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Evidence from Government Court Briefs

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Abstract

The European Court of Justice (ECJ) is commonly described as a powerful international force for legal integration. Indeed, past studies indicate that the ECJ has developed a supranational legal order that trumps national law in a broad range of economic policy areas. But this depiction of an autonomous Court driving European integration beyond the desires of the member-states is dubious. We would expect the Court, whose existence depends on an international treaty and whose authority depends on national enforcement, to have strong incentives to decide cases with an eye to concerns of national governments. We argue that past studies--which were based on a small number of case studies--cannot demonstrate whether the Court is or is not sensitive to member-state interests. Based on novel dataset of all ECJ decisions over three years, we develop an empirical test of member-state influence on ECJ decisions and demonstrate that the Court does temper its decisions to accommodate member-state concerns.

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The European Union (EU) is widely considered to be one of the most successful international organizations ever created, responsible for a wide array of policies including economic, monetary, social, and environmental policy. However, while the EU is now legally responsible for much of what used to be the sole jurisdiction of national governments, these powers are only meaningful if governments actually follow EU law. Thus, the European Court of Justice (ECJ) – as the body ultimately responsible for enforcing compliance with EU law – has become the focus of much study.

The ECJ faces at least two significant challenges in trying to enforce EU law over a set of independent minded states. First, the ECJ has no way of making a government obey its rulings. Thus, at least in theory, ECJ decision-making may be influenced by the possibility of governments ignoring undesirable rulings. Second, governments have the power to both revise the EU treaty bases and pass secondary legislation at the EU level. Thus, ECJ decision-making also may be influenced by the possibility of governments changing the legal bases upon which the Court made its decision if governments do not like the Court's application of existing law.

Existing evidence suggests that, despite these challenges, the ECJ is successfully enforcing EU law against recalcitrant governments. Governments are regularly brought to court for violations of EU law, governments are ruled against the vast majority of the time, and governments regularly comply with the Court's decisions. Further, when making decisions, the Court rules with the Commission position roughly 80% of the time, and appears little influenced by government arguments in a case. Thus, the Court appears unafraid of ruling against governments, perfectly capable of getting compliance with adverse decisions, and primarily influenced by the arguments of an ostensibly apolitical Commission.

However, while this evidence appears persuasive, recent work demonstrates that it is actually anything but conclusive (Carrubba, forthcoming). In fact, governments being taken to court regularly, being ruled against regularly, and complying regularly could be observed even if the court was effectively incapable of enforcing adverse decisions against national governments. Thus, it remains an open question whether threats of noncompliance, or treaty and/or secondary law revision, are credible threats that actually constrain the ECJ's ability to enforce its interpretation of EU law.

This study analyzes a year's worth of (1997) ECJ decisions in order to evaluate to what degree these threats matter. The analysis includes a number of unique features. First, unlike previous large N studies (e.g. Stone Sweet and Brunell 1998), this study allows us to predict actual case outcomes; did the Court decide for the plaintiff or defendant, and is there evidence that this decision is influenced by possible government reactions to that decision? Second, the dataset codes information not just by case, but also by within-case legal issues. This coding scheme allows us to explore whether the ECJ is following different strategies over how it decides cases and how it decides on particular legal issues raised within cases. For example, we can determine whether the ECJ is following the "Marbury versus Madison" strategy of ruling in favor of the government's position on the case, while using its ruling to establish legal precedent inconsistent with the longer-term goals of the government. Finally, the dataset includes all cases decided by the ECJ, not just those referred to it by national courts. Doing so is valuable for several reasons. First, while preliminary rulings have grown dramatically in number, they are historically a minority of decisions. Thus, we know very little about the decision-making of the Court on the cases that represent the majority of its decisions. Second, most of the cases that involve national governments as litigants are direct actions, not preliminary rulings. If we are

interested in learning about how the ECJ and national governments engage on EU legal issues, then we obviously want to look beyond preliminary rulings. Finally, considering the full set of cases allows us to evaluate whether the Court treats cases arising through national courts differently from cases brought before the Court directly.¹ This is an important issue. Past research (e.g., Alter 1996) has identified a variety of reasons for why these cases, exactly because they originate in national courts and involve preliminary rulings, may induce particular behavior by litigants and the ECJ that would be absent in direct actions. The rest of paper proceeds as follows; part 2 provides a more detailed overview of the literature's theoretical expectations; part 3 presents our test; and part 4 concludes.

II. ECJ Decision-Making and Government Influence

The European Union (EU) is a highly unusual international regulatory regime. While most international regulatory regimes only allow governments to bring cases against other governments for noncompliance with the regime's rules, legal standing in the EU is quite widespread. In particular, challenges can arise through one of two routes, direct actions and preliminary references. In 2004 (the latest available data), the ECJ decided 262 cases arising from a national court seeking a preliminary ruling, 299 cases involving direct actions brought by the Commission or a member-state against a member-state, 89 appeals, and 15 cases of other character (Annual Report, 2004, European Court of Justice).

Direct actions are cases brought directly to the ECJ by either the Commission – the EU civil service in charge of monitoring implementation of EU law, among other responsibilities –

¹ Of course, one must recognize the caveat that this dataset only covers one year's worth of decisions. It is possible that Court behavior changed over time (Tsebelis and Garrett 2001). Independent of this fact, the evidence brought to bear in this study is the first of its kind and more inclusive in important ways than previous case studies or large N

or a member state government. These cases mainly consist of cases brought by the Commission against a member-state for failure to fulfill its obligations under the treaties or cases brought by member-states against the Commission to annul a Commission decision. Preliminary references arise when a private litigant brings a case to his/her national court, the national court makes a determination that EU law is relevant to the case, and the national court asks the ECJ for an interpretation of EU law. Once that opinion is passed back down to the national court, the national court then makes a final ruling. Importantly, while the Treaty of Rome originally did not allow charges of noncompliance with EU law to be brought through preliminary references, subsequent rulings by the ECJ transformed the preliminary ruling system into one that could be used to challenge government noncompliance.²

This breadth of standing is central to arguments that the ECJ is capably enforcing EU law over recalcitrant governments. While governments only rarely bring cases against other governments, as stated previously, we now observe hundreds of cases a year being brought by the Commission and private litigants, many of which are brought against governments for noncompliance with EU law. However, while opportunities for the Court to rule against governments are now widespread, some have argued that governments themselves are far from powerless. In particular, governments retain both legal and extra-legal means through which they can try to influence how the ECJ actually decides on the cases it hears. The degree to which these potential tools actually influence ECJ decision-making has been a matter of some debate.

analyses. Thus, while being able to analyze all cases decided by the ECJ is a valuable long-term goal, we believe that this analysis can still provide valuable new insights.

² See Alter (1996, 1998, 2001), Stone Sweet and Brunell (1998a, 1998b), Garrett (1995), Burley and Mattli (1993), and Mattli and Slaughter (1995, 1998) for discussion of this transformation.

Legal Constraints

Under the Treaty of European Union, member state governments have the power to pass treaty revisions and secondary legislation. Revising treaty law is a two-step process. First, the member state governments must convene an intergovernmental conference, at which any proposed changes must be agreed upon unanimously if they are to pass. Second, the new treaty then must be ratified by each of the member states. This ratification process entails approval from the national legislature and, in some cases, approval by popular referendum. Secondary legislation, by contrast, is solely a product of bargaining among the EU legislative institutions. The exact procedure by which a proposal becomes law depends upon the substantive content dealt with by the proposal. However, independent of the issue area, governments (through their representatives on the European Council of Ministers) are always free to force the drafting of a proposal, to amend whatever proposal is produced, and to decide whether a proposal actually passes.

Some scholars have argued that government threats of treaty revision and secondary law influence how the ECJ decides on cases. In particular, they argue that governments can threaten to use these tools to change EU law if the Court interprets existing law inconsistently with how the governments want the law interpreted. Anticipating this reaction, they then argue that the Court actually may decide simply to interpret EU law consistent with government preferences in the first place. For example, Garrett and Weingast write:

“EC members maintain considerable control over the course of rulemaking through the Council of Ministers. More fundamentally, the continued legitimacy of the court and its rulings is contingent upon the support of governments of EC members. Put simply, the implicit threat of intervention by the member states, either through decisions in the Council of Ministers or through noncompliance with court decisions, ultimately constrains judicial activism in the EC” (Garrett and Weingast, 178, 1993)

Other scholars disagree. First, these scholars point out that passing treaty revisions is exceedingly difficult (Alter 2001). As stated above, not only must governments agree upon the changes by unanimous consent, but the treaty then must be ratified by each of the member states. Even if successful, this process will take years. As a result, skeptics like Mark Pollack (1997) can reasonably conclude, “the threat of treaty revision is essentially the ‘nuclear option’ – exceedingly effective, but difficult to use – and is therefore a relatively ineffective and non-credible means of Member State control”.

In contrast, secondary legislation is a comparatively easy process; while passage of some legislation still requires unanimous consent in the Council of Ministers, there is no need for national ratification, and much legislation now only requires a qualified majority vote.³ However, these scholars still argue that constraining the court through secondary legislation is quite unlikely for two reasons. First, even though a qualified majority vote is easier to pass, it is still a very high threshold. As a result, any government or governments that do not like a particular court decision must cobble together a large supermajority if they want to use secondary law to bring the Court back into line. This challenge would be relatively modest if court decisions affected all governments identically. However, these scholars argue, court decisions generally have cross-national distributive implications, and thus assembling this supermajority, while easier than achieving unanimous consent, is still going to be difficult. This challenge is often described as “the joint decision trap” (Scharpf 1988). Second, some scholars also believe that the Court simply will not be influenced by these threats (Mattli and Slaughter). Thus, even if governments could assemble the votes necessary to pass secondary legislation, the court will not allow this threat to influence how it actually decides on the case.

Extra-Legal Constraints

Scholars also have argued that governments simply will circumvent undesirable Court rulings if necessary (Garrett, Keleman, and Schultz 1998; Garrett 1995; and Garrett and Weingast 1993; Carrubba, forthcoming). Such evasion, at least in theory, can take many forms, ranging from anything as overt as blatantly ignoring a decision, to abiding by the decision only as it applies to that particular case, to trying to appear as if they are complying fully, while really avoiding the substantive impact of the ruling (e.g. passing a new national law that appears to be in compliance with the Court's interpretation of EU law, but in reality is not). Whatever the particular form of noncompliance, these scholars have argued that a credible threat of noncompliance may influence how the Court rules on a case. Similar to the argument made above, if the Court is concerned with its perceived legitimacy, it may not want to be seen having its rulings ignored, or otherwise circumvented, and, as a result, the Court might choose not to rule against the government in the first place.

Note that noncompliance may provide member states with an even more powerful instrument of control over the ECJ than legal constraints, as it is not subject to the joint decision trap. Conceivably, a particularly costly ECJ ruling could motivate a member government to ignore the financial sanctions handed down by the Court even without the support of other EU governments.

Once more, the extent to which this threat actually influences Court behavior is a matter of some debate. Three counter-arguments are made. First, scholars claim that the transformation of the preliminary ruling system seriously constrained governments' room for maneuver (Alter

³ Under the qualified-majority rule in the Council, each member-states is allocated a number of votes roughly proportionate its population. Member-states than cast these votes on legislation, which is only adopted if the total

2001). In particular, cases arising through the preliminary ruling system are cases in which national courts, not the ECJ, makes the final ruling. As a result, if a government loses a case involving a preliminary ruling, and that government does not want to comply, the government is going to have to ignore a domestic court's ruling. To the degree that governments do not want to be seen violating their domestic judicial institutions, this transformation therefore will curtail government noncompliance. Recall, however, a large number of cases (for most years, the majority of cases) do not reach the ECJ via the preliminary rulings system. Thus, this transformation cannot, in a general way, eliminate the issue of member-state compliance with Court rulings.

Second, as of 1996, the Commission and ECJ were granted new powers specifically designed to help encourage government compliance with adverse court rulings. Prior to 1996, if a government ignored an adverse ruling, the only option available to the Commission was to bring the government back to court over and over again, hoping to embarrass the government into compliance. However, as of 1996, the ECJ is now allowed to impose financial penalties for noncompliance with previous rulings (article 228 EC). Further, these penalties can be made contingent not only on the extent of the violation, but also on the size of the violator's economy. This procedure has been used infrequently. Some scholars interpret this as proof that the mechanism is having the desired affect of inducing states to comply (Tallberg 2002). Of course, an alternative interpretation is that the Commission is reluctant to use the procedure. The Commission must consider the political costs associated with bringing a member-state before the Court to pursue financial penalties. Furthermore, the Commission must pursue a lengthy process to even engage the Court about a financial penalty. Consequently, the infrequent use of this procedure can also be interpreted as evidence of its insignificance for compliance.

votes supporting the legislation surpasses a supermajority threshold.

Finally, some scholars make a legalistic argument that governments are constrained to obey Court rulings because the law acts as a “mask and shield” for ECJ decisions (Burley and Mattli 1993; Mattli and Slaughter 1995, 1998). In particular, the “mask of technical discourse” often hides the political repercussions of a case from governments, and ““the shield” of domestic norms of rule of law and judicial independence” provides a normative constraint on a government’s willingness to subvert court rulings (Burley and Mattli 1993).⁴

In sum, it is unclear to what degree governments are able to influence ECJ decision-making. Governments certainly can threaten passing treaty revisions, passing secondary legislation, or simple noncompliance if they do not like the way the Court is ruling. However, for the reasons described above, it is unclear how credible these threats really are, or whether the Court would condition its behavior on those threats, even if they are credible. In the next section, we specify a test that will allow us to evaluate not only whether, but also to what degree the Court does condition its behavior on these potential government threats.

One final note is warranted regarding the process by which cases come before the ECJ. A common concern with testing for political influences on judicial decision-making is that courts might select cases to decide based on exactly the political concerns we might expect to influence their legal decisions. If, for example, a court were very sensitive to a particular party’s (e.g., a member-state’s) interests and suspected that these interests would conflict with an appropriate legal ruling in a case, then the court would have an incentive to avoid the case. This sort of selection bias would result in a set of court decisions where we would not see political influence, even if the Court is very sensitive to political influence. We are not concerned about this issue in

⁴ Others who have made more legally based arguments include Stein (1981), Rasmussen (1986), Cappelletti, et.al. (1986), Mancini (1991), Weiler (1991, 1993, 1994), Volcansek (1993), and Wincott (1995). Also see Shapiro and Stone (1994), and Stone Sweet and Brunell (1998a, 1998b) for other arguments.

the context of the ECJ because the Court does not exercise strict or significant docket control. Unlike the United State Supreme Court, the ECJ has little opportunity to manage its agenda.

III. Empirical Section

To examine for the existence and degree of member state influence on ECJ decision-making, we coded information on the 615 cases argued before the court over three years, 1989, 1993, and 1997. While we have no reason to consider these years unusual, we also do not necessarily consider them generally representative. Scholars have speculated that the Court's willingness to pursue European legal integration and confront member-states has varied over time. In addition, the membership of the Court varies over time, with slow but steady changes in membership. Thus, we obviously must be cautious in inferring anything from our to Court behavior in other periods. It is important to note that we are in the process of collecting similar data for all other years of ECJ decisions. Thus, this paper serves as a pilot analysis for a much broader study.

In this year, four types of cases dominated the ECJ's docket: preliminary references (360), direct actions taken against a member state (101), actions for annulment of Community institution decisions (73), and cases involving staff regulations covering employees of the European Union (38).

Cases described in the *Annual Report of the European Court of Justice* consist of four sections. The first section summarizes the facts of the case and all of the litigants' formal arguments. The facts include information such as the type of case, important dates associated with the case, identities of the litigants, et cetera. The formal arguments include all legal issues that each side believes should influence the outcome of the case. For example, a defendant might

raise four points in a case, two suggesting that the plaintiff's complaint should not be admissible in court, and two suggesting that the case should be dismissed on its merits.

The second section, often appended to the end of the summary of the litigants' arguments, consists of reported opinions filed by third parties, including governments, EU institutions, and private actors. These opinions comment on whatever legal issues the opinion-giver wishes to discuss, and generally come down in favor of either the plaintiff or defendant.⁵

The third section presents the conclusions of the Advocate General (AG). Every case is assigned to a judge of the Court for an initial reading. This judge, the AG, is responsible for working through all of the relevant arguments, including, but not exclusive to, the legal issues raised by the litigants, and issuing an initial opinion on how the case should be decided by the Court. The AG's advisory opinion is part of the materials considered by the Court when it makes a definitive judgment.

The final section of the Report summarizes the conclusions of the Court. The Court's decision is presented as a series of points, in which each point disposes of a legal issue, and a conclusion, in which the conclusion summarizes how the case as a whole should be disposed. While the Court frequently addresses all of the legal issues raised in a case, it does not always do so.⁶ Importantly, the Court can rule in favor of one litigant for one or more of the legal issues, but in favor of the other litigant on the case as a whole. Returning to the example above, the Court might decide that the case is admissible on both counts raised by the defendant, but agree that the defendant should win based on the substantive merits of the case.

⁵ Unfortunately, not all opinions are included in the Annual Reports. Sometimes opinions are simply omitted. For example, the Commission now has a policy of filing an opinion on every case. However, many of these opinions are left unrecorded in the Annual Reports. Sometimes opinions are only mentioned. For example, not infrequently, the Annual Report mentions that a government filed an opinion, but does not indicate the actual content of that opinion.

⁶ While legal issues are left un-addressed under a variety of circumstances, they are most often left un-addressed when the Court rules that a complaint is inadmissible. Sometimes the Court does not comment on the substance of

From this information we created two datasets, one with each *legal issue* in a case as the unit of analysis and one with the *case*, which sometimes consists of multiple legal issues, as the unit of analysis. These two datasets allow us to explore two separate, though related, questions. Analyzing case outcomes obviously allows us to determine if the final decision of the Court is influenced by member-state preferences. Analyzing decisions on individual within-case legal issues allows us to determine if the Court is influenced by government preferences even when those decisions may not affect the actual outcome of the case.⁷

This distinction is important, because scholars have argued that the Court has promoted its legal agenda in the face of government opposition not only by simply making final rulings on cases that governments dislike, but also by developing legal precedent, the impact of which only becomes apparent over time. For example, Alter (1998) argues that politicians are mostly concerned with the immediate negative consequences of the case, while the ECJ takes into account the longer-term implications of the overall legal question. Given these differences in time horizons, Alter claims that the ECJ can take advantage of “this political fixation on material consequences of cases to construct legal precedent without arousing political concern” (Alter 1998: 131). In an empirical examination of this practice, Trevor Hartley noted:

“A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-

an inadmissible complaint on its own volition, and sometimes at the request of defendants. Interestingly, the Commission is not hesitant to employ this tactic.

⁷ Although generally there was one significant issue central to determining who actually won the case, most also included one or more additional legal issues concerning interpretations of the case law. Consequently, testing ECJ decisions on the case as a whole does not capture all of the court’s opinions expressed in the case. An example of this is seen in case C-340/94. The Court found that the definition of an employed person for the purposes of social security should be left to legislation from each member state. The Court then clarified two other related legal issues. First, Community law does not preclude the legislation of one of the two member states from insuring the person in question. Second, Community law does not preclude one of the two member states from determining the amount of contributions to be paid.

affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed” (Hartley 1988: 78-79).

By examining ECJ decision-making at the legal issue unit of analysis, we are able to test the influence of member state opinion over the formation of legal principles.

In both datasets, we constructed a variable indicating whether the ECJ decided in favor of the plaintiff (1) or defendant (0).⁸ This will serve as the dependent variable in the analysis. The datasets also include variables characterizing the identity of the plaintiff and defendant, and the stated position of third parties (via formal observations) on the legal issues or case. Obviously, for cases with multiple legal issues, the coding of a third party’s position on the case was sometimes difficult. For example, national governments might argue in favor of the plaintiff’s position on one legal issue and against the plaintiff’s position on another. How then should one code whether the government was in favor of the plaintiff’s position or the defendant’s position on the case as a whole? We adopted the following rules. First, if an actor, be it a government or the Commission, only made observations that supported one of the two litigants, that actor was coded as having supported that litigant for the case as a whole. Perhaps surprisingly, this decision rule was sufficient to code most observations. For those cases in which an actor made observations that supported different litigants over different legal issues, we returned to the case, identified which observation pertained to a legal issue that would determine the outcome of the case, and coded the actor as intervening in favor of the litigant for whom that legal issue pertained. This coding scheme sufficed to code all recorded government or Commission observations by case.

⁸ In preliminary reference cases (article 234) the ECJ answers the legal questions referred by the national courts and does not assess damages in favor of the plaintiff or defendant. This is not to say, however, that Court decisions cannot be interpreted in favor of either the plaintiff or defendant. In each individual judgment, it is relatively easy to see the implications of the Court’s decision on each litigant’s case.

We followed the equivalent exercise for the ECJ decision itself. If the ECJ ruled in favor of one litigant for all legal issues on which the ECJ commented, we coded the ECJ as ruling in favor of that litigant for the case. For all remaining cases, we determined which legal issue actually determined the outcome of the case and coded the case accordingly.

Hypotheses and Tests

As stated previously, governments have two potentially credible threats with which to try to influence ECJ decision-making; threats of legislative override, and threats of noncompliance. Testing whether the Court is influenced by one and/or the other of these threats requires an objective measure of government preferences over Court decisions, and an operationalization of those government preferences that allow us to discriminate between the threats.

We use the observations filed by governments as an indicator of how the governments would like the court to rule. While there might be particular circumstances under which a government would choose to strategically file a brief on behalf of one litigant, while sincerely preferring that litigant to lose, we presume for now that these circumstances will be rare at best.⁹ Thus, we assume that briefs are revealed preferences; if one is filed for the plaintiff, the government prefers that the Court rule on that issue in favor of the plaintiff, if one is filed for the defendant, the government prefers that outcome, and if no brief is filed, the government is indifferent.

To test for the threat of override, we need a measure that captures the likelihood with which governments can successfully pass the necessary treaty revision or secondary law. Thus, we created a variable that measures the difference between the total number of member state

⁹ Future research will explicitly examine the question over the conditions under which a government chooses to file a brief.

government observations made in favor of the plaintiff and the total number of member state government observations made in favor of the defendant. This variable is labeled *Net Gov Observations*.¹⁰ Presumably, the more observations on behalf of one litigant, and the fewer on behalf of the opposing litigant, the easier it should be to assemble the votes necessary for a legislative override, and therefore the more credible should be the threat. If the Court cares about this threat, therefore, the more net government support for a litigant, the more likely we should see the Court should decide in favor of that litigant.¹¹ This leads to hypothesis one.

H1: If member states influence the ECJ with an implicit threat of secondary legislation or treaty revision, the coefficient of *Net Gov Observation* should be statistically significant in the positive direction.

To test for the threat of noncompliance, we need a measure that captures the conditions under which a threat of noncompliance is credible. Government threats of noncompliance should be more credible when 1) governments are litigants, and 2) other governments signal support for the government's position. The first constraint is straightforward. If a government is a litigant, it can simply choose to ignore an adverse ruling. Thus, a threat of noncompliance is eminently

¹⁰ We identify a government having made an observation on a case or a legal issue as defined in the previous section.

¹¹ Note that we considered two alternative measures in our analysis. The first alternative is a simple weighting of each observation by the number of votes that observer casts in the Council. That is, we summed the vote weighted number of observations on behalf of the plaintiff and subtracted from it the vote weighted number of observations on behalf of the defendant. This measure is a better characterization of the legislative override threat when the Council is voting by Qualified Majority (QMV), since it captures how many Council votes are on each side of the issue. The second alternative introduces the notion of the blocking minority. That is, under QMV, roughly only 28% of the votes are needed to blocked passage of a piece of legislation. Thus, fifty percent of the votes on behalf of a plaintiff might be a serious threat of override when no one is supporting the defendant, and somewhat of a threat when fifteen percent of the votes support the defendant, but it is almost no threat if thirty percent of the votes support the defendant. In the last scenario, the Court knows that it is free to vote for the plaintiff or the defendant, since there are enough votes on each side of the issue to prevent legislative override (pending some sort of a logroll). To capture this feature of the QMV rule, we first calculated the percentage of the Council votes "cast" on behalf of a litigant (one variable calculated the percentage for the plaintiff and one for the defendant). Next we calculated the the percent of votes needed to form a blocking minority on behalf of each litigant, where the values are capped at one if the necessary number of votes for a blocking minority are exceeded. We then created two variables, multiplying the percentage of votes for each litigant by one minus the percent of votes necessary to form a blocking minority on behalf of the other litigant. Results are generally robust across all three specifications.

credible if the case involves a government.¹² The second constraint arises from the existing literature. As argued most recently by Carrubba (2005), international agreements often rest on fragile agreements in which participants benefit if everyone complies with the agreement, but every participant also has an incentive to defect from the agreement if they think they can get away with it. The key to continued cooperation in such an environment is the threat of sanctioning by other governments. That is, if other governments will punish a defector for violating the agreement, then a government might decide that the cost from defecting from the agreement exceeds any short-term benefit. As such, punishment for being ruled in violation of EU law and then ignoring that ruling is less likely the more governments come out in favor of the defending government's position. And, thus, the threat of ignoring an adverse ruling will be more credible the more governments come out in support of the defending government.

Importantly, this analysis does not yet discriminate between whether the Court is responding to threats of override or threats of noncompliance. While a threat of noncompliance should exclusively exist in cases where governments are litigants, threats of override could exist whether governments are litigants or not. Thus, observing that Court decisions are correlated with government observations when governments are litigants is not discriminating in and of itself. However, what should be discriminating is the magnitude of the effect. As discussed previously, override requires at a minimum a qualified-majority vote, and often requires unanimity. Noncompliance, on the other hand, is a unilateral action. Thus, because noncompliance is an easier threat to execute, we should expect Court decisions to be more sensitive to threats of noncompliance than to threats of override. To operationalize this

¹² One might argue that the threat is more credible when a government is a defendant than when a government is a plaintiff. Noncompliance with an adverse ruling as a defendant simply entails ignoring the ruling, while noncompliance with an adverse ruling as a plaintiff might require the government making the defendant follow its

expectation, we interacted the *Net Gov Observations* variable with a dummy variable that takes a value of one if a government is a litigant. This variable is labeled *Net Gov Observations for*

Govs. Hypothesis two describes the expected relationship.

H2: If member states influence the ECJ with an implicit threat of unilateral noncompliance, then the coefficient of an interactive variable (*Net Gov Observations X Gov is a Litigant*) should be statistically significant in the positive direction.

We also then interact *Net Gov Observations for Govs* with a dummy variable that takes a value of one if the case is an article 177 preliminary ruling. We include this additional interaction to test for the possibility that threats of noncompliance are less effective when cases come through the national court system. This could be true for two reasons. First, as Pollack (1997) and others have argued, governments may be more hesitant to ignore adverse Court rulings when those rulings are made by national courts. Second, in preliminary rulings, the ECJ is simply handing down clarifications of EU law, which the national courts can then choose to do with as they wish. Thus, even if the ECJ offers a ruling that contains undesirable implications for the national government, if the national court does not follow the ECJ's ruling there will be no need to engage in noncompliance. Hypothesis three describes the expected relationship.

H3: If member states only influence the ECJ with an implicit threat of unilateral noncompliance in non-article 177 references, then the coefficient of an interactive variable (*Net Gov Observations X Gov is a Litigant X Article177*) should be statistically significant in the negative direction and of the same magnitude as the coefficient from the term un-interacted with the article 177 dummy.

Controls

While government observations plausibly can act as indicators of government preferences over case outcomes, they may also be more than that. In particular, government observations may

wishes despite the Court ruling. We performed the analysis both by considering any case in which a government was a litigant and only when the government was a defendant and the results were identical.

simply be signals of the quality of each litigant's case. The better the case, all else equal, the more likely a government will file an observation agreeing with that litigant's position. If correct, we might find a correlation between government observations and Court decisions even if the Court is not responding to government threats of override or noncompliance.¹³

To control for this possibility we include an indicator of the Advocate General's (AG) position on the case. As discussed previously, the AG is a judge, not on the chamber assigned to hear the case, who initially vets the case. That is, the AG reviews the history of the case, any materials or arguments filed by the litigants and all observations filed by third parties, and then the AG writes an initial opinion on the case. All these same materials, plus the AG opinion are then considered by the Court before the Court itself issues its opinion. If government observations are simply valid legal arguments, those arguments should influence the AG's position just as much as they influence the chamber deciding the case. However, the same is not true if the observations are signals of threats of override or noncompliance. Simply put, government threats of override or noncompliance are not credible against an individual whose ruling is just an advisory opinion. There is no consequent law to override, and not outcome with which to not comply. Thus, by including an indicator of whether the AG supports the plaintiff's or the defendant's position (coded one if the AG supports the plaintiff), we can control for the possibility that government observations are simply indicators of valid legal arguments.

We also include additional controls for a variety of other factors that may influence Court decisions. First, we consider whether the Commission is a party to the case and, if not, whether it submitted a written observation on the legal issue (or the case) on behalf of the plaintiff or

¹³ This relationship would also hold if government observations are providing pertinent information and thereby helping persuade the Court to make the desired decision. Thus, we cannot distinguish between observations mattering because they are signals of the quality of a case versus making legally relevant arguments in an effort to

defendant. The Commission is the source of all cases in our dataset where member-states are brought before the court as defendants in a direct action. In choosing to pursue a member-state to the Court for infringements, the Commission has obvious incentives to choose cases it expects to win. Thus, the likelihood of an ECJ decision against a member-state may vary with whether the Commission is the plaintiff. Furthermore, we could imagine the Court is politically sensitive to the position of the Commission in all cases because the Commission is an important source of cases for the Court. If we believe that judges on the Court have policy goals they would like to pursue through rulings, then they have a vested interest in inducing the Commission to use the Court.¹⁴ Obviously, generally ruling against the Commission or ignoring its observations would be a poor way to proceed. Thus, we are concerned that the position of the Commission may influence ECJ decisions and we want to control for it. To that end, we have created dummy variables identifying whether the Commission is a plaintiff or defendant in the case and whether the Commission has made an observation supporting the position of the plaintiff or defendant.

Finally, we created variables for other characteristics of the case. First, we control for the types of plaintiffs and defendants. Our dataset distinguishes between administrative agencies, private parties, and other litigants (e.g., the European Parliament) as parties to a case. We include dummy variables for these parties, using private parties and other litigants (of which there were only a few) as the baseline category. Including these controls allows us to isolate the effect governments as parties to the case from that of administrative agencies at the national or subnational level. Second, we control for the type of action, by including dummies for each of the treaty bases under which an action can be brought. Here we omit article 177 preliminary

persuade the court of the relative merits of a position. Either way, observations for the plaintiff and observations for the defendant should matter equally.

¹⁴ Indeed, scholars have made exactly this argument with respect to the ECJ inducing national courts to refer cases through the preliminary ruling procedure (Alter 2001).

rulings as the baseline category.¹⁵ And finally, we control for whether the chamber hearing the case was a panel of three, a joined panel of 5 or 7 judges, or a plenum of nine or more judges. Again, dummies were created, with the omitted category being panels of three judges. Tables 1 and 2 present some summary statistics on these variables for the legal issue dataset.

Table 1: Descriptive Statistics for Dataset of 1989, 1993, and 1997 ECJ Decisions by Legal Issue (N=880)

Variable	Mean	Standard Deviation	Minimum	Maximum
<i>ECJ Ruling for Plaintiff</i>	0.53	0.49	0	1
<i>Net Gov Observation</i>	-0.23	1.04	-6	3
<i>AG Support for Plaintiff</i>	0.53	0.50	0	1
<i>Commission Observation_{Plf}</i>	0.42	0.49	0	1
<i>Commission Observation_{Def}</i>	0.37	0.48	0	1
<i>Commission is plaintiff</i>	0.16	0.37	0	1
<i>Commission is defendant</i>	0.13	0.34	0	1
<i>Government is plaintiff</i>	0.16	0.37	0	1
<i>Government is defendant</i>	0.19	0.39	0	1
<i>Administrative agency is plaintiff</i>	0.05	0.22	0	1
<i>Administrative agency is defendant</i>	0.38	0.49	0	1

Table 2: Descriptive Statistics for Dataset of 1997 ECJ Decisions by Legal Issue (N=615)

Variable	Mean	Standard Deviation	Minimum	Maximum
<i>ECJ Ruling for Plaintiff</i>	0.52	0.47	0	1
<i>Net Gov Observations</i>	-0.21	0.95	-6	3
<i>AG Support for Plaintiff</i>	0.53	0.48	0	1
<i>Commission Observation_{Plf}</i>	0.23	0.40	0	1
<i>Commission Observation_{Def}</i>	0.24	0.40	0	1
<i>Commission is plaintiff</i>	0.19	0.40	0	1
<i>Commission is defendant</i>	0.14	0.35	0	1
<i>Government is plaintiff</i>	0.09	0.28	0	1
<i>Government is defendant</i>	0.21	0.41	0	1
<i>Administrative agency is plaintiff</i>	0.05	0.22	0	1
<i>Administrative agency is defendant</i>	0.35	0.48	0	1

Analysis and Results

¹⁵ Note that there were only a small number of article 171 and article 172 cases in these three years, and as a result

We estimated a probit model to test these hypotheses for ECJ decision-making at the legal issue level (we have not had time to do the recoding necessary to analyze the data by case).¹⁶ Table 3 reports the results of our analysis for the issue-level decisions. We consider this the more appropriate dataset, since we avoid questions of how to aggregate decisions and observations over multiple issues within a single case.

they were dropped due to perfect multicollinearity.

¹⁶ We make use of clustered robust standard errors where the clustering is by case.

Table 3. Probit Analysis of ECJ Decisions (legal issue)

Independent Variables	Coefficient	Clustered SE (by Case)
<i>Net Gov Observations</i>	0.195**	0.064
<i>Net Gov Observations X Gov is a Defendant</i>	1.534**	0.59
<i>Net Gov Observations X Gov is a Defendant X Article 177</i>	-1.434**	0.612
<i>AG for Plaintiff</i>	1.45**	0.128
<i>Joined Chamber</i>	-0.003	0.182
<i>Plenum</i>	0.316*	0.135
<i>Commission Observation_{Pf}</i>	0.399*	0.168
<i>Commission Observation_{Def}</i>	-0.455**	0.162
<i>Commission is plaintiff</i>	-0.620	0.278
<i>Commission is defendant</i>	-1.250*	0.326
<i>Government is plaintiff</i>	-0.196	0.239
<i>Government is defendant</i>	0.299	0.247
<i>Administrative agency is plaintiff</i>	-0.173	0.237
<i>Administrative agency is defendant</i>	-0.007	0.161
<i>Article 169</i>	0.818	0.519
<i>Article 173</i>	0.150	0.289
<i>Article 175</i>	-0.732	0.392
<i>Article 178</i>	0.099	0.488
<i>Article 179</i>	0.048	0.341
<i>Article 33</i>	-0.631	0.693
Constant	-0.717**	0.177
Pseudo-R ²	0.3868	
N	869	

** = Significant at the 1% level; * = Significant at the 5% level

The results in Table 3 are consistent with all three hypotheses. The coefficient for the effect of net national government observations is positive and statistically significant. The coefficient on the interaction term of net government observations and cases in which national governments are litigants is positive and statistically significant. And, the coefficient on the interaction of net government observations, cases in which governments are litigants, and cases that are preliminary rulings is negative and statistically significant (further, this last coefficient is of a magnitude such that it cancels the effect of the net observations when governments are litigants variable, $\chi^2 = .29$). Thus, the more government observations made on behalf of a plaintiff, the more likely the Court is going to rule for the plaintiff, the more government observations made on behalf of a defendant, the more likely the Court is going to rule for the defendant, and this relationship is especially strong if one of the litigants is a government in a direct action case. By implication, this evidence is consistent with the argument that the Court is sensitive to threats of override, and that the Court is especially sensitive to threats of noncompliance on direct actions, but not on preliminary rulings.

Figure 1 presents the predicted probability of a Court decision in favor of the plaintiff on a legal issue for a preliminary ruling case with two private actors as litigants.¹⁷ The predicted probability and 95% confidence interval are plotted. As can be seen, net government observations matter in a substantial sense. The probability of ruling for the plaintiff increases from a fifty-fifty shot when net three more observations are filed on behalf of the defendant, to a ninety percent chance when net three more observations are filed on behalf of the plaintiff (actual values range from -6 to 3).

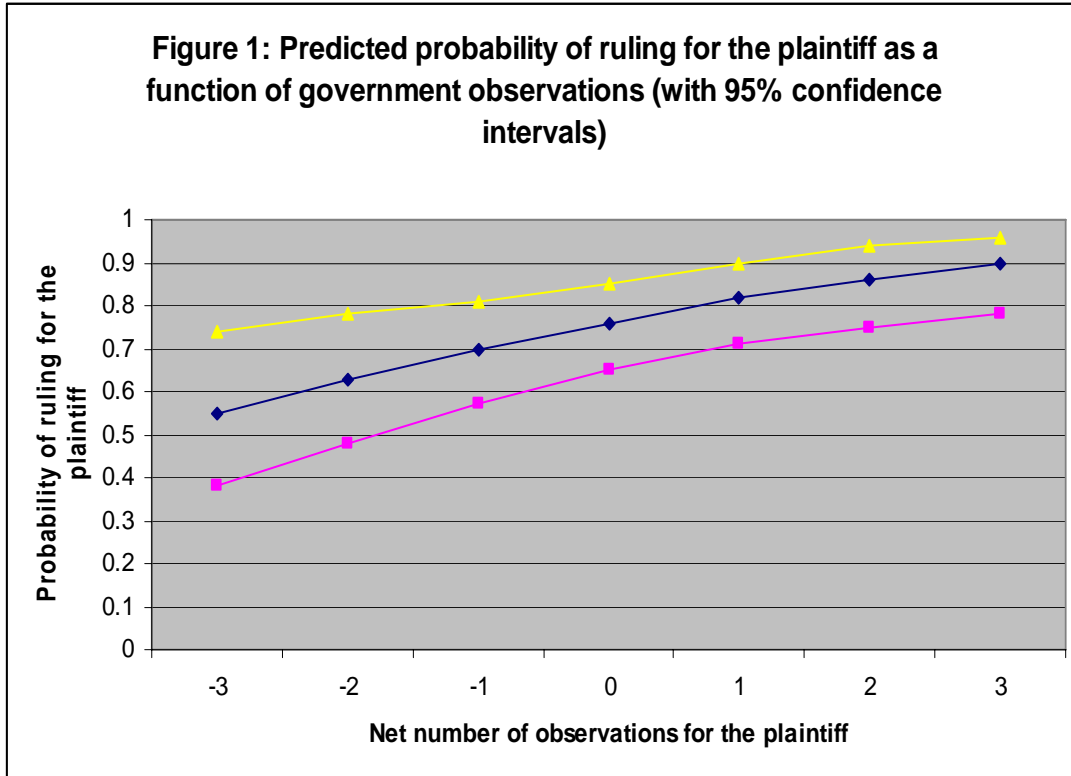
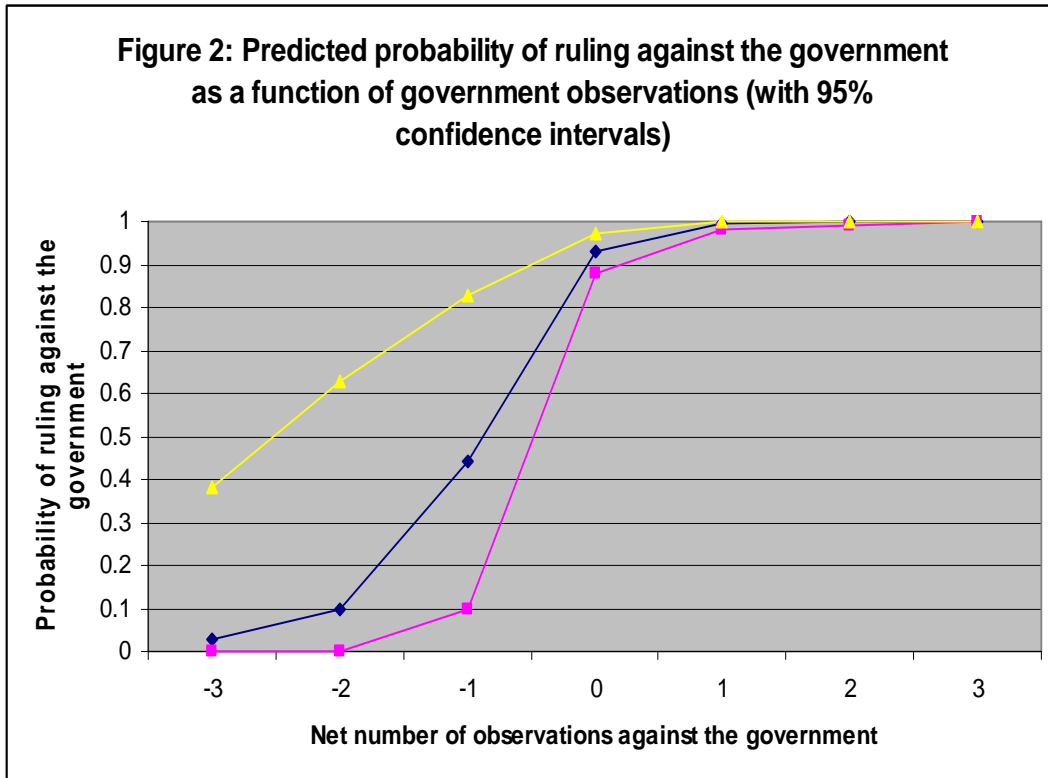


Figure 2 presents the same information for the case when the Commission is bringing an article 169 direct action against a government. In this case the impact of the observations is almost deterministic. When the weight of the observations are on behalf of the defendant (i.e. minus two or more observations), the government loses less than 10% of the time, when support for the defending government is modest (i.e. minus one observation), the government wins the majority of the time, and when third party governments are neutral or opposed to the defending government (i.e. zero or more net observations), the defending government almost always loses. Thus, the evidence is consistent with the argument that the Court is sensitive to threats of government overrides and noncompliance not only in a statistical sense, but also in terms of

¹⁷ These probabilities are conditional on all variables being at their median values except the ones that we manipulate (e.g., the number of observations by national government).

substantive significance. The Court is responsive to government observations in general, and highly responsive when they are made on behalf of a government litigant.



These findings have at least three important implications. First, and most obviously, they support the interpretation that national government observations are not serving simply as signals regarding the merits of the case. Instead, the results are consistent with the story that these observations are used as signals of government preferences over Court decision-making, that the Court is sensitive to these observations when there is an implicit threat of override, and that the Court is highly sensitive to them when there is a implicit threat of noncompliance.

Second, at this point it appears that preliminary rulings really are treated differently by the Court than direct actions. While the Court is sensitive to threats of override on preliminary

ruling cases, the Court is not sensitive, or at least more sensitive to threats of noncompliance. Rather, the effectiveness of threats of noncompliance seem limited to direct action cases.

Third, and finally, these results demonstrate that the Court is responsive to government influence not only over case outcomes (not presented here), but even when making within-case legal decisions. This finding suggests that the Court is not as free to create undesirable precedent (in the minds of the member state governments at least) by creating it within cases as might be believed. That is, this evidence suggests that the Court is not free to pursue a “Marbury versus Madison” strategy by hiding undesirable rulings within cases where the final outcome is the one the government wants. Simply put, the Court is demonstrably and systematically sensitive to government preferences as it sculpts its legal reasoning that aggregates up to case outcomes.

IV. Conclusion

In this paper, we made use of newly coded data to provide empirical leverage on the role of member state preferences in European Court of Justice decision-making. Using the observations submitted by member states to gauge their preferences, we tested whether and how they exercise political influence over the outcomes of ECJ cases. Our results indicate strongly that the Court is constrained by member state preferences, and that it responds to both legal and extra-legal threats. These results have important implications. They bring the best empirical evidence yet to bear on the question of member-state influence over the ECJ, and also represent the first attempt to distinguish between legal and extra-legal methods of constraint. That the judicial arm of the European Union must behave strategically to maintain its authority teaches us something about enforcement in other international organizations. In the face of threats of secondary legislation, treaty revision, and unilateral non-compliance, the ECJ must make political calculations to preserve its future

credibility. Thus the Court is, at least in part, a political actor that is sensitive to the interests of member-states.

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