



Are Adjudication Panels Strategically Selected? The Case of Constitutional Court in Poland

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ABSTRACT

While judicial independence is often considered to be a foundation for the rule of law and economic prosperity, there is overwhelming evidence suggesting that judges and court decision-making are sensitive to the political environment. In this paper, we explore one channel through which political alignment of the judges can manifest itself and verify whether political party support, expressed as a recommendation to the tribunal, is relevant for the allocation of judges to adjudication panels. Our specific example comes from the Polish Constitutional Tribunal and refers to the period 2005–2014. With respect to the mass of filed cases, we do not find that allocation of judges to adjudication panels favored nominees of any political party. Our results however provide support for the strategic selection to adjudication panels in politically sensitive cases in the period 2011–2014. We find that nominees of the governing party were allocated to these panels more often than other members of the tribunal and that in these cases they had more voting power than in cases of lower political clout.

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1. Introduction

The independence of judicial system is often considered as *conditio sine qua non* for the functioning of liberal democracy and economic prosperity. Indeed, it has been argued that independently performing judicial system plays a fundamental role in making political and economic freedom possible (La Porta et al., 2004), as well as for supporting economic growth (Voigt et al., 2015).¹

That being said, judicial impartiality has often been called into question. Furthermore, doubts about court independence and politicization of judicial system have been raised not only with respect to authoritarian regimes or captured democracies, but also

with reference to countries that are commonly perceived as consolidated democracies and free. While in the latter cases the patterns of political influences on constitutional courts are quite complex, the studies by Franck (2009) for France, Amaral-Garcia et al. (2009) for Portugal, or Garoupa et al. (2013) for Spain substantiate the claims about political ideologies affecting the behavior of constitutional judges. Attempts of American presidents to shape the ideological character of U.S. Supreme Court (Segal and Spaeth, 1993) or the recent election of Stephan Harbarth, the CDU's parliamentary group vice-president, as a vice-president of the Federal Constitutional Court in Germany provide further illustrations that political alignment of the judges seems to importantly influence their selection.

Most of the existing literature, which studies judicial insulation from politics, is based either on checking whether court rulings are in line with the expectations of political majority, or on examining the extent to which the behavior of individual judges can be accounted for by various political variables. In this paper we try to further contribute to this strand of research, but with a different focus. Our aim is to test one particular channel, through which political alignment may shape the rulings of constitutional court. More specifically, our focus is on the composition of adjudication panels and on checking whether they are strategically selected to assure that winning coalitions in these panels are formed by nominees of a given political grouping. The rationale behind this focus is the following. In the environment characterized by high polit-

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¹ These positive effects can be expected to emerge in multiple ways. Protection of property rights, impartial contract enforcement, penalization of defaulters, providing compensation for aggrieved parties or imposing checks and balances on politicians all provide examples of channels, through which independent judicial system can exert its influence on society's institutional system and its functioning. Note however that these claims have not been accepted without qualifications. Helmke and Rosenbluth (2009), for example, argue that independent courts are not always necessary for the rule of law. Reenock et al. (2013), in turn, provide arguments and evidence that although judicial independence may lead to political stability, this is not always the case and might be conditional on specific macroeconomic equilibria.

ical turnover and political appointment of the judges, it is likely that subsequent court members are elected by various governing coalitions.² In this case, the potential for tilting court verdicts in favor of a given political grouping would hinge on a strategic composition of adjudication panels. Indeed, with members of the court being effectively nominated by several political parties, judges with a given political alignment may affect the decision of the court only if they can participate in a winning coalition within the panel. This, in turn, depends on the selection of judges to panels. To the extent that political polarization translates into the functioning of constitutional courts, one may assume that judges with a given political alignment will appear on adjudication panels more often than judges with a different political alignment. In addition, to the extent that constitutional court reacts to political influences, this should be reflected in the frequency with which judges aligned with a given political party adjudicate with other judges of the same alignment. Given the fact that constitutional courts adjudicate on a number of issues which can be considered as apolitical, it seems reasonable to assume that the strategic composition of adjudication panels should be especially visible in the cases that can be considered politically sensitive.³

In this paper we check to what extent the pattern of selecting adjudication panels fits the portrayal sketched above using the case of one particular constitutional court. Our example is based on data from the Polish Constitutional Tribunal and the period 2005–2014, with a special focus on years 2011–2014. We take advantage of the fact that, while there are fifteen judges in the court, a lot of verdicts are pronounced by adjudication panels composed of five judges. While judge's appointment to cases should follow some rules (see further), the ultimate decision about the assignment of judges to panels is made by the president of the tribunal. This allows us to check whether the panels, especially if they refer to politically sensitive cases, are strategically selected or not. To achieve that, we test whether political alignment of a judge affects the number of verdicts he/she decides upon or the incidence he/she adjudicates in panels with other judges of the same alignment. This research problem fits not only recent developments in law and economics and constitutional economics, but also contributes to the current debate on the status of key Polish judiciary institutions.

Clearly, while a prejudiced selection to adjudication panels may lead to politically biased verdicts of constitutional court benches, it should not be treated as an automatic evidence of violation of justice.⁴ This needs to be kept in mind when interpreting our results. It should be stressed however that the same qualification applies to the vast majority of other studies analyzing the politicization of the constitutional court. What we believe weighs in our favor, is the fact that our research strategy on the issue in question seems to have three important advantages over the other approaches used in the literature. First, looking at the composition of adjudication panels does not require from us to assess whether a given verdict is in line with the interest of the political principal or not. Thanks to this, we do not have to identify the position of each political party on each issue decided by the court. Second, we do

not have to assess the legal quality of judgements of the tribunal. Third, as our focus is simply on the composition of adjudication panels and not on the decision that was ultimately made, we do not have to make any assumptions about judges' private preferences or about the extent to which they would be eager to defend their beliefs against political pressure. This, in turn, allows us to abstract from whether the judges are guided by potential career concerns, loyalty towards their peers, or some ideological agenda.

Our study is related to several strands of the research. On the one hand, we build on the literature that investigates the extent to which court rulings depend on judges' political preferences. In general, there are two opposing views on that matter. Formalists assume that judges interpret the law while putting aside their ideological preferences, whereas proponents of the attitudinal model assume that court rulings are not free from judges' political sympathies (for a brief discussion on both these views see, for example, Posner, 2011). The existing evidence suggests that political partisanship of court members often importantly affects their verdicts (Segal and Spaeth, 1993; Pinello, 1999; Ginsburg, 2003; Harris and Sen, 2019). This finding is important given our focus, as it provides the rationale for the strategic selection of adjudication panels. Indeed, should the political preferences of judges be irrelevant for their verdicts, any attempt to affect the composition of adjudication panels would be pointless. In this context, our work is closely related to the paper by Kantorowicz and Garoupa (2016). The study investigates whether the decision-making of the Polish Constitutional Tribunal was characterized by party alignment over the period 2003–2014 and supports this presumption. In this paper, we complement their findings by showing that, at least partly, this result could be explained by a strategic selection of court benches adjudicating on politically sensitive cases in the period 2011–2014.

By adopting this focus, our paper adds to the growing literature on the selection of judges to adjudication panels and its consequences for providing unbiased legal judgements (Sunstein et al., 2006; Boyd et al., 2010; Kestellec, 2011, 2013; Anwar et al., 2012, 2019; Harris and Sen, 2019). There has been an increasing recognition that the decisions judges make depend not only on their own views but also on the preferences of the judiciary as a whole and on the preferences of people selected to a given adjudication panel. The latter finding is especially interesting given our focus as it provides additional rationale for why the composition of a panel may reflect strategic behavior. Compared to these studies our paper tries to make two contributions. First, most of the available evidence comes from the U.S. In this paper we study the composition of adjudication panels in a different geographical context. Second, and perhaps more importantly, whereas the existing studies show that the composition of the panel may matter for the verdict, they rarely investigate whether the selection to adjudication panels reflects strategic behavior. In our study we attempt to address this issue at least partly. To achieve that, we analyze the composition of adjudication panels and compare the panels adjudicating on cases that can be considered as politically sensitive with the panels adjudicating on cases that can be deemed apolitical.

The paper is structured as follows. The next section briefly presents key information that constitutes the background for our analysis. Section 3 describes our data, methodology and findings. Finally, Section 4 concludes.

2. Background information on the Constitutional Tribunal of the Republic of Poland

2.1. Timespan of the analysis

The analysis covers the period 2005–2014. Our special focus however is on the years 2011–2014 and the preceding years serve as

² High political turnover makes that the tenure of ruling political incumbents is likely to be shorter than the tenure of a judge. Consequently, subsequent vacancies in the court should be filled with nominees of different political parties.

³ This assumption seems to be in line with the findings coming from, among others, Ashenfelter et al. (1995), who show that political preferences of judges are irrelevant for the decisions with respect to the mass of filed cases.

⁴ The sole fact that judges of the same political alignment adjudicate together does not necessarily imply that their verdict is biased. In addition, a panel composed of five judges aligned with party X might reach different conclusions than a panel composed of three judges aligned with party X and two judges aligned with party Y, even if in both cases party X has a winning coalition (see, for example, Sunstein et al., 2006). Recent debates on what does "bias" in the judiciary mean (see, for example, Harris and Sen, 2019) complicate this issue even further.

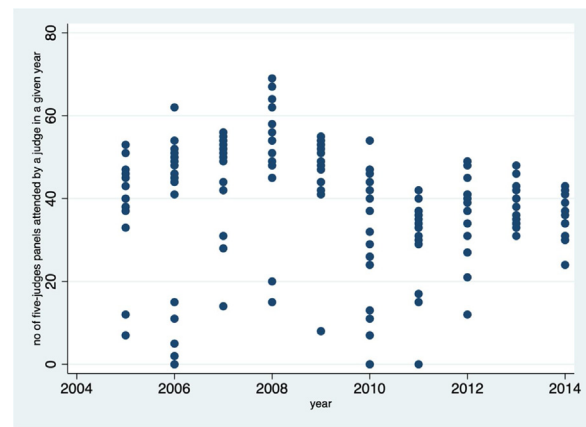
a reference point. The reason to concentrate on the years 2011–2014 is that in this period the working of the tribunal was considerably influenced by nominees of one party, namely Civic Platform (*Platforma Obywatelska*; PO). PO was the main governing party between 2007 and 2015. The party won also Poland's presidential election in 2010. At the end of 2010 PO's nominees filled the posts of the tribunal's president and vice-president. Equally important, starting from 2011 the nominees of PO gained an absolute majority in the tribunal. This, in turn, created favorable conditions for potential strategic selection of adjudication panels.

The reason why we finish in 2014 and do not continue with the analysis for the following years is quite mundane. In 2015, just before the parliamentary elections in which the power shifted from PO to Law and Justice party (*Prawo i Sprawiedliwość*, PiS), the Polish Constitutional Tribunal crisis started (gaining both domestic and international attention). The issue was about the legality of nomination of several judges and resulted in blocking the selection of these judges to adjudication panels. In consequence, we have a clear case in which judges with a given political alignment are not admitted to pronounce. Additionally, in 2015 The Constitutional Tribunal Act was amended, and then supplemented with new statutes introduced in 2016, what brought some changes with respect to proceedings before the tribunal. The analysis for the period 2005–2014 should not be confounded by these events and by the abnormal situation that accompanied the election of constitutional judges in 2015. Consequently, focusing on this period allows us to check whether strategic selection of adjudication panels took place before the constitutional crisis started.

2.2. Functioning of the Constitutional Tribunal

The essential goal of the Polish Constitutional Tribunal is to control over constitutionality of the law ([The Constitution of the Republic of Poland, 1997](#); [The Constitutional Tribunal Act, 1997](#)). Tribunal judges are appointed individually for nine-year terms by the lower house of the Polish parliament and re-election of the same person is not allowed. The president of the tribunal performs the function for six years and is appointed by the President of the Republic of Poland from candidates proposed by the general assembly of the judges of the tribunal. Judges are assigned to cases by the president of the tribunal and the cases should be analyzed in the order of receipt ([The Statute of the Constitutional Tribunal of the Republic of Poland, 1997](#)). Moreover, starting from 2006, judges should be assigned to cases in alphabetical order ([The Statute of the Constitutional Tribunal of the Republic of Poland, 2006](#)). However, and important given our focus, in justified cases, the president of the tribunal is allowed to allocate cases in a different order. This, in turn, constitutes a potential for political abuse, as it leaves the president some room for discretionary allocation of judges to adjudication panels (either by manipulating the registration of cases and/or changing the order of assignments).⁵

There are three types of adjudication panels, depending on the investigated case – full bench, bench of three judges and bench of five judges.⁶ A great majority of cases (depending on a year covered by our study, from 76% to 86%), is adjudicated by five-judges panels. In contrast, three-judges and full benches adjudicate much less often (depending on a year, three-judges panels accounted for from 5% to 12% of cases, whereas full bench accounted for from 6% to 15%



Graph 1. Verdicts by different judges in benches of five judges.
Source: own elaboration.

of cases). Possible inference in the selection of judges to adjudication panels may exist in cases of three- and five-judges benches. Due to relatively small number of verdicts issued by benches of three judges and lower importance of cases investigated by these adjudication panels, in our analysis we focus on benches of five judges.⁷

3. Empirical analysis

3.1. Data and descriptive statistics

Our research is based on the publicly available data on judgments issued by the Constitutional Tribunal of the Republic of Poland between 2005 and 2014, with detailed information on the composition of adjudication panels. While at any point in time the tribunal consists of 15 judges, given the judicial turnover, in our dataset we observe 30 judges and 162 judge-year observations. The data allow us to calculate, for each judge, the number of five-judges panels he/she sat on. In addition, we collect some information concerning the judges' academic career (24 judges have at least J.D. degree), gender (7 judges are female) or a function within the tribunal (8 judges assumed the function of a president or vice-president). [Table 1](#) presents key descriptive statistics in this respect. The average number of cases adjudicated by five-judges benches per one judge per year is equal to 37.7 cases, whereas the respective average for cases adjudicated by three-judges benches is 2.3 cases. This obviously masks an important variation between the judges, as the reported maximum and minimum values indicate. Further details of this variation are illustrated with [Graph 1](#), which shows the distribution of five-judges cases among individual judges adjudicating in a given year. While part of this variation is due to judicial turnover and the fact that some judges were appointed in the middle or at the end of the calendar year and the number of their assigned cases is very low (or even zero), it seems worth asking whether strategic composition of adjudication panels did not contribute to that outcome as well. As reported in [Table 2](#), this seems to be a legitimate question also if we limit our attention only to newly appointed judges (i.e. to the judges appointed to the tribunal at some point during the period covered by our analysis). In that case we have 98 judge-year observations for 15 judges.

As far as the distribution of places in the tribunal among different political groupings is concerned, the following picture emerges. In 2005, i.e. at the beginning of our period, the tribunal was composed

⁵ For instance, as an important case is being petitioned, a politically aligned president of the tribunal might be willing to wait to officially register the case until there is an opportunity to assign it for a favorable bench of judges.

⁶ A detailed description of the proceedings before the tribunal (including the types of cases adjudicated by different types of adjudication panels) is included in [The Constitutional Tribunal Act of August 1st 1997](#).

⁷ In the period under study 1223 judgements of five-judges benches and 125 judgements of three-judges benches were made.

Table 1
Descriptive statistics for the key variables, period of 2005–2014, whole dataset.

Variable	Obs.	Mean	Std. Dev.	Min.	Max.
Judgement by 5 judges bench	162	37.74691	15.10226	0	69
Judgement by 3 judges bench	162	2.314815	1.731951	0	10
Nominees of PO	162	0.2777778	0.4492921	0	1
Nominees of PiS	162	0.2222222	0.4170288	0	1
Nominees of SLD	162	0.2407407	0.4288589	0	1
Nominees of LPR-Samoobrona	162	0.1049383	0.3074242	0	1
Nominees of AWS-UW	162	0.154321	0.3623763	0	1
Sex (female = 1; male = 0)	162	0.2345679	0.4250423	0	1
Academic career (yes = 1; no = 0)	162	0.7839506	0.4128245	0	1
Function in the tribunal (yes = 1; no = 0)	162	0.1481481	0.3563483	0	1
Seniority in a given year (months)	162	11.04938	2.669828	1	12
Number of years in office	162	5.425926	2.713677	1	10

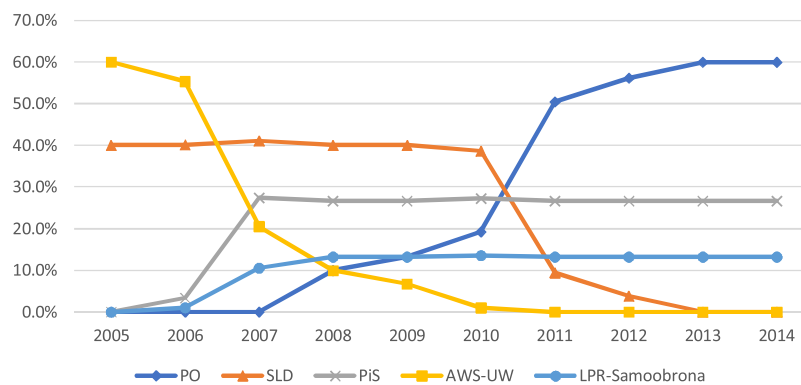
Source: own elaboration.

Table 2
Descriptive statistics for the key variables, period of 2005–2014, for a subset of judges appointed in this period.

Variable	Obs.	Mean	Std. Dev.	Min.	Max.
Judgement by 5 judges bench	98	35.20408	14.36129	0	67
Judgement by 3 judges bench	98	2.204082	1.384444	0	6
Nominees of PO	98	0.4591837	0.5008934	0	1
Nominees of PiS	98	0.3673469	0.4845607	0	1
Nominees of SLD	98	0	0	0	0
Nominees of LPR-Samoobrona	98	0.1734694	0.3805994	0	1
Nominees of AWS-UW	98	0	0	0	0
Sex (female = 1; male = 0)	98	0.2755102	0.449068	0	1
Academic career (yes = 1; no = 0)	98	0.7653061	0.4259863	0	1
Function in the tribunal (yes = 1; no = 0)	98	0.0816327	0.275212	0	1
Seniority in a given year (months)	98	10.84694	3.104211	1	12
Number of years in office	98	4.112245	2.372013	1	9

Source: own elaboration.

Note: Judges adjudicating after 2005 but appointed before 2005 not included.



Graph 2. Distribution of person-months in the tribunal, 2005–2014, by political alignment of judges.

Source: own elaboration.

of 6 judges nominated by the post-communists (SLD), 3 judges nominated by the center-left (UW) and 6 nominees of the conglomerate of the right-wing parties (AWS). The two parties that since 2005 have dominated political stage in Poland, i.e. Law and Justice (PiS) and Civic Platform (PO) did not have their nominees in the tribunal at that time. PiS nominated 4 judges at the very end of 2006, whereas PO nominated 1 judge at the very end of 2007, 1 judge in 2008, 4 judges in 2010, 2 judges in 2011 and 1 judge in 2012.⁸ In addition, our sample includes two judges nominated at the end of 2006 and at the beginning of 2007 respectively by

two smaller parties, LPR and Samoobrona.⁹ Given that in each year there are (15×12) 180 person-months to be distributed among the nominees to the tribunal, over the whole period (2005–2014) the nominees of PO accounted for 27% of person-months, the nominees of SLD accounted for 25.2% of person-months, the nominees of PiS accounted for 21.8% person-months, the nominees of AWS-UW accounted for 15.4% of person-months, whereas the nominees of LPR-Samoobrona accounted for 10.6% of person-months.¹⁰ The

⁸ To be exact, as the official sources inform, Marek Zubik was formally proposed by the coalition PO-PSL, whereas Andrzej Wróbel and Leon Kieres were formally proposed by the coalition PO-PSL-SLD.

⁹ Both these parties formed with PiS a coalition government between July 2006 and September 2007. As soon as the government collapsed, however they both became PiS's fierce opponents. Since 2007 elections the two parties are no longer in the parliament. Samoobrona's leader, Andrzej Lepper, is dead, whereas LPR's leader, Roman Giertych, is in close cooperation with key figures from PO.

¹⁰ Please note that this portrayal is slightly different from the one based on judge-year observations as presented in Tables 1 and 2. The difference stems from the fact

exact distribution of person-months among the nominees of various political parties over time is presented in [Graph 2](#).

As noted earlier, the end of 2010 marks the time when nominees of PO start to dominate in the tribunal (taking the leadership from the nominees of the post-communist SLD). Importantly given our focus, in 2010 nominees of PO assume also the functions of the tribunal's president and vice-president. Given the role of the tribunal's president in allocating cases, this created potentially favorable conditions for a strategic selection of judges to adjudicating panels. To the extent that the functioning of the constitutional tribunal reacted to political influences, one may assume that the strategic selection should be especially visible in politically sensitive cases adjudicated in the period 2011–2014. Below we try to test this supposition by comparing panels selected to adjudicate upon cases of higher political clout with panels selected to adjudicate upon cases of lower political clout. We also compare the composition of panels adjudicating before PO got the majority in the tribunal and panels established after its nominees dominated the tribunal. To achieve that, we draw upon basic combinatorics. The analysis is preceded by a simple econometric modelling which aims to document the correlation between political alignment of constitutional judges and the number of cases they adjudicated upon. While the results of this exercise definitely cannot be interpreted as causal, they still may be informative by highlighting whether the two phenomena are linked to each other at least in correlational sense.

3.2. Political alignment and the number of adjudicated cases

To verify whether the appointment of tribunal judges to adjudication panels is correlated with judges' political alignment, we estimate the model of the following form:

$$adjudication_panel_{i,t} = \alpha + \beta_1 political_affiliation_{i,t} + \beta_2 X_{i,t} + \mu_t + \varepsilon_i$$

where $adjudication_panel_{i,t}$ is a variable showing how many times a judge i was appointed to a bench of five people in a year t . In additional specifications, instead of looking at the absolute number of panels, we look at the share of panels in which a given judge adjudicated relative to the total number of adjudication panels of five judges in a selected year. Importantly, to account for the fact that judges not serving a full year might have automatically adjudicated upon fewer cases, our estimations are based on a sample limited to these judges that during a given year served in the tribunal for twelve months. X_i is a vector of basic covariates that control for key characteristics of a given judge. It includes a dummy variable indicating whether a judge is an academician (equal to one if a judge had a J.D. degree, and equal to zero otherwise), a variable measuring the number of years a given judge served on the tribunal, a dummy variable capturing whether a judge assumed a function of the tribunal's president or vice-president (= 1 if yes, = 0 if no) and a dummy variable equal to one for females and equal to zero for males. In addition, we control for a full set of year dummies (μ_t) to account for the fact that the number of cases adjudicated by the tribunal varied over time. The year-fixed effects should also capture the fact that political pressure exerted on the tribunal in year t might have been different than the political pressure in year $t - 1$. $political_affiliation_{i,t}$ is a vector of our crucial variables of interest on the right-hand side of the model that are supposed to capture the impact of being aligned with a given political party. As mentioned earlier, during the period 2005–2014, we distinguish between five political groupings (PO, PiS, SLD, AWS-UW, and LPR-Samoobrona). Accordingly, for each of them we create a dummy variable which

equals one if a given judge was nominated by a particular grouping, and equals zero otherwise. Depending on a specification, we include either dummy variables for all political groupings except for PO (which then serves as a reference group) or dummy variables for all political groupings except for PiS (which then serves as a reference group). This way we can illustrate whether nominees of either PO or PiS, i.e. the two main political parties in the period of the analysis, were more (less) likely to adjudicate than nominees from other political groupings. Clearly, these models should not be seen as establishing causation. Nevertheless, they may be helpful in assessing whether political alignment and selection to adjudication panels are linked to each other at least in correlational sense. Statistically significant impact of the political variables (especially the ones measuring the comparison between PO and PiS) would suggest that political alignment might have influenced the selection of judges to adjudication panels. The evidence of no impact, in turn, would indicate the opposite. Since our dependent variable is a count variable, except for OLS models, we also estimate negative binomial models.¹¹

The results, based on a sample using all filed cases, are reported in [Tables 3 and 4](#). [Table 3](#) presents the specifications in which 'being aligned with PO' serves as a reference category, whereas [Table 4](#) presents the specifications in which the reference category is 'being aligned with PiS'. Subsequent columns in each table refer to different subsamples. Column (1) reports the specification estimated for the period 2011–2014, whereas column (2) reports the results of specifications estimated for the period 2005–2014. This separation is done to capture the potential effect of the year 2010 as explained earlier. Both these columns refer to specifications in which the dependent variable measures the absolute number of cases a given judge was assigned to. Columns (3) and (4) are analogical, but refer to specifications in which the dependent variable measures the relative number of panels in which a given judge adjudicated. The estimates of OLS regressions are listed in columns annotated with the letter 'a', and the estimates of negative binomial models are shown in columns marked with the letter 'b'. As reported in the two tables, with respect to all filed cases, we do not find that political alignment is systematically related to the number of cases a given judge was assigned to. What seems to matter here instead, is the function assumed in the tribunal (presidents and vice-presidents were assigned to fewer cases) and academic career (academicians adjudicate in a lower share of cases than non-academicians). These results hold regardless of whether we compare PO with any other party ([Table 3](#)) or PiS with any other party ([Table 4](#)). Furthermore, these findings do not seem to depend on the period studied, as our results appear to be the same no matter whether we look at the period 2011–2014 or at the period 2005–2014. Changing the definition of the dependent variable (i.e. using the relative number of cases instead of the absolute number of cases) does not seem to affect these results either. Finally both OLS and negative binomial models incline towards broadly the same conclusion.

Overall, these findings seem to weigh against the thesis that the functioning of the constitutional tribunal was shaped by political influences, at least if the latter is measured by assignments of individual judges to five-person adjudication panels. As such, these results are consistent with the evidence from [Ashenfelter](#)

that judge-year observations overlap when judicial turnover took place. This does not affect the measure based on person-months.

¹¹ We thank an anonymous referee for this suggestion. Taking into consideration that our dependent variable is a nonnegative count variable following the negative binomial distribution (nonnegative integers; the unconditional mean of the outcome variable is much lower than the variance), and the data meets the condition of overdispersion (the conditional variances within each level of our explanatory variables are higher than the conditional means), this model seems to fit our quantitative goals ([Cameron and Trivedi, 2013](#)). Negative binomial model may be considered as a generalization of Poisson regression, having the same mean structure, but accompanied by an extra parameter for modelling the existing overdispersion.

Table 3

Political alignment and judge's participation in adjudication panels – bench of five judges, all cases; the reference cat. PO.

Variables	(1a) OLS 2011–2014 No. of cases	(1b) neg. binomial 2011–2014 No. of cases	(2a) OLS 2005–2014 No. of cases	(2b) neg. binomial 2005–2014 No. of cases	(3a) OLS 2011–2014 % of cases	(3b) neg. binomial 2011–2014 % of cases	(4a) OLS 2005–2014 % of cases	(4b) neg. binomial 2005–2014 % of cases
PO	Reference group –7.434 (8.129)	Reference group –0.210 (0.236)	Reference group 0.329 (3.775)	Reference group 0.0351 (0.0887)	Reference group –0.0718 (0.0762)	Reference group –0.222 (2.465)	Reference group 0.00493 (0.0314)	Reference group 0.0240 (0.832)
PiS	–16.26 (14.84)	–0.453 (0.433)	1.859 (6.514)	0.0961 (0.154)	–0.153 (0.139)	–0.471 (4.475)	0.0178 (0.0541)	0.0725 (1.448)
SLD	–	–	0.171 (8.596)	0.0783 (0.203)	–	–	–0.00169 (0.0714)	0.0313 (1.922)
AWS-UW	–6.241 (7.307)	–0.179 (0.212)	–1.291 (3.787)	–0.00976 (0.0894)	–0.0585 (0.0685)	–0.184 (2.210)	–0.00914 (0.0315)	–0.0172 (0.835)
LPR-Samoobrona	–4.234** (2.032)	–0.119** (0.0591)	–1.219 (1.844)	–0.0290 (0.0433)	–0.0382* (0.0191)	–0.115 (0.612)	–0.0107 (0.0153)	–0.0295 (0.401)
Sex (1 = female; 0 = male)	0.738 (2.323)	0.0222 (0.0653)	–4.374** (2.004)	–0.117** (0.0468)	0.00602 (0.0218)	0.0200 (0.677)	–0.0395** (0.0167)	–0.115 (0.427)
Academic career (=1 if yes, =0 if no)	–11.30** (5.237)	–0.324** (0.153)	–10.34*** (2.462)	–0.279*** (0.0606)	–0.105** (0.0491)	–0.326 (1.594)	–0.0849*** (0.0205)	–0.271 (0.572)
tribunal (=1 if yes, =0 if no)	2.376 (1.809)	0.0669 (0.0529)	0.362 (0.841)	0.00273 (0.0198)	0.0228 (0.0170)	0.0698 (0.553)	0.00311 (0.00699)	0.00632 (0.186)
Number of years in office	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Year FE	29.14*** (4.420)	3.384*** (0.130)	39.70*** (4.597)	3.652*** (0.108)	0.306*** (0.0415)	–1.187 (1.342)	0.353*** (0.0382)	–1.058 (1.002)
Constant	–	–18.256	–	–4.644	–	–36.604	–	–17.342
Inalpha	58	58	135	135	58	58	135	135
Observations	0.326	0.055	0.529	0.087	0.267	0.002	0.244	0.003
(Pseudo) R-squared								

Source: own elaboration.

Note: Columns (1) and (2) have the absolute number of cases in a given year as the dependent variable, whereas columns (3) and (4) have the relative number of cases in a given year as the dependent variable. For negative binomial regressions we report pseudo R^2 .

* Significant at 10% level.

** Significant at 5% level.

*** Significant at 1% level.

Table 4

Political alignment and judge's participation in adjudication panels – bench of five judges, all cases; the reference cat. PiS.

Variables	(1a) OLS 2011–2014 No. of cases	(1b) neg. binomial 2011–2014 No. of cases	(2a) OLS 2005–2014 No. of cases	(2b) neg. binomial 2005–2014 No. of cases	(3a) OLS 2011–2014 % of cases	(3b) neg. binomial 2011–2014 % of cases	(4a) OLS 2005–2014 % of cases	(4b) neg. binomial 2005–2014 % of cases
PO	7.434 (8.129)	0.210 (0.236)	–0.329 (3.775)	–0.0351 (0.0887)	0.0718 (0.0762)	0.222 (2.465)	–0.00493 (0.0314)	–0.0240 (0.832)
PiS	Reference group	Reference group	Reference group	Reference group	Reference group	Reference group	Reference group	Reference group
SLD	–8.829 (8.398)	–0.243 (0.246)	1.530 (3.781)	0.0611 (0.0891)	–0.0809 (0.0788)	–0.249 (2.486)	0.0129 (0.0314)	0.0485 (0.835)
AWS-UW	–	–	–0.158 (5.864)	0.0433 (0.139)	–	–	–0.00662 (0.0487)	0.00731 (1.310)
LPR-Samoobrona	1.193 (2.860)	0.031 (0.0799)	–1.620 (2.656)	–0.0448 (0.0617)	0.0133 (0.0268)	0.0377 (0.828)	–0.0141 (0.0221)	–0.0412 (0.567)
Sex (1 = female; 0 = male)	–4.234** (2.032)	–0.119** (0.0591)	–1.219 (1.844)	–0.0290 (0.0433)	–0.0382* (0.0191)	–0.115 (0.612)	–0.0107 (0.0153)	–0.0295 (0.401)
Academic career (=1 if yes, =0 if no)	0.738 (2.323)	0.0222 (0.0653)	–4.374** (2.004)	–0.117** (0.0468)	0.00602 (0.0218)	0.0200 (0.677)	–0.0395** (0.0167)	–0.115 (0.427)
Function in the tribunal (=1 if yes, =0 if no)	–11.30** (5.237)	–0.324** (0.153)	–10.34*** (2.462)	–0.279*** (0.0606)	–0.105** (0.0491)	–0.326 (1.594)	–0.0849*** (0.0205)	–0.271 (0.572)
Number of years in office	2.376 (1.809)	0.0670 (0.0529)	0.362 (0.841)	0.00273 (0.0198)	0.0228 (0.0170)	0.0698 (0.553)	0.00311 (0.00699)	0.00632 (0.186)
Year FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Constant	21.70* (11.83)	3.174*** (0.345)	40.03*** (3.939)	3.687*** (0.0904)	0.234** (0.111)	–1.409 (3.601)	0.358*** (0.0327)	–1.034 (0.843)
Inalpha	–	–18.584	–	–4.644	–	–36.604	–	–18.516
Observations	58	58	135	135	58	58	135	135
(Pseudo) R-squared	0.326	0.055	0.529	0.087	0.267	0.002	0.244	0.003

Source: own elaboration.

Note: Columns (1) and (2) have the absolute number of cases in a given year as the dependent variable, whereas columns (3) and (4) have the relative number of cases in a given year as the dependent variable. For negative binomial regressions we report pseudo R^2 .

* Significant at 10% level.

** Significant at 5% level.

*** Significant at 1% level.

et al. (1995), who show that, when analyzed with respect to the mass of filed cases, political variables do not seem to be good predictors of judicial decisions. That being said, this conclusion has two major weaknesses. First, it can be argued that a strategic selection may apply only to these cases that can be considered politically sensitive. Accordingly, the argument may continue, when we consider all cases together, the potential effect of political pressure can be obscured by the fact that the majority of cases adjudicated in the tribunal can be considered apolitical. A distinct point that may be raised here, and which would urge us to look at the above-mentioned results with caution, is that what really matters is not the number of cases a given judge adjudicates upon, but his/her chances to participate in a winning coalition within the panel, i.e. the frequency with which he/she adjudicates with other judges of the same alignment. In the analysis below we try to explore both these arguments.

3.3. Politically sensitive cases

In response to the argument that strategic selection may apply to politically sensitive cases, we check whether political alignment correlates with sitting on five-judges benches in cases that were brought to the tribunal either by the President of the Republic of Poland, the Prime Minister, a group of deputies, a group of senators, the Marshal of the Sejm or the Marshal of the Senate. These cases can be considered potentially more politically sensitive than the other cases as they all were brought by political actors (Kantorowicz and Garoupa, 2016).¹² In consequence, to the extent that political influences affect the functioning of the tribunal, this could be particularly visible in assigning judges to these cases. The strength of using this approach, instead of relying on the strategy to look at the political alignment of the party that is petitioning the tribunal, is the fact that it focuses on institutional actors filing a constitutional request regarding a given law. What follows, we do not have to assume political alignment of each actor bringing the case to the tribunal and to assess, whether it is in line with political views of the tribunal's president. This also allows us to solve the issue of classifying the cases brought to the constitutional court by people or institutions, whose political alignment is not always evident. Furthermore, and perhaps most importantly, the strategy that we adopt, allows us to take into account the fact that politically sensitive cases can be brought to the tribunal by parties of various political alignment, both those close to the tribunal's president, as well as those holding opposing views. This feature of our approach seems to be especially valuable, if one assumes that the legislative process is characterized by the phenomenon of logrolling.

To check whether political alignment of judges nominated to the tribunal affect their selection to panels adjudicating upon politically sensitive cases, we run the same regressions as before, but this time using only a sample of cases brought by the political actors as defined above. Again, we look at the periods 2011–2014 and 2005–2014 separately, to take into account that after 2010 there were much more favorable conditions for political alignment with PO to potentially influence the functioning of the tribunal than before. In the period 2005–2014 (2011–2014) we identified 64 (31) cases that can be considered politically sensitive.¹³ The relevant results

are reported in Table 5. Columns (1) and (2) refer to specifications in which 'being nominated by PiS' serves as a reference category, whereas columns (3) and (4) refer to specifications in which 'being nominated by PO' serves as a reference category. Odd columns refer to specifications based on politically sensitive cases in the period 2011–2014, and even columns refer to specifications based on politically sensitive cases in the period 2005–2014. As before, we estimate both OLS and negative binomial models and the estimates of OLS models are presented in columns annotated with the letter 'a', whereas the estimates of negative binomial models are presented in columns marked with the letter 'b'. All specifications include the same covariates as before. Interestingly, and importantly given our focus, when we consider politically sensitive cases in the period 2011–2014, we find some evidence suggesting that nominees of PiS might have been assigned to fewer cases than nominees of PO. It seems also that in this period nominees of PO were adjudicating upon more politically sensitive cases than the nominees of LPR-Samoobrona and the nominees of SLD (in this case, however, the evidence is weaker as it comes only from the OLS model). Note that the documented differences imply that the alphabetical order of judges' appointment to adjudicating panels must have been violated. If put into practice, the alphabetical rule should assure that the number of cases per judge is the same for all court members, regardless of what party nominated them. The second thing to note is that the positive impact of being aligned with PO is observable only for the period of 2011–2014. Indeed when we look at the period 2005–2014 the difference between being aligned with PO vs. being aligned with PiS or other parties is statistically insignificant. This finding is in line with the argument that strategic selection to adjudication panels is more likely to take place when the nominees of a given political grouping start to dominate in the tribunal and when the case being adjudicated is more politically sensitive. While these results uncover potentially interesting insights about the functioning of the tribunal under study, it should be stressed that they come with two important caveats. First, the estimated models should be treated with caution due to a small number of observations. Second, while the findings can be informative on whether nominees of a given party adjudicated more or less often than nominees of the other party, they cannot straightforwardly capture the strategic selection to the panels.

3.4. Pronouncing with judges of the same alignment

To get further insights on the extent to which the functioning of the constitutional tribunal is sensitive to political environment, we take a closer look at the specific composition of adjudication panels and analyze the occurrence of winning coalitions formed by judges aligned with PiS or PO. Given the results just presented, our focus is on the period 2011–2014. Our analysis is based on 370 benches of five judges that we classify based on the number of judges aligned with PO, PiS or LPR-Samoobrona.¹⁴ Of these, 27 cases were brought to the tribunal by political actors and thus can be considered of higher political clout. The distribution of the adjudication panels with respect to different combinations of political alignment of their members is presented in Table 6. Column (1) considers

¹² This strategy to identify politically sensitive cases is in line with that proposed by Kantorowicz and Garoupa (2016). Interestingly, this view seems to be shared and expressed by constitutional judges themselves (see the open letter of seven judges – 6 aligned with PO and 1 aligned with PiS – to the president of the tribunal on 5th of December 2018, in which they make exactly the point that cases brought to the tribunal by political actors are more politically sensitive than the other cases <https://oko.press/images/2018/12/List-Se%CC%A8dzio%CC%81w-TK.5.12.2018-r..pdf>).

¹³ We refer here only to cases adjudicated upon by five-judges benches. At first, two more cases were identified but were not taken into account. One case was due

to a mistake in writing in one of the previous verdicts. The other case was about reimbursement of the costs of judicial proceedings before the tribunal. Including these two cases in the analysis does not affect our results.

¹⁴ Consequently, we exclude here the verdicts given by the panels which included Adam Jamróz, the nominee of post-communist SLD (the only judge not from PO, PiS or LPR-Samoobrona during this period), whose term in the tribunal ended in the middle of 2012. In 2011 (2012) there were 35 (27) such adjudication panels. Thanks to this approach, we can focus on the distribution of voting power between the representatives of the three parties that continuously had its nominees in the tribunal between 2011 and 2014.

Table 5

Political alignment and judge's participation in adjudication panels – bench of five judges, politically sensitive cases.

Variables	(1a) OLS 2011–2014 No. of cases	(1b) neg. binomial 2011–2014 No. of cases	(2a) OLS 2005–2014 No. of cases	(2b) neg. binomial 2005–2014 No. of cases	(3a) OLS 2011–2014 No. of cases	(3b) neg. binomial 2011–2014 No. of cases	(4a) OLS 2005–2014 No. of cases	(4b) neg. binomial 2005–2014 No. of cases
PO	Reference group	Reference group	Reference group	Reference group	4.202** (1.915)	1.518* (0.911)	–0.151 (0.654)	0.0342 (0.323)
PiS	–4.202** (1.915)	–1.518* (0.911)	0.151 (0.654)	–0.0343 (0.323)	Reference group	Reference group	Reference group	Reference group
SLD	–6.537* (3.495)	–2.317 (1.608)	0.720 (1.129)	0.124 (0.552)	–2.335 (1.979)	–0.799 (0.840)	0.569 (0.655)	0.158 (0.318)
AWS-UW	–	–	0.582 (1.489)	0.0525 (0.745)	–	–	0.431 (1.016)	0.0869 (0.500)
in	–3.842** (1.722)	–1.369* (0.811)	–0.839 (0.656)	–0.496 (0.346)	0.360 (0.674)	0.149 (0.325)	–0.990** (0.460)	–0.462* (0.252)
LPR-Samoobrona	–0.737 (0.479)	–0.258 (0.217)	–0.882*** (0.319)	–0.376** (0.160)	–0.737 (0.479)	–0.258 (0.217)	–0.882*** (0.319)	–0.376** (0.160)
Sex (1 = female; 0 = male)	0.602 (0.547)	0.201 (0.242)	–0.0129 (0.347)	0.0166 (0.163)	0.602 (0.547)	0.201 (0.242)	–0.0129 (0.347)	0.0166 (0.163)
Academic career (=1 if yes, =0 if no)	–2.471* (1.234)	–0.856 (0.553)	–0.447 (0.427)	–0.218 (0.205)	–2.471* (1.234)	–0.856 (0.553)	–0.447 (0.427)	–0.218 (0.205)
Function in the tribunal (=1 if yes, =0 if no)	0.781* (0.426)	0.281 (0.208)	–0.0768 (0.146)	–0.00804 (0.0701)	0.781* (0.426)	0.281 (0.208)	–0.0768 (0.146)	–0.00804 (0.0701)
Number of years in office	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Year FE	2.902*** (1.041)	0.972* (0.497)	4.419*** (0.796)	1.512*** (0.372)	–1.300 (2.787)	–0.546 (1.347)	4.570*** (0.682)	1.478*** (0.291)
Constant	–	–48.041	–	–17.737	–	–48.041	–	–63.025
Inalpha	58	58	135	135	58	58	135	135
Observations	0.310	0.095	0.544	0.215	0.357	0.095	0.400	0.215
(Pseudo) R-squared								

Source: own elaboration.

Note: Estimations based on cases brought to the tribunal by political actors. For negative binomial regressions we report pseudo R^2 .

* Significant at 10% level.

** Significant at 5% level.

*** Significant at 1% level.

Table 6

Selection to five-judges adjudication panels 2011–2014 (all judges nominated by PO, PiS and LPR-Samoobrona).

	(1) All cases	(2) Politically sensitive cases	(3) All other cases
Cases in total	370	27	343
5 PO, 0 PiS, 0 LPR	23 (6%)	4 (15%)	19 (6%)
4 PO, 1 PiS, 0 LPR	58 (16%)	7 (26%)	51 (15%)
4 PO, 0 PiS, 1 LPR	33 (9%)	4 (15%)	29 (8%)
3 PO, 0 PiS, 2 LPR	3 (1%)	0 (0%)	3 (1%)
3 PO, 2 PiS, 0 LPR	54 (15%)	2 (7%)	52 (15%)
3 PO, 1 PiS, 1 LPR	71 (19%)	3 (11%)	68 (20%)
2 PO, 3 PiS, 0 LPR	12 (3%)	1 (4%)	11 (3%)
2 PO, 2 PiS, 1 LPR	71 (19%)	4 (15%)	67 (20%)
2 PO, 1 PiS, 2 LPR	12 (3%)	1 (4%)	11 (3%)
1 PO, 4 PiS, 0 LPR	0 (0%)	0 (0%)	0 (0%)
1 PO, 3 PiS, 1 LPR	17 (5%)	0 (0%)	17 (5%)
1 PO, 2 PiS, 2 LPR	15 (4%)	1 (4%)	14 (4%)
0 PO, 4 PiS, 1 LPR	0 (0%)	0 (0%)	0 (0%)
0 PO, 3 PiS, 2 LPR	1 (0%)	0 (0%)	1 (0%)

Source: own elaboration.

Cases including Adam Jamróz, the nominee of SLD, not included.

all cases together. In columns (2) and (3) in turn we disentangle between these cases that can be considered politically sensitive (as defined above) and the rest. When looking at the distributions presented in columns (2) and (3), two important differences can be spotted. First, for the politically sensitive cases we observe relatively more panels with at least 4 nominees of PO as compared to all other cases. Indeed, panels with at least 4 nominees of PO account for 56% of politically sensitive cases and for 29% of all other cases. Second, for the politically sensitive cases we observe relatively fewer panels with at least 2 nominees of PiS as compared to all other cases. While panels with at least 2 PiS's nominees account for 47% of all other cases, they account for 30% of politically sensitive cases. In addition, among the politically sensitive cases PiS had

a majority (i.e. at least three nominees) in only 1 out of 27 cases (not even 4%). As far as 'all other cases' are concerned, PiS had a majority in 28 cases out of 343 (8%).

Although these observations may suggest that the selection process to panels adjudicating on politically sensitive cases was different from the selection process to panels adjudicating on all other cases, the evidence is based on simple descriptive statistics and thus should not be used to underpin far-reaching conclusions. To shed some more light on this, using Pearson's χ^2 test, we check whether the distribution of the number of PO's nominees in the one type of cases differs from the distribution of the number of PO's nominees in the other type of cases. The relevant test statistic is 9.764 with p-val. 0.082 (or 0.072 if significance is calculated by Fisher's exact

test), which suggests that indeed the selection process to the two types of cases might have been different. This interpretation is in line with our previous finding which indicated that in the period 2011–2014 the nominees of PO were assigned to politically sensitive cases more often than the nominees of other parties. The fact that the two distributions of PO's nominees differ from each other might also imply that the rule of assigning judges to adjudication panels was applied differently, depending on the type of cases. This, in turn, questions again whether the alphabetical rule, that was supposed to guide the assignment of judges to cases, was always obeyed. Indeed, with this rule in place we should not observe the difference between the selection of PO's nominees to panels adjudicating upon cases of high political clout and their selection to panels adjudicating upon cases that can be considered as less politically sensitive. What might potentially explain the difference is either the fact that the two types of cases have a systematically different distribution over time, or that some cases are intentionally registered with delay.

An important point that can be raised with respect to the statistics presented in Table 6 is that while the distributions of PO nominees to the two types of cases may differ, it is not clear whether this difference affected in any way the distribution of political influences in the tribunal. Indeed, it can be argued that for the politically sensitive cases we observe not only relatively more panels with at least 4 nominees of PO, but also relatively fewer panels in which PO have 3 nominees.¹⁵ For these reasons, the argument can continue, the overall ability for PO's nominees to form a winning coalition within a panel might have remained the same or even got worse. This is a legitimate concern. To provide some more insights on this issue, we turn to the so-called Shapley-Shubik index, that has gained increasing attention in political science literature. This index is used for analyzing the distribution of voting power among different actors taking part in a voting game (Roth, 1988). A simple voting game is represented by a characteristic function v that takes on only the values 0 and 1, and can be represented by the vector $[q; w_1, \dots, w_n]$, where w_i represents the number of votes cast by player i , and q represents the number of votes needed by a winning coalition. A coalition S is called winning if and only if $\sum_{i \in S} w_i \geq q$ (and

in that case $v(S) = 1$). The Shapley-Shubik index equals the proportion of random orders in which player i is "pivotal" for the outcome of the game, i.e. the proportion of random orders in which player i leaving the coalition turns it from a winning to a non-winning one (Shapley and Shubik, 1954).

In our case, we have three players in the game (one player being PO, the second player being PiS and the third player being LPR-Samoobrona) and the number of votes needed by a winning coalition equals to 3. The number of votes cast by each player depends on the composition of the adjudication panel and on the number of nominees from each party assigned to a particular case. The data presented in Table 6 allows us to calculate the Shapley-Shubik index for each party, separately for these cases that can be considered politically sensitive and for all other cases.

When we look at cases that are not politically sensitive, we have 222 (64.7%) panels in which the nominees of PO have at least 3 representatives; 29 (8.5%) panels in which the nominees of PiS have at least 3 representatives and 92 (26.8%) panels in which neither of the two parties have the majority (i.e. two of the three parties have two representatives and one party has one representative). Consequently, for panels adjudicating on 'all other cases', the Shapley-Shubik index takes on the following values: 0.736 for

PO, 0.173 for PiS and 0.089 for LPR-Samoobrona. When we turn to politically sensitive cases, we have 20 (74.1%) panels with at least 3 representatives of PO; 1 (3.7%) panel with at least 3 representatives of PiS; and 6 (22.2%) panels where neither of the two parties had a majority. In this case, the Shapley-Shubik index takes on the following values: 0.814 for PO, 0.111 for PiS and 0.074 for LPR-Samoobrona. Accordingly, compared with cases of lower political clout, in adjudication panels deciding upon politically sensitive cases PO (PiS and LPR-Samoobrona) had more (less) voting power. This result supplements our previous findings. In particular, it suggests that changing the selection process to politically sensitive cases, intentionally or not, increased the voting power of PO's nominees at the expense of nominees of PiS and of LPR-Samoobrona.

3.5. Further analysis

In order to provide further insights on the potential politicization of the tribunal, we now turn to the comparison between the selection to adjudication panels of four judges nominated by PiS (Maria Gintowt-Jankowicz and Wojciech Hermeliński, both nominated in November 2006; as well as Zbigniew Cieślak and Teresa Liszcz, both nominated in December 2006) and the selection to adjudication panels of four nominees of PO (Sławomira Wronkowska-Jaśkiewicz, nominated in May 2010; and Stanisław Rymar, Piotr Tuleja, and Marek Zubik, all nominated in December 2010).¹⁶ As before, we look at the period 2011–2014 in which all the judges just mentioned were members of the tribunal. What is important, given the alphabetical rule that should guide the selection of adjudication panels, judges nominated by PiS are clustered in the upper part of the alphabetical list of judges, whereas judges nominated by PO are clustered in the bottom part of the list.¹⁸

The relevant distributions are displayed in Table 7. Column (1) shows adjudication panels with different combinations of the four PO nominees. Column (2) is analogical but shows the panels to which the four PiS' nominees were assigned. Both columns refer to the period 2011–2014. As shown, and fully in line with our previous findings, compared to the four nominees of PiS, the four nominees of PO more often tend to adjudicate in panels consisting of at least three of them, and less often in panels having two of them. To see if this observation could reflect a systematic difference we refer again to Pearson's χ^2 test. The test comparing the distributions from columns (1) and (2) clearly suggests that they differ from each other. The relevant test statistics is 21.978 which allows to reject the null hypothesis of both distributions being the same at less than 1% significance level. To get some further insights on whether this could be related to potential influences of PO in the tribunal, we take advantage of the fact that the four nominees of PiS were present in the tribunal also in the period 2007–2010. This allows us to compare the distribution of their participation in adjudication panels in two four-year periods: 2011–2014 (column (2)) and 2007–2010 (column (3)). This may provide us with some information on whether we observe any change in the selection process of PiS's nominees after PO got majority in the tribunal. The rele-

¹⁵ As presented in Table 6, the number of panels adjudicating on politically sensitive cases in which PO had 3 nominees accounted for 18%. The respective number for 'all other cases' in turn was 36%.

¹⁶ While PO nominated two other judges earlier (Andrzej Rzepliński and Stanisław Biernat), they both soon became the president and vice-president of the tribunal, which, as shown earlier, decreases the number of cases adjudicated upon. Focusing on the four judges nominated by PO in 2010 assures that the four judges nominated by PiS and the four judges nominated by PO are more comparable to each other. As noted earlier, judge Marek Zubik was officially proposed by the coalition PO-PSL and was more closely associated with PSL rather than PO. However, during the whole period under analysis the two parties were in a close cooperation and formed together a governing coalition. Consequently, we treat all nominees proposed by this coalition in the same way.

¹⁸ Indeed, if we number the judges in the tribunal from 1 to 15, during the period 2011–2014, the four nominees of PiS occupied places (2, 3, 5, 8), whereas the four nominees of PO occupied places (10, 12, 13, 15).

Table 7
Distribution of adjudication panels with four – PO nominees and four-PiS nominees.

	(1) PO (2011–2014)	(2) PiS (2011–2014)	(3) PiS (2007–2010)
Party X has 0 representatives	75 (17.32%)	66 (15.24%)	63 (11.62%)
Party X has 1 representative	178 (41.11%)	164 (37.88%)	241 (44.46%)
Party X has 2 representatives	118 (27.25%)	164 (37.88%)	194 (35.79%)
Party X has 3 representatives	57 (13.16%)	33 (7.62%)	35 (6.46%)
Party X has 4 representatives	7 (1.62%)	0 (0%)	3 (0.55%)
Total number of panels	433	433	542

Source: own elaboration.

Four PiS's nominees are the following: Zbigniew Cieślak (appointed in Dec. 2006), Maria Gintowt-Jankowicz (appointed in Nov. 2006), Wojciech Hermeliński (appointed in Nov. 2006), and Teresa Liszcz (appointed in Dec. 2006). Four PO's nominees are the following: Stanisław Rymar (appointed in Dec. 2010); Piotr Tuleja (appointed in Dec. 2010), Sławomira Wronkowska-Jaśkiewicz (appointed in May 2010), and Marek Zubik (appointed in Dec. 2010, formally nominated by the coalition PO-PSL). Two other judges nominated by PO: Andrzej Rzepliński (appointed in Dec. 2007) and Stanisław Biernat (appointed in June 2008) are not considered here.

van χ^2 test statistic is 8.047, with p-value 0.090, suggesting that indeed this might have been the case and that the participation of PiS's nominees in adjudication benches differs between 2011–2014 and 2007–2010 in a statistically significant manner.

Further information providing some more details about these differences is presented in Table 8. Subsequent columns contain the distributions of different combinations of adjudication panels in various sub-periods. The top panel focuses on assignments of the four PiS's nominees. The bottom panel, in turn, reports the details on assignments of the four PO's nominees. For illustrative purposes, we test whether the observed frequencies from a given sub-period differ from the frequency that we would observe should the assignments to adjudication panels were random. As regards, the assignments of PiS's nominees it seems that the difference between the periods 2007–2010 and 2011–2014 documented earlier is not driven by any peculiar year. In the former period we observe consistent underrepresentation of panels in which PiS's nominees have zero representatives. On the other hand, in the period 2011–2014 we observe consistent underrepresentation of panels in which PiS's nominees have one representative and overrepresentation of panels in which PiS's nominees have two representatives (i.e. just below the number needed to form the winning coalition). As regards the assignments of the four PO's nominees, in turn, we observe consistent overrepresentation of panels in which they have three or four representatives (and so they can form a winning coalition within a panel). Again, this does not seem to be driven by any particular year.

While these two results may point to political determinants of the selection to adjudication panels, two caveats need to be presented. First, with respect to the mass of cases we do not find that the number of panels in which PiS's nominees have the winning coalition is systematically lower than what we should observe if the selection to panels were random. While the observed frequency is smaller than the assumed probability, the difference between the two is never statistically significant. Second, it could be argued that the cases in which the four nominees of PO had the majority in the adjudication panel were apolitical, and consequently the political alignment of the winning coalition in these cases was irrelevant. As we showed earlier, however, the picture based on the politically sensitive cases considerably weakens both these arguments.

4. Conclusions

The main aim of the presented research was to contribute to a better understanding of the functioning of constitutional court as an institution holding a special and important place in legal systems. Recent cross-disciplinary researches regarding the relevance of political ideologies affecting verdicts of constitutional court judges, reveal the importance of this topic. At the same time, there is only scant evidence on whether the fact that judges follow

their political sympathies is strategically used to affect the court's decisions. In this paper we tried to address this shortcoming by having a closer look at the functioning of the Constitutional Tribunal of the Republic of Poland. Our focus was on testing whether political alignment of the judges systematically determines the number of cases they adjudicate upon and whether adjudication panels are strategically selected to assure that judges with a given political alignment can form a winning coalition more often than judges appointed by a different political grouping. To achieve this end, we carefully analyzed all five-judges panels that adjudicated in the period 2005–2014, with a special attention to the period 2011–2014 when one of the parties (PO) dominated the tribunal by assuming the functions of the tribunal's president and vice-president as well as by having an absolute majority among the tribunal's members.

Our analysis suggests that, with respect to the mass of filed cases, political alignment does not seem to affect the number of panels (either absolute or relative) a given judge was assigned to. This portrayal however is different when we look at politically sensitive cases during the period 2011–2014. When we adopt this focus we observe that judges aligned with PO were assigned to more cases than the nominees of other parties. This in turn suggests that a strategic assignment to adjudication panels might have taken place when judges aligned with PO dominated the tribunal and the cases that were adjudicated upon where of higher political clout.

In line with this result, we also find that in the period 2011–2014 the distribution of various combinations of adjudication panels for politically sensitive cases was different than that observed for the cases that were not brought to the tribunal by political actors. Based on Shapley-Shubik indices, we find that this difference resulted in strengthening the voting power of PO's nominees in the cases of higher political clout. Taken together, the evidence we show suggests that the alphabetical rule, which should guide the selection of adjudicating judges, could not have been always in force. While under justified circumstances the president of the tribunal can allocate cases in a different order, our analysis suggests that this possibility might have been used for cases of higher political clout to a different degree than for cases of lower political clout. This, in turn, seems to be consistent with the argument that leaving the president some room for discretionary allocation of judges to adjudication panels can result in some form of political abuse.¹⁷ Another point is that the alphabetical order of appointments seems to be less justified than random selection to adjudicating panels, especially when political scene in a country is polarized.

¹⁷ It can be noted that similar charges were formulated by some constitutional judges as regards the functioning of the tribunal from the year 2017, i.e. when the presidency in the tribunal was assumed by a judge aligned with PiS. See the open letter of seven judges – 6 aligned with PO and 1 aligned with PiS – to the president of the tribunal on 5th of December 2018 (<https://oko.press/images/2018/12/List-Se%C4%8Dzio%C4%81w-TK.5.12.2018-r..pdf>).

Table 8

Selection of the four PiS's and the four PO's nominees to five-judges adjudication panels over time.

Adjudication panels with	Assumed probability	Observed frequency					
		2007–2010	2008–2010	2009–2010	2011–2014	2012–2014	2013–2014
0 nominees by PiS	15.38%	11.62%**	10.78%***	7.95%***	15.24%	16.67%	16.22%
1 nominee by PiS	43.96%	44.46%	43.61%	48.54%	37.88%**	36.01%***	36.49%**
2 nominees by PiS	32.97%	35.79%	38.60%**	35.98%	37.88%**	38.39%**	40.09%**
3 nominees by PiS	7.33%	6.46%	6.27%	6.28%	7.62%	7.14%	4.95%
4 nominees by PiS	0.37%	0.55%	0.75%	1.26%*	0.00%	0.00%	0.00%
0 nominees by PO	15.38%				17.32%	18.15%	18.02%
1 nominee by PO	43.96%				41.11%	38.39%**	38.74%
2 nominees by PO	32.97%				27.25%**	30.95%	31.53%
3 nominees by PO	7.33%				13.16%***	11.31%***	9.91%
4 nominees by PO	0.37%				1.62%***	1.79%***	1.80%***

Source: own elaboration.

Note: ***, **, and * denote 1%, 5% and 10% significance level respectively in the two-sided test comparing the assumed probability with the observed frequencies. PiS's nominees are the following: Zbigniew Cieślak (appointed in Dec. 2006), Maria Gintowt-Jankowicz (appointed in Nov. 2006), Wojciech Hermeliński (appointed in Nov. 2006), and Teresa Liszcz (appointed in Dec. 2006). PO's nominees are the following: Stanisław Rymar (appointed in Dec. 2010); Piotr Tuleja (appointed in Dec. 2010), Sławomira Wronkowska-Jaśkiewicz (appointed in May 2010), and Marek Zubik (appointed in Dec. 2010, formally nominated by the coalition PO-PSL). Two other judges nominated by PO: Andrzej Rzepliński (appointed in Dec. 2007) and Stanisław Biernat (appointed in June 2008) are not considered here.

Overall, our analysis seems to be supportive for arguing that political influences translate into the functioning of constitutional court, but in a nuanced manner. While we do not find that political alignment impacts the assignment to adjudication panels with respect to the mass of cases, it does seem to strategically affect the selection of judges adjudicating upon politically sensitive cases. We believe that our study brings a new perspective on the decision-making of the Polish Constitutional Tribunal previously analyzed i.a. by Kantorowicz and Garoupa (2016). Our empirical strategy is also a *novum* when compared to other available researches on the relevance of political ideology for behavior of constitutional judges (e.g. Franck, 2009; Amaral-Garcia et al., 2009; Garoupa et al., 2013). Whereas our analysis applies to a specific case of Poland, it can be easily implemented also in other contexts in which constitutional court judges make their decisions not only in a full bench, but also in smaller panels. More systematic empirical analysis may allow for formulating reliable and data-based recommendations for policies and legal framework, in order to create settings conducive to the optimal functioning of the key judiciary institutions.

Disclaimer

The views, thoughts, and opinions expressed in the text belong solely to the authors, and not necessarily to the authors' employer, organization, committee or other group or individual.

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