

The Faceless Court

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Abstract

This Article examines the behavior of judges and their law clerks (officially entitled *référéndaires*) at the Court of Justice of the European Union. It identifies a number of serious issues affecting court performance. First, the Article finds that the Court's high judicial salaries and lack of procedural safeguards for EU judicial appointments attract political appointees. As a consequence, some judges who are selected are not competent to perform and are dominated by their *référéndaires*. Moreover, the high turnover rate of EU judges hampers their productivity, and increases their dependence on the *référéndaires*. Using a sample of data hand-collected from LinkedIn, the Article demonstrates that *référéndaires* are drawn from a relatively closed social network. There is no open platform for recruiting *référéndaires* and the requirement of French as the working language significantly limits the pool of eligible candidates. The inefficiency of the *référéndaire* labor market results in less competition, leading many *référéndaires* to stay longer at the Court. The revolving door between the Court and the European Commission raises serious conflict issues, as the Commission is able to exert influence on the Court from the inside and gain a comparative advantage in litigation.

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I. INTRODUCTION

The Court of Justice of the European Union (the Court)¹ is the most powerful supranational court in the world. In the political science literature the Court is often depicted as activist, constantly expanding the scope of EU law and pushing its boundaries.² Indeed, through a series of innovative decisions in the 1960s, the Court is said to have effectively “constitutionalized” Europe.³ Today the Court’s power and influence have extended far beyond its founders’ original goal of unifying Europe. As regulations originating from Brussels have penetrated many aspects of economic life,⁴ the Court not only delineates the fundamental rights of European citizens, but also greatly influences the way multinational companies are conducting businesses within and outside of Europe. Acting as a veritable “Supreme Court” of Europe, the Court has the authority to provide the ultimate interpretation of EU regulations in a wide range of areas affecting global commerce. Multinational companies ranging from European leaders like GlaxoSmithKline and LVMH, to America’s iconic businesses such as Google and Facebook, to China’s national champions such as Huawei and ZTE all need to pay heed to the Court’s rulings.

Despite this considerable global profile, we know very little about the Court itself. Indeed, existing literature on EU law tend to view the Court as a black box and ignore one crucial element in judicial law making—human behavior. This partly has to do with the “faceless” nature of EU judicial law making. Since its establishment, the Court has followed the French tradition of issuing a single, collective and unanimous judgment without dissents. In fact, judges are prohibited from revealing how the Court reached its decision in a particular case.⁵ Another daunting challenge in understanding the Court is the secrecy of the decision-makers themselves. While judges’ profiles are disclosed by the Court, the Court does not publish any information on their law clerks (officially entitled “référéndaires”⁶). But référéndaires play an important and indeed sometimes crucial role in the decision-making process.

Despite these challenges, this Article hopes to draw a sketch of the faces behind the Court. This project is inherently interdisciplinary and builds upon various strands of literature in law, economics, political science and sociology. It is also both quantitative and qualitative. Based on the public information disclosed by the Court, I provide a summary statistics of the background of the judges and advocates general⁷

¹ The Court of Justice of the European Union comprises three tribunals: The Court of Justice, the General Court, and the Civil Service Tribunal. For purpose of this Article, the Court refers to the Court of Justice and the General Court.

² See generally HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986); KAREN ALTER, THE EUROPEAN COURT’S POLITICAL POWER (2009); JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE (Mark Dawson *et al.* eds., 2013).

³ See generally Eric Stein, *Lawyers, Judges and the Making of A Transnational Constitution*, 75 AM. J. INT’L L. 1 (1981); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L J. 2403 (1991).

⁴ See generally Anu Bradford, *The Brussels Effects*, 107 NW. U. L. J. 1 (2012).

⁵ See Art. 2, the Statute of the Court of Justice of the European Union (2012).

⁶ Référéndaires are also referred to as “legal secretaries” in English.

⁷ Similar to judges, advocates general are also officially “members” of the Court and indeed enjoy status equal to judges. However, they do not participate in the deliberation of cases. Rather, they

(collectively referred to as EU judges hereinafter) appointed by the Court since 1952. As the background of référendaires is not disclosed, I hand-collected data from LinkedIn, a professional social networking website, and created a dataset of 103 former référendaires and 74 current référendaires working for the Court. In May 2014 I made a field trip to Luxembourg and during the subsequent twelve months I conducted twenty extensive interviews with former and current members and staff of the Court.⁸

The Article is organized as follows: Section II delves into the appointment process of EU judges and analyzes how the salary of EU judges could in turn influence their judicial quality. Section III studies the hidden decision-makers at the Court by examining the labour market, social network, country of origin, and career structure of référendaires. It also probes into the affiliation of some référendaires with the European Commission (the Commission) and explores the potential consequences. Section IV concludes and provides implications for the study. The summary statistics of the EU judges and référendaires are presented in Section V.

II. EU JUDGES

Judges are, as Posner called them, “all-too-human workers”.⁹ And like other humans, judges derive their utility from maximizing the sources of their satisfaction; these include not only income, but also non-pecuniary compensation such as prestige, power and leisure. However, unlike labor participants working for private organizations, the performance of judges is largely insulated from performance review. To be sure, judicial opinions are often subject to criticisms, but the nature of judicial rulings will always create winners and losers. As long as judges do not commit gross mistakes and faithfully apply the statutes, a judge’s career will normally be secure no matter what interpretation he applies to the statute. Indeed, the loosely-worded EU treaties provide plenty of room for EU judges to make law. The unobservability of judicial output could therefore lead to problems of adverse selection and moral hazard. This, however, does not mean that EU judges are free from any constraints. The selection process for EU judges, as well as the incentives and constraints imposed by the structure and rules of their careers, in fact has a significant impact on how they behave.

Since the establishment of the Court in 1952, 184 men and women have served at the Court of Justice and the General Court. 95 have served as judges and 45 as advocates general at the Court of Justice, and 66 have served as judges at the General Court. 22 judges have served multiple roles at the Court. A statistical summary of the judges’ gender, education and professional experience are presented in Appendix I.

i. Selection

provide an independent reasoned opinion to the Court, thus playing the role of a quasi-decision-maker.

⁸ The interviews were open-ended and conducted either face to face or over the phone and lasted for about an hour on average.

⁹ RICHARD A. POSNER, *HOW JUDGES THINK* 7 (2008).

As the performance of EU judges cannot be easily observed and monitored, judicial appointment becomes of paramount importance in controlling judicial quality.¹⁰ However, judicial appointments are not made strictly on merit. While the EU prides itself on integration, there is no common market for judges. Like many other international tribunals, candidates for judicial positions at the Court are put forward by the individual Member States. Upon nomination, governments of the Member States by common accord appoint the judge for a renewable term of six years. In practice, Member States never disagree with each other's nomination so in effect each Member State appoints its own judges. As a consequence, each Member State follows its own judicial appointment process, which is often opaque and political.¹¹

As shown in Appendix I, more than 65% of the EU judges have worked in government prior to joining the Court. In particular, 28% of the EU judges' primary work experience, and 27% of the EU judges' last position before joining the Court was in government. Noticeably more judges at the Court of Justice (67%) have backgrounds in government than those at the General Court (57%). Many of them have been former ministers or legal advisors at the Ministry of Justice, or former members of the diplomatic corps. Some have even served in the parliaments of the nominating state. The preference for government officials is not surprising. As the secret deliberation rule prevents nominating states from monitoring the voting preference of their appointees, appointing governments are more prudent in choosing the candidates that they believe will act in their interests. Only 53% have prior judicial experience in the national courts. In fact, only 17% of the EU judges' primary work experience, and 29% of the EU judges' last position before joining the Court was in the judiciary. But sovereign interest is not the whole story. Kenney observes that each nominating country would need to strike their own balance of interests in terms of political parties and languages when selecting the "best" candidates to the Court and other supranational tribunals.¹² Even if appointments are not driven by a specific policy agenda, personal connections to the appointing executive and party credentials are deemed paramount in some member states.¹³ In some cases the nominating state has used judicial appointment as a form of patronage to reward loyal functionaries or as an opportunity to remove an undesirable political opponent.¹⁴

¹⁰ See generally Damian Chalmers, *Judicial Performance, Membership, and Design at the Court of Justice*, in SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENTS TO THE EUROPEAN COURT 51 (Michal Bobek eds., 2015). (arguing that the lack of clear vision in the function and direction of the Court during the judicial appointment stage results in the Court setting its own tasks for itself. As a consequence, judicial outcome reflects the prevailing professional disposition of the Court.)

¹¹ See Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUDIES 257, 260 (2002). See also Henri de Waele, *Not Quite the Bed Procrustes Built*, in SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENTS TO THE EUROPEAN COURT 24 (Michal Bobek eds., 2015).

¹² Kenney, *supra* note 11.

¹³ *Id.*

¹⁴ *Id.* In this regard, the Court of Justice is not so different from other international tribunals. See generally Erik Voeten, *the Politics of International Judicial Appointments*, 9 CHI J. INT'L L. 387 (2008).

Worse yet, there is no public hearing during the appointment process. The only public information the Court makes available about the judges is their profiles. These profiles generally contain a judge's birth year, year of entry and departure, position at the Court, prior education background, work experience and other public activities. However, a closer look at these profiles reveals that there is no mandatory disclosure rule and many of the profiles are incomplete. Indeed, Appendix I reveals that almost 77% of the profiles of the EU judges contain missing information about their education background, so it is not possible to verify either schools, degrees, or both. 16% of profiles do not contain sufficient information about work experience, so it is not possible to verify their primary work experience prior to joining the bench. Nor do we know the last positions of almost 18% of judges based on their public profiles. In fact, 26% of EU judges provide no information regarding their educational background whatsoever. Over 40% of judges from Portugal, Spain, Greece, Denmark and the Netherlands completely omit their educational background. An extreme example is Denmark, where five out of seven appointees provide no disclosure of educational background. This coincides with the fact that most judges appointed from Denmark come from the government.

Even when the profiles are complete, the information on paper is still far from enough to gauge the judge's qualifications for the position. To function effectively and efficiently at the Court, EU judges need to possess three important skills: First, knowledge of EU Law; second, superb legal and research skills and an astute legal mind; and third, fluency in the French language.¹⁵ However, the criteria as established in the EU Treaty is very loose.¹⁶ This leaves considerable room for discretion.

In 2010, an expert committee was established under Article 255 TFEU to vet the credentials of candidates nominated by the member state as well as current members who are up for reappointment (the Committee). The Committee is comprised of seven members, who are chosen from former EU judges as well as members of national supreme courts and lawyers of recognized competence.¹⁷ The assessment criteria of the Committee are more comprehensive than the standards stipulated in the Treaty. It considers that judges or advocates general from the Court of Justice should possess more than twenty years of experience with high-level duties, and that judges at the General Court should have more than twelve years experience with similar duties.¹⁸ The Committee states that it assesses the candidates' grasp of "the main aspects of EU law" but it does not "seek to assess the scope and comprehensiveness"

¹⁵ See Kenney, *supra* note 11, at 267; See also Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 COLUMBIA J. EUROPEAN L. 89 (2008).

¹⁶ Art. 253 of the TFEU provides that "the Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence". Art. 254 of the TFEU provides that "the members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office."

¹⁷ Council Decision 2010/125/EU on Appointing the Members of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union, O.J. 2010. L 50/20.

¹⁸ The Council of the European Union, *Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union* (hereinafter Activity Report), 6509/11 (Feb. 17, 2011) at 18-19.

of the candidate's expertise in EU law.¹⁹ The requirement to speak French remains a soft constraint, and the Committee expects that the candidates to at least acquire proficiency in French "within a reasonable time."²⁰

To be sure, the Committee constitutes an encouraging first step in providing some safeguards to the appointment process and a few member states governments have recently overhauled their own selection processes to introduce more transparency and formality.²¹ However, in a few countries such as Greece, Italy and Spain, appointment remains exclusively controlled by the executives.²² Moreover, the power of the Committee is very limited. It has no power to nominate or choose between candidates, but only has the power to consider one candidate at a time and issues a non-binding opinion. The composition of the Committee also suffers from democratic deficit. The President of the Court nominates six of the seven members, and one is nominated by the European Parliament.

By December 2013 the Committee had examined 32 new candidates, and delivered 7 unfavorable opinions on candidates from Greece, Italy, Cyprus, Romania, Sweden, Lithuania and the Czech Republic.²³ These candidates were all running for positions at the General Court. A few candidates were rejected for lack of professional experience, on the basis that their "length of high-level professional experience" was "manifestly too short."²⁴ Some candidates were rejected for "insufficient familiarity with EU law".²⁵ This disturbing fact reflects the severity of the lack of quality control by some nominating states during the selection process.

Without rigorous procedural safeguards for judicial appointment, the quality of the EU judges appointed to the Court is bound to vary significantly. Interviewees indicate that the less capable the EU judge is, the more he or she will need to rely on the *référéndaires* to carry out the judicial functions.²⁶ As a consequences, the voices of *référéndaires* are amplified, and in some instances they even effectively become the judges behind the scenes.²⁷

ii. Compensation

¹⁹ *Id.* at 19.

²⁰ *Id.*

²¹ Tomáš Dumbrovský et al., *Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States*, 51 COMMON MARKET L. REV. 455, 459 (2014) .

²² *Id.*, at 467.

²³ See The Council of the European Union, *Third Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union*, 1118/2014 (Dec. 13, 2013), at 9-10.

²⁴ See Activity Report, *supra* note 18, at 20.

²⁵ *Id.*

²⁶ Interview with a member of the Court, Luxembourg (May 5, 2014); Interview with two current *référéndaires*, Luxembourg (May 5, 2014); Interview with a former *référéndaire*, London (Feb. 19, 2015); Interview with a member of the Court, London (March 12, 2015); Interview with a former *référéndaire*, London (April 10, 2015); Telephone interview with a former *référéndaire* (April 29, 2015).

²⁷ *Id.*

The Court is an attractive workplace for European jurists not only for its prestige but also its generous compensation package. Currently the President of the Court of Justice is entitled to a €306,654 (equivalent to the President of the Commission) annual salary, the Vice President is entitled to €277,767 (equivalent to the Vice-President of the Commission), and other judges and advocates general are entitled to €249,989 (equivalent to a Commissioner of the Commission).²⁸ They also enjoy generous entertainment allowances ranging from €7292 for ordinary judges to €17,016 annually for the President.²⁹ The Presidents of the chambers are entitled to an additional €9729.³⁰ In addition, EU judges enjoy generous fringe benefits including a car and a driver and residence allowance equal to 15% of their salary.³¹ When they leave the bench, EU judges are also entitled to generous pension benefits³² and transitional allowances.³³ The judges from the General Court similarly enjoy a generous compensation package even though their salaries are lower. Currently the President of the General Court is entitled to €249,989 in yearly salary, the Vice President is entitled to €239,990, and other judges are entitled to €231,101.³⁴ They also receive entertainment allowances ranging from €6650 for ordinary judges to €7292 annually for the President.³⁵ The Presidents of the chambers are entitled to an additional €8873 each year.³⁶ Salaries of EU judges are subject to both income tax and a solidarity levy.³⁷ For instance, the net salary of a judge at the Court of Justice (with no management role) with no dependent spouse or children is €203,652.³⁸

As one of the criteria for appointment to the Court of Justice is that the candidate should possess the qualifications required for appointments to the national Supreme Court, I use the salary of the national Supreme Court judges as a crude proxy for the pre-existing salary of EU judges. To be sure, some members of the Court were in private practice immediately before they joined the Court and they could have enjoyed higher incomes than national Supreme Court justices. However, such members are only a small minority. As shown in Appendix I, 74% of the Court members were either civil servants (27%), academics (19%) or national court judges

²⁸ See REGULATION No 422/67/EEC, No 5/67/Euratom of the Council of 25 July 1967 determining the emoluments of the President and Members of the Commission, of the President, Judges, Advocates-General and Registrar of the Court of Justice, of the President, Members and Registrar of the General Court and of the President, Members and Registrar of the European Union Civil Service Tribunal. See also REGULATION No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, at 169.

²⁹ *Id.*, art. 4 (3).

³⁰ *Id.*

³¹ *Id.*, art. 4.

³² *Id.*

³³ *Id.*, art. 7.

³⁴ *Id.*, art. 21(a) (2).

³⁵ *Id.*, art. 21(a) (3).

³⁶ *Id.*

³⁷ Email correspondence with the Court (July 27, 2015).

³⁸ *Id.*

(28%) immediately before joining the Court. Only 7% were engaged in private practice, with most coming from the UK and Ireland.

Table 1 below compares both the gross and net annual salary of judges from the national Supreme Courts and those of an ordinary judge at the Court of Justice. Table 2 adjusts for the cost of living and provides the equivalent salary of national Supreme Court judges if they live in Luxembourg. These two tables show that the vast majority of EU judges received a significant pay raise, particularly for judges from Eastern European countries. This stands in sharp contrast to the status of judicial salary in the United States, where most judges could earn significantly higher wages when working for other employers. However, the relatively low US wages have not prevented the US judiciary from attracting the best legal minds. Indeed, judicial positions are highly regarded in the United States and “[come] as a kind of crowning achievement relatively late in life.”³⁹

Table 1: Comparison of Salary of National Supreme Court Judges with EU judges⁴⁰

EU Country	Gross Annual Salary of National Supreme Court Judges (€)	Net Annual Salary of National Supreme Court Judges (€)	EU Judge Gross Annual Salary* to National Supreme Court Judges	EU Judge Net Annual Salary* to National Supreme Court Judges
Bulgaria	28,019	25,215	8.9	8.1
Lithuania	29,103	22,118	8.6	9.2
Hungary	35,289	25,476	7.1	8.0
Latvia	37,616	25,573	6.6	8.0
Malta	40,221	32,919	6.2	6.2
Romania	42,049	29,493	5.9	6.9
Slovakia	42,916	N/A	5.8	N/A
Estonia	48,077	37,924	5.2	5.4
Czech	54,272	N/A	4.6	N/A
Greece	57,009	47,030	4.4	4.3
Poland	60,998	43,445	4.1	4.7
Croatia	63,120	31,320	4.0	6.5
Slovenia	63,664	34,212	3.9	6.0
Portugal	66,204	N/A	3.8	N/A
Sweden	94,500	N/A	2.6	N/A

³⁹ JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 34 (3d. 2007).

⁴⁰ The salary data of judges at the national Supreme Courts is compiled based on the 2012 data collected by the European Commission for the Efficiency of Justice. See European Commission for the Efficiency of Justice, *Report on “European Judicial Systems – Edition 2014 (2012 data): Efficiency and Quality of Justice”*, available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf , at 309.

Germany	104,711	N/A	2.4	N/A
Spain	107,565	66,690	2.3	N/A
France	110,082	93,762	2.3	2.2
Belgium	118,643	56,536	2.1	3.6
Austria	119,771	41,418	2.1	4.9
Finland	128,700	78,553	1.9	2.6
Netherlands	128,900	67,000	1.9	3.0
Luxembourg	129,943	N/A	1.9	N/A
Cyprus	133,219	N/A	1.9	N/A
Denmark	176,769	N/A	1.4	N/A
Italy	179,747	97,833	1.4	2.1
Ireland	197,272	N/A	1.3	N/A
UK-England	256,206	N/A	1.0	N/A

* According to the data provide by the Court, the current gross annual salary of a judge at the Court of Justice (with no management role) is €249,989; the net annual salary of such a judge with no dependent spouse or children is €203,652.

Table 2 Comparison of Salary of National Supreme Court Judges with EU Judges (after adjusting for cost of living)⁴¹

EU Country	Equivalent Gross Annual Salary of National Supreme Court Judges (€)	Equivalent Net Annual Salary of National Supreme Court Judges (€)	EU Judge Gross Annual Salary* to National Supreme Court Judges	EU Judge Net Annual Salary* to National Supreme Court Judges
Bulgaria	70,048	63,038	4.1	3.8
Lithuania	54,568	41,471	5.3	5.8
Hungary	74,293	53,634	3.9	4.5
Latvia	62,693	42,622	4.6	5.7
Malta	58,151	47,594	4.9	5.1
Romania	93,442	65,540	3.1	3.7
Slovakia	74,637	N/A	3.9	N/A
Estonia	73,028	57,606	3.9	4.2
Czech	101,760	N/A	2.8	N/A
Greece	79,547	65,623	3.6	3.7
Poland	130,710	93,096	2.2	2.6
Croatia	113,051	56,096	2.5	4.3
Slovenia	92,044	49,463	3.1	4.9

⁴¹ The salary of national Supreme Court judges is adjusted using the 2014 price level index compiled by Eurostat. The index is available here: http://ec.europa.eu/eurostat/statistics-explained/index.php/Comparative_price_levels_of_consumer_goods_and_services#Price_level_indices

Portugal	98,080	N/A	2.9	N/A
Sweden	90,720	N/A	3.2	N/A
Germany	123,189	N/A	2.3	N/A
Spain	138,794	86,052	2.1	2.8
France	122,313	104,180	2.4	2.3
Belgium	130,616	62,241	2.2	3.9
Austria	134,323	46,450	2.1	5.2
Finland	125,561	76,637	2.3	3.1
Netherlands	139,351	72,432	2.1	3.3
Luxembourg	129,943	N/A	2.2	N/A
Cyprus	179,621	N/A	1.6	N/A
Denmark	153,712	N/A	1.9	N/A
Italy	211,467	115,098	1.4	2.1
Ireland	195,642	N/A	1.5	N/A
UK-England	252,006	N/A	1.1	N/A

* As EU judge receive residence allowance which equals 15% of the judge's salary and is not subject to tax, so the gross annual salary of a EU judge at the Court of Justice with the residence allowance is €287,487; and the net annual salary is €241,150.

Economists have long argued that when the appointment process is crude, the quality of the judges selected will actually be higher when judges are willing to accept a pay-cut to join the judiciary.⁴² This is because unlike private employees, the government cannot use external monitors to discipline the performance of judges. Instead, the government relies primarily on judges' own self-restraint to promote excellence. For those who are willing to accept a lower salary, they are signaling that they view the non-pecuniary benefits of being a judge as outweighing the pecuniary loss they suffer.⁴³ These individuals are more likely to exhibit self-restraint, a desirable quality for good judges.⁴⁴

To be sure, if a salary is set too low, the attractiveness of the judicial positions will be eroded, and the quality and independence of the judiciary will be threatened.⁴⁵ However, EU judges' salary is currently set at a level that far exceeds the pre-existing salary for the vast majority of national Supreme Court judges. It is therefore very likely that most judges received significant pay raise for being appointed to the Court. Such a salary structure is not only going to attract more qualified candidates, but also those less genuinely interested in judging than in the perks and benefits the job brings. As the EU judicial appointment process is often opaque and political, a higher salary could attract those primarily seeking a leisurely life in Luxembourg, or those yearning

⁴² See Paul E. Greenberg & James A. Haley, *The Role of Compensation Structure in Enhancing Judicial Quality*, 15 J. LEGAL STUD. 417, 418 (1986); Stephen J. Choi *et. al.*, *Are Judges Overpaid? A Skeptical Response to Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47, 55 (2009).

⁴³ Greenberg & Haley, *supra* note 42, at 418.

⁴⁴ *Id.*

⁴⁵ *Id.* at 421.

for power and influence. As Choi and his co-authors argue, leisure seekers would need a higher salary to support their leisurely activities (e.g., expensive vacations), and power seekers would find it more satisfying to work for a high-paying job as higher salary entails higher social status.⁴⁶ Therefore, when appointment is not strictly made on merits, a high salary increases the chance that appointments are used as political patronage to reward loyal functionaries or political allies. Interviewees observe that some judges who received significant pay increases are indeed political appointees who are not competent to perform and are dominated by their référendaires.⁴⁷

iii. Tenure

EU judges serve renewable, six-year terms. On average, judges at the General Court served eight years, judges at the Court of Justice served nine years and advocates general served seven years, as indicated in Appendix II. But the variability is quite high. The longest a judge has served at the Court is 21 years, and the shortest stay is less than a year. Furthermore, over 42% of the EU judges served no more than six years. In particular, 41% of judges appointed to the Court of Justice and 52% of judges appointed to the General Court were not renewed after serving one term.

This short tenure hampers the productivity of judges. Judges require a year or two to familiarize themselves with the court's procedures and style.⁴⁸ As shown in Appendix I, only 18% and 5% of the judges at the General Court and the Court of Justice have clerked at the Court before. Some judges who are not familiar with the Court's procedures and formality complained that they did not get sufficient support when they first started their jobs.⁴⁹ Every three years, half of the judges at the Court are subject to renewal. These judges cannot take on much responsibility for about six months before their departure, which causes much instability in the formation of the chambers of judges and their work.⁵⁰ Thus, if a judge stays at the Court for only one term, his productive time spent on the Court is likely to be only three to four years. Worse yet, Judge Franklin Dehousse from the General Court observed that in 2011, 50% of judges at his Court were appointed outside the normal triennial renewal procedure.⁵¹ As he noted: "The General Court is thus in permanent reorganization,

⁴⁶ Choi *et. al.*, *supra* note 42, at 55.

⁴⁷ Interview with a member of the Court, Luxembourg (May 5, 2014); Interview with two current référendaires, Luxembourg (May 5, 2014); Interview with a former référendaire, London (Feb. 19, 2015); Interview with a former référendaire, London (April 10, 2015); Telephone interview with a former référendaire (April 29, 2015).

⁴⁸ Marc van der Woude, *The General Court: The Need and Opportunity for Reform*, PRESENTATION AT KING'S COLLEGE LONDON (March 8, 2013), slides available at: <https://www.kcl.ac.uk/law/research/centres/european/KCL-Marc-van-der-Woude-GC-Reform-08-03-13.pdf>

⁴⁹ Interview with a former référendaire, London (April 10, 2015).

⁵⁰ See House of Lord, European Union Committee, *The Report of Session 2006-2007, An EU Competition Court* (2007), at 96. (Testimony from John Cooke, a former Irish judge at the General Court)

⁵¹ Franklin Dehousse, *The Reform of the EU Courts*, EGMONT PAPER NO. 53 (2011), at 11.

and regularly looks like the waiting room of an airport, with permanent new arrivals, departures, announcements...and delays.”⁵²

Moreover, the requirement of French on the job further hampers judicial performance. Since the expansion of the EU in 2004, a growing number of judges, especially those from Eastern European states, have found it difficult to deliberate in French.⁵³ This is because French is not a widely spoken language in Eastern European and Nordic countries,⁵⁴ and it has been difficult for these countries to identify competent candidates that are suitable for the position.⁵⁵ Thus if a judge expects that he will only be on the job for a short period of time, he will be less likely to invest time to improve his French or learn EU law. This uncertainty in judicial re-appointment and the high turnover of EU judges means that judges must rely more heavily on their référendaires to do the work for them.⁵⁶

III. RÉFÉRENDAIRES

Référendaires are a hidden workforce within the Court. Some call them the Court’s “ghost writers”.⁵⁷ Their names are never mentioned in any judgments, nor does the Court publicize their profiles. Nonetheless, they play an indispensable role during the Court’s decision-making process. While the working style of each judge is different and the involvement of référendaires varies, they generally assume the responsibility of digesting the written submissions and ploughing through various annexes to understand the facts and reasoning of each case.⁵⁸ They also shoulder much of the responsibility for drafting the various reports and providing comments.⁵⁹

According to the data provided by the Court, every judge or advocate general is entitled to three référendaires; some judges who assume management responsibilities are entitled to four référendaires. Judges at the Court of Justice have additional help

⁵² *Id.*

⁵³ Editorial Comments, *The Court of Justice in Limelight Again*, 45 COMMON MARKET L. REV. 1571, 1577 (2008).

⁵⁴ See European Commission, *Europeans and Their Languages Report* (2012), available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_386_en.pdf, at 31. (showing that in only 1% of the population in many eastern European countries and less than 5% of the population in Nordic countries were able to speak French well enough to have a conversation).

⁵⁵ Interview with a former member of the Court, London (Feb. 10, 2015). Telephone Interview with a former référendaire (April 29, 2015). See also Konrad Schiemann, *The Functioning of the Court of Justice in An Enlarged Union and the Future of the Court*, in CONTINUITY AND CHANGE IN EU LAW: ESSAYS IN HONOR OF SIR FRANCIS JACOB 10 (Anthony Arnall *et al.* eds., 2008)

⁵⁶ Interview with a member of the Court, Luxembourg (May 5, 2014); Interview with two current référendaires, Luxembourg (May 5, 2014); Interview with a former member of the Court, London (Feb. 10, 2015); Telephone Interview with a former référendaire (April 29, 2015).

⁵⁷ Michal Bobek, *the Court of Justice of the European Union*, in THE OXFORD HANDBOOK OF EU LAW (Anthony Arnall & Damian Chalmers eds., 2015).

⁵⁸ See Sally J. Kenney, *Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court*, 33 COMPARATIVE POLITICAL STUD. 593, 611 (2000).

⁵⁹ *Id.* See also a fascinating account by Diane Hansen-Ingram, *Tales from the Tartan Chambers*, in A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD (Mark Hoskins & William Robinson eds. 2004) (observing how Judge David Edward delegated work to his référendaires).

from administrateurs juristes, who are lawyers but do not work on cases directly. Currently there are 123 référendaires, 22 administrateurs juristes working at the Court of Justice and 94 référendaires at the General Court.⁶⁰ However, the Court cannot provide any other background information of the current or former référendaires. In February 2015, I used LinkedIn to hand-collect the background data for 74 current référendaires, of whom 31 work for the Court of Justice and 43 for the General Court. This represents 25% of current référendaires at the Court of Justice and 46% of those at the General Court.⁶¹ In March 2015, I hand-collected the background data of 103 former référendaires from LinkedIn. The summary statistics of the education and professional experience of these référendaires are presented in Appendix III. Their years of prior work experience and tenure at the Court are presented in Appendix IV.

Admittedly, since the data is collected from LinkedIn, it is likely that some groups are underrepresented in the samples. Law firms and other private businesses tend to rely more on headhunters who use LinkedIn to tap talents than public institutions, which normally have formal channels for recruitment. Therefore, former référendaires who are currently working for public institutions such as national governments, national judiciaries and EU institutions are less incentivized to use LinkedIn than those who are in private practice. Similarly, current référendaires who plan to work for public institutions upon departing the Court are less incentivized to use LinkedIn than those who wish to go into private practice. This is especially true for référendaires who were seconded from public institutions. For instance, interviewees indicate that a sizeable portion of référendaires are administrative judges from France but none of them appear in the samples.⁶² Notably, the bias is probably more pronounced for former référendaires as current référendaires have a number of exit options available to them.

i. The Labor Market

Like law clerks in the United States, référendaires are chosen by the individual judges; judges can also fire them at will. However, unlike the United States, where federal law clerks are recruited through an open online system,⁶³ the Court lacks an official recruitment program. Thus judges rely exclusively on informal channels to recruit référendaires, such as from among their former employees, subordinates, students, or those recommended by their personal friends or former colleagues. Job seekers also lack information regarding vacancies at the Court and the particular requirements of judges. Thus the labor market for référendaires is very inefficient for both buyers (the judges) and sellers (the référendaires). A référendaire who was

⁶⁰ Data requested from the Court (March 18, 2015).

⁶¹ The LinkedIn data has been cross-referenced with EU's official directory "Who'sWho", which discloses the names of the current référendaires.

⁶² Interview with two current référendaires, Luxembourg (May 5, 2014). *See also* ANTOINE VAUCHEZ, *L'UNION PAR LE DROIT. L'INVENTION D'UN PROGRAMME INSTITUTIONNEL POUR L'EUROPE* 167 (2013) (noting many French référendaires came from Conseil d'État).

⁶³ OSCAR (<https://oscar.uscourts.gov/home>) allows US federal judges to post law clerk positions and law students can use the same platform to apply for clerkship. Note, however, the recruitment process of US federal judicial law clerks also faces a whole host of problems. *See e.g.*, Christopher Avery *et al.*, *The New Market for Federal Judicial Law Clerks*, 74 U. CHICAGO L. REV. 447 (2007).

interviewed noted that generally candidates know someone already working there in order to get hired.⁶⁴

Meanwhile, the requirement of French as a working language significantly limits the pool of eligible candidates for référendaires. Compared with the diverse nationalities of EU judges, the background of référendaires is relatively homogeneous. The requirement of French as a working language significantly limits the pool of eligible candidates for référendaires. Therefore, native French speakers enjoy an inherent advantage.

As a consequence, the network of référendaires becomes relatively impermeable to outsiders. The sample of 74 current and 103 former référendaires I collected from LinkedIn provides strong support for this observation. As shown in Table 3 below, the three schools most attended by these référendaires are all located in French-speaking countries: College of Europe (23.6%), Université Panthéon-Assas (10.3%) and Université Panthéon-Sorbonne (9.7%). The leading former employer is the Court itself (16.9%), as many référendaires used to work as linguists or researchers in the Court, followed by the Commission (13.6%); these two bodies far exceed the third most common former employers Van Bael & Bellis (4%) and Linklaters (4%). Indeed, the employment of internal administrative staff to fill in the référendaire positions shows the importance judges place on understanding the institutional workings of the Court. It also reveals the closed nature of the network inside the Court.

Table 3: Most Common Law Schools and Former Employers Among a Sample of 177 Référendaires

Most Common Law Schools⁶⁵	%	Most Common Former Employers⁶⁶	%
1. College of Europe	23.6	1. Court of Justice of the European Union	16.9
2. Université Panthéon-Assas (Paris II)	10.3	2. European Commission	13.6
3. Université Panthéon-Sorbonne (Paris I)	9.7	3. Van Bael & Bellis	4.0
4. Harvard University	9.1	3. Linklaters LLP	4.0
5. King's College London	7.9	5. Cleary Gottlieb Steen & Hamilton LLP	3.4
6. Université Libre de Bruxelles	7.3	6. European Parliament	2.8
7. Oxford University	6.7	7. European Free Trade Association	2.3
8. Katholieke Universiteit	6.1	8. College of Europe	2.3

⁶⁴ Telephone interview with a current référendaire (Feb. 12, 2015).

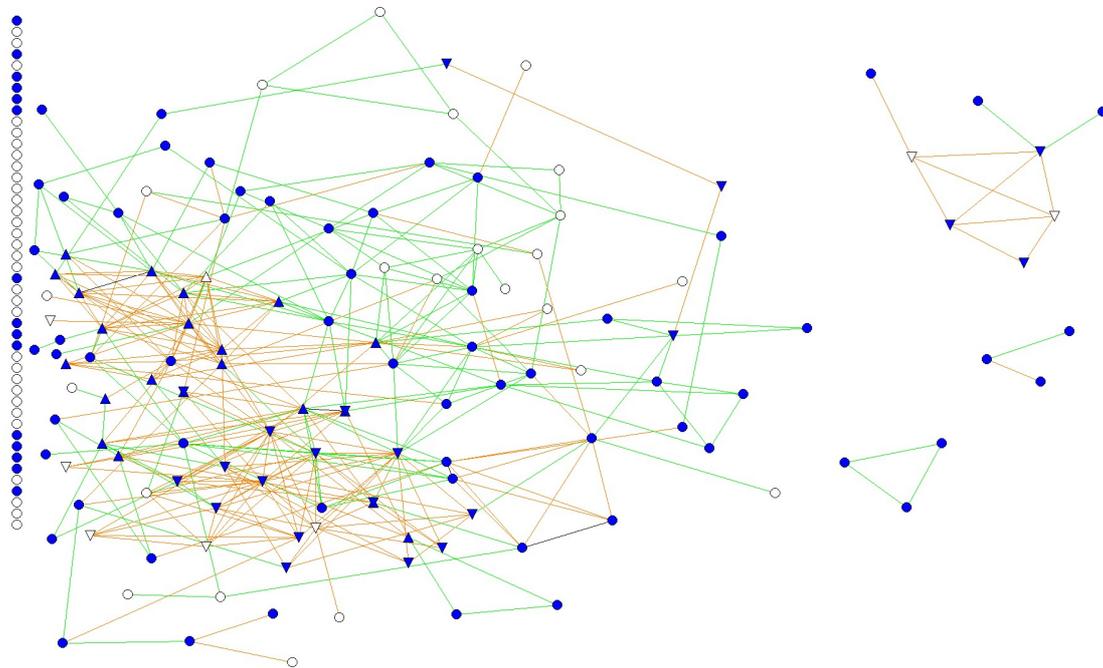
⁶⁵ 12 of the 177 référendaires' LinkedIn profiles contain no education background. The data here therefore only presents the education information of 165 référendaires.

⁶⁶ 13 of the 177 référendaires' LinkedIn profiles contain missing information about their work experience so it is possible that the actual shares of these former employers are higher than what are presented here.

Leuven			
9. Cambridge University	5.5	8. Allen & Overy LLP	2.3
10. Université Catholique de Louvain	4.8	8. Freshfields Bruckhaus Deringer LLP	2.3
10. Institut d'études politiques de Paris (Sciences Po Paris)	4.8		
10. University of Copenhagen	4.8		

Figure 1 is a sociogram of the network data of these référendaires.⁶⁷ Each node represents one of the 177 référendaires. Two types of network connection are presented here: A green line between nodes indicates that the two référendaires were classmates at law school, while an orange line indicates that they overlapped with one another at a previous workplace. The defining feature of this sociogram is a large cluster of dense connection among 117 référendaires (66%), with three small clusters of référendaires belonging to smaller social network groups. Only 46 nodes (26%) are isolated, indicating that the vast majority of référendaires have strong in-group ties and most likely had connections with the Court prior to joining. Figure 1 also reveals that those référendaires who received legal education in French-speaking countries and were formerly employed by either the Court or the Commission are tightly interconnected at the center of the sociogram. These référendaires possess valuable social capital as their positions and connections become “[assets] in [their] own rights”.⁶⁸

Figure 1: The Social Network of A Sample of 177 Référendaires



⁶⁷ The network data only shows the connection among the 177 référendaires based on their LinkedIn profiles. As the profiles of some référendaires are incomplete (as discussed in *infra* notes 67 and 68), it is possible that there are more connections among these référendaires than what is presented in Figure 1 here.

⁶⁸ RONALD S. BURT, *BROKERAGE & CLOSURE: AN INTRODUCTION TO SOCIAL CAPITAL* 4 (2005).

(Notes:

The color of nodes represents education background of référendaires: Blue (White) nodes represent those référendaires who received (did not receive) legal education in France, Belgium or Luxembourg. The shape of nodes represents the previous work experience of référendaires: Triangles represent référendaires formerly employed at the Commission; Upside-down triangles represent référendaires who used to work in other positions at the Court; Double-triangles represent former employment at both bodies; Circles represent référendaires who had never worked at either the Court or the Commission. The line represents the ties between référendaires: Orange lines indicate that the référendaires were former colleagues; Green lines indicate that the référendaires were classmates at law school; Black lines indicate both.)

Because of this relatively closed network, current référendaires become attractive candidates for new judges. Normally, a référendaire only serves one judge at a time and will not switch to another judge during the former's tenure. Référendaires can, however, be “inherited” by other judges upon the departure of the original judge. Thus an internal labor market of référendaires exists within the Court. As shown in Appendix III, within the sample of 74 current référendaires, 37% from the General Court and 30% from the Court of Justice have served at the Court longer than their judges, indicating that they must have worked for more than one judge.

Appendix III reveals another important feature of référendaires—the vast majority of them are experienced lawyers prior to the joining the Court and many have varied experience. In particular, 20% of them worked in other positions in the Court (such as linguists and research positions), 12% served in their respective national governments, 20% worked at the Commission, 24% held academic positions and 37% were in private practice. For former référendaires, 7% held other positions in the Court, 8% worked in the national courts, 18% were government officials, 7% worked for the Commission, 27% held academic positions and 56% were in private practice. Notably, a significantly higher percentage of former référendaires were engaged in private practice than that of current référendaires. This is probably due to the fact that the sample of the former référendaires is more biased towards over-representing private attorneys and under-representing lawyers at public institutions.

As shown in Appendix IV, the average prior working experience of current and former référendaires is six years and four years, respectively. These figures contrast with those for law clerks from the United States, the vast majority of whom are fresh graduates rather than experienced lawyers. This seems to suggest that EU judges rely more heavily on their clerks to do the work for them than US judges.

ii. Career Structure and Conservatism

Référendaires are well paid. Like employees at other EU institutions, the salary of référendaires is mainly tied to age and seniority at the Court. For instance, a référendaire who was hired at the age of 35 before 2004 would be awarded a grade of A11 (step 1) and is entitled to a basic salary of approximately €110,364.⁶⁹ After he

⁶⁹ REGULATION No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, at 169. Similar to judges, référendaires' income is also

works for the Court for ten years, he will be graded A14 (Step 1) and be entitled to approximately €159,864.⁷⁰ Therefore, the older and more experienced the référendaire, the more expensive he or she becomes. Judges, however, do not bear the cost of hiring référendaires. While there is a quota on how many référendaires a judge can have, there is no limit on the *cost* of référendaires. Judges may therefore have a preference for référendaires with more seniority and experience, even though they are more costly.⁷¹

Unlike employees at other EU institutions, référendaires are not eligible for promotion. Some however are elected to become judges later in their careers. As shown in Appendix I, 18% of judges from the General Court, and 5% of judges and 11% of advocates general from the Court of Justice had experience working as référendaires before joining the Court. Few however are elected to become judges directly.⁷² But this lack of career advancement has not discouraged référendaires from pursuing long-term careers at the Court. Financial benefit is an important consideration. Référendaires enjoy compensation packages similar to officials at other EU institutions. After 10 years of service référendaires are eligible for generous pensions as civil servants when they reach the age of 66. A 1994 study found that the Court had 56 référendaires at that time, among which the most tenured had served 13 years; two référendaires had worked for 12 years, and one had worked for 11 years; with the average amount of work experience being 5 years.⁷³ Based on the sample of 74 current référendaires, on average référendaires have served more than 7 years at the Court. (see Appendix IV). But the variability is once again quite high. In fact, 23 (more than 31%) have served more than a decade. One référendaire from the Court of Justice has served for more than 22 years and one from the General Court has served for more than 26 years, longer than the longest-serving judge in the Court's history.⁷⁴

Despite the financial benefits, référendaires are temporary workers and do not have the same job security as officials in other EU institutions. They can be fired by the judges at will, and may not be able to find another job at the Court when their judges

subject to a community tax and a solidarity tax. See European Commission, Permanent Officials, available at: http://ec.europa.eu/civil_service/job/official/index_en.htm#4 See also email correspondence with the Court (July 22, 2015).

⁷⁰ *Id.*

⁷¹ For instance, Judge Dehousse suggested that the General Court could consider creating a limited number of senior référendaire positions with six-year, renewable terms, contractually linked to the General Court but not to a particular judge. See Dehousse, *supra* note 51, at 15.

⁷² Based on the data disclosed by the Court, Mark Jaeger from Luxembourg, Maria Eugenia Martins de Nazare Ribeiro from Portugal and Hubert Legal from France are examples of judges who worked as référendaires immediately before they joined the Court.

⁷³ Kenney, *supra* note 58, at 605-6.

⁷⁴ Kenney notes that in the first two decades of the Court, each member of the Court had one référendaire who was a permanent employee and each new member would inherit his or her successor's référendaire. But référendaires became temporary posts in the 1970s. *Id.*, at 605. See also VAUCHEZ, *supra* note 62, at 236 (2013) (noting that the examples of several référendaires who served decades inside the Court for multiple judges until the late 1970s and early 1980s.)

leave the bench.⁷⁵ This job insecurity has a pronounced impact on how référendaires behave, especially for those who want to pursue a long-term career inside the Court. Of course, the evaluation of référendaires solely depends on their performance to the satisfaction of their judges, but given the nature of the work delegated to référendaires, judges are unlikely to encourage their référendaires to take a bold, intellectually challenging approach to law.⁷⁶ This is especially true for career référendaires.⁷⁷

At the same time, the longevity of career référendaires also gives them tremendous power. Many EU judges serve relatively short tenures at the Court (almost 42% of them stay no more than six years). Some judges lack a background in EU law or struggle with the French language (or both). When judges first start at the Court, they lack adequate support and training to operate efficiently and also need time to familiarize themselves with the Court's working procedure and drafting styles. In contrast, career référendaires are fluent in French, highly skilled in the Court's drafting style, well-versed in EU law and precedents, and familiar with the institutional workings of the Court. Therefore less able judges rely heavily on these career référendaires. Interviewees note that because these référendaires have the tendency to strictly to adhere to the Court's precedents, formality and style, they represent a force of conservatism and formalism at the Court.⁷⁸

The Court's formalism can find its origin in the French legal tradition. When the Court was first established it was modelled after the prototype of the Conseil d'Etat – the highest administrative court in France. Indeed, the French influence on the Court is profound and many of its rules and procedures are obvious derivatives of French administrative law.⁷⁹ Compared with the common law tradition, the French legal tradition emphasized a high degree of procedural formalism to minimize the discretion of judges.⁸⁰ As Judge Posner once describe it: “ This is the idea that the judge has no will, makes no value choices, but is just a calculating machine.”⁸¹ Inevitably and invariably, the formalistic interpretation of law requires the Court to discount or even disregard the economic realities.⁸² Indeed, over the past few decades, the Court has been subject to fierce attack for its form-based approach to law, particularly in the area of antitrust and competition.

⁷⁵ For this reason some référendaires took the requisite exams for EU civil servants and became functionaries, which then qualified them to work for other EU institutions. Telephone interview with a current référendaire (Feb. 26, 2015).

⁷⁶ Interview with a former référendaire, London (Feb. 19, 2015); Interview with a member of the Court, Luxembourg (May 5, 2014).

⁷⁷ *Id.*

⁷⁸ *Id.* See also Karen McAuliffe, *Precedent in the Court of Justice of the European Union: The Linguistic Aspect*, 15 CURRENT LEGAL ISSUES 483, 488-491(2013) (observing the Court's formalistic style of drafting imposes a serious constrain on the work of the référendaires and as a consequence they have the tendency to strictly adhere the language of precedents).

⁷⁹ See Giuseppe Federico Mancini & David T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 COLUM. J. EUR. L. 397, 399 (1994).

⁸⁰ Thorsten Beck & Ross Levine, *Legal Institutions and Financial Development*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 251, 255 (Claude Menard & Mary M. Shirley eds., 2005).

⁸¹ Richard A. Posner, *Judicial Self-Restraint*, 59 INDIANA L. J. 1, 3 (1983).

⁸² Barak Orbach, *The Durability of Antitrust Formalism*, 100 IOWA L. REV. 2197, 2199 (2015).

As observed by Marc van der Woude, a judge at the General Court, when asked what he likes the least about his job:

“I have difficulties in finding negative aspects of my current job. However, there may be two things, which I sometimes find irritating and inefficient: Formalism and conservatism. Like many other lawyers, judges tend to have a disproportionate interest in form. Obviously, form is important, but the attention to form and detail should never distract from the substance of a case. Also, lawyers tend to be conservative and feel comforted by the existence of precedents. I am regularly confronted with arguments that do not have any other merit than referring to past practices or customs. This backward-looking mentality is not very helpful, if one wants to increase the Court’s productivity and the quality of its judgments.”⁸³

iii. Revolving Door

Due to the relatively close social network and the difficulty of finding French-speaking candidates who are well-versed in EU law, Commission officials become an important source of talent. Based on the sample in Appendix III, 30% of current référendaires from the General Court used to work for the Commission – in particular 13% worked for the Legal Service, and 8% served at the Directorate-General for Competition. The percentage at the Court of Justice is lower, 7% of current référendaires used to work for the Commission. Indeed, Commission officials have the opportunity to seek secondment at the Court, while keeping their ranking within the Commission. For instance, the Legal Service, which is the in-house department within the Commission and regularly represents the Commission in front of the Court, started to send secondees to the Court in the 1980s. Based on one study in 1994, among the 56 référendaires working at the Court at that time, six were seconded from the Commission.⁸⁴

Among the sample of former référendaires, 7% worked at the Commission prior to joining the Court. Upon their departure, 16% joined for the Commission (9% for the Legal Service), representing a 9% increase. This suggests that experience working as a référendaire is very valuable for the Commission, especially for the Legal Service. As the skillsets at the Legal Service and the Court are highly transferable, even when a Commission employee does not join the Court on a secondment scheme, “the Commission is glad to take him or her back at the end of the period of being a référendaire”, as one former senior Commission official puts it.⁸⁵

Appendix V further examines 35 former and current référendaires who have had experience working at both the Commission and the Court. Among them, 12 served

⁸³ Nicolas Petit, *The Friday Slot (13) Marc Van Der Woude*, Nov. 16, 2012, available at: <http://chillingcompetition.com/2012/11/16/the-friday-slot-13-marc-van-der-woude/> It should be noted that while Judge Van Der Woude’s statements seem to only mention judges, they should be interpreted to also include référendaires as they are often the judges behind the scene.

⁸⁴ Kenney, *supra* note 58, at 605.

⁸⁵ Email correspondence with a former Commission official who used to work for the Legal Service (Feb. 12, 2015).

at the Commission immediately before they joined the Court, 20 joined the Commission immediately after they left the Court (11 joined the Legal Service), and five served both before and after. On average they have eight years' experience at the Commission and four years' experience working at the Court, though the variance is very high. This shows a veritable revolving door exists between the Commission and the Court.

Abundant literature in law, economics and political science has voiced concern that revolving doors can lead to regulatory capture.⁸⁶ As the EU's main executive arm, the Commission is the most frequent party appearing in front of the Court.⁸⁷ This raises the immediate question of whether adequate procedural safeguards exist to address the potential conflicts of interest between the Court and the Commission. To be sure, a revolving door between business and government is not uncommon in Europe. EU Staff Regulations have put in place specific measures that address this concern. Before recruitment as an EU official, the candidate is required to inform the appointing authority of any actual or potential conflict of interest.⁸⁸ Within two years after leaving the post, the official has the mandatory obligation to notify his institution of his occupational activity.⁸⁹ If the activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the interests of the EU institution, the appointing authority may either forbid him from undertaking it or impose certain restrictions.⁹⁰ In addition, senior EU officials are subject to a one-year "cooling off" period, which bans them from lobbying their former institutions "for their business, clients or employers on matters for which they were responsible during the last three years in service."⁹¹

It appears, however, that the EU Staff Regulations have never been applied to manage the potential conflicts of interest for officials moving between different EU institutions. Based on the Court's disclosure, référendaires have the obligation of declaring any actual or potential conflict of interest situation at the time of his employment.⁹² Yet according to the Rules for Good Conduct for référendaires adopted by the Court in 2009, référendaires only have the obligation to inform their judges or advocates general if they worked on the same case in their former workplaces.⁹³ It is then left up to their judges or advocates generals to decide

⁸⁶ For a comprehensive survey of literature on revolving door, *see generally* Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015).

⁸⁷ Since the Court's establishment, the Commission has served as a party in over 52% of the cases. I hand-collected this data using the Court's database available here: <http://curia.europa.eu/juris/recherche.jsf?language=en> (this data include all cases decided by the Court from its establishment to August 27, 2015).

⁸⁸ Art. 11, Regulation No. 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (hereinafter Staff Regulations).

⁸⁹ Art. 16, Staff Regulations, *supra* note 90.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Correspondence with the Court (Oct. 7, 2015).

⁹³ Art. 2, Code of Good Conduct for Référendaires. The original version of the Code of Good Conduct is in French and was requested from the Court.

whether they can continue working on the same matter.⁹⁴ Even if they are prohibited from doing so, Commission secondees are free to work on any other cases as long as they were not personally involved in the matter. Since the Commission is an important player in most EU cases, in reality Commission secondees cannot possibly be excluded from all cases in which the Commission appears.

Another consequence of the revolving door is that it allows the Commission to conduct intelligence surveillance on the Court. As Court membership is fluid and the preference of individual judges varies, the revolving door makes it possible for the Commission to keep pace with its changing landscape. Commission secondees can sharpen their litigation tactics, for instance, by learning how to present arguments that can best persuade particular judges and référendaires at the Court.⁹⁵ On the other hand, the private bar is at a comparative disadvantage. Although the private bar can also attract référendaires from the Court, they lack the economy of scale of the Commission. The Legal Service of the Commission, which employs more than 200 lawyers, is a powerhouse that specializes in litigation before the Court. Even though private law firms are also equipped with superb practitioners with in-depth knowledge of EU law, they lack a sufficient caseload to match the experience of the Legal Service. Nor are private firms able to run a secondment program as the Commission does to closely monitor the Court. While private firms could also engage experienced référendaires, the intelligence gathered by those hired tends to become stale within a few years.

iv. The French Dominance

Compared with the diverse nationalities of EU judges, the background of référendaires is relatively homogeneous. The requirement of French as a working language significantly limits the pool of eligible candidates for référendaires. Therefore, native French speakers enjoy an inherent advantage. As Judge Mancini once remarked:

“Yet the fact of having to speak French, which has been the Court’s working language since 1952, in the deliberation room and having to draft judgments in French, puts the non-francophones at a definite disadvantage vis-à-vis their brethren from France, Belgium and Luxembourg. Being of course accomplished gentlemen, they would never consciously take advantage of their colleagues’ handicap; but the full mastery of a language—is an irresistible weapon; and the owner of that weapon will not be likely to refrain from using it.”⁹⁶

According to data provided by the Court,⁹⁷ over 42% of référendaires at the Court of Justice are citizens from Belgium, France and Luxembourg (see Table 4). At the level of the General Court the percentage is higher, at 49%. The population of référendaires is concentrated among a few countries, especially those with the French

⁹⁴ *Id.*

⁹⁵ Telephone interview with a current référendaire (Feb. 19, 2015); Telephone interview with a current référendaire (March 12, 2015).

⁹⁶ Mancini & Keeling, *supra* note 82, at 398.

⁹⁷ Data requested from the Court (March 18, 2015).

legal origin and in Germany. On the other hand, référendaires from the Nordic, common law and ex-socialist countries are underrepresented. Indeed, at the General Court there is only one référendaire from Nordic countries and two from common law countries.

Using the country of origin as a crude proxy of the legal tradition⁹⁸ in which a référendaire is bred, Table 4 also shows the strong influence of the French legal tradition on référendaires. This is consistent with the data provided in Appendix III, which indicates 79% of référendaires at the Court of Justice and 83% at the General Court were educated in law schools located in France, Belgium or Luxembourg. Few référendaires come from common law countries, indicating that the common law tradition probably has a relatively weak influence on référendaires working in the Court.

While some référendaires with French legal educations also receive common law training, they are probably a minority. For instance, based on the education background of référendaires in the sample presented in Appendix III, 38% of current référendaires received law degrees in common law countries. But this figure is likely to overestimate the common law influence as the samples in Appendix III over-represent those référendaires with private practice backgrounds and under-represent those with public institution backgrounds. This is because the private bar (particularly UK and US law firms) have a stronger preference for common law legal education than institutional employers. Accordingly, it is likely that the actual percentage of current référendaires who received common law training is lower than 38%.

Table 4: Référendaires based on Country of Origin and Legal Origin

Legal Origin	Country of Origin*	Court of Justice	%	%	General Court	%	%
French	France	30	23%	60%	38	38%	72%
	Belgium	22	17%		8	8%	
	Luxembourg	3	2%		3	3%	
	Italy	9	7%		8	8%	
	Spain	7	5%		7	7%	
	Portugal	2	2%		1	1%	
	Netherlands	0	0%		2	2%	
	Greece	6	5%	5	5%		
German	Germany	19	14%	17%	12	12%	15%
	Austria	3	2%		1	1%	
	Switzerland**	0	0%		2	2%	

⁹⁸ For the legal origin of each EU member state, *see generally* THOMAS H. REYNOLDS & ARTURO A. FLORES, *FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD* (1989).

Nordic	Denmark	1	1%	3%	0	0%	1%
	Finland	2	2%		0	0%	
	Sweden	1	1%		1	1%	
Common Law	Ireland	4	3%	8%	1	1%	2%
	United Kingdom	5	4%		1	1%	
	Malta	1	1%		0	0%	
	Cyprus	1	1%		0	0%	
Ex-Socialist	Bulgaria	0	0%	12%	0	0%	10%
	Croatia	1	1%		1	1%	
	Czech	1	1%		1	1%	
	Estonia	1	1%		0	0%	
	Hungary	2	2%		0	0%	
	Latvia	1	1%		1	1%	
	Lithuania	2	2%		1	1%	
	Poland	3	2%		3	3%	
	Romania	3	2%		0	0%	
	Slovakia	1	1%		2	2%	
	Slovenia	1	1%		1	1%	

*Note that a number of référendaires have dual nationalities.

** Switzerland is not a member of the Court but there are two référendaires who hold dual citizenship with an EU member state and with Switzerland.

IV. CONCLUSIONS AND IMPLICATIONS

Political scientists and legal scholars who study the Court tend to view it as a black box. In a departure from previous analysis, this Article considers the individuals who comprise the Court. It examines the career structures and incentives of the EU judges and their référendaires, and investigates how these can influence judicial behavior. It has several major findings.

First, the Article finds that the Court's high judicial salaries and lack of procedural safeguards for EU judicial appointments attract political appointees. As a consequence, some judges who are selected are not competent to perform and are dominated by their référendaires. Moreover, the uncertainty inherent to judicial re-appointment and the high turnover rate of EU judges hampers their productivity, and increases their dependence on the référendaires. Meanwhile, référendaires are drawn from a relatively closed social network due to the lack of an open platform for recruitment and the requirement of French as the working language. The inefficiency of the référendaire labor market results in less competition, leading many référendaires to stay longer at the Court. The longevity of career référendaires also gives them tremendous power; some of these référendaires become conservative forces that resist changes and reform. The revolving door between the Court and the Commission raises serious conflict issues, as the Commission was able to exert influence on the Court from the inside and gain a comparative advantage in litigation.

Achieving a sound understanding of the Court is key to legal reform. The current EU proposal to reform the Court, which focuses primarily on increasing the number of judges in order to reduce backlog,⁹⁹ misses the bigger picture. This Article points to a three critical aspects in need of reform.

First, instead of continuing the current fragmented approach to nominating EU judges, the EU needs a unified policy for judicial appointment. The Committee established under Article 255 TFEU is a promising step, but its power is limited and is inadequate to address concerns over judicial quality. Meanwhile, more careful consideration should be given to the optimal structure of judicial careers (e.g., compensation, tenure, exit option), which directly influences selection into the judiciary and the behavior of judges.

Second, the Court should reconsider the use of the French language as a working language. One oft-cited reason to preserve the French language is to reduce administrative cost.¹⁰⁰ But this argument overlooks the impact of the French language on judicial decision-makers. The difficulty of the French language has prohibited many EU countries from finding suitable candidates to serve at the Court. Equally important, but often ignored, is that French also artificially reduces the size of the labor market for *référéndaires*, resulting in an outcome wherein Francophones have a disproportionate influence on shaping EU law. English is the obvious alternative. As a foreign language English is much more widely spoken than French in Europe¹⁰¹ and it has functioned well as the official language in other EU institutions such as the Commission.

Last but not least, the recruitment, management and governance of *référéndaires* should command more attention from EU policymakers. Establishing an official online platform for recruiting *référéndaires* will increase the efficiency for both the application and hiring processes. In addition, an adequate mechanism should be created to address any potential concern of a revolving door between the Court and other public and private institutions. The secondment program from the Commission to the Court raises serious conflict issues, and it is questionable whether such a scheme should be allowed to continue. Considering that many *référéndaires* serve longer than their judges, it is well worth considering whether the tenure of *référéndaires* should be capped, as otherwise they risk exerting a powerful conservative force upon the Court and dominating less experienced judges.

⁹⁹ See Press Release of the Council of the European Union, *Q&A on the Reform of the General Court* (June 23, 2015), available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/06/23-questions-answers-general-court/> (The General Court will double its number of judges in a few years).

¹⁰⁰ See Schiemann, *supra* note 55, at 10-11 (noting the difficulty in finding English-speaking supporting staff to serve at the Court, especially considering the Court is located in a French-speaking country).

¹⁰¹ See European Commission, *supra* note 54, at 5 (showing English is the most widely spoken language in the EU (38%), far exceeding French (12%)).

V. DATA APPENDICES

Appendix I Background Information of Judges and Advocates General

		Total	GC Judge	CJ Judge	AG
Count		184	65	95	45
Gender (M=1, F = 0)		0.892	0.831	0.917	0.911
Current Member		0.346	0.508	0.302	0.244
Complete Education Information		0.227	0.277	0.188	0.178
Education (PHD 1, non-PHD 0)		0.416	0.385	0.469	0.311
Previous Experience	Academia	0.619	0.600	0.630	0.733
	Private Practice	0.335	0.415	0.313	0.333
	Référéndaire at the Court	0.108	0.182	0.052	0.111
	CJEU	0.135	0.000	0.063	0.133
	National Court	0.535	0.508	0.552	0.467
	National Government	0.654	0.569	0.667	0.756
	European Commission	0.070	0.108	0.042	0.089
Primary Prior Work Experience	Government	0.281	0.215	0.292	0.289
	Academia	0.276	0.262	0.313	0.244
	Judiciary	0.173	0.231	0.156	0.089
	Private Practice	0.108	0.123	0.094	0.067
	Unknown	0.162	0.169	0.146	0.311
Last Position	Government	0.270	0.262	0.271	0.222
	Academia	0.189	0.154	0.240	0.178
	Judiciary	0.286	0.292	0.281	0.222
	Private Practice	0.070	0.138	0.021	0.089
	Unknown	0.184	0.154	0.188	0.289

Notes

1. This table provides the summary statistics of the background information of current and former judges and advocates general (both referred to as EU judges) at the General Court and the Court of Justice. It does not provide information on the judges at the Civil Service Tribunal (CST).
2. "Count" indicates the number of valid data points.
3. GC=General Court; CJ=Court of Justice; AG=Advocate General; Court = GC+CJ; "CJEU" =GC+CJ+CST.
4. "Complete education experience" means that the schools and the degrees received by the EU judge are both specified in his public profile.
5. "Previous experience" refers to an EU judge's prior working experience before joining the Court. The vast majority of EU judges have varied experience.
6. "Primary prior work experience" refers to the longest job experience of an EU judge prior to joining the Court. For instance, if a judge worked for ten years as a judge at the national court and five years as an academic prior to joining the Court, his primary prior work experience is judiciary.
7. "Last position" refers to the last position immediately before the EU judge joins the Court.

Appendix II Tenure of Former Judges and Advocates General (in years)

	GC Judge	CJ Judge	AG
Average	8.243	8.985	7.278
Median	7	8	6
Std Dev	4.136	4.310	4.286
Min	2	0	2
Max	18	21	20

Notes:

1. This table provides the summary statistics of the tenure of the former EU judges at the General Court and the Court of Justice.
2. GC=General Court; CJ=Court of Justice; AG=Advocate General.

		Current <i>Référendaires</i>			Former <i>Référendaires</i>	
		Total	CJ	GC		
Count		74	31	43	103	
Gender (M=1, F = 0)		0.622	0.516	0.698	0.709	
Worked for Multiple Judges at the Court		0.338	0.300	0.366	N/A	
Education	Doctoral	0.273	0.357	0.211	0.271	
	Master	0.939	1.000	0.895	0.979	
	French-Speaking Law Schools	0.812	0.793	0.825	0.628	
	Common-law Law schools	0.382	0.375	0.392	0.598	
Previous Professional Experience	National Government	0.118	0.107	0.125	0.188	0.069
	Academia	0.235	0.429	0.100	0.271	0.216
	Private Practice	0.368	0.536	0.250	0.563	0.392
	Internship in the Court	0.088	0.107	0.075	0.073	0.000
	Other Positions in the Court	0.203	0.286	0.146	0.083	Former <i>Référendaires</i>
	Internship in the Commission	0.147	0.107	0.175	0.052	Exit Option
	Commission	0.206	0.071	0.300	0.073	
	Commission: Legal Service	0.074	0.000	0.125	0.031	
	Commission: DG Comp	0.059	0.036	0.075	0.031	
	Commission: Others	0.074	0.036	0.100	0.010	

Notes:

1. This table provides the summary statistics of education and professional experience of 74 current and 103 former *référendaires* based on information hand-collected from LinkedIn.
2. Count indicates the number of valid data points.
3. GC=General Court; CJ=Court of Justice; Commission= European Commission; Court= GC +CJ; DG Comp = Director General for Competition at the Commission.
4. "Other positions in the Court" means the *référendaire* worked in positions other than *référendaires* at the Court (e.g., linguist, researcher).
5. "Former *référendaire* exit option" means the first job a *référendaire* joined upon departing the Court.

Appendix

IV Tenure and Work Experience of A Sample of Current and Former Référéndaires

	Years Working as Référéndaires				Years of Previous Work Experience			
	Current Référéndaires			Former Référéndaires	Current Référéndaires			Former Référéndaires
	Total	CJ	GC		Total	CJ	GC	
Mean	7.11	6.77	7.56	3.62	5.85	6.25	5.26	4.33
Median	7.35	7.00	7.50	3.00	5.60	6.00	4.60	3.95
Std. Dev	5.07	5.21	4.84	2.50	3.87	3.97	3.63	3.44
Min	0.1	0.2	0.1	0.1	0	0	0.5	0
Max	26	26	22.2	12	18	18	17.3	15.5

Notes:

1. This table provides the summary statistics of the years of previous job experience and the tenure of 74 current and 103 former référéndaires at the General Court and the Court of Justice based on information hand-collected from LinkedIn.

2. GC=General Court; CJ=Court of Justice

Appendix V Revolving Door between the Commission and the Court

	Mean	Median	Std Dev.	Min	Max	
Current Member of the Commission	0.49	0	0.50	0	1	
Commission to Court	0.34	0	0.47	0	1	
Court to Commission	0.57	1	0.49	0	1	
Commission	Legal Service	0.46	0	0.50	0	1
	DG Comp	0.37	0	0.48	0	1
	Other Departments	0.46	0	0.50	0	1
Years of Commission Experience	7.69	4.7	7.14	1	36	
Years of Référéndaires Experience	4.40	3.6	3.14	0.8	12	

Notes:

1. This table provides the summary statistics of 35 current and former référendaires who have experience working full-time at both the Commission and the Court. The data is hand-collected from LinkedIn.
2. Commission= European Commission; Court= General Court +Court of Justice; DG Comp=Director General for Competition
3. “Commission to Court” means if the référendaire worked for the Commission immediately before joining the Court.
4. “Court to Commission” means if the référendaire joined the Commission upon departing the Court.