Judicial Behavior on International Courts:

The European Court of Human Rights

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Abstract

Although judges on international courts have become increasingly important actors in international politics, we know little about their behavior or dispositions. This paper seeks to rectify this through an analysis of dissenting behavior on the European Court of Human Rights (ECHR). The most important results are that: (1) the main dimension of contestation between judges concerns the reach of the court itself rather than a set of political values; (2) the composition of the court has become increasingly activist over time; (3) countries that aspire European Union (EU) membership and countries that are long-time EU members are most likely to appoint activist judges, thus suggesting that the EU is the driving force behind the court's increased activism; (4) national bias has a sizeable impact on individual decision-making but only a modest overall impact on ECHR decisions: on an estimated 11 occasions have states escaped judgments of violations due to strategic behavior by their national judges; (5) judges facing compulsory retirement exhibit lower rates of national bias than judges with the prospect of reappointment, implying that international judges are not immune to concerns about job security.

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International courts and dispute resolution bodies have assumed increased prominence in international affairs, especially in Europe where the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) now regularly make decisions that directly affect European citizens and government policies. This development has made judges on international courts important actors in international politics. Scholarly analyses, however, tend to treat international courts and dispute resolution bodies as unitary actors rather than as collections of individuals with heterogeneous objectives and dispositions. This is unfortunate not only because it leaves us in the dark about an increasingly influential group of actors in the international arena but also because competing theoretical perspectives depend on untested assertions about the behavior of international judges.

The main issue of contention concerns the extent to which national governments are able to control the decisions of courts that are formally independent. Various theorists have argued that international courts, such as the ECJ, have developed in ways that were neither anticipated nor desired by their member governments.[1] This perspective implies that international judges engaged in treaty interpretation that was systematically broader than desired by national governments and that these governments were unable to anticipate that behavior when they appointed these judges. Principal-agent theorists counter that judicial independence serves a purpose, it enhances the credibility of the commitment that the court seeks to enforce, but it is also inherently limited.[2] National governments possess and use various tools to prevent judges from engaging in overly broad or politically sensitive treaty interpretations. These tools include the ability to appoint and re-appoint judges. There is considerable evidence from domestic courts that these tools can be effective. For example in the U.S. context, Democratic executives seek to appoint more liberal judges than their Republican counterparts. While judicial appointees do not always faithfully apply the wishes of their principals, there is a strong and robust correlation between the observed behavior of judges and the political ideology of those who appointed them.[3] Moreover, judges appear sensitive to the prospects of losing their jobs. For example, U.S. trial judges tend to become more punitive as reelection nears.[4]

Do similar patterns pertain for international judges? If so, what are the dimension(s) of contestation that divide these judges? What explains how judges position themselves ideologically? Or, put differently, what explains why governments appoint international judges with certain ideological leanings? Are international judges sensitive to the threat of removal? I seek to answer these questions through an analysis of dissents by ECHR judges on all judgments reached between 1955 and 2005. The ECHR is the main control mechanism to ensure that state parties observe the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereafter: the Convention) and its amendments (protocols). The Convention was inspired by the 1948 *Universal Declaration of Human Rights* but has greater enforcement mechanisms attached to it.[5] The Court has issued judgments on such controversial and diverse issues as abortion rights in Ireland, administrative review procedures in Sweden and

[1] E.g. Alter 1998, Burley and Mattli 1994, Stone-Sweet and Brunell 1998. Note that these authors make quite distinct theoretical arguments but are united in the role they assign to the court itself.
[2] Applications of principal-agent theory to international courts include: Garrett 1995, Garrett, Keleman and Schulz 1998, Keleman 2001, Tallberg 2002.
[3] E.g. Songer and Ginn 2002, Rowland and Todd 1991.
[4] Huber and Gordon 2004.
[5] For a political analysis of the origins of the ECHR, see Moravcsik 2000.

the Netherlands, gays in the British military, torture in Turkey, slow court proceedings in Italy, and the expulsion of Russians from Latvia. Moreover, the Court recently caused uproar in the U.S. when the majority opinion in the U.S. Supreme Court cited ECHR rulings as evidence for international legal standards in *Lawrence v. Texas*.[6]

The ECHR is a useful testing ground for various reasons. First, the ECHR parallels domestic constitutional courts in that it primarily engages in judicial review.[7] The international political context differentiates the court from its domestic counterparts in important ways. The defendants in ECHR cases are always governments who are accused of violating rights of private parties.[8] Nevertheless, the methods developed to investigate the impact of domestic politics on domestic judicial behavior may well be relevant to study the extent to which the international political context shaped judicial behavior in the ECHR. Second, the ECHR enjoys a considerable degree of formal independence from national governments. The court scores high on all dimensions of legalization: obligation, precision, and delegation.[9] The court allows private access to more than 800 million potential claimants in 45 member states[10] who can file grievances regarding human rights violations by their governments. Its decisions are often enforced through national courts. These characteristics limit direct governmental interference with judicial decisions. Hence, the appointment process becomes a relatively important potential tool of government influence.

Third, the ECHR has a large number of judges from countries with varied legal systems. ECHR judges constitute about 20% of the universe of international judges.[11] Moreover, in no issue area is the expansion of international courts as prolific as in human rights. Thus, the results from the ECHR may shed some light on international judicial behavior more generally. Fourth, the dearth of systematic research on individual judges and their responsiveness to national governments can in large part be attributed to the absence of data. Most international courts either issue very few judgments (e.g. International Court of Justice (ICJ)) and/or do not publish dissents (e.g. the ECJ). The ECHR is an exception in that it has both many judgments and public records of dissent.

The first section of this paper places the politics of international judicial appointments in the context of broader theoretical questions regarding political control over international courts. The paper then proceeds to derive a set of testable predictions that relate government objectives to observable judicial behavior. The empirical component is divided into three parts. The first part essentially seeks to find the ECHR equivalent to the liberal-conservative dimension. This is done through an application of ideal point estimation using MCMC methods. The following two sections directly test the principal-agent assertions that governments systematically appoint judges with ideological leanings close to their own and that judges disproportionally rule in favor of their home governments because they seek to be reappointed.

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[6] In particular they referred to *Dudgeon v. United Kingdom*, reaffirmed in *Norris v. Ireland* and *Modinos v. Cyprus*. Note that Justice Breyer had previously cited ECHR decisions in at least two separate opinions: *Nixon v. Shrink*, 528 U.S. 377, 403 (2000) and *Knight v. Florida*, 528 U.S. (1999).

[7] Bruinsma 2005. Some argue that the ECHR is a de facto constitutional court (Shapiro and Stone Sweet 2002).

[8] In this paper, I ignore the 7 cases in which the ECHR was asked to referee inter-state disputes.

[9] Abbott at el. 2000, 404.

[10] The 25 EU members and Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Georgia, Iceland, Liechtenstein, Moldova, Norway, Romania, Russia, San Marino, Serbia and Montenegro, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, and Ukraine.

[11] Based on a claim that there are about 200 international judges (Alvarez 2003).

Political Control over Judicial Behavior on International Courts

The extent to which national governments can, do, and should influence the behavior of international judges is a topic of considerable debate.[12] On the one hand, justices ought to be independent from national governments in order to make law-based judgments about potential violations by state parties. On the other hand, governments have incentives to control judicial decision-making. They may worry about the immediate consequences of findings of violations against them. They may also have reasons to be concerned that treaty interpretation by independent courts tends to result in understandings of treaty obligations that are broader than governments initially intended, as arguably occurred with the ECJ.[13]

There are three general ways by which governments can control judicial behavior. First, they may limit the formal independence of a court through institutional checks and opt-outs. Such checks have largely disappeared from the ECHR. Initially, states were allowed to exempt themselves from compulsory jurisdiction and direct access for private litigants.[14] France, for instance, did not accept the jurisdiction of the ECHR until 1974 (when it finally ratified the Convention) and waited until 1981 to declare that French citizens could directly apply to the ECHR. Greece (1979 and 1985) and Turkey (1990 and 1987) waited even longer to accept these provisions. In the early 1990s, the new Eastern European members made declarations to accept both provisions, although the majority made these declarations only for five-year periods, thus signaling the possibility of withdrawal in case the ECHR would be overly broad in its rulings. While there is no systematic study of this phenomenon, it is plausible that the shadow of these exemptions made judges more cautious in their findings.

The adoption of Protocol 11, which went into force on November 1, 1998, made both private access and compulsory jurisdiction mandatory. It also removed elements of political control from the judgment process. In the old system, applicants first went through a Commission of legal experts that decided whether applications were admissible. Less than 10% of applications survived this initial stage. In the remainder of the applications, the Commission sought to achieve a settlement between the applicant and the respondent state. In case this failed, the Commission produced an opinion on whether a violation had occurred. Either the Commission or the respondent member state could then refer the report to the Court for a binding ruling. In other cases, the Council of Europe's executive organ, the Committee of Ministers (a political institution), could determine that a violation had taken place.[15]

After Protocol 11 came into force, the "new" full-time ECHR took responsibility for the handling of cases. Each case first goes to a rapporteur, generally the national judge of the respondent country who can presumably make the most informed assessment as to whether domestic remedies have been exhausted. The rapporteur can refer the case to a committee of herself and two other judges who may unanimously decide to dismiss a case. In case no unanimity is reached on dismissal, the case goes to a Chamber of seven judges. Parties can then request a hearing by a Grand Chamber of seventeen judges that transcends the sections of the

[12] For overviews of dependent and independent courts and the arguments for and against them, see Posner and Yoo 2005 and the response by Helfer and Slaughter 2005. Note that most of these debates are at the level of courts, but they have explicit and implicit implications for the behavior of individual judges.

[13] Alter 1998.

[14] In the absence of private access, the Court can mediate disputes between states. By 2000, only 7 such cases had been filed, two of which led to a Court ruling: *Ireland v. UK* and *Turkey v. Cyprus* (Cameron 2002).

[15] Until Protocol 10 amendment in 1992, the Committee had to rule for a violation by a two-third majority.

Court. The Committee of Ministers still has an institutional role in overseeing the execution of the judgment but not in the judgment process itself.

Second, even formally independent international courts depend on government actions for funding and for the execution of judgments. Governments may define the "strategic space" in which judges operate by setting clear limits to the decisions that they are willing to comply with.[16] The potential effectiveness of this strategy is limited to the extent that national courts enforce ECHR rulings.[17] This constraint is especially strong in monist countries, where the provisions contained in a treaty can be invoked directly by individuals and applied by national courts. Most dualist member states have also adopted the Convention and its protocols into national law, thus increasingly allowing domestic courts to enforce ECHR rulings.[18] Scholars generally perceive actual levels of compliance as high,[19] although there is little systematic analysis in the area[20] and there are some well-known cases where countries have failed to implement ECHR decisions.[21] Moreover, there are few credible sanctions that the Council of Europe can apply other than 'naming and shaming' violators.[22]

Beyond non-compliance, governments could (threaten to) renegotiate the treaties upon which a court's authority is based in response to (anticipated) undesirable rulings. In practice, this threat is rarely credible given the "joint-decision trap" that arises when each member state has to agree to a proposed change.[23] More credible is that an individual state could withdraw from the Court in response to undesirable rulings. Although this has yet to occur in the case of the ECHR,[24] it is not beyond imagination.[25]

It is fair to say that governments are limited in the extent to which they can influence ECHR decisions through formal channels or exit threats. In large part, these constraints are the results of deliberate government actions, most notably the adoption of Protocol 11 in 1998. These constraints grant greater independence to judges and thereby increase the stakes for the third tool that governments have to their disposal: the ability to appoint and re-appoint justices.

The Politics of International Judicial Appointments

In theory, governments and judges share a quintessential principal-agent relationship: governments can select, monitor, and sanction judges, whereas judges have incentives to please their principals as well as to occasionally act against their principals' interests (the desire for legal consistency). Each member state can appoint one judge to the ECHR. In the post-Protocol 11 system, governments no longer have absolute control over these appointments. They submit three candidates, who they may rank order. The Council of Europe's Parliamentary Assembly

[16] Steinberg 2004.
[17] For the importance of national courts in establishing the independence of the ECJ, see Alter 1998.
[18] Especially noteworthy in this regard is the UK *Human Rights Act of 1998* (October 2, 2000).
[19] E.g. Helfer and Slaughter 1997, Zorn and Van Winkle 2001.
[20] See Posner and Yoo 2005.
[21] The most publicized case is *Loizidou v. Turkey* (28/07/1998), which Turkey refused to implement due to concerns that it would delegitimize the Turkish occupation of Northern Cyprus.
[22] On the above mentioned case for instance, the Parliamentary Assembly has adopted various resolutions to that effect: Documents 9307 (2001), 9375 (2002), 9537 (2002), 9754 (2003), 10192 (2004), and 10351 (2004).
[23] Alter 2005, Scharpf 1989.
[24] It has, however, occurred in other contexts. The best-known example is the U.S. withdrawal from the compulsory jurisdiction of the ICJ after a negative ruling on Nicaragua v. United States of America (June 27, 1986).
[25] For example, the British government has openly considered withdrawing from the ECHR out of a concern that human rights law might get in the way of anti-terrorism measures (e.g. "Clark outlines moves to expel troublemakers who back terror." Philip Johnson 25/8/2005, *The Daily Telegraph*.

has occasionally selected a candidate other than the government's favorite and has refused to accept a few candidate lists for want of gender-balance or proper qualifications. Generally, however, the government's preferred candidate is elected. Once selected, ECHR judges have incentives to be responsive to government interests. There are relatively short renewable terms (six years). The public availability of dissenting opinions implies that judicial behavior is easily monitored compared to the ECJ. Moreover, judgeships at the ECHR are lucrative, certainly in comparison to what legal practitioners could earn in private practice in Eastern and Southern European countries,[26] and may be stepping stones towards other prestigious national or international appointments.

It is not clear, however, to what extent the theoretical opportunities for agency control can and have been used by governments. First, it is difficult to assess ex ante how judges will rule on cases that come before international courts. Governments do have information on the partisanship and professional background of prospective candidates. Presumably, politicians and diplomats are better versed at representing their governments and are less inclined to have strong norms of independence than are academics, judges on high national courts, or other domestic legal practitioners. Yet, it is unclear how informative such categorizations are about judicial behavior.[27] Second, judges have strong professional norms that tend towards independence from the political process. Such norms may be strengthened in the collegial and relatively isolated setting of Strasbourg. Third, the firing threat is weak for those international judges who are nearing compulsory retirement ages (70 in the ECHR). Fourth, influencing individual judges is of limited consequence in controlling court decisions that are taken by simple majority votes.

These weaknesses have led some to reject the utility of the principal-agent framework altogether.[28] Rather, international judges should be considered "trustees," who are by and large appointed and evaluated based on their professional accomplishments and who are unfazed by the threat of removal.[29]

What are Divisions between ECHR Judges about?

Principal-agent models posit that there is some relationship between the preferences of national governments and the observed behavior of international judges and that this relationship is due to the careful selection of judges by principals and/or the threat of sanctions. In order to test the empirical implications of a principal-agent model in a systematic way, we need to explicitly specify what governments seek to achieve when they appoint judges and what type of judicial behavior we expect as a result. It is impossible to derive specific predictions about the political nature of judicial appointments without understanding the source of heterogeneity on the ECHR.[30] For example, U.S. Supreme Court justices can be located along the same liberal-conservative continuum that dominates American politics.[31] This establishes an important link between the judicial arena and the political bodies responsible for judicial appointments and suggests relatively straightforward hypotheses based on principal-agent logic.

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[26] In 1998, the annual salary was FF1,100,000 (about $215,000), tax free.

[27] The list of ECHR judges includes several former ambassadors, representatives to international organizations, parliamentarians, and two former ministers of justice. Bruinsma (2005) argues that professional background are quite informative about attitudes and vote choices of ECHR judges.

[28] Alter 2005.

[29] Ibid.

[30] For a criticism that in practice, principal-agent models are usually to broad to be testable, see Alter 2005.

[31] In recent years the voting behavior of Supreme Court justices is predicted more accurately by a one-dimensional model than are the vote choices of members of Congress (see Martin and Quinn 2002, Poole and Rosenthal 1997).

Observers commonly interpret divisions within the ECHR as concerning the size of the margin of appreciation that should be left to respondent states.[32] The ECHR's margin of appreciation doctrine holds that each country has some latitude in resolving conflicts that arise between individual rights and the perceived national interests or values of that country.[33] Those who believe that this margin should be broad, stress that the subsidiarity principle underlying the court suggests that it is appropriate to grant a great deal of deference to national practices, policies, and perceived interests. Consequentially, they tend to have a greater propensity to give governments the benefit of the doubt in their assessments of whether violations have occurred. Judges on the other side of the spectrum tend to believe that states have less room to hide behind local customs and national interests when it concerns the implementation of the Convention.

This division is generally labeled as being between those who favor "judicial activism" and those who prefer "judicial restraint."[34] Even though the margin of appreciation and subsidiarity labels are more precise and avoid confusion with other common uses of the labels activism and restraint, I stick to the usage of these terms while explicitly noting their specific operationalization in the context of the ECHR: given a case, an activist judge is more likely to rule in favor of the applicant, and thus against a government, than a judge on the self-restraint side of the spectrum.[35]

That activism-restraint dominates divisions between judges is an assertion made by observers. It has not been tested in a systematic manner against alternative hypotheses. The chief alternative candidate is the socio-economic left-right dimension, which dominates partisan politics in many European societies as well as in Europe's most prominent supranational political institution: the European Parliament.[36] Left-right conflict may be related to divisions over levels of activism in that ECHR justices on the self-restraint side are generally perceived to be on the right (conservative) side of the political spectrum whereas judges on the activist side are perceived as being on the left (or liberal).[37] While this classification may have some merit on social issues, such as judgment on sodomy laws, gays in the military, abortion, and rights for transsexuals, there are also issues on which an activist ECHR fits comfortably within an ideological framework that should appeal to the European right. Several ECHR decisions have served as a check on state power vis-à-vis individual exercises of economic rights. An example is the set of Article 6 ("right to a fair trial") cases, led by *Benthem v. The Netherlands,* that helped grant private persons and businesses access to independent courts in countries where administrative review boards previously went unchecked.[38] Similarly, we may expect those on the right of the socio-economic spectrum to be supportive of an activist court on Article 1 of the First Protocol, which shields property from improper government extraction and is the second most frequent subject of ECHR judgments.[39] Hence, it may well be that left-right rather than activism-restraint is the proper label for the main dimension of contestation.

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[32] E.g. Bruinsma 2005, Bruinsma and Parmentier 2003, Jackson 1997, Morrison 1981.
[33] For a comprehensive treatment see Yourow 1995.
[34] See Jackson 1997, Morrison 1981, Bruinsma and Parmentier 2003.
[35] Steinberg (2004) suggests that a similar division exists between justices on the WTO's appellate body ans similarly notes the sometimes ambiguous meaning of the activism term.
[36] E.g. Hix et al 2005.
[37] E.g. Merills 1988.
[38] BENTHEM v. THE NETHERLANDS (8848/80) [1985] ECHR 11 (23 October 1985).
[39]For a full overview of the relative frequency of cases, see Cichowski 2005. Article 6 cases are by far the most common. Only a small subset of these cases deals with the protection of individual economic rights.

The empirical part of this paper will explicitly assess the proper interpretation of the main dimension of contestation. It is important to appreciate that the two interpretations suggest different types of politics. If left-right conflict dominates, then divisions between judges are about political values. If, as suggested by observers, activism-restraint is indeed the dominant cleavage, then conflict over the proper role of the institution is at the heart of the dissenting behavior of judges. Hence, principal-agent approaches would expect governments that are more skeptical about a strong court to be least inclined to appoint activist judges. The next section derives more specific hypotheses.

Hypotheses

Can divisions between ECHR judges be traced back to characteristics of the governments that appointed them? In this section, I discuss three theoretical explanations of such a link. The first two accounts trace judicial appointments to variation in the national interests of states. The third explanation stresses domestic partisan politics and has already been highlighted above. A fourth account looks at a potential source for variation in judicial behavior that is completely unrelated to the governments that appoint judges: variation in domestic legal systems. Finally, I briefly derive some predictions from the principal-agent framework regarding national bias among ECHR judges.

I. Realist Politics

Realists argue that governments make appeals to liberal goals, including human rights, in order to justify their geopolitical pursuits.[40] In this perspective, powerful liberal states induce or coerce other states to sign human rights treaties in an effort to extend national ideals derived from national pride or geopolitical self-interest.[41] Once target states have submitted themselves to the judgments of an independent court, realists would expect that governments use judicial appointments to shield them from unwanted findings while maintaining a public commitment to the cause. Thus, states that are most vulnerable to negative judgments by the court should be least likely to appoint activist judges, as they have the least interest in an activist court. On the other hand, governments that do not fear that the court affects a domestic status quo may favor activist judges as these may aid them in submitting other states to the set of liberal goals they seek to achieve.

The Convention primarily seeks to protect a set of individual civil liberties. Thus, countries that are generally perceived to fare poorly in this regard have more to fear from an activist Court than countries that already guarantee a broad set of civil liberties at home. Consequentially, countries with poor domestic human rights records may be more likely to pick judges on the self-restraint side of the spectrum. Countries with poorly performing legal systems are also a popular target for ECHR rulings, especially regarding article 6 (“right to a fair trial”), by far the most frequent article in ECHR judgments. Such countries may also seek to shield their vulnerability by exercising caution in appointing judges that are likely to be activist.

II. Commitment Politics and the European Union

Liberal institutionalists argue that governments may favor an independent court in order to increase the credibility of their commitments to a treaty. Moravcsik found that governments in new democracies sought to “lock-in” their commitments to human rights against future political

[40] Carr 1946, Morgenthau 1960.
[41] For a similar exposition of the realist perspective on the ECHR, see Moravcsik 2000, especially table 1, p. 222.

change by subscribing to the control mechanisms of the Convention. [42] Established democracies saw little use for interference into their domestic affairs by an independent international court and worried about potentially undesirable side-effects from creating such a body. Regimes that were not fully democratic feared that unwanted intervention into their domestic affairs might upset the domestic status quo. Governments in young democracies, on the other hand, worried more about potential future domestic regimes with authoritarian inclinations than about foreign interference that would uphold a set of liberal standards. By extension, it may be that young democracies are more likely to appoint activist judges than are older established democracies and non-democracies.

It is, however, questionable whether appointing judges is a viable "lock-in" strategy. After all, judges have relatively short terms and could be replaced at little cost by a future government. A more plausible thesis is that governments use judicial appointments to signal their human rights commitments to interested parties, especially the European Union and its member states. The EU is an explicitly liberal community that views expansion as an attempt to broaden that community.[43] Hence, the EU seeks assurances from prospective members regarding their commitments to a set of liberal rules.[44] For aspirant members, appointing judges that appear willing to actively apply international standards, perhaps even against their own governments, is a way to signal their commitments to a set of rules and conflict resolution procedures that are integral to the EU.

EU membership is accompanied by an ever increasing set of adjustments of domestic rules and regulations in response to supranational decision-making and ECJ rulings.[45] Countries that become more integrated into the EU system not only grow accustomed to interference by international courts but also may perceive it to be in their interests that neighbouring states are also held to a set of international rules. Hence, governments may become more inclined to appoint activist judges, the longer they have been a part of the EU.

III. Partisan Politics

A third thesis, already highlighted above, is that governments may appoint international judges based on the ideological composition of governments. Given the pervasiveness of left-right conflict in European politics, the most obvious hypothesis is that left-wing governments tend to appoint judges that are more "activist" in their orientation whereas right-wing governments favor judges more on the "self-restraint" side. As noted above, it may even be that left-right conflict rather than activism-restraint is the dominant dimension of contestation in the ECHR. If this were so, then the politics of ECHR appointments is a rather straightforward extension of domestic democratic politics, in a similar way the politics in the European parliament appears to be "politics as usual."[46]

There are, however, some reasons to be cautious about the thesis that left-right conflict dominates divisions between justices. To the extent that research exists, scholars have found that divisions on Europe's domestic constitutional courts are generally not determined by partisanship.[47] The potential impact of partisanship is blurred by the power-sharing arrangements

[42] Moravcsik 2001.
[43] Schimmelfenig 2001.
[44] Ibid.
[45] E.g. Stone-Sweet and Brunell 1998, Stone-Sweet and Sandholtz 1998.
[46] Hix, Noury and Roland 2005.
[47] See Von Brünneck 1988. Schwartz 1994 suggests that this also holds in the new Eastern European Courts. For an exception, see Magalhães 1998.

that are common in European governments. In many coalition governments, the allocation of justices to high courts by parties is roughly proportional to the legislative participation of parties.[48] Where qualified majorities are required, opposition parties usually also get to appoint their share of judges. In other countries, judicial appointments are more consensual, making justices less reliant on a single party. Appointments to the ECHR are generally cabinet-level decisions based on nominations by the ministers of justice and foreign affairs. In coalition governments, some of these appointments will be consensual candidates, others will be part of log-rolls. Moreover, while left-right conflict is dominant in the countries of the EU, it is somewhat more tenuous in many Eastern European party systems.[49]

IV. Domestic Legal Systems

Finally, variation in judicial activism of international judges may reside in the characteristics of domestic legal systems. A prominent line of reasoning suggests that many features of contemporary legal systems are inherited and thus largely exogenous to other aspects of the political systems of countries.[50] This literature has focused mostly on the distinctions between common law and civil law countries. Due to colonial exploits, military adventures, and other reasons, the legal systems of France and England have had a vast influence on systems adopted in many other countries. Divergence in these legal systems was heavily shaped by developments in the 12th and 13th century, when France moved towards adjudication by royally-controlled professional judges, while England developed a system in which courts enjoyed greater independence from royal interference.[51] As a consequence, in legal systems designed after the French civil law system judges have generally played a subordinate role.[52] In common law countries, on the other hand, judges are frequently asked to engage in broader interpretations of legal principles. This, the argument goes, would make judges from common law countries more likely to be activist in their role orientation than judges from civil law countries.[53]

More generally, domestic legal systems vary in at least two potentially relevant ways. First, in some systems judges have greater independence from the political process than in others. Potential sources of independence are lifelong tenure, which shields judges from ex post political evaluations, and the use of case law as a source of law, which increases the implications of judicial decisions.[54] Judges that are accustomed to independence from political interference may tend to be more activist in their orientations. Second, not all legal systems formally assign a role to courts as evaluators of the constitutionality of legislative initiatives. Judges from countries where constitutional review is absent are perhaps less inclined to engage in more open interpretations of textual provisions than judges who commonly review the legality of initiatives from democratically elected officials based on abstract principles.

There is some ground for scepticism about these hypotheses. First, the view that judges who are "activist" on the national level would translate that activism to an international court relies strongly on the notion that judicial behavior is driven by role conceptions into which judges are socialized. If judges more instrumentally determined their interests based on an assessment of the effects of their deeds, we may well reach the exact opposite predictions. If

[48] Von Brünneck 1988.
[49] Kitschelt et al 1999.
[50] E.g. Merryman 1985, Glaeser and Schleifer 2002.
[51] See Glaeser and Schleifer 2002.
[52] Merryman 1985 dates this back even further to the Roman *judex*.
[53] See Alivizatos 1995.
[54] La Porta et al 2004.

national judges enjoy a high degree of independence and have the opportunity for constitutional review, then activism by an international court may appear an undesirable interference into a system in which the power of the judiciary is firmly entrenched. Second, much of the "new constitutional politics of Europe" has been the result of activism by judges from civil law countries that lack formal constitutional review.[55] It is thus not entirely clear that the above characterization is informative about judicial behavior even at the domestic level.

NATIONAL BIAS AND CAREER CONCERNS

The most immediate, and most studied, objective that governments may have in controlling international courts is to prevent findings of violations against them. Each member state has the right to have its national judge vote in cases in which it is the respondent state.[56] Hence, if governments effectively select judges and/or if the firing threat has the appropriate deterrent effect, we would expect judges to be much more likely to side with the government's position when that government is the judge's home country. Moreover, if this behavior is driven by reappointment concerns, we should observe that judges who can be reappointed for another term have a greater propensity for national bias than judges who face compulsory retirement following their current terms.

Data

Although there are some analyses of episodes of dissenting behavior,[57] this is the first study that examines the entire voting record between 1955 and March 1st 2005 that contain dissents. While most judgments are unanimous, dissents are certainly not rare events: 800 of the 5,010 ECHR judgments included at least one dissenting opinion.[58] Many of the unanimous judgments are on cases that have become routine affairs. For instance, 3,760 of the judgments referred to article 6, paragraph 1 (right to a fair trial).[59] 3,270 of these judgments were reached during the new Court. Of these, only 273 elicited at least one dissenting opinion. This includes a set of 133 judgments on alleged Italian violations that were all decided on February 28 2002 among the same panel of judges with the same judge dissenting using the same dissenting opinion.[60] These and other judgments that were unambiguously identical were treated as a single case such as not to skew the results and artificially increase the number of observations.[61]

Most judgments consisted of multiple issues. For example, multiple decisions were usually taken on alleged violations of individual articles of the Convention. Sometimes, these individual decisions exhibited different patterns. There were twenty-four cases where at least half the judges expressed a dissenting opinion. Often, these were cases where some dissenters

[55] E.g. Shapiro and Stone 1994, Stone Sweet 2000.
[56] If the national judge cannot sit, the government has the right to appoint an "ad hoc" judge.
[57] Arnold 2001, Bruinsma 2005, Bruinsma and De Blois 1997, Jackson 1997, Schermers 1998.
[58] Based on a search in the on-line catalog HUDOC (http://www.echr.coe.int/Eng/Judgments.htm). The search identified judgments that include the word "dissenting" in the separate opinions portion of the case. Since the full text of some cases is only included in one of the two official languages, a complementary search was performed in the French language portion of the database. An earlier study with data from 1991-1995 found that about 60% of all cases were non-unanimous (Bruinsma and De Blois 1997). However, that study also included separate concurring opinions and its included only judgments on the merit of a case, which are likely to be more controversial than judgments on admissibility or just satisfaction. I also exclude just satisfaction issues at a later stage (see below) but they are included in the total number of judgments.
[59] Note that most judgments concern multiple articles of the Convention.
[60] Judge Ferrari-Bravo of San Marino. In the new Court, there were 1407 art.6-1 judgments on Italy.
[61] Note that the ECHR itself frequently consolidates multiple cases into a single judgment.

argued that no violation had occurred whereas others believed that violations of multiple articles had occurred, even though a majority could only be found on the occurrence of a subset of these violations. Such issues were treated as separate entries in the dataset. Issues within a judgment that yielded identical divisions were consolidated into a single entry.[62]

The dataset used in this analysis includes only decisions on jurisdictional questions and the merit of a case (i.e. did a violation occur?). The vast majority (87%) concerned the latter.[63] This excludes decisions on just satisfaction. Just satisfaction decisions often followed naturally from decisions on the merit of the case. To the extent that they did not, judges did not always motivate why they voted differently on the just satisfaction decision than on the merit question.[64] Moreover, splits on just satisfaction were often ambiguous: some judges dissented because they believed that no compensation ought to be given, others deemed the compensation insufficient.

The final dataset includes votes on 735 issues from 584 cases with 36 different respondent states. The UK is the most common respondent country in the data (126 issues), followed by France (97), Turkey (96), Italy (57), and Belgium (40).[65] The dataset includes 155 judges from 42 different countries. 60 of these judges voted less than 10 times, either because they were used only as an ad-hoc judge or because they served only briefly in the early years of the ECHR. 65 judges voted more than 50 times.[66]

The vast majority of issues are from recent years: 82% of all issues are from a judgment in 1990 or later, 43% of all issues come from the "new" Court (post November 1, 1998). A plurality of issues that generated controversy (39%) invoked article 6 ("right to a fair trial"). Other articles commonly appealed to are article 3 (13%, "prohibition of torture"), article 5 (10%, "right to liberty and security of person"), article 8 (15%, "Right to respect for private and family life"), article 10 (10%, "freedom of expression"), and protocol 1, article 1 (8%, "protection of property"). It should be remembered that issues may deal with multiple articles. A more detailed analysis of what articles generate disproportionate dissent is left as a future exercise but it is immediately apparent that article 6 cases invited fewer dissents than their preponderance in the universe of judgments would suggest.[67]

What is the Ideological Structure of Divisions between Judges?

Estimating the Ideal points of Judges

In recent years, there have been enormous methodological advances in the estimation of ideal points based on vote choices made by actors in political or judicial institutions.[68] These new methods have important advantages over measurement strategies that might appear more straightforward, such as taking the proportion of issues on which a judge rules against the

[62] But the subject matter of each issue was recorded.
[63] 59% of these cases found a violation, whereas 41% found in favor of the respondent government. Note that many of these issues also address jurisdictional issues. If the applicability and the merit judgment yielded the same split, the issue was coded as a decision on the merit.
[64] ECHR judgments do not explicitly reveal which judge voted how on what issue within a given judgment. A cursory glance at the attached dissenting opinions almost always clarified this. In the rare instances where votes by judges on sub-issues could not be unambiguously identified, the issue was not included in the dataset.
[65] There is some evidence that issues involving the UK were disproportionally likely to invite dissent. I leave a more detailed analysis of this as a future exercise.
[66] Note that 64% of all issues in the data were decided in the Chambers, 36% in the Grand Chamber.
[67] For a thorough description of the universe of cases, see Cichowski 2005.
[68] E.g. Poole and Rosenthal 1997, Jackman et al 2000, Poole 2000, Martin and Quinn 2002.

government as a measure of her activist tendencies. Such an approach would ignore variability in the characteristics of issues. By the luck of the draw, some judges may well vote on a disproportional number of issues on which severe and clear violations occurred. Those judges would be labeled activists even if a moderate judge would have voted the same way. This problem is exacerbated by the fact that judges vary considerably in the number of issues they voted on. Finally, the simple approach is not based on a realistic model of judicial decision-making. Hence, we cannot assess how well the theoretical activism-restraint distinction actually describes the data as opposed to some other division, such as left-right ideology.

Instead, this analysis employs a probabilistic spatial model of judicial decision-making.[69] Figure one illustrates a one-dimensional variant. In the figure, five judges are depicted by their ideal points along a continuum from activism to restraint. The figure also includes the cut-points for three hypothetical issues. The decision-making model assumes that the further a judge's ideal point is to the left of an issue cut-point; the more likely that judge is to rule against the government. Conversely, the more a judge is to the right of the cut-point; the less likely it is that the judge will find a violation. There will be issues, such as issue 1, on which even the highly activist judge A is unlikely to find a violation. Similarly, there will be issues, such as issue 3 on which even most judges on the self-restraint side of the spectrum are likely to find a violation.

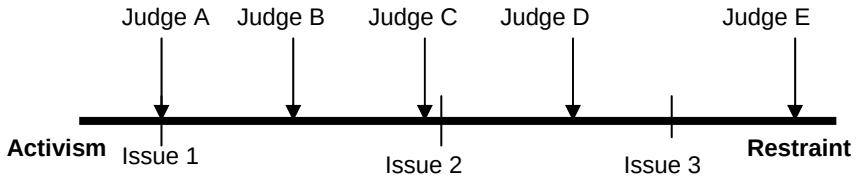

Figure 1: Illustration of the spatial model of judicial decision making

Unfortunately, we observe neither the judges' ideal points nor the issue cut-points. There are, however, algorithms to estimate both sets of parameters from what we do observe: whether judges ruled in favor of or against the government. We have n observed responses y (vote choices), where i=1,….,n, by J judges on K issues. $y_i = 1$ if the vote choice is in favor of the government, 0 otherwise. We can model these responses using a two-parameter item response model:

$$\Pr(y_i = 1) = \text{logit}^{-1} \beta_k (\theta_j - \alpha_k)$$

In this equation, θ_j reflects judge j's ideal point and α_k represents the cut-point on issue k as outlined in figure 1. β_k is the discrimination parameter. If β_k equals zero, variation in judicial ideal points is not informative about how judges vote on issue k. If β_k is large and positive, judges on the positive side of the scale have a high probability of voting in favor of the government. If, on the other hand, β_k is large and negative, judges on the negative side of the scale are likely to vote in favor of the government on this particular issue. Thus, the model offers an opportunity to explicitly test whether activism-restraint is indeed the main dimension of contestation. If the main division between judges is activism-restraint, then we would expect the

[69] E.g. Martin and Quinn 2002, Bafumi et al 2005.

discrimination parameters to be positive. In order to assess this, I estimate one model in which the discrimination parameters are constrained to be positive and one model where this constraint is relaxed.[70]

I estimated the models using MCMC methods within a Bayesian framework, using the robust logistic model specified by Bafumi et al (2005).[71] The estimation includes the 88 judges who voted at least 10 times on issues that did not involve their home countries. This leaves 632 non-unanimous issues.[72] The votes on the judges' home countries will be used in a later section to assess the issue of national bias.

RESULTS

The activism-restraint model correctly accounts for 84.3% of all vote choices by judges in the ECHR.[73] The unconstrained model yields a slight improvement in classification success (84.9%). The bivariate correlation between the two sets of ideal point estimates is .96.[74] There were only two issues on which the polarity was clearly reversed from expected under the activism-restraint model.[75] Both issues involved miscodings: issues where the majority favored the government even though I had originally coded the issue otherwise. This suggests very strongly that the first dimension indeed reflects activism-restraint. On the other hand, there were 106 issues where the 95% credible interval of the discrimination parameter included 0. On those issues, variation in the judges' ideal points on the activism-restraint dimension is largely uninformative about the vote choices of these judges. This suggests that there may be another dimension underlying the vote choices of ECHR judges. An investigation into the dimensionality is left as a future exercise.

Figure 2 displays the estimated ideal points and the 95% posterior credible intervals of the 88 judges that voted at least ten times.[76] The further the median estimated ideal point is to the left, the more activist the judge. The further the estimated ideal point is to the right, the more the judge has a tendency to prefer self-restraint. The larger the posterior credible interval (the line in the figure) the more uncertainty there is about the precise location of a judge's ideal point. Large posterior intervals mostly reflect the small number of vote choices of some judges.

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[70] In this model, the polarity of the scale is identified by restricting one judge, Vilhjálmsson, to have an ideal point to the right of another judge, De Meyer. These two judges have served together for a long time and infrequently vote together, so their ideal points can be expected to be far apart, regardless of the content of the dimension.

[71] $\Pr(y_i = 1) = \varepsilon_0 + (1 - \varepsilon_0 - \varepsilon_1)\,\text{logit}^{-1}\beta_k(\theta_j - \alpha_k)$, with $\varepsilon_0 \sim \text{dunif}(0,.1)$, $\varepsilon_1 \sim \text{dunif}(0,.1)$

$\theta_j \sim N(\mu_\theta, \sigma_\theta^2)$, for j = 1,.....J, $\alpha_k \sim N(\mu_k, \sigma_k^2)$ and $\beta_k \sim N(\mu_\beta, \sigma_\beta^2)$, for k = 1,.....K . The parameters were normalized after estimation was complete: $\theta_j^{adj} = (\theta_j - \bar{\theta}) / s_\theta, \alpha_k^{adj} = (\alpha_k - \bar{\theta}) / s_\theta, \beta_k^{adj} = (\beta_k) * s_\theta$

[72] Almost two-thirds of these issues were decided by panels of only 7 judges. Many of the judges never sat on the same panel and are thus connected to each other only indirectly The Grand Chamber is important in this regard. All judges are connected with a maximum degree of 2.

[73] This is the mean of the posterior distribution. This is about 35% of the variation in vote choices. A model that simply predicts that everyone will always vote with the majority will get 75.7% of vote choices right. Note that the estimated model is a parametric and thus does nor seek to maximize the proportion of correctly predicted vote choices. In fact, the maximum of the posterior of the unconstrained model is 85,6% correctly predicted, which corresponds to the results from Poole's (2000) non-parametric estimator.

[74] This is the Pearson R between the means of both posterior distributions.

[75] I.e. a discrimination parameter whose entire credible interval was below zero.

[76] The estimates from the second model are used.

FIGURE 2 ABOUT HERE

To the extent that the positions of judges are known, the estimates appear to have considerable face validity. The British judge Sir Gerald Fitzmaurice is estimated to be the most "extreme" judge on the restraint side. Fitzmaurice was a legal adviser in the British foreign office who became a well-known academic and a judge on the ICJ (1960-1973) before coming to the ECHR in 1973. He is often cited as the prototype of the "tough conservative" judge,[77] who sometimes angered his colleagues with long and opinionated dissents.[78] Another judge with a precisely estimated ideal point on the restraint side, the Austrian Judge Matscher, spent seventeen years in the Austrian diplomatic service before joining the Court in 1977 and has openly expressed his concern about the ECHR's activist tendencies by writing that the ECHR has "[..] entered territory which is no longer that of treaty interpretation but is actually legal policy-making" (1993,70). The Swiss president of the court, Judge Wildhaber, recently proclaimed himself to be "slightly more to the self-restraint side" in comparison to his colleagues,[79] which is confirmed by his ideal point estimate.

Similar observations can be made about many of the judges with estimated ideal points on the activist side of the spectrum. The Belgian judge Tulkens, for instance, asserted in a recent interview that: "One can speak of judges who are concerned about problems of the *raison d'état* and others who sympathize with the applicants. The *raison d'état* is more present here than I would have thought possible.[80] The Italian judge Casadavall (serving for Andorra) declared that 'Personally I am a judicial activist as to Article 6 with a bent to enlarge its scope'[81] The French judge Pettiti, who has a background as attorney (*avocat)* and human rights activist, had been singled out as the prototypical "activist" in an earlier study.[82] Similarly, the Maltese judge Bonello has defended 170 human rights lawsuits in the Maltese courts as a private practitioner and is a self-identified activist.[83] The "most" activist judge, Cypriot judge Loukis Loucaidis, has published widely on human rights, motivated primarily by concerns over individual rights in Turkish Cyprus.[84]

In short, the estimates are consistent with but much more informative than our prior information about the positions of judges. Most importantly, they allow for systematic examination of the variation in judicial behavior.

Dynamics of Activism on the Court

It is instructive to evaluate whether and to what extent the level of activism on the ECHR has changed over time. Although the estimation assumes that the ideal points of individual judges are constant, the composition of the court can change if, for instance, incoming judges tend to be more activist than the judges they replace. Figure 3 shows considerable evidence for such a trend. The figure plots the ideal point estimate for the median justice on the Court from 1980 to 2005. The median justice in 2005 is almost one standard deviation more activist than the median

[77] Merills 1988.
[78] Judge Wildhaber in Bruinsma and Parmentier (2003).
[79] Ibid.
[80] In: Bruinsma 2005.
[81] Ibid.
[82] Jackson 1997, 25.
[83] Bruinsma 2005.
[84] Loucaides 1995, 2003, 2004.

justice in 1980. The biggest shift in the ideological composition of the Court occurred between 1998 and 1999, with the installation of the post Protocol 11 Court.

FIGURE 3 ABOUT HERE

Why do new justices tend to be more activist than their predecessors? Does this trend reflect the deliberate choices of governments to appoint more activist judges or is this largely an unintended outcome? If the former is true, we should be able to explicitly link levels of judicial activism to characteristics of the governments that appointed them. This is the subject of the next section.

Why are Some Judges more Activist than Others?

Table one provides a brief overview of the various explanations proposed in this paper. In this section, these accounts will be evaluated independently. This approach is necessitated by the small number of judges and the fact that many of the independent variables are limited in their temporal and/or cross-sectional domain. Table two offers results from a limited set of multiple regression analyses that evaluate whether bivariate results are robust to the introduction of relevant control variables.

Most of the presentation of evidence relies heavily on graphs, especially boxplots. Since these plots are relatively unknown, their interpretation warrants some explanation. A boxplot is a graphical representation of an analysis of variance. The plot shows median values, inter-quartile ranges, and extreme values of judicial activism within groups of judges defined by the explanatory variables.[85] If the boxes (interquartile ranges) are small then there is little variation in the levels of activism *within* a category of an explanatory variable. If the central tendencies between the categories are very different then there is much variation *between* the categories of an explanatory variable. A variable has greater explanatory value the larger its between-categories variance and the smaller its within-categories variance.

TABLE ONE ABOUT HERE

REALIST POLITICS

Do countries that offer better protections for individual civil liberties generally appoint judges that are more activist than countries that provide less broad guarantees? Figure 4 uses Freedom House civil liberties scores at the time of a judge's election as an indicator for civil liberties.[86] The Freedom House scores run from 1 (extensive civil liberties) to 7 (very restrictive civil liberties). Most judges come from countries with either a score of 1 (47%) or 2 (27%). There is no evidence that judges from countries that are less respectful of civil liberties tend to be more on the self-restraint side. Instead, most of these judges are in the middle of the spectrum. The most extreme judges from both sides come from countries that already respect civil liberties, as evidenced by the wide range of values for judges from that group of countries.

The ECHR also aims to correct deficiencies in the functioning of domestic legal systems. Hence, it may be that countries with legal systems that are generally perceived to function poorly are less likely to pick activist judges. The lower panel of figure 3 plots the level of activism of

[85] All inferences about judicial activism are on the mean of the posterior distribution, for the moment treating them as point estimates.

[86] www.freedomhouse.org Note that Freedom House scores are available only from 1972. I

judges against a measure of the perceived performance of domestic legal systems, based on a six-point "law and order" scale developed by the *Inter Country Risk Guide* published by *Political Risk Services*.[87] Most of the judges come from countries with either perfect (score 6, 44%) or near-perfect scores (5, 34%). There is no evidence that judges from countries with poor legal systems tend to appoint judges that lean towards self-restraint.

The first column in table 2 presents the results of a multiple regression analysis. Civil liberties and the performance of the domestic legal system do not correlate with the level of activism of ECHR judges.[88] Similar analyses using alternative measures of human rights[89] and democracy[90] do not yield different results. Thus, there is no evidence that countries that appear vulnerable to an activist ECHR tend to pick judges that favor self-restraint.[91]

Commitment Mechanism for Young Democracies

Are young democracies particularly likely to appoint activist judges? The upper panel of figure 5 plots the degree of activism of a judge against whether the judge's country was a democracy and for how long it had been so at the time of the judge's election. Countries are coded democracies if they have a score of 7 or higher on the widely used Polity scale.[92] In the scatter plot, the markers are labeled by the IFS country-codes

There is no support for the thesis that young democracies are particularly prone to appoint activist judges. This is also confirmed by the regression analysis in table 2. If there is any pattern related to levels of democracy, it is that only established democracies appoint judges on the extreme ends of the spectrum. This pattern confirms that found for civil liberties.

European Integration

Are governments from countries that are better integrated into the European multilateral system more comfortable appointing activist judges? Do countries that aspire to EU membership have incentives to signal their commitment by appointing a judge who is willing to apply a small margin of appreciation?

I code aspirant membership, imperfectly, by a dummy variable that takes the value 1 during the ten-year period leading up to EU membership or the ten-year period before an announced membership date. Integration is measured by the number of years a country has been a member of the EU.[93] Accession to the EU and its predecessors was staggered. The United Kingdom, Denmark and Ireland joined in 1973, Greece in 1981, Portugal and Spain in 1986, Austria, Sweden, and Finland in 1995. A group of ten mostly Eastern European states became members in 2004 but others (Bulgaria, Romania, and Croatia) have an announced accession date in 2007. The assumption underlying the measurement is that these accession dates reveal something about a country's relative level of integration within the set of supranational institutions created by the European Union.[94]

The bottom panel in figure 5 shows the relationship between EU membership status and duration at the time of a judge's appointment and the level of activism of that judge. The third

[87] http://www.icrgonline.com/ Data is available from 1980 onwards.
[88] The Pearson correlation between the law and order and civil liberties measures is -.53.
[89] Political Terror Scale scores based on Amnesty International reports.
[90] Polity scores.
[91] A future analysis will also use past ECHR rulings on violations as an independent variable.
[92] It matters not if we raise the bar to 9 or 10.
[93] Or its predecessors the European Community and the European Economic Community. The starting year is 1958.
[94] I exclude from the analysis countries that do not have an independent foreign policy (San Marino and Andorra).

column in table 2 reveals the results of a multiple regression analysis of the three EU related variables on the level of activism of a judge.

The regression results show that judges from aspirant EU countries are on average located .82 points towards the activist pole of the scale in comparison to the reference group; judges from non-EU countries that do not have aspirant membership status. This is a very sizeable effect.[95] This result also holds when we control for the level of human rights violations, the level of democracy in a country, or whether the country is classified as a low-or middle income country by the World Bank. Hence, the results suggest that the effect is indeed due to aspirant membership status within the EU rather than some other variable correlated with this status.

Both the figure and the regression results also reveal evidence that more activist judges tend to be appointed by long-time EU members. All judges beyond -1 on the activism scale have been appointed either by countries that, at the time of appointment, had been EU members for at least ten years or expected to become EU members in the next ten years. In the regression analysis, this result is robust to the introduction of a simple time counter for the years since the inception of the ECHR when the judge is elected.[96] This implies that the result is not simply a function of more activist judges being appointed in the later years of the ECHR. Rather, it may point to an explanation for this phenomenon: the EU integration process may be driving the increased activism of the ECHR.

PARTISANSHIP

Are judges appointed by left-wing governments more activist than judges appointed by right-wing governments? It is surprisingly difficult to adequately measure the ideological composition of governments in a comparative way. A first approach is based on party families. A measure for left-wing government ideology is the percentage of total cabinet posts, weighted by days of a calendar year, held by social-democratic and other left parties.[97] Similarly, we can compute the right-leaning tendencies of a cabinet as well as the percentage of cabinet seats occupied by independents or centrists. Neither left-wing nor right-wing ideology measured in this way correlates with the levels of judicial activism of appointed judges.[98] Table two shows that this result does not change when both measures are introduced in a multiple regression analysis.

The disadvantage of measuring government ideology based on party families is that it lumps together very distinct parties into single categories. A much better alternative is to use party manifestoes or expert surveys as a data source. The disadvantage of this approach is its limited cross-sectional and/or temporal coverage. I am currently in the process of piecing together various datasets. Preliminary analyses with limited coverage reveal no evidence for a partisan influence on judicial activism.

A future test will also use partisan support for European integration as a plausible explanatory variable. Unfortunately, this measure is subject to even more stringent limitations than left-right ideology.

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[95] The standard deviation is .91 so the effect size is .90 standard deviations.

[96] The time counter starts at 1 in 1958, the year of the first elected judge in the sample. The results hold regardless of whether the counter is introduced directly or transformed into natural log scale. The untransformed counter has the largest effect on activism, and these results are shown in table 2.

[97] Armingeon et al. 2004. The data for Eastern European countries is computed from Armingeon and Carreja 2004.

[98] The bivariate correlations are -.03 and .16 for left and right ideology respectively.

DOMESTIC LEGAL SYSTEMS

Are international judges from civil law countries, where judges have traditionally played a subordinate role, less likely to be activist than judges from common law countries? Figure 5 shows that there is no evidence for this proposition.[99] On average, judges from French civil law systems are even slightly more activist than judges from common law countries. Judges from German civil law countries, on the other hand, are more likely to be more on the self-restraint side. There are, however, only eight judges from this legal tradition in the dataset. In all, legal origins explain a barely statistically significant portion of the variance in the positions of judges.[100] However, the direction of the effect is not as expected.

To give further scrutiny to the potential impact of domestic legal systems, we consider composite measures of the degree of judicial independence and constitutional review in countries.[101] Both variables are normalized from zero to one where higher values equal a higher degree of judicial independence and constitutional review respectively. Both variables are measured as of 1995.

The lower panel of figure 5 shows the relationship between judicial independence and activism-restraint. Contrary to the expectation of the role model, international judges from countries in which judges are more independent tend to be least activist. The box-plot for constitutional review, on the next page, shows an interesting, if unexpected, pattern. Countries that are in the middle of the constitutional review scale are most likely to appoint activist judges. This is not a function of the small number of judges coming from the middle group of countries; 36 of the 52 judges on which we have data come from countries with scores between .50 and .83.

These analyses do not provide any evidence for the thesis that judges transport their supposed domestic roles into the international arena. If domestic legal systems matter at all, it is because judges from countries in which judges are not very independent and that engage in moderate levels of constitutional review use the international court as an opportunity to increase judicial power. This effect, however, is very weak.

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[99] The data on legal origins are from La Porta et al (1998).

[100] F-test of an ANOVA analysis states that we can reject the null-hypothesis of no effect at p=.057. Eta-squared is .103 (.i.e about 10% of the variation in activism is explained by legal origins).

[101] La Porta et al (2004): "Judicial independence is computed as the sum of three variables. The first measures the tenure of Supreme Court judges (highest court in any country) and takes a value of 2 - if tenure is lifelong, 1 - if tenure is more than six years but not lifelong, and 0 - if tenure is less than six years. The second measures the tenure of the highest ranked judges ruling on administrative cases and takes a value of 2 - if tenure is lifelong, 1 - if tenure is more than six years but not lifelong, 0 – if tenure is less than six years. The third measures the existence of case law and takes a value of 1 if judicial decisions in a given country are a source of law and 0 otherwise. This variable is measured as of 1995. Source: La Porta et al. (2004). Constitutional review is computed as the sum of two variables. The first variable measures the extent to which judges (either Supreme Court or constitutional court) have the power to review the constitutionality of laws in a given country. The variable takes three values: 2- if there is full review of constitutionality of laws, 1 - if there is limited review of constitutionality of laws, 0 - if there is no review of constitutionality of laws. The second variable measures (on a scale from 1 to 4) how hard it is to change the constitution in a given country. One point each is given if the approval of the majority of the legislature, the chief of state and a referendum is necessary in order to change the constitution. An additional point is given for each of the following: if a supermajority in the legislature (more than 66% of votes) is needed, if both houses of the legislature have to approve, if the legislature has to approve the amendment in two consecutive legislative terms or if the approval of a majority of state legislature is required."

National Bias and Strategic Voting

Table 3A presents the dissenting behavior of judges by the direction of the majority ruling and whether the respondent government represents the judge's home country. Nationality clearly matters. When a ruling favored of the respondent government, 95% of judges from the respondent's country voted with the majority. This held for 74% of other judges. When the ruling went against the respondent country, 58% of "home judges" dissented against only 18% of other judges. In all, judges voted in favor of their home governments on 74% of all issues that created dissent, whereas non-home country judges voted in favor of the respondent government only 45% of the time.

These results indicate that nationality clearly matters in the voting behavior of ECHR judges. It also confirms previous studies with limited samples in that national bias of ECHR judges is lower than the rate reported for the ICJ, where judges vote in favor of their home countries in 90% of all cases.[102] One potential explanation is that ECHR judgeships are full-time jobs that involve regular interactions with other international judges. Hence, it may be that peer pressure and distance from the home capital reduce national bias. If this were so, we would expect that ad hoc judges would exhibit more national bias than regular judges. Ad hoc judges are appointed directly by governments for individual cases on which the regular home country judge is unable to sit. As a result, they are not subject to the same socialization pressures. There is, however, no evidence for this proposition: regular and ad hoc judges have near-identical rates of favoring their home countries (73% and 74%).

In order to get a proper estimate of the impact of national bias, we need to take into account alternative explanations of judicial behavior. The first column of table 3B presents the results from a probit model with as dependent variable whether a judge votes in favor of the government. The model includes random effects for the individual issues. The independent variables are activism, the estimated ideal points for each individual judge, and a dummy for whether the vote is on the judge's home country. The results show that for a judge with a mean level of activism, the probability of a vote in favor of the respondent government increase by .42 if that government is the judge's home government. This is a very sizeable effect.

DO REAPPOINTMENT FEARS FUEL NATIONAL BIAS?

To what extent do judges favor their home countries because they fear post-hoc removal if they act otherwise? Anecdotal evidence suggests that it is at least plausible that the possibility of post-hoc removal had some deterrent effect on judicial behavior. When half the judges of the post-1998 Court were up for re-election in 2001, fifteen of the eighteen sitting judges were re-elected.[103] While this appears to speak for the independence of the judges, two of the three retirements were involuntary. The Austrian judge Führman, a former Social-Democratic parliamentarian, was replaced after his party lost domestic elections. Likewise, the Moldovan judge Pantiru was ousted by the newly elected Communist government, which vowed to "send real patriots" to Moldova's diplomatic missions.[104] Similarly, in 1998 Bulgaria did not put the

[102] On the ICJ, see Posner and De Figuerido 2005. On the ECHR, see Bruinsma and DeBlois 1997, Jackson 1997 and Schermers 1998. Note that the numbers may not be exactly comparable across studies given that

[103] Half of the judges in the post-1998 Court had an initial 3-year term (assigned through a lottery) in order to stagger judicial replacement.

[104] "Communists Announce Possible Recall of ECRH Judge Tudor Pantiru" *Moldova Azi*, April 6, 2001. Judge Pantiru did not dissent from a finding of a violation in *Metropolitan Church of Bessarabia and Others v. Moldova*, one of only two judgments on Moldova during his judgeship.

sitting judge Gotchev on its nominee list, allegedly because of his refusal to dissent in *Lukanov v. Bulgaria*,[105] and in 2004, the Slovakian judge Stráznická was not selected for reelection despite her desire to remain in her post. Although these cases are exceptions, they may well encourage prudent behavior among judges.

The thesis that reappointment concerns fuel national bias can be tested more systematically. If judges tend to vote for their home governments because they fear that doing otherwise would threaten reappointment chances, then we would expect that judges nearing compulsory retirement are less likely to show national bias than other judges. After all, reappointment prospects should not factor into their decisions. The model in column two of table 3B shows considerable evidence for that proposition. The estimated increase in the probability of favoring the respondent if it is the judge's home government is .40 for a moderately activist judge who can be reelected and only .17 for a moderately activist judge who cannot be reelected.[106] Thus, reappointment fears have a sizeable impact on the tendency of judges to favor their home governments. This may explain why governments tend to appoint judges that are reasonably young: the average age of judges at the time of appointment is 52.

DOES NATIONAL BIAS AFFECT ECHR DECISIONS?

The preceding section provides evidence that national bias affects judicial behavior. To what extent does this bias affect the actual decisions that the ECHR makes? After all, there is only one judge from the home country on each panel. Thus, national bias can matter only in cases where the national judge is pivotal.

There were 34 votes on which a country escaped a violation by 1 vote. On 31 of these issues, the national judge voted for the home country. We can use the MCMC simulation to assess how likely it is that each of these national judges would have voted in favor of the respondent government had they voted sincerely. That is, we can use our estimates about the judge's general preferences and about the issue parameters to make "out-of-sample" predictions.[107]

Three of the judges involved were ad-hoc appointees, so we cannot use their general voting behavior to make predictions. Of the 28 remaining judges, 17 are predicted to vote in favor of the government (and thus against the violation) regardless of whether the respondent government was their home government.[108] These are mostly judges that were on the self-restraint side of the spectrum.[109] There were five judges who voted for their home governments, even though this was a very low probability event (less than 10%) based on their ideological convictions.[110] Based on this analysis, our best estimate is that there have been 11 cases where a respondent government escaped a violation thanks to a strategic vote by a national judge (not

[105] March 20, 1997, Flauss 1998, 440.

[106] .40-.23=.17. Defining reelection prospects is tricky. In the model presented in table 3, all judges that were 59 at the time of their last election were categorized as having no reelection prospects, given that they would not be able to serve a full term (except for those judges elected for a 3-year term in 1998). Raising the threshold age increases the size of the effect. Including the age of the judge at the time of a vote as a covariate does not affect the results. Note that there are many missing values on the birth dates of judges.

[107] Remember, vote choices on the judge's home country are not included in the ideal-point estimation.

[108] That is, the median of the posterior predicted vote choice was 1 for 17 judges. If calculating an expected value based on the means of the posteriors, the prediction is that 16,5 judges would have favored the government.

[109] Judge Matscher was involved on 3 of the votes, Judge Freeland (UK) on 5 of them.

[110] These five were judges Carrillo-Salcedo, Pettiti, Russo, Tulkens, Palm.

counting the 3 cases where ad hoc judges toed the line). Thus, it appears that national bias had only a modest, but not nonexistent, impact on ECHR decisions.

Conclusion

This study, albeit preliminary, suggests several important implications for our understanding of the ECHR and the politics of international judicial appointments more generally. First, "activism"-"self-restraint" is the most prominent cleavage between justices. That is, judges vary in the extent to which they show deference to governments when assessing whether a violation has occurred. That this dimension rather than a more value-based cleavage emerges as the most prominent dimension is telling, and points to an interesting difference with the U.S. Supreme Court. It means, among others, that conflict over the proper reach of the institution is at the heart of divisions between judges.

Second, the composition of the ECHR has grown more activist over time as governments have tended to replace more restraint judges with more activist judges. The evidence suggests that this process is driven by EU integration. As countries become more integrated into the EU system, they tend to appoint more activist judges. Moreover, countries for which EU membership is expected within ten years appoint more activist judges than other non-members. Neither of these findings disappears when controlling for the most obvious alternative accounts. If this finding survives further scrutiny, it suggests rather strongly that the EU has been the driving force behind the increased activism of the ECHR, even if there is no formal relationship between the EU and the ECHR. This spillover effect of the EU into the role of supranational institutions elsewhere in Europe warrants further attention. Moreover, if certain countries indeed deliberately appoint activist judges to international courts, then the increased activism of European courts may be "by design" to a greater extent than is maintained in the view that the expansion of these courts went against the wishes of their principals.

Third, national bias plays a sizeable role in judicial decision-making. Judges tend to be much more lenient towards their home countries than towards other states. Moreover, this leniency has at times been decisive in preventing rulings of violations. On the other hand, national bias plays this role in only a small fraction of cases. Thus, we should be careful not to dismiss ECHR decisions as biased across the board.

Fourth, international judges are not immune to the prospect of losing their jobs. Judges who are nearing the compulsory retirement age are much less likely to exhibit national bias than are judges who may potentially be reappointed. Given the size of this effect, we would expect a notable reduction in national bias following institutional reforms, such as longer non-renewable tenure for judges.

Fifth, variations in domestic legal systems appear inconsequential in explaining variation in judicial behavior. This finding is important given the rather wide variety in legal systems represented on the ECHR: it suggests that variation in domestic conceptions about the role of law and judges vis-à-vis the political system does not necessarily transfer to the international level in a predictable way.

The analysis also leaves many questions unanswered. It seems likely that the ideological space is multi-dimensional. Whether this is so and what the nature of the other dimension(s) is left as a future exercise. The analysis has not been concerned with testing specific hypotheses about variations in judicial behavior based on broad characteristics of respondent countries or substantive aspects of the issues. Moreover, some caution is warranted in interpreting the findings on partisanship, as these are based on incomplete data. Finally, before generalizing these

results to other international courts, we should take into account that the availability of public dissents probably affects judicial behavior: ECJ judges are likely to be less responsive to carrots and sticks than are ECHR judges given that their behavior is less easily monitored. This immediately suggests a follow-up question regarding institutional design: why do some courts allow public dissents while others do not?

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Table 1: Overview of theoretical predictions

Theory	**Prediction**
Realist politics	Governments that are most vulnerable (due to poor civil liberties and/or legal systems) are least inclined to appoint activist judges.
Commitment mechanism for young democracies	Young democracies are more likely to appoint activist judges than old democracies or authoritarian states.
Signaling commitment to EU	Aspirant EU members and long-time EU members are most likely to appoint activist judges
Partisan politics	Left-wing governments are most likely to appoint activist judges
Domestic legal systems	Countries with traditions of judicial independence and constitutional review are most likely to appoint activist judges

Table 2: Results from selective multiple regression analyses.

Model:	*Civil Liberties*	*Democracy*	*Partisanship*	*EU1*	*EU2*	*EU3*
Constant	-1.485*	-.114	-.270	.357**	.816**	1.15***
	(.805)	(.309)	(.280)	(.149)	(.311)	(.428)
Civil Liberties	.108	-	-	-	-	-.075
	(.112)					(.097)
Rule of Law	.213	-	-	-	-	-
	(.132)					
Democracy	-	.182	-	-	-	-
		(.420)				
Log years democracy	-	-.225	-	-	-	-
		(.294)				
Log years democracy^2	-	.067	-	-	-	-
		(.059)				
Left Ideology	-	-	.002			
			(.004)			
Right Ideology	-	-	.006			
			(.004)			
EU Member	-	-	-	.776*	.537	.872
				(.450)	.467	(.549)
Aspirant Member	-	-	-	-.820***	-.804***	-.766***
				(.243)	(.240)	(.262)
log years in EU	-	-	-	-.442***	-.354**	-.468***
				(.149)	(.157)	(.175)
Years since formation ECHR	-	-	-	-	-.015*	-.023**
					(.009)	(.011)
N	54	71	56	82	82	74
R^2_{adj}	.011	-.011	-.003	.176	.195	.214
S.E. Estimate	.780	.875	.885	.814	.805	.798

*** p < .01, ** p < .05 * p<.1. All tests are two-tailed.

Table 3A: Dissenting behavior of all judges by whether the issue concerns the judge's home country and whether the majority ruled in favor of the government.

	Majority against Government		*Majority for Government*	
	Home Country	Not Home Country	Home Country	Not Home Country
Dissent	235 (58%)	803 (18%)	17 (5%)	851 (26%)
Majority	168 (42%)	3690 (82%)	295 (95%)	2439 (74%)
Total	403 (100%)	4493 (100%)	312 (100%)	3290 (100%)

Table 3B: Results from Random Effects Probit Model (standard error in parentheses)

Marginal effects independent variables		
Constant	.423	.347
Activism	.161 (.008)	.156 (.013)
Home Country	.423 (.019)	.397 (.049)
Not reelectable	-	.054 (.024)
Not reelectable and home country	-	-.230 (.053)
Variance explained by random component	.461 (.017)	.570 (.027)
Log-Likelihood	-4428.72	-2031.65
Number of Observations	8254	3876

.

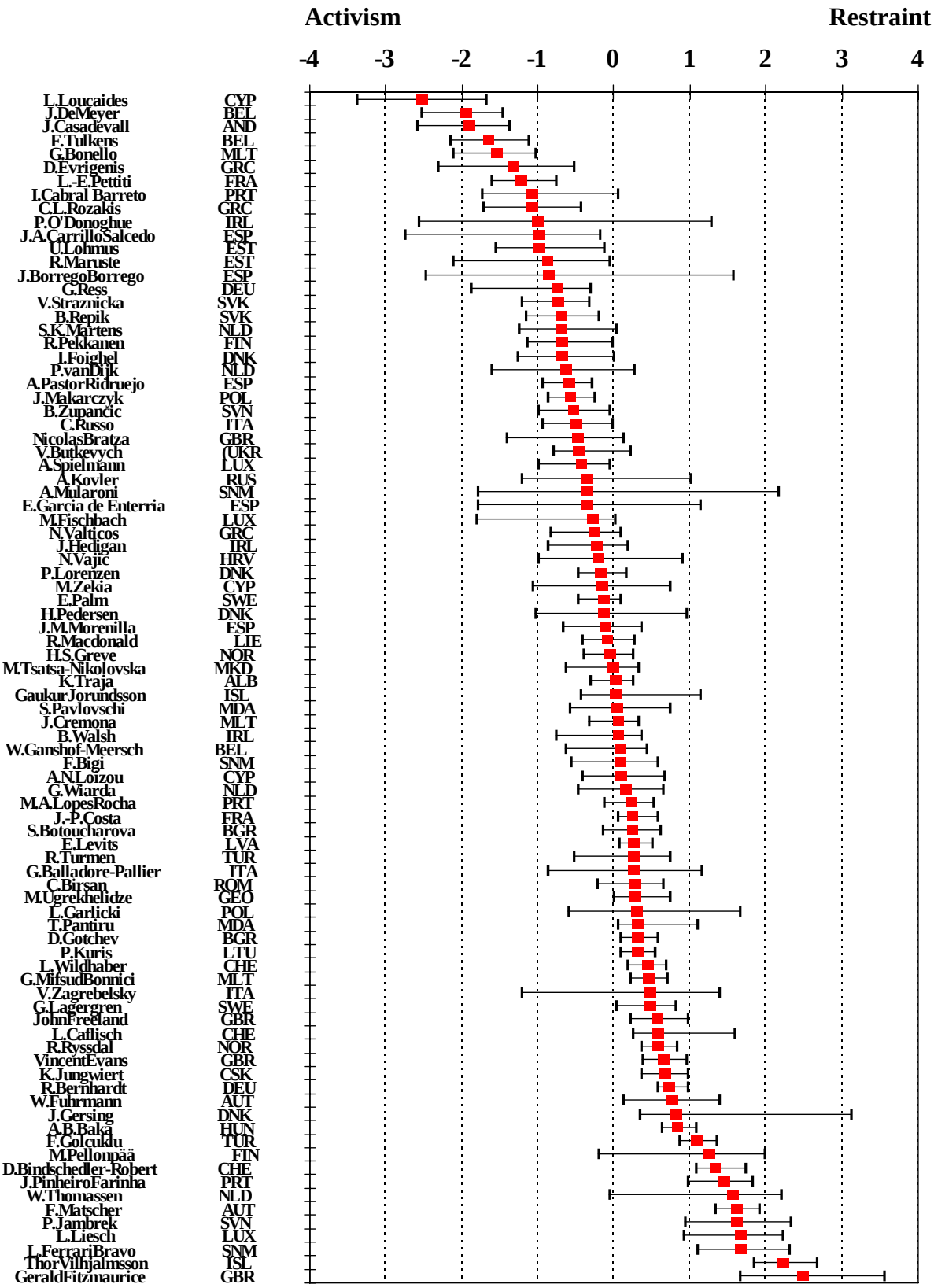

Activism
Restraint
-4
-3
-2
-1
0
1
2
3
4
L.Loucaides CYP
J.DeMeyer BEL
J.Casadevall AND
F.Tulkens BEL
G.Bonello MLT
D.Evrigenis GRC
L.-E.Pettiti FRA
I.Cabral Barreto PRT
C.L.Rozakis GRC
P.O'Donoghue IRL
J.A.CarrilloSalcedo ESP
U.Lohmus EST
R.Maruste EST
J.BorregoBorrego ESP
G.Ress DEU
V.Straznicka SVK
B.Repik SVK
S.K.Martens NLD
R.Pekkanen FIN
I.Foighel DNK
P.vanDijk NLD
A.PastorRidruejo ESP
J.Makarczyk POL
B.Zupancic SVN
C.Russo ITA
NicolasBratza GBR
V.Butkevych (UKR
A.Spielmann LUX
A.Kovler RUS
A.Mularoni SNM
E.Garcia de Enterria ESP
M.Fischbach LUX
N.Valticos GRC
J.Hedigan IRL
N.Vajic HRV
P.Lorenzen DNK
M.Zekia CYP
E.Palm SWE
H.Pedersen DNK
J.M.Morenilla ESP
R.Macdonald LIE
H.S.Greve NOR
M.Tsatsa-Nikolovska MKD
K.Traja ALB
GaukurJorundsson ISL
S.Pavlovschi MDA
J.Cremona MLT
B.Walsh IRL
W.Ganshof-Meersch BEL
F.Bigi SNM
A.N.Loizou CYP
G.Wiarda NLD
M.A.LopesRocha PRT
J.-P.Costa FRA
S.Botoucharova BGR
E.Levits LVA
R.Turmen TUR
G.Balladore-Pallier ITA
C.Birsan ROM
M.Ugrekhelidze GEO
L.Garlicki POL
T.Pantiru MDA
D.Gotchev BGR
P.Kuris LTU
L.Wildhaber CHE
G.MifsudBonnici MLT
V.Zagrebelsky ITA
G.Lagergren SWE
JohnFreeland GBR
L.Caflisch CHE
R.Ryssdal NOR
VincentEvans GBR
K.Jungwiert CSK
R.Bernhardt DEU
W.Fuhrmann AUT
J.Gersing DNK
A.B.Baka HUN
F.Golcuklu TUR
M.Pellonpää FIN
D.Bindschedler-Robert CHE
J.PinheiroFarinha PRT
W.Thomassen NLD
F.Matscher AUT
P.Jambrek SVN
L.Liesch LUX
L.FerrariBravo SNM
ThorVilhjalmsson ISL
GeraldFitzmaurice GBR

Figure 3: Activism Median ECHR Judge

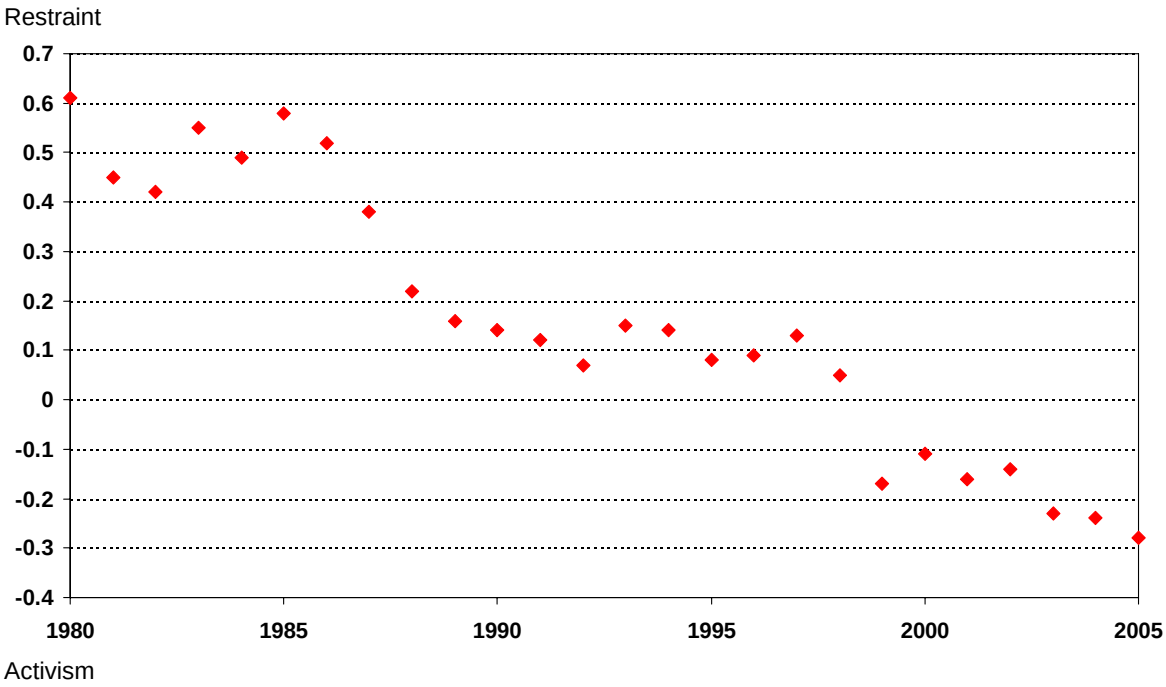
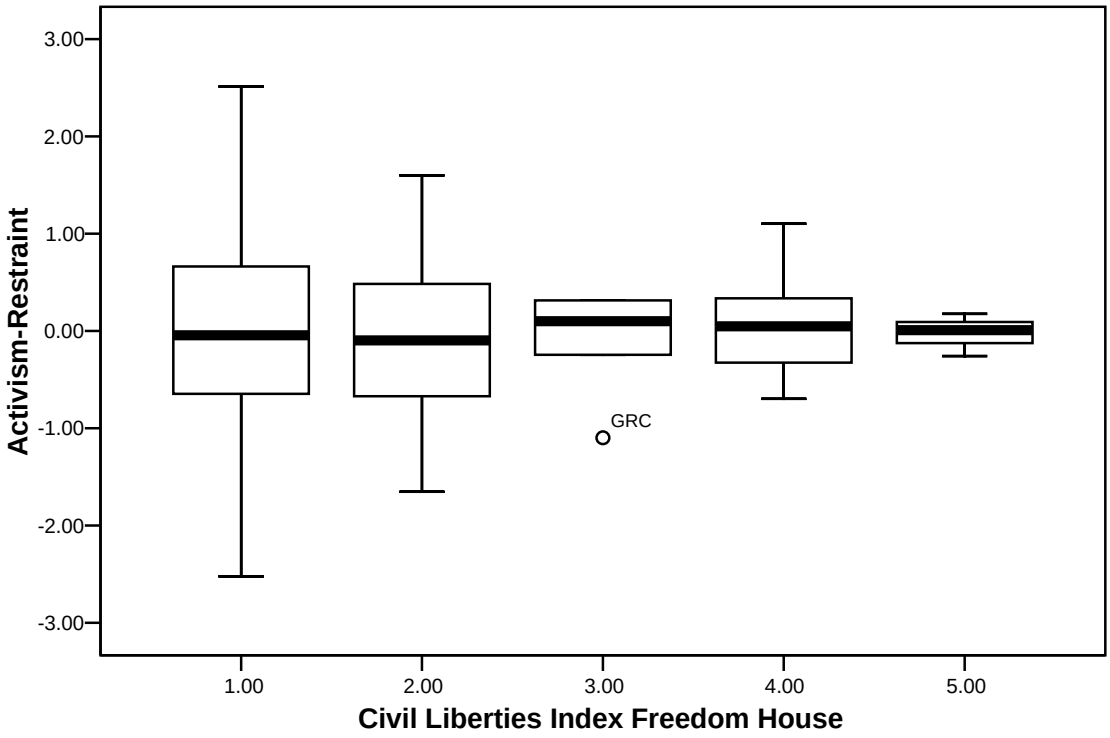


Figure 4: Civil Liberties and Performance of Legal Systems and levels of Activism-Restraint in the ECHR.



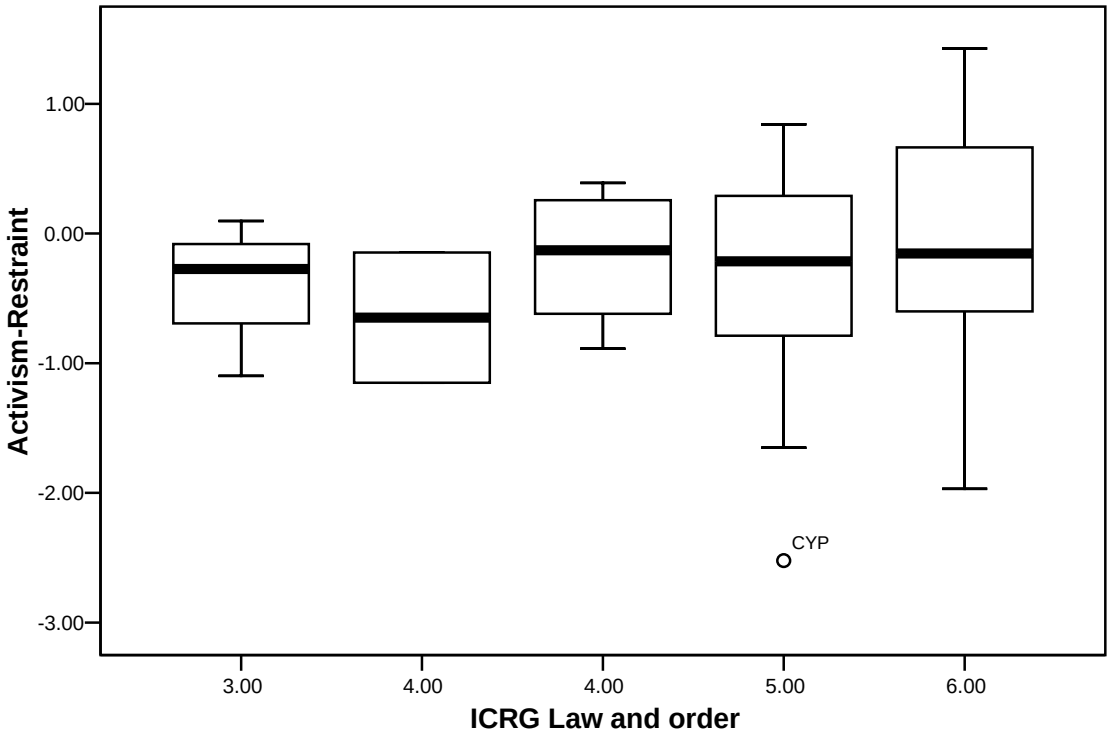


Figure 5: Duration Democracy, EU Membership and Judicial Activism

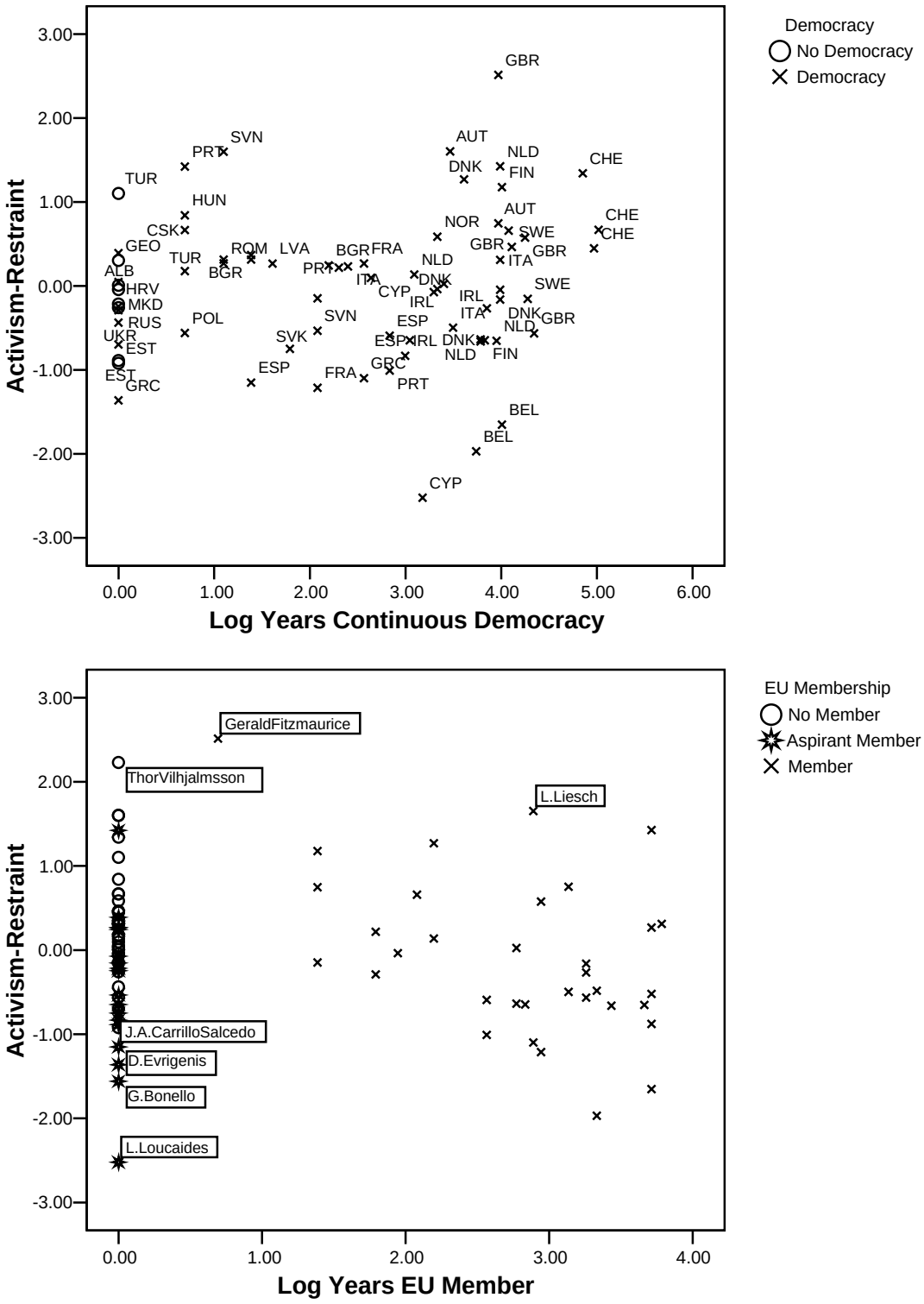


Figure 6: Domestic Legal Systems and Activism of International Judges