

# Tending the bar: Strategic Case allocations in the Court of Justice of the European Union

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## **Abstract**

To what extent does the president of the Court of Justice of the European Union (CJEU) make strategic use of his members? Despite its status as the world's most powerful court, recent scholarship has identified substantial self-restraint when the Court receives signals from member states. To date, studies in the separation-of-powers tradition have considered court behavior at the organizational level. In contrast, this paper focuses on the effect of external strategic considerations on allocation of influence within the Court.

Contrary to many other international courts, influence in the CJEU is individualized and distributed at the discretion of its leadership. This paper argues that the president seeks to enhance the Court's position by strategic use of experienced members and emphasis of individual independence. Yet, case allocations remain sensitive to the broader (political) context.

To support its arguments, the paper draws on original data including allocations in 9955 cases brought before the CJEU (1980-2015). The results speak to the key role of internal organization for judicial independence as well as the interdependence between state-signatories and the court's leadership.

## 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. I look at two underresearched legitimization strategies implemented at courts’ case management stage: Individual-level specialization and court’s strategic attempts to depolarize politicized debates.

I focus on a type of courts in which individual decision makers play a central role and the leadership enjoys a large discretion in assigning it. Judges in the Court of Justice of the European Union (CJEU) 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.

To conduct the study, I have collected information on 9955 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 experi-

ence adjudicating on similar topics, as well as the potential politicization of the case in question.

Specialization is an important asset for power-seeking courts. It alleviates coordination problems among judges and favors coherence. Yet, the CJEU has consistently rejected the practice of specialized chambers that many courts operate (Fabri and Langbroek, 2007). This study begins by showing that the President instead promotes specialization at the individual level and argues that it provides him with the flexibility required to make strategic allocation choices. I then argue that judges' accountability to their political appointers is particularly delicate in a politicized environment where suspicions of undue pressure would polarize decision making further. Relying on two different measures of politicization, I demonstrate that the Court's President shortcuts such dynamics by allocating cases to judges whose governments occupy a moderate position.

In the following, I survey why specialization and political sensitivity are valuable to an ambitious court. 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 furthermore more likely to endorse the output merely to the extent that it aligns with their political opinions (Bartels and Johnston, 2013). Politically debated cases are therefore key 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.

## 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 attitudes to guide interpretation (Segal and Spaeth, 1993). Second, external political actors may see it more beneficial to pressure the court. The potential gains are high because they can set the direction for future case law. The costs are also minimal, since there is no authoritative presedence 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 law is brought before a court. 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).

Cohesiveness may nevertheless offer coordination problems. Although there is an expectation that presedence guides judicial decision making (Knight and Epstein, 1996), members also frequently overlook extant case law (Se-

gal 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. With the exception of institutions with life tenure, judges may furthermore respond to different principals. Appointments can, for instance, be staggered or follow geographical quotas. Both are common for international courts. Diverse motivations adds to the complexity of deliberations and may lead to inconsistent outcomes.

One way to promote consistency is to ensure specialization. Most courts delegate to one judge the task of drafting judgments, and in many courts that decision is incumbent on the leadership. When the same types of cases are repeatedly matched with the same decision maker, consistency is more likely to occur. Specialization also provides the expertise needed to efficiently handle a substantial case load while still rendering high-valence judgments (Lax and Cameron, 2007). As such, substantive expertise is a consistent predictor of majority opinion assignments in the US Supreme Court (Maltzman and Wahlbeck, 1996, 2004; Wahlbeck, 2006).

## **Impartiality**

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

This is not to say that judges may not pursue an agenda of their own. Case allocation is an opportunity for the leadership to influence the outcome upstream. Research on the US Supreme Court, has demonstrated how the prospect of designating the majority opinion writer leads to strategic behavior on the part of the Chief Justice (Bonneau et al., 2007; Lax and Cameron, 2007; Ura and Flink, 2016). However, policy-seeking judges are also reliant on

the Court’s diffuse support to effectively forward their agenda. In the example of Chief Justice Roberts, commentators have suggested that – rather than sacrificing his ultimate policy goals – the Chief Justice strategically opted for an incremental change in the Court’s case law on abortion. When he was in minority, Roberts voted in favor of restricting abortion rights (Hellerstedt, 2016). On contrast, his votes to deny certiorari in *Gee v. Planned Parenthood of Gulf Coast* (2018) and stay restrictions on Louisiana abortion clinics (2019) are seen strategic delays whereby the Chief Justice awaits the appropriate time and case to overturn presedence. If so, he restrained himself *because* the Court was in an exceptionally powerful position and would be perceived as unduly political.

It is useful in this respect to distinguish between the attributes of the process and its output. Although appropriate decision making cannot in itself legitimize the outcome, a criticized process suffices to undermine it (Schmidt, 2013). That is, judgments may be discredited merely by the way they are decided.

Judges’ perceived impartiality is key to effective adjudication. When they are politically appointed and sit on renewable terms, this impartiality may come under scrutiny (Voeten, 2008; Shepherd, 2009a,b; Elsig and Pollack, 2014; Dunoff and Pollack, 2017). The preferences of the current government end up reflecting 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, if only a few members play a key role, observers may suspect that career concerns influence the Court’s decision (Christenson and Glick, 2015). Onlookers are furthermore 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 may

therefore be beneficial to avoid delegating politicized tasks to judges whose appointers are polarizing.

While concerns for the legitimacy of the process is sufficient to motivate specific allocations in a politicized environment, these reasons are also compatible with concerns for the outcome of the case.

## **Effectiveness**

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 may furthermore rely on inter-state enforcement. Although the decision not to comply is unilateral, exerting pressure on the non-complier requires coordinated action among the remaining state signatories. A division between member states may therefore put the Court in a weak position.

The EU judicial system is geared towards identifying situations where enforcement is politically feasible and effective. The EU infringement procedure is a case in point, where both the Commission and the affected states have several occasions to back down from further conflict (König and Mäder, 2014; Fjelstul and Carrubba, 2018). If litigation occurs, Carrubba (2005) shows that – while international courts may be useful “fire alarms” alerting states to breeches of the contract – their added value is the highest where the domestic context renders non-compliance inevitable. Courts can identify these situations and render narrow judgments that in effect constitute permissible derogations. This allows states to remain in cooperation despite the occasional non-compliance.

## **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. 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 higher formation of the CJEU (the “Court of Justice”) provides an example of extremely individualized decision-making. Even though both the European Court for Human Rights (ECtHR) and CJEU are formally full-representation courts – most decisions are taken by a sub-set of judges without substantive involvement of the plenary (Mackenzie et al., 2010, p. 7-8; Dunoff and Pollack 2018, p. 101-102). Cases are allocated directly to chambers in the ECtHR and the General Court of the EU, and only at that point will a “judge-rapporteur” be assigned to the case. In contrast, the rapporteur in the CJEU is appointed already at the out-set, and the assignment of other panelists follows from his chamber affiliation (Guide Pratique, 2017, Title(IV)31).

This person acts as an agenda-setter (Saurugger and Terpan, 2017, p. 53). Early in the process, he communicates a preliminary report to the plenary meeting (RoP, 2012, Article 59). The rapporteur suggests how to



deal with the case, the key questions involved and may go far in outlining the outcome. 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. 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 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 substantial 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/her 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. However, no dissenting opinions are made public (RoP, 2012, Article 32). In contrast to the American majority opinion writer, the judge-rapporteur writes the final decision on behalf of the entire panel regardless of whether he is in the majority. This is also different from the ECtHR, where the rapporteur occasionally desist from his role because of divergent opinions. Finally, the rapporteur signs the judgment and his name is published together with the text (Guide Pratique, 2017, Title IX(95)).

The information supplied by the CJEU is in this respect diametrically

opposed to what is provided by the ECtHR (Dunoff and Pollack, 2017). While the latter allows for dissents, it has also introduced term limits to prevent governments from holding judges accountable. The rapporteur’s identity remains nevertheless unpublished and practitioners have called for greater protection against retaliatory actions after their service has ended (e.g.: Keller and Meier, 2017). Conversely, all judges in the CJEU sit for six years renewable, while voting is kept secret to constrict accountability. As a transparency measure, the names of the key decision makers are nevertheless made available.

Given 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 discrete, we may expect the choice to be strategic.

### **Allocations are at the President’s discretion**

Courts also vary in how much discretion they enjoy in assigning cases. 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 guaran-

teed representation by their own appointed judge (ECtHR, 2018, Rule 26). These rules can be seen as attempts by treaty makers to constrain or enhance the Court's autonomy.

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 sized by the German Constitutional Court to determine whether the Outright Monetary Transactions program lead 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 Court 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-examination”. The document is authored by one of the Court’s civil servants with local expertise<sup>1</sup> 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)).

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<sup>1</sup>The internal guidelines suggest relying on nationals from the member state in which the case originated.

## Empirical expectations

Cases and judges are matched at the very beginning of the Court’s decision-making process. The conventional criteria for judicial retreat 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.

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. The Court’s chamber structure poses a particular threat in this respect. Thus, 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. Specialization is an additional way of favoring consistency.

Yet, the Court has consistently rejected the institutionalization of specialized chambers. This can be understood in light of the delegation problem inherent in specialization. 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). 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. A *de facto* specialization has therefore

developed at the individual level so that the President retains the possibility to allocate differently (Prechal, 2015, p. 1286-1287).

A judge may signal to the President the type of cases he finds interesting. However, it is up to the President to decide whether this wish can be satisfied. 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.

**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.*

The division of labor in the Court 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. Consequently, I expect that the President seeks to identify potentially politicized cases already when they are lodged and avoids judges whose government would 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 large. 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.

**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 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 selection criteria to 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 do 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 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 asymmetry 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 predecessor's) earlier allocations and a result of his diminishing marginal returns on specialization. In contrast to previous studies, the measure is continuous (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 heterogeneity is low, but

stochastically choose among the more expert members when heterogeneity 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). All policy proposals are not 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 between the 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 following 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 (Carrubba and Gabel, 2011; Carrubba et al., 2008, cases lodged from 1980 to 1996; Larsson and Naurin, 2016, from 1996 to 2008).

In the models the indicators of politicization are interacted with a measure of preferences, and I expect a negative sign. The CJEU has been a major driver for European economic integration and its' rulings can constrict governments' ability to formulate economic policies. Economic preferences are also the most salient policy dimension in domestic politics.

*Distance from median judge* therefore reports the absolute preference distance on economic issues between a judge's current government and the median 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). 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.

*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 assiduous 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

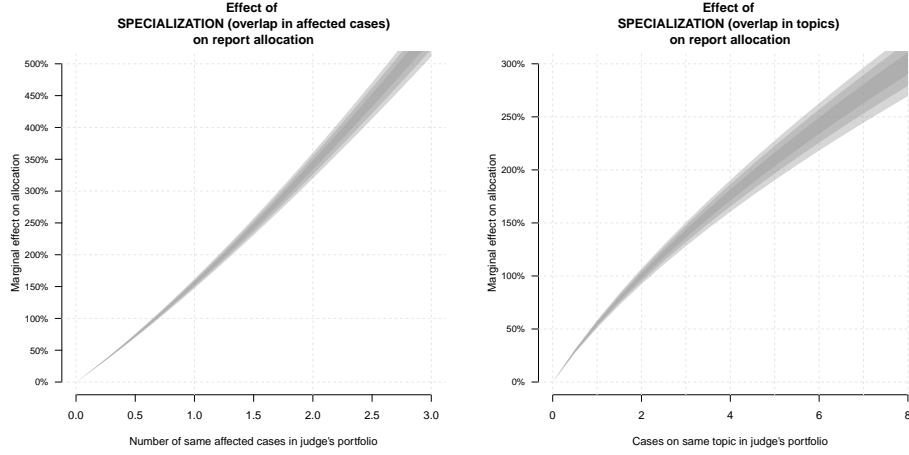


Figure 1: The effect of relative expertise acquired from previous cases on the same topic on case allocation.

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 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

Dependent variable: 'Allocation of report'	Model 1	Model 2
Expertise (overlap in affected case(s))	1.379 (1.343,1.411)	
Expertise (EUR-Lex)		0.659 (0.633,0.686)
Ties to member state (case from MS)	-1.458 (-1.587,-1.309)	-1.427 (-1.587,-1.313)
Cases as rapporteur	-0.251 (-0.27,-0.231)	-0.483 (-0.507,-0.463)
Membership unclear	-0.922 (-1.022,-0.839)	-0.986 (-1.077,-0.895)
Participation	0.045 (0.042,0.047)	0.045 (0.043,0.048)
Leadership (Chamber/Vice president)	-0.492 (-0.573,-0.414)	-0.534 (-0.609,-0.445)
Number of observations	217284	217284
Number of choice sets	9949	9949
Proportion of correct predictions	0.65	0.597
Prop. of correct positive pred.	0.614	0.643
Prop. of correct negative pred.	0.652	0.594

Median effects with 95% HDI in parenthesis.

Table 1: The effect of expertise and ties to the member state on allocation of court cases, regardless of the procedure in question. Results from a hierarchical conditional logit.

appointed.

The results show how individual judges can successfully shape 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. The case-to-case approach to allocations means that the President can move to compensate as other judges’ ability to monitor or supplement 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 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 45% if the affected legislation had been subject to political bargaining and the Court has not yet made an interpretation. The similar figure is 31% 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 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 sixth iteration, the chances of appointing a judge from a policy outlier is indistinguishable from that of other members.

The results 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 of his selection criteria to governments’ preferences.

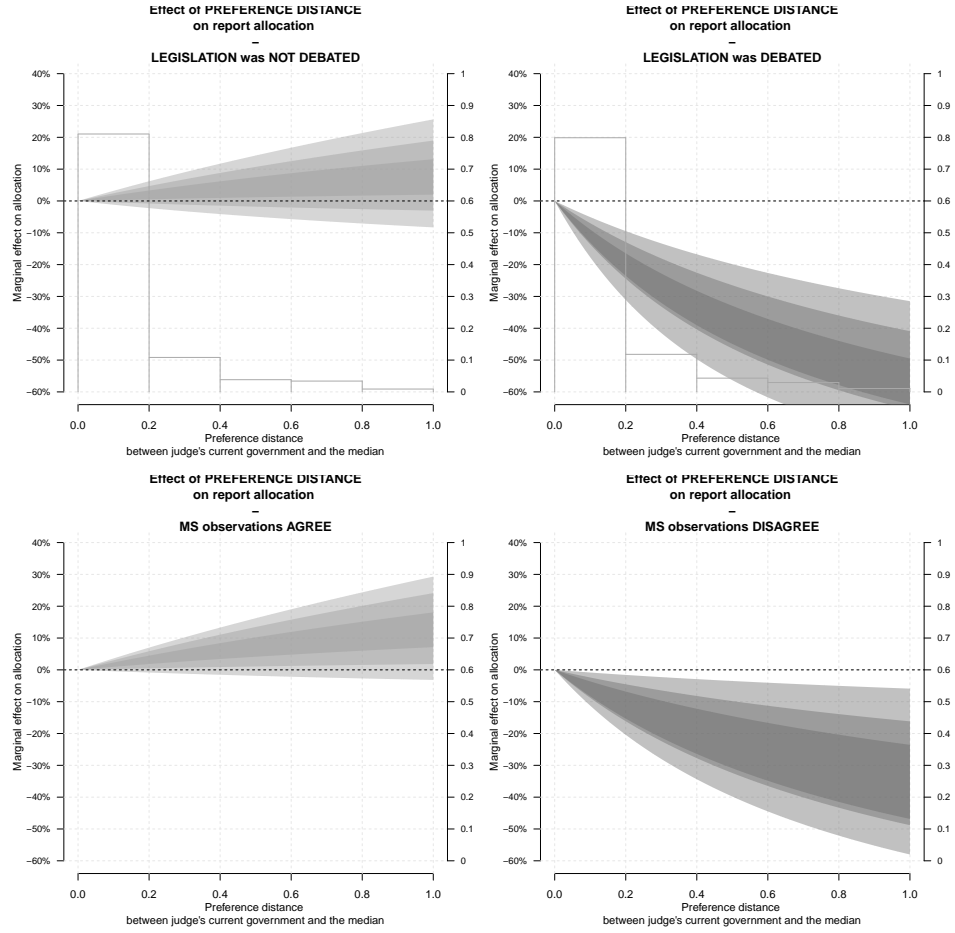


Figure 2: The conditional effect of politicization: The figures illustrate the effect of distance between a judge's current government and the median government currently in power on the probability of case allocations.



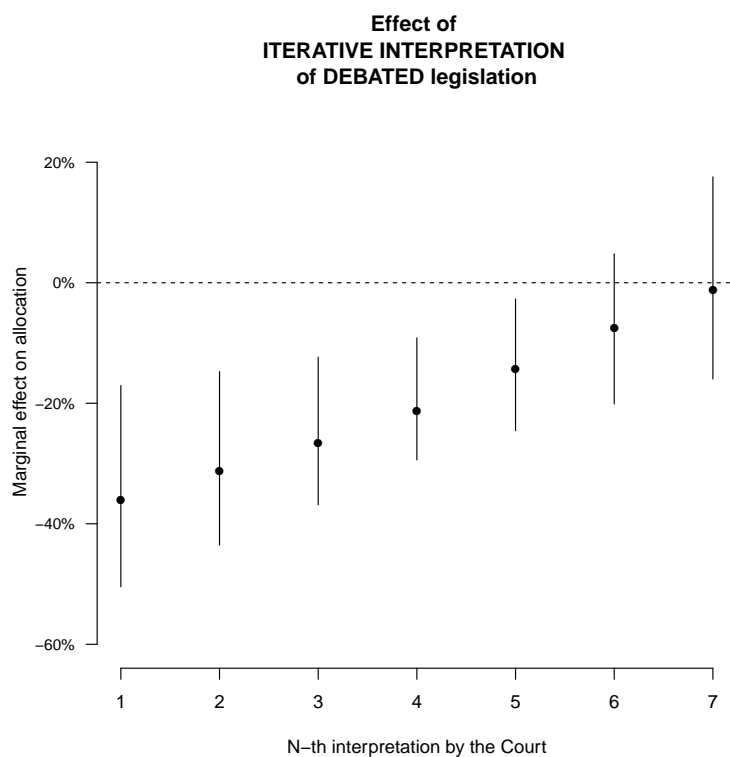


Figure 3: The figure illustrates the predicted effect of the Court’s iterative interpretation of politicized legislation among judges from the (median) most outlying governments.

Dependent variable: 'Allocation of report'	1980-2015	1980-2008
Distance from median judge	0.247 (0.035,0.493)	0.171 (0,0.337)
Distance from median judge * New debated legislation (H2a)	-1.199 (-1.814,-0.68)	
Distance from median judge * Disagreement MS observations (H2a)		-0.724 (-1.212,-0.241)
Distance from median judge * Iteration before the court (H2b)	0.141 (0.033,0.236)	
Specialization (overlap in affected legislation)	1.531 (1.479,1.582)	1.099 (1.042,1.16)
Specialization (overlap in topics)	0.295 (0.251,0.346)	0.222 (0.171,0.284)
Ties to member state (Case from MS)	-1.869 (-2.098,-1.605)	-1.054 (-1.226,-0.895)
Past cases	-0.501 (-0.54,-0.463)	-0.421 (-0.464,-0.37)
Membership unclear	-1.179 (-1.309,-1.04)	-1.18 (-1.343,-0.988)
Participation	0.047 (0.043,0.05)	0.051 (0.048,0.056)
Leadership (Chamber/vice president)	-0.592 (-0.692,-0.483)	-0.599 (-0.817,-0.403)
Number of observations	118496	60080
Number of choice sets	5024	3286
Proportion of correct predictions	0.702	0.661
Prop. of correct positive pred.	0.64	0.62
Prop. of correct negative pred.	0.704	0.663

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 court's legitimacy is built already at the case-management stage. Although an orderly process is not enough to legitimize the court's output, a critized process suffices to sink it. State signatories may be tempted to constrict international courts' autonomy to organize their work. However, 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

addressed 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. This is *a fortiori* true when member states are guaranteed representation among the key decision makers.

In contrast, 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. Politics are the most salient when the legal uncertainty is large, and I consequently find that the effect of government preferences decreases when the Court has established its' case law.

A clear precedent imposes a cost on decision makers who seek to overturn it. However, coherent decision making also implies coordination problems among judges with diverse motivations. While specialization promotes consistency, it also entails limitations on the President's discretion. This study demonstrates that the CJEU promotes individual-level specialization and argues that it provides the President with the flexibility required to make strategic allocations.

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