POLITICAL INFLUENCE AND CAREER JUDGES: AN EMPIRICAL ANALYSIS OF ADMINISTRATIVE REVIEW BY THE SPANISH SUPREME COURT[•]

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Abstract

This paper develops an empirical analysis of judicial behavior in the Spanish Supreme Court, a court of law dominated by career judiciary. We focus on administrative review. The evidence seems to confirm that a career judiciary is not strongly politically aligned and favors consensus, formalism and dissent avoidance. Notwithstanding, we detect a significant relationship between the decisions of the Court and the interest of the government. We suggest that our empirical analysis makes a significant contribution to undermine the myth of political insulation by career judges. Unlike previous literature, however, we argue and show that judicial politicization can be consistent with consensus and dissent avoidance.

Keywords: career judges, judicial behavior, empirical legal studies, Spanish Supreme Court, justice rapporteur, ideology.

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1. *Introduction*

Judicial behavior in any court can be explained by individual preferences, intra-court interaction and the influence of other relevant actors, including the political branches of government and the general public. Judicial preferences reflect personal attributes and attitudes in respect to each individual case, case law more generally and legal policy implications.[1] Intra-court interaction captures the collegiality of judicial decision-making. Judges have to weigh their individual preferences (their disposition towards a particular outcome) and their influence on the decisions of the court (their ability to shape the outcome in terms of public policy).[2] At the same time, judges also take into account the interests of external audiences.[3] They might be worried about exhibiting loyalty to the appointer (given the prospect of a future career under political patronage). The possible reactions of the executive and legislative branches are likely to be anticipated by the judiciary and influence their decisions. The positive or negative perception by the general public might also be of significance to individual judges and collectively as a court or more broadly as a group.

Different theories have been developed mainly in the context of the United States to explain judicial decision-making. In this respect, there is an important ongoing debate over whether judges are guided by the law or by personal ideology. Formalists take the stance that judges simply interpret and apply the constitution and the law in a conformist view of precedents. Judges are largely guided by what the law says and abide by a strict legal authoritative interpretation. Under a completely different perspective, the attitudinal model sees judicial preferences, with special emphasis on ideology, as the main explanatory model. Finally, agency theorists recognize the importance of judicial preferences but argue that they are implemented taking into account political and institutional realities.[4]

[1] For judicial preferences, see Posner (1993 & 2005).
[2] See Cameron and Kornhauser (2010).
[3] See generally Garoupa and Ginsburg (2010).
[4] For discussion, see among others, Brenner and Spaeth (1988), Segal and Cover (1989), Gely and Spiller (1990), Epstein and Knight (1998), Segal and Spaeth (2002), and Hansford and Springgs (2006).

The distinction between policy preferences and dispositional preferences is significantly important to understand judicial behavior.[5] Policy preferences are associated with the court's opinion while dispositional preferences reflect an ideal position associated with the judge's opinion. Collegial judges have to trade policy losses (whether or not an individual judge supports the court's opinion) against dispositional losses (whether or not an individual judge delivers an opinion consistent with the most preferred solution). Policy losses are determined by the interaction between judges while dispositional losses are independently determined by each individual judge. While the attitudinal model focuses on dispositional losses, the literature on strategic judicial decision-making takes into account both aspects.[6]

These different theories of judicial behavior cannot be convincingly addressed without an adequate empirical assessment. Legal scholars and political scientists have focused much empirical attention on the U.S. Supreme Court.[7] Empirical debate about other higher courts is an emerging literature, with notable applications in Europe and North America,[8] in Asia[9] and in Latin America.[10]

This paper contributes to the empirical literature on judicial behavior by looking at administrative review in the context of the Spanish Supreme Court. The institutional setting has important unique features. Administrative review is largely performed by career judges.[11] The Spanish Supreme Court justices operate in a traditional civil law setup

[5] For example, see Daughety and Reinganum (2006). Cameron and Kornhauser show that the final outcome might not be the position of the median justice because it depends on the entire distribution of ideal points. The model also suggests the importance of opinion assignment. See also Kornhauser (1992) explaining that path-dependence in collegial courts results from the fact that no single judge controls lawmaking, and Kornhauser (2003) pointing out that, due to collective decision-making, case-by-case and issue-by-issue approaches can result in different outcomes. The development of legal doctrines is determined crucially by how collegial courts operate.

[6] See Spiller and Gely (2007), presenting an extensive survey of judicial behavior. The authors argue that for civil law jurisdictions, because of a strong and unified polity, courts are inherently more deferential because exercising independence will trigger political conflict and retaliation. Courts are more likely to go against the government when there is a divided polity.

[7] See Brenner and Spaeth (1988), Segal and Cover (1989), George and Epstein (1992), Epstein and Knight (1998), Epstein et. al. (2001), Segal and Spaeth (2002), Goff (2006), Hansford and Springgs (2006), Lax and Cameron (2007).

[8] On Canada, see Tate and Sittiwong (1989), Alarie and Green (2008), Green and Alarie (2009). On Germany, see Schneider (2005) and Vanberg (2005). On Italy, see Breton and Fraschini (2003), Fiorino et. al. (2007), Padovano (2009) and Dalla Pellegrina and Garoupa (2011). On Portugal, see Amaral Garcia et. al. (2009). On France, see Franck (2009 & 2010). On Spain, see Garoupa et. al. (2013).

[9] On Japan, see Ramseyer and Rasmusen (2003), and in particular on the Japanese Supreme Court, see Ramseyer and Rasmusen (2006). On Taiwan, see Ginsburg (2003) and Garoupa et. al. (2011).

[10] On Argentina, see Chávez (2004) and Helmke (2004) as well as Iaryczower et. al. (2002 & 2006). On Chile, see Hilbink (2007). More generally, see Kapiszewski and Taylor (2008).

[11] On the distinction between career and recognition judiciaries, see Garoupa and Ginsburg (2012b).

which disfavors division, dissent and public controversy within the bench. Judicial review by the Spanish Supreme Court is formally not based on constitutional grounds since that is the competence of the Spanish Constitutional Court. Unlike the Spanish Supreme Court, the Constitutional Court is essentially politically appointed, in the traditional mode of a Kelsenian constitutional court.

Following the standard account by legal scholars, administrative review by the Spanish Supreme Court should be fundamentally formalistic and immune to attitudinal preferences or strategic considerations. Civil law courts have been praised for their political insularity and their ability to avoid the politicization that is observable on American courts.[12] Civil law judges do not develop "ideologically distinct public personalities," as some legal scholars have expressed.[13] Moreover, there is no correlation between political ideologies and judicial philosophies.[14]

In a separate paper, we have provided evidence that Spanish constitutional judges are guided by ideology subject to some important institutional constraints.[15] On the one hand, the formalist approach taken by traditional constitutional law scholars, in Spain and in other places, was rejected by the empirical evidence. The personal ideology of the judges is correlated with the way they vote in the Spanish Constitutional Court. On the other hand, we recognized and provided evidence that there are certain institutional features creating (actually influential and not merely nominal) incentives for independence of the Spanish Constitutional Court from party politics (namely the lack of discretion in some particular contexts, the civil law tradition, and judicial reputation in front of the regular courts). For example, we showed that when ideological interests are not very strong or when there is little discretion left to the judges, unanimous voting prevailed.

A potential objection to the evidence on judicial behavior in the Spanish Constitutional Court is that it is not representative of civil law judges. Unlike career judges, the constitutional judges are, to a very large extent, political appointees. They operate outside of the ordinary court system; in fact, they might even be in conflict with the ordinary courts due to their different nature.[16] Their decisions, in particular in respect to abstract review, have immediate political consequences. The evidence we have found seems to show that

[12] See Ferejohn and Pasquino (2004).
[13] Id.
[14] Id.
[15] Garoupa et. al. (2013).
[16] See general discussion by Garoupa and Ginsburg (2012a).

constitutional courts in Europe are more politicized than legal scholars admit;[17] however, we cannot easily generalize such an observation to the more conventional career judiciary. In other words, the myth of political insulation within a career judiciary would not be undermined by the evidence of politicization of constitutional review.

This paper aims at filling this gap. We provide convincing evidence that judicial behavior in the Spanish Supreme Court is partially explained by political determinants, therefore arguing that the political insulation of the career judiciary has been significantly exaggerated by comparativists. The civil law tradition of unanimous decisions and dissent avoidance makes the detection of politicization more difficult. The dispositional preferences are hidden by policy goals that largely exclude dissent opinions. Not surprisingly, legal scholars point out that very high rates of unanimous decisions are evidence of political insulation. We take a different approach. The high rate of unanimous decisions, above 95%, simply shows that career judges dislike public dissent, not necessarily that they are apolitical in their judicial behavior.

The focus of our analysis is administrative review. Formally speaking, administrative review is not constitutional review but it has clear political implications. The defendant is the executive branch and the subject of review is not a single administrative action or decision based on the application of a general provision passed by a given government, but the general provision itself when it is contrary to the law or the 1978 Spanish Constitution.[18] In this sense, administrative review by the Spanish Supreme Court is significantly different than by U.S. courts. The former is fundamentally abstract in nature (focusing on legal rules of general applicability and less on individual facts) whereas the latter is essentially concrete in nature, a distinction also reflected in constitutional review. In fact, legal scholars have emphasized administrative review as quasi-constitutional in nature.[19] Therefore the political incentives should not be significantly different in administrative review than in constitutional review.

[17] See Vanberg (2005) and Robertson (2010).
[18] The Spanish Constitutional Court does not rule on the validity of rules that are not legislative in nature, that is, not passed by the national or a regional parliament, but rather passed by the relevant executive (national or regional) or agency. Control over the legality and constitutionality corresponds to ordinary administrative courts. This does not exclude the competence of the Spanish Constitutional Court to indirectly declare the illegality of infra-legal provisions by means of the individual complaints involving fundamental rights (*recurso de amparo*) or conflicts of powers (*conflicto de competencia*).
[19] See Ginsburg (2011).

Notwithstanding our results concerning political determinants of judicial behavior, the empirical evidence we provide also confirms that the behavior of career judges is particularly different from common law judges. We find no evidence to support the attitudinal hypothesis in the Spanish Supreme Court, that is, political preferences do not seem to explain judicial behavior. However, we detect an important effect when the defendant (the executive) changes from one political party to a different political party. The Court is less likely to be deferent to the defendant when the party that passed the law being reviewed is no longer in office. Our interpretation is that there is a strategic effect; the Court feels less compelled to rule for the defendant when the executive being challenged is no longer in office. Our main argument is that a traditional strictly formalist view cannot explain this effect in the sense that there is a "political connection" in the behavior of the Court and who is holding office.

To our knowledge, this is the first paper that, focusing exclusively on career judiciary, finds compelling evidence against the myth of political insulation in Europe.[20] Nevertheless, the patterns of political influence on a collegial court of the civil law tradition are different than that on American courts. Politics matter, judges strategize, but professional norms that restrict dissent and decry public division inside the court are also significant (even if they are merely informal as in the case of the Spanish Supreme Court). These two features shape a process of politicization that is quite different from the American experience.

The paper goes as follows. An overview of administrative review by the Spanish Supreme Court is presented in section 2. Our approach is introduced and discussed in section 3. Regression analysis is discussed in sections 4 and 5. Section 6 concludes the paper.

2. *The Institutional and Political Background of the Spanish Supreme Court*

Spain is a parliamentary monarchy with a system of political institutions originating in the 1978 Constitution. The government system of Spain is divided up into the three traditional branches (legislative, executive and judiciary), each with separate and independent powers and competences as defined by the 1978 Constitution.

[20] On Japan, see Ramseyer and Rasmusen (2003 & 2006). They showed that Japanese career judges were not politically insulated and that those who issued political rulings (or rather, rulings which were hostile to the Liberal-Democratic Party which ruled Japan for nearly four decades) paid for their "audacity" by having an undistinguished judicial career.

The Spanish judicial power (*Poder Judicial*) is organized in various sets of specialized and independent courts, not too different from the French, Italian and Portuguese ones. In general terms, civil courts deal with private law matters; criminal courts, with crimes and misdemeanors; administrative courts, with all kinds of legal disputes with public authorities at all levels of government and under public law; social courts, with labor law and social security claims; and military courts, with army discipline and crime. All of these court systems (*órdenes jurisdiccionales*) typically start at the bottom with a single-judge court[21] and then move up to an intermediate appeal level at one of the seventeen regional high courts (*Tribunal Superior de Justicia*) or one of the fifty provincial courts (*Audiencia Provincial*). For some specific legal matters, mainly in criminal law and administrative law, there is a national appellate court (*Audiencia Nacional)*. Finally, at the top, final restricted appeals are presented before the Supreme Court (*Tribunal Supremo*). Abstract and concrete constitutional review of legislation is assigned to a specialized court (*Tribunal Constitucional*).

The Supreme Court is established by the Spanish Constitution as the highest judicial body in all fields of law (apart from the Constitutional Court with exclusive powers to deliver binding constitutional interpretation)..[22] The Spanish Supreme Court is composed of its President, the five chambers' Presidents and multiple justices (*magistrados*). The number of justices is determined by law for each chamber and its sections.[23]

The Court is divided up in to five chambers (*Salas*) regulated by statute:[24]

(i) First, the civil chamber (*Sala de lo Civil*) is composed of its President, eleven judges and three substitute judges.

(ii) Second, the criminal chamber (*Sala de lo Penal*) is composed of its President, fifteen judges and seven other judges (emeritus and substitute judges).

(iii) Third, the administrative chamber (*Sala de lo Contencioso-Administrativo*) is composed of its President and thirty-five judges, who are organized in to seven sections with composition and functions determined and reviewed annually by

[21] They are essentially *Juzgados de Primera Instancia, Juzgados de lo Mercantil, Juzgados de lo Social, Juzgados de lo Contencioso-Administrativo, Juzgados de Violencia sobre la Mujer* or *Juzgados de Menores.* Some of these types of courts have special features, particularly in criminal and administrative cases.

[22] Title VI of the Spanish Constitution (Judicial Power) and, specifically, in Section 123: "1. The Supreme Court, with jurisdiction over the whole of Spain, is the highest judicial body in all branches of justice, except with regard to provisions concerning constitutional guarantees. 2. The President of the Supreme Court shall be appointed by the King, on the Judicial Council's proposal in the manner to be laid down by the law."

[23] Section 54 of the Organic Law No. 6/1985 (*LOPJ*).

[24] Section 55 of the Organic Law No. 6/1985 (*LOPJ*).

the governance committee of the Supreme Court (*Sala de Gobierno del Tribunal Supremo*).

(iv) Fourth, the social chamber (*Sala de lo Social*) is composed of its President and twelve judges.

(v) Fifth, the military chamber (*Sala de lo Militar*) is composed of its President and seven judges.

The Judicial Council (*Consejo General del Poder Judicial*) plays an essential role in the appointment of both Supreme Court President and justices.[25] The Council is composed of the President of the Supreme Court (who also acts as President of the Council) and twenty members (*vocales*). The members of the Council reflect the influence of judicial associations.[26] As judicial associations are formed according to political views and with informal and subtle, but undeniable, links with political parties, it can be said that there is a substantial degree of influence of political parties on the composition of the Council.[27]

The President of the Supreme Court is appointed by the King for a five-year renewable term (with a maximum of two terms), following a proposal by the Council adopted with a 3/5ths majority, among career judges or law professors with renowned competence for the position that possess at least fifteen years of professional experience.[28] The Presidents of each of the five chambers are nominated for a five-year term among the justices of the Supreme Court who possess at least three years of judicial experience at the Supreme Court. The remaining positions on the Court are nominated as follows: four out of the five justices are selected among career judges that possess at least ten years of experience at the appellate courts (*magistrado*), and at least fifteen years of experience as career judges. One out of the five positions is to be held by law professors possessing renowned competence for the position and more than fifteen years of professional experience.

[25] Under sections 107.1 and 107.5 of the Organic Law No. 6/1985 (*LOPJ*).

[26] The appointment process is as follows: Judicial associations or a number of judges that represent at least 2% of those judges currently serving will present a maximum of thirty-six candidates, six of which will be appointed by each House of the Parliament (Congress and Senate) with a 3/5ths majority. Each House will also choose four additional members among lawyers and law professors with renowned competence for the position and at least fifteen years of professional experience.

[27] The most relevant judicial associations are APM (conservative; *Asociación Profesional de la Magistratura*), FdV (moderate; *Asociación Francisco de Vitoria*), and JpD (progressive; *Jueces para la Democracia*). Other judicial associations exist in Spain such as FJI (*Foro Judicial Independiente*) or ANJ (*Asociación Nacional de Jueces*), but they are not actually represented in the Council.

[28] For the analysis of their specific functions, see section 160 of the Organic Law No. 6/1985 (*LOPJ*).

Our major area of interest in this paper is the Third (Administrative) Chamber of the Spanish Supreme Court. According to the relevant statute,[29] the Third Chamber of the Supreme Court decides the following appeals:

(i) Appeals against acts and provisions of the Council of Ministers (Cabinet at the level of national government), Cabinet committees and the Judicial Council.
(ii) Appeals against acts and provisions of the competent bodies of the Congress and the Senate, the Constitutional Court, the Auditing Court and the Ombudsman.
(iii) Other appeals established exceptionally by law.
(iv) Appeals from appellate courts (*recursos de casación*) and appeals for review (*recursos de revision*)[30] according to the terms established by law.

The evolution of Spanish administrative judicial review is summarized by Table One. In this context, administrative judicial review is currently regulated by the Administrative Jurisdiction Law of 1998.[31]

<Insert Table One here>

There are two different ways to challenge the validity of general administrative provisions. First, general provisions may be directly appealed before the competent administrative court after they have been finally approved in the administrative process (*recurso directo*). Second, general provisions may be indirectly appealed by challenging a single administrative act or decision that applies the relevant general provision, based on the fact that these provisions are contrary to the law (*recurso indirecto*). In this case, when the lower court that has granted the indirect appeal (that is, when the lower court deciding the individual case has provided a remedy against the single administrative act or decision based on the unlawfulness of the underlying general administrative provision) a legal duty arises for that lower court to lodge a question of illegality (*cuestión de ilegalidad*) before the competent court to solve the direct appeal (unless it is also the competent court to solve it) in order to clarify whether the general provision is contrary to the law and should be declared unlawful in a general way.

[29] Section 58 of the Organic Law No. 6/1985 (*LOPJ*).
[30] These are extraordinary appeals against a final (that is, not subject to appeal in principle) decision of a lower court, when fraud or other serious procedural misconduct ocurred in the proceedings.
[31] Law No. 29/1998, of 13th July, on the regulation of the administrative jurisdiction (*Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa*).

Our paper analyses direct challenges (*recursos directos)* and questions of illegality referrals by lower courts (*cuestiones de ilegalidad*) decided by the Spanish Supreme Court in the period 2000-2008. The plaintiff of a direct challenge is a private party (individual, firm, NGO, union, non-profit entity, etc.) whose interests are affected, even indirectly, by a particular governmental regulation. The petitioner in case of a question of illegality referral is always a lower court that issued a positive (pro-plaintiff) ruling concerning a single administrative act or decision by a public body and therefore asks the Spanish Supreme Court to determine in a general way if an administrative provision is against the law.

3. Hypotheses Concerning Judicial Behavior at the Spanish Supreme Court

In the standard attitudinal model, we expect behavior in the form of ideological voting essentially due to four conditions: life tenure, no judicial superiors, docket control and no career ambitions.[32] Three of these conditions are satisfied in the Spanish Supreme Court (no judicial superiors, life tenure subject to mandatory retirement[33] and no direct career ambitions). Furthermore, the justices appointed to the Supreme Court have some political connection as filtered by the Judicial Council. This political affiliation is less obvious than in the Spanish Constitutional Court since the justices are overwhelmingly career judges with no previous record of political activity or involvement (career judges while in active duty are forbidden to become members of political parties or labor unions). However, even if there is no direct political party influence in appointments to the Spanish Supreme Court, the views of the main political parties are reflected in the composition of the Judicial Council, as was explained above.[34]

The defendant in each case of administrative review is the executive branch. As a consequence, it is reasonably clear where the party interests lie on each particular direct challenge or referral from a lower court. Ideological voting in the Spanish Supreme Court could be easily motivated by the policy implications of administrative review. Party alignment would be easily traceable given the association of individual justices to largely politicized judicial associations and the policy implications of the decisions by the Court.

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[32] See Segal and Spaeth (2002).

[33] The rule of mandatory retirement at seventy allows for some minor exceptions since there is the possibility of extending the term as an emeritus justice.

[34] Judges are appointed to the Spanish Constitutional Court through a mechanism that largely and directly relies on the political influence of the two main national parties (conservatives and socialists).

There are, however, significant limitations as to how much ideological goals can be advanced by individual justices in Spain. Justices have a degree of dissent aversion which can be justified for different reasons, including the additional work that dissenting requires, the difficulties of collegial relationships or their detrimental effects on the workplace.[35] One immediate restriction is the nature of the case; the extent to which there is no discretion according to the law. The second constraint is the civil law background that traditionally favors consensus and dislikes dissent within the bench embodied by professional norms that strongly constrain judicial behavior.[36] There is inevitably some pressure for consensus emerging from the ways of judicial demeanor in the civil law tradition as dissent hinders perceived court legitimacy and the alleged objectivity and neutrality of the law.

According to statute law, each case is assigned to a justice rapporteur.[37] The allocation process is established on a yearly basis following objective criteria based on a list that includes all members of the chamber and sets a particular order. The justice rapporteur prepares the adequate file, reviews the reasons for appeal and the applicable legislation and case law, and proposes a decision. However, if the justice rapporteur finds her/himself in the minority, s/he has to leave the position to a different justice on the panel. The President of the chamber will appoint a new justice rapporteur from the original group participating in the decision.

The role of the justice rapporteur is critical for mutually reinforcing reasons. First, as we have already mentioned, there is the civil law tradition against dissent and publicly observable division within the bench. Second, the initial justice rapporteur bears the most significant costs of preparing the adequate file and engaging in legal research. Opposing the proposal of the justice rapporteur has costs in terms of working environment (besides breaching a professional norm of consensus). It is also inefficient since a second justice rapporteur has to be appointed and start the whole process from scratch in terms of preparing the case and writing a new draft of the decision.[38] Third, the justices are under extreme pressure due to congestion and a severe backlog. Table Two documents

[35] See Edelman, Klein and Lindquist (2011) and Epstein, Landes and Posner (2011). The existence and development of a judicial norm of consensus in U.S. courts has been discussed by Atkins and Green (1976), Songer (1982), Ginsburg (1990), Dorff and Brenner (1992), Cross and Tiller (1998) and Epstein, Segal and Spaeth (2001).
[36] See Merryman and Pérez-Pordomo (2007).
[37] Section 203 to 206 of the Organic Law No. 6/1985 (*LOPJ*).
[38] The Spanish Supreme Court does not benefit from generous clerkship support as does the U.S. Supreme Court.

congestion rates in the Supreme Court. It is clear that the administrative chamber is the one most severely affected by backlog in the period 2000-2008. Such backlog also raises issues concerning the management of the Court workload. A case that requires two rapporteurs instead of just one seems highly inefficient in terms of its disposition, hence increasing the individual cost of dissenting.

<Insert Table Two here>

It is likely that justices are highly deferential to the decision suggested by the rapporteur who is largely selected randomly in relation to each particular case. Such behavior is consistent with the civil law principle of dissent avoidance, collegial working environment and efficiency in terms of allocation of resources in a highly congested court.

There are important implications from these arrangements. First, an extremely high rate of unanimous decisions should prevail. Second, there is no endogeneity between the rapporteur and the political interests at stake in any particular decision since the assignment of rapporteurs largely follows the ordering imposed by statute. Third, even if justices are motivated by ideology, there should be no correlation between their party affiliation (as documented by the judicial association) and individual vote.

It could be that, if ideology prevails in judicial behavior, a correlation between party affiliation and the opinion of the judge rapporteur should exist. However, in a collegial working environment with a culture of dissent avoidance, it is also possible that the judge rapporteur makes an effort to take into account the views of the entire panel rather than merely relying on an informal principle of deference.

As we can see there are good institutional reasons to expect that an attitudinal model cannot explain behavior in the Spanish Supreme Court. It is likely that disposition preferences are subdued by internal policy goals consistent with professional norms, civil law tradition and the pressure imposed by a significant workload.

An alternative possibility is a strategic model. Justices decide in an environment dominated by consensus and dissent avoidance where they are used to sacrifice disposition preferences, but they also take into account the interests of the defendant. If a particular law has been passed by a government that is no longer in office, it is less likely that

affecting negatively the interests of the government creates a significant pressure on the Court. Therefore the decision (by consensus) is less likely to be favorable to the defendant.

Under such strategic model, we cannot easily detect alignment between the way individual justices behave and political variables since unanimous decisions prevail. However, we should observe less deference to the executive when the political party that supported a particular legislation is no longer in office. The direct and indirect political costs of deciding against the defendant are expected to be lower after a change in government. Directly, the new government is likely to care less about such regulations than the previous government. Indirectly, the new government is more likely to pass new regulations that are different from the challenged provisions.

4. Regression Analysis of the Administrative Chamber of the Spanish Supreme Court

This paper applies regression analysis to a unique dataset collected and coded by the authors. We look at both direct appeals and questions of illegality solved by the Administrative Chamber of the Supreme Court from 2000 to 2008. There are 507 decisions which can be divided into 183 decisions from 2000 to 2004 (conservative government) and 324 from 2004 to 2008 (socialist government).[39] At the same time, due to a time lag between an administrative act and the decision by the Court, 350 decisions refer to a conservative defendant and 157 decisions refer to a socialist defendant.[40] As the different political cycles are fairly represented in the sample, it is possible to conclude that our econometric results are not primarily driven by a certain particular political context.

Out of these 507 decisions, 484 (95.5%) are unanimous while twenty-three (4.5%) have at least one dissent. There is no observable pattern in relation to these twenty-three cases. They seem randomly distributed in the period 2000 to 2008. Some of these cases refer to matters directly related to the judiciary (regulations that affect the judicial power, decisions of the Judicial Council) or other legal professions (for example, changes that affect the notaries). The other cases do not reflect any particular subject.

[39] From 2000 to 2004, the conservatives enjoyed a comfortable absolute majority in Parliament. In 2004, the socialists regained power but without a strong majority. They had to rely on smaller parties from the left and regional parties (Catalan, Basque, Canarian, Galician). After the March 2008 election, PSOE remained comfortably in power, although slightly short of an absolute majority. The next general election is scheduled for November 2011.

[40] The socialists were in power from 1982 to 1996 while the conservatives took office in 1996; some of the early cases in our dataset reflect these previous political cycles. Also, many cases decided after 2004 refer to the period 2000 to 2004.

In this period, fifty-five judges sat at the Administrative Chamber. They were mostly male and career magistrates. Tables Three and Four summarize the characteristics of the justices. We have described each justice as "conservative" or "socialist." This partition of the fifty-five judges is based on the judicial association they are affiliated with, media reports at the time of their appointment as well as information provided by local experts. There are three justices for whom we could not obtain definite information or who were described by local experts as fairly neutral. They are labeled as "neutral." As we can see from Table Three, the composition of the Court is fairly balanced between "conservative" and "socialist" with a slightly advantage to "conservative" justices. We can also observe that few had political appointments before 2000 and after 2008 and that a small proportion of the Supreme Court justices – only seven – later became members of the Judicial Council. Most justices are career judges. Finally, the distribution of rapporteur justices in the dataset reflects the balance between "conservative" and "socialist." Table Four offers a more detailed list of the fifty-five justices in the period 2000-2008. It identifies the 2914 individual votes per justice.

<Insert Tables Three and Four here>

Out of the 507 decisions, there are 156 pro-defendant decisions (31%) and 351 decisions are pro-plaintiff (69%). The political side of the defendant (either conservative or socialist government) is easily identifiable. As a consequence, it is not difficult to relate the nature of the decision of the Court and the corresponding political composition. Table Five relates the political composition of the Court, the political side of the defendant and the Court decision. There seems to be no relation between the decision of the Court and the political majority. Socialist defendant wins often (80% of the cases) whereas conservative defendant loses often (91% of the cases).[41] These patterns seem largely independent of the political majority according to Table Five A. The majority being politically on the side of the defendant does not seem to provide any advantage to the latter, as we can easily conclude from Table Five B. In fact, the numbers seem to point in the opposite direction.

<Insert Tables Five A and Five B here>

[41] As we will see with the regression analysis, this apparent "bias" is largely explained by the fact that most cases that have a conservative defendant are actually decided after the conservatives are no longer in office.

We turn our attention to the rapporteur. Before we investigate the existence of a relationship between the political affiliation of the rapporteur and the political side of the defendant, we should check if the choice of rapporteur is largely exogenous to the political majority on the panel as suggested by the formal procedural rules of the Court. According to Table Six, unfortunately, we cannot rule out completely the possibility of endogenous behavior. We have no evidence concerning the rapporteur being the first or second choice, information that would conclusively respond to this possible concern. However, a high presence of second choice rapporteurs would seem inconsistent with unanimous decisions prevailing in 95% of the decisions.

<Insert Table Six here>

We further investigate the behavior of the rapporteur. Table Seven relates the political side of the defendant and of the justice rapporteur as well as the Court decision. When the defendant is conservative, there seems to be no difference in relation to the political majority. The results very much replicate the conclusions from Table Five. The pattern that socialist defendant wins often and conservative defendant loses often seem largely independent of the rapporteur's political side according to Table Seven A. The rapporteur being politically sympathetic to the defendant does not seem to provide any advantage to the latter, as we can easily conclude from Table Seven B. In fact, the numbers seem to point out that there is no relationship whatsoever.

<Insert Tables Seven A and Seven B here>

We turn to a regression analysis. The dependent variable considers the court decision. It takes the value one if the decision is pro-defendant and zero if the decision is pro-plaintiff. The explanatory political variables include:

(i) Percentage of Justices from the same political side as the defendant: it takes a value from zero to one. We have grouped Supreme Court judges by "socialist" and "conservative" according to their affiliation to a particular judicial association, previous career, media reports at the time of their appointment and the views of local experts according to Table Four.

(ii) Majority of Justices from the same political side as the defendant: it takes a value one if the majority of the voting college is from the same political side as the defendant and zero otherwise.

(iii) Rapporteur from the same political side as the defendant: it takes a value one if the rapporteur is from the same political side as the defendant and zero otherwise.

(iv) Plaintiff from the same side as the defendant: it takes a value one if the plaintiff is from the same political side as the defendant and zero otherwise.[42]

If disposition preferences prevail, we should expect the coefficients of the first three political variables to be positive. The coefficient for plaintiff and defendant from the same side should be negative since when both sides in litigation are from the same political background, the relative position of the defendant is undermined. For strict formalists, the expected coefficients of all four of these variables should be zero.

We add two important controls, lag and change in government. Lag measures (in years) the time from the date that the challenged law was approved to the date the Spanish Supreme Court decided the challenge.[43] We expect that a longer time lag increases the costs of invalidating an administrative regulation (because it is more established and more cases have been decided under it, so potential costs for the taxpayer in terms of compensation to those negatively affected by the regulation that has been struck down increase significantly) and therefore results in a decision favorable to the defendant. Change in government takes a value one if the party in government when the challenged law was approved is different from the party in government when the Spanish Supreme Court addresses the challenge, and zero otherwise.[44] A change in government could make the pro-defendant vote less likely since there is presumably less political pressure. For strict formalists, the expected coefficients of these two variables should be zero.

Finally, we consider two additional controls, unanimous vote and *recurso directo*. Unanimous vote has a value equal to one if the decision is unanimous and zero if there are dissenting opinions. Given the few number of non-unanimous decisions (twenty-three only), we do not expect this variable to play a major role. As to *recurso*, it takes a value one if the challenge is in the form of a *recurso directo* and zero otherwise (that is, a referral by a

[42] The plaintiffs are divided into three groups: those from the same side, those from the opposite side, and those characterized as politically neutral plaintiffs (which are the vast majority of the dataset). Neutral plaintiffs are usually companies, business associations or private individuals.
[43] The average lag is less than five years.
[44] There are 35% cases with change in government, mostly reflecting the 2004 transition.

lower court) . This variable is supposed to detect any possible differences concerning these two ways to access the Spanish Supreme Court.[45]

We also consider fixed effects per section of the Third Chamber.[46] Due to the non-independence of decisions with respect to the same regulations under review, we estimated the appropriate logit models, correcting for the non-independence, in particular, with clustering by regulations.[47] We have estimated these econometric models for all the 507 decisions, but also separately for those decisions without a change of government in between approving the regulation and deciding the challenge (330 observations). A total of five specifications are reported in Table Eight.

<Insert Table Eight here>

The results show that both percentage and majority of justices on the same side as defendant have a negative impact on a decision favorable to the defendant. The negative sign is statistically significant across all specifications. Rapporteur on the same side as defendant has a negative sign on specifications without fixed effects and a positive sign on specifications with fixed effects. It is never statistically significant. Plaintiff on the same side as defendant has the expected negative sign in all specifications except one, but it is never statistically significant. Unanimous decision and *recurso* have negative coefficients, occasionally statistically significant. Finally, lag has a positive sign statistically significant in four specifications whereas change in government has a negative sign statistically significant in all specifications.

The preliminary conclusion is that Table Eight is largely inconsistent with a strict formalist view (since all coefficients should be zero) as well as an explanation based on disposition preferences (clearly the political variables do not have a positive impact on a decision favorable to the defendant). The results seem more consistent with a strategic model.

5. Discussion of Results

[45] We have also run other regression specifications controlling for individual law professors (who presumably could have a different set of incentives and behavioral attributes from career judges). The coefficients associated with individual law professors are not statistically significant (some are positive, others are negative; hence there is no distinct pattern). The results from the specifications presented in Table Eight are robust.

[46] Although, we do not comment on them extensively because their statistical significance is known to be unstable in this type of econometric exercise.

[47] We have used STATA 11.

There are more than 95% unanimous decisions in the Administrative Chamber of the Spanish Supreme Court from 2000 to 2008 as represented by our dataset. Inevitably there is little to be expected from the empirical analysis of individual votes. Clearly disposition preferences are constrained by policy goals and the data provides strong evidence to support that. From the results of Tables Five and Seven we could be led to think that there is no degree of political bias on the Court, thus confirming the myth of political insularity of career judges in civil law systems. However, the results of Table Eight are inconsistent with such a view and seem to provide more support to a strategic model.

The results in Table Eight cannot be explained by a strict formalist view of administrative review. However, at the same time, they are largely inconsistent with a model of pure disposition preferences. The variable change in government is robust across specifications and shows that a vote favorable to the defendant is affected by whoever is holding office. This observation is inconsistent with both strict formalism and pure attitudinal.

Notice that this result cannot be simply explained by the passing of time or delay in administrative review. The variable lag clearly captures these effects and they have a positive, not negative, impact on a decision favorable to the defendant (which is not surprising since, as we have explained before, the costs of overturning administrative regulations plausibly increase with time).

The last column of Table Eight shows that if we focus on those decisions without a change of government, the results are largely the same (comparing third and fifth columns in Table Eight). Therefore it seems to be the case that a change in government does play a significant role. Overall, these are cases challenging pre-2004 legislation and being decided after 2004, with a new government in office. One could be tempted to conclude that legislation at the end of a political cycle could be more easily declared unlawful when the decision is taken at a later stage, well into a new political cycle. The last column of Table Eight seems to reject an alternative explanation based on judicial defection (justices switch political sides when a new government is appointed) since, even within the same political cycle, we do not see the political variables playing the expected role.[48]

6. Conclusions

[48] For a discussion of the defection model, see Helmke (2004).

We have provided an empirical analysis of judicial behavior in the Spanish Supreme Court. Unlike previous literature, this paper addresses a court of law dominated by career judiciary. The evidence and the regression analyses seem to confirm that a career judiciary appears more willing to abdicate disposition preferences in order to favor certain policy goals such as consensus, formalism and dissent avoidance. At the same time, we detect a strong strategic behavior in response to changes in government. We suggest that our empirical analysis undermines the myth of political insulation by career judges.

Our results are likely to be generalized to most relevant courts in civil law jurisdictions. The political implications of their decisions are unmistakable. However, consensus, formalism and dissent avoidance prevail in a civil law environment. Therefore, political insulation seems dominant at first glance. A more refined analysis shows strategic behavior which is inconsistent with the strict formalist account. At the same time, data does not confirm behavior consistent with full-fledged attitudinal model.

An important implication of our analysis is that the empirical observation that unanimous decisions are overwhelming in a particular court (in our sample, they are 95%) does not constitute evidence of strict formalism as suggested by legal scholars.

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Table One
Evolution of Spanish Administrative Law

1845	Following the French model, a separate administrative jurisdiction was introduced.
1868	Unification of all jurisdictions.
1870	Section 9.2 of the Spanish Constitution of 1869 and Section 7.1 of the Provisional Law regarding the Organization of the Judicial Power of 1870 (*Ley provisional de organización del Poder Judicial*) imposed on judges and courts of all jurisdictions the duty not to apply rules and regulations (*reglamentos*) that were contrary to the law.
1875	Administrative jurisdiction is reestablished.
1888	First Administrative Jurisdiction Law (*Ley de la Jurisdicción Contencioso-administrativa*).
1924	Local Statute (*Estatuto Municipal*) of Calvo Sotelo.
1931	Section 101 of the Spanish Republican Constitution established a general direct appeal against regulations, but it was never put in practice because of the lack of proper legal implementation.
1950	Sections 386 and 698 of the Law on Local Regime (*Ley de Régimen Local*) foresaw a direct appeal against local rules with executive force that could only be lodged by those who had a direct interest.
1956	Second Administrative Jurisdiction Law (*LJCA 1956*).
1998	Third Administrative Jurisdiction Law (*LJCA 1998*).

Table Two
Congestion Rates

	ADMINISTRATIVE CHAMBER	CIVIL CHAMBER	CRIMINAL CHAMBER	SOCIAL CHAMBER
2000	2.51	1.76	1.17	1.49
2001	2.36	1.67	1.17	1.48
2002	2.46	1.70	1.17	1.57
2003	3.02	3.85	1.98	2.15
2004	3.18	3.59	1.66	2.1
2005	2.80	3.12	1.38	2.35
2006	2.66	2.89	1.44	2.02
2007	2.29	2.07	1.44	1.84
2008	2.46	1.63	1.73	1.96

Note: Congestion rate is the ratio of the workload (new cases plus pending cases at January 1st) by the number of cases concluded by January 31st.
Source: Spanish Judicial Council statistics.

Table Three
Spanish Supreme Court Administrative Chamber, 2000-2008

	TOTAL	CONSERVATIVE	SOCIALIST	INDEPENDENT
Total Justices	55	29	23	3
Male	52	29	20	3
Female	3	0	3	0
Career Judges	43	24	18	1
Political Appointments (before or after term in the SSC)	7	2	4	1
Constitutional Court Judge (before or after term in the SSC)	2	1	1	0
Judicial Council member (before or after term in the SSC)	7	1	6	0
Number of Cases Rapporteur	507	296	205	6
President of Supreme Court	2	1	1	0
President of Administrative Chamber	3	1	2	0

Source: Own dataset.

Table Four
Spanish Supreme Court Administrative Chamber Justices, 2000-2008

Justices	Number of Decisions	Rapporteur	Political Affiliation	Year of Appointment
Aguallo Avilés, Ángel	2	0	Socialist	2008
Álvarez-Cienfuegos Suárez, José María	5	0	Socialist	2000
Baena del Alcázar, Mariano	71	10	Socialist	1997
Bandrés Sánchez Cruzat, José Manuel	76	28	Socialist	2003
Calvo Rojas, Eduardo	15	2	Socialist	2005
Campos Sánchez-Bordona, Manuel	148	43	Conservative	2003
Cancer Lalanne, Enrique	112	3	Conservative	1997
Cid Fontán, Fernando	44	0	Neutral	1998
Díaz Delgado, José	26	4	Conservative	2005
Díez-Picazo Giménez, Luis María	32	0	Socialist	2008
Enríquez Sancho, Ricardo	61	2	Conservative	1997
Escusol Barra, Eladio	16	0	Socialist	1997
Espín Templado, Eduardo	91	22	Socialist	2003
Fernández Montalvo, Rafael	63	12	Socialist	2003
Fernández Valverde, Rafael	17	5	Socialist	2003
Frías Ponce, Emilio	26	5	Conservative	2004
García-Ramos Iturralde, Juan	23	0	Neutral	1997
Garzón Herrero, Manuel Vicente	29	3	Conservative	1997
Goded Miranda, Manuel	81	18	Conservative	1997
González González, Oscar	149	18	Conservative	2002
González Navarro, Francisco	26	1	Conservative	1998
González Rivas, Juan José	121	34	Conservative	1997
Gota Losada, Alfonso	35	6	Neutral	1997
Hernando Santiago, Francisco José	8	0	Conservative	1997
Herrero Pina, Octavio Juan	57	37	Conservative	2005
Huelin Martínez de Velasco, Joaquín	18	0	Conservative	2008
Lecumberri Martí, Enrique	51	8	Conservative	1998
Ledesma Bartret, Fernando	139	4	Socialist	1997
Martí García, Antonio	95	15	Conservative	1997
Martín González, Fernando	80	7	Conservative	1997
Martín Timón, Manuel	13	2	Conservative	2006
Martínez Micó, Juan Gonzalo	32	10	Conservative	2003
Martínez-Vares García, Santiago	56	16	Conservative	2003
Mateo Díaz, José	40	12	Conservative	2001
Mateos García, Pedro Antonio	14	1	Conservative	1997
Maurandi Guillén, Nicolás	120	25	Socialist	1999
Menéndez Pérez, Segundo	83	14	Socialist	1997
Murillo de la Cueva, Pablo Lucas	121	26	Socialist	2001
Oro Pulido y López, Mariano de	18	0	Conservative	1998
Peces Morate, Jesús Ernesto	33	8	Socialist	1997
Pico Lorenzo, Celsa	62	14	Socialist	2004
Puente Prieto, Agustín	60	2	Conservative	2006
Pujalte Clariana, Emilio	34	7	Conservative	1997
Robles Fernández, Margarita	19	8	Socialist	2004
Rodríguez Arribas, Ramón	40	7	Conservative	1995
Rodríguez García, Ángel	1	0	Socialist	1985
Rouanet Moscardó, Jaime	71	8	Conservative	1997
Sala Sánchez, Pascual	42	4	Socialist	1997
Sieira Míguez, José Manuel	71	6	Socialist	1997
Soto Vázquez, Rodolfo	48	9	Conservative	1997
Teso Gamella, María del Pilar	1	1	Socialist	2008
Trillo Torres, Ramón	77	6	Conservative	1990
Trujillo Mamely, Francisco	83	18	Conservative	1999
Xiol Ríos, Juan Antonio	39	14	Socialist	1997
Yagüe Gil, Pedro José	18	2	Socialist	1998
Total	**2914**	**507**		

Source: Own dataset.

Table Five A
Decisions by the Spanish Supreme Court and Political Composition, 2000-2008

	DEFENDANT CONSERVATIVE	DEFENDANT CONSERVATIVE		DEFENDANT SOCIALIST	DEFENDANT SOCIALIST	
	DEFENDANT WINS	DEFENDANT LOSES		DEFENDANT WINS	DEFENDANT LOSES	
MAJORITY CONSERVATIVE	17 (7%)	237 (93%)	254	93 (84%)	18 (16%)	111
MAJORITY SOCIALIST	13 (14%)	83 (86%)	96	33 (72%)	13 (28%)	46
TOTAL	30	320	350	126	31	157

Source: Own dataset.

Table Five B
Decisions by the Spanish Supreme Court and Political Composition, 2000-2008

	DEFENDANT WINS	DEFENDANT LOOSES	
MAJORITY SAME SIDE	50 (17%)	250 (83%)	300
MAJORITY OPPOSITE SIDE	106 (51%)	101 (49%)	207
TOTAL	156	351	507

Source: Own dataset.

Table Six
Justice rapporteur and Court majority, 2000-2008

	MAJORITY CONSERVATIVE	MAJORITY SOCIALIST	
RAPPORTEUR CONSERVATIVE	244 (67%)	52 (37%)	296
RAPPORTEUR SOCIALIST	115 (31%)	90 (63%)	205
RAPPORTEUR NEUTRAL	6 (2%)	0 (0%)	6
TOTAL	365	142	507

Source: Own dataset.

Table Seven A
Decisions by the Spanish Supreme Court and the Rapporteur, 2000-2008

	DEFENDANT CONSERVATIVE	DEFENDANT CONSERVATIVE		DEFENDANT SOCIALIST	DEFENDANT SOCIALIST	
	DEFENDANT WINS	DEFENDANT LOSES		DEFENDANT WINS	DEFENDANT LOSES	
RAPPORTEUR CONSERVATIVE	14 (7%)	195 (93%)	209	72 (83%)	15 (17%)	87
RAPPORTEUR SOCIALIST	16 (12%)	119 (88%)	135	54 (77%)	16 (23%)	70
RAPPORTEUR NEUTRAL	0 (-)	6 (100%)	6	0 (-)	0 (-)	0
TOTAL	30	320	350	126	31	157

Source: Own dataset.

Table Seven B
Decisions by the Spanish Supreme Court and the Rapporteur, 2000-2008

	DEFENDANT WINS	DEFENDANT LOSES	
RAPPORTEUR SAME SIDE	68 (24%)	211 (76%)	279
RAPPORTEUR OPPOSITE SIDE	88 (40%)	134 (60%)	218
RAPPORTEUR NEUTRAL	0	6 (100%)	6
TOTAL	156	351	507

Source: Own dataset.

Table Eight
Regression Analysis (Logits) of the Decisions by the Spanish Supreme Court, 2000-2008
Dependent Variable: Decision favorable to the defendant

	All Defendants	All Defendants (With Fixed Effects)	All Defendants	All Defendants (With Fixed Effects)	Without Change of Government (With Fixed Effects)
Observations	507	507	507	507	330
Clusters	249	249	249	249	170
Psuedo R2	0.262	0.309	0.261	0.317	0.247
Log Pseudolikelihood	-251.30	-235.45	-251.55	-232.47	-171.33
Constant	**2.07*** **	2.08	**-3.14*** **	**3.33** **	**7.62*** **
	(0.72)	(1.33)	**(0.80)**	**(1.65)**	**(2.00)**
Unanimous Vote	**-1.11** **	-0.81	**-1.00** **	-0.67	-0.76
	(0.49)	(0.67)	**(0.50)**	(0.69)	(0.73)
% Same Side Justices			**-3.44*** **	**-3.89** **	**-5.92*** **
			(0.78)	**(1.60)**	**(1.54)**
Majority Justices Same Side	**-1.11*** **	**-1.04***			
	(0.24)	**(0.49)**			
Rapporteur Justice is Same Side	-0.06	0.06	-0.03	0.16	0.13
	(0.23)	(0.34)	(0.23)	(0.33)	(0.33)
Plaintiff is Same Side Defendant	-0.19	-0.26	-0.20	-0.27	0.05
	(0.35)	(0.52)	(0.35)	(0.49)	(0.44)
Lag	**0.29*** **	**0.30*** **	**0.30*** **	**0.32*** **	0.01
	(0.05)	**(0.10)**	**(0.05)**	**(0.11)**	(0.71)
Change in Gov	**-2.51*** **	**-2.64*** **	**-2.45*** **	**-2.61*** **	
	(0.37)	**(0.57)**	**(0.37)**	**(0.60)**	
Recurso	-1.46	-1.11	-1.52	-1.05	**-3.70*** **
	(0.46)	(0.84)	(0.46)	(0.87)	**1.27**

Robust z statistics in parentheses. *** p<0.001, ** p<0.01, * p<0.05