Justice Delayed: How Ideological Conflict Constrains the Court of Justice of the European Union[♥]

Draft, April 2019

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Abstract

In this paper, we sketch a general theory of international judicial institutions, using the Court of Justice of the European Union as our exemplifying case. We argue that, when states delegate powers to international courts, they typically organize them from the outset to mirror the political pressures that initially gave rise to their regulatory mandates. We explain how the member states of the European Union have used the Court of Justice's staff, structure, and process to grant themselves political representation on the bench, and show statistically how their desire for ex-ante control has constrained the court's production of case law. Specifically, using an original dataset with detailed information on all of the Court of Justice's judgments between 1952 and 2018, we find that as the level of ideological conflict among the states that were responsible for appointing the court's judges increases, so too does the expected duration of the court's legal procedures. In additional to shedding new light on the internal operations of one of the most powerful international courts in the world, the findings also have implications for advancing theories of delegation and judicial design more broadly.

A central tension in contemporary theories of delegation from national governments to international courts concerns the potential conflict between the value of judicial independence, on the one hand, and political responsiveness, on the other. The proliferation of international regulatory regimes over the past half-century has brought with it a variety of adjudicating procedures that empower standing bodies of judges to issue binding rulings on matters of international law. The stakes of these arrangements have been debated for decades (e.g. Alter 2014; Follesdal and Ullsten 2018). In order for international courts to speak law to power, they must establish a legal space where ordinary politics do not shape statutory interpretation. At the same time, the creation of an international judiciary with statutory privileges also brings inevitable opportunities for illegitimate activism. Because the way in which this tension is resolved determines the ultimate compatibility of international courts and conventional notions of democracy, much of the extant scholarship has focused on clarifying their actual place in the policy process—how they are designed, the functions that they serve, and whose interests that they represent.

Part of the debate has revolved around the role of the individual judge. In particular, some scholars have suggested that even formally independent judges can be subject to substantial political manipulation (e.g. Carrubba 2005; Garret 1995; Larsson and Naurin 2016). On this view, national political leaders can often use monitoring and sanctions to sway judicial decision-making in their own favor, despite their supposed commitments to international rule of law. Others, however, see the reach of national political leaders as so constrained by coalition bargaining and information asymmetries that they have come to characterize international judges as "trustees" of international relations (e.g. Alter 2008; Majone 2001; Stone Sweet and Brunell 2013). On this view, international judges can typically develop legal doctrine without concern for the political preferences of the member

state governments—and in some cases, even act as the "engines of integration" (Pollack 2003). Sorting out the actual connections between political and judicial decision-making in this context is essential for determining the contribution of international courts to international cooperation, their implications for national sovereignty, and whether they can generally be relied upon to resolve disputes impartially and independently.

To that end, in this paper we sketch a general theory of delegation to international courts that explains when and why their decisions will be politically motivated—and the answer is "almost always", but for reasons that are quite different than those usually highlighted in the literature. Specifically, we suggest that, when national governments coalesce to design international courts, they typically organize them from the outset to mirror the political pressures that initially gave rise to their regulatory mandates. As McCubbins, Noll and Weingast (1987, 1989) pointed out some years ago in the context of political delegation to public bureaucracies, the point of this exercise is not so much to pre-select any particular policy outcome. Instead, the point is to cope with the shadow of an uncertain future and assure that, when push comes to shove, the court will operate in a decision-making environment that reflects the political cleavages of the groups who were parties to the original regulatory regime. From this perspective, the politicization of judicial decision-making can be viewed as part of a broader ex ante agreement among the member states that limits the ability of both the court and the member states to engage in ex post opportunistic behavior. Because judicial decisions that the member states consider illegitimate can be costly both for the member states as well as the court, everyone involved has an incentive to pursue institutional arrangements that limit the court's discretion from the outset of delegation.

Empirically, we apply our argument to the Court of Justice of the European Union, which has long been at the center of research and theory development on the judicialization of world politics. In the academic debate surrounding the rise of international courts, the Court of Justice has commonly been described as both a forerunner in terms of judicial independence (Keohane, Moravcsik, and Slaughter 2000) and an inspirational model for the construction of many other international courts (Alter 2014). While some scholars have recently proposed that the Court of Justice operates under more significant political constraints than its legal mandate might suggest (Carrubba, Gabel and Hankla 2008; Larsson and Naurin 2016), most students of European integration and international law nonetheless perceive the court's judges as effectively and unambiguously insulated from politics (Stone Sweet and Brunell 2012). Although the population of international courts is a diverse one, if the mirroring principle applies to the Court of Justice, we believe that it is likely to apply elsewhere as well.

We ground our argument in an historical analysis of the Court of Justice's internal organization and an original dataset with detailed information on all of the court's judgments between 1952 and 2018. On our account, the Court of Justice operates much like a modern separation of powers system, wherein the most salient adjudicatory decisions must both follow certain administrative procedures and pass certain veto gates in order to become official. From the perspective of the member states, each individual judge serves as a political representative on the bench whose primary duty is to check and balance the inputs of the other judges—and in particular, judges that represent conflicting political interests. They are appointed to delay, interrupt, and question the judicial proceedings and, if necessary, warn their political allies of any potentially undesirable changes to the regulatory status quo. Although costly to all, the systemic inefficiencies that the member states have embedded into

the court's structure and process are also politically valuable because they both reduce the need for cumbersome ex post oversight and expand the opportunities for ex ante mobilization. Using a battery of survival models, we show that politically imposed divisions among the court's judges substantially constrain the court's production of case law.

Our conclusions run counter to a wide array of popular theories that characterize the Court of Justice either as wholly disconnected from the political sphere, or as hopelessly captured by parochial special interests. Though our empirical models focus on the ability of political leaders to appoint friendly judges, in our view, the appointment mechanism does not by itself constitute the bedrock of political control. Instead, the bedrock is jointly provided by a set of judicial institutions that: (1) grant all member states a say over the composition of the court's judges; (2) allocate proposal and veto powers to various judicial offices; and (3) require the most salient adjudicatory decisions to be backed by notices, comments, deliberations, evidence, and records. What the appointment mechanism contributes in particular is to assure that the court's separation of power is always accompanied by a corresponding separation of purpose, such that no single faction can claim exclusive control over all of the court's powers. That is, in order to reduce the risk of judicial drift, the member states have packed the court with a group of countervailing agents whose interests broadly mirror the political divisions in the polity as a whole, and provided them with a set of institutional levers to scrutinize and oppose each other's positions. The outcome is an international court that is *politically dependent*, yet not under the control of any one member state.

Our study contributes to the research on delegation problems and international institutions and to ongoing debates regarding international courts and tribunals. While the vast majority of prior research has focused on mechanisms for *ex post* accountability, such as

legislative override, non-compliance, or exit, we emphasize the importance a court's administrative procedures, organization, and personnel system—all of which operate before any judicial decisions are actually made. Our study also departs from most prior works by not treating courts as unitary actors with one coherent set of preferences that may contrast with state governments. Instead, the mirroring perspective on international courts in effect loosens up the hard distinction between the judicial and the political side in the engagements over the implementation of international treaties: The judges of the Court of Justice do not only carry their astounding red robes into the courtroom in Luxemburg, but also, although less immediately visible, their member state governments' hopes and expectations.

The Politics and Performance of International Courts

International courts can help states cooperate in mutually beneficial ways by reducing the transaction costs involved in the implementation of international agreements. For these courts to be successful, however, states need to invest powers in them to complete the contracts, i.e. to determine which actions are in accordance with the rules. They must be able to authoritatively request changes in states' behavior when their actions are found to be in breach with the rules. But as is well known, delegating power is risky business. As James Madison famously observed in the *Federalist 51*, an agent that is powerful enough to govern effectively will also be powerful enough to manipulate, vex, and oppress.

Although scholars generally agree that courts can make international treaties more effective, they are also deeply divided with regards to the ability of states to maintain control over the judges and avoid unintended consequences following from their jurisprudence. For example, Johns (2015) argues that "strong" courts that are delegated significant authority to pressure states into compliance may also generate unwanted costs in

terms of increased litigation. Furthermore, too little flexibility in terms of letting states off the hook when they face unusually high compliance costs may generate instability in the overall regime by provoking states to exit a court's jurisdiction. If the court is nested into a broader international regime, where short term compliance costs in one case may be compensated by longer term benefits in other areas, the costs of exit increases and the risk of instability decreases. One example of the latter, according to Johns, is the Court of Justice of the European Union (Johns 2015:167f).

Another set of theories hold that the legalization (Keohane, Moravcsik and Slaughter 2000) and judicialization (Alter, Hafner-Burton and Helfer 2019) of international relations have resulted in states frequently finding themselves bound by international agreements beyond what they had foreseen or signed up to. These theories emphasize that conflicts that are adjudicated by a "court"—with all the normative associations to rule-of-law that comes with that—empowers those actors who contest the policies that the court declares "illegal". Even though international courts usually lack the means to enforce their decisions against the will of recalcitrant states, they may leverage the political powers of other actors to compel government authorities to comply. Among these "compliance constituencies" (Alter 2014) are non-governmental actors, domestic judiciaries, and public opinion. Furthermore, the ability of states to recontract and revise the agreements and jurisdictions of a court is usually limited (Stone Sweet 2004, Alter 2008, Kelemen 2012). With imprecise international agreements, the result may be significant judicial drift towards policies preferred by activist judges, or shifts in power in favor of those political interests that have the most to gain from the direction in which the court takes the legal framework (Stone Sweet 2004, Pollack 2003, Alter 2014, St John 2018). In this context, too, the Court of Justice has been advanced as a

primary example of a court that has received a particularly powerful position in this regard (Alter 2009, Schmidt 2018).

Carubba and Gabel, on the other hand, has developed a theory which makes a very different prediction. Their model holds that enforcement in international relations fundamentally rests with states, and that there is little risk that international courts are able to lock the same states into suboptimal agreements (Carrubba and Gabel 2015: 49). This is not a realist argument about epiphenomenal international institutions. Carrubba and Gabel recognize the effectiveness of international courts in improving international cooperation and reducing transactions costs. But their theory does not generate any serious possibility for agency costs stemming from judicial behavior. The main functions of an international court in their model is to provide a "fire alarm" mechanism, by which litigants may signal possible non-compliance, and an "information-clearinghouse", by which the non-defendant states may form an opinion about whether the possible breech of the agreement by the defendant state is severe enough to warrant retaliation from their side. There is little room for the court itself to push for an interpretation of the rules that states find—on balance—not to be beneficial. Should it try to do so, it would be met by non-compliance by the defendant state, without any retaliatory actions from the other states. Again, the key empirical example of such a court as discussed by Carrubba and Gabel is the Court of Justice.

In what follows, we shall take a quite different approach to international courts. On the one hand, we argue that delegation to international courts does not imply unconditional submission of powers to independent and unaccountable judges. On the other hand, we also do not reduce international courts into mere platforms for inter-governmental bargaining, without any risk for agency loss. In our view, delegating powers to an international court can enable states to accomplish more than they otherwise would have,

much like Carubba and Gabel (2015) suggests. At the same time, however, we also maintain that the political risks that have been highlighted by Alter (2008), Johns (2015), Stone-Sweet (2004), and others are real. Where we differ is in our view of how exactly states manage these risks. While previous research has focused almost exclusively on the ability of states to correct undesirable judicial decisions through *ex post* reactions—such as override, non-compliance, or exit—we propose that, precisely because such reactions are often exceedingly difficult to muster, the participating states also often face strong incentives to enact institutional arrangements that constrain a court's discretion *ex ante*—that is, before any judicial decisions are actually made. In the next two sections, we first provide a generic inventory of how such constraints may be devised; and then, we turn to a more detailed analysis of how the member states of the European Union have used the Court of Justice's staff, structure, and process to grant themselves political representation on the bench.

The Mirroring Principle

When analyzing the relationship between national governments and international courts, we take inspiration from a venerable literature on political delegation to public bureaucracies. For our purposes, the key insight from this research program is that governments can not only influence agency policy choices *ex post* through monitoring and sanctions (McCubbins and Schwarz 1984; Weingast and Moran 1984), but also *ex ante* through strategic decisions about an agency's procedures and internal organization (McCubbins, Noll, and Weingast 1987, 1989). For example, to ameliorate informational asymmetries, a government need not necessarily monitor an agency's activities. Instead, they can demand that the agency notify affected stakeholders about forthcoming disputes and solicit comments about how to most appropriately proceed with a decision. In this context,

the *mirroring principle* implies that, when governments choose an institutional design for a particular agency, they use their control over the agency's personnel, structure, and process to establish a decision-making environment that reflects the political pressures that initially gave rise to the agency's regulatory mandate. Our core claim is that this simple idea also applies in the context of delegation to international courts, and we highlight three complementary mechanisms through which mirroring can be achieved.

First, the perhaps most obvious way in which a government can affect an agency's decision-making environment is by manipulating the composition of the agency's *personnel*. Moe (1985), for example, argues that US presidents commonly reserve the agency positions earning the highest pay and greatest authority for individuals who share their policy views. Similarly, Lewis (2008) argues that, precisely because presidents are prone to fill central agency position on the basis of ideology, loyalty, or programmatic support, incoming presidents are also particularly inclined to replace the appointees that were authorized by their political opponents. In addition to politically appointed leaders, however, many agencies also feature management boards or advisory committees with seats reserved for specific interest groups. By enfranchising constituencies that the government favors, the government need not closely supervise an agency to assure that the agency acts in the government's interests, but can instead allow it to operate on "autopilot" (McCubbins, Noll and Weingast 1987, 271). Although many bureaucracies are built around a set of formal rules that forbid politicized appointments, there are also many ways to work around such rules without violating the letter, if not the spirit, of the law (Dahlström and Holmgren 2017; Doherty, Lewis and Limbocker 2019).

Second, in addition to manipulating the composition of an agency's personnel, a government can also affect an agency's decision-making environment by manipulating the

agency's *structure*. The rules that assign bureaucratic authority and responsibility are not politically innocent, but rather allocates proposal and veto rights to some actors at the expense of other actors. One particularly salient veto gate is of course constituted by the government itself, who, in principle, can decide to override or even terminate an agency whenever they so desire (e.g. Holmgren 2018). In practice, however, government interventions in bureaucratic affairs will often impose significant costs not only on the agency, but also on the government (e.g. Ting 2001). And in the shadow of endemic collective action problems, a swift political response to bureaucratic drift may not always be possible. To work around such obstacles, the government can instead decide to institute a set of "veto sub-groups" (Kiewiet and McCubbins 1991, 34-37) that serve to continuously check the agency's decisions on the government's behalf. For example, instead of allowing a singular agency head to decide how to use an agency's resources, the government can mandate that the head must submit a budget proposal for confirmation to a board of directors. So long as the veto sub-groups reflect the relevant political cleavages of the government, then the government need not be united or even directly involve themselves in an agency's decisions to constrain the agency's discretion—because the constraints are built into the agency's structure from the outset of delegation.

Finally, a more subtle way in which a government can affect an agency's decision-making environment is by manipulating the agency's *process*. Much as in the case of an agency's structure, the rules that define how an agency's decisions must be made can carry substantial political implications, and perhaps most notably by determining the flow of information. For example, as McCubbins, Noll and Weingast (1999) point out, the US Administrative Procedure Act of 1946 establishes several provisions that constrain an agency's discretion. For instance, agencies must give notice that they will consider an issue

well in advance of any decision, solicit comments from affected stakeholders, allow all interested parties to communicate their views through hearings and other forms of participation, collect evidence that justify their policy positions, and construct a formal record in favor of a chosen action. Procedural requirements such as these promote political responsiveness in a number of ways. The notice and comment provisions assure both that an agency cannot secretly conspire against the government to present them with a *fait accompli*, and that the agency learns something about the political issues at stake. At the same time, the entire sequence of decision-making—notice, comment, stakeholder participation, collection of evidence, and construction of a record in favor of a chosen action—includes numerous opportunities for the government or their allies to raise the alarm in case an agency seeks to move in a politically sensitive direction.

We suggest that many of the instruments of political control that have been identified by scholars of public bureaucracy are also operative in the context of international courts. In particular, the tendency to allow all member states a say in the nomination of a court's judges can be viewed as means to assure that the court will feature an appropriate representation of political interests from the outset of delegation (Elsig and Pollack 2014). Additionally, the fact that international courts are generally structured as collective decision-making bodies (Voeten 2008) further assures that, if the judges were to disagree about a particular course of action, then they will also face ample opportunities to scrutinize and oppose each other's positions. And last but certainly not least, the standard judicial process typically requires each judgment to be backed by notices, comments, participations, evidence, and records—not unlike how regulatory agencies are typically obligated to take politically salient information into account before promulgating a new rule. The result, in our view, is an

internal system of checks and balances that activates in response to conflicts of interests between the member states that have a political stake in a court's decisions.

More generally, mirroring may be seen as a response to the problem of flexibility—the ability to accommodate unanticipated circumstances—that is emphasized in the literature on the rational design of international institutions. Koremenos, Lipson and Snidal (2001:773) point at flexibility as a key dimension of international institutions. They distinguish two kinds of institutional flexibility, transformative and adaptive. The former implies changing the ground rules of the agreement when new circumstances arise that reveal deficiencies in the present rules. In the research on international courts, the significance of transformative flexibility is debated. For example, Larsson and Naurin (2016) have emphasized the potential correctional effect of legislative override of international courts' decisions, and Johns argues that strengthening international courts authority should be balanced by increasing the precision of the rules in order to avoid a rise in litigation costs (Johns 2015:169f). However, as already mentioned, a common view in the literature is that accomplishing transformative treaty change *ex post* is prohibitively difficult, since such reforms usually require unanimity among states with heterogenous preferences (Stone Sweet and Brunell 2012, Alter 2009, Stone Sweet 2004, Pollack 2003. Cf. Scharpf 1988). By embedding their own interests in a court's organization from the outset of delegation and creating a continuous flow of information, the member states may instead promote what Koremenos, Lipson and Snidal call adaptive flexibility. This includes more limited mechanisms for dealing with unexpectedly high costs generated by strict rule following in specific cases. Students of international courts have identified some ways by which states and judges may secure adaptive flexibility. Sometimes formal provisions to that effect are included in the treaties, such as escape clauses in the WTO system (Rosendorff 2005). Other

times an international court may develop the necessary flexibility through its case law. The "margin of appreciation" doctrine established by the European Court of Human Rights (ECtHR), for example, works as a court-generated practice with similar effect as escape clauses. It allows the ECtHR to show deference to the laws and procedures of domestic institutions by tolerating—under specific circumstances—that states derogate from their obligations under the European Convention. If the court itself reflects the political cleavages of the member states, then the judges will also have a considerably easier time identifying the decisions that the member states would consider illegitimate.

In the next two sections, we first provide a more detailed inventory of the sort of *ex ante* constraints that the member states of the European Union have imposed upon the Court of Justice; and then, we present a battery of statistical evidence suggesting that these constraints are, in fact, also operative.

The Institutional Foundation of the Court of Justice of the EU

The history of the organization of the Court of Justice is one of its member states—through their control over the EU treaties, the Statute of the Court, and the court's Rules of Procedure—gradually and cautiously allowing the court to take an increasing number of decisions without their full attention, while still making sure that the most salient decisions are subject to an appropriate level of scrutiny. The main driver behind the reforms has been the increase in the number of cases arriving at the court. As the number of EU member states has successively increased from six in 1952 to 28 in 2013, and the scope of the treaties broadened to more policy areas, the court's caseload has unsurprisingly also grown substantially over time. The pressure on the court to diminish its workload and reduce the duration of its procedures prompted a gradual development of a system of chambers, with the

court being granted the right to decide an increasing number of cases in smaller settings of three or five judges, as opposed to making all decisions in the "full court", or more recently, the Grand Chamber of fifteen judges (Gabel et al 2018). However, these reforms have not corresponded to an unconditional abdication of political authority. We lack the space here to provide a very detailed account of all the intricate ways by which the member states have infused the organization of the Court with their eyes and ears, while at the same time giving it necessary latitude to perform its tasks. In what follows, we will highlight some of the most important examples of institutional mechanisms that contribute to a state presence in the Court—directly and indirectly, formally and informally—as counterweight to the increased pressure over time for more delegation to increase the court's performance.

First, consider the court's leading personnel. The member states and the court's judges both have important roles to play in determining the set of operative judges on a given case, but the member states naturally move first. The member states have the right to nominate one judge each on a renewable six-year fixed-term, with staggered replacements for half of the judges every three years. Formally, each nomination must be unanimously confirmed by the entire Council of the EU, effectively reserving a veto for all member states regarding all judicial appointments. In practice, however, none of the nominations have ever been blocked, and the fact that the member states appear to *de facto* appoint one judge each may perhaps be read as one of the most obvious applications of the mirroring principle in the design of the CJEU (e.g. Hermanssen and Naurin 2019). At the same time, however, the rules regarding the screening and selection of judges of course do not unequivocally favor politicized appointments. Strikingly, the first iteration of the Court of Justice—enacted in 1952 as part of the European Coal and Steel Community—did not include any requirements whatsoever regarding the legal qualifications of the judges (Saurugger and Terpan 2017:50).

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The Treaty of Rome in 1957, which created the European Economic Community, was the first to introduce such an obligation, and most conventional accounts of the court's development would suggest that the legal competence of the judges has increased in salience along with the scope and depth of the regulatory regime as a whole (e.g. Chalmers 2015). The Lisbon Treaty of 2009, for example, created the Article 255 Committee with the mission to screen all judicial nominations on the basis of legal qualifications. In addition, the member states have also attempted to limit the extent of politicization. The Eastern enlargements of 2004 and 2007, for example, were followed by the enactment of the first Code of Conduct for Members of the Court, which introduced a number of classical "civil service" provisions emphasizing impartiality and loyalty towards the institution. Accordingly, although the member states have reserved the right to nominate representatives who may share their national and political perspectives, they have also attempted to constrain themselves to make their picks from a pool of legally competent candidates, rather than simply pack the court with incompetent party loyalists and other unsavory characters.

Second, once the member states have made their appointments, it is important to note that the judges do not start from a blank slate, but rather enter an organizational structure with several pre-defined offices and powers. The most central decision-making body is the General Assembly, which consists of all of the court's judges and advocates general (Krenn 2017). The first item on the assembly's agenda is to elect a president from among their ranks for a term of three years to "represent", "direct the judicial business", and "ensure the proper functioning" of the court (Rules of Procedure, art. 9). Among the president's many executive responsibilities, we find in particular the responsibility to propose the composition of the court's chambers to the General Assembly. In the contemporary era, the president usually assigns each judge to two chambers: one referred to as a chamber of

three judges; and one referred to as a chamber of five judges. The naming convention does not necessarily indicate the total number of judges associated with a chamber, however, but rather denotes the number of judges that will serve on the panel that ultimately judges a case. In practice, most of the chambers will have at least one backbencher position that the chamber's members are formally obligated to rotate amongst each other for each new case assignment. Since 2003, the assembly also has a second item on the agenda: they must elect a president for each chamber. The president of the court chairs the Grand Chamber and the Full Court, but the presidencies of the smaller chambers are all open to electoral competition among the other judges. The chamber presidents enjoy the same formal powers as the president of the court within their respective turfs and are obligated to participate on every single case that a chamber receives. Furthermore, according to our interviews with court officials, all of the chamber presidents meet weekly together with the president of the court to discuss and monitor the progress of the court's cases. Simplifying only slightly, we may thus think of the Court of Justice as organized quite similarly to a conventional parliamentary democracy, where the General Assembly corresponds to the legislature, the president of the court the executive cabinet, and the chambers the departments or agencies that are responsible for carrying out the court's decisions.

Finally, once the court's offices have all been filled, the judges can start handling the court's caseload. Formally, the judicial process at the Court of Justice consists of a written stage and an oral stage. The written stage begins with a plaintiff submitting a case application to the court's Registry, which, once lodged, opens for the parties to provide statements and for national authorities, European Union institutions, and private citizens to submit briefs. Notably, unlike many other courts, the member states have not granted the Court of Justice any kind of docket control to speak of. Instead, the court must process all

cases that are brought before it and notify affected parties that a claim has been raised against them. As detailed by the court's own *Guide Pratique*, once a case has been lodged at the court, the president of the court first pre-screens the case together with his cabinet, and then unilaterally chooses a judge from the General Assembly to serve as rapporteur on the case. The first job of the rapporteur is to draft a preliminary case report with recommendations on a suitable chamber formation and procedures for the oral stage. The formal rule is that more difficult and important cases should go to larger chambers, which is also what happens in practice (Gabel et al 2018). The most central procedural choices concern whether to include an opinion from an advocate general, a research note from the Research and Documentation Directorate, an oral hearing, and which if any questions to ask the parties. After informing the advocate general of the recommendations (who may respond with a dissenting note), the rapporteur presents the recommendations for confirmation to the general assembly, which invites all of the court's judges and advocate generals to voice their views on the case. In addition, the Statute of the Court also grants each member state the right to unilaterally override the rapporteur's recommendations and request that the case be assigned to the Grand Chamber, which the General Assembly is obliged to accept (art. 16). Once the general assembly has decided on a chamber formation and procedure, the case enters the oral stage of the judicial process. If the general assembly decides to include a research note, the Research and Documentation Directorate presents a factual analysis of the case's legal background to the panel. If the general assembly decides to include an oral hearing, the court invites the parties to clarify their positions to the panel. If the General Assembly decides to include an opinion from the advocate general, the advocate general recommends an outcome to the panel. Then begins the second job of the judge rapporteur, which is to draft and present an actual judgment to the panel. In most cases, the rapporteur's draft judgment will broadly

conform to the opinion of the advocate general (Cramér et al 2016). In some cases, however, the rapporteur may also draft an entirely new judgment, either by their own accord or at the request of the panel's members. Formally, the panel decides on a judgment through hidden majority rule, but the chamber president may also unilaterally decide to return the case for reassessment by the General Assembly. Once the panel accepts the rapporteur's proposal, the case is closed and the outcome revealed to all.

The court's administrative procedures, organization, and personnel system are not merely arcane details of the EU treaties, but essential instruments for assuring that the court produces judgments that the member states deem satisfactory. To facilitate the checking function of each judge, the member state governments have carefully crafted a judicial structure and process that actively promotes collective decision-making, partisan representation, and the sharing of politically relevant information. We take this as a general characteristic with wide applicability: we should generally expect real-typical (as opposed to ideal-typical) courts to be organized such that the most important decisions are always made in committees, panels, and plenaries; by politically approved appointees; and with notices, comments, and evidence appropriately constructed in advance of any judgments. In addition, besides the formal rules that guide the court's practice, informal norms also speak to the way in which mirroring permeates the court's internal operations. For example, according to court officials, the chamber compositions are carefully chosen so as to assure a "balance" between a number of salient characteristics, such as legal tradition and geography (Prechal 2016). Another important informal practice—which incidentally also reveals the widespread perception of judges as state "representatives"—is that the president of the court intentionally avoids to assign judges as rapporteurs in cases that originate from their home countries. The behavioral outcome, in our view, should correlate with the political characteristics of the

member state governments—the judges should struggle over same issues, agree on the same issues, demand expediency on the same issues, and so forth, with higher bargaining costs the more heterogeneous the preferences. When it comes to judicial decision-making, "political responsiveness" should ultimately be understood as the extent to which a given court approaches regulatory implementation in the same way as the enacting coalition would have done, had they invested the time, effort, and resources to do the job themselves. In the remainder of the paper, we shall put the relationship between political preferences and judicial behavior to statistical task.

Research Design and Methods

To explore the relationship between political preferences and judicial behavior, we use an original dataset with detailed information on the proceedings of all judgements from the Court of Justice of the European Union between 1952 and 2018. To acquire information on the court's proceedings, we have scraped all judgments published on Curia, which is the official website for the Court of Justice's case law. To acquire information on the court's political environment, we have relied on extant scholarly efforts, such as the ParlGov database (Döring and Manow 2018) and the Comparative Manifestos Project (Volkens et al 2018). The scope of our data presents us with a unique opportunity to examine how the court's decision-making might respond to changes in the political composition of the member state governments, under a variety of more or less common initial conditions. In this section, we first describe our data, then present our modeling strategy, before finally turning to the results.

Data, Units, and Key Variables

We focus our empirical efforts on an aspect of judicial behavior that fits naturally within the mirroring perspective on institutional choice, but that most of the literature on international courts has willfully ignored, namely: the time it takes for a court to produce a judgment on a case. Recall that, according to our story, international courts should broadly mirror the political divisions of the polity as a whole, with higher bargaining costs the more heterogeneous the preferences. To the extent that international courts do reflect the interests of the political coalitions who build them, the same kind of ideological conflicts that can constrain the member states' production of statutory law (e.g. Cox and McCubbins 2005; Crombez and Hix 2015; Krehbiel 1998) should also extend to constrain the court's production of case law. If the court's judges were truly politically independent, it would be quite the coincidence to find a constraining relationship between the political preferences of the member state governments and the court's production of case law; but if the judges were serving on behalf of the parties that appointed them, it would follow as a matter of course.

To make our theoretical analysis empirically tractable, we first require a measure that traces the duration of the court's judicial process. We have recorded the amount of time that the court spent working on a case by counting the number of days between the date of lodging and the date of documentation, which the court reports along with the published judgment on the Curia website. For convenience, we do not make a hard distinction between cases and judgments, although a "case" is technically a different unit than a "judgment". Because the Court of Justice can sometimes combine similar or related cases and resolve them with a single judgment, the real amount of cases is substantially larger than the real amount of judgements. For joint-cases, the date of lodging marks the registration of the first case in a series of cases, and the date of documentation the resolution of all cases in the

series. We refer to the resulting measure as *judgment duration*, denoting the time it takes for the court to produce a judgment on a case.

In Figure 1, we chart the annual judgment durations for all cases that the Court of Justice has ever completed. The x-axis shows the calendar year in which the court registered a particular case, while the y-axis shows how many days it took the court to produce a judgment on the case. Each circle represents one judgment, while the dashed and solid lines show the mean and median judgment durations, respectively. We can see that the court's overall productivity has experienced periods of both relative stability and change. From the middle of the 1970's to the middle of the 1980's, for example, the average judgment duration rose from about two hundred days to six hundred days, while from the middle of the 1980's to the middle of the 1990's, the upward trend essentially flatlined. The mean and median durations across all observations are 579 and 546 days respectively, with a standard deviation of 268 days. We use this measure of the court's time-to-judgment as the outcome variable in all of our statistical models[1].

To link judicial behavior with political preferences, we also require a measure that transposes the desires of the member state governments unto the court's judgments. We accomplish this feat by treating the appointment process as the intermediate step. Specifically, for each judgment that the court has ever produced, we have recorded: (1) the judges on the panel that delivered the judgment; (2) the governments responsible for

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[1] Because the Court of Justice only publishes judgments on resolved cases, our data contains no right-censored observations (i.e. cases with pending judgments). We therefore also caution against substantive inferences about recent trends in the time-series, as we lack information on any judgment currently in progress. In the Online Appendix, we supplement the raw durations with non-parametric estimates of the associated hazard and survival functions.

appointing the judges; (3) the ideological positions of the governments; and (4) the diversity of the governments' ideological positions. We have identified the judges on a panel by machine-reading the signatories of each judgment. For information about the governments that were in power at the time of appointment, we have relied on the ParlGov database (Döring and Manow 2018). For information about the governments' ideological positions, we have relied on the Comparative Manifestos Project (Volkens et al 2018). Finally, to capture the level of ideological diversity in the panels, we have relied on conventional statistical dispersion measures, such as the standard deviation. This procedure allows us to trace changes in the ideological composition of the individuals that ultimately pen the court's judgments, as opposed to constructing an aggregate measure of, say, the court as a whole.

We have used the above procedure to construct three complimentary measures of conflict, grounded in the empirical literature on international courts and European integration[2]. First, we have constructed a measure based on attitudes towards market liberalization, which we refer to as *economic conflict.* The foundation of the measure is the Manifesto Project's own index of market economic attitudes. We first compute the (vote-weighted) average position of the government responsible for appointing a particular judge to the court, which gives us a unique ideology score for each judicial appointment. Next, we

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[2] Note that, because we are agnostic with respect to the substantive interests of the member state governments, we are less concerned about establishing what sort of factors that motivate the behavior of the union's political leaders than we are about establishing what happens when their motivations might clash. However, as we require both "conflicts" and "interests" in order to construct a sensible measure of "conflicting interests", we must also necessarily make some second-order assumptions about the motivations that undergird the union as a whole in order to meet our primary objective.

compute the ideological standard deviation among the judges responsible for signing a particular judgment, which gives us a unique conflict score for each panel. Second, we have also constructed a measure based on attitudes towards European integration, which we refer to as *integrative conflict*. In an influential study of the European Court of Human Rights, for example, Voeten (2008, 431) argues that national political leaders can have different views regarding the appropriate level of supranational judicial activism, and that some governments "willingly put activists on the bench". The Manifesto Project does not offer a ready-made index of integrative attitudes, but does offer two component measures of positive and negative mentions of the union. We have used the sum of these components as a foundation for our measure of integrative conflict, and then computed the values for the panels in the same way as for the measure of economic conflict. Finally, we have also constructed a measure based on party representation, which we refer to as *party conflict*. While the classical theories of European integration all focused on interactions between "states", more recent scholarship has emphasized the central role of national political parties (e.g. König 2018). Our measures of economic and integrative conflict both follow a similar logic by taking party manifestos as indicators of government ideology, but they do not pay any special attention to the party organizations as such. For our measure of party conflict, we have first recorded the party family of the head of government responsible for appointing each judge; and then, calculated the sum of the squares of the vote shares associated with each party family within each of the court's panels. The composition of the measure corresponds to the well-known Herfindahl-Hirschman index of market competition in economics, but the same computational logic has also been commonly applied to study electoral competition in party systems (e.g. Laakso and Taagepera 1979). A value of zero indicates that the same party family controls all the seats on a given panel, while values approaching ten indicate

increasing levels of fragmentation[3]. For convenience, we use *ideological conflict* to refer to all three measures as a group, while reserving the individual denominations for more targeted discussions.

In Figure 2, 3, and 4, we graph each of the above conflict measures for each calendar year of the court's existence, analogously to the graph of judgment durations in Figure 1. As we can see from the graphs, each measure follows a quite distinct temporal pattern. In time-series terms, the economic conflict measure appears to follow something akin to a random walk, where each new step can lead in a new direction. The integrative conflict measure has a more stable variance, but with some notable disturbances around the fall of the Soviet Union and the Nice Treaty of 2001. The party conflict measure, meanwhile, starts out somewhat erratic, but stabilizes with the accession of Denmark, Ireland and the United Kingdom in 1973. In fact, the three measures are sufficiently distinct to be almost entirely orthogonal (VIF = 1.0), which means that we can also conveniently include them in the same statistical model without concern for multi-collinearity. We use these measures of ideological conflict as treatment variables in all of our statistical models.

Modeling Strategy

Our goal is to estimate the average causal effect of ideological conflict in the court's panels on the court's judgment durations. Let X be the conflict treatment, Y the duration outcome, Z a vector of covariates, and x a particular conflict level. We can then write the difference in expected durations under two different conflict regimens as

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[3] In the original index, a value of one would indicate a monopoly while values approaching zero would indicate increasing levels of fragmentation, but we have reversed the scale and multiplied the values by ten in order to align the index with our other two conflict measures.

$$E(Y|X = x, Z) - E(Y|X = x', Z).$$

If Z is sufficient to adjust for all possible sources of confounding, then we may also interpret the difference in expected durations as the average causal effect in the study population (e.g. Pearl 2009). Because the validity of this interpretation hinges crucially on Z and its putative effect on X and Y, however, we devote a full section of the Online Appendix to our identifying assumptions. In this section, by contrast, we merely introduce our vector of covariates and briefly explain how we model the expected duration under different conflict regimens.

First, we include a fixed-effect for each presidential year, chamber, and judge-rapporteur, respectively. The president of the court has a formal mandate to "direct the judicial business" and "ensure the proper functioning of the court" (Rules of Procedure, art. 9). Our main concern in this respect is that each president may not only have distinct preferences regarding the court's internal operations and outputs, but also periodically update their objectives over time. Because the president-effects double as period-effects, however, they also conveniently adjust for many potential changes both in the composition of the court itself, as well as in the court's broader institutional context (e.g. the enlargement of the European Union). The chamber- and rapporteur-effects each add an additional layer of depth by allowing for each chamber and rapporteur to have a distinct judgment rate. For example, the Grand Chamber is reserved for cases of particular "difficulty or importance" (Rules of Procedure, art. 60), which we can adjust for by treating each chamber separately. Similarly, the rapporteurs can differ on a variety of dimensions of relevance for the court's performance (e.g. Cheruvu forthcoming), which we can adjust for by treating each rapporteur separately.

When combined, the president-, chamber-, and rapporteur-effects stratify our study population into 2342 distinct judgment-strata, where each stratum is a unique combination of a judge-rapporteur, chamber, and presidential year.

Second, we also include a set of continuous covariates that focuses on the panels themselves. Because the ideological compositions of the panels may still co-vary with other performance-affecting factors within each judgment-stratum, we also consider some supplementary covariates at the panel level for completeness. In order to avoid confusing ideological conflicts with plain incompetence (cite something), we include a continuous measure of the proportion of judges with prior experience as a judge. Additionally, to account for differences in both legal origins and geography, we have measured both the proportion of judges with a French legal origin and the proportion of judges from the ex-Socialist eastern bloc (La Porta et al 2008). Finally, we also include a continuous measure of the number of judges that signed a particular judgment in order to account for the fact that chamber size is not necessarily a constant. Notice that we have also added quadratic terms for the measures of legal-geographic origins and proportion of female judges in order to allow them to vary nonlinearly with the durations. Going by the judges' own accounts of how the court operates (Prechal 2016), these continuous covariates should capture a good deal of the variance that our fixed-effects could potentially miss.

Finally, we implement our measures using a survival analysis framework. To model the expected duration given the treatments and covariates, we rely on a fully parametric class of generalized survival models, originally due to Royston and Parmar (2002). For our purposes, the key feature of these models is that they rely on restricted cubic spline functions to capture the functional form of the baseline judgment rate, enabling a highly flexible treatment of both the underlying probability distribution of event-occurrence,

as well as any potentially duration-dependent effects (e.g. Collet 2015). For the spline functions, we use the standard setup of three interior knots at the 25th, 50th, and 75th centiles of the distribution of uncensored log event times, but also note that the results are virtually indistinguishable from having (e.g.) four knots at the 20th, 40th, 60th, and 80th centiles, or two knots at the 33rd and 67th centiles. Furthermore, to recover marginal estimates in the spirit of equation (1), we standardize the expected durations to the observed covariate distribution (Hernán and Robins 2019). That is, we first model the mean outcome under relatively low levels of conflict and the same covariate distribution as in the entire study population, and then compare the result against a model with relatively high levels of conflict and the same covariate distribution as in the entire study population. We review the results of our modeling efforts below, but refer to the Online Appendix for more detailed information regarding methods, descriptive statistics, and alternative specifications[4].

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[4] For instance, a valid concern is that our very high-dimensional setup might sacrifice too much variance for the sake of warding against bias. Specifically, our stratification procedure produces 485 strata with only one observation each, and an additional 353 strata with multiple observations but constant treatment status. For the main manuscript, we use standardization to estimate the average causal effect in the entire study population (Hernán and Robins 2019). Because we cannot assure positive assignment probabilities given the data, however, these estimates rely on a good deal of parametric extrapolation. In the Online Appendix, we therefore also provide supplementary results from a set of alternative specifications where we restrict our attention to the subpopulation of judgments where we know that the positivity condition holds (i.e. the subpopulation constituted by all strata where we have actual variance on the treatment). Both strategies produce similar results.

Results

Overall, our results indicate that politically imposed divisions among the Court of Justice's judges can constrain the court's production of case law. To be specific, cases that the court assigns to panels where the judges' respective political principals are relatively ideologically distant tend to take noticeably longer for the court to resolve than cases that the court assigns to panels where the judges' respective political principals are relatively ideologically proximate. As we explained in the previous section, we have constructed three distinct treatments: one based on attitudes towards economic liberalization; one based on attitudes towards European integration; and one based on party families. We can observe these differences both for each individual treatment—although as we show below, with some notable differences in precision and magnitude—as well as for all three treatments jointly. In contrast to popular theories of judicial independence, these findings suggest that partisan politics is one important part of the explanation for why the court's judges behave in the way they do.

To substantiate our conclusions, we present results from two sets of generalized survival models: one that builds on a static specification; and one that builds on a dynamic specification. In the first set of models, we assume that our treatments have time-constant effects, or what methodologists sometimes term "proportional hazards" (e.g. Box-Steffensmeier and Jones 2004). For these models, the coefficients can be read as weighted averages over the entire judicial process. In the second set of models, we relax the proportional hazards assumption and instead let the treatment effects vary with the duration of the judgment. Because the coefficients can take on different values at different stages of the judicial process in these models, they are most appropriately evaluated in temporal context. To accommodate the differences in model specifications, we have opted to present

the results from the static models numerically in Table 1, while presenting the results from the dynamic models graphically in Figure 6 to 11. We review the results from each set of models in turn.

Static Results

In Table 1, we report the coefficients and standard errors from our static models, for each of our treatments. The coefficients show the relative difference in hazard rates for a one-unit change in our conflict measures. In the context of our study, we can loosely think of the hazard rate as the conditional probability that the court will produce a judgment on a case, given that it has not yet done so[5]. That is, if the hazard rate is high, then the court quickly resolves its incoming cases; if the hazard rate is low, then the court works more slowly. Recall that our measures of economic and integrative conflict both correspond to the standard deviation of the appointing governments' policy positions in each panel, while our measure of party conflict corresponds to the Herfindahl-Hirschman index of the size and number of party families in each panel. A coefficient of zero would imply that there is no discernable difference in judgment rates between ideologically divided and unified panels, a positive coefficient that an increase in ideological conflict is associated with an increase in

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[5] For any time t, the hazard rate is the proportion of units that experience the event of interest among those that had not experienced it before t. The perhaps easiest way to translate the hazard rate into something substantive is to envision it as the expected number of event occurrences per unit of time (e.g. judgments per day, month, year, etc.). The reported coefficients are equivalent to the hazard ratio, which can be tricky to interpret (Hernán 2010). We report additional quantities of interest below.

the judgment rate (i.e. shorter durations), and a negative coefficient that an increase in ideological conflict is associated with a decrease in the judgment rate (i.e. longer durations).

We first present results from a baseline model that only includes our treatments and then add each covariate set separately, before finishing with a fully specified model. In Model 1, all three treatments indicate that ideological conflicts in the court's panels are associated with substantial reductions in the court's performance. For example, the coefficient for economic conflict in Model 1 is -0.046, which indicates that a one-unit increase is associated with about a five percent decrease in the judgment rate. The coefficients for integrative and party conflict are even larger at -0.143 and -0.107, respectively, but as the measures have different variances they are also not directly comparable (cf. Figure 2-4). Adjusting for different types of panels, as we do in Model 2, brings the coefficient for economic conflict down to more realistic values, but the coefficients for integrative and party conflict remain sizable at -0.115 and -0.065. When we adjust for different types of rapporteurs in Model 3, the coefficients on economic and integrative conflict drop to -0.030 and -0.025, while the coefficient on party conflict is largely unaffected. Adjusting for different types of chambers, as we do in Model 4, has the most notable impact on economic conflict, bringing the coefficient down to -0.023. When we adjust for different types of presidential years in Model 5, the coefficient for economic conflict is essentially obliterated, while the coefficients for integrative and party conflict are both left alive and well. Finally, in the fully specified model, all three treatments display the expected negative sign—with the coefficients for economic, integrative, and party conflict landing on -0.019, -0.015, and -0.059, respectively—but with a very large standard error for integrative conflict. The sort of lessons that we can reasonably expect to learn from our

modeling exercise thus hinges on the assumptions that we are willing to make about the court's underlying causal structure, as we argued in the previous section.

The coefficients in Table 1 provide a useful bird's eye perspective on the potential impact of our treatments, but the lack of detail can also be misleading. For example, the early stages of the Court of Justice's judicial process include a variety of procedural checkpoints that all cases must pass—such as the directorates for legal translations and research and documentation—but that are not obviously conflictual in nature. For our purposes, averaging the coefficients over the entire duration may well obscure rather than illuminate the true impact of our treatments. Furthermore, while the hazard ratios give an indication of the relative difference in outcomes for low and high levels of conflict, they say nothing about what the difference means in absolute terms. Perhaps the difference is relatively large, but absolutely trivial. Furthermore, if the event of interest is terminal, as in our case, hazard ratios also feature a built-in selection bias that makes them difficult to interpret causally (Hernán 2010). The bias stems from the varying risk profiles of the units under study: "frail" units will tend to exit the study population at greater rates than "robust" units, leaving us with a disproportionate amount of observations of the latter type for the actual analysis. For these reasons, we have also made sure to examine the marginal effect of the treatments using a more dynamic model specification, which we report below.

Dynamic Results

In Figure 6 to 11, we present a series of standardized survival curves. We have recovered the curves from a model specification that is identical to Model 6 in Table 1,

except that we have also interacted the treatments with the restricted cubic spline functions[6].

Each curve charts the predicted probability that a case will remain unresolved for a given number of days under different levels of ideological conflict, with the probability on the y-axis and the judgment duration on the x-axis (i.e. a case has a y percent chance of "surviving" for x days). The dark shaded area shows the predicted probability for panels at the 90th centile of the relevant conflict measure ("divided panel"), while the light shaded area shows the predicted probability for panels at the 10th centile of the relevant conflict measure ("unified panel"). That the curves are "standardized" means that we make the predictions for each type of panel under the exact same covariate distribution (Hernán and Robins 2019), which we have set to equal the study population unless noted otherwise. Put differently, in each figure we compare the mean outcomes for two counterfactual panels that are quite far apart in their level of conflict, but with otherwise similar background characteristics.

We first present predictions for each individual treatment in Figure 6, 7, and 8. As we can see from the graphs, all three treatments produce similar temporal patterns. The divided and unified panels are essentially indistinguishable during the first 200 days, then diverge over the next 500 days, before finally converging into the right-hand tail. For example, consider the predicted probabilities associated with party conflict. A case that the court assigns to a panel that is divided on the party dimension has a seventy-five percent

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[6] Specifically, we let the coefficients depend on the restricted cubic spline functions, with the same degrees of freedom as the baseline hazard. The point of the interaction is to let the coefficient vary with the duration, rather than assume that they remain constant for all durations (e.g. Box-Steffensmeier and Zorn 2001). Furthermore, to avoid swamping the models with incidental parameters, we only allow for time-dependent coefficients at the panel level, while treating the fixed-effects as having time-constant effects.

chance of remaining unresolved for about 420 days, while a case that the court assigns to a panel that is unified on the party dimensions has a seventy-five percent chance of remaining unresolved for about 380 days. Meanwhile, both types of panels have a twenty-five percent chance of taking around 700 days to resolve the case. Notably, we can now also see why the standard error was so large on the coefficient for integrative conflict in the static Model 6: the curves actually make a slight crossing in the right-hand tail. As we discuss further in the conclusions, however, due to a latent potential for measurement bias, we would caution against substantive inferences in the upper ranges of the duration. Nevertheless, if we are mainly interested in cases that take either an exceptionally short or an exceptionally long time to resolve, our conflict treatments appear to offer limited leverage. On the other hand, if we are mainly interested in the court's more normal state of affairs, then the ideologies of the appointing governments appear salient to judicial behavior and, accordingly, well-worthy of further investigation.

As a complement to the predictions for each individual treatment, in Figure 9 we also show the joint-effect of all three treatments. The predicted probabilities in Figure 6 to 8 are estimated "ceteris paribus" and thus assume that the only difference between the two panels is the level of economic, integrative, or party conflict. In the real world, however, legal disputes can often activate multiple conflict dimensions at the same time (cite something). In Figure 9, we therefore also consider a counterfactual scenario where the three treatments may co-vary, either by chance or nature. The predictions can be read in the same way as for each individual treatment. For example, a case that the court assigns to a panel that is divided on all three dimensions has a seventy-five percent chance of remaining unresolved for about 450 days, while a case that the court assigns to a panel that is unified on all three dimensions has a seventy-five percent chance of remaining unresolved for about 360 days. At the same time,

the unified panel also has a twenty-five percent chance of taking about 700 days to resolve the case, while the divided panel has twenty-five percent chance of taking about 740 days to resolve the case. In this more extreme scenario, we are accordingly talking about differences in terms of months, and not just a few days or weeks.

Finally, in Figure 10 and 11 we also show the joint-effect of our treatments for two very distinct subpopulations: the Skouris presidency (2003-2015); and the Lecourt presidency (1967-1976). We highlight these subpopulations to demonstrate that the ideological association is neither a new nor an old phenomenon, but rather something that can be observed throughout the Court of Justice's legal history. The Skouris presidency offers a contemporary view of the court's operations and covers about 38 % of our observations. It should thus come as no surprise that the predicted probabilities for our treatments under President Skouris look quite similar to the population average in Figure 9, although with somewhat tighter variance on the mean outcome. The Lecourt presidency, on the other hand, offers a more historical perspective. During this period, the Court of Justice was a considerably smaller institution, having both a much weaker mandate and far lighter caseload than is currently the case (cite something). Yet, despite the numerous differences between the two presidencies, we can still observe a quite noticeable gap between divided and unified panels. Future research on international courts would accordingly do well to further consider how ideological conflicts can affect judicial decision-making—in the European Union and beyond.

Discussion

In this paper, we have sketched a simple but general theory of international judicial institutions, using the Court of Justice of the European Union as our exemplifying

case. We have argued that, when national governments coalesce to design international courts, they typically try to organize them from the outset to mirror the political pressures that initially gave rise to their regulatory mandates. From the perspective of the coalition's central decision-makers, however, the mirroring principle is both a blessing and a curse. On the one hand, by enfranchising the political interests that were parties to the original regulatory regime, the enacting coalition need not closely supervise the court to assure that it acts in the coalition's interests, but can instead allow the judges to check and balance their own operations. On the other hand, to the extent that the coalition's members differ in their most desired policy outcomes, inhibiting the ability of the court's judges to take undesirable actions will necessarily retard their ability to take desirable actions as well. To buttress this conjecture, we have traced the proceedings of more than ten thousand judgments from the Court of Justice of the European Union between 1952 and 2017 and demonstrated that politically imposed divisions among the court's judges substantially constrain the court's production of case law.

Our theory is not a naïve theory of one-to-one correspondence. We are not suggesting that all international courts will be entirely or even mostly composed of former politicians and party loyalists. People can have well-defined preferences over policy outcomes without ever going near politics as a vocation. When we say that the participating governments will seek political representation on the bench, we mean that they will seek to promote judges whose preferences and priorities are similar to those of their own (e.g. Bendor et al 2001; Dahl 1957). Nor are we suggesting that all international courts will be entirely or even mostly composed of legal dilettantes. Clearly, expertise is an important concern for many governments. But partisanship and expertise are not mutually exclusive; in fact, political convictions can often serve as a potent incentive for people to become experts

in the first place (eg. Gailmard and Patty 2007, 2012). We are also not suggesting that international courts must always feature at least one unique agent for each member state. Because political control is costly to exercise, the inclination of the regime's political leaders to impose institutional checks on judicial decision-making depends upon their valuation of the status quo. In situations where they do not perceive the political stakes as particularly high, the potential gains from specialization may well far outweigh the risk of agency loss (Kiewiet and McCubbins 1991, 34). As with any other act of delegation, delegation to international courts is about economizing on the costs of decision-making, and any reasonably rational political principal would be ready to adapt their strategies to the situation at hand.

What we are suggesting is that national governments do not only choose judicial institutions with an eye towards performance, but also to cope with political uncertainty. At the end of the day, international courts arise out of political concerns over the exercise of public authority, and their staff, structure, and process will accordingly reflect the interests, strategies, and compromises of the political coalitions who build them. Because the resulting organizations can usually be expected to suffer from both political bias and administrative inefficiency, many prospective coalition partners will be naturally inclined from the outset to either form a regulatory regime without a court, or to not form a regulatory regime at all. Indeed, the modal response throughout known history has simply been for national governments to avoid international cooperation all together and instead settle their differences using sticks and stones. In those instances where the central decision-makers' interests are sufficiently aligned for a court to be on the table, however, we should generally expect to find a distinctively political dynamic between the composition of the member states and subsequent judicial behavior.

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Table 1. Ideological Conflict and Judgment Durations in the CJEU, 1952-2015.

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Economic conflict	-.046	-.036	-.030	-.023	-.008	-.019
	(.006)	(.007)	(.009)	(.006)	(.008)	(.009)
Integrative conflict	-.143	-.115	-.025	-.113	-.083	-.015
	(.009)	(.011)	(.013)	(.010)	(.014)	(.015)
Party conflict	-.107	-.065	-.100	-.113	-.116	-.059
	(.007)	(.008)	(0.01)	(.008)	(.009)	(.010)
Panel		Yes				Yes
Rapporteur			Yes			Yes
Chamber				Yes		Yes
President					Yes	Yes
Splines	Yes	Yes	Yes	Yes	Yes	Yes
Observations	11 089	11 089	11 089	11 089	11 089	11 089

Notes. Coefficients show the marginal change in the hazard ratio. Robust standard errors in parenthesis. Panel, rapporteur, chamber, and president lines indicate active covariates. Splines are restricted cubic spline functions with interior knots at the 25th, 50th, and 75th centiles of the distribution of uncensored log event times.

Figures

Figure 1. Judgment Durations by Calendar Year.
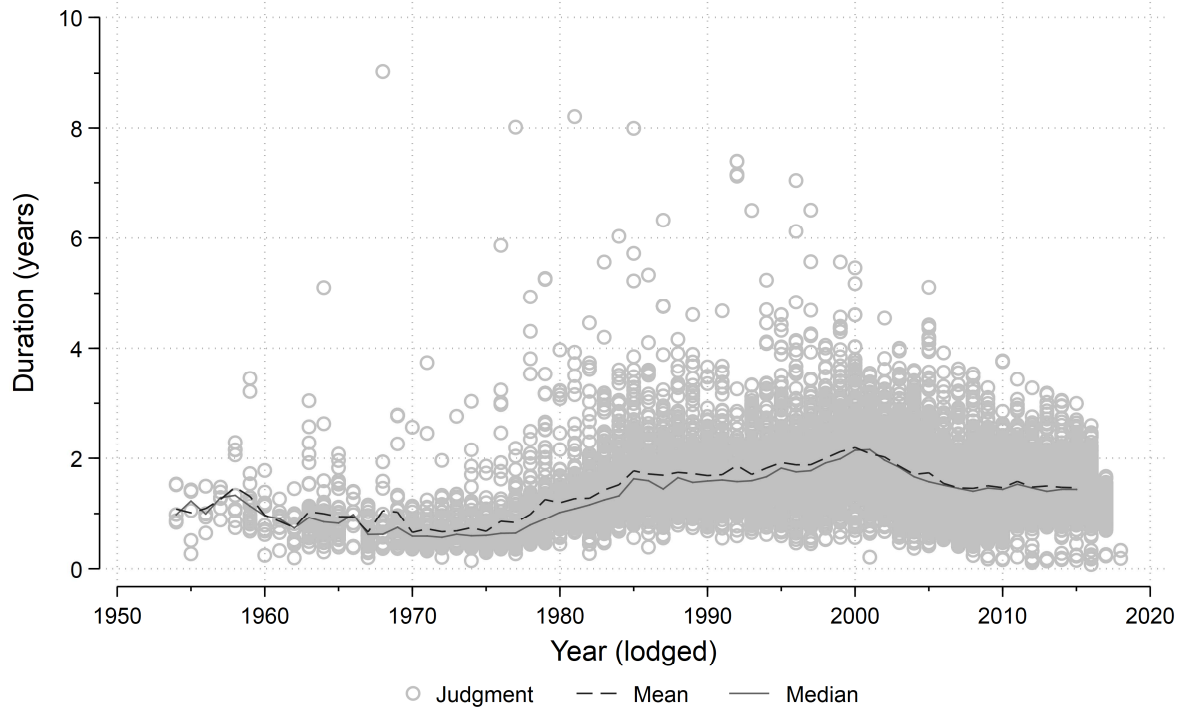
Figure 2. Economic Conflict by Calendar Year.
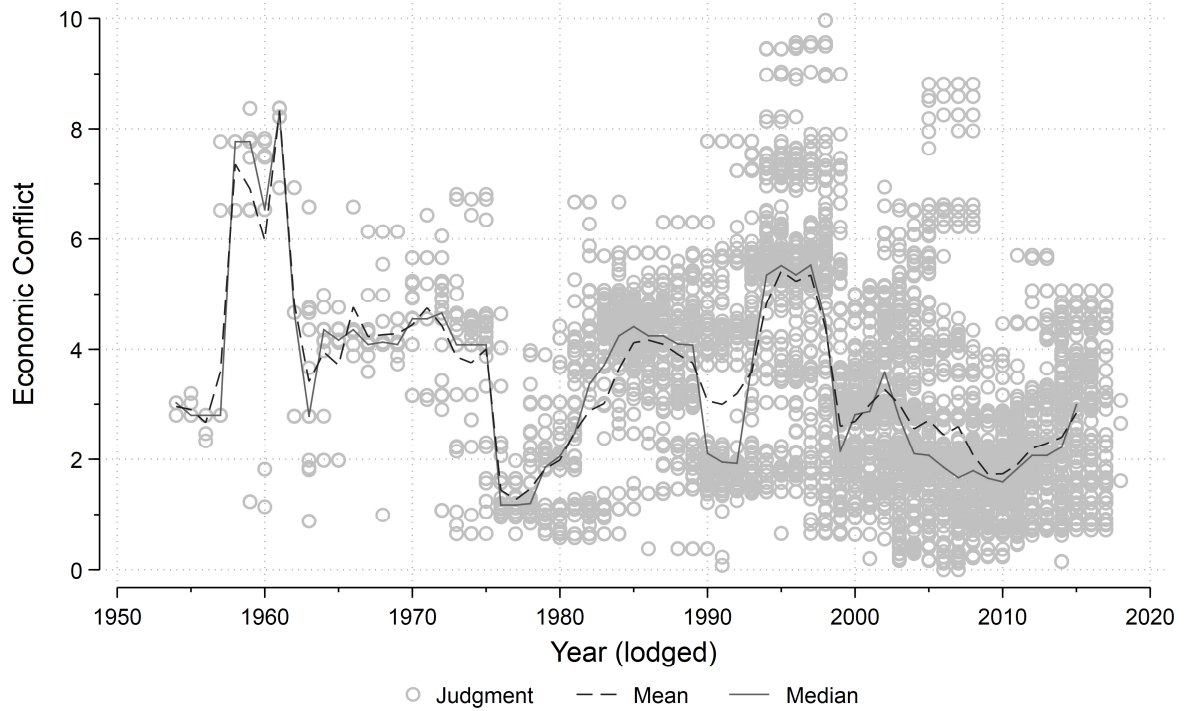
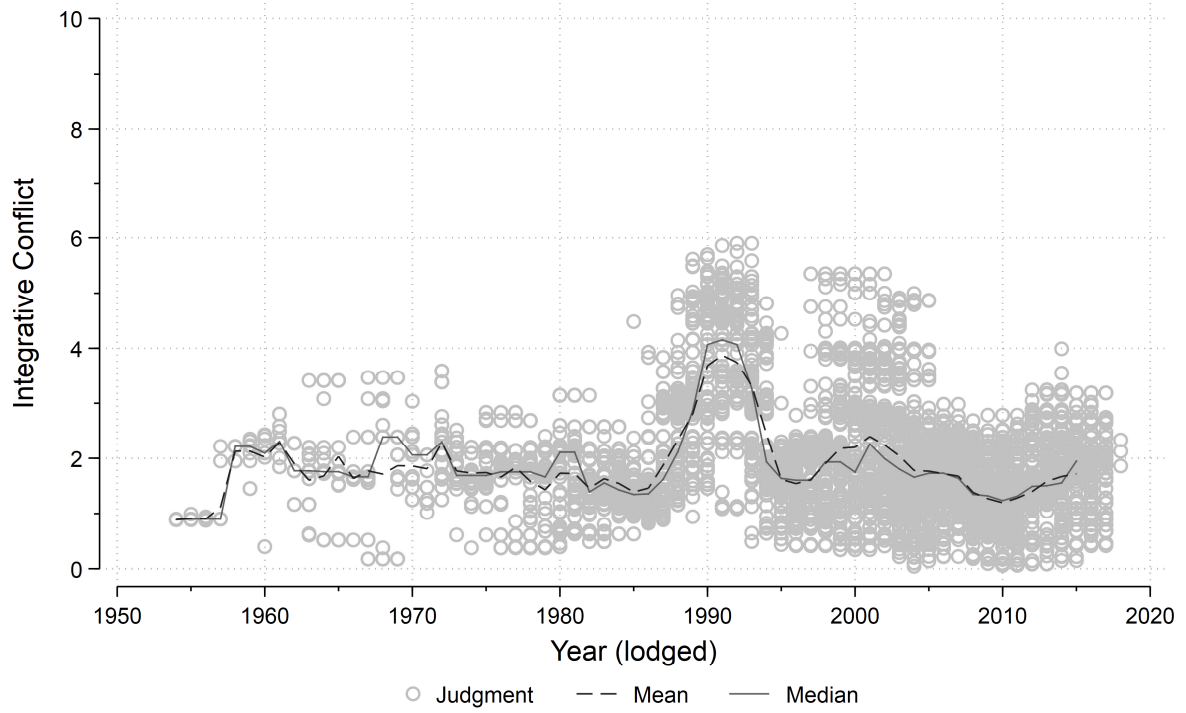Figure 3. Integrative Conflict by Calendar Year.
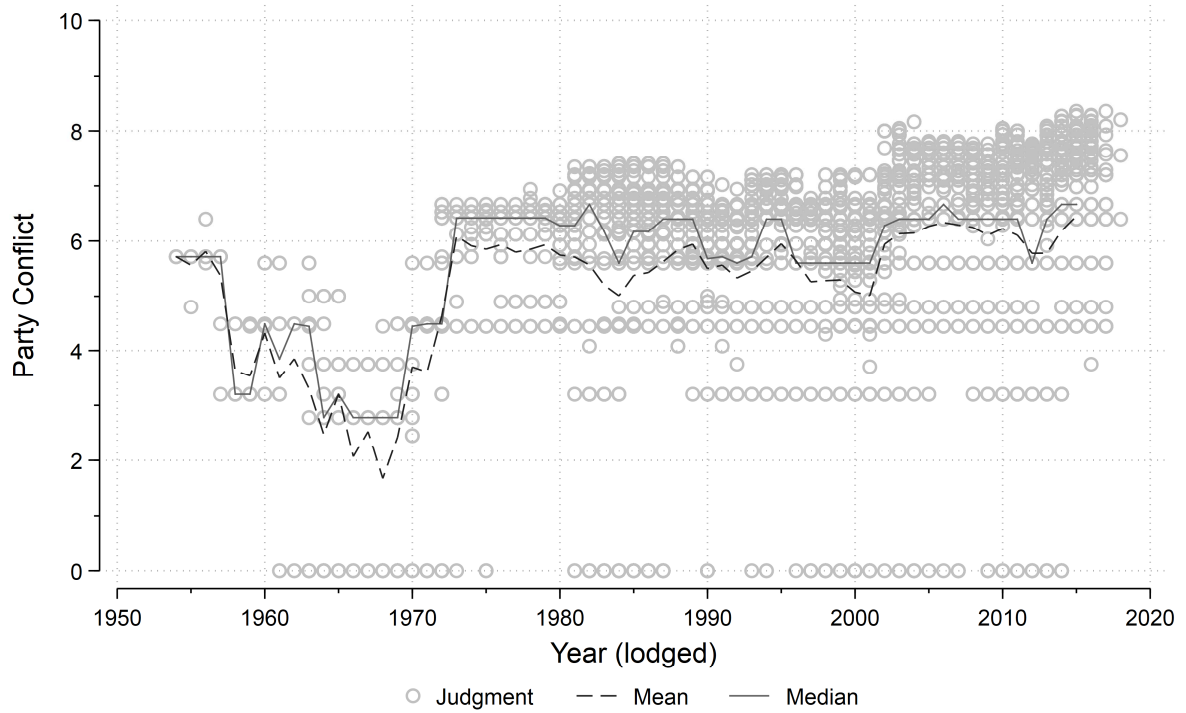

Figure 4. Party Conflict by Calendar Year.

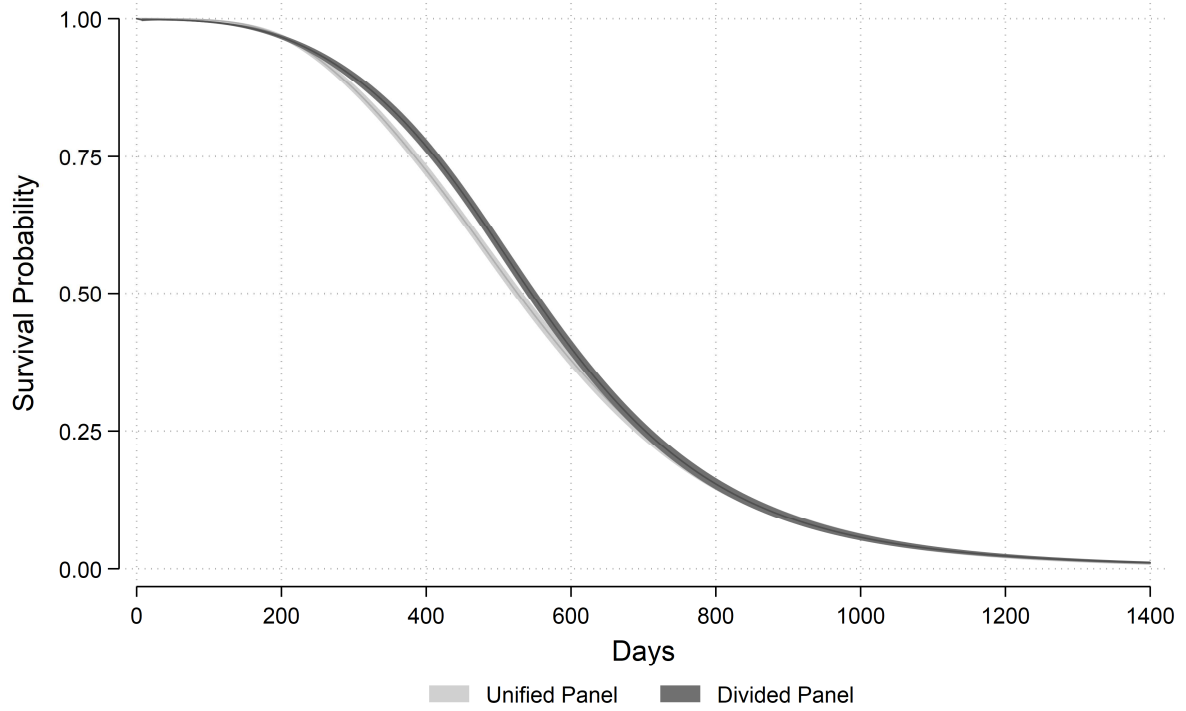Figure 6. Judgment Durations by Economic Conflict.

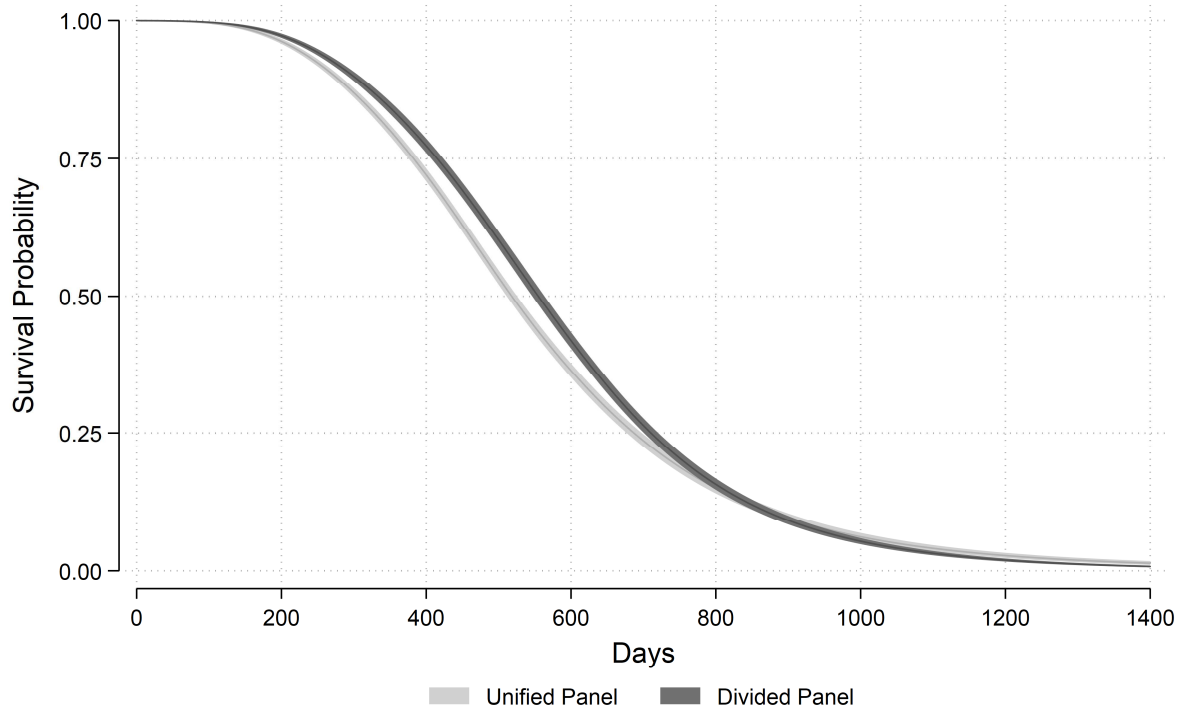Figure 7. Judgment Durations by Integrative Conflict.

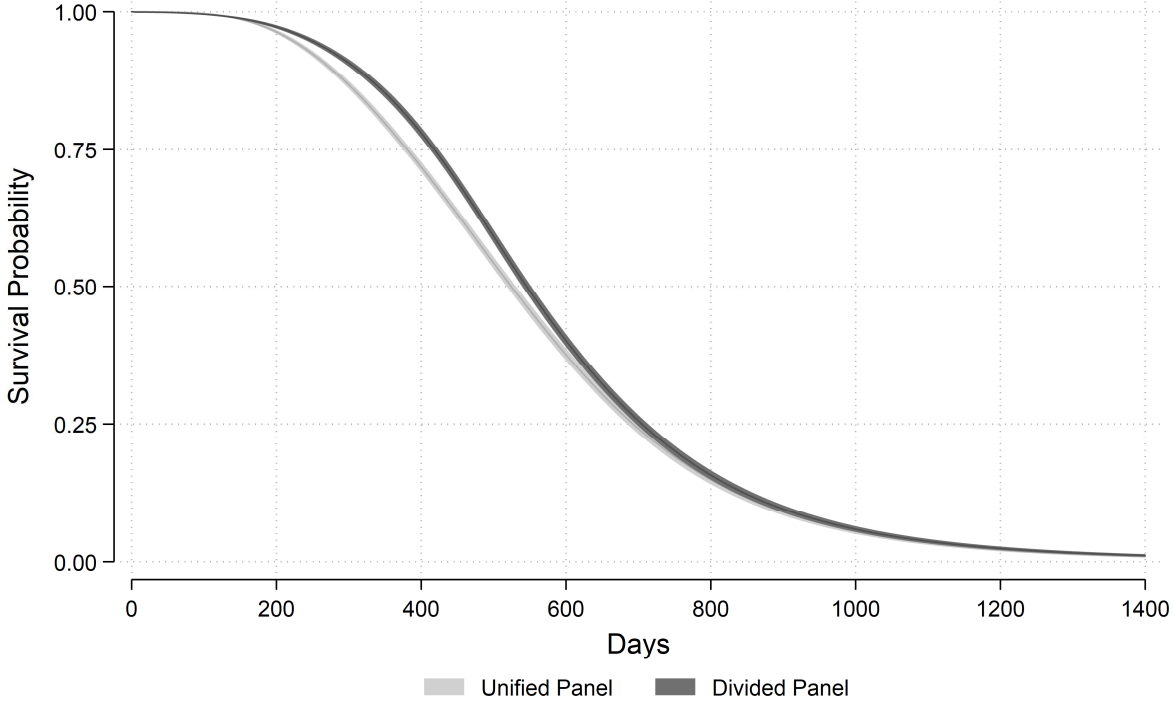Figure 8. Judgment Durations by Party Conflict.

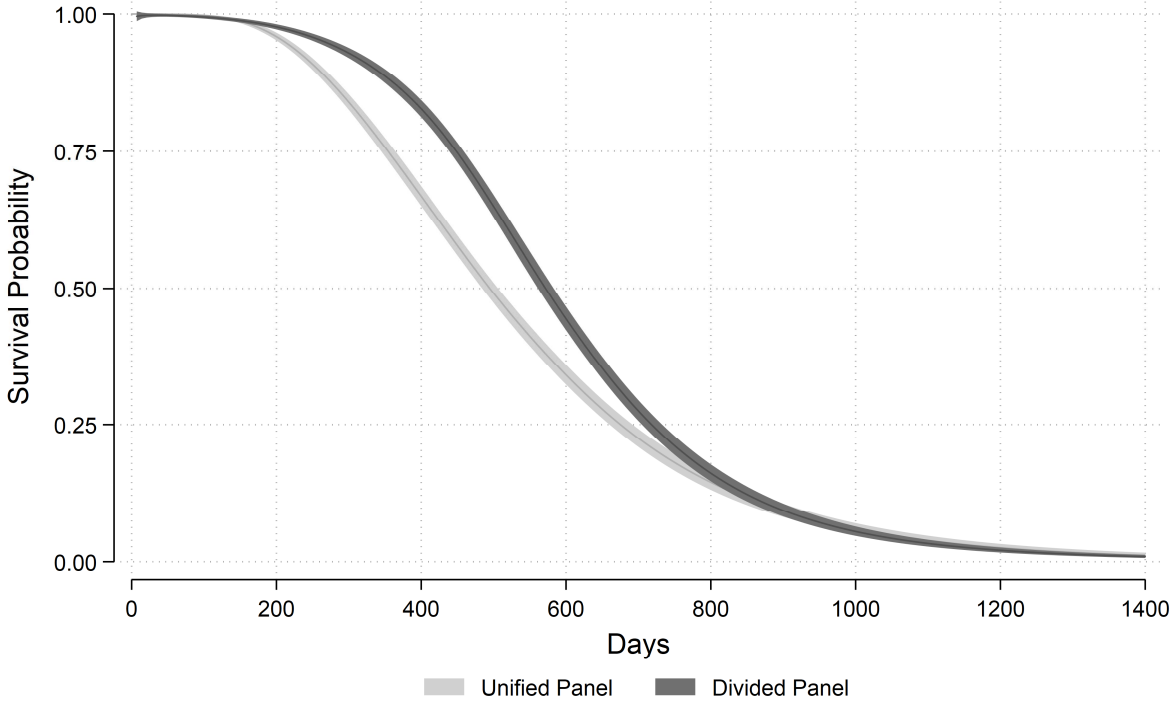Figure 9. Judgment Durations by Ideological Conflict (Population).

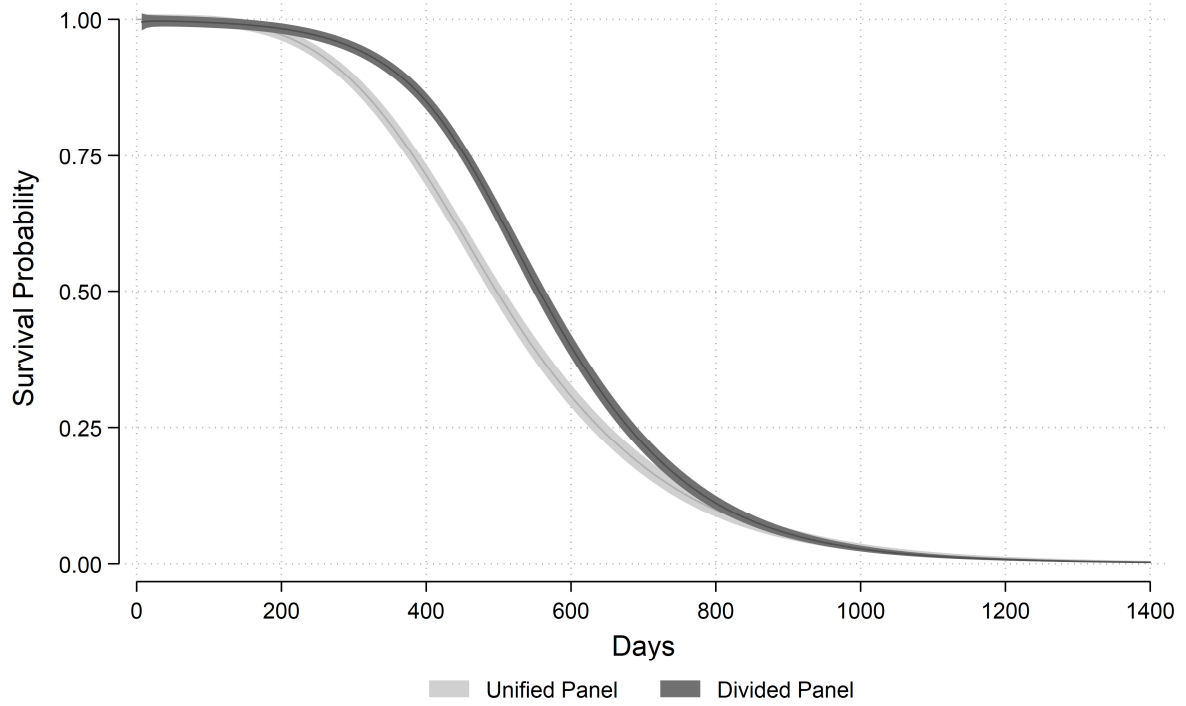Figure 10. Judgment Durations by Ideological Conflict (Skouris).

Figure 11. Judgment Durations by Ideological Conflict (Lecourt).