AGENDAS, DECISIONS, AND AUTONOMY:
How Government Lawyers Shape Judicial Behavior

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ABSTRACT

Legal scholars and social scientists have long traced how private attorneys influence judicial behavior. By contrast, we lack a cohesive and comparative agenda probing how government lawyers impact the courts. This chapter serves as a springboard for this agenda by identifying three ways that government attorneys influence judicial behavior: by shaping judicial agendas, decisions, and autonomy. I attribute each mode of influence to a distinct type of government lawyer – public prosecutors, government litigators, and executive branch attorneys – and illustrate the mechanisms driving their influence over judges via concrete examples. First, I spotlight research delineating how government lawyers in law enforcement roles can wield a "politics of discretion" to shape judges' agendas and their supervisory capacity by strategically withholding or prioritizing particular lawsuits. Next, I highlight studies demonstrating how attorneys representing governments in court can engage in a "politics of positionality," leveraging their role as intermediaries and repeat players to influence judgments – provided that their credibility as litigators is not hampered by overt politicization. Finally, I chronicle a burgeoning literature on attorneys in the executive branch who weaponize their legal training to undermine judicial independence and manufacture obeisance – what I call "power politics, lawyer-style." Taken together, these politics highlight the pressing need to synthesize research on government lawyers within studies of comparative judicial behavior.

Introduction: A Research Blind Spot

There is arguably no professional class as well-represented in government than lawyers. In the United States, lawyers account for 39% of the seats in the House and 56% of the seats in the Senate, making them 100 times more likely to be elected than the average citizen[1] and raising concerns that attorneys have "colonized" the state.[2] In Brazil and most of Latin America, "even the legislators elected from the [w]orker's [p]art[ies] tend to be lawyers."[3] In Europe, 22% of cabinet ministers are lawyers, far outnumbering the 3% of ministers drawn from all other professions.[4] Although reliable figures for autocracies are difficult to come by, even revolutionary regimes intent on purging lawyers from their ranks soon realized that they are useful after all.[5]

No wonder, for lawyers perform all manner of government service. They craft legislation and as legally-trained policymakers;[6] they advise the executive as to what regulatory actions to take and how best to legally justify them;[7] they defend the government's interests and represent it in court;[8] they open prosecutions in the state's name.[9] As they advise, defend, enforce, and gatekeep while on public employ, government lawyers mold the state and the degree to which the government is constrained by the rule of law and democratic accountability. In other words, government lawyers are crucial agents of institutional change and political development.[10]

Yet for all their influence, "government lawyers" are not yet objects of a coherent and comparative agenda. Even as studies of private attorneys and the legal profession proliferated into an

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[1] Lawyers only make up 0.4% of the adult US population, by contrast. These figures are for the 115th Congress. See: Bonica, Adam. 2020. "Why Are There So Many Lawyers in Congress?" *Legislative Studies Quarterly* 45 (2): 253-289, at 253.

[2] Miller, Mark. 2002. *The High Priests of American Politics: The Role of Lawyers in American Political Institutions.* Knoxville, TN: University of Tennessee Press, at 3.

[3] Carnes, Nicholas, and Noam Lupu. 2015. "Rethinking the Comparative Perspective on Class and Representation: Evidence from Latin America." *American Journal of Political Science* 59 (1): 1-18, at 6.

[4] This figure surveys cabinet ministers across 14 European countries from the 1940s to the 1980s: Thiebault, Jean-Louis. 1991. "The Social Background of Western European Cabinet Ministers," in *The Profession of Government Minister in Western Europe*, Blondel and Thiebault, eds. New Tork, NY: St. Martin's Press, at 22.

[5] See the examples of post-Mao China and the Soviet Union under Stalin: Komaiko, Richard, and Beibei Que. 2009. *Lawyers in Modern China.* Amherst, NY: Cambria Press, at 35-36; Hendley, Kathryn. 1996. *Trying to Make Law Matter: Legal Reform and Labor Law in the Soviet Union.* Ann Arbor, MI: University of Michigan Press, at 168-170.

[6] Hain, Paul., and James Piereson. 1975. "Lawyers and politics revisited: Structural advantages of lawyer-politicians." *American Journal of Political Science* 19 (1): 41-51.

[7] Casey, Conor, and David Kenny. 2022. "The gatekeepers: Executive lawyers and the executive power in comparative constitutional law." *International Journal of Constitutional Law* 20 (2): 664-695.

[8] Salokar, Rebecca Mae. 1994. *The Solicitor General: The Politics of Law.* Philadelphia, PA: Temple University Press.

[9] Langer, Maximo, and David Sklansky, 2017. *Prosecutors and Democracy: A Cross-National Study.* New York, NY: Cambridge University Press.

[10] Here, I borrow from Francis Fukuyama's definition of political development, which centers on the evolution and entanglement of three institutions: the state (especially the executive), the rule of law (especially the judiciary and the legal profession), and mechanisms of accountability (especially democratic elections). See: Fukuyama, Francis. 2014. *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy.* New York, NY: Ferrar, Straus, and Giroux, at 23-39.

influential subfield of socio-legal research,[11] no self-conscious research program on government lawyers exists. This blind spot is not because studies of government lawyers do not exist – they do, and we will engage several exemplars throughout this chapter. Rather, it is because these studies have yet to be put into conversation with one another and integrated in the burgeoning literature on comparative judicial behavior.

In this chapter, I aim to sketch the contours of what a comparative research agenda on government lawyers and judicial behavior might look like, and to defend the value of this agenda. My goal is to illuminate and empirically substantiate the diversity of ways that government attorneys can impact the judiciary. Because "government lawyer" is such an amorphous and encompassing term, I limit my attention to those legal professionals employed by the state that either regularly appear in court or occupy sufficiently powerful executive positions to directly shape judicial independence. I thus focus on three types of government lawyers: public prosecutors, government litigators, and executive branch attorneys. I tie each type of government lawyer to an outcome of interest for the study of judicial behavior – the shaping of judicial agendas, decisions, and autonomy – and link each outcome to a distinct mechanism of lawyer influence.

The rest of this chapter conceptualizes and illustrates a tripartite politics of government lawyers. I first spotlight recent research tracing how public prosecutors shape judges' agendas and the courts' capacity to enforce public law by strategically withholding or prioritizing particular lawsuits. I refer to this as a *politics of discretion.* Next, I highlight studies demonstrating how government litigators can wield their institutional position as intermediaries and repeat players to influence judges' decisions – so long as their credibility as litigators is not hampered by overt politicization. I refer to this as a *politics of positionality.* Finally, I chronicle a burgeoning literature on executive branch attorneys who weaponize their legal training not so much to steer governments towards legality, but rather to undermine judicial independence and advance democratic backsliding. I call this *power politics, lawyer-style.* Taken together, these dynamic yet hitherto fragmented studies highlight the pressing need to synthesize disparate strands of research on government lawyers and place them in conversation with studies of comparative judicial behavior.

Government Lawyers and Judicial Behavior: Three Politics

To conceptualize how government lawyers influence judicial behavior, we must first define what a "government lawyer" is. This task turns out to be unexpectedly challenging.

We might be tempted to proceed negatively by defining government lawyers in opposition to private lawyers. Yet the boundaries between public and private in the legal field are increasingly porous. Sometimes, private lawyers are summoned to play public roles. For instance, American big law firms are regularly hired by debtor governments shaken by economic crises to manage sovereign debt restructuring and secure bailouts – as Cleary Gottlieb did in Latin America and Eastern Europe

[11] See, for instance, the multi-volume "lawyers in society" series: Abel, Richard, and Philip Lewis. 1988. *Lawyers in Society: The Civil Law World.* Berkeley, CA: University of California Press; Abel, Richard, and Philip Lewis. 1989. *Lawyers in Society: Comparative Theories.* Berkeley, CA: University of California Press; Abel, Richard, and Philip Lewis. 1995. *Lawyers in Society: An Overview.* Berkeley, CA: University of California Press; Abel, Richard, et al. 2020. *Lawyers in 31st-Century Societies: National Reports*. New York, NY: Bloomsbury; Abel, Richard, et al. 2022. *Lawyers in 31st-Century Societies: Comparisons and Theories*. New York, NY: Bloomsbury.

during the Washington consensus era, in Greece during the European sovereign debt crisis, and in Iraq following the US invasion.[12] Other times, boundary crossings and revolving doors muddy the public-private distinction, as when government officials join corporate law firms, advise and lobby governments for favored policies, and then return to government – a phenomenon so common in France that it has its own name: *pantouflage*.[13]

To cut through this complexity, I define a government lawyer as a person with legal training pursuing a career as a state civil servant (such as prosecutors or lawyers in state legal services) or occupying a position in government (such as attorneys general, offices of legal counsel, and sometimes even presidents and prime ministers themselves). This definition excludes private attorneys hired on temporary contracts as government legal counsel, although it may include lawyers that have left private practice. The definition also encompasses both nominally apolitical lawyers pursuing careers in a state civil service as well as more political lawyers whose public employ hinges on the fate of a particular governing coalition; for simplicity, I refer to both as "government lawyers."

How might these government lawyers shape judicial behavior? A helpful way to think through this question is to consider how government lawyers might influence the litigation process and shape the broader institutional environment in which judges make decisions. Vis-à-vis the litigation process, government lawyers can shape the cases that judges get and do not get – i.e. judicial *agendas* – as well as how judges adjudicate and resolve those cases – namely, judicial *decisions*. Vis-à-vis the broader judicial institutional environment, government lawyers can mold the degree of executive interference in judicial affairs and the degree to which the judiciary is politicized: that is, judicial *autonomy*. Let us conceptualize each of these modes of influence in turn.

The first opportunity for lawyer influence is inherent in a fundamental way that judiciaries differ from legislatures and executives: courts are reactive institutions who largely depend upon others for their agendas. Because judges "have no self-starting mechanisms," they can only make decisions if a public or private party brings a case to court.[14] Judges might send signals to prospective litigants to incentivize them to bring some cases over others, but at the end of the day this choice lies with the parties.[15] In other words, courts' substantive agenda – or whether judges even get to have an agenda at all – depends a great deal on lawyers. This is particularly evident when it comes to law enforcement, where government lawyers enjoy substantial prosecutorial discretion in lodging cases under criminal or international law. By prioritizing certain cases or strategically withholding prosecutions – what

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[12] Dezelay, Yves, and Bryant Garth. 2002. *The Internationalization of the Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States.* Chicago, IL: University of Chicago Press, at 50, 204; Meager, Lizzie, Price, Edward, and Brian Yap. 2016. "How to Jump-Start Sovereign Debt." *International Financial Law Review* 35: 23-26; Hinrichsen, Simon. 2021. "The Iraq Sovereign Debt Restructuring." *Capital Markets Journal* 16 (1): 95-114, at 101.

[13] Vauchez, Antoine, and Pierre France. 2021. *The Neoliberal Republic: Corporate lawyers, statecraft, and the making of public-private France.* Ithaca, NY: Cornell University Press.

[14] Horowitz, Donald. 1977. *The Courts and Social Policy.* Washington, DC: Brookings Institution, at 53.

[15] Pavone, Tommaso, and Øyvind Stiansen. 2022. "The Shadow Effect of Courts." *American Political Science Review* 116 (1): 322-336.

political scientists call "forbearance"[16] – government lawyers can direct or starve judges' very capacity to decide on fundamental social, economic, and political issues.[17] I call this a *politics of discretion.*

Once a case makes it onto a court's agenda, government lawyers tend to benefit from significant advantages as litigants. These advantages are all tied to the unique institutional position that government lawyers occupy. First, government lawyers usually do not have to worry about mobilizing the financial resources and human capital necessary to sustain a litigation campaign – at least not to the same extent as private attorneys.[18] Combined with the fact that many lawsuits target the state, government lawyers can become prototypical "repeat players" (as opposed to "one shotters").[19] Being a repeat player enables government lawyers to develop tacit knowledge of court procedures and judicial personalities ("process expertise"),[20] as well as the ability to forge a credible reputation and build trust with judges. Finally, government lawyers can provide important political signals and information to judges because of their political embeddedness.[21] This boundary-blurring position – part court insider, part government insider – can bolster government attorneys' capacity to secure favorable rulings in court. I thus refer to this as a *politics of positionality.*

Government lawyers can also shape the institutional environment in which judges are embedded without ever stepping into the courtroom. This is particularly true of lawyers at the helm of the executive branch. These lawyers can serve as legal advisors to presidents and prime ministers – such as attorneys in offices of legal counsel – or as chief executives themselves – what Kim Scheppele calls "lawyers-in-chief."[22] Although executive branch lawyers were often presumed to carry forth their commitment to political liberalism – and thus serve as a constraint on executive action[23] – increasingly it is apparent that these attorneys can threaten judicial prerogatives and independence. They can do so by curtailing courts' jurisdiction – as when the US office of legal counsel in the Bush Administration promoted the view that the American judiciary should not try terrorism cases.[24] Executive attorneys can also devise and justify frontal attacks and court curbing – as when Hungarian Prime Minister

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[16] Holland, Alisha. 2016. "Forbearance." *American Political Science Review* 110 (2): 232-246; Kelemen, R. Daniel, and Tommaso Pavone. Forthcoming. "Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union." *World Politics* 75 (4).

[17] Brinks, Daniel. 2007. *The Judicial Response to Police Killings in Latin America: Inequality and the rule of law*. New York, NY: Cambridge University Press.

[18] On the importance of resource mobilization for litigation campaigns, see: Epp, Charles. 1998. *The Rights Revolution: Lawyers, activists, and supreme courts in comparative perspective*. Chicago, IL: University of Chicago Press.

[19] On the distinction between "one shotters" and "repeat players," see: Galanter, Marc. 1974. "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change". *Law & Society Review* 9 (1): 95–160.

[20] On "process expertise," see: Kritzer, Herbert M. 1998. *Legal advocacy: Lawyers and nonlawyers at work*. University of Michigan Press, at 194.

[21] On "political embeddedness," see: Michelson, Ethan. 2007. "Lawyers, political embeddedness, and institutional continuity in China's transition from socialism." *American Journal of Sociology* 113 (2): 352-414.

[22] Scheppele, Kim Lane. 2019. "The Legal Complex and Lawyers-in-Chief," in *The Legal Process and the Promise of Justice: Studies Inspired by the Work of Malcolm Feeley*, Greenspan, Aviram, and Simon (eds). New York, NY: Cambridge University Press.

[23] On lawyers as agents of political liberalism, see: Halliday, Terence, and Lucien Karpik. 1997. *Lawyers and the Rise of Western Political Liberalism*. New York, NY: Oxford University Press; Halliday, Terence, Lucien Karpik, and Malcolm Feeley. 2007. *Fighting for Political Freedom*. New York, NY: Bloomsbury.

[24] Bruff, Harold. 2009. *Bad Advice: Bush's Lawyers in the War on Terror*. Lawrence, KS: University Press of Kansas.

Viktor Orbán devised policies to pack the Constitutional Court with loyalists and assert government control over judicial appointments.[25] By eroding judicial independence and propelling repertoires of "autocratic legalism," executive lawyers can profoundly affect judicial behavior via what we may call *lawyer-style power politics*. While most judges may conform or be forced into quiescence, some may respond via rare forms of protest and political activism.[26]

Table 1 summarizes how three types of government lawyers – prosecutors, litigators, and executives – influence judicial behavior. It captures a conceptual framework that parses three (non-exhaustive) political processes into actors, mechanisms,[27] and outcomes of interest. First, in a politics of discretion, lawyers occupying law enforcement positions wield their discretion to prioritize particular cases or forbear from enforcement, thus shaping courts' agendas. Second, in a politics of positionality, lawyers representing governments in court leverage their favored institutional position and advantages as repeat-players to influence judicial decisions. Finally, in power politics, lawyer-style, attorneys at the helm of the executive branch weaponize their power to devise autocratic legalist reforms that erode judicial autonomy. Let us consider the evidence for each politics in turn.

Table 1: *Government lawyers and judicial behavior: three politics of influence*

	Actors types of government-employed lawyers		**Mechanisms** of influence over judicial behavior		**Outcomes** impact on judicial behavior
Politics of discretion	***prosecutors:*** lawyers in law enforcement offices	→	***discretion:*** forbearance & prioritization in enforcement	→	shape judicial ***agendas***
Politics of positionality	***litigators***: lawyers representing governments in court	→	***positionality:*** institutional reputation & repeat-player advantage	→	influence judicial ***decisions***
Power politics, lawyer-style	***executives***: lawyers at the helm of the executive branch	→	***power:*** "autocratic legalist" reforms	→	erode judicial ***autonomy***

Prosecutors and Judicial Agendas: The Politics of Discretion

In distinguishing courts from other branches of government, scholars and laymen routinely quote Alexander Hamilton's *Federalist 78*: courts have "neither force nor will, but merely judgement," having

[25] Scheppele, Kim Lane. 2018. "Autocratic legalism." *University of Chicago Law Review* 85 (2): 545-584.
[26] Matthes, Claudia-Y. 2022. "Judges as activists: how Polish judges mobilise to defend the rule of law." *East European Politics* 38 (3): 468-487.
[27] By mechanisms, I follow the definition provided by Derek Beach and Rasmus Pedersen, namely a set of entities, or actors, engaging in activities. See: Beach, Derek and Rasmus Brun Pedersen (2019). *Process-tracing Methods: Foundations and guidel ines*. University of Michigan Press, at 99-100.

"no influence over either the sword or the purse."[28] But we should add something else: that courts do not control their own agendas. Courts are designed as reactive institutions who depend on other social and political actors for their cases and their capacity to shape policy. Although informally judges can signal their desire to adjudicate certain kinds of controversies to prospective litigants, courts have no direct control over this crucial pre-litigation phase.[29]

It follows that by wielding their discretion in the pre-litigation phase, lawyers can mold judicial agendas. And as the overwhelming repeat-players in certain fields of law – such as administrative, criminal, constitutional, and international law – government lawyers' influence over judicial agenda-setting can be extraordinary. In particular, they can wage a *politics of discretion* via two strategies: selecting which cases to prioritize and vigorously push, and selecting which cases to drop and subtract from courts' attention. The impact of this politics is maximized when courts are seldom solicited and the government has exclusive standing – since it increases judges' dependence on the cases that government attorneys choose to bring – and when courts lack discretionary dockets – since it forces judges to pronounce themselves in all cases brought.

Yet, even when judges are regularly solicited and boast a discretionary docket, their agendas can depend on government lawyers to a surprising extent. Consider the instructive example of the US Supreme Court's agenda and the influence of the lawyers in the Solicitor General's (SG) office. Since 1925, the Supreme Court can select which subset of cases to adjudicate (by "granting cert" via a writ of certiorari); today, the Court selects only 80 or so cases a year from a pool of thousands of petitions.[30] SG attorneys – who coordinate the federal government's litigation strategy and represent the government before the Court – are uniquely effective in pushing favored cases past this onerous filter. As the justices confide, "the Court look[s] at the solicitor general as fulfilling part of their own screening function;" by being very selective in bringing petitions, SG lawyers can "convinc[e] [the justices] that refusal to decide the issue now would be disastrous."[31] So while the Court only grants cert in 3% of petitions, when the SG petitions to hear a case the justices abide 70% of the time (more on the SG's privileged relationship vis- the Court in the next section).[32] This discrepancy is dizzying even for seasoned Supreme Court attorneys: when Paul Clement left the SG's office in 2008 to return to private practice, his success rate in cert petitions plunged from 72.3% to 23.2%.[33] As Kritzer cleverly

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[28] Hamilton, Alexander. 1788. "Federalist No. 78." Available at: https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493470

[29] Pavone, Tommaso, and Øyvind Stiansen. 2022. "The Shadow Effect of Courts." *American Political Science Review* 116 (1): 322-336.

[30] Kastellec, Jonathan, and Huchen Liu. 2023. "The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court." *American Politics Research* 51 (1): 3-22, at 3-4.

[31] Quoted in: Perry, H.W. 1994. *Deciding to Decide: Agenda Setting in the United States Supreme Court.* Cambridge, MA: Harvard University Press, at 280.

[32] Chandler, Adam. 2011. "The Solicitor General of the United States: Tenth Justice or Zealous Advocate?" *Yale Law Journal* 121: 725-737, at 728.

[33] Compare the cert petition success rate of Clement as non-SG attorney to when he served as SG in: Feldman, Adam, and Alexander Kappner. 2016. "Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015." *Villanova Law Review* 61: 795-842, at 820, 828. Owens and Black also find that former SGs are no more likely to obtain the Court's support compared to attorneys with similar levels of experience: Black, Ryan, and Ryan Owens. 2016. "The Success of Former Solicitors General in Private Practice: Costly and Unnecessary?" *Michigan State Law Review*: 325-365.

concludes, when looking for a "needle in the haystack" of what drives the Court's agenda, "some needles are much larger than others (e.g. when the needle bears the imprimatur of the Solicitor General)."[34]

To some extent, private attorneys can wage a politics of discretion too – by strategically pushing clients to settle some cases in the shadow of the courts.[35] But in some instances, government lawyers are the *sole* actor with authority to bring suit. The prototypical exemplar is that of prosecutors or any government attorney in a law enforcement position. For instance, national prosecutors usually have exclusive discretion to indict persons or businesses and take them to court for violating criminal law.[36] Here, the US adversarial system maximizes prosecutors' discretion: beyond their enforcement monopoly, it grants them "essentially unchecked discretion" to overcharge defendants to obtain guilty verdicts and avoid trial (prosecutors succeed 95% of the time) while relegating judges to a deferential and passive role in the few cases that do make it to trial.[37] In civil law countries like Italy and Germany, prosecutors' discretion is more constrained: plea bargaining is limited, prosecutions are nearly compulsory, and judges assume a more proactive role as fact-finders who scrutinize prosecutors.[38] At the supranational level, nine regional organizations – such as the African Union, the Andean Community, and the European Free Trade Area – empower international secretariats with sole discretion to bring member states to court when they violate regional or international law.[39] And in 1998, the creation of the International Criminal Court (ICC) established an international prosecutor with discretion to initiate proceedings before the ICC against individuals for genocide, crimes against humanity, and war crimes.[40]

Recently, a vibrant comparative literature has revealed a politics of prosecutorial discretion that is particularly consequential to judicial agenda-setting: the politics of *forbearance*, or the "intentional and revocable under-enforcement of the law."[41] Forbearance is significant for courts because if taken too far, it can starve judges of their supervisory function and preclude them from enforcing the law

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[34] Kritzer, Herbert. 1994. "Interpretation and Validity Assessment in Qualitative Research: The Case of H.W. Perry's Deciding to Decide." *Law & Social Inquiry* 19 (3): 687-724, at 690.

[35] Mnookin, Robert, and Lewis Kornhauser. 1979. "Bargaining in the Shadow of the Law: The Case of Divorce." *Yale Law Journal* 88 (5): 950–97.

[36] Haynie, Stacia, and Ernest Dover. 1994. "Prosecutorial Discretion and Press Coverage: the Decision to Try a Case." *American Politics Quarterly* 22 (3): 370-381.

[37] For instance, American judges are highly dependent on and deferential to prosecutors' evidence and charging decisions: Johnson, Brian, and Raquel Hernandez. "Prosecutors and Plea Bargaining." In *The Oxford Handbook of Prosecutors and Prosecution,* Levine, Wright, and Gold, eds. New York, NY: Oxford University Press, at 75; Ross, Jacqueline. 2006. "The Entrenched Position of Plea Bargains in United States Legal Practice." *American Journal of Comparative Law* 54: 717-732.

[38] Among other things, prosecutors are not allowed to overcharge, and plea bargains cannot be used to avoid trial. See: Ma, Ye. 2002. "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy." *International Criminal Justice Review* 12: 22-52.

[39] Alter, Karen. 2014. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton, NJ: Princeton University Press, at 112-160.

[40] Brubacher, Matthew. 2004. "Prosecutorial Discretion within the International Criminal Court." *Journal of International Criminal Justice* 2: 71-95.

[41] Holland, Alisha. 2016. "Forbearance." *American Political Science Review* 110 (2): 232-246, at 232.

against powerful political actors, like corrupt politicians or states violating international law.[42] An emergent finding of this research is that government lawyers in enforcement positions usually adopt forbearance when they are insufficiently insulated from political interference – that is, when "politicians [can] make decisions to halt enforcement," even when lawyers "perform their jobs."[43] Government lawyers' liminal position – part government agent, part agent for the public interest – thus opens the door to politics and strategic behavior.

At the national level, a politics of discretion is usually driven by an electoral calculus. That is, government lawyers may be pressured by powerful politicians (such as ministers of justice or mayors) to underenforce the law against political allies and electoral constituencies that said politicians value for re-election (or, conversely, to target opponents or disfavored groups). In Guatemala, prosecutors began to uncover networks of political corruption beginning in 2015; the President and the Congress quickly united to attack the lawyers leading the investigations, quashing them before they could reach the courts.[44] In Chile, Peru, Colombia, and Brazil, mayors facing large working-class constituencies routinely interfere with government lawyers to block prosecutions of squatters, street vendors, and informal workers – especially in the lead-up to elections.[45] In some US states where prosecutors are elected, district attorneys in cities like San Francisco and Philadelphia actively campaign on the promise to underenforce unpopular drug and immigration laws.[46] In Italy and Germany, where small business owners are a powerful constituency for center-right parties, governments engage in "organizational sabotage" by cutting staff and resources allocated for prosecuting tax evasion.[47]

In short, political meddling can effectively reduce government lawyers' institutional autonomy and prosecutorial capacity. As a result, in Latin American countries like Brazil, prosecutors often depend on citizens and NGOs to gather evidence of illegality to pursue enforcement against powerful state actors like the police.[48] The takeaway is that even well-resourced and independent judiciaries may be starved of opportunities to supervise government agents and enforce the law against certain electoral constituencies. Figure 1 visualizes this politics: given a certain number of detected violations of the law, it distinguishes a process of normal attrition at the investigation and litigation stages from forbearance for favored groups and overenforcement against disfavored groups.

A discretionary politics of forbearance can also arise and reshape judicial agendas at the supranational level. Its logic, however, is not electoral since international policymakers are not directly

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[42] Pavone, Tommaso, and Øyvind Stiansen. 2022. "The Shadow Effect of Courts." *American Political Science Review* 116 (1): 322-336.

[43] Holland, Alisha. 2016. "Forbearance." *American Political Science Review* 110 (2): 232-246, at 240.

[44] Freeman, Will. 2023. *Ending Impunity: The Prosecution of Grand Corruption in latin America.* PhD. Dissertation, Princeton University.

[45] Holland, Alisha. 2017. *Forbearance as Redistribution: The politics of informal welfare in Latin America.* New York, NY: Cambridge University Press; Feierherd, German. 2020. "Courting Informal Workers: Exclusion, Forbearance, and the Left," *American Journal of Political Science* 66 (2): 418-433.

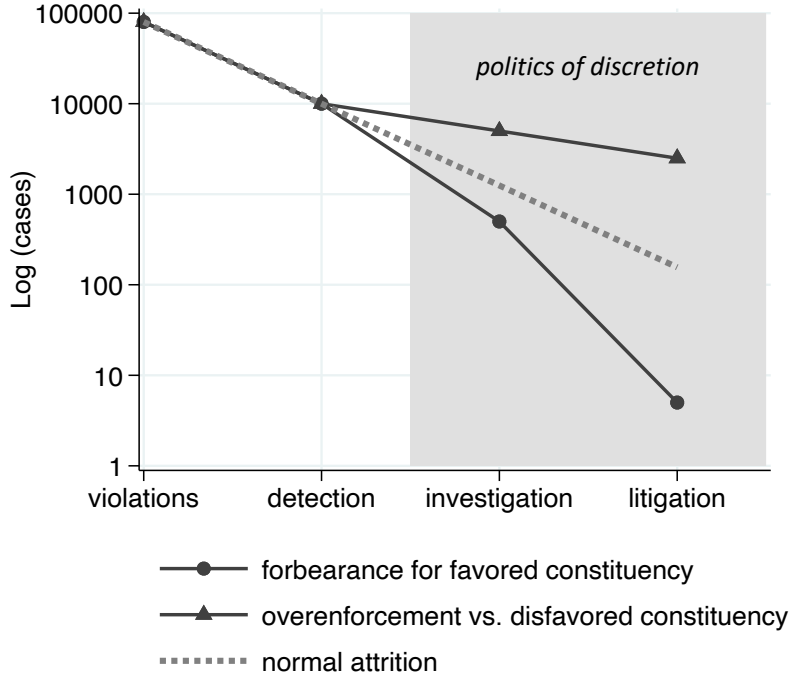
[46] Holland, Alisha. 2016. "Forbearance." *American Political Science Review* 110 (2): 232-246, at 245; Sawyer, Logan. 2020. "Reform Prosecutors and the Separation of Powers." *Oklahoma Law Review* 72: 603-634.

[47] Dewey, Matias, and Donato Di Carlo. 2021. "Governing through non-enforcement: Regulatory forbearance as industrial policy in advanced economies." *Regulation and Governance* 16 (3): 930-950.

[48] Brinks, Daniel. 2007. *The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law.* New York, NY: Cambridge University Press.

elected by voters. Instead, supranational forbearance is more likely to arise when international executives face cross-pressures between their duty to enforce the law against noncompliant states and their desire to work cooperatively with national governments to advance common policies. Eight of nine such international executives in regional organizations like the European Union and the East African Community "double-hat" as policymakers and prosecutors. As national governments respond to a growing cross-national backlash against international institutions by reassert control over transnational policymaking,[49] these international executives may sacrifice their role as prosecutors in order to safeguard their role as policy agenda-setters.[50]

Figure 1: *Visualizing a politics of prosecutorial discretion: normal attrition, overenforcement, and forbearance*



Notes: Adapted from Holland (2016, 243) figure 6.

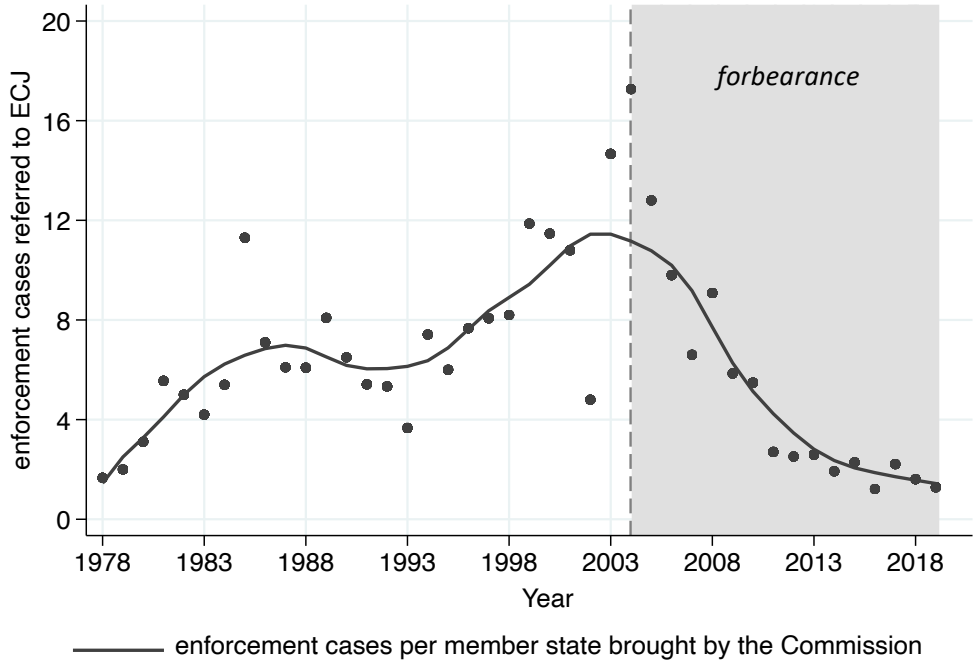
In some of my own research with R. Daniel Kelemen, we trace the rise of this politics of forbearance in the European Union's (EU) executive: the European Commission. The Commission not only is almost akin to a pan-European government; it is also the sole EU institution capable of bringing national governments before the European Court of Justice (ECJ) for violating European law (via what are known as "infringement cases"). We show that when José Manuel Barroso – the former Portuguese Prime Minister – became Commission President in 2004, he spearheaded internal reforms

[49] Voeten, Erik. 2022. "Is the Public Backlash against Globalization a Backlash against Legalization and Judicialization?" *International Studies Review* 24 (2): 1-17.

[50] Kelemen, R. Daniel, and Tommaso Pavone. Forthcoming. "Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union." *World Politics* 75 (4), at 27.

to gain political control over prosecutorial decisions hitherto made by the independent-minded lawyers in the Commission's Legal Service (LS). By politicizing the LS[51] and reining-in prosecutions against member governments, Barroso successfully rekindled intergovernmental support for his policy agenda. Yet as one lawyer confided, this "very heavy political interference" to "drop" enforcement cases and "remain on good terms with the member governments" [52] deprived the ECJ of opportunities to supervise and sanction non-compliance, even as some governments like Hungary and Poland began to systematically flout fundamental EU rules.[53] Figure 2 visualizes this decline in enforcement cases lodged before the ECJ by the Commission following the politicization of the LS: cases brought by the LS plummeted from comprising 49% of the Court's docket in 2004 to a mere 8% by 2014.[54]

Figure 2: *The European Commission's Legal Service (LS) referred member states to the ECJ far less often following its politicization post-2004*



Notes: Adapted from Kelemen & Pavone (2023, 6), figure 1.

The takeaway from this burgeoning research agenda is that in certain legal fields like criminal law and international law, government lawyers have an extraordinary first-mover advantage: how they move, and whether they even choose to move, frames courts' agendas. To the extent that prosecutors submit

[51] On the growing politicization of the LS, see: Leino-Sandberg, Päivi. 2021. *The Politics of Legal Expertise in EU Policy-Making.* New York, NY: Cambridge University Press, at 137-196.
[52] Ibid, at 27.
[53] Scheppele, Kim Lane. Forthcoming. "The Treaties Without a Guardian." *Columbia Journal of European Law.* One file with author.
[54] That is, 259 out of 531 new cases in 2004, versus 52 of 622 new cases in 2014. Data is from Kelemen & Pavone (2023).

to political pressures to prioritize certain cases or forbear from bringing some violations to courts' attention, government lawyers effectively warp judges' supervisory and law enforcement functions.

Litigators and Judicial Decisions: The Politics of Positionality

When government lawyers enter a courtroom, they tend to do so from a decidedly privileged institutional position. After all, their 'client' – the state (or the government; more on this ambiguity in a second) – usually possesses the economic prowess to fund repeated and often protracted litigation campaigns. Government lawyers thus have the opportunity to accrue "human capital in court,"[55] becoming known personalities capable of dexterously forging a favorable rapport with their judicial interlocutors. This capacity can be limited for lawyers representing private litigants whose engagement with the court system tends to be ephemeral and who may lack the money to sustain litigation. The state's capacity to absorb the costs of litigation also enables government lawyers to litigate with an eye to obtaining policy changes that may only concretize in the long-run: to "play for rules," and not just "play for cases."[56]

Impressive though the foregoing advantages may be, they are not unique to government attorneys: they also apply to lawyers representing multi-national corporations. The final ace up government lawyers' sleeve, however, is uniquely their own: it lies, once again, in their very political embeddedness. Government lawyers can supply judges with credible political signals regarding the government's preferences and policy intentions. And if they play their cards right, government lawyers can simultaneously cultivate a reputation for impartiality as representatives of the public interest.

No other type of litigator occupies an institutional position that allows them to wear so many hats simultaneously: the repeat-player advantages of a corporate lawyer, the political embeddedness of a government operative, the impartiality and public spirit of a civil servant. It turns out that all of these 'hats' can be valuable for judges too. When a lawyer appears in court time and again, judges can get a better sense of their abilities and their trustworthiness, to "establish relations of trust and reciprocity."[57] When a lawyer has privileged access to government, judges can better glean the political salience of the dispute before them and assess the threat of noncompliance. And when a lawyer credibly speaks for the public interest, judges can look to them for ideas regarding which path to take in pursuit of a common enterprise.

By far the best-documented example of the privileged institutional position or "built-in advantage" of government litigators[58] is that of the few dozen attorneys serving in the US Solicitor General's (SG) office.[59] Since the 1970s, lawyers from the SG office have comprised 13% of all lawyers

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[55] Epstein, Lee, and Michael Nelson. 2022. "Human Capital in Court: The Role of Attorney Experience in Supreme Court Litigation." *Journal of Law & Courts* 10 (1): 61-85.

[56] Galanter, Marc. 1974. "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9 (1): 95–160, at 99-100.

[57] Ibid.

[58] Black, Ryan, and Ryan Owens. 2012. "A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court." *Political Research Quarterly* 66 (2): 454-466.

[59] Caplan, Lincoln. 1987. *The Tenth Justice: The Solicitor General and the Rule of Law*. New York, NY: Knopf, at 3-6.

before the Court[60] and have appeared in approximately 30% of all cases argued.[61] When SGs address the justices to argue a case, they do so with an average experience of 34 prior appearances under their belt (their assistants do so with an average experience of 15 prior Supreme Court lawsuits). By contrast, the average private lawyer before the Court has only appeared in that forum once before.[62] Regularly arguing cases before the nation's highest court endows the SG with unique professional prestige: as Rex Lee, the former SG under President Reagan, put it, "I was very much hoping that I would be picked [as SG] because that is… probably the creamiest lawyering job in the country."[63]

US Supreme Court justices rely heavily on the Solicitor General – and not just at the agenda-setting stage, as we saw previously. First, justices know that as a repeat-player, the SG will be able to speak their language, as it were. One justice described the SG's "process expertise"[64] to H.W. Perry as follows: "the Solicitor General also knows all the catchwords, and they just know how to write them in a brief."[65] Second, justices rely on SG lawyers for political signals about what the government wants, how much it wants it, and what it is willing (and unwilling) to tolerate. As Thomas Merrill – deputy SG under Presidents Reagan and Bush – confided, justices "look to the solicitor general for guidance… for signals about the political atmosphere, 'for what's do-able'."[66] In this way, the justices treat the SG as a political operative, an emissary of the government and President. Yet justices *also* treat the SG as one of their own, as a state civil servant representing the public interest, earning the SG the nickname of "the tenth justice."[67] As Justice Powell illustrated during deliberations in one case, "the importance of this case – and the interest of the government - justify giving the Solicitor General 15 minutes [for oral argument]… he may be more helpful than the more partisan counsel."[68] Supreme Court clerks and justices have confided in scholarly interviews that they expect the SG to "play as an honest broker of the facts"[69] who serves as a "surrogate" for the Court.[70] As one justice put it, "we jokingly referred to the SG's petition as the answer sheet,"[71] and there is striking historical evidence

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[60] Johnson, Timothy, Wahlbeck, Paul, & James Spriggs II. 2006. "The Influence of Oral Arguments on the US Supreme Court." *American Political Science Review* 100 (1): 99-113, at 105-107.

[61] Epstein, Lee, and Michael Nelson. 2022. "Human Capital in Court: The Role of Attorney Experience in Supreme Court Litigation." *Journal of Law & Courts* 10 (1): 61-85, at 69.

[62] Johnson, Timothy, Wahlbeck, Paul, & James Spriggs II. 2006. "The Influence of Oral Arguments on the US Supreme Court." *American Political Science Review* 100 (1): 99-113, at 105-107.

[63] Quoted in: Salokar, Rebecca. 1992. *The Solicitor General: The Politics of Law*. Philadelphia, PA: Temple University Press, at 33.

[64] Kritzer, Herbert M. 1998. *Legal advocacy: Lawyers and nonlawyers at work*. University of Michigan Press, at 194.

[65] Quoted in: Perry, H.W. 1994. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press, at 132.

[66] Quoted in: Bailey, Michael, Kamoie, Brian, and Forrest Maltzman. 2005. "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making." *American Journal of Political Science* 49 (1): 72-85, at 74.

[67] Caplan, Lincoln. 1987. *The Tenth Justice: The Solicitor General and the Rule of Law*. New York, NY: Knopf.

[68] Johnson, Timothy, Wahlbeck, Paul, & James Spriggs II. 2006. "The Influence of Oral Arguments on the US Supreme Court." *American Political Science Review* 100 (1): 99-113, at 101-102.

[69] Quoted in: Black, Ryan, and Ryan Owens. 2011. "Solicitor General Influence and Agenda Setting on the U.S. Supreme Court." *Political Research Quarterly* 64 (4): 765-778, at 766.

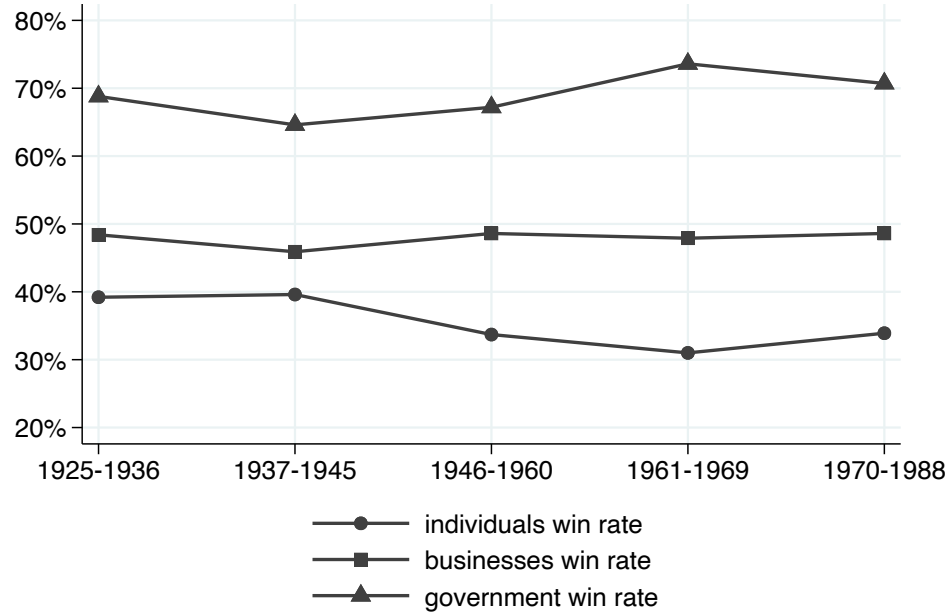
[70] Quoted in: Perry, H.W. 1994. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press, at 75-76.

[71] Ibid, at 133.

that in salient cases – such as the *Brown v. Board of Education* desegregation cases – the Court effectively "adopted the position" articulated by the SG.[72]

There is also consistent quantitative evidence that lawyers representing the federal government – particularly those in the SG office – do deliver 'answer sheets' to the Supreme Court. As Figure 3 shows, government lawyers are almost twice as likely to sway the Court in their favor (with a 65 to 75% win rate) than lawyers representing individuals (with a 30 to 40% win rate).[73] Government lawyers in the SG office have the greatest advantage, as demonstrated by research revealing that justices informally assign significantly higher grades to their oral arguments than those by private attorneys.[74] Sophisticated econometric analyses confirm that that "OSG attorneys… are more likely to win their cases" compared to "nearly identical non-OSG lawyers in nearly identical cases."[75]

Figure 3: *US government lawyers win at higher rates than lawyers representing private litigants*



Notes: Adapted from Songer et al. (1999, 821), table 3.

At the same time, research on the SG office suggests that government lawyers' influence is conditional on their capacity to cultivate a reputation for institutional independence. This reputation is bolstered, for instance, when government attorneys argue in favor of a position that counters the partisan or

[72] Gillman, Howard, Graber, Mark, and Keith Whittington. 2013. *American Constitutionalism, Vol II: Rights and Liberties.* New York, NY: Oxford University Press, at 594.
[73] Songer, Donald, Sheehan, Reginald, and Susan Haire. 1999. "Do the "Haves" Come out Ahead over Time?" *Law & Society Review*33 (4): 811-832, at 821.
[74] Johnson, Timothy, Wahlbeck, Paul, & James Spriggs II. 2006. "The Influence of Oral Arguments on the US Supreme Court." *American Political Science Review* 100 (1): 99-113, at 107-108.
[75] Black, Ryan, and Ryan Owens. 2012. "A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court." *Political Research Quarterly* 66 (2): 454-466, at 454.

ideological orientation of the sitting government. For instance, when a SG appointed by Republican President argues in favor of a liberal outcome, their probability of securing the justices' support rises by fifteen percentage points from 68% to 83%.[76] Conversely, historical and econometric studies suggest that when the Reagan Administration and its pugnacious Attorney General – Edwin Meese – began pressuring the SG office to push "agenda cases" towing the party line,[77] the SG's credibility as a litigator was hampered. For once Reagan and Meese made overtly partisan appointments to the SG office, government attorneys lost some of their capacity to double-hat not only as political operatives, but also as disinterested surrogates of the Court. Consequently, their litigation success rate plunged by 12%, despite the increasingly conservative orientation of the Supreme Court.[78]

The US experience suggests two comparative insights regarding when a politics of positionality is most likely to sway judicial decisions: when (1) the government is sufficiently resourceful to forge an elite group of repeat-players as its litigators; (2) when government attorneys can cultivate a credible reputation of institutional independence to double-hat as political emissaries and representatives of the public interest. To the extent that a government lacks the resources and organizational capacity to nurture human capital, or that it wields government lawyers as overtly partisan actors, then its attorneys are less likely to sway judicial decisions.

One example indicating that the US experience generalizes beyond the American context is that of government lawyers in the European Union (EU). In the EU, the European Commission employs an elite group of about 150 lawyers in its Legal Service (LS) tasked with representing the European executive before the European Court of Justice (ECJ). Like the SG office, the LS has "far more resources" than any other body of EU-employed legal counsel,[79] and is thus "the single most frequent litigator before the Court of Justice, and the prototypical repeat player on the European legal stage."[80] The Director of the LS is arguably the EU's most influential lawyer, just as the SG is arguably the US's most influential litigator.[81] Since many LS lawyers served as clerks for ECJ judges, they possess unique knowledge of the "inner workings of the [European] Court."[82] Like the SG's office,

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[76] Bailey, Michael, Kamoie, Brian, and Forrest Maltzman. 2005. "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making." *American Journal of Political Science* 49 (1): 72-85, at 76-77; 81.

[77] Salokar, Rebecca. 1992. *The Solicitor General: The Politics of Law*. Philadelphia, PA: Temple University Press, at 72; Caplan, Lincoln. 1987. *The Tenth Justice: The Solicitor General and the Rule of Law*. New York, NY: Knopf.

[78] This decline in litigation success occurred in particular after Rex Lee was criticized for being insufficiently loyal as SG to the Reagan administration, and was replaced by the more obedient Charles Fried. See: Wohlfarth, Patrick. 2009. "The Tenth Justice? Consequences of Politicization of the Solicitor General's Office." Journal of Politics 71 (1): 224-237, at 227-228; 231; 234.

[79] Leino-Sandberg, Päivi. 2021. *The Politics of Legal Expertise in EU Policy-Making.* New York, NY: Cambridge University Press, at 152.

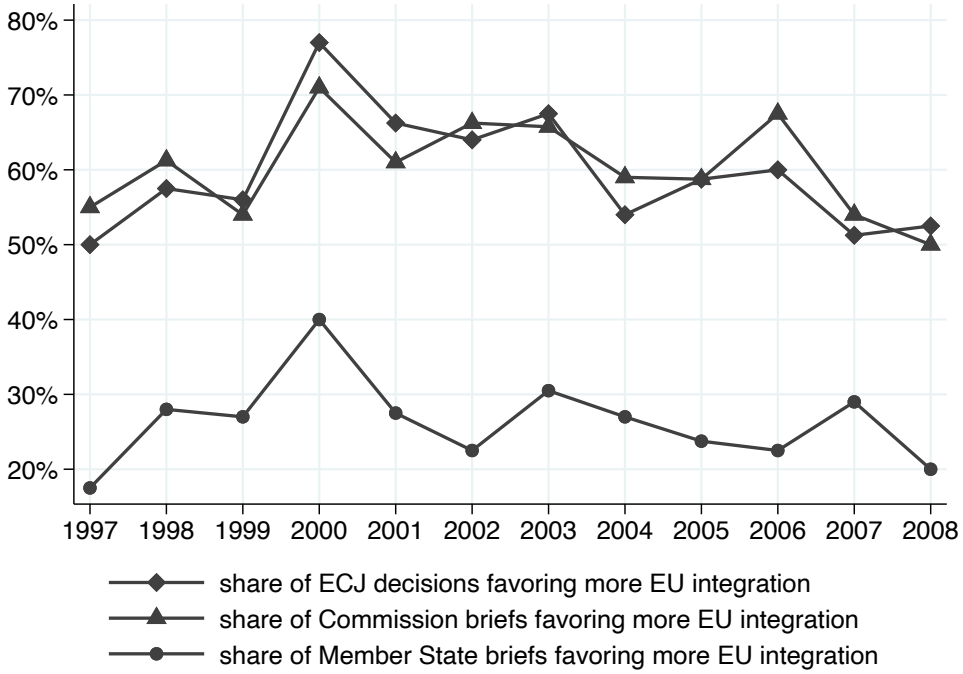
[80] Hofmann, Andreas. 2013. *Strategies of the Repeat Player: The European Commission between Courtroom and Legislature.* PhD Thesis, University of Cologne, at 9.

[81] Probably the most influential director of the LS is Michel Gaudet, who built up the service and established its unparalleled influence over the ECJ from 1958-1967. See: Bailleux, Julie. 2013. "Michel Gaudet, a Law Entrepreneur." *Common Market Law Review* 50 (2): 359-367.

[82] Leino-Sandberg, Päivi. 2021. *The Politics of Legal Expertise in EU Policy-Making.* New York, NY: Cambridge University Press, at 174.

the Commission has historically cultivated a "special rapport"[83] with the ECJ: the Court trusts that the LS will work "in the service of the European interest"[84] and will ensure that "the general interest of the Community takes precedence at all times."[85] At the same time, the ECJ looks to the Commission for signals of what is politically feasible given the latter's involvement in the EU's intergovernmental politics. Hence, just as the US Supreme Court treats the SG's observations as something of an 'answer sheet,' so too does the ECJ develop its case law with an eye to the arguments of the Commission LS. For instance, recent archival work traces how the ECJ's pathbreaking decisions holding that EU law has primacy over conflicting national law and can be directly invoked by private litigants before national courts were devised by LS lawyers and then appropriated by the Court.[86]

Figure 4: *European Court of Justice decisions closely reflect European Commission lawyers' pro-EU briefs*



Notes: Adapted from Larsson and Naurin (2016, 395), figure 2.

Quantitative evidence confirms that the ECJ follows the Commission's LS to a remarkable degree. Not only does ECJ decision-making closely reflect the pro-EU bias in the LS' briefs (see Figure 4), but the LS wins the vast majority of the cases it argues before the Court. In cases lodged by

[83] Ibid, at xi.

[84] Leino-Sandberg, Päivi. 2021. *The Politics of Legal Expertise in EU Policy-Making.* New York, NY: Cambridge University Press, at 140-151.

[85] Case C-432/04, *Commission of the European Communities v. Edith Cresson* [2006], ECLI:EU:C:2006:455, par. 71.

[86] Rasmussen, Morten. 2012. "Establishing a Constitutional Practice of European law: The History of the Legal Service of the European Executive, 1952-65." *Contemporary European History* 21 (3): 375-397; Boerger, Anne, and Morten Rasmussen. 2014. "Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993." *European Constitutional Law Review* 10 (2): 199-225.

Commission lawyers against member states for violations of EU law, the ECJ consistently sides with the LS 90% of the time.[87] Where the LS intervenes in disputes lodged by private parties and referred to the ECJ by national courts (known as 'preliminary reference' cases), the Court sides with the LS just under 80% of the time.[88] And when "the Commission favors the plaintiff [in a case], the Court listens:" a plaintiff supported by the LS is approximately twice as likely to win compared to a plaintiff that is not supported by the LS.[89] Private attorneys do not come close to replicating the success rate of the EU's 'government' lawyers: attorneys representing individuals prevail in 1/3 to 1/2 of the cases they argue before the ECJ, whereas attorneys representing businesses prevail 1/4 to 2/5 of the time.[90]

We can identify scope conditions to the foregoing findings that open fruitful pathways for comparative research. These conditions hinge on the variegated capacity of governments to mobilize the resources necessary to employ specialized teams of litigators, to cultivate the human capital necessary to boost these legal units' prestige, and to forbear from excessive partisan politicization. When it comes to resources and human capital, a revealing comparison is offered by the divergent success of government litigators in South Africa and Canada. In post-apartheid South Africa, the fledgling democratic state initially lacked resources and depended on a rotating cast of private attorneys to represent it in court.[91] Once funds were appropriated to employ government litigators in 2007 – by creating the office of the Chief Litigation Officer (OCLO) – the office struggled to recruit high-profile attorneys and remains a low-prestige post for South African lawyers.[92] Unsurprisingly, statistical analyses find that the South African "government [is] unable to consistently prevail in litigation outcomes," and its advocates are no more likely to sway judges than lawyers representing private parties.[93] Conversely, in Canada, where the resource-rich Attorney General's office employs an elite unit of attorneys to represent it in court, government litigators historically prevail far more often before the Canadian Supreme Court than any other type of advocate.[94] Crucially, the advantage of these "government gorillas" remains even when controlling for the positive effect of lawyer

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87 Kelemen, R. Daniel, and Tommaso Pavone. Forthcoming. "Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union." *World Politics* 95 (4).

88 Stone Sweet, Alec, and Thomas Brunell. 2012. "The European Court of Justice, State Noncompliance, and the Politics of Override." *American Political Science Review* 106 (1): 204-213, at 211.

89 Ibid, at 210.

90 Hermansen, Silje, Pavone, Tommaso, and Louisa Boulaziz. 2023. "Leveling and Spotlighting: How International Courts Refract Private Litigation to Build Institutional Legitimacy." Working paper on file with author.

91 Haynie, Stacia, and Kaitlyn Sill. 2007. "Experienced Advocates and Litigation Outcomes: Repeat Players in the South African Supreme Court of Appeal." *Political Research Quarterly* 60 (3): 443-453, at 446-447.

92 Klaaren, Jonathan. 2016. "Civil Government Lawyers in South Africa." *New York Law School Law Review* 60: 417-429.

93 Haynie, Stacia, and Kaitlyn Sill. 2007. "Experienced Advocates and Litigation Outcomes: Repeat Players in the South African Supreme Court of Appeal." *Political Research Quarterly* 60 (3): 443-453, at 448-450.

94 McCormick, Peter. 1994. *Canada's Courts*. Toronto, CA: James Lorimer, at 152-167; Flemming, Roy, and Glen Krutz. 2002. "Repeat Litigators and Agenda Setting on the Supreme Court of Canada." *Canadian Journal of Political Science* 35 (4): 811-833.

experience – i.e. their repeat player advantage – suggesting that their success inheres in their very position as representatives of the government.[95]

Yet, as we saw from the SG's experience in the US, the success of a politics of positionality also hinges on government lawyers cultivating a reputation as sufficiently independent actors to serve as trusted representatives of the public interest. Consider the case of government lawyers in Israel. There, career lawyers in the "prestig[ious]" High Court of Justice Department (HCJD), under the supervision of the Attorney General, "abandoned the traditional model of [just] lawyering for the government" that prevailed through the 1970s and labored to establish a reputation as an "organ that [also] seeks to promote the general values of the rule of law" and is "accountable" to the Israeli Supreme Court.[96] This institutional double-hatting paid off: the Supreme Court – soon presided by Aharon Barak, himself the former Attorney General – began treating "the cooperation of the department" as essential, and the HCJD as a "natural ally in its struggle to enhance its influence over society."[97] Unsurprisingly, then, by the 1990s HCJD lawyers grew significantly more successful in defending the government before the Court (boasting a 58.5% win rate) compared to other government attorneys, such as those representing municipalities (with a 45.8% win rate).[98]

In short, a politics of positionality is a strategic balancing act: given a government with enough resources to nurture human capital and endow lawyers with a repeat-player advantage, the most successful attorneys also leverage their political embeddedness as the government's agents while simultaneously wielding their judicial embeddedness to serve as the court's trustees. Too much of the former and their credibility in court is compromised; too much of the latter and their loyalty in government is scrutinized, jeopardizing their career. But when the right balance is struck, no party can match the capacity of government lawyers to "come out ahead"[99] in court.

Executives and Judicial Autonomy: Power Politics, Lawyer-Style

Across the world, executive power is making an unlikely resurgence. I say "unlikely" because it was fashionable in the 1990s and early 2000s to presume that globalization and the post-Cold War spread of liberal democracy[100] would go hand-in-hand with the "disaggregation" of executive power and the rise of judicial power.[101] Given these political developments, lawyers would "enthusiastically suppor[t] efforts to delegate power to the judiciary."[102] After all, "the fight by lawyers for judicial autonomy" in countries like France, Germany, and the United States suggested that lawyers would be inclined to

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[95] Szmer, John, Johnson, Susan, and Tammy Sarver. 2007. "Does the Lawyer Matter? Influencing Outcomes on the Supreme Court of Canada." *Law & Society Review* 41 (2): 279-304, at 296-298.

[96] Dotan, Yoav. 2014. *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel.* New York, NY: Cambridge University Press, at 63; 75; 87.

[97] Ibid, at 82; 85.

[98] Ibid, at 106-108.

[99] Galanter, Marc. 1974. "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change". *Law & Society Review* 9 (1): 95–160.

[100] This belief was epitomized in Francis Fukuyama's "end of history" thesis: Fukuyama, Francis. 1992. *The End of History and the Last Man.* New York, NY: Simon & Schuster.

[101] Slaughter, Anne-Marie. 2004. *A New World Order.* Princeton, NJ: Princeton University Press, at 35.

[102] Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* Cambridge, MA: Harvard University Press, at 63.

cultivate political liberalism and support a "moderate state."[103] For our purposes, the implication is that the more lawyers can achieve positions of executive influence, the more moderate the government and the greater its deference to an autonomous judiciary.

We certainly know of cases that fit the foregoing narrative, such as the critical support that the Israeli Attorney General's office offered the Supreme Court in the 1980s and 1990s in its assertive exercise of judicial review.[104] But what is most striking about the post-Cold War era has been the rise of executive branch attorneys who weaponize their legal training and power to cow judges into obeisance and undermine democratic checks and balances.

As the world experiences a "democratic recession"[105] and the share of the population living in autocratizing states spikes from 5% in 2011 to 36% in 2021,[106] we have witnessed the rise of a cadre of "autocratic legalists" – attorneys with both feet planted in the executive branch who seek to dismantle liberal democracy by law. Some of these government lawyers are even "lawyers-in-chief" – chief executives like Vladimir Putin in Russia and Viktor Orbán in Hungary, who are "deeply trained as lawyers and their governing styles reflect their legal education."[107] Elsewhere from Turkey, Venezuela, Brazil and most recently Israel, wannabe-autocrats deploy executive branch attorneys to devise a modular script for capturing institutions that can check what the government does, which is to say to go after the courts.[108]

Figure 4 visualizes the worrying trend "buried within the general phenomenon of democratic decline:" the increasing government attacks on autonomous courts, and the correlate decline in judicial independence. But even Figure 4 does not capture the whole story: it traces public speeches and rhetorical affronts that are easiest to perceive and measure. In addition to these "informal" court-curbing tools that non-lawyers may be better equipped to use,[109] autocratic legalists engage in a form of *lawyer-style power politics*: they mobilize their legal training to weaponize the law and make it appear like the executive is reforming the judiciary to make it more efficient or responsive. By the time coercion comes into play and rule *by* law supplants the rule *of* law,[110] the courts may be co-opted to such an extent that they no longer serve as a forum to challenge the government.

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[103] Halliday, Terence, Karpik, Lucien, and Malcolm Feeley. 2007. *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*. New York, NY: Bloomsbury, at 4.

[104] Dotan, Yoav. 2014. *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*. New York, NY: Cambridge University Press.

[105] Diamond, Larry. 2015. "Facing up to the Democratic Recession." *Journal of Democracy* 26 (1): 141-155; Levitsky, Steven, and Lucan Way. 2019. *How Democracies Die*. New York, NY: Broadway Books.

[106] V-Dem. 2022. *Democracy Report 2022: Autocratization Changing Nature?* Gothenburg: V-Dem Institute, at 7.

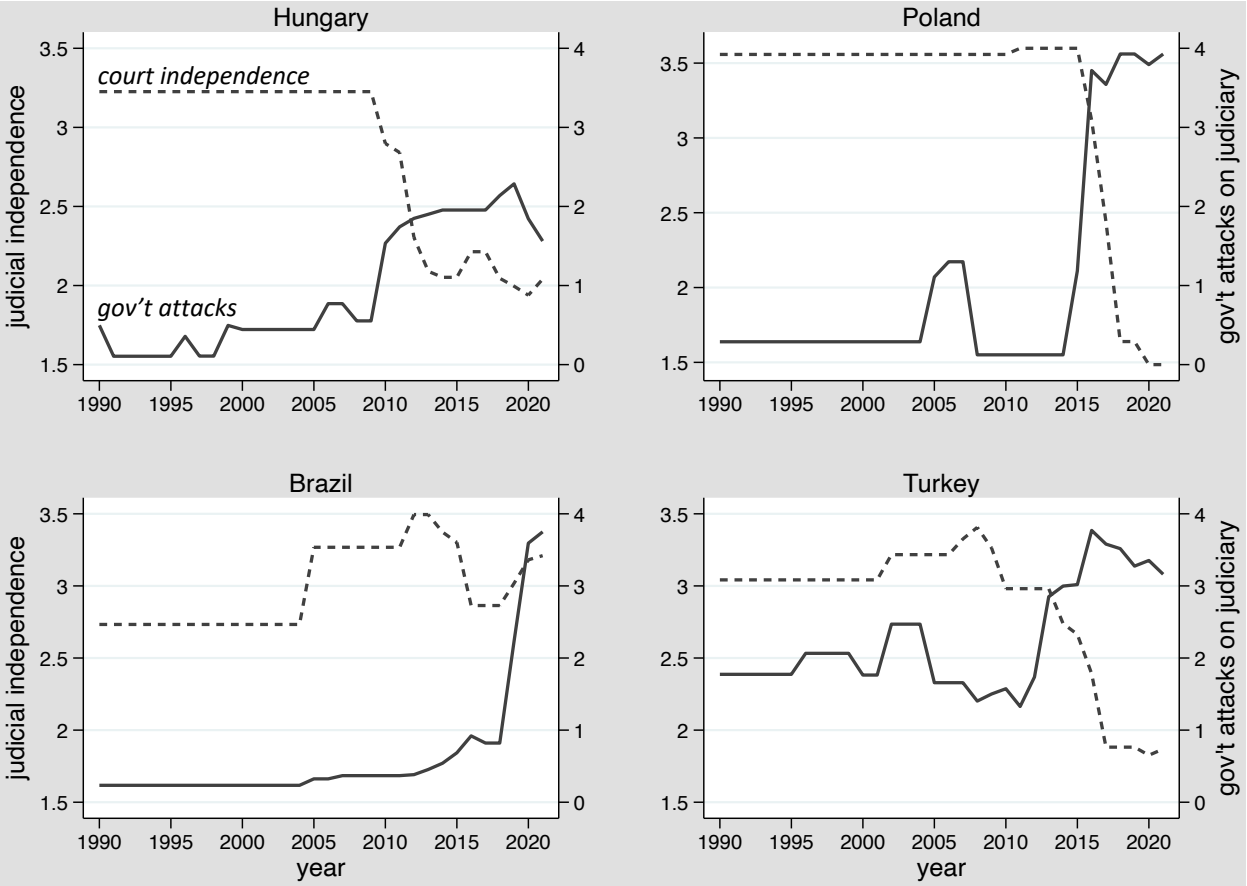
[107] Corrales, Javier. 2015. "The Authoritarian Resurgence: Autocratic legalism in Venezuela." *Journal of Democracy* 26 (2): 37-51; Scheppele, Kim Lane. 2019. "The Legal Complex and Lawyers-in-Chief," in *The Legal Process and the Promise of Justice*, Greenspan, Aviram, & Simon (eds). New York, NY: Cambridge University Press, at 362; Lieblich, Eliav, and Adam Shinar. 2023. "The End of Israeli Democracy? Netanyahu's Latest Reforms Come Straight from the Autocrat's Playbook." *Foreign Affairs*, February 8.

[108] Scheppele, Kim Lane. 2018. "Autocratic Legalism." *University of Chicago Law Review* 85 (2): 545-584.

[109] On 'informal' vs 'formal' court-curbing by the executive, see: Aydin-Cakir, Aylin. 2023. "The varying effect of court-curbing: evidence from Hungary and Poland." *Journal of European Public Policy* (early view): 1-27.

[110] Ginsburg, Tom, and Tamir Moustafa. 2008. *Rule by Law: The Politics of Courts in Authoritarian Regimes*. New York, NY: Cambridge University Press.

Figure 4: *Judicial independence has eroded in tandem with rising government attacks on the courts in Hungary, Poland, Brazil, and Turkey*



Notes: Data is from Varieties of Democracy (V-DEM), version 12. For judicial independence, I use the high court independence variable. The government attacks variable is reverse-coded for ease of interpretation, such that both variables range from 0 (low) to 4 (high). See Coppedge et al. (2022).[111]

For instance, autocratic legalists might expand a high court's jurisdiction to flood it with new cases – and then justify packing the court with executive-appointed (loyalist) judges. This strategy makes it appear like high courts are being strengthened by improving their accessibly and efficiency, when in reality the judiciary's leadership is being co-opted. Upon taking power in 2010, Hungarian Prime Minister and lawyer-in-chief Viktor Orbán pushed through a new constitution that expanded the Constitutional Court's jurisdiction to include constitutional complaints (borrowing from the much-admired German constitutional system). To respond to the rising caseload, the new constitution also expanded the Court from 11 judges to 15 – enabling the Orbán government to pack the Court with loyalists. To make it clear that the newly-packed Court should not follow its previously-autonomous

[111] Coppedge, Michael, et al. 2022. "VDem [Country–Year/Country–Date] Dataset v12." Varieties of Democracy (V-Dem) Project, available at: https://doi.org/10.23696/vdemds22.

(and much-admired) predecessor by taking rights seriously, the Orbán government amended the Constitution in 2013 to nullify the previous 20 years of the Court's case law.[112]

Poland offers another example of autocratic legalism as embodied in the government's top lawyer: Zbigniew Ziobro. Following the Law and Justice Party (PiS)'s electoral victory in 2015, Ziobro was appointed Minister of Justice. Ziobro used his executive post to secure a majority of the seats in the National Council of the Judiciary, appointing more than a dozen new members "who now owe him everything." Then in 2016 the PiS parliamentary majority pushed through legislation that made Ziobro not just the top government lawyer, but also the chief prosecutor (Prosecutor General). This allowed him to manipulate criminal proceedings in the name of "efficiency," force all court presidents to "report to him,"[113] and prosecute judges who 'mishandle' cases involving his personal or party interests.[114] Then in 2017, new PiS legislation empowered Ziobro to fire and appoint court presidents within 6-months, a power he weaponized to replace the leadership of one fifth (158 out of 730) of all Polish courts, solidifying Ziobro's grips over judges' careers.[115] Having Ziobro consolidate executive power over the judiciary was particularly efficacious because he was a former member of the Legal Affairs Committee of the European Parliament: once EU officials noticed the reforms and debated whether to respond, Ziobro knew which EU legal arguments to spin into a "rhetoric of inaction."[116]

Executive branch attorneys figure prominently in power politics well beyond Hungary and Poland: from Venezuelan President Hugo Chavez's creation of a new Supreme Court in 1999 and its legislative packing in 2005;[117] to the design of a constitutional referendum in 2010 that enabled Turkish President Recep Erdoğan's to solidify political control of Constitutional Court;[118] to Brazilian prosecutors developing a legal discourse that was weaponized post-2019 by President Jair Bolsonaro to justify "act[ing] beyond the existing law" in response to "existential threats;"[119] to Israeli Justice Minister Yariv Levin's selective use of comparative constitutional law in 2023 to propose judicial reforms drastically curbing the Supreme Court's judicial review powers and enabling the government's

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112 Kelemen, R. Daniel, and Mitchell Orenstein. 2016. "Europe's Autocracy Problem." *Foreign Affairs,* January 7; Scheppele, Kim Lane. 2018. "Autocratic Legalism." *University of Chicago Law Review* 85 (2): 545-584, at 551-553.

113 These quotes are from President of the Polish Supreme Court Małgorzata Maria Gersdorf, describing Ziobro's role in the rise of autocratic legalism in Poland. Quoted in: Sadurski, Wojciech. 2019. *Poland's Constitutional Breakdown.* New York, NY: Oxford University Press, at 96.

114 For instance, Ziobro's Prosecutor General office opened criminal proceedings against Krakow judge Pilarczyk for her conduct in a dispute involving Ziobro's late father; see Ibid, at 119.

115 Ibid, at 115-116.

116 Emmons, Cassandra, and Tommaso Pavone 2021. "The Rhetoric of Inaction: Failing to fail forward in the EU's rule of law crisis." *Journal of European Public Policy* 28 (1): 1611-1629.

117 Corrales, Javier. 2015. "The Authoritarian Resurgence: Autocratic legalism in Venezuela." *Journal of Democracy* 26 (2): 37-51, at 43-44; Keck, Thomas. 2022. "Court-Packing and Democratic Erosion," in *Democratic Resilience*, Lieberman, Mettler, and Roberts (eds). New York, NY: Cambridge University Press, at 146.

118 Keck, Thomas. 2022. "Court-Packing and Democratic Erosion," in *Democratic Resilience*, Lieberman, Mettler, and Roberts (eds). New York, NY: Cambridge University Press, at 145.

119 De Sá e Silva, Fabio. 2020. "From Car Wash to Bolsonaro: Law and Lawyers in Brazil's Illiberal Turn (2014–2018)." *Journal of Law and Society* 47: 90-110, at 110.

parliamentary coalition to override Court decisions by simple majority.[120] Across the world, lawyers in the executive branch are emerging as a fierce adversary of autonomous judges.

In many instances, lawyer-style power politics succeed in engineering judicial quiescence. As Figure 4 makes clear, judicial independence is at best on life support in countries like Hungary, Poland, and Turkey. The captured Polish Constitutional Tribunal, for instance, is now doing the government's bidding: in response to a court action spearheaded by Minister Ziobro, in 2021 the Tribunal declared some provisions of the European Convention on Human Rights[121] (and later the primacy of EU law[122]) to be unconstitutional, blunting judges and civil society's attempts to mobilize European law to challenge the government. In Venezuela, out of 45,474 decisions rendered by the Supreme Court after it was packed by the Chavez regime, not once did its judges rule against the government.[123] Installing loyalists in high places often does the trick. Other times, handing begrudging judges a 'carrot' can help reward quiescence and make the 'stick' easier to bear. When in 2012 the Orbán government lowered the judicial retirement age to forcibly retire half of lower court presidents, it promised to pay those judges a year's salary to stay retired instead of heeding EU calls to return to their posts.[124] Most judges took the deal.

On occasion, however, autocratic legalism can proceed so brusquely that it triggers rare forms of judicial behavior: namely, "off-bench mobilization" and protests.[125] In Poland, many judges have become activists by "protesting on the streets, spreading information through social media and the websites of their associations and are reaching out to the European Commission and European Parliament."[126] European judicial associations like *Magistrats européens pour la démocratie et les libertés* (MENDEL) have also collectively mobilized to pressure national and EU politicians to defend their colleagues, including by challenging the disbursement of EU funds to Poland in an ongoing lawsuit

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120 Jaffe-Hoffman, Maayan. 2023. "Is Judicial Reform Dangerous for Israeli Democracy?" *Jerusalem Post,* February 10; Lieblich, Eliav, and Adam Shinar. 2023. "The End of Israeli Democracy? Netanyahu's Latest Reforms Come Straight from the Autocrat's Playbook." *Foreign Affairs*, February 8.

121 Specifically, the Tribunal ruled Article 6 of the ECHR on the right to a fair trial to be unconstitutional, after the European Court of Human Rights invoked Article 6 to hold that the Tribunal was violating citizens' right to a fair trial because it is politically captured. See: Ploszka, Adam. 2022. "It Never Rains but it Pours." *Hague Journal on the Rule of Law* early view: 1-24.

122 The Tribunal ruled unconstitutional Article 19(1) of the Treaty on European Union (guaranteeing effective legal and judicial protection), after the European Court of Justice invoked the article to hold that the government's judicial reforms violated EU law. See: Bard, Petra, and Adam Bodnar. 2021. "The End of an Era: The Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust." *CEPS Policy Insights No. 2021-15*: 1-7.

123 Corrales, Javier. 2015. "The Authoritarian Resurgence: Autocratic legalism in Venezuela." *Journal of Democracy* 26 (2): 37-51, at 44.

124 Halmai, Gabor. 2017. "The Early Retirement Age of the Hungarian Judges," in *EU Law Stories*, Nicola and Davies (eds). New York, NY: Cambridge University Press, at 482-483; the PiS Ministry of Justice in Poland copied this strategy to lower the judicial retirement age a few years later, see: Sadurski, Wojciech. 2019. *Poland's Constitutional Breakdown.* New York, NY: Oxford University Press, at 121.

125 Bakiner, Onur. 2016. "Judges Discover Politics: Sources of Judges' Off-Bench Mobilization in Turkey." *Journal of Law and Courts* 4 (1): 131-157.

126 Matthes, Claudia-Y. 2022. "Judges as Activists: how Polish judges mobilise to defend the rule of law." *East European Politics* 38 (3): 468-487, at 468.

before the European Court of Justice.[127] Although judges need a unified political opposition at their side to stand any chance of reversing an executive takeover of the courts, they are uniquely-placed to legitimate the opposition, institutionalize its tactics, and attract an international audience.[128]

Still, judges rarely abandon their commitment to "apoliticism" in dramatic fashion, even when faced with the specter of autocracy.[129] Armed with government attorneys unencumbered by a commitment to political liberalism, executive aggrandizers often get their way when they target the courts. Our understanding of judicial behavior would thus be greatly enriched by structured comparisons of clashes between autocratic legalists and the courts, to identify when these clashes push judges into rare off-bench resistance and when they instead manufacture judges' deference.

Conclusion: Fertile Next Steps

No scholar of comparative judicial behavior can ignore the potentially enormous influence that government lawyers wield over the courts. Government lawyers can in some instances determine the contours of courts' agendas; they are often the most successful architects of judges' decisions; and they can wield their executive power to curtail judicial autonomy and induce quiescence. Government lawyers also cannot be vaporized as mere emissaries of their governments, under the presumption that 'the government' speaks through them. As actors who repeatedly find themselves in court, government attorneys can sometimes carve a surprising amount of bureaucratic autonomy for themselves; as legal professionals, they have a distinctly legalistic style of governance that distinguishes them from other executive actors, even when they aid and abet executive power politics. Government lawyers are powerful agents in their own right – neither interchangeable with private attorneys nor subsumable with other government officials.

By tracing three distinct politics waged by government lawyers – a politics of discretion, a politics of positionality, and lawyer-style power politics – I have sought to identify three non-exhaustive mechanisms of influence over judicial behavior. Examples illustrating these mechanisms are abundant, only a fraction of which have been mentioned here. What remains scarce is a coherent attempt to synthesize the study of these politics with the study of comparative judicial politics. Yet, if we care about where judges' agendas come from; if we care about why judges rule the way they do; if we care about the political environment that constrains or enables judicial review, then government lawyers must be placed at the heart of our conversation.

Taking government lawyers seriously has benefits beyond explaining the micro-foundations of judicial decision-making. It also forces scholars of comparative law and politics to embed courts in a broader political constellation of actors and processes. By shadowing these liminal intermediaries as they shuttle back-and-forth between governments, courts, and society, we can unearth the myriad ways that judicial behavior *in court* is entangled in a broader politics *outside court*. If we are interested in

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[127] Shipley, Trajan. 2022. "European Judges v Council: The European judiciary stands up for the rule of law." *EU Law Live*, August 30.

[128] On the importance of these strategies to the success of resistances to democratic backsliding, see: Gamboa, Laura. 2022. *Resisting Backsliding: Opposition Strategies Against the Erosion of Democracy*. New York, NY: Cambridge University Press.

[129] Hilbink, Lisa. 2007. *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. New York, NY: Cambridge University Press.

how elections or intergovernmental politics shape opportunities for judicial review; if we ponder whether state capacity and bureaucratic autonomy may undergird the rise of judicial power; if we are curious about the forces that are undermining judicial independence and eroding liberal democracy, then following the footsteps of government attorneys is an excellent place to start.

To be sure, government lawyers are not all-powerful. They can be starved of resources or fired from their posts when they stray too far; they can tarnish their credibility and trustworthiness in the eyes of judges; they can interfere too brusquely in courts' affairs and trigger rare forms of judicial resistance. Having recognized their potentially enormous influence over judicial agendas, decisions, and autonomy, comparativists are uniquely placed to illuminate which political conditions tend to amplify and constrain government attorneys' influence over the courts. Much fertile terrain remains to be treaded on this front. To borrow from a brilliant if controversial social theorist, we might well say that government lawyers make their own judiciaries, but they do not make them as they please.[130] Therein lies the social science puzzle.

[130] Here, I borrow from Marx's famous phrase that "men make their own history, but they do not make it as they please." See: Marx, Karl. 1852. *The Eighteenth Brumaire of Louis Bonaparte*, Chapter 1, available at: https://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch01.htm