

The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court

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Abstract

Modern liberal democracies typically depend on courts with the power of constitutional review to ensure that elected officials do not breach their constitutional obligations. The efficacy of this review, however, depends critically on the public's ability to observe such breaches. One resource available to many of the world's constitutional courts to influence this ability is public oral hearings. Drawing on the comparative judicial literature on separation of powers, public awareness, and non-compliance, I develop a formal model of public oral hearings. The model provides empirical implications for when a court will hold public hearings and how hearings correspond to a court's willingness to rule against elected officials. An empirical analysis of hearings at the German Constitutional Court supports the model's prediction that courts use hearings as a resource to address potential noncompliance.

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Modern liberal democracies rely broadly on the threat of electoral punishment to ensure elected officials act in accordance with both the policy objectives of voters and constitutional obligations (e.g. Powell 2004). For voters to effectively hold politicians accountable, however, voters must be aware of their elected officials' behavior. A variety of institutional rules and procedures, such as roll call votes, are designed to achieve this end.

Similarly, whether elected officials comply with their constitutional obligations can be a function of the public's ability to observe and evaluate instances of potentially unconstitutional behavior. Liberal democracies typically depend on constitutional courts or courts with the power of constitutional review to consider alleged breaches of constitutional obligations by government officials. The potency of this review, however, depends in part on the capacity of voters to observe such breaches and punish government officials for their misconduct. With neither the power of the purse nor the sword, courts cannot directly enforce their decisions. Rather, courts must rely on the government for implementation, even when doing so is counter to interests of the actor directed to implement the decision. Examining the German Constitutional Court, Vanberg (2001, 2005) argues that when the public is aware of a case and the Court enjoys a high level of support, the Court is free to rule against the government with the knowledge that voters will hold their elected officials accountable for noncompliance.

A key feature of Vanberg's argument is that courts cannot assume their rulings will always attract the necessary public attention to assure compliance. As Staton (2006, 2010) shows, however, courts are not entirely helpless. Studying the Mexican Supreme Court, Staton demonstrates that public attention is endogenous to judicial behavior. While Staton focuses on the use of public relations efforts, his theory draws attention to the ability of courts to use their resources strategically to enhance the chances of gaining compliance. If Staton's argument holds in general, we would expect to see courts using other institutional tools at their disposal to raise public awareness about their rulings when faced with potential noncompliance. In this article, I consider one such tool, public oral hearings.

In what follows, I develop a theory of the role of public oral hearings. Building on the theoretical and empirical work of Vanberg (2001, 2005) and Staton (2006, 2010), I argue that courts call public oral hearings to promote compliance by governments with adverse rulings. To illustrate my argument, I develop a formal model of the interaction between a government and a court empowered to hold a public oral hearing. I then test a set of the model's empirical implications on a dataset of decisions reviewing the constitutionality of federal or state laws issued by the German Constitutional Court from 1983 to 2014. I conclude with a discussion of the article's implications for the German Constitutional Court, the influence of hearings on judicial review, the quality of liberal democratic governance, and the broader study of compliance.

Public Oral Hearings as an Institutional Tool

Scholars of the politics of constitutional review have devoted considerable attention to the influence of interbranch politics on judicial decisionmaking (e.g. Epstein and Knight 1998; Helmke 2002). The key insight of this literature, that institutions matter for the effective exercise of judicial authority, has spurred researchers to examine the separations of powers between the judiciary, legislature, and executive. Integrating this perspective with the judicial legitimacy literature (e.g. Caldeira and Gibson 1992), Staton (2006, 2010) identifies courts' public relations efforts as an institutional tool capable of enhancing a court's ability to overcome constraints created by interbranch politics. Staton argues that media relations allow courts to publicize decisions, creating a more attentive public capable of punishing noncompliance.

A generalization of Staton's argument is that we should observe courts strategically utilizing institutional tools to increase public awareness and overcome threats of noncompliance. One of the most prominent such tools available to many judiciaries is the public oral hearing. Hearings provide litigants the opportunity to state their arguments directly to the court and to answer justices' questions. Moreover, the public nature of hearings means that members of the media can observe the proceedings and the public can conse-

quently become increasingly aware of the court, cases, and legal issues. A typical hearing at the Austrian Constitutional Court, for example, begins with an overview of the case presented by the Permanent Reporter, after which the judges question the litigants. Video and audio recording are only permitted for the introduction; recordings are not allowed during the hearings.

Hearings raise public awareness by encouraging media coverage of otherwise typically closed judicial processes. To this end, the access provided to the media figures prominently in many courts' rules of procedures regarding hearings. Media access to hearings takes a wide range of forms, from live broadcasting of entire proceedings at the UK Supreme Court to the presence of television cameras for the formal opening of cases at the German Constitutional Court.¹ Critically, this increased coverage is likely to raise the public profile of a case (Staton 2006), which, by Vanberg's account, increases a court's capacity to effectively constrain the other branches of government.

In contemporary liberal democracies, constitutional courts typically have discretion over which cases are granted a public oral hearing.² While courts are often required to hold hearings for certain types of cases, such as political party prohibitions, the decision to hold a hearing is often left to the court for more common proceedings. As a result, many courts can rule with or without public oral hearings, allowing them to manipulate public awareness without limiting their capacity to adjudicate cases. If courts are using hearings to affect awareness as a means to countering potential noncompliance, then public oral hearings should be systematically related to a court's expectations of government noncompliance with an adverse ruling, the potential for increasing public awareness, and ultimately a court's willingness to challenge the government.

Below, I develop a formal argument of how a court can use public oral hearings to promote compliance. The formalization is valuable because it distinguishes my argument

¹See appendix for examples of rules governing how hearings engage the media.

²Of a sample of 40 high courts from around the world including many of the most prominent and powerful constitutional courts, 27 have wide discretion over the use of hearings in constitutional review cases.

from extant theoretical and empirical claims about the relationships between oral hearings, the likelihood of government noncompliance, and case disposition. For one, courts may hold hearings in the pursuit of normative or functional goals, such as increasing transparency of publicly salient cases. Salient cases are more likely to involve government actions where compliance is at issue. For another, hearings may affect a court's likelihood of ruling against the government. In particular, empirical research on the U.S. Supreme Court shows that oral arguments advantage the government's position because the government typically has superior representation in the form of the Solicitor General (Johnson, Wahlbeck and Spriggs II 2006). The formal model will help to clarify the strategic argument advanced here and identify empirical implications that distinguish my argument from extant ones like those described above.

A Formal Model of Public Oral Hearings

Following the example of Vanberg (2001, 2005) and Staton (2006, 2010), I use a single period game of incomplete information. The game has two players: a government³, G , and a court, C . I assume the government prefers its policy upheld and the court prefers to strike down the challenged law as unconstitutional. I further assume that the court enjoys a high level of public support such that the government is always punished when the public observes noncompliance. Upon receiving a case, the court chooses whether to hold a public oral hearing ($H = 1$) or forego doing so ($H = 0$). The court then issues its decision and either upholds ($V = 0$) or vetoes ($V = 1$) the challenged government action. If the court upholds, the game ends as the government automatically complies. If the court vetoes, the government responds by either evading ($E = 1$) or complying ($E = 0$) with the ruling. The game then ends and payoffs are realized.

Both players have a common prior belief, π , about the probability of the public be-

³I treat the government as a unitary actor since many of the courts with discretion over hearings are in countries with a fused executive. Indeed, most of the courts in my sample that have discretion operate in such a system.

coming aware of evasion by the government when the court does not hold a hearing. The model's innovation is the addition of a second belief, ϕ , the public becoming aware when a hearing is held. I assume the likelihood of public awareness is strictly greater for cases granted a hearing ($\phi > \pi$). As with the baseline probability π , both the government and court share the same belief about ϕ . The timing of the game is summarized as follows:

1. Nature presents a case to the court and selects π and ϕ .
2. Court chooses to hold a hearing ($H = 1$) or not hold a hearing ($H = 0$).
3. Court chooses to uphold ($V = 0$) or veto ($V = 1$) the challenged law. If the court chooses $V = 0$, the game ends.
4. If the court vetoes, the government chooses to evade ($E = 1$) or comply ($E = 0$).
5. Game ends, payoffs are realized.

I now turn to the utility functions of the players. I specify three components of the court's utility function. First, a policy component captures the court's preference over the policy at issue in the case.⁴ This component is captured by the parameter A , where $A > 0$. Since I assume the court has preferences divergent from the government, the court only receives A when it vetoes and the government complies. The second component represents the institutional costs of noncompliance. Successful noncompliance can undermine public confidence in the court's ability to effectively constrain other institutions. Similarly, noncompliance can harm how the court is perceived by other political institutions, which can encourage further noncompliance. This cost is captured in the model by the parameter I , where $I > 0$. The court incurs this cost when the government successfully evades; otherwise I equals 0. The third component of the court's utility function is the cost of holding a hearing. Judges have limited time, especially in courts with mandatory dockets. Frequently faced with overwhelming caseloads, dedicating at least a full day to a hearing

⁴I make no claim here as to the source of the court's policy preference, i.e. ideology, legal education, etc.

for a single case comes at considerable cost. The model captures this opportunity cost with the parameter κ , where $\kappa > 0$. To summarize, the utility function of the court is:

$$\begin{aligned} EU_C(H = 0) &= A(V)(\pi) - I(V)(1 - \pi) \\ EU_C(H = 1) &= A(V)(\phi) - I(V)(1 - \phi) - \kappa \end{aligned}$$

The government's utility has two components. The value the government places on the challenged policy is represented by α , where $\alpha > 0$. This assumes that every policy has some value to the government. The government gains α if either the court upholds or the government successfully evades a judicial veto. The second component of the government's utility function is the potential electoral backlash from the public for noncompliance. The intuition is that a publicly observed failure to implement a court decision will result in the public electorally punishing the government. This is captured by the parameter β , where $\beta > 0$. To summarize, the utility function of the government is:

$$\begin{aligned} EU_G(H = 0) &= \alpha(E)(1 - \pi) - \beta(E)(\pi) \\ EU_G(H = 1) &= \alpha(E)(1 - \phi) - \beta(E)(\phi) \end{aligned}$$

Results and Interpretation

The solution concept for the game is subgame perfection. I limit the analysis to pure strategies. To aid the analysis, I state three definitions that structure the equilibria conditions. The first definition delineates the threshold by which the government determines whether or not to evade a judicial veto. If π , or ϕ when the court holds a hearing, is less than this value, then the government chooses to evade the ruling. I refer to this threshold as the "Government Compliance Threshold."

Definition 1.1: Define the “Government Compliance Threshold” as:

$$T_G^{Comp} \equiv \frac{\alpha}{\alpha+\beta}$$

The second definition concerns the court’s decision of whether or not to veto the challenged government action. The court vetoes only if π , or ϕ when the court holds a hearing, is greater than the threshold value. I label this the “Judicial Veto Threshold.”

Definition 1.2: Define the “Judicial Veto Threshold” as:

$$T_C^{Veto} \equiv \frac{I}{A+I}$$

The third threshold defines the court’s decision to hold a public hearing. The court will only hold a public oral hearing if this condition is met. The parameter values necessary for this condition to obtain, however, vary with the values taken by π and ϕ . I will address these equilibria conditions below, along with discussions of their substantive significance. I define the following as the “Judicial Public Hearing Threshold.”

Definition 1.3: Define the “Judicial Public Hearing Threshold” as:

$$T_C^{Hearing} \equiv \frac{K}{A+I}$$

In total, there are eight subgame perfect equilibria (SPE) in the game.⁵ In discussing these equilibria, I group them into categories. The following propositions summarize the equilibria. The proofs of the equilibria are left to the appendix.

Proposition 1 (“Confrontational Hearings”): For $\pi < \phi < T_G^{Comp}$, $\phi > \pi > T_C^{Veto}$, and $\phi - \pi > T_C^{Hearing}$ the following strategy profile constitutes a SPE:

$$S_G = \{Evade, \dots, Evade\}$$

$$S_C = \{Hearing, Veto\}$$

⁵The government’s strategy profile is listed in the following order: 1.) nature selects an environment in which evasion will be observed and the court holds a hearing; 2.) nature chooses such an environment but the court does not hold a hearing; 3.) nature selects an environment in which evasion will not be observed and the court holds a hearing; 4.) nature selects such an environment and the court does not hold a hearing.

Proposition 1 characterizes instances where the court’s belief about the likelihood of public mobilization without a hearing (π) is sufficiently high such that it will veto even in the absence of a hearing. However, as proposition 1 (“Mobilizing Hearing”) indicates, the court will nonetheless pay the cost of a hearing when the benefit of improving the likelihood of public mobilization outweighs the cost. In this instance, the court continues to face a defiant government. As the procedure does not alter the government’s anticipated behavior, the court’s decision to hold a hearing in this scenario is contingent on how big of a difference the hearing will make in terms of public awareness. If either the case or the broader political environment is not conducive for a hearing to be effective, i.e. $\phi - \pi$ is not sufficiently large, the court will still veto the government but will do so without incurring the cost of holding a hearing.

Proposition 1a (“Mobilizing Hearing”): For $\phi > T_G^{Comp} > \pi$, $\phi > T_C^{Veto}$, and $1 - \pi > T_C^{Hearing}$, the following strategy profile constitutes a SPE:

$$S_G = \{Comply, Evade, Comply, Evade\}$$

$$S_C = \{Hearing, Veto\}$$

Proposition 1a characterizes an equilibrium in which the holding of a hearing alters the government’s behavior from evasion to compliance. This equilibrium obtains if the court’s veto and hearing thresholds are met and the government’s threshold for compliance is met only when the court holds a hearing. In this setting, the government will only comply when a hearing is held; otherwise, it will evade the decision. The court will hold a hearing when the cost of doing so justifies the increase in the likelihood of public awareness. As with Proposition 1, the court’s veto threshold is met without a hearing, and thus the court will veto regardless of whether or not it holds a hearing. The decision to hold a hearing, then, is similar to that described in Proposition 1, in that it turns on the procedure’s effectiveness.

Proposition 2 (“Judicial Emboldening Hearing”): For $\phi > T_G^{Comp} > \pi$, $\pi < T_C^{Veto} < \phi$, and $\frac{A}{A+I} > T_C^{Hearing}$, the following strategy profile constitutes a SPE:

$$S_G = \{Comply, Evade, Comply, Evade\}$$

$$S_C = \{Hearing, Veto\}$$

Proposition 2a (“Limited Judicial Emboldening Hearing”): For $\phi < T_G^{Comp}$, $\pi < T_C^{Veto}$, and $\frac{\kappa\phi}{K+I} > T_C^{Hearing}$, the following strategy profile constitutes a SPE:

$$S_G = \{Evade, \dots, Evade\}$$

$$S_C = \{Hearing, Veto\}$$

Propositions 2 and 2a characterize equilibria in which a hearing alters the court’s behavior. These equilibria obtain when the court’s veto threshold lies between the probability of awareness without a hearing and the probability of awareness after the court holds a hearing. In these equilibria, the increased level of public awareness emboldens the court to veto the challenged government action when it otherwise would uphold. In the equilibrium characterized by Proposition 2, hearings have the additional effect of making the government switch its strategy from evasion to compliance. Once again, these equilibria are bounded by the costs associated with holding a hearing; if the costs to doing so become too high, the court will forgo the procedure. In addition to the direct cost of the hearing (κ), these thresholds are a function of the policy component of the court’s utility function. The more the court values the specific policy at stake, the greater the cost it is willing to bear to hold a hearing.

Proposition 3 (“Fully Deferential Government”): If $\pi > T_G^{Comp}$ and $\pi > T_C^{Veto}$, the following strategy profile constitutes a SPE:

$$S_G = \{Comply, \dots, Comply\}$$

$$S_C = \{No\ Hearing, Veto\}$$

Proposition 3a (“Fully Deferential Court”): For $\phi < T_C^{Veto}$, the following strategy profile constitutes a SPE:

$$S_G = \{Evade, \dots, Evade\}$$

$$S_C = \{No\ Hearing, Uphold\}$$

The equilibria presented in Propositions 3 and 3a characterize when the court will not hold a hearing because the increase in public attention does not offset the cost of the hearing. Consider Proposition 3, which characterizes a “fully deferential government” equilibrium. In this setting, the government will comply with a judicial veto regardless of whether a hearing is held. This equilibrium obtains when the baseline likelihood of public mobilization, π , is greater than the government’s compliance threshold. In this situation, the court will never hold a hearing because the government will always comply. Second, consider the equilibrium characterized by Proposition 3a, the “fully deferential court” equilibrium. In this equilibrium, the court never vetoes the government because there will not be sufficient public awareness of a veto regardless of whether or not the court holds a hearing. Since a hearing is insufficient to allow the court to challenge the government, the court opts not to incur the cost of a hearing and upholds.

Proposition 4 (“Excessively Costly Hearings”): For anytime $T_C^{Hearing}$ is not met, the following strategy profiles constitute SPE:

$$S_G = \begin{cases} Evade, \dots, Evade & \text{if } \pi < T_G^{Comp} \\ Comply, \dots, Comply & \text{if } \pi > T_G^{Comp} \end{cases}$$

$$S_C = \begin{cases} No\ Hearing, Veto & \text{if } \pi > T_C^{Veto} \\ No\ Hearing, Uphold & \text{if } \pi < T_C^{Veto} \end{cases}$$

Finally, Proposition 4 characterizes the equilibria that obtain when the court’s hearing

threshold $T_C^{Hearing}$ is not met. In this situation, the court chooses not to hold a hearing because the cost of doing so is prohibitively high. While the parameter values necessary for this to hold vary across these four situations, the basic insight is the same. The cost of hearings in these settings is so high that it is not to the court's benefit to hold one. As a result, the court and government rely on their prior belief about the likelihood of mobilization, π , to construct their strategies.

[Figure 1 Here]

Figure 1 provides a graphical representation of the equilibria when the level of public awareness after a hearing surpasses the court's veto threshold ($\pi > T_C^{Veto}$); when this is not the case, the "Fully Deferent Court" equilibrium obtains for all possible values of the parameters, and the court never holds a hearing. Figure 1 depicts the equilibria that can obtain when $\pi > T_C^{Veto}$, Propositions 1 and 1a, 3, and 4.⁶ Analysis of the results, as depicted in Figure 1, produces several implications for the interactions between constitutional courts and governments. I organize the discussion around three observations.

Observation 1: The court is more likely to hold hearings for cases that pose a sufficient risk of noncompliance.

When the threat of noncompliance is low or nonexistent, the court does not have an incentive to incur the cost of holding a hearing. The government's compliance threshold is partially driven by how much it values the policy being reviewed. If the government does not care about the policy, evasion is unlikely. However, the risk of noncompliance grows with the value placed on the policy, which makes a public oral hearing an increasingly attractive option. If judges view public hearings as a means of addressing the implementation problem, then the decision to hold hearings is directly linked to the credibility of noncompliance threats.

⁶See appendix for a figure of the equilibria that can obtain when $\phi > T_C^{Veto} > \pi$.

Observation 2: Given a sufficient risk of noncompliance, the court is more likely to hold hearings when they will be most effective at increasing public awareness.

As $\phi - \pi$ increases, the range of values that satisfy $T_C^{Hearing}$ increases, making it more likely that the court will hold a hearing. This dynamic is illustrated in Figure 1. In Figure 1, the court will hold a hearing even when doing so does not change the government's strategy only if the increase in the likelihood of public awareness is sufficiently large. The share of the parameter space in which the court will hold a hearing increases with the distance between π and ϕ ; as the distance between these values grows, so does the range of possible values the model's other parameters can take and still have a hearing be an equilibrium strategy for the court. This relationship, however, only holds when the government's compliance threshold is greater than π . Otherwise, the model predicts no connection between the court's decision to hold a hearing and the impact of that hearing on public awareness.

Observation 3: Given a sufficient risk of noncompliance, the court is more likely to rule against the government in cases granted a hearing.

This observation follows from the theory's central argument that hearings improve the level of public awareness and ultimately increase the likelihood of compliance. Formally, as ϕ increases, the range of values captured by the Judicial Emboldening equilibria (Propositions 2 and 2a) increases. In this environment, holding a hearing switches the court's strategy from uphold ($V=0$) to veto ($V=1$). Such a switch means that when faced with the risk of noncompliance, the court is confident enough in the likelihood of compliance given the level of public awareness generated by the hearing that it vetoes when it otherwise would have upheld. Thus, the court's willingness to challenge the government is partly a function of the court's own procedural decisions.

These observations lead to the following three hypotheses:

Noncompliance Risk Hypothesis (H1): *A court is more likely to hold a*

hearing when the government poses a credible threat of noncompliance.

Effectiveness Hypothesis (H2): *When faced with the risk of noncompliance, a court is more likely to hold public oral hearings for the cases in which the hearing will be most effective at increasing public awareness.*

Strategic Case Disposition Hypothesis (H3): *When faced with the risk of noncompliance, a court is more likely to rule against a government action in cases granted a public oral hearing.*

Recall that one goal of the modeling exercise was to identify empirically testable hypotheses that distinguish my argument from two prominent alternative accounts. One alternative is that courts may hold hearings to achieve the normative goal of increasing the transparency of salient cases. If true, courts should hold hearings for the most salient cases and hearings should not be related to case disposition. The second alternative account is that hearings benefit the government. An implication of this account is that courts should be more likely to rule in favor of the government in cases granted a hearing. In the remainder of the article, I take the model's predictions and these alternative hypotheses to data from the German Constitutional Court to determine whether or not the predicted behavior conforms to the observed behavior of one of the most influential judicial institutions.

An Application: The German Constitutional Court

To test these hypotheses I examine the German Federal Constitutional Court (FCC). The FCC presents an excellent case, as the Court's role in the German political system

and its institutional structures satisfy key assumptions of the theoretical model.⁷ The FCC is a prominent institution in German politics, repeatedly finding itself at the center of controversial political conflicts (Kommers and Miller 2012; Vanberg 2000). This prominence has made the Court one of the most recognized institutions in the German political system as well as one of the most popular. Indeed, public support for the Court consistently exceeds that of the other major German political institutions (Vanberg 2005).⁸

The support of the German public has not, however, fully insulated the Court from the possibility of noncompliance. Although elected officials rarely engage in outright defiance against the Court, less publicized means of noncompliance are credible threats to the Court's authority and can influence the Court's decisionmaking.⁹ A government can fail to pass the legislation necessary to implement the Court's decision, as the Federal government did in response to a 1980 ruling on civil servant pensions. Ordered to revise the tax code, the government failed to pass the legislation, citing the complex nature of the issue at hand as justification for the legislation delay.¹⁰ Alternatively, a government can pass legislation creating a policy that on its face conforms to the Court's decision but when implemented is substantively identical to the policy struck down by the Court. The Federal government adopted this strategy when faced with an adverse ruling in 1992

⁷An additional advantage of the German case concerns generalizability. As one of the most powerful European courts, the FCC influenced the institutional design of many constitutional courts. For example, the South Korean Constitutional Court was modeled closely on the FCC (Ginsburg 2003), while many features of the FCC like the constitutional complaint were incorporated into constitutional courts in Eastern Europe (Schwartz 2000).

⁸Survey results on public support for German political and civic institutions may be found in the appendix.

⁹A well known instance of outright defiance is the 1995 *Cruficix* case; see Kommers and Miller (2012) and Vanberg (2005).

¹⁰This case is further an example of how noncompliance affected future FCC decisions. When faced twelve years later with a constitutional complaint pointing out the government's failure to act, the Court cited the delay as not unreasonable and dismissed the claim.

regarding political party finance laws. The government did so by passing a revised law that made the changes requested by the Court but added a new clause that in effect replaced the unconstitutional features of the original statute.¹¹

Importantly, the FCC's rules regarding hearings correspond to the parameters and assumptions of the model. Article 25 of the Federal Constitutional Court Act stipulates that "the Federal Constitutional Court shall decide on the basis of oral proceedings." The FCC developed its own interpretation of the law's provisions for oral arguments, determining that only a small subset of proceeding types, such as abstract review and political party prohibitions, are entitled to guaranteed oral hearings, while constitutional complaints and concrete review cases, which comprise the bulk of the Court's caseload, can be adjudicated with or without a hearing. As a result, oral arguments have become the exception rather than the norm (Kommers and Miller 2012).

In addition to assuming a court's discretion over holding hearings, a key assumption of the model is that hearings increase the likelihood of public awareness. To determine if the German case meets this assumption, I constructed an original dataset on newspaper and news agency coverage of FCC decisions from 2000 to 2013 (i.e., all the cases in my dataset). Using Lexis Nexis' Foreign Language News Search, I count the number of unique articles covering a case at two points: prior to the point when a hearing (if one is held) is announced and after the court issues a decision.¹² An analysis of this coverage reveals the magnitude of hearings' influence on media coverage. While pre-hearing coverage is similar (no statistically significant difference), post-decision coverage is markedly different for cases granted a hearing: the expected number of articles covering an FCC decision

¹¹See Vanberg (2005) for a discussion on both cases.

¹²If a case was not granted a hearing, its coverage is the number of articles written prior to the decision. If a case was granted a hearing, its coverage only includes articles written before the Court announces a hearing; any coverage of the case written before the decision but after the hearing is not included in this variable. See appendix for details on coding and data collection.

is 90% greater for cases granted a hearing.¹³ Such a strong relationship is compelling evidence that hearings at the FCC do in fact satisfy the model's key assumption.

Empirical Approach

I use data collected on published FCC decisions reviewing federal and state laws made between 1995 and 2014, which I then supplement with Vanberg's (2005) dataset of such cases from 1983 to 1995.¹⁴ The dataset consists of 613 cases for which the Court had discretion over holding a hearing, including constitutional complaints, concrete review, public law disputes, election disputes involving the constitutionality of an electoral law, constitutional disputes between the national and states governments, and constitutional disputes within a state. It excludes cases in which the Court does not have discretion over hearings, such as abstract review cases and disputes between federal institutions.

The outcome variable for the first and second hypotheses is the Court's decision to hold a hearing. The variable *Hearing* is coded 1 if the Court held a hearing and 0 otherwise. The outcome variable for the third hypothesis, *Overturn*, is the decision of the Court. The variable is coded 1 if the Court rules the statute unconstitutional and 0 if it upholds the statute.

For the first hypothesis, which predicts the likelihood of a hearing to be greater for cases involving potential noncompliance, I measure the risk of noncompliance by examining whether or not the government whose statute is being challenged filed an amicus brief in defense of the statute. Filing a brief requires a government to invest resources, which can indicate the level of importance politicians place on the law. Furthermore, filing a brief requires a government to take a public stance and risk its reputation on the issue. While such briefs are rarely direct threats of noncompliance, they signal to the court the government's investment in the law and potential willingness to engage in noncompliance.

¹³This result is robust to the inclusion of potential confounding variables. See appendix for full results.

¹⁴Descriptive statistics are provided in the appendix.

This variable, *No Government Brief*, is coded 0 when the challenged government files a brief defending the constitutionality of the statute under review and 1 otherwise.¹⁵

I use two variables for the second hypothesis, which predicts the likelihood of a hearing to increase as the impact of the hearing on public awareness increases. First, the complexity of a case can influence how much hearings increase public awareness. As the complexity of a case increases, so does the difficulty citizens have in understanding the case. The average citizen is, in general, more likely to pay attention to simpler cases than more complex ones. To measure complexity, I use Vanberg's (2005) dichotomous coding scheme to construct the variable *Case Complexity*. Cases involving taxation, budgets, economic regulation, social insurance, civil servant compensation, and party finance are coded as "complex" with a value of 0, while those involving institutional disputes, family law, judicial process, individual rights, asylum rights, and military conscription are coded as "simple" with a value of 1.

The second measure is proceeding type. Constitutional complaints allow citizens to make claims of unconstitutional actions directly to the court. Although most constitutional complaints are directed against the decisions of other courts, this procedure critically provides citizens the opportunity to directly challenge the legality of legislation. Constitutional complaints are more easily relatable for the public, as the cases involve instances of individual harm rather than issues of constitutional jurisprudence raised by lower courts. As a result, news coverage of a citizen's complaint against the government should be more effective at increasing public awareness. Thus, I expect the FCC to be more likely to hold a hearing for constitutional complaints than other proceedings. The variable *Constitutional Complaint* is coded 1 for constitutional complaints and 0 for all

¹⁵This variable does not distinguish between the Federal and state governments. Thus, if a state law is challenged, the variable is coded as 1 only if the state government files a brief defending the law; the Federal government's position is not taken into account.

other proceedings.¹⁶

Since the third hypothesis predicts the Court to be more likely to rule against the government in cases granted a hearing, the independent variable for this hypothesis is whether or not the Court held a public oral hearing. This variable, *Hearing*, is the same as the outcome variable for the first and second hypotheses.

The theoretical model identified the conditions under which the decision to hold a hearing coincides with the risk of noncompliance, the expected effectiveness of hearings at increasing public awareness, and case disposition. Fisher's exact test provides a straightforward method for determining the relationship between two dichotomous variables such as those used here. Based on the first hypothesis, I expect an odds ratios of less than one for the relationship between *Hearing* and *No Government Brief*. For the second hypothesis, I expect the odds ratio between *Hearing* and each of the effectiveness measures, *Case Complexity* and *Constitutional Compliant*, to be greater than one when *No Government Brief* equals zero. Similarly, for the third hypothesis I expect an odds ratio greater than one for *Hearing* and *Overturn* when *No Government Brief* equals zero. The results of this preliminary analysis, presented in Table 1, conform to the theoretical model's predictions.¹⁷

[Table 1 Here]

Although this preliminary analysis supports the theoretical account, the conclusions we can draw from the results are limited in two critical ways. First, it is difficult to discern the substantive significance of the relationships from these results. Second, these results do not take potential confounding factors into account. To address these issues I estimate logistic regressions, as this approach provides estimates of both the statistical and

¹⁶The dataset excludes constitutional complaints that do not directly challenge the constitutionality of legislation, as such cases do not involve the inter-institutional dynamic of interest here. See appendix for details.

¹⁷Results are robust to variety of alternative measures of association for contingency tables, such as standard χ^2 tests.

substantive significance of the hypothesized relationships while controlling for potential confounders.

The *Noncompliance Risk Hypothesis* (H1) predicts a negative relationship between *No Government Brief* and *Hearing*. For the *Effectiveness Hypothesis* (H2) and *Strategic Case Disposition Hypothesis* (H3), I follow Kam and Franzese's (2007) recommendation to estimate a model including an interaction term between the independent variables and the conditioning variable *No Government Brief*.¹⁸ The coefficients of the interaction's constituent terms are estimates of the independent variables when there is a risk of non-compliance (*No Government Brief* = 0). For the Effectiveness Hypothesis I estimate a model interacting the measures of effectiveness (*Case Complexity* and *Constitutional Complaint*) with *No Government Brief*. I expect the variables *Case Complexity* and *Constitutional Complaint* to be positive and statistically significant, while the interaction between those variables and *No Government Brief* should not be statistically significant. For the Strategic Case Disposition Hypothesis, I estimate a model interacting *Hearing* with *No Government Brief*.¹⁹ The coefficient of *Hearing* should be positive and statistically significant, while the interaction term between *Hearing* and *No Government Brief* should not be statistically significant.

I include a series of control variables to address potential omitted variable bias. The court's decision to hold a hearing may be a function of existing salience rather than the risk of noncompliance. As salience may correlate with the government's decision to file a brief, failing to control for existing public awareness could lead to biased results. To measure existing salience, I create the variable *Total Briefs* using the number of amicus briefs filed for a case, as greater interest group participation can be indicative of a case's salience (Spriggs and Wahlbeck 1997; Vanberg 2005). As an additional measure of pre-

¹⁸See Kam and Franzese (2007), pgs. 103-111, for benefits of this approach over alternatives such as subsetting the data.

¹⁹As the model predicts the decision to hold a hearing and case disposition to effectively be joint choices, the decision to specify *Overturn* as the outcome variable is based on the temporal ordering of the judicial process.

hearing awareness, I account for whether the challenged statute was passed by the Federal government or a state government. Federal laws are likely to have a broader societal impact than subnational laws, which may lead the public to be more aware of a case if it involves a national rather than subnational law.²⁰ *Federal Law* takes a value of 1 for cases involving a Federal statute and 0 for state and local statutes.

I further control for two potential alternative goals judges may pursue through the use of hearings. Scholars have argued that the U.S. Supreme Court uses oral arguments as an information-gathering tool to improve the quality of decisions (e.g Johnson 2001). To control for this possibility in the context of the FCC, I include the variable *Court Brief*, which captures whether or not a lower court filed a brief. Lower courts regularly file briefs for cases, providing the FCC with more reliable information than interest groups. Second, the FCC may use hearings to legitimate decision by reassuring litigants of the proceeding's fairness. If the Court is concerned about highlighting the legitimacy of the process, I would expect it to hold hearings more frequently when faced with a plaintiff with third party support. Therefore, I include the variable *Complainant Support*, which is coded 1 if a brief was filed supporting the plaintiff's position and 0 otherwise.

Additionally, I control for the institutional structure of the FCC. The court conducts the majority of its business, including oral hearings, in one of two senates consisting of eight judges (Kommers and Miller 2012). Differences in personnel and jurisdiction may lead to different strategies both by litigants and the Court that result in systematic variation in the use hearings. The variable *Second Senate* addresses these concerns, with cases adjudicated by the Second Senate assigned a value of 1 and those adjudicated by the First Senate coded as 0.

Similarly, I control for potential confounding factors in testing the third hypothesis.

²⁰Including this variable also addresses the possibility that the Court's potential costs are greater when facing the Federal government than when facing a state government. As such, we might expect the Court to be more likely to grant a hearing for cases involving Federal laws than state laws.

First, I control for the legal merits of each case. I follow the example of Vanberg (2005) and examine the opinion of lower courts to control for the legal merits. The lower courts of the German judiciary are staffed with judges who have the necessary legal expertise and familiarity with the FCC's jurisprudence to provide the Court with a clear portrayal of a case's legal merits. Furthermore, while the information provided by interest groups is likely biased, the FCC can have greater confidence in the objectivity of the legal reasoning presented in lower court briefs. The variable *Lower Court Unconstitutional Brief* is coded 1 if any lower court filed a brief supporting the plaintiff and 0 otherwise. In addition, I include a variable considering only briefs filed by high courts, as they may provide higher quality information than lower courts. This variable, *High Court Unconstitutionality Brief*, is coded 1 if a high court in the German federal or state judiciaries files a brief in support of overturning the statute. A third control for legal merits, *Amicus Brief Balance*, is calculated by subtracting the number of pro-plaintiff briefs from the number of pro-government briefs. Thus, a negative number indicates more support for the plaintiff than the government, while more support for the government is indicated by a positive value.

I additionally include the variable *Second Senate* to account for the possibility hearings vary systematically across the two Senates in a manner that correlates with case disposition. *Case Complexity* is also included, as (Vanberg 2005) finds it is a significant predictor of FCC decisions. Finally, I control for the governing party. To account for possible partisan bias on the court, the variable *CDU* captures the partisan identity of the defendant government. This variable is intended to ensure that my results are not driven by a predisposition of the Court to rule for or against a specific political party. This variable takes a value of 1 when the head of the defendant government is a member of the Christian Democratic Union (or Christian Social Union in Bavaria) and 0 otherwise.

Results

Table 2 displays the results of the logistic regressions for the Noncompliance Risk (H1) and Effectiveness Hypotheses (H2). Model 1 analyzes the Noncompliance Risk Hy-

pothesis. The results support the theoretical model; the FCC is more likely to hold a hearing when the government files a brief defending the constitutionality of its statute. Importantly, this relationship remains statistically significant after controlling for potential confounding factors.²¹ Moreover, the substantive significance of noncompliance rivals that of saliency.²² Figure 2 presents the substantive significance of the relationship graphically. The figure provides the predicted probability of the FCC holding a hearing based on the presence or absence of a government brief. The predicted probability of the FCC holding a hearing when the government files a brief is 17%, while the probability of a hearing when the government does not file a brief is 6%.²³

[Table 2 Here]

[Figure 2 Here]

Models 2 and 3 analyze the the Effectiveness Hypothesis, with the former model using *Case Complexity* as the key explanatory variable while the latter model uses *Constitutional Complaint*. The Effectiveness Hypothesis predicts that when faced with a risk of noncompliance, the FCC is more likely to hold a hearing when doing so will have the largest effect on public awareness. The empirical results support this prediction. Based on the results of model 2, the FCC is more likely to hold a hearing for cases involving “simple” issue areas, but only when there is a risk of noncompliance. This relationship, presented in Figure 3, is substantively significant. In cases including a brief filed by the government, the probability of a hearing increases from 12% for “complex” cases to 25%

²¹The results for both H1 and H2 are robust to the use of an alternative measure of public awareness using media coverage collected from Lexis Nexis. Data limitations, however, constrain this robustness analysis to cases from 2000 to 2013. The appendix contains a full description of the variables and analyses.

²²This is based on Model 1. The inclusion of a government brief increases the probability of a hearing from 6% to 17%, while increasing the number of amicus briefs from the mean (3.25) by one standard deviation (3.38) raises the probability from 14% to 25%.

²³Presented differences in predicted probability are all statistically significant at the $p < 0.05$ level.

for “simple” cases. When the government does not file a brief, case complexity does not have a statistically significant relationship with the Court’s decision to hold a hearing.

[Figure 3 Here]

[Figure 4 Here]

Model 3 yields a similar relationship between proceeding type and hearings. The FCC is more likely to hold a hearing for constitutional complaints than other proceeding types, such as concrete review cases. The probability of a hearing for a constitutional complaint is 24% but only 11% for other proceeding types (see Figure 4). This relationship holds, however, only when the government files a brief. Otherwise, the proceeding type does not have a statistically significant relationship with the Court’s decision to hold a hearing.

[Table 3 Here]

Table 3 presents the analysis of the Case Disposition Hypothesis (H3).²⁴ This hypothesis states that, given a sufficient risk of noncompliance, the likelihood of an unconstitutionality ruling should be greater for cases granted a hearing. The results of models 4 and 5 provide support for this hypothesis. German federal and state governments tend to lose cases more often when the Court holds a public oral hearing. This tendency, however, only holds in those cases for which the government filed a brief. When there is a low risk of noncompliance, there is no statistically significant relationship between hearings and the Court’s willingness to rule against the government.

[Figure 5 Here]

To ascertain the substantive significance of the relationship between hearings and case disposition, Figure 5 provides predicted probabilities of the Court ruling against the government according to whether or not a hearing was held and whether or not the

²⁴The results are robust to analysis using only cases including a brief from the government. See appendix for full results.

government filed a brief defending the statute's constitutionality. In cases including a brief filed by the government, the probability of the Court ruling against the government after holding a public oral hearing is 58%. In contrast, when the Court does not hold a hearing in cases including a brief from the government, the probability of an unconstitutionality ruling is 35%.²⁵ This relationship between hearings and case disposition fails to reach statistical significance, however, in cases that do not include a brief from the government defending the statute's constitutionality.

Conclusion

This article developed a theory of how judicial institutions enable courts to manage noncompliance threats from elected officials. I have shown how one of the most prominent judicial procedures, public oral hearings, can expand a court's capacity to effectively exercise constitutional review by enhancing the public's ability to observe and evaluate instances of potentially unconstitutional behavior. In doing so, the article has several implications for the study of constitutional courts and the politics of constitutional review.

This article has implications for the study of the German Federal Constitutional Court. The conventional wisdom has been that a case's saliency is the primary determinant for whether or not the Court holds a hearing (Vanberg 2001: 355, 2005: 103; Kommers and Miller 2012: 27). While my analysis shows empirical support for the previously untested claim of salience's effect, it also provides compelling evidence for the article's novel claim that the threat of noncompliance motivates the FCC's use of hearings. Moreover, the results reveal the substantively significant influence of noncompliance, most notably in comparison to the influence of salience. Together with Vanberg's empirical evidence, these results provide further evidence of how noncompliance influences the FCC's behavior.

The results of this study are also interesting when considered in light of recent evi-

²⁵Probabilities are based on model 4. Using model 5, which controls for the legal merits using *High Court Unconstitutional Brief*, does not effect the statistical or substantive interpretation.

dence of the ideological basis of decisionmaking by European constitutional courts (e.g. Hanretty 2012; Hönnige 2011). This line of research has demonstrated that courts strike government actions more often when the court consists of judges with conflicting ideological preferences to that of the government (Hönnige 2009). Such ideological considerations cannot account for the results presented here. By typical measures of ideology, the FCC had no variation in ideological divergence from the government during the period of this study (Hönnige 2009). As a result, the patterns of FCC decisionmaking, and their systematic connection to procedural choice, complement these past studies and provide a richer depiction of adjudication in these courts. This study also suggests that previous evidence of ideological voting on constitutional courts likely under-states the actual prevalence of ideological considerations in judges' sincere preferences over rulings. Based on the model and findings presented here, non-compliance concerns should cause judges, at least some of the time, to vote strategically and uphold government actions that they ideologically oppose. This finding directs the attention of future research on Europe's constitutional courts toward incorporating the procedures and processes that shape the judicial process, such as the constitutional complaint, into theories of judicial behavior and empirical studies of ideological voting on constitutional courts.

The study additionally offers insights into the role and influence of public oral hearings on judicial review. The most developed empirical literature addresses the U.S. Supreme Court's oral arguments and the impact of the content of hearings. In these works, hearings affect judicial review by serving as an information-gathering tool for judges (Johnson 2001) and an opportunity for the Federal government to convert the Solicitor General's superior resources and expertise into a higher likelihood of winning (Johnson, Wahlbeck and Spriggs II 2006). While addressing important questions, this line of research is limited to considering behavior after the Court has decided to hold oral arguments. In contrast, this article poses the question of why courts opt to hold hearings when they do. A more complete appreciation of hearings might consider how the answers to these two distinct questions complement or contradict each other.

The results further highlight the influence of institutional rules on the quality of liberal democratic governance. Liberal democratic governance requires elected officials to adhere to constitutional obligations and constitutional courts to hold officials to account when they breach those obligations. To effectively do so, constitutional courts must be willing to rule against the wishes of the government and then maximize the chance such rulings will be accompanied by electoral or other pressures on the government to comply. The theoretical account presented here suggests that courts use procedures such as public oral hearings to bring such pressures upon officials by increasing public attention to cases of unconstitutional behavior. The discretion available to courts allows them to use hearings when they are both most needed to confront threats of noncompliance and when they will be most effective at garnering public attention. Ultimately, as evidenced by the empirical results from the German Constitutional Court, hearings provide courts with a route through which they can more readily exercise their authority and hold government officials accountable for breaches of their constitutional obligations.

Finally, my findings have implications for the study of compliance. Scholars of the politics of judicial review are increasingly considering how threats of noncompliance constrain constitutional courts (e.g. Vanberg 2001, 2005; Staton 2006, 2010; Carrubba and Zorn 2010; Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015). This article provides further theoretical and empirical support for this literature's key conclusion that noncompliance shapes judicial behavior and substantiates the conclusion of previous studies (Staton 2006, 2010) that courts use the institutional tools at their disposal to address potential noncompliance. Moreover, the article extends Staton's conclusions regarding media relations by demonstrating that the list of institutional tools includes key features of the judicial process. A key implication of this conclusion is that similar strategic judicial behavior may extend to a multitude of facets of the judicial process; courts have a list of potential tools that goes far beyond public oral hearings and press releases. For example, many courts, including the FCC, can reduce the ambiguity of rulings by specifying the date upon which the government must implement new legislation. The

theoretical account presented here suggests that the relationship between public awareness and noncompliance may be one possible explanation for why and when courts use such features.²⁶ Insofar that such tools can be manipulated to effectively influence public awareness, this article directs the attention of future research to the influence of threats of noncompliance on the judicial process.

²⁶The political potential of this feature in the German context has not been lost on scholars of the FCC (Kommers and Miller 2012, Vanberg 2005).

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Table 1: Fisher's Exact Test Results

Relevant Hypothesis	First Variable	Second Variable	Government Brief Filed?	Odds Ratio
H1	Hearing	No Government Brief	-	0.30*
H2	Hearing	Case Complexity	Yes	2.13*
H2	Hearing	Case Complexity	No	5.82
H2	Hearing	Const. Complaint	Yes	2.61*
H2	Hearing	Const. Complaint	No	3.21
H3	Overtun	Hearing	Yes	2.29*
H3	Overtun	Hearing	No	3.86

* = Significant at 0.05 level.

Total of 613 Cases. Government brief filed in 486 cases.

Table 2: Logit Analysis of Noncompliance Risk and Effectiveness Hypotheses

Variable	Model 1	Model 2	Model 3
No Government Brief	-1.15 (0.40)	-1.84 (1.03)	-1.13 (0.64)
Case Complexity	-	0.92 (0.25)	-
Constitutional Complaint	-	-	0.87 (0.25)
No Gov't Brief * Case Complexity	-	0.51 (1.14)	-
No Gov't Brief * Const. Complaint	-	-	-0.05 (0.82)
Second Senate	0.48 (0.25)	0.42 (0.26)	0.53 (0.26)
Total Briefs	0.21 (0.04)	0.19 (0.04)	0.19 (0.04)
Court Brief	0.12 (0.23)	0.13 (0.24)	0.25 (0.24)
Federal Law	0.81 (0.32)	1.02 (0.33)	0.79 (0.32)
Complainant Support	0.36 (0.29)	0.48 (0.29)	0.45 (0.29)
Constant	-3.31 (0.40)	-3.85 (0.45)	-3.80 (0.44)
<i>N</i>	613	613	613

Note: Cell entries are coefficient estimates; numbers in parentheses are standard errors.

Table 3: Logit Analysis of the Strategic Case Disposition Hypothesis

Variable	Model 4	Model 5
Hearing	0.93 (0.25)	0.92 (0.25)
No Government Brief	-0.15 (0.23)	-0.10 (0.23)
No Gov't Brief * Hearing	0.78 (0.87)	0.67 (0.87)
Lower Court Unconst. Brief	0.10 (0.18)	-
High Court Unconst. Brief	-	0.68 (0.24)
Second Senate	-0.46 (0.18)	-0.49 (0.18)
Amicus Brief Balance	-0.15 (0.04)	-0.13 (0.04)
Federal Law	-0.75 (0.23)	-0.76 (0.23)
Case Complexity	-0.01 (0.19)	0.06 (0.19)
CDU	-0.19 (0.20)	-0.19 (0.20)
Constant	0.41 (0.27)	0.31 (0.26)
<i>N</i>	612	612

Note: Cell entries are coefficient estimates; numbers in parentheses are standard errors.

Figure 1: Equilibrium Predictions when $\pi > T_C^{Veto}$

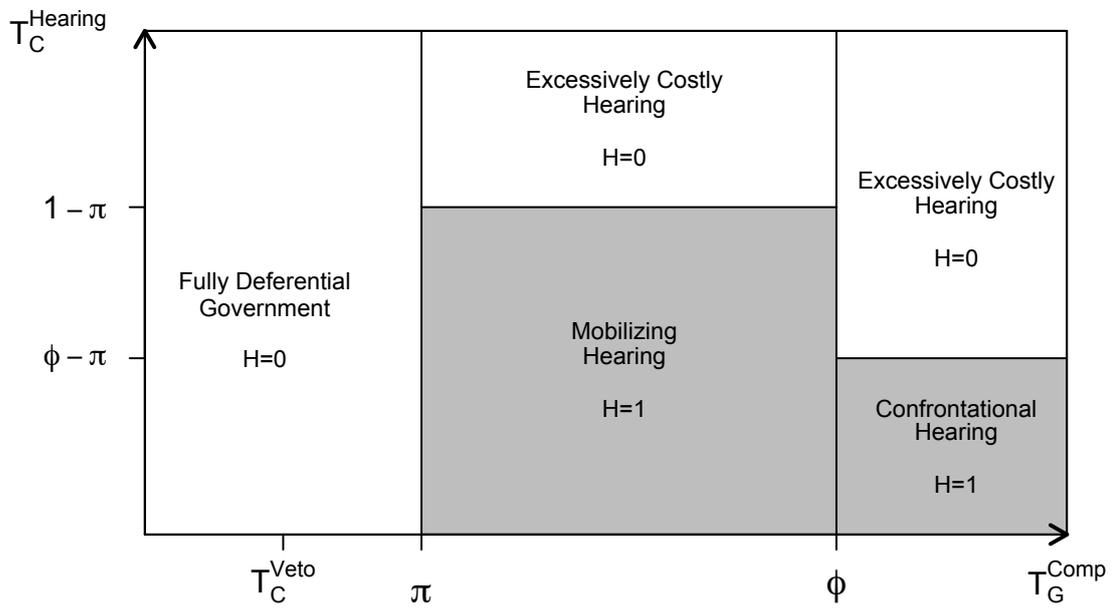
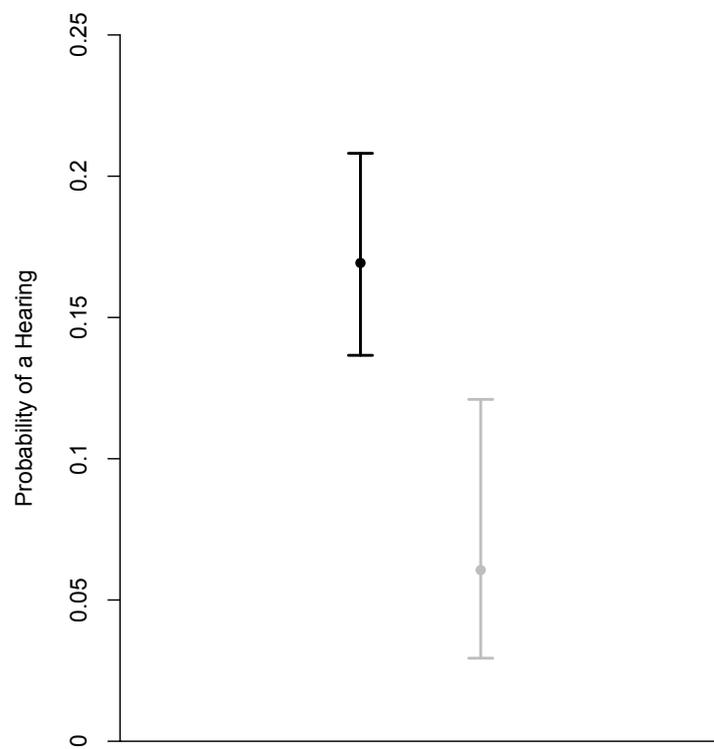
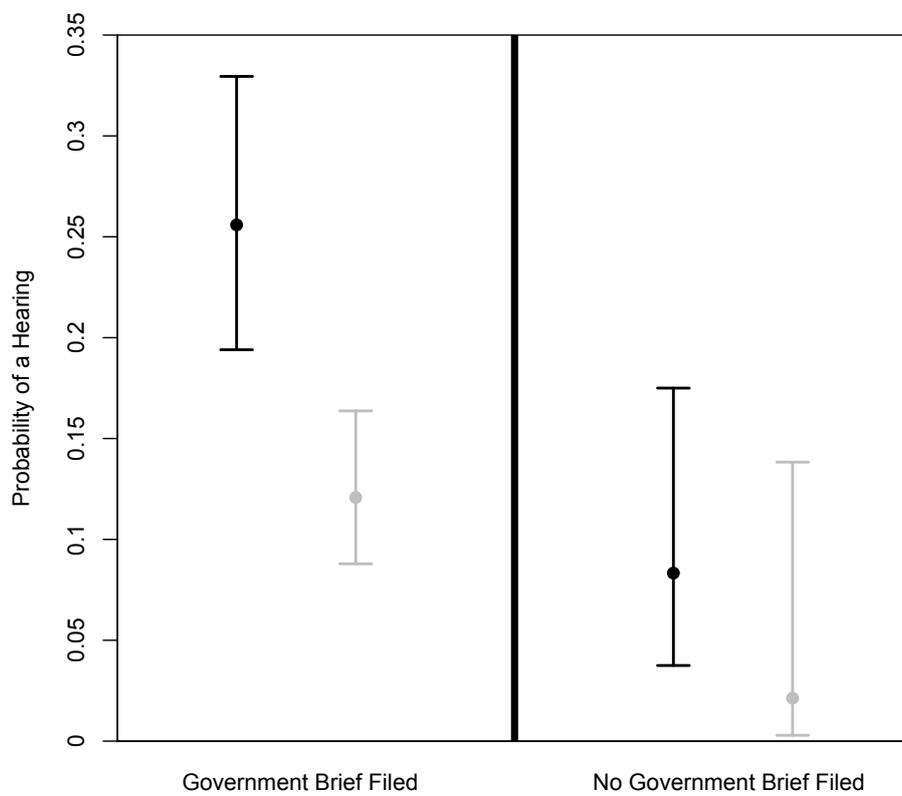


Figure 2: Government Briefs and the Decision to Hold a Public Oral Hearing



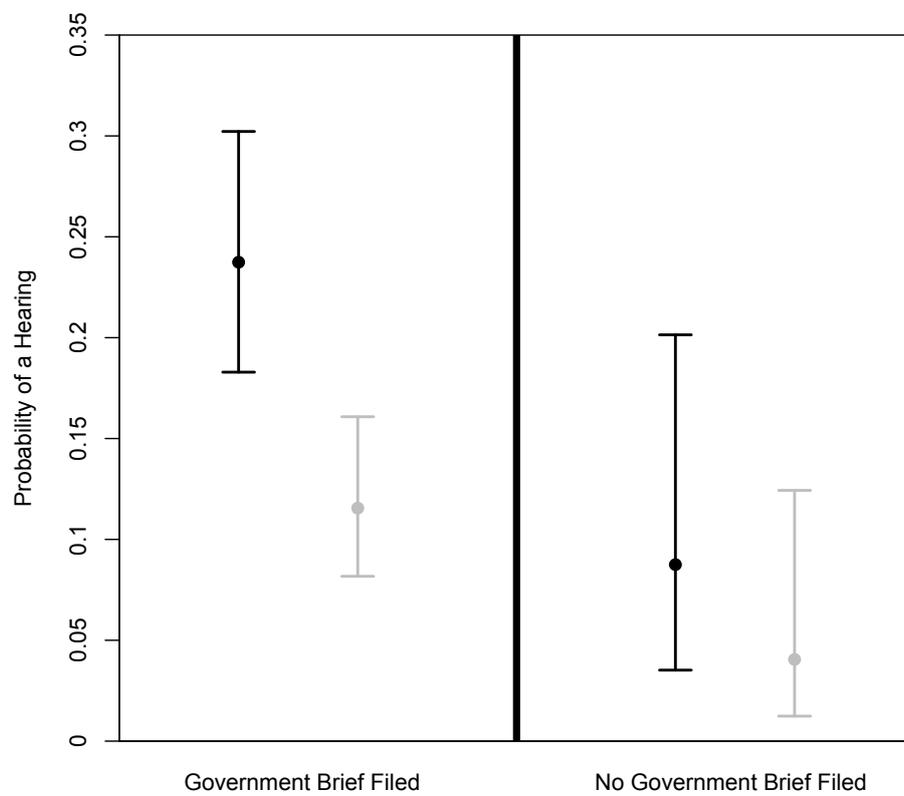
Note: The black point is the predicted probability of a hearing when the government files a brief. The gray point is the predicted probability of a hearing when the government does not file a brief. Lines represent 95% confidence intervals. Estimates based on Model 1.

Figure 3: Case Complexity and the Decision to Hold a Public Oral Hearing



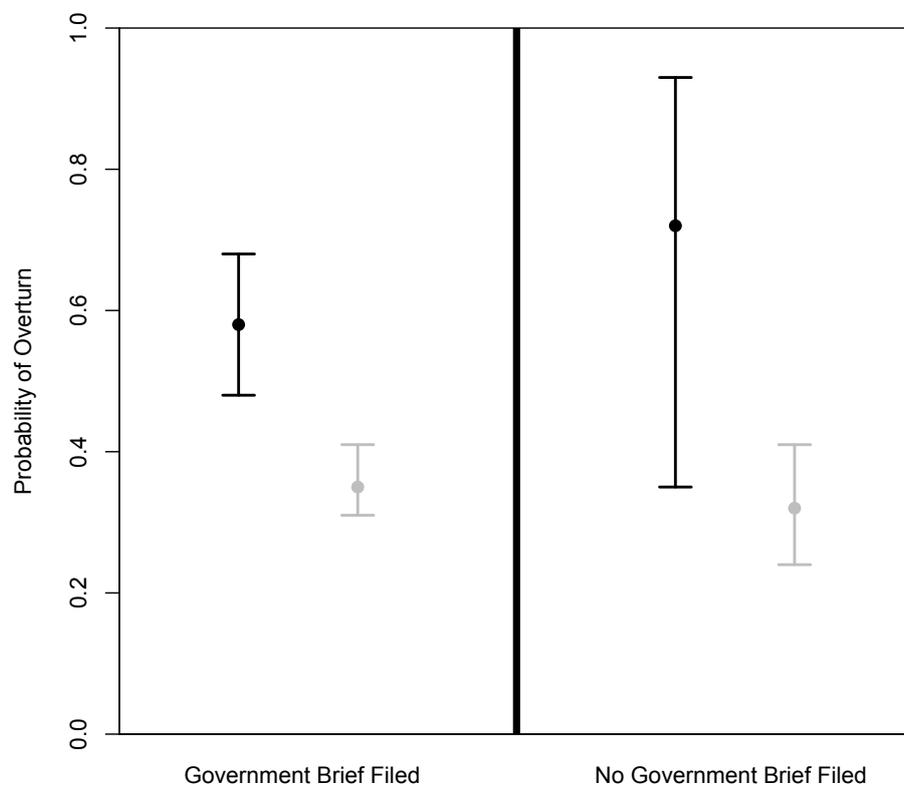
Note: Black points are predicted probabilities for “simple” cases. Gray points are predicted probabilities for “complex” cases. Lines represent 95% confidence intervals. Estimates based on the interaction term *Case Complexity * No Government Brief* in Model 2.

Figure 4: Proceeding Type and the Decision to Hold a Public Oral Hearing



Note: Black points are predicted probabilities for constitutional complaints. Gray points are predicted probabilities for all other proceeding types. Lines represent 95% confidence intervals. Estimates based on the interaction term *Constitutional Complaint * No Government Brief* in Model 3.

Figure 5: Public Oral Hearings and Case Disposition



Note: Black points are predicted probabilities for cases granted a public oral hearing. Gray points are predicted probabilities for cases not granted a hearing. Lines represent 95% confidence intervals. Estimates based on the interaction term *Hearing * No Government Brief* in Model 4.