Do Legislative Agenda-Setters Constrain Judicial Decision-making? Evidence from the European Union

Sivaram Cheruvu*†

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Abstract

The judiciary's ability to safeguard liberal democracy critically depends on whether government institutions abide by their rulings. Among other constraints, courts face the possibility of the legislature overriding unwanted decisions when adjudicating cases in which legislators have an interest. I argue that this threat heightens when courts' decisions affect legislative agenda-setters that can prioritize bills favoring override, prompting courts to act strategically in response. Leveraging exogenous variation in agenda-setting power from the six-month rotating terms of the Council of the European Union Presidency, I provide evidence that the Court of Justice of the European Union strategically delays deciding a case when the member state holding the Presidency expresses interest in the case's outcome. A difference-in-differences design demonstrates that this effect disappeared with the introduction of the Trio Presidency in 2007, which reduced each individual Presidency's agenda-setting power.

*School of Economics, Political, and Policy Sciences, University of Texas at Dallas, 3.802B Green Hall, 800 West Campbell Road (GR 31), Richardson, TX, 75080, USA; sivaram.cheruvu@utdallas.edu; https://sivaramcheruvu.com

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Introduction

The functioning of liberal democracy is critically dependent on courts' ability to protect citizens from the state. Leveraging their power of judicial review,[1] courts can annul legislative acts that contravene the statutory and constitutional order. Lacking the power of the purse and sword, however, courts are frequently reliant on legislatures to implement their rulings. This reliance is particularly troublesome when legislators have an interest in these rulings, as legislators' willingness to implement rulings that are adverse to their policy preferences is not guaranteed. They may, for example, threaten to propose bills to override such unfavorable rulings. In response, courts may adjust their rulings or even uphold legally questionable statutes to avoid direct confrontation (e.g., Carrubba, Gabel and Hankla 2008; Schroeder 2022; Staton and Vanberg 2008). Nonetheless, for most legislators, assembling a sufficient coalition to pass legislation is a difficult task, undermining the viability of such threats (e.g., Stone Sweet and Brunell 2012). Under what conditions are threats of legislative override credible and how do courts respond strategically?

I argue one such condition is when a legislator threatening override also holds agenda-setting power. While wielding such power to determine the item(s) that lawmakers can consider, a legislator can prioritize, bring attention to, and call for a vote on override legislation. This ability to accelerate consideration of acts that may otherwise languish in the legislative queue presents a distinct threat to courts who may prefer a ruling against the legislator's preferences. Previewing my argument, when agenda-setting has a temporal component, I posit that courts will act strategically to minimize this threat by delaying their rulings until the legislator no longer controls the agenda. I test my theory by leveraging the six-month rotating Presidency of the Council of the European Union (hereafter "the Council") and provide evidence that the Court of Justice of the European Union (CJEU) will wait until the Presidency rotates to issue its decision in a case when the incumbent

[1] I define judicial review broadly to include a court's review of government acts, statutes, constitutional provisions (e.g., Ferejohn, Rosenbluth and Shipan 2009).

Council President signals its interest in the case's outcome. This effect disappears following a 2007 reform forcing member states to coordinate the Council Presidency in groups of three, reducing the ability of any one member state to unilaterally affect the agenda.

I organize this article as follows. First, I discuss legislative agenda-setting and contextualize it within the existing comparative judicial politics scholarship. Second, I describe the legislative process of the EU and how the Council Presidency's agenda-control serves as a credible threat of override to the CJEU. Third, I present empirical evidence leveraging the Council Presidency's rotating terms and member state's *amici curiae* briefs sent to the CJEU. Lastly, I conclude by discussing this article's implications for the study of the separation of powers and propose avenues for future research.

When is Legislative Override a Systematic Constraint?

A fundamental puzzle for the study of judicial politics is the conditions under which judges' behave strategically. Given courts' inability to implement their decisions, judges must evaluate the political environment in which they are making rulings and behave strategically in order to increase the efficacy of judicial review (e.g., Vanberg 2015) — especially when the government responsible for implementing these rulings has an interest in their outcomes. Such strategic behavior may include issuing rulings that allow behavior incompatible with the legal order to continue (e.g., Helmke 2005; Ramseyer and Rasmusen 2001), crafting the content of rulings to provide more discretion as to what constitutes compliance (e.g., Rosenberg 1991; Staton and Vanberg 2008), or increasing public awareness of rulings to spur electoral backlash against policymakers (e.g., Krehbiel 2016; Staton 2010; Vanberg 2005). A common thread is explicit in these models of strategic judicial behavior: courts view the threat of overt government defiance and, potentially, retaliation as *credible*.

One such form of defiance is legislative override, or the legislature overturning or amending a court's ruling by drafting new legislation. Scholars argue that threats of legislative

override should influence judicial decision-making, either because courts can secure better long term outcomes when taking it into account (e.g., Ferejohn and Weingast 1992; Rogers 2001) or because open defiance may serve to erode a court's public legitimacy and be deleterious to its ability to influence policy moving forward (e.g., Carrubba 2009; Gibson, Caldeira and Baird 1998). As long as courts care about their influence over policy and ability to constrain the government, they have reason to anticipate legislative reactions to their behavior.

Nonetheless, courts should only behave strategically when they believe such a threat is credible. Scholars provide a few explanations for when it may be the case. The mere proposal of bills that, for example, "never earn so much as a committee hearing" (Clark 2009, 974) may reflect public preferences that are turning against the court and — even if not an imminent threat — may portend citizens' electing legislators in the future that may override unfavorable decisions (e.g., Bartels and Johnston 2020; Ura and Wohlfarth 2010). Furthermore, a court may perceive the legislature as ideologically distant from its own preferences and, generally, may exercise caution (e.g., Hettinger and Zorn 2005; Segal, Westerland and Lindquist 2011). Additionally, following conventional legislative politics theories (e.g., Krehbiel 1998), the threat of override may be credible when court decisions are averse to the preferences of pivotal legislators (e.g., Uribe, Spriggs II and Hansford 2014).

Building upon this scholarship, I argue that override is a credible threat when a legislative agenda-setter — that is, the individual(s) that have the power to initiate a proposal on which others will vote (e.g., Romer and Rosenthal 1978) or, in the negative sense, restrict the subset of items for which institutional action (e.g., voting, deliberation, etc.) can occur (e.g., Carpenter 2023) — has an interest in the outcome of a court case. With limited time and resources, one of a legislature's most important tasks is to decide the proper allocation of attention to a wide variety of potential legislative acts (e.g., Ballard 2022). The prioritization of this time ultimately affects which bills policymakers enact into law. To achieve this task, legislatures frequently delegate this power in various ways, such as through the election of leadership or the appointment of committee chairs (e.g., Fortunato, Martin and Vanberg

2019), which, in effect, monopolize agenda-setting in the hands of a few actors (e.g., Cox and McCubbins 2005; Döring 2001). As a result, even if legislators publicly express their desire for override (e.g., Schroeder 2022) and, moreover, even if a sufficient number in the chamber would support override if put to a vote (e.g., Lane 2022; Uribe, Spriggs II and Hansford 2014), whether such a bill garners consideration at all is a function of who controls the agenda.

This impediment to potential override mitigates, however, when a legislator interested in the outcome of a court case has agenda-setting power. In such instances, the legislator can substantially influence the prioritization of items and enable debate of override legislation. Agenda-setting power, thus, may affect a court's decision-making, as a legislator's ability to affect conversation and call for a vote on a bill increases the probability of override. Taking the agenda-setter's preferences into account for a given case, a strategic court would act to limit their likelihood of override.

A court's specific action, nonetheless, is conditional on the nature of the agenda-setting power and the tools that a court has at its disposal. For example, if a sufficient coalition exists in the legislature irrespective of who holds agenda-setting power, a court may have no other option other than issuing a ruling in line with the legislature's preferences to avoid override (e.g., Carrubba, Gabel and Hankla 2008; Larsson and Naurin 2016). In other instances, the threat of override may have a temporal component. A court that posits a legislature will be less hostile following an election may leverage legal tools to delay resolving a potential case (e.g., Arguelhes and Hartmann 2017; Krehbiel 2021*b*).

Some legislatures feature procedures that allocate short-term proposal power to legislators. In parliaments such as the United Kingdom, New Zealand (e.g., Morelli, Osnabrügge and Vannoni 2020), and Canada (e.g., Green and Sevi 2022), for example, a lottery randomly provides legislators the opportunity to introduce bills to the parliamentary floor. In Canada, parliamentarians appear in an "Order of Precedence" document, which details when they can bring their legislation to floor for debate and (potentially) a vote (e.g., Loewen et al. 2014).

The Council of the European Union also has a temporal component to its agenda-setting power, as member states have a six-month period in which they serve as President and control the agenda. In this instance, if a parliamentarian (or member state) favoring override in a particular court ruling has the ability control the agenda — but only at a specific point in time — a court may delay its decision until after the legislator's bill proposal power has ended to avoid confrontation. Such a delay, simply put, would prevent the legislator from having the *opportunity* to override a court ruling.[2]

Analyzing whether courts delay rulings to avoid override also provides a solution to an observational problem. Although a principle critique of this scholarship is that overrides are relatively rare events,[3] separation of powers models predict that a court properly assessing the threat would not put itself in a position to be vulnerable to override in the first place (e.g., Clark 2009). Scholars make inferences about the credibility of override threats by analyzing either a court's rulings (e.g., Segal and Spaeth 2002) or a legislature's override bills (e.g., Nelson and Uribe-McGuire 2017). As Segal, Westerland and Lindquist (2011, 91) argue, "While the rational anticipation model is straightforward, supporting empirical evidence is far from conclusive" because it is difficult to "distinguish sincere from sophisticated behavior." In other words, observing a court making a ruling in line with the legislature's preferences could be evidence of strategic decision-making avoiding legislative override, sincere decision-making according to its own ideological preferences, or sincere decision-making regarding the "correct" legal interpretation in a case. While scholars attempt to control for a court's preferences (e.g., Hall 2014) and a case's legal merits in empirical analyses (e.g., Carrubba and Gabel 2015; Larsson and Naurin 2016), such proxies are imperfect as they often require strong assumptions regarding which judges are pivotal (e.g., Carrubba et al.

[2]See Potter (2017) for an example of such strategic delay in a bureaucratic context.

[3]Stone Sweet and Brunell (2012, 205) go as far to say there is "no significant case [of override] in the history of [the CJEU] adjudicating the treaties." See Larsson (2021), and Carrubba, Gabel and Hankla (2012) for examples of legislative override of CJEU rulings.

2012; Lauderdale and Clark 2012), the consistency of ideological estimates over time (e.g., Martin and Quinn 2002), and whether third-party legal actors — such as advocates-general at the CJEU — are truly impartial (e.g., Frankenreiter 2018).

Leveraging exogenous variation in agenda-setting power to examine whether courts strategically delay their decisions in anticipation of legislative override circumvents this issue. The counterfactual is a ruling's *timing* as opposed to its *merits*. Empirically, thus, assumptions regarding the court's preferred ruling — or which judges have the largest influence over the outcome — are not required. It does, however, require a measure of an agenda-setter's interest in a case, which, below, I argue that a legislator sending an *amicus curiae* brief to a court in a given case is a credible signal of interest. In sum, the *content* of a court's decision may appear as if it were immune to override threats, but the decision's *timing* may provide alternative evidence, suggesting a more subtle way in which courts act strategically.

While strategically delaying issuing a ruling may seem innocuous, it is a *systematic constraint*, as the entire judiciary can incur costs such as increased noncompliance, non-uniformity of the law, and workload pressures. First, a case may arrive to the court because a given area of the law — or the court's previous rulings (e.g., Beim, Clark and Patty 2017) — are sufficiently vague. Scholars argue and provide evidence that vague laws encourage noncompliance (e.g., Baum 1976; Spriggs 1997) by providing policymakers discretion over implementation (e.g., Gauri, Staton and Cullell 2015). In federal systems where multiple levels of government are creating policy, such vagueness may spur additional noncompliance and create greater pressure for override (e.g., Rosenberg 1991). Put differently, delaying a ruling to avoid an immediate override threat may create a larger threat in the future, as the cost of changing noncompliant behavior may increase (e.g., Carrubba 2009).

Additionally, in judicial hierarchies, an apex court's delay in particular may have ripple effects throughout the system. Lower courts may be adjudicating similar disputes on the same substantive legal issue, for example, and reach different outcomes because the apex court delayed clarifying the law. Such divergence creates non-uniformity within the law (e.g.,

Beim and Rader 2019), undermines the normative principle of the law's equal application across litigants, and creates economic inefficiencies. In preliminary reference systems such as the CJEU and the Andean Tribunal of Justice in which the apex court hears cases when a domestic member state court refers them (e.g., Alter and Helfer 2010), domestic courts may decline to refer cases at all if strategic delay by the high court — in addition to the normal time for a decision following a referral — makes referrals more costly on average than rulings without a referral (e.g., Krehbiel and Cheruvu 2022).

Furthermore, courts face an opportunity cost in terms of the resources that can be allocated elsewhere (e.g., Tridimas and Tridimas 2004). Leaving a case unresolved takes time away that can be spent completing other cases. Judges in many high courts around the world already face substantial workload pressures — as scholars provide evidence that large case backlogs affect litigation rates across the European continent (e.g., Bielen et al. 2018) — and must make trade offs to expedite dispute resolution (e.g., Epstein, Landes and Posner 2013; Roussey and Soubeyran 2018). Strategically delaying cases to avoid override may compound such problems for courts that are already overburdened by their workload and increase the time to complete cases for which the court does not face an override threat.

The Council Presidency, the CJEU, and Override

The CJEU provides an ideal setting to assess whether legislative agenda-setters affect judicial decision-making. It is the EU's highest court and adjudicates disputes regarding the application of and compliance with EU law. Relative to other international courts, it has substantially expanded its competences over time to incorporate a power of judicial review, making it a distinct threat to member states' policy interests. Member States, however, maintain the ability to legislatively override its decisions through the power they wield in the EU Council. In particular, the Council's Presidency awards a member state the ability to

set the agenda. Below I describe the CJEU's decision-making under the Council President's shadow of legislative override and derive empirically testable hypotheses.

The CJEU can hear cases from a variety of litigants across the member states, as disputes arrive at the Court through multiple mechanisms. A domestic court, for example, can ask the CJEU for a ruling on a case through the preliminary reference procedure if a party (private or public) challenges the legality of EU law or a member state's compliance with the law (e.g., Alter 1998; Krehbiel and Cheruvu 2022; Pavone 2018). Alternatively, the European Commission — the executive body of the European Union — can bring cases against member states they believe are not properly applying EU law to the CJEU through the infringement procedure (e.g., Fjelstul and Carrubba 2018; König and Mäder 2014). Such cases' outcomes have considerable implications for member states, as they can affect their gains from trade (e.g., Gabel et al. 2012) and discretion over policy making (e.g., Schroeder 2023).

The preliminary reference procedure in particular exerts a substantial influence over the development of EU law. The CJEU leveraged the procedure in order to develop doctrines such as direct effect (*Van Gend en Loos*) and supremacy (*Costa v. Enel*). The former allowed national courts to apply EU law even if such statutes did not exist in member state law, while the latter established that EU law takes precedence over national law when they conflict with one another. By allowing individual litigants to have standing in their national courts and assert their rights under EU law, the CJEU could use these cases to create new legal protections to supplement the EU treaties. Furthermore, Weiler (1991, 2426) argues that the preliminary reference procedure gave lower courts "the facility to engage with the highest jurisdiction in the Community and thus to have *de facto* judicial review of legislation," with accounts emphasizing domestic interests and entrepreneurial lawyers taking advantage of the procedure to achieve policy victories (e.g., Pavone 2022).

With cases available to establish expansive doctrine, the CJEU has long preferred to push forward a pro-European integration agenda (e.g., Ovádek 2021). Scholars argue that the CJEU strategically engaged domestic litigants and judges through the preliminary reference

procedure to advance economic integration, even if member state governments resisted this expansion of EU law (e.g., Burley and Mattli 1993; Mattli and Slaughter 1998). Although the extent of national governments' partnership in this expansion is the subject of an extensive debate (e.g., Alter 2000; Garrett 1995; Moravcsik 1997), "there is virtual consensus, among otherwise diverse disciplines and otherwise hostile schools of thought, that the Court [...] [has a] consistent, decades-long preference for European integration" (Pollack 2012, 1265).

Member states, thus, have strong incentives to influence the CJEU's decision-making to obtain favorable rulings. In addition to treaty revision (e.g., Castro-Montero et al. 2018) and noncompliance (e.g., Cheruvu and Krehbiel 2022; Peritz 2018), scholars argue that member states can also threaten the CJEU with legislative override in the Council (e.g., Carrubba, Gabel and Hankla 2008; Larsson and Naurin 2016). The EU legislative process includes three bodies: the European Commission (consisting of individual Commissioners from each member state with portfolio power over different policy areas), the Council (one representative from each member state),[4] and the European Parliament (legislative chamber that EU citizens directly elect). Although the Commission has the power to initiate proposals, the Council has the ability to amend any proposal under a qualified majority vote (QMV) — or unanimity for certain policy areas — with the Parliament's ability to amend a proposal dependant on the policy area. Legislation requires approval across all three institutions under the ordinary legislative procedure, whereas it only requires the Council and the Commission under the special legislative procedure. As a result, at times, multiple veto points exist that could make passing override legislation difficult (e.g., Tsebelis and Garrett 2000).

Carrubba, Gabel and Hankla (2008, 438) argue that despite these hurdles, legislative overrides can be credible threats as "it requires a government, or set of governments, opposed to the Court's preferred ruling to cobble together a logroll." Indeed, they provide empirical evidence demonstrating that the CJEU is sensitive to threats of legislative override, with

[4]The Council meets in 10 different configurations depending on the policy area, with the relevant minister from each member state present.

Larsson and Naurin (2016) supplementing these findings with evidence that the Court's sensitivity is heightened when override in the Council requires QMV as opposed to unanimity. Conversely, others argue "for any important and controversial ruling of the court, [member state governments] are likely to be divided and unable to muster the votes required to overturn it" (Stone Sweet and Brunell 2012, 205), and, furthermore, "the EU's 'joint decision trap' (Scharpf 1988) insulate[s] the [CJEU] against threats of legislative or constitutional override" (Kelemen 2012, 44). An additional critique is the process by which member states put together a logroll is unspecified (Stone Sweet and Brunell 2012, 208).[5]

Building upon this scholarship, I argue that a member state government is more likely to set override legislation into motion when it holds the Council Presidency. The Presidency rotates every six months among the member states with rotations taking place in January and July of each year. Broadly, the Council Presidency takes the role of agenda-setter, broker, and mediator within the Council, as well as negotiator on behalf of the Council to the other EU institutions.[6] The Presidency has three procedural tools — as Tallberg (2006) identifies — at its disposal to control and prioritize the agenda that put it in a privileged position to advance, and potentially pass, override legislation: the ability to create a *political program* to frame the six-month period, the ability to develop *concrete proposals for action* through its special relationship with the European Commission, and the ability to determine *actual meeting agendas*.

First, the Council's political program allows it to directly prioritize the issues that are on the EU agenda. The future holder of the Presidency designs the program in tandem with national ministries, taking stock of domestic interests in the future of European policy, and designing a series of action plans and priority proposals (Elgström 2014). The member state,

[5]See Aksoy (2012) for theory and evidence for the conditions under which logrolling is likely in the Council.

[6]Other roles include representing the EU on the international stage and influencing its foreign aid allocations (e.g., Carnegie and Marinov 2017).

then, presents the program shortly before their Presidency commences to set the docket of policy proposals and topics for the Council to address over the following six months. As Tallberg (2006, 84) states, the program is not "neutral to the interests of the Presidency government or other member states. Some themes are given a more prominent position than others, and the more specific goals developed under each theme mark the prioritization of some policy concerns before others. New issues are included that would not have been part of another government's program." Corroborating this description, Cross and Vaznonytė (2020) provide empirical evidence that when the President prioritizes an issue area in its political program, legislation advances more quickly in those issue areas relative to others. Presidents, thus, have substantial discretion and control to frame the issues the Council focuses on during their six-month stint.

Second, as a result of this relative broader prioritization of policy agenda items, a framework exists for *concrete proposals for action*. Although the Commission enjoys a monopoly on policy proposal power, it works closely with the Council when developing policy (e.g., Franchino 2004). Member states, while equally able to lobby the Commission, take a back seat to the Council President that is recognized as "first among equals." The Presidency's support "is essential for the Commission's ability to reach its own objectives. It is therefore easier for the Presidency to plant issues on the agenda through the Commission, than for other member states." As a result, "the Presidency has developed into the dominant producer of proposals [...] and its initiatives stand a better chance of success" (Tallberg 2006, 85). Simply put, the President has an advantage relative to other member states when navigating the EU legislative process.

Third, the President's creation of the political program and close work with the Commission manifests itself most tangibly through its ability to shape the agendas for individual Council meetings. These tasks directly involve "organizing meetings, distributing relevant documents and revising draft texts in accordance with previous meetings" (Thomson 2008, 597), in addition to ordering the priorities of items that ministers will discuss. Further-

more, the Presidency sets the overall meeting schedule for six months. As Tallberg (2006, 86-87) describes, "To determine the number of opportunities for governments to consider an issue is a very concrete way of shaping priorities in EU decision-making." Furthermore, the Presidency's gathering of informal meetings in their home country also serves an agenda function: "Since these meetings take place at the initiative of the Presidency, and are funded by this state, the host government is at complete liberty to determine the theme. Up to 100 such meetings may be held during a Presidency. These meetings are regularly used to raise the awareness among EU governments and institutions of concerns dear to the Presidency." Empirically supporting the relevance of scheduling with a data set on Council meetings, Häge (2017) provides evidence that the President exerts substantial influence over the topics ministers discuss, when they discuss these topics, and the amount of time for discussion. These tools of the Presidency, taken together, allow it to disproportionately influence the legislative agenda. Although the time it may take for a proposal's adoption usually is longer than the six-month presidency term, holding the presidency allows a member state to bring such a proposal for consideration (e.g., Van Gruisen 2019), which would be otherwise more difficult when it does not hold the presidency.

If the President expresses their interest in the outcome of a case the CJEU should act with caution, as the threat of override is considerably more credible relative to a similar threat from any other member state. Since the Presidency has a temporal component, however, the CJEU has a simple solution: *wait until the Presidency rotates to another member state to decide the case*. Unlike the United States Supreme Court — or other courts than operate on terms requiring it to issue rulings on all cases on the docket by a certain date – the CJEU's judges have relative freedom over when they issue a ruling. The Court, as a result, can simply reduce the probability of legislative override by waiting until the Presidency rotates to another member state that may not have an interest in a case's outcome. This theorizing leads to the following hypothesis:

Hypothesis 1 *When the Council President expresses their interest in the outcome of a case, the CJEU waits until after the President completes their term to issue its ruling*

Given the importance of the Council Presidency on the EU's legislative process and the desire for continuity in decision-making across Presidencies, the Council introduced the Trio Presidency in January 2007, which the EU member states formalized in the Lisbon Treaty. The Trio is three Council presidencies grouped together over an 18-month period that coordinate an agenda in tandem with the other EU institutions. For example, the first Trio consisted of the Presidencies of Germany, Portugal, and Slovenia, lasting from January 2007 to June 2008. Together they produced an 18-month political program (e.g., Batory and Puetter 2013), a practice that subsequent Trios maintained.

The Trio gave member states the advantage of having some form of input for a longer period of time but the disadvantage of "policies set during their own Presidencies [being] worse for them than the policies they would set in the absence of Trios" (Van Gruisen, Vangerven and Crombez 2019, 494). Although debate exists as to whether Trios are successful at achieving the goals the Lisbon Treaty set out — specifically whether Trios lead to greater continuity and efficiency in the legislative process across presidencies (e.g., Van Gruisen 2019) or an additional administrative burden that may make the process more inefficient (e.g., Warntjen 2013) — they make it harder for any single Council President to affect the agenda. The CJEU, thus, should be less concerned about the Council President putting forward override legislation as the barrier to doing so is now higher. A smaller effect after the start of Trios helps rule out other explanations, such as the additional media coverage given to member states holding the Presidency (e.g., Eisele et al. 2022) making the CJEU wary of making potentially unpopular decisions (e.g., Blauberger et al. 2018; Krehbiel 2021*a*). This logic leads to the following hypothesis:

Hypothesis 2 *The relationship defined in hypothesis 1 is weaker under Trios*

Strategically delaying cases to avoid legislative override is a *systematic constraint* for the CJEU as it affects compliance with EU law, national courts' willingness to send it cases through the preliminary reference procedure, and exacerbates its backlog of cases. Scholars of European integration drawing upon to management school theories of compliance with international law point to vague laws and subsequent barriers to proper rule interpretation as a cause of noncompliance (e.g., Börzel 2003; Hille and Knill 2006). The CJEU's role, for these scholars, is to provide authoritative rule interpretation and to settle any errors or disagreement about the law (e.g., Chayes and Chayes 1993; Tallberg 2002). By delaying a case to avoid override and not resolving it in a timely manner, the CJEU may enable more noncompliance with the law and, subsequently, encounter greater domestic resistance to its decision-making.

The CJEU's strategic delay may also affect national courts' likelihood of referring cases. Given their productivity may correlate with their likelihood of promotion (e.g., Voigt 2016), judges are already reluctant to refer cases to the CJEU due to the amount of time and effort they must invest (e.g., Pavone 2018). As a German lower court judge explains, "it takes a long time to prepare a referral [...] and while you wait, the case is in your register, it becomes two years old! Everybody asks you: 'Why has the case been there two years?'" (Pavone 2022, 70). As the CJEU delays cases to avoid override, it adds to the amount of time it takes for a lower court judge to resolve cases. This delay further disincentivizes lower court judges from referring cases (e.g., Hübner 2016), which, consequently, decreases the CJEU's ability to influence EU law's development.

The CJEU itself faces its own workload issues, as its caseload has increased substantially over time (e.g., Brekke et al. 2023). In order to deal with this burden, the CJEU assigned more cases to chambers in which smaller panels of judges would adjudicate cases (e.g., Fjelstul, Gabel and Carrubba 2022). Scholars provide evidence that the CJEU's delegation to chambers affects the consistency of the Court's application of EU law across cases (e.g., Cheruvu and Krehbiel 2022; Fjelstul 2023). Delaying adjudication to avoid legislative over-

ride further exacerbates these challenges, as the CJEU's opportunity cost for not allocating resources to other cases is high.

Data and Empirical Methods

In order to empirically test the hypotheses, I first require data on CJEU cases and Council Presidencies. I use data from IUROPA CJEU database platform (Brekke et al. 2023), which includes all of the Court's judgments from 1954 to 2022. Importantly these data include each case's start and end date, among other relevant descriptive features that I operationalize as control variables below. Following Larsson and Naurin (2016), I restrict these data to only include cases that arrive to the court via the preliminary reference procedure, totalling 8,240 judgments. Second, I collect data on the dates of each Presidency from the Council's website and create a unique identifier for each individual Presidency (*Presidency ID*). Lastly, I combine these data by whether a case was active during a Council Presidency, creating a dataset of 24,290 observations in which the unit of analysis is case-presidency (the average case overlaps approximately three presidencies). For all cases, I drop the Council Presidency that was active at the time a case started, as cases are virtually guaranteed to outlast the first Presidency.

My primary dependent variable of interest is *Judgment Issued*, which is a binary indicator of whether the CJEU issued its judgment during the presidency. For example, the case *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland*[7] (hereafter *Peter Paul*) started on June 17, 2002 and ended on October 12, 2004. During this time, it overlapped five Council Presidency terms — Denmark (July to December 2002), Greece (January to June 2003), Italy (July to December 2003), Ireland (January to June 2004), and the Netherlands (July to December 2004). In *Peter Paul*, *Judgment Issued* would take

[7]The case's CELEX number is 62002CJ0222 and IUROPA decision id is CJEU:C:2002:0222:J:20041012

the value of 0 for Spain, Denmark, Greece, Italy, and Ireland's presidencies, while it would take the value of 1 for the Netherlands' presidency, as the Court issued the case's judgment during that Presidency.

Second, I require a measure of member state's interest in a case's outcome, as my theory predicts that if the President expresses their interest in the outcome of a case, the CJEU should wait until after the presidency is over to issue its judgment. One means by which member states express their interest in a case is through submitting observations (*amici curiae* briefs) directly to the Court. All EU member states and institutions have the ability to submit observations on any pending case before the CJEU. Member states use these observations to express their beliefs on how the Court should rule in a particular case (e.g., Dederke and Naurin 2018; Stein 1981). Scholars leverage these observations as informative signals of the likelihood that a group of member states may legislatively override an adverse decision (e.g., Carrubba and Gabel 2015; Larsson and Naurin 2016).

My primary independent variable of interest is *Observer President*, which takes the value of 1 if the President sent an observation to the Court for a given Presidency-case observation. Returning to the *Peter Paul* case, Germany, Spain, Ireland, Italy, Portugal, and the United Kingdom sent observations to the CJEU. *Observer President* would take the value of 1 for the Italy and Ireland presidencies, while it would take the value of 0 for the Denmark, Greece, and the Netherlands' presidencies. When Italy's Presidency started, the case was already open for 379 days, and when Ireland's Presidency started, the case was open for 563 days. While the average preliminary reference case in these data finishes in 543 days, the Court issued a judgment in this case after 848 days. Consistent with the theory, the Court may have delayed this case to avoid issuing its judgment during Ireland's Presidency. Additionally, I create a variable for the number of days a case was active when a given Presidency started (*Time Active*).

Although this research design leverages the rotation of Presidencies for inference, systematic differences may exist between cases in which member states send an observation

compared to cases in which they do not. I, thus, conceptualize the "treatment" of *Observer President* as *conditionally as-if-random* on whether member states send an observation. To control for this conditional relationship, I create a variable that is a count of all the observations that the Court receives from other member states that do not hold the Presidency. Since six member states sent observations in the *Peter Paul* case, for example, *Count Member State Observers* takes the value of 6 for the units in which *Observer President* equals 0 (Denmark, Greece, Netherlands) and takes the value of 5 for the units in which *Observer President* equals 1 (Spain, Italy, Ireland). This variable also accounts for threats of override that may arise because a sufficient coalition already exists irrespective of who holds the council presidency (e.g., Carrubba, Gabel and Hankla 2008; Larsson and Naurin 2016). I also create a variable for whether the Commission submitted an observation in the case, as scholars provide evidence the Commission influences CJEU decision-making (e.g., Stone Sweet and Brunell 1998),

Next, I create a series of control variables for case characteristics that may affect the amount of time a case takes to complete and, additionally, whether a member state sends an observation to the Court. Following Fjelstul, Gabel and Carrubba (2022), I include variables for whether a case deals with principles of law, the number of sources of law, legal order, the number of policy areas, the number of authentic languages, whether the Court joined the proceeding, the number of judges hearing the case, and whether the advocate-general (AG) issued an opinion in the case. If a case deals with general principles of law, the law may be decidedly less complex and, thus, take the Court less time to complete. Simply put, "Judges are more likely to be applying existing legal rules than developing new ones" (Fjelstul, Gabel and Carrubba 2022, 9). Second, as the number of sources of law increases — i.e., treaty law, legislation, and case law — the Court's task in resolving a case is more complex, leading to a longer case time. Third, *legal order* is a binary variable for whether a case deals with conflicts between EU law and member state law. Such cases are more likely to be complex and politically sensitive, also leading to longer case times. Fourth, as the

number of policy areas increases, cases are more complex and time consuming to resolve. Fifth, given cases arrive at the Court in the languages of the different member states, as the number of languages in a case increases, the more documents will need to be translated (e.g., McAuliffe 2008), subsequently increasing case time. Sixth, the Court occasionally joins similar cases together. Such joined proceedings should take more time for the Court to process. Seventh, the Court frequently sends more complex and politically salient cases to larger panels of judges (e.g., Kelemen 2012). Such cases, thus, should take a longer time to complete. Lastly, AG opinions are an additional procedural step that the Court post-2001 has discretion over requesting. Fjelstul, Gabel and Carrubba (2022) provide evidence that AG opinions correlate with a 2.4 month increase in a case's duration.

Coarsened Exact Matching

To compare similar case-presidency units, I pre-process these data using coarsened exact matching (CEM) (Iacus, King and Porro 2012). The probability that the CJEU issues a judgment in a case is strongly correlated with how long the case is active. The longer a case is active, the more likely it is that the AG issued their opinion, and that the judges have deliberated about their preferred outcome and are ready to issue a judgment. Furthermore, some proportion of a case's duration is also purely logistical — such as translating documents for the judges. These processes for translating have both become more efficient and more cumbersome over time given the EU's enlargement and, subsequently, the Court's requirements for translating documents from and to an increasing number of languages (e.g., McAuliffe 2008). Additionally, the Court's caseload has increased over time, which, as I previously mentioned, increases the cost of keeping a case open.

In order to have empirically valid counterfactuals, thus, I need to compare cases that were active for similar number of days at a similar point in time. To that end, I used CEM to match "treatment" (*Observer President* = 1) and control case-presidency units to one another conditional on *Time Active* and *Presidency ID*. This procedure matched 21,587

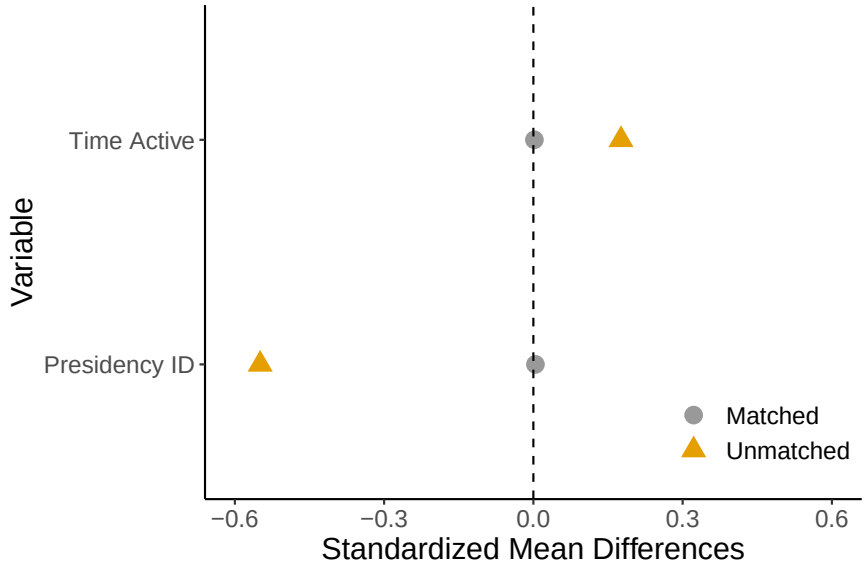

Figure 1: This plot illustrates the balance for *Time Active* and *Presidency ID* before and after matching.

Table 1: Example of matched data

Case Name	Case Start	Case End	President	Presidency Start	Presidency End	Time Active	Observer President	Judgment Issued
Groß Godems	1998-11-20	2000-01-20	Portugal	2000-01-01	2000-06-30	407	0	1
Polo/Lauren	1998-10-26	2000-04-06	Portugal	2000-01-01	2000-06-30	432	0	1
Kaba	1998-10-01	2000-04-11	Portugal	2000-01-01	2000-06-30	457	0	1
W.N.	1998-11-23	2000-04-13	Portugal	2000-01-01	2000-06-30	404	0	1
Epson Europe	1998-10-19	2000-06-08	Portugal	2000-01-01	2000-06-30	439	1	1

control units (630 were unmatched) to 2069 treatment units (4 were unmatched), creating a matched dataset of 23,656 observations. Figure 1 illustrates standardized mean differences for these covariates before and after matching. If treated and untreated units are comparable to one another, these differences should be close to 0. The figure demonstrates that treated units tend be active more days and tend to occur in earlier presidencies than control units. This finding is intuitive as 1) the longer a case is open the more likely it is for the case to overlap a presidency of a member state that submitted an observation for the case and 2) EU enlargement added more "control" presidencies in later years. After matching, however, these differences are very close to 0. Table 1 provides a snapshot of five data points from one of the subclassifications that the CEM procedure created. The four "control" units on

Table 2: Descriptive Statistics for Dependent Variable and Control Variables

	Mean	SD	Min	Max
Judgment Issued	0.323	0.468	0.000	1.000
Observer President	0.087	0.283	0.000	1.000
Trio	0.516	0.500	0.000	1.000
Principles of law	0.034	0.181	0.000	1.000
Legal Order	0.127	0.333	0.000	1.000
Policy Areas	0.583	0.589	0.000	5.000
Judges	5.899	3.173	3.000	15.000
Joined Proceedings	1.191	1.099	1.000	38.000
Languages	1.004	0.072	1.000	3.000
Count Member State Observers	1.985	1.804	0.000	15.000
Commission Observer	0.998	0.041	0.000	1.000
AG opinion	0.805	0.396	0.000	1.000
Time Active	298.378	209.329	0.000	1379.000

average were active for a similar amount of time as the "treatment" unit when Portugal's Presidency started in January 2000.

Difference-in-Differences specification

To test my hypotheses, I estimate a difference-in-differences (DiD) model on the matched data set (e.g., Daw and Hatfield 2018) examining the probability of *Judgment Issued* for units with an *Observer President* before and after the introduction of the Trio presidency. The variable *Trio* is a binary variable indicating whether a case-presidency unit was before or after the introduction of the Trio presidency in 2007. Figure A1 in the appendix provides an event history plot justifying the parallel trends assumption. I estimate a weighted ordinary least squares for case i during presidency t of the following form:

$$\begin{aligned} \textbf{Judgment Issued}_{it} = \beta_0 + \beta_1 \cdot \textit{Observer President} \ + \beta_2 \cdot \textit{Trio} + \\ \beta_3 \cdot \textit{Observer President} \cdot \textit{Trio} \ + \delta \mathbf{X}_{it} + \epsilon_{it} \end{aligned} \tag{1}$$

with $\mathbf{X}_{it}$ vector of controls, ϵ_{it} standard errors clustered at the CEM created sub-classification level, and CEM generated weights for each unit. Table 2 provides descriptive statistics for the dependent variable and all control variables not included in the CEM procedure. A negative and statistically significant coefficient for *Observer President* before the introduction of

Table 3: Results

	Judgment Issued			
	Matched		Unmatched	
	(1)	(2)	(3)	(4)
Constant	0.3375***	0.1053	0.3262***	0.2117***
	(0.0433)	(0.1036)	(0.0129)	(0.0791)
Observer President	-0.0559***	-0.0256*	-0.0429**	-0.0459**
	(0.0151)	(0.0136)	(0.0190)	(0.0206)
Trio	0.0611	0.0722*	0.0198	0.0389*
	(0.0771)	(0.0398)	(0.0165)	(0.0221)
Observer President × Trio	0.0497*	0.0430*	0.0892**	0.0643**
	(0.0279)	(0.0241)	(0.0410)	(0.0310)
Principles of Law		0.0384		0.0101
		(0.0318)		(0.0192)
Legal Order		-0.0264		-0.0001
		(0.0212)		(0.0156)
Policy Areas		0.0041		0.0070
		(0.0092)		(0.0080)
Judges		-0.0044		-0.0057***
		(0.0033)		(0.0018)
Joined Proceedings		-0.0059**		-0.0094***
		(0.0029)		(0.0026)
Languages		0.0058		-0.0533*
		(0.0394)		(0.0288)
Count Member State Observers		-0.0328***		-0.0244***
		(0.0050)		(0.0030)
Commission Observer		0.0512		-0.0044
		(0.0696)		(0.0657)
AG Opinion		-0.0740*		-0.1157***
		(0.0404)		(0.0111)
Time Active		0.0010***		0.0011***
		(0.0001)		(0.0000)
Standard-Errors	CEM Subclassification		Presidency ID	
R^2	0.00425	0.23096	0.00149	0.26477
Observations	23,656	23,656	24,290	24,290

*p<0.1; **p<0.05; ***p<0.01

Trios would be evidence in support of hypothesis 1. A positive and statistically significant β_3 alongside a weaker marginal effect for *Observer President* following Trios would be evidence for hypothesis 2.

Results

Table 3 displays the results. Models 1 and 2 are run on the CEM data with standard errors clustered by subclassification while models 3 and 4 are run on the unmatched data with

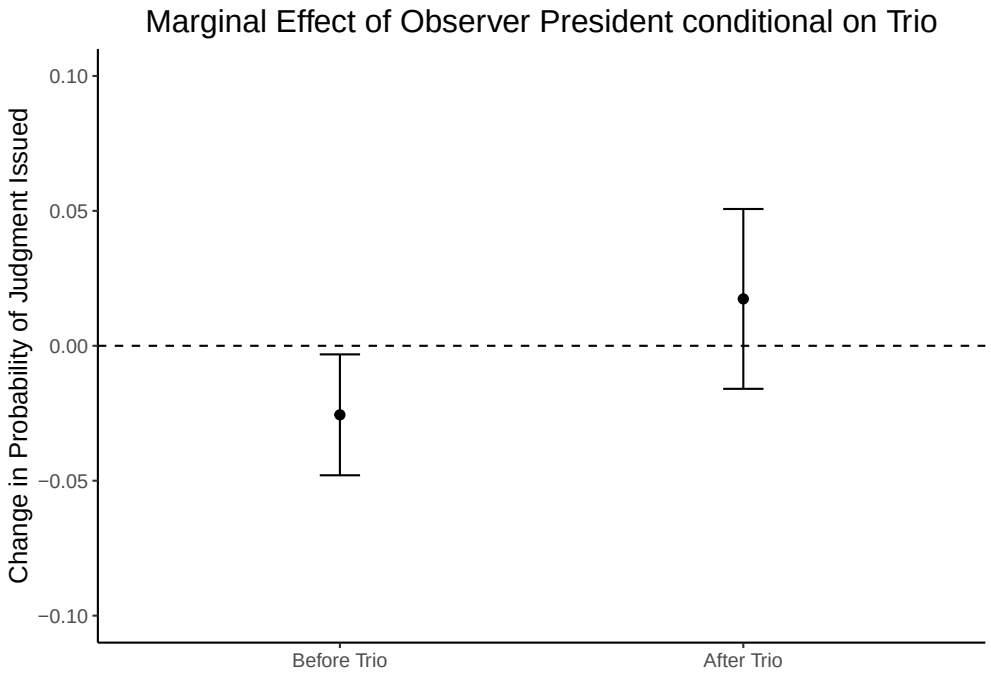

Figure 2: Based on Table 3 Model 2. This plot illustrates the marginal effect of *Observer President* before and after Trios with 90% confidence intervals clustered at the CEM sub-classification level.

standard errors clustered by *Presidency ID*. Model 1 presents the DiD specification without controls, while Model 2 presents the DiD specification with controls. As expected, the coefficient for *Observer President x Trio* in both models is positive and statistically significant, indicating that the probability that the CJEU completes a case when a member state that sends an observation holds the Council Presidency increases after the introduction of the Trio Presidency. That is, under Trios, the Court is less likely to strategically delay resolving a case until after a member state's presidency term is complete. Importantly, as model 2 demonstrates, this result is robust to the inclusion of relevant covariates. Furthermore, as evident from models 3 and 4, the unmatched models provide similar results.

To substantively interpret the results from this DiD specification, Figure 2 illustrates the average marginal effect of *Observer President* before and after Trios. Providing evidence for hypothesis 1 — which predicts that CJEU will be less likely to issue a judgment during the presidency of a member state that submitted an observation on the case — the marginal effect

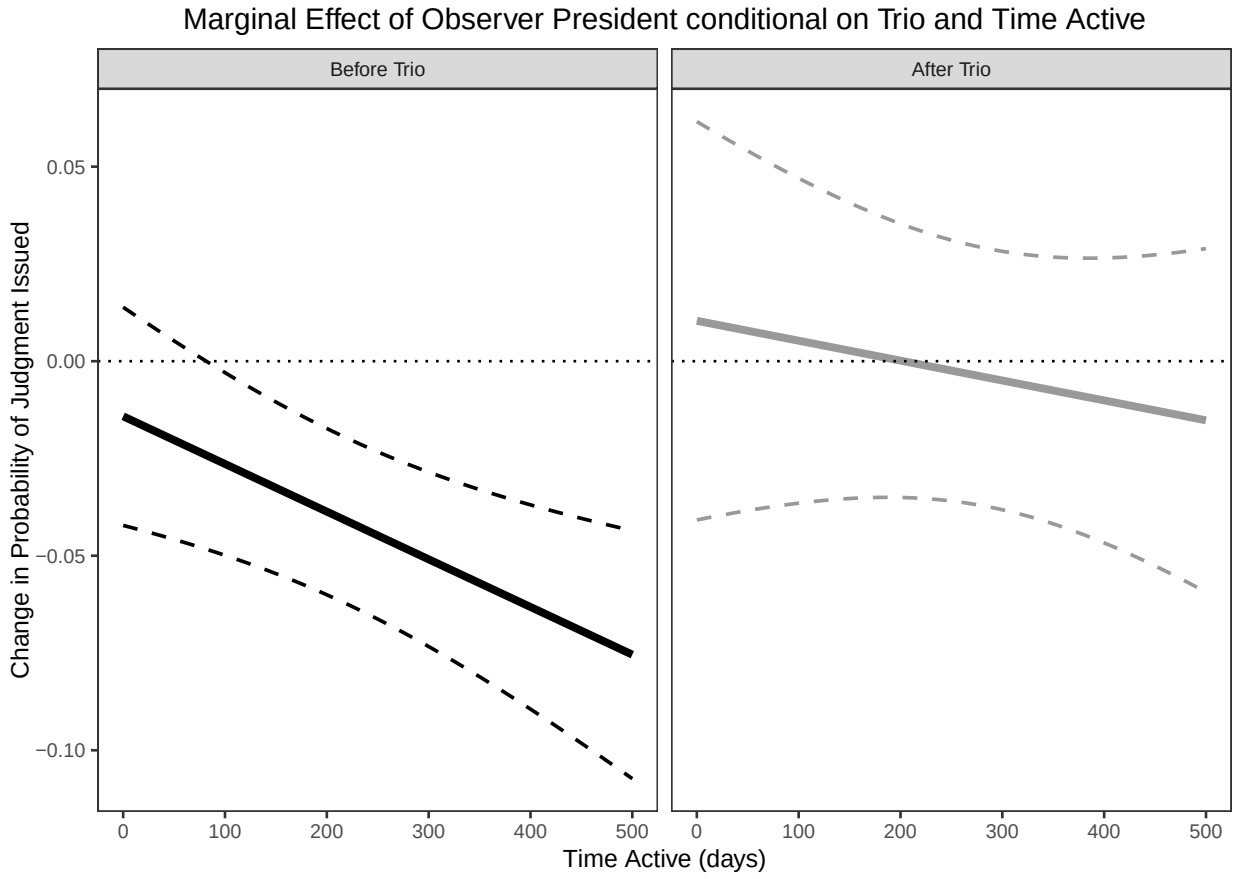

Figure 3: Based on appendix Table A1 Model 1. This plot illustrates the marginal effect of *Observer President* as a function of *Time Active* on the probability of *Judgment Issued* before and after Trios with 90% confidence intervals clustered at the CEM subclassification level. Before Trios (left pane), the marginal effect of *Observer President* becomes larger as a case is active for more days. After Trios (right pane), the marginal effects are indistinguishable from zero.

for *Observer President* before Trios is negative and statistically significant (-.025, $p < .1$). After Trios, however, the marginal effect of *Observer President* is no longer statistically significant, providing evidence supporting hypothesis 2.

Importantly, these results are average marginal effects across the whole range of cases. As mentioned previously, however, the probability a judgment is issued is strongly associated with the amount of time the a case is active. To explore how *Time Active* moderates these results, I run a series of models interacting *Time Active* with *Observer President* and *Trio*. These models can be found in appendix table A1. Figure 3 provides a substantive

interpretation for this triple interaction. As expected, before Trios (left pane), the marginal effect of *Observer President* becomes stronger as a case is active for more days. A shift in the *Time Active* variable's interquartile range from 134 days to 424 days increases the marginal effect of *Observer President* from -0.03 to -0.066. After trios (right pane), however, none of the marginal effects across the range of *Time Active* are statistically significant.

These marginal effects across model specifications can be understood as a *lower bound* for the CJEU's strategic delay when the member state holding the Council Presidency sends an observation. The variables used in this analysis are directly measurable and do not require any assumptions about the Court's preferred ruling in a case. For example, if the Court were to receive an observation from a member state that held the Council Presidency, but the Court were planning to rule in favor of the member state's preferences regardless, the Court would be less likely to delay issuing its judgment. As such, not knowing the Court's preferences *ex ante* and, subsequently, not including such information in the regression model, *biases against* finding a result. Furthermore, it is impossible to distinguish from the raw data when the Court has completed all of the logistical tasks required to proceed with a case, such as translating documents. Knowing such information would more precisely identify *when* during a case the Court can strategically delay and potentially lead to stronger marginal effects.

Conclusion

Under what conditions are courts responsive to threats of legislative override? In this paper, I argue that when an agenda-setting legislator has an interest in the outcome of a case, a court will believe that the threat of legislative override is heightened. In response, if the legislator only holds agenda-setting power for a period of time, the Court will wait until the legislator no longer holds agenda setting power to issue its decision in a case. I provide evidence by leveraging the rotating presidency of the Council of the European Union

as an exogenous determinant of member state agenda-setting power and demonstrate that the CJEU strategically delays its decisions until the Presidency rotates when the President signals its interest in a case through an *amicus curiae* brief. These results disappear after the introduction of the Trio Presidency, which reduced each individual member state's agenda-setting power.

These findings have implications for the separation of powers and judicial behavior. First, building upon the robust scholarship that explores the nature and extent of strategic judicial behavior (e.g., Carrubba 2009; Clark 2011; Engst 2021; Helmke 2005; Krehbiel 2016; Staton 2010; Vanberg 2005), this paper further combines these insights with canonical insights on legislative agenda-setting (e.g., Carpenter 2023; Romer and Rosenthal 1978). By leveraging institutional features of legislatures, scholars may produce fruitful insights on the viability of threats to courts' efficacy. Additionally, through exploring other more subtle means by which courts reduce override threats, scholars may be better able to distinguish between competing theoretical explanations for courts' behavior.

Second, judicial politics scholars can expand what they consider a *systematic constraint* on courts' behavior. Most scholars view override as a constraint in so far as it affects a case's *outcome*. Such a view, however, requires researchers to have an appropriate proxy for a court's counterfactual decision-making that may require in depth knowledge about a case's legal merits or a judge's ideology. Nonetheless, because a clean counterfactual rarely exists, it is hard to distinguish between explanations of a court's behavior. As an alternative to case outcomes, analyzing courts' other observable behaviors, such as whether to hear cases in the first place (e.g., Lane 2022), the timing of decisions (e.g., Arguelhes and Hartmann 2017; Krehbiel 2021*a*), or increasing public awareness of cases (e.g., Staton 2010), requires fewer assumptions when developing a counterfactual. Furthermore, scholars must also establish why such behavior may be costly for courts. Declining to hear cases may encourage more noncompliance, as relevant actors are unclear as to the law's meaning (e.g., Beim and Rader 2019). Strategically delaying decisions, as I describe in the theory section, overburdens courts

that already have substantial workloads (e.g., Roussey and Soubeyran 2018). Employing staff to publicize court decisions may take away budget lines that may be better spent on hiring additional clerks. Understanding courts' choices that are not directly related to case outcomes in terms of their opportunity costs provides a clear path to understanding the systematic constraints courts face when making such alternative choices (e.g., Strayhorn, Carrubba and Giles 2016).

Lastly, this article heeds the call of Staton and Moore (2011) by combining insights from the American, comparative, and international relations scholarship on judicial behavior. By engaging across subfields, scholars can contribute to a more comprehensive understanding of the dynamics that fundamentally constrain judicial institutions. This article's incorporation of insights from the domestic courts scholarship on legislative-judicial relations and international courts to explain behavior of an international court is one such example of the benefits of this approach. Future research on international courts can similarly draw from scholarship on domestic separation of powers to explain their strategic behavior.

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Supplemental Appendix for "Do Legislative Agenda-Setters Constrain Judicial Decision-making? Evidence from the European Union"

Appendices

Table of Contents

Appendices **1**

Figure A1 visualizes the parallel trends assumption necessary for the difference-in-differences analysis. Table A1 provides the regression coefficients for Figure 3 in the main text.

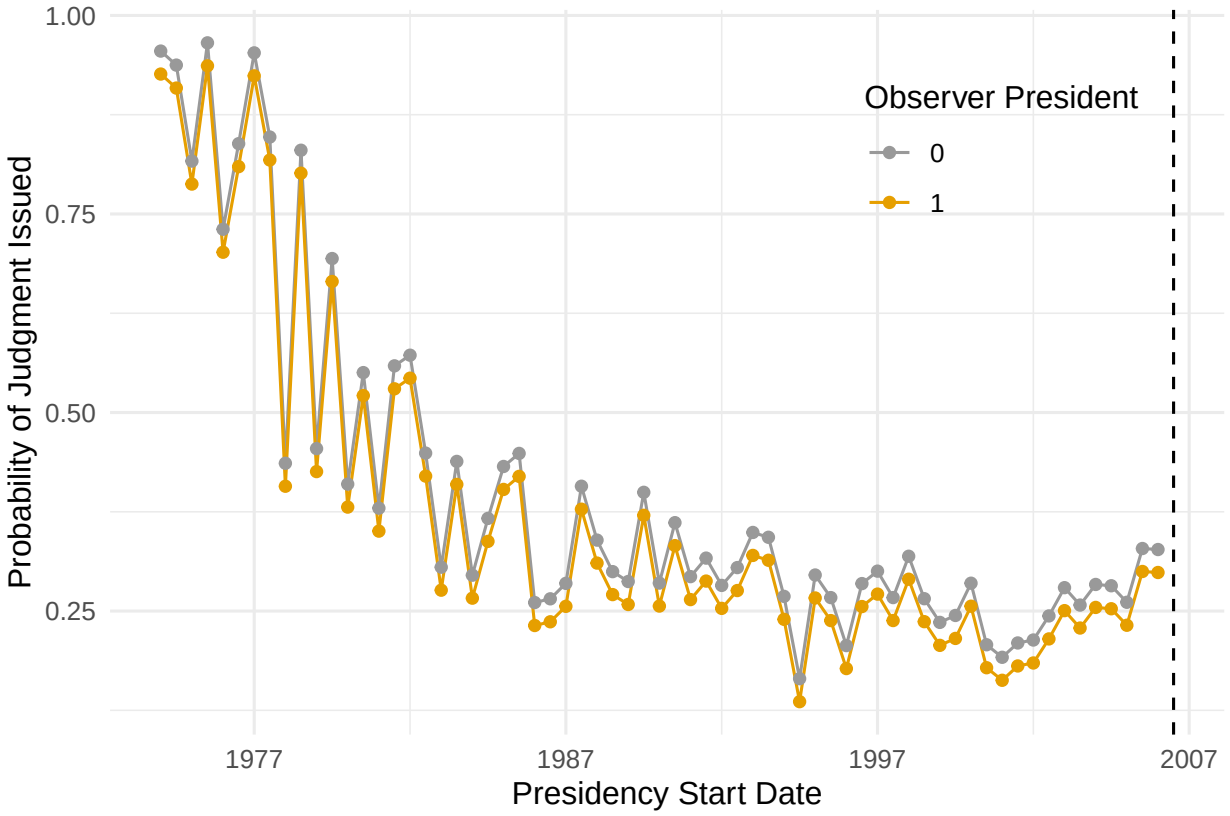

Figure A1: This event history plot illustrates parallel trends between treated and control units in the matched data set before the introduction of the Trio Presidency in 2007.

Table A1: Robustness with Time Active Interaction

	Judgment Issued			
	Matched		Unmatched	
	(1)	(2)	(3)	(4)
Constant	0.0454	0.1725	0.0687**	0.3650***
	(0.0452)	(0.1067)	(0.0272)	(0.0835)
Observer President	-0.0142	0.0071	-0.0375	-0.0159
	(0.0170)	(0.0173)	(0.0252)	(0.0246)
Trio	-0.0618	-0.0797	-0.1418***	-0.1836***
	(0.0565)	(0.0565)	(0.0282)	(0.0279)
Time Active	0.0009***	0.0009***	0.0008***	0.0008***
	(0.0001)	(0.0001)	(0.0001)	(0.0000)
Observer President × Trio	0.0245	0.0032	0.1047**	0.0902*
	(0.0361)	(0.0354)	(0.0503)	(0.0515)
Observer President × Time Active	-0.0001**	-0.0001*	-0.0001	-0.0001
	(0.0001)	(0.0001)	(0.0001)	(0.0001)
Trio × Time Active	0.0004***	0.0004***	0.0006***	0.0007***
	(0.0001)	(0.0001)	(0.0001)	(0.0001)
Observer President × Trio × Time Active	0.0001	0.0001	-0.0002	-0.0002
	(0.0001)	(0.0001)	(0.0002)	(0.0002)
Principles of Law		0.0264		0.0063
		(0.0350)		(0.0185)
Legal Order		-0.0267		-0.0006
		(0.0210)		(0.0143)
Policy Areas		0.0026		0.0052
		(0.0086)		(0.0073)
Judges		-0.0047		-0.0064***
		(0.0033)		(0.0016)
Joined Proceedings		-0.0060**		-0.0094***
		(0.0029)		(0.0026)
Languages		0.0040		-0.0643**
		(0.0408)		(0.0304)
Count Member State Observers		-0.0326***		-0.0231***
		(0.0049)		(0.0029)
Commission Observer		0.0339		-0.0274
		(0.0710)		(0.0645)
AG Opinion		-0.0925**		-0.1395***
		(0.0400)		(0.0108)
Standard-Errors	Subclassification		Presidency	
R^2	0.21580	0.23877	0.26076	0.29034
Observations	23,656	23,656	24,290	24,290

*p<0.1; **p<0.05; ***p<0.01