaties and secondary acts – directly affected by the litigation. To construct the variable, I compare each case with all previous cases in a judge's portfolio. For each pair of cases, I thus calculate the proportion of overlap, before summing over the entire portfolio. In most instances (71% of the cases), the President has at least one judge at his disposal who has previously rendered a judgement affected by the same EU laws.

Specialization – overlap in topics is constructed in the same way, but captures the overlap between the 56 policy area identified by EUR-Lex. Throughout his career, a judge is the institution's most specialized member on average in 3% of the allocations. However, the President will almost always have at least one member with some related experience at his disposal (99.77% of the cases).

The assymetry works in the President's favor, since the spread in related experience means he generally has other alternatives to choose from. This is, of course, the product of the President's (or his predecesor's) earlier allocations and a result of his diminishing marginal returns on specialization (Chiou et al., 2020). In contrast to previous studies, the measure is contin-

uous (e.g.: Maltzman and Wahlbeck, 1996, 2004). To reflect the President's fear of agency drift, the variable is log transformed ($log(x + 1)$). It expresses the expectation that the President prefers the most specialized member when there is little difference between judges, but then chooses the most expert member less frequently as the most expert members specialization increases.

Avoiding polarization of controversial cases

The President will avoid polarizing cases that are already controversial (H_{2a}). Testing the expectation requires a measure of governments' political preferences as well as an indication of which cases the President anticipates divide member states. I rely on two measures where governments have potentially different preferences over the outcome.

Potential politicization - new debated legislation relies on all cases affecting secondary legislation that passed through the Council (1980-2016). Only some policy proposals are discussed at the ministerial level. If a proposal can be resolved by national civil servants, the dossier passes without discussion as an "A-item" on the Council's agenda. In contrast, a "B-item" reflects cases with sufficient political disagreement to vouch for a discussion among ministers. B-items are therefore a typical proxy for the difficulty with which governments reached an agreement (e.g. Häge, 2007; Wøien Hansen, 2014). When such legislation is brought before the Court for the first time, I expect that the President has reasons to anticipate some degree of politicization. Such cases are relatively rare. In total, I have identified 466 out of 2823 judgments (17%) affecting B-item legislation where the text has not yet been interpreted by the Court.

In H_{2b} I specifically test the argument that cases are more prone to politicization when the legal uncertainty is high. I assume that uncertainty decreases for each time the Court interprets a law. *Potential politicization - iteration before the Court* therefore reports the n^{th} interpretation that the Court makes of a debated piece of legislation.

Potential politicization - diverging member state observations indicates whether the Court received amici curiae briefs from at least two governments expressing different preferences over the outcome. Roughly half (58%) of the Courts cases are preliminary references, where judges are called to determine the compatibility of EU and national law with the treaties. Member states are invited to submit their observations within two month follwing their notification (Statutes of the Court, 2012, Article 23). While the President may not have read these observations at the time of the allocation, he has likely other sources of information that I, as a researcher, do not. In the second operationalization, I therefore rely on information from these observations. The data is obtained from two handcoded sources which do not, unfortunately, cover my entire period of study (Carrubba and Gabel, 2011; Carrubba et al., 2008, cases lodged from 1980 to 1996; Larsson and Naurin, 2016, from 1996 to 2008).

Following H_{2a}, I expect the President takes into account government preferences only when governments have expressed disagreement. The indicators of politicization are therefore interacted with a measure of governments' economic preferences to assess whether the effect of preferences is conditional on the Court's political context. I expect a negative sign. The choice of an economic scale is closely linked to the measure of politicization. The Court is called to clarify policies on which member states in the Council have expressed a disagreement. The left-right clevage is a dominant dimension in the EU legislative process (Crombez and Hix, 2015). Economic preferences are also the most salient policy dimension in domestic politics. The CJEU has furthermore been a major driver for European economic integration and its' rulings can constrict governments' ability to formulate economic policies. This also spills over to the judges careers. Current research shows that governments with different economic preferences tend to appoint different judges, while no such relationship is observable for the EU-integration dimension (**?**).

Distance from median government therefore reports the absolute preference distance on economic issues between a judge's current government and the median among members on the bench. Preferences are calculated as a weighted mean derived from the current governmental parties' electoral manifestos using the vanilla method (Döring and Manow, 2018; Volkens et al., 2017; Gabel and Huber, 2000). Cabinet-share weighted manifesto scores have also previously been used to assess judges' ideal points along a left-right dimension (Malecki, 2012). While the measure is stylized, it has the advantage that all governments are placed in the same policy space. In practice, most observations (99%) are registered with a distance ranging between 0 and 1.

Preferences have varied over time. The distance between governments reached a high in the beginning of the 1980-ies following the election of conservative prime minister Margaret Thatcher and socialist president Francois Mitterrand. However, the median choice set faced by the Court's President had an inter quartile range of 0.18. In the model, the measure is logtransformed ($log(x + 1)$) in order to limit the influence of extreme outliers on the overall effect.

Controls

The models include controls for members who are a priori unlikely to act as rapporteur. *Ties to member state – Case from judge's member state* indicates if the judge's member state is involved in the case; either in a direct action or a case filed by a national court. The President only acts as rapporteur in the rare event of a sitting with the full court. He is therefore excluded from the choice set. Similarly, *Leadership* indicates presidents in chambers of five judges (since 2003) and the Court's Vice-President (since 2012). These are positions which in recent years have become more managerial. Last, *Membership unclear* indicates judges whose membership at the Court is uncertain because they are at the beginning or end of their mandate. It may be unclear to the President whether the case will conclude before the end of the judge's

mandate. Similarly, judges require a varying period to adjust to the French-speaking environment in Luxembourg (Cheruvu, 2019) and may therefore not be considered for reports.

Participation counts the number of panel deliberations a judge has participated in in the last 90 days prior to the allocation. Judges' vary in how invested they are in their mandate and what career stage they are at. This is reflected in their participation rates. In the median choice set, the inter quartile range among members is 8 deliberations. I expect that assidious members are more likely to be appointed.

Similarly, all models control for the number of *Past cases* in which a judge has acted as rapporteur. The measure can be seen as a lag of the dependent variable, subsuming all other reasons why the President may prefer one judge over another. Once again, the variation among judges is substantive, with the median choice set displaying an inter quartile range of no less than 82 cases. In the multivariate analysis, the variable captures a member's experience with unrelated cases. If the President favors specialization, I expect it to correlate negatively with the likelihood of an appointment.

Results

Constructing coherence through specialization (H_1) Results from a first series of regressions are displayed in Table 1 and further illustrated in Figure 1. The limits of the 95% highest posterior density interval are reported in parentheses and can be read as confidence intervals. The results indicate a strong and consistently positive effect of specialization across the two operationalizations.

In instances where the Court has already interpreted the legislation, a judge who acted as the rapporteur once before is more than 1.6 times more likely to act as a rapporteur again compared to a colleague with no such experience. Overall, when considering the median distance between the most

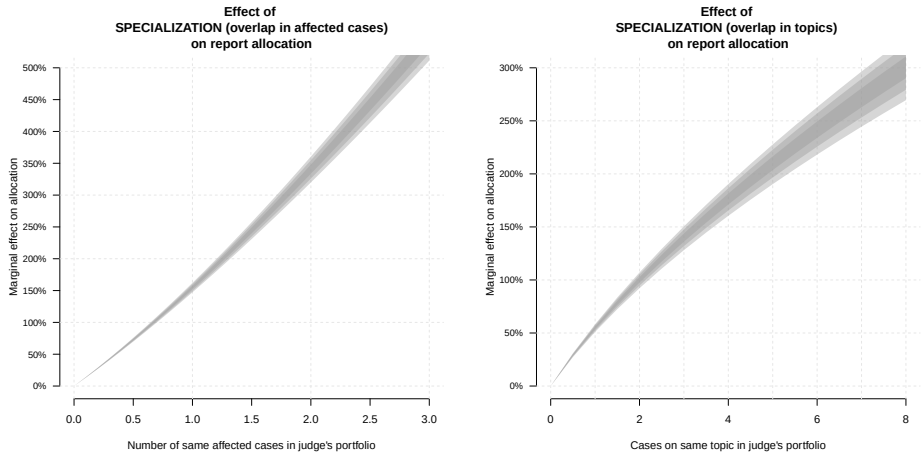

Figure 1: The effect of relative expertise acquired from previous cases on the same topic on case allocation.

specialized and the least specialized judges in a choice set (an overlap of 1.5 cases), the likelihood of an appointment is 2.5 times higher for the most expert judge.

The effect is equally substantial for cases related by their subject matter. For each related judgment, a member sees his likelihood of appointment increase by 58% compared to a judge with equivalent but unrelated experience. When considering the median difference between the most and the least specialized member on the Court (an overlap of 26 cases), the effect is consequential: The most specialized judge is 7.6 times more likely to be appointed.

The results show how individual judges play a central role in formulating the Court's policies deriving from specific pieces of legislation and within policy areas. However, the shape of the curve in the right panel of Figure 1 also indicates that specialization in a subject matter yields diminishing returns. The President does not consistently favor the most specialized member. That is, he discriminates less according to specialization as the distance increases between the judges. We can understand this through the lens of agency drift.

Dependent variable: 'Allocation of report'	Overlap in legislation	Overlap in topics
Specialization (H1)	1.378	0.656
	(1.343,1.412)	(0.626,0.685)
Ties to member state (case from MS)	-1.45	-1.445
	(-1.567,-1.295)	(-1.586,-1.311)
Cases as rapporteur	-0.248	-0.48
	(-0.271,-0.234)	(-0.506,-0.451)
Membership unclear	-0.924	-0.982
	(-1.023,-0.834)	(-1.071,-0.889)
Participation	0.045	0.045
	(0.042,0.047)	(0.043,0.048)
Leadership (Chamber/Vice president)	-0.489	-0.542
	(-0.563,-0.416)	(-0.628,-0.469)
Number of observations	217284	217284
Number of choice sets	9949	9949
Proportion of correct predictions	0.65	0.597
Prop. of correct positive pred.	0.613	0.643
Prop. of correct negative pred.	0.652	0.594

Median effects with 95% symmetric posterior density interval in parenthesis.

Table 1: The effect of SPECIALIZATION on allocation of court cases. Results from a hierarchical conditional logit.

The case-to-case approach to allocations means that the President can move to compensate as other judges' ability to monitor or suplement a rapporteur decreases. This flexibility also means that he can occasionally prioritize other selection criteria without making a substantial tradeoff with specialization.

Avoiding policy outliers when cases are politicized (H_2) Table 2 displays results from a second series of regressions testing the effect of preferences in politicized cases. This time, the measures of specialization are included as controls. Once again, the results are as expected.

As is apparent from Figure 2, both operationalizations of politicization indicate a significant shift towards rapporteurs with a government close to the median (H_{2a}). If we consider the median most extreme outlier that the President could potentially choose (i.e. a median absolute distance of 0.66), his chances of allocation would decrease by 44% if the affected legislation had been subject to political bargaining and the Court has not yet made an interpretation. The similar figure is 30% when politicization is measured as

disagreement expressed in the case at hand. Preferences are also relevant for judges from more moderate governments. If we consider the typical distance between judges on the Court (an interquartile range of 0.13), we still see a decrease of 13% when disagreement was expressed at the legislation phase, and 8% when disagreement is expressed in the concrete.

The results indicate that the President is sensitive to government preferences when he allocates politicized cases. I have argued that this is due to the member states' suspicion that judges could take cues from their home government. A controversial choice of judge in cases where governments already disagree would unnecessarily polarize the Court's decision. The President seeks to avoid that. Depolarization is important for him because the Court's legitimacy increases when its decision making is perceived as apolitical and because divisions between member states risk weakening their ability to ensure effective implementation. It is worth noting, however, that these political considerations only spill over to the Presidents' allocations in a subset of Court cases. As the left column in Figure 2 illustrate, government references do not have an effect when cases are not politicized.

The results also speak to the importance of coherence. A consistent case law allows the Court to build support for a line of interpretation. It also means that the President expects less political debate in subsequent cases. This is reflected in the decreasing sensitivity to governments' preferences as the Court repeatedly interprets the initially debated legislation.

The second interaction reported in Table 2 tests the idea that the President believes cases are more likely to politicize when the Court's interpretation is uncertain (H_{2b}). Figure 3 illustrates the hypothetical example of the median most extreme outlier when an allocation pertains to debated legislation. The figure makes clear that the importance of governmental preferences decreases as the Court's interpretation of the law becomes established. By the fifth iteration, the chances of appointing a judge from a policy outlier is indistinguishable from that of other members.

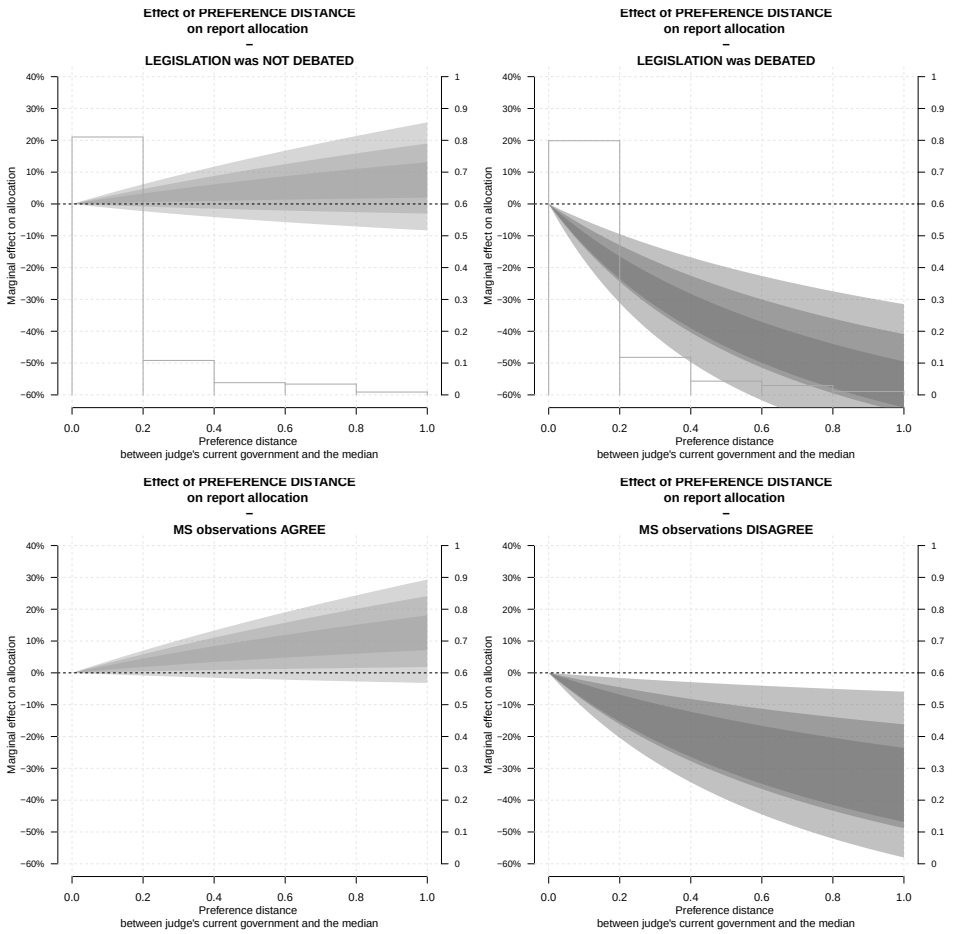

Figure 2: The conditional effect of politicization: The figures illustrate the effect of distance between a judge's current government and the median government currently in power on the probability of case allocations.

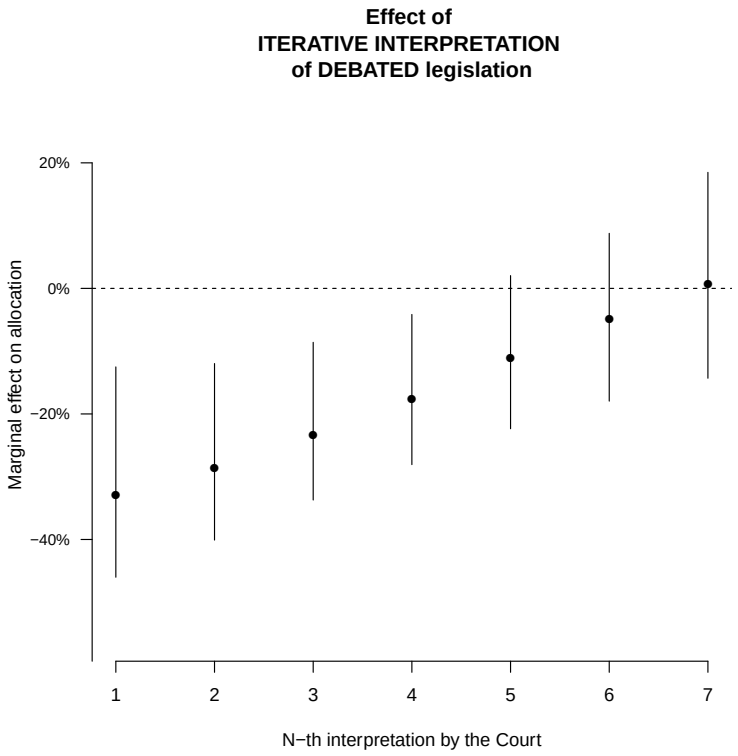

Figure 3: The figure illustrates the predicted effect of the Court's iterative interpretation of politicized legislation among judges from the (median) most outlying governments.

Dependent variable: 'Allocation of report'	1980-2015	1980-2008
Distance from median government	0.245	0.182
	(0.029,0.44)	(-0.003,0.337)
Distance from median government * New debated legislation (H2a)	-1.15	
	(-1.709,-0.56)	
Distance from median government * Disagreement MS observations (H2a)		-0.702
		(-1.329,-0.175)
Distance from median government * Iteration before the court (H2b)	0.133	
	(0.041,0.228)	
Specialization (overlap in affected legislation)	1.536	1.092
	(1.485,1.58)	(1.042,1.146)
Specialization (overlap in topics)	0.299	0.215
	(0.265,0.341)	(0.156,0.281)
Ties to member state (Case from MS)	-1.892	-1.038
	(-2.13,-1.647)	(-1.251,-0.876)
Past cases	-0.506	-0.414
	(-0.546,-0.467)	(-0.463,-0.368)
Membership unclear	-1.193	-1.167
	(-1.313,-1.039)	(-1.331,-0.99)
Participation	0.047	0.051
	(0.043,0.05)	(0.047,0.056)
Leadership (Chamber/vice president)	-0.596	-0.614
	(-0.692,-0.485)	(-0.8,-0.408)
Number of observations	118247	60080
Number of choice sets	5015	3286
Proportion of correct predictions	0.702	0.66
Prop. of correct positive pred.	0.641	0.621
Prop. of correct negative pred.	0.705	0.662

Median effects with 95% HDI in parenthesis.

Table 2: The effect of the current government's preferences on allocation of preliminary reference cases. Results from a hierarchical conditional logit.

Conclusion

I have argued that courts' legitimacy is built already at the case-management stage. Although an orderly process is not enough to legitimize a court's output, a critized process suffices to sink it. The Court of Justice of the EU enjoys extensive internal autonomy, and I have investigated two of its strategies to build legitimacy. Case allocation is done by the Court's President, and I find that his choice is sensitive to the judiciary's political environment. Because polarization is detrimental to the Court, he allocates potentially politicized cases to judges from moderate member states. I also find that the

effect of government preferences decreases once the Court has established its' case law. This is because politics are the most salient when legal uncertainty is high. A clear precedent imposes a cost on decision makers who seek to overturn it and is therefore valuable to power-seeking courts. However, coherent decision making also implies coordination problems among judges with diverse motivations. While chamber-level specialization promotes consistency within a policy domain, it also limits the President's discretion. This study demonstrates that the CJEU instead promotes individual-level specialization and argues that it provides the President with the flexibility required to make strategic allocations.

The results shed new light on the preconditions for international courts' independence.

First, I demonstrate that the Court's political context spills over to the allocation of influence among judges and link it to their potential accountability. Extant literature highlights two alternative routes to prevent sanctions against individual judges. The sanction itself can be removed or governments' ability to impose it meaningfully can be curtailed by reducing transparency. Thus far, studies have focused mainly on the effect of renewable terms and information on judges' voting (Dunoff and Pollack, 2017). However, removing these elements may not be enough to ensure onlookers of the adjudicators' impartiality. Other types of retaliation or information may also be relevant. I focus on information on particular judges' role as agenda setters and suggest that it reintroduces elements of accountability that secret voting seeks to prevent. The comparison with the European Court of Human Rights furthermore shows that even when terms are non-renewable and dissents are public, the court may choose not to disclose the identity of the judge rapporteur. I conclude from this that the rapporteur is a central player in the Court's decision making and information on his identity can be sensitive.

Second, I have demonstrated that the Court's internal organization gives it agency. The President can take additional steps to build up expertise or

prevent backlash against judges. Thus, judges never act as rapporteurs in cases involving their own government.

Member states may be tempted to constrict international courts' autonomy to organize their work by imposing national quotas among decision makers. Yet, as long as judicial appointments are political and judges do not have life tenure, the current governments' preferences reflect upon their appointee. This is a limited problem when decision making is collective, as different judges hold each other in check. However, many international courts have adressed their increasing case load with similar increases in division of labor. Even when voting is secret, the agenda setters may be identifiable and their impartiality put under scrutiny. A random case allocation would regularly lead to matches between judges and cases that unnecessarily polarize the court's decision making.

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