7 The Judges of the Court of Justice of the European Communities

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In view of the far-reaching significance which the Court has obviously assumed for governments and private individuals alike in the member states, one may be justified in asking who are the justices wielding such extensive power and responsibility? How are they appointed and under what conditions can they be removed from office? What are their duties and privileges, and what measure of judicial independence do they possess (Feld 1963)?

INTRODUCTION

This chapter attempts to systematically answer Feld’s first question – a question that remains unanswered yet relevant more than 35 years after he posed it – and issues a call for scholars to answer the rest. Researchers in the USA have long pondered the following questions: how representative of the population should judges be, and what different groups need representation? Who should participate in the selection process? What should be the role of legislatures and interest groups in judicial appointments? What should the qualifications for judges be? While many have debated the merits and legal reasoning of the ECJ’s rulings, few have studied how judges are chosen or who they are (Kennedy 1996). Interestingly, the catalyst for such a discussion has come from the European Parliament. Parliament has demanded that it play a role in selecting members of the Court. Parliament has also criticized the member states’ failure to appoint women.

Article 167 of the Treaty of Rome states that the judges and advocates general shall be appointed by common accord of the governments of the member states for a term of six years. In practice, each member state government follows its own internal selection procedure and simply announces the result to the Council when a vacancy occurs. Because the Court of Justice is a hybrid, a supranational court...
that is part international and part constitutional, member state judicial selection procedures display an interesting combination of conventional judicial selection procedures and systems for choosing European Community appointees more generally. There appears to be little public scrutiny of appointments to the Court within member states and there is none within Community institutions.

I begin by providing some background on the EU and how the Court operates. Comparisons with the US Supreme Court provide a context for understanding the ECJ for a North American audience but also stem from the greater body of social science literature on courts and judicial selection in the USA. After describing my sources, I analyze patterns in member states' appointments, review the issues surrounding judicial selection, outline the European Parliament's attempts to participate in the judicial selection, and end with a discussion of why it matters who participates in the process of selecting judges. The absence of women may provide the focus for Parliament's criticisms of member states, but elite domination of the Community, its democracy deficit, and the secrecy of its deliberations lie beneath Parliament's demand for greater participation. Despite the efforts of Parliament, there has been little demand for opening up the selection process either to greater public participation or even to greater public scrutiny.

BACKGROUND: THE EUROPEAN COURT OF JUSTICE

As of 1995, fifteen judges sit on the Court of Justice, one from each member state. The Council of Ministers officially appoints members for renewable six-year terms. The judges elect one of their members to be the President for a three-year term. The President assigns cases, is in charge of the administration of the Court, and leads the Court in its internal deliberations. Also sitting with the Court are nine (formerly six) advocates general (modeled on French practice) with one assigned to each case. The advocate general reads the briefs, attends oral argument, and writes an opinion setting out the facts, summarizing the legal arguments, and recommending how the Court should rule.

Despite frequent comparisons of the US Supreme Court and the ECJ (Stein 1981; Bridge 1982, Sandalow and Stein 1982; Rasmussen 1986; The Economist 1989, 48; Lenaerts 1990; Fernhout 1993), the two courts and the legal systems they head are very different. Treaties