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Recusal and the Question of Judicial Independence: Reflections on the Current Spanish Controversy in Comparative and Theoretical Perspective

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Abstract

This article situates the recent controversy over the recusal of one member of the Spanish Constitutional Tribunal from an important pending decision on the recently passed new Statute of Autonomy for Catalonia in comparative and theoretical perspective. It begins with an overview of the recent crisis. It continues by examining the ambiguous standards for recusal in place in the Spanish context, comparing them to similar ones in the United States. It next turns to consider the charge that the recusal motion has resulted in the "politicization" of the Spanish Court. It explores whether such "politicization" can be attributed to deficiencies in institutional design, again making use of the comparison with the United States. It concludes by investigating the concept of a "politicized" Court itself, and outlines prescriptions for the Court in the case at hand according to five influential ideals for the proper role of Constitutional Courts in a democratic polity.

I. Introduction

In this article, we will situate the recent controversy over the recusal of one member of the Spanish Constitutional Tribunal (Pablo Perez Tremps) from an important pending decision on the recently passed new Statute of Autonomy for Catalonia in comparative and theoretical perspective. We will argue: (a) that in comparison with the United States, at least, the current Court cannot be considered highly

"politicized"; (b) that to the extent that it is "politicized," this is but a reflection of the broader context of heightened contestation in contemporary Spanish politics; and (c) that, by all means, from the standpoint of democratic theory, such "politicization" is not near as pathological as so many commentators and critics seem to assume.

II. The Recent Recusal Controversy in Spain

The *Tribunal Constitucional* now finds itself at the eye of the political storm in Spain. When the socialist Prime Minister José Luis Rodriguez Zapatero came to power in March of 2004, in the wake of elections held just three days after bombings at the Atocha train station in Madrid that had left 291 people dead, he arrived with more than one important campaign promise to fulfill. Alongside his commitment to withdraw Spanish troops from the war in Iraq, Zapatero had also prominently pledged to lend his support to the pet project of the recently elected Catalan regional governing coalition, headed by Pasqual Maragall, leader of the Catalan branch of the federally-organized socialist party: namely, Maragall's plan to reform his region's Statute of Autonomy. In the face of certainly strident and arguably effective opposition by the conservative *Partido Popular*, and despite some serious difficulties imposing his program within his own party, Zapatero managed (for the most part) to make good on this campaign promise as well at three critical junctures of the tumultuous reform process.

In the tense moments that preceded deliberations over the proposal on the floor of the Catalan Parliament in Barcelona, Zapatero had personally intervened to secure support for it by the conservative nationalist opposition. Before his direct intervention, *Convergència i Unió* had credibly threatened to sink Maragall's pet project by holding out for a more "maximalist" alternative. Then, when the time came for deliberations on the floor of the *Congreso de los Diputados* in Madrid, Zapatero successfully marginalized powerful dissidents within his own ranks, thereby securing that the document be approved with relatively few alterations (though the support of the radical nationalist *Esquerra Republicana* had to be sacrificed along the way). Finally, in the run-up to the referendum in Catalonia, he could hardly have been more active in the (only partially successful) attempt to mobilize an apathetic public in favor of a resoundingly affirmative vote to ratify the new Statute, despite very high levels of absention.

Zapatero had proven willing to gamble much of his political capital on the prospects for a successful outcome of the reform process. So much so that, along with his commitment to a negotiated settlement with ETA in the hopes of once and for all putting an end to the violence, the issue had come to dominate the terms of the country's political debate, clearly situated at the epicenter of the political struggle between government and opposition.

Upon the Statute's approval in the *Congreso de los Diputados* in Madrid, the PP immediately filed an appeal to the Constitutional Court, alongside the *Defensor del Pueblo* and five Autonomous Communities, in accordance with the

comparatively restrictive stipulations for Constitutional appeal provided by Article 162 of the 1978 Constitution.[1]

To observers at all familiar with the American political system, characterized as it is by the dual phenomenon of judicialized politics and politicized judiciaries, such behavior on the part of the PP appears hardly surprising. For that matter, its subsequent efforts to pressure the High Court to recuse one of its twelve members from the pending deliberations over the constitutionality of the Statute, in an attempt to alter the balance of ideological sensibilities in its favor, seem perfectly predictable as well. After all, the Court's decision over the Statute promises to be a landmark case with obvious transcendence and far-reaching consequences not only in terms of immediate electoral fortunes but also in terms of the eventual outcome of a highly-contested and salient political conflict currently dividing much of the country. The stakes could thus hardly be higher. As such, given minimum assumptions about rational incentives in democratic politics, and given the opposition party's power to bring the case before the Court as well as its power to effectively influence the case's outcome by exerting pressure to change the composition of the Court during the deliberations, it would only have been surprising had the PP behaved otherwise – that is, had it failed to make use of the weapons at its disposal in such a decisive political struggle.

On February 5, after several days of tense debate over the PP's motion to have Pablo Pérez Tremps disqualified from the forthcoming case concerning the *Estatut*, the remaining eleven members of the Constitutional Tribunal voted 6-5 to recuse their fellow Justice. The decision was particularly polemical, given the fact that approximately a year earlier, a nearly identical motion had been rejected by a vote of 8-3 – a motion the PP had presented alongside its "*recurso de amparo*", as part of its effort to avoid having the Statute proposal even be debated on the floor of the *Congreso de los Diputados*. As it had attempted to no avail on that prior occasion, the PP had again filed the recusal motion against Pérez Tremps on the grounds of an alleged lack of impartiality, specifically because, before having been appointed to the TC, he had signed a contract with the Catalan regional government

[1] Article 162.1a of the Spanish Constitution reads: "Están legitimados para interponer un recurso de inconstitucionalidad, el Presidente del Gobierno, el Defensor del Pueblo, cincuenta Diputados, cincuenta Senadores, los órganos colegiados de las Comunidades Autónomas y, en su caso, las Asambleas de las mismas". By contrast, in the United States, any American citizen can file such a suit. Likewise, in Germany, "anyone who feels that his or her fundamental rights have been infringed by the public authorities may lodge a constitutional complaint. It may be directed against a measure of an administrative body, against the verdict of a court or against a law." (http://www.bverfg.de/en/organization/verfassungsbeschwerde.html). See also Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke, 1997), p.14. In principle, the mechanism of the "recurso de amparo" spelled out in Article 162.1b of the Spanish Constitution, similar to the German *Verfassungsbuchwerde*, allows for individuals to file constitutional complaints; however, in contrast to Germany, only under certain restrictive conditions can the "amparo" process be used to appeal statutes. For a brief comparative overview of constitutional appeal procedures in France, Germany, Italy, see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000), pp.44-47.

and subsequently prepared an advisory memorandum on "*relaciones exteriores*," parts of which were later incorporated into the text of the proposed Statute reform.

III. Reactions among the Political Establishment

The recusal decision provoked reactions among high-ranking members of the political establishment in Catalonia bordering on hysteria. Pasquall Maragall's successor as President of the *Generalitat*, the socialist José Montilla, responded to the bad news by vehemently attacking the PP, whom he accused of "trying to win in the Courts what they could not win through elections." He continued: "The PP is evidently not worried about creating division and tension. It could care less about dividing and politicizing the Judiciary. The PP is doing no favor to the Constitutional Tribunal nor to Spanish society, dividing it." As for the Court itself, Montilla would not spare it either, openly questioning its independence, by remarking that its decision "says very little in favor of the members of the Tribunal who voted in favor of the resolution … [and] who were clearly [being influenced] by political rather than juridical arguments."[2]

Ernest Benach, President of the Catalan Parliament and member of the center-left and radical-nationalist *Esquerra Republicana*, a junior partner in the region's tripartite coalition government, was even more blunt, warning that "a grave conflict should be avoided" at all costs, while calling for "unity amongst Catalan parties and Catalan society in the face of the dire situation that might well occur."[3]

Determined not to be outflanked, Artur Mas, leader of the center-right and moderate-nationalist Catalan opposition, *Convergència i Unió*, delivered an equally forceful verdict, denouncing "the politicization of the Spanish judiciary" as a very grave issue "working to undermine the foundations of the Rule of Law and the democratic health of the country." He continued: "According to the Rule of Law, the judiciary should act independently, not with permanent intrusions on the part of political forces. But unfortunately, in these moments in Spain, the politicization of the judiciary is more and more evident." He concluded by reminding the magistrates that the issue of the Constitutionality was one of "maximum transcendence," and threatening that the relations between Catalonia and the rest of Spain would be left in a very delicate situation should significant sections of the Statute be declared unconstitutional.[4]

Reactions in Madrid were nearly every bit as dramatic, though obviously much more divided. On the one side, Spain's Vice-President, the socialist María Teresa Fernández de la Vega, was more cautious than her Catalan counterparts, carefully avoiding any direct reference to the recusal decision. She did, nevertheless, brand the PP "right-wing extremist," pointing to its alleged determination to "pervert the functioning of the Rule of Law" altogether.[5] On the

[2] Francesc Bracero and Silvia Hinojosa, "Montilla cuestiona la independencia de los magistrados del Constitucional", *La Vanguardia*, Feb. 7, 2007.
[3] Ibid.
[4] Ibid.
[5] Julio M. Lázaro, "La recusación de Pérez Tremps desata una Guerra política por el control del Constitucional", *El País*, Feb. 7, 2007.

other side, the conservative opposition welcomed the decision, which it considered, in the words of its leader, Mariano Rajoy, "The best news in a long time." Meanwhile, another high-ranking member of the PP procured to preempt any attempt on the part of the Spanish government to pressure Pérez Tremps to resign, so as to re-equilibrate the Court's ideological composition, by commenting: "I doubt the government would do such a thing, since those kinds of decisions are more typical of other political regimes – playing with institutions, adapting them to the necessities of the moment … one might think this Government is a disaster, but [I am confident that things would not unravel] to such an extreme."[6]

IV. Reactions in the Mainstream Press

Responses to the recusal decision in editorials published by the mainstream press divided rather predictably along regional, ideological, and party lines. In Barcelona, the conservative and moderately-"*catalanist*" periodical *La Vanguardia* waxed eloquent about what it depicted as a clear "contradiction" in the Court's conclusion: namely, that the publication of an academic text, an activity normally considered a merit for being named a justice on the TC, would end being considered not only a demerit, but actually the direct cause for disqualification. Somewhat more subtly, it would also question the capacity for impartiality of the Court altogether, given its current composition, by referring to the Franquist past of one of the magistrates who voted against Pérez Tremps, Roberto García Calvo,[7] before concluding that the Court's contested decision "does not appear to have responded to the juridical debate, but to political divisions and ideological prejudices that are degrading present Spanish politics."[8]

In Madrid, Jesús Polanco's prestigious daily, *El País*, closely aligned with the governing socialist party, also lamented the "disastrous precedent" the TC had created with its decision to "cut out the people who are most capable due to their specialized knowledge;" and it went on to caution the TC against a "clash of legitimacies" that would likely occur should the Court come out with an "extreme resolution" against the Statute, advising it not to further follow such an "irresponsible" course.[9]

By contrast, Pedro J. Ramirez's somewhat sensationalist and squarely anti-PSOE newspaper *El Mundo*, forecast that the political pressure the TC was likely to face as a result of its valiant decision were going to be "brutal", urging the Court not to give into such pressure, since doing so "would suppose signing the death sentence for the credibility of the Tribuanl, since its politicization would be apparent to all." In particular, it sought preemptively to warn the Court against accepting Pérez Tremps' resignation, a possibility about which rumors had immediately begun to circulate, by pronouncing in no uncertain terms that "the resignation and substitution of Pérez Tremps would suppose a legal fraud, no matter

[6] Carmen Remírez de Ganuza, "El PP advierte de que relevar al juez recusado sería un 'acto fraudulento e inaceptable", *El Mundo*, Feb. 7, 2007.
[7] García Calvo had served as Gobernador Civil under Arias Navarro.
[8] "Estatut y parcialidad," *La Vanguardia*, Feb. 7, 2007.
[9] "Decisión arriesgada, antecedente desastroso", *El País*, Feb. 7, 2007.

how one looks at its," before concluding that "if Pérez Tremps steps down, he will be taking revenge on his colleagues and giving a two-fingered salute to the institution."[10]

V. Ambiguous Standards for Recusal

Critics of the TC's decision were quick to point out the Court's own inconsistency, given that it was effectively reversing its unequivocal judgment of a year prior, at which point, when faced with the same evidence against Tremps' ability to remain impartial, it had concluded:

> "According to constitutional imperative, only those who qualify as 'jurists with recognized competence and with more than fifteen years of professional experience' can be named magistrates of the Constitutional Tribunal. For this reason, it is not uncommon nor should it be seen strange that, before becoming part of the college of magistrates, in the exercise of his respective background profession, its members have voluntarily or obligatorily made pronouncements about juridical material that, in the end, can become direct or indirect objects of constitutional judgments" (ATC 18/2006, de 24 de Enero, FJ3).

The critics themselves suggested that the Court's about-face had been the product of "political pressures" rather than a response to any new "factual evidence," much less a reconsideration of how to properly apply the "relevant legal principles." The ideologically-loaded juxtaposition of "political pressures" and "legal principles" at the core of this discourse undoubtedly reflects some combination of consciously-crafted rhetoric with genuine jurisprudential naïvete – a point we will return to below. But for now, let us bracket any such fundamental skepticism grounded in legal realism and/or in hermeneutics, and merely point out that the "relevant legal principles" operative in the Spanish context are indeed ambiguous.

The regulations related to the recusal of Justices serving on Spain's Constitutional Tribunal are found in Articles 10h and 80 of the *Ley Orgánica del Tribunal Constitucional* (LOTC), alongside Article 219 of the *Ley Orgánica del Poder Judicial* (LOPJ). Article 10h of the LOTC establishes that recusal should occur "when it is ossible to presume that a magistrate could have stopped being impartial" ("*cuando quepa presumir que algún magistrado podría dejar de ser imparcial*"). However, the LOTC does not itself include any explicit guidelines for interpreting when this kind of presumption can be made. In Article 80, however, it refers to possible causes as outlined in Article 219 of the LOPJ.[11] Section 13 of that Article fixes as one such cause "having participated directly or indirectly in the matter that is the object of litigation or cause or in another related to it."[12]

[10] "¿Permitirá María Emilia Casas la autodestrucción del TC?", *El Mundo*, Feb. 7, 2007.
[11] Jorge de Esteban, "El disputado voto de un magistrado," *El Mundo*, Feb. 12, 2007.
[12] "El Gobierno intentará forzar la dimisión de Pérez-Tremps y sustituirle," *Elsemanaldigital.com*, Feb. 6, 2007.

Whether the academic consulting for the *Generalitat* that Pérez Tremps engaged in is enough to justify disqualification on the grounds of having "participated indirectly" in the subject under consideration is certainly questionable, but given the vagueness of the language employed in the relevant legal regulations, it seems to be a question upon which reasonable people might plausibly disagree – even if, at the same time, given the high political stakes of the outcome of the Court's pending decision, it should hardly come as a surprise that opinions have split so neatly along regional, ideological, and party lines.

There is of course a deeper ambiguity underlying and animating the debates about the relevant legal regulations regarding recusal: namely, that of the very ideal of judicial impartiality – a controversial ideal no doubt, but nevertheless one upon which the legitimacy of the Constitutional Tribunal arguably ultimately rests.

Before attempting to tackle head-on the issue of judicial impartiality, however, let us begin by pointing out that Spain is not the only country that has found itself in the midst of serious political controversy over an attempt to have one of the members of its Constitutional Court disqualified from a particular case; nor, for that matter, is it the only country with ambiguous standards regulating judicial recusal. A review of a recent and somewhat similar controversy in the United States, where the ideological inclinations of the would-be recusers and the would-be recused are quite the reverse, can help shed light on the problems of legal and political theory involved.

VI. An American Precedent

In 2004, in the United States, there was an attempt to pressure Justice Antonin Scalia to recuse himself from participating in a relatively high-profile case involving Vice-President Dick Cheney. In that case, *Cheney vs. United States District Court for the District of Columbia*, the issue before the Supreme Court concerned the constitutionality of a Federal Court's order that Cheney release internal files related to an energy task force he had headed. In 2001, that task force, the National Energy Policy Development Group (NEDPG), had produced a controversial report "recommending opening up more federal land to oil, natural gas, and coal development." Suspecting foul play and the exercise of undue influence on the part of the energy industry on the contours of that report, the environmental group, the *Sierra Club*, along with the organization Judicial Watch, filed suit in an attempt to get access to information about the task force's interactions with lobbyists from the energy industry, many of whom had regularly attended the NEDPG's private meetings.[13] A Federal Court demanded that the Administration release a series of internal files, in compliance with the Federal Advisee Committee Act. The White House refused, and Cheney filed an appeal on the grounds that the federal court order constituted an infringement upon executive prerogatives for confidentiality, alleging thereby that the Court's action had violated

[13] According to Adam Cohen, a member of the editorial board for *The New York Times*, "Critics of the Administration have long suspected that those meetings were a forum for oil companies, and other powerful corporations, to shape the Administration's energy policies," "Reining in Justice Scalia," *The New York Times*, April 26, 2006.

the separation of powers and that it neither courts nor congress are constitutionally permitted to make inquiries into the decision-making powers of federal agencies and offices.[14]

Recognizing the importance of a number of the issues involved – the separation of powers at a time when the Bush Administration was aggressively asserting executive prerogatives, in a case having to do with such salient and conflictual partisan matters as corporate influence on public policy, the environment, and the U.S. energy supply –the Supreme Court decided to hear Cheney's case. Shortly thereafter, the Sierra Club requested a recusal motion for Justice Antonin Scalia, upon discovering that he had accepted an invitation to go duck-hunting with the Vice President, after the Court had already decided to hear his case. The Sierra Club contended that Scalia's acceptance had created an appearance of impropriety and/or bias, and therefore constituted sufficient grounds for his recusal.

Unlike in Spain, or for that matter in Germany,[15] in the United States judges have the power to decide whether to remove themselves from cases. Such legislation grants Supreme Court Justices extremely wide discretion, since their decisions cannot be appealed at all. In the case at hand, Scalia refused to recuse himself, and he published a tightly-argued though typically-polemical memorandum justifying his decision, in which he asserted, in no uncertain terms, that "the people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults," before concluding that "[i]f it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined."[16]

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[14] See Bill Mears, "Scalia Won't Recuse Himself from Cheney Case," May 6, 2004, cnn.com.

[15] According to Donald Kommers, in Germany, recusal "is beyond a justice's own discretion. Whether he or she initiates the recusal or resists a formal challenge of bias by one of the parties, the full Senate [all members of the High Court] decides the matter in his or her absence. A decision denying or upholding a voluntary recusal or a challenge to a justice refusing to withdrawal himself from a case must be supported in writing and included among the court's published opinions. A justice who refuses to recuse himself in the face of motions against his participation must provide his colleagues with a formal statement in defense of his involvement. The statement is included in the senate's formal opinion on the recusal" *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke, 1997), pp.23-24.

[16] See "Memorandum of Justice Scalia," *Supreme Court of the United States, Cheney vs. U.S.D.C. for District of Columbia*, pp. 19-20. Scalia would take particular issue with the idea that his personal friendship with the Vice President could constitute sufficient grounds for "the appearance of impropriety" threshold to have been crossed. He would insist: "A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials – and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive." Scalia's bald-faced justification of "the old boys' network" on the grounds of the frequency with

As it turned out, Scalia's refusal to recuse himself would not be decisive, since the Supreme Court ended up ruling in favor of Vice President Cheney, in the heat of the 2004 presidential election campaign, in an opinion drafted by Justice Kennedy, joined in full by four others (Rehnquist, Stevens, O'Connor, and Breyer), and in part by two more (Scalia along with Thomas), with full dissent from only two (Ginsburg and Souter).[17] Even so, the controversy surrounding the recusal issue in the United States is highly instructive for a Spanish audience nevertheless – not only because of the similar issues of legal principle invoked, but also because of the analogous climate of political polarization within which these issues were raised, not to mention the particular role that the struggle for control over the Court has played in contributing to such polarization.[18]

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which it has determined the professional success of fellow jurisprudential elites in the past is bound to strike any reader familiar with the work of C. Wright Mills and his radical-sociological school of power-structural analysis as more akin to a confession than a defense. A confession, that is, of the density and tightness of the ties that have traditionally bound, and to a large extent continue to bind, the members of the political, legal, and corporate elite. From the standpoint of a suspicion to hierarchy, which lies at the core of egalitarian as well as non-domination justifications for the democratic mode of governance, the burden of proof would seem to rest squarely on the shoulders of those who, like Scalia, would deny that such networks constitute *prima facie* evidence against the ideal of judicial impartiality or legal autonomy altogether. Given Scalia's own ideological inclinations, however, his flippant dismissal of such healthy suspicion should come as no shock. Somewhat more surprising, however, is the resonance in Spain of an argument almost identical to the one advanced by Scalia among "progressive" jurisprudential circles critical of the TC's recent recusal decision. For example, in their attempt to defend Pérez Tremps against any suspicion of bias, Alejandro Saiz Arnaiz and Rafael Jiménez Asensio would point out, just like Scalia, that: "Un repaso a la hemeroteca, en los momentos previos a cada renovación del Tribunal Constitucional, nos descubriría las relaciones de estrecha amistad que, en no pocas ocasiones, vinculan a quienes son promovidos al cargo con tal o cual diputado o senador relevante para la toma de decision o incluso promoter de la misma" ("Un grave error," *El País*, Feb. 8, 2007).

[17] The Supreme Court objected to the Federal Court's reliance upon the precedent of *The United States vs. Nixon*, on the grounds that "The right to production of evidence in civil proceedings does not have the same 'constitutional dimensions' as it does in the criminal context," p.4.

[18] It is worth noting that the Cheney case does not constitute the only recent recusal controversy in the United States. To the contrary, in the wake of defeat in the 2000 presidential election, when control of the Court was placed definitively out of their reach, Democrats and their allies in "civil society" soon began to experiment with rearguard tactics intended to seal the cracks in the constitutional floodgates and thereby avoid the immanent deluge. The tactic of recusal was among the first floated, in a proposed Congressional resolution of censure circulated against the five justices who had concurred in the majority decision of *Bush v. Gore*. The author and chief lobbyist for that failed resolution, Eric C. Jacobson, would introduce the argument that the disastrous decision could have been avoided had the "appearance of impropriety" standard for recusal been properly implemented. In 2002, this rearguard tactic would be successfully employed against the ultra-conservative and outspoken Scalia in a critical case regarding the separation of church and state, one of the lynchpins of the Reaganite social-conservative agenda. More precisely, that case, *Elk Grove Unified School District vs. Newdow*

VII. Similarities and Differences at the Levels of Legal Principle and Factual Circumstances

Let us begin with the issues of legal principle involved. As is the case in Spain, the standards for judicial recusal in the United States are notoriously ambiguous. According to a long-standing federal statute, a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," the language of which is strikingly similar to that of the standard operative in Spain ("*cuando quepa presumir que algún magistrado podría dejar de ser imparcial*").[19]

(commonly referred to as the Pledge of Allegiance case), involved the Establishment Clause of the First Amendment. Michael Newdow had filed suit, on behalf of his daughter, against the Congressionally-backed requirement to recite the Pledge of Allegiance on a daily basis in all primary and secondary schools, on the grounds that the phrase "under God" effectively violated the Establishment Clause. In a controversial decision, California's Ninth Circuit ruled in favor of Newdow. In the aftermath of that decision, Scalia accused the Ninth Circuit of having misinterpreted the Establishment Clause, in a speech he delivered at an event sponsored by the Knights of Columbus. The Supreme Court agreed to hear the appeal, and before oral arguments, Newdow filed a motion for Scalia to recuse himself, alleging that Scalia's public comments "evidenced that the judge had already decided his position without reading the briefs, a situation where an objective person might reasonably question the judge's impartiality." On that occasion, Scalia did in fact agree to recuse himself, and he would later refer to this decision (in contrast to the allegations included in the *Sierra Club* motion) as being in accordance with "established principles and practices."

[19] To be precise, Part 1, Chapter 1, Section 455 of Title 28 of the United States Code of Judiciary and Judicial Procedure, provides the following grounds for recusal: (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned; (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iii) Is to the judge's knowledge likely to be a material witness in the proceeding; (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household; (d) For the purposes of this section the following words or phrases shall have the meaning

The United States Supreme Court has interpreted the language of this federal statute to require that motions for disqualification "be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance."[20] However, unlike in Spain, the Supreme Court has also interpreted this so-called "appearance of impropriety" standard in relatively liberal or broad terms, so as to secure that "suspicions and doubts" about the integrity of judges be avoided.[21]

In its motion for recusal, the *Sierra Club* appealed to the fact that "8 of the 10 newspapers with the largest circulation, 14 of the largest 20, and 20 of the largest 30 have called on Justice Scalia to step aside because of his vacation with the Vice President," and noted as well that "of equal import, there is no counterbalance or

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indicated: (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation; (2) the degree of relationship is calculated according to the civil law system; (3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian; (4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund; (ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization; (iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest; (iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities; (e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification; (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

[20] Liteky vs. United States, 510 U.S. 540, 548 (1994). Elsewhere, a lower court has further clarified, "In applying Section 455(a), the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue," United States vs. Cooley, 1, F.3d 985 993 (10th Cir. 1993). Both established precedents are cited by the *Sierra Club* in its motion for recusal. It is worth noting as well that a similar "appearance" standard regarding recusal applies in Germany, where, according to Donald Kommers, "[t]he critical issue … is not whether the justice is in fact biased, but whether a party to a case has a sufficient reason for believing that he or she may be incapable of making an impartial judgment." See *The Constitutional Jurisprudence of the Federal Republic of Germany*, op. cit., p.24.

[21] Liljeberg vs. Health Services Acquisition Corp, 486 U.S. 847, 864 (1988). Cited by Monroe H. Freedman, "Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case," *The Georgetown Journal of Legal Ethics* (Volume 18, Isssue 1, Fall 2004).

controversy: not a single newspaper has argued against recusal." From such facts, the *Sierra Club* would surmise, with more than a hint of hyperbole, that "[b]ecause the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned," and that, therefore, "the appearance of impropriety standard" as spelled out in Section 455 had been "more than satisfied."[22]

In his memorandum, Scalia would retort that the "implications of this argument are staggering," mocking it by paraphrasing it as follows, "I must recuse because a significant portion of the press, which is deemed to be the American public, demands it," before proceeding to complain about a host of alleged factual and legal inaccuracies included in the press reports and editorials.[23]

Even so, it is far from clear whether any of the factual or legal inaccuracies recited by Scalia are "material to the motion of recusal." Nor, for that matter, is his insistence that he and Cheney did not talk to each other about the pending case during their vacation necessarily relevant either, since "a denial of impropriety by the judge whose impartiality might reasonably be questioned is not sufficient to remove the question."[24]

Likewise, though it is clear, as we have seen, that reactions in the Spanish press to the motion to have Pérez Tremps disqualified from participating in the pending deliberations over the constitutionality of the Statute of Autonomy were much more divided (quite neatly along ideological and party lines), if we were to apply a "liberal" interpretation of the "appearance of impropriety" (or the "*cuando quepa presumir que algún magistrado podría dejar de ser imparcial*") standard, it is equally clear that significant segments of Spanish society have come to question the magistrate's impartiality in the case at hand.

There is but one marked contrast with respect to the legal principles invoked in the two controversies (aside from the paramount procedural difference about who decides): namely, that in refusing to recuse himself, Scalia appears to reject the Supreme Court line of precedent that had interpreted the "appearance of impropriety" standard in a relatively liberal or broad fashion; by contrast, in voting to have Pérez Tremps recused, the Constitutional Tribunal seems to have rejected its own record of having abided by a strict interpretation of the similar standard operative in the Spanish context. This important difference is reflected in the terms of political discourse surrounding the respective controversies. Whereas in the United States, critics of Scalia's decision accused him of "politicizing" the Court by willfully attempting to roll back an established liberal line of precedent intended to avoid "suspicions and doubts" about the integrity of judges, in Spain critics of the TC's decision have accused the Court of having succumbed to "political pressures" by interpreting the operative standard more "liberally" than it had in the past.

Despite this significant contrast, the convergence at the level of legal principles involved in the two controversies remains striking. Nor are similarities entirely absent at the level of factual circumstances either. For both Scalia and

[22] "Motion to Recuse," *Cheney vs. U.S.D.C. for the District of Columbia*, p.3.
[23] "Memorandum of Scalia," op. cit., p.14.
[24] Freedman, op. cit.

Pérez Tremps had indeed accepted something of value from one of the parties in the dispute. For his part, not only did he Scalia agree to vacation alongside his close friend Cheney when a case of considerable importance was pending in which the Vice President was named as one of the parties, and during a presidential election year in which issues related to that case, such as energy and environmental policy, were being debated; but in addition, Scalia had "accepted a free ride for himself and two family members on Air Force two from Mister Cheney right before hearing the case."[25] On this last point of factual circumstance, Monroe Freedman, a leading American legal ethicist, argued that such comportment (i.e. having accepted something of value from a litigant) "is universally recognized as relevant to a judge's impartiality."

Once again, the Spanish controversy turns out to be somewhat more complicated. For though Pérez Tremps did indeed receive a 6000 Euro stipend from the Catalan regional government in exchange for his advisory memorandum, parts of which were later incorporated into the text of the proposed Statute reform, he obviously did so before the case against the *Statute* was pending, not to mention even before he had been named a justice of the Court.[26] Still, such comportment was by no means obviously beyond reasonable suspicion, along lines such as those plausibly pursued by Jorge de Esteban in the pages of *El Mundo*:

"[Pérez Tremps' brief] was commissioned by Carles Viver, ex-president of the Constitutional Tribunal, then member and later director of the Institut d'Estudis Autonòmics, as were other professors, as a consequence of a decision of the Catalan Parliament at the end of the year 2002, which was the origin of the Memorandum on the reform of the Statute, published in November 2003 by the Institut … All of these professors accepted the commission knowing that they were working for the *Generalitat*, who paid them, and that they were doing so in order to document the increasingly vindicated reform of the Statute, with the end of deepening the self-government of Catalonia … The fact is, on the one hand, that Pérez Tremps has had the *Generalitat* as a client, for whom he elaborated a brief that he turned in shortly before being named a magistrate, and that that institution is now one of the parties in the constitutional appeal. As such, if, as is known, "partiality" comes from "being a part," Pérez Tremps should have decided to abstain from participating, as he has done on other occasions.And on the

[25] Adam Cohen, "Reining in Scalia," op. cit.

[26] The fact that Pérez Tremps was commissioned by the *Generalitat* in his capacity as a sympathetic academic expert has been much emphasized by critics of the TC's recent decision, who have not hesitated to embrace an ideologically-loaded vision of academic commissions as value-free, technocratic exercises, thereby concealing the highly contested terrain in which jurisprudential scholarship is inevitably immersed. Typical in this regard are Alejandro Saiz Arnaiz and Rafael Jiménez Asensio, who go so far as to cite the German precedent, according to which "the Law of the Federal Constitutional Tribunal expressly excludes as a cause of recusal *scientific* opinions of constitutional judges relative to juridical material that is the object of dispute (Artícle 18.3)," "Un grave error," *El País*, Feb. 8, 2007.

other hand, his proposals were faithfully adopted, as can be confirmed en the book *Estudios sobre a reforma del Estatuto*, published in November 2004, by the Institut d'Estudis Autonòmics."[27]

VIII. Similarities and Differences in Institutional Safeguards against "Politicization"

As we have seen, commentators on all sides of the current controversy over the recusal of Pérez Tremps in particular (and of the pending TC decision regarding the constitutionality of the Catalan Statute of Autonomy more generally) either decry or at least caution against the "politicization" of the Court. In so doing, they appeal to a deeply-ingrained if nevertheless at least partially problematic distinction between law and politics. According to the normative conception within which this distinction is embedded, both the independence of the judiciary and the autonomy of the law from "politics" are posited as desirable. Each side accuses the other of having compromised judicial independence. For its part, the PP initially pushed for the recusal of Pérez Tremps on the grounds that his presence in the pending deliberations would compromise the independence of the Court. Likewise, the PSOE, as well as the Catalan nationalists, responded to the recusal with arguments about how the PP's exercise of political pressure upon the conservative judges to vote with their "ideological hearts," so to speak, had compromised the independence of the Court.

Commentators have thus tended to blame the "politicization" of the Court, understood as the compromise of its independence, on the allegedly irresponsible or even demagogic tactics of their political opponents. However, because the tactics pursued by all sides in the current controversy have taken place within a particular institutional framework, perhaps an objective rather than partisan analysis would reveal that the "politicization" of the Court can be attributed to deficiencies at the level of institutional design rather than mere political irresponsibility. We will now turn to consider this possibility.

Let us begin by considering the procedure of recusal itself. It is indeed ironic that the current controversy in Spain over the "politicization" of the Constitutional Court was triggered by a motion of recusal, a procedure explicitly designed to safeguard the Court's independence against biases likely to be introduced by judges whose personal circumstances link them too closely to one of the party's involved in any particular case. As we have seen, the rules by which recusal motions are processed can vary, as they do between the United States, on the one hand, and Spain and Germany, on the other. It is fairly obvious that not all procedures for recusal are capable of providing equally strong safeguards against the infiltration of personal bias. In point of fact, the procedure in place in the United States seems manifestly inferior to the one in place in Spain and Germany. For by leaving the final decision in the hands of the judge herself, the procedure in the United States seems to assume the very capacity for impartiality on the part of that judge even in circumstances that have led to a motion of recusal against her.

[27] Jorge de Esteban, "El disputado voto de un magistrado," *El Mundo*, Feb. 12, 2007.

Yet, in cases where personal circumstances might actually bias a judge, why should she be trusted to impartially decide whether her own impartiality can be "reasonably called into question"? Is it not more plausible to assume, as the Spanish and German procedural guidelines do, that the rest of the Court is more capable of impartially deciding the matter than is the accused judge herself?

Of course, no procedural mechanism is full-proof. It is not difficult to imagine a scenario in which a majority of the Court were to succumb to "political" pressures and thereby unjustly exclude an accused justice whose interpretive inclinations are at odds with those of the majority. This is precisely what the critics of the Spanish Court's recent recusal decision contend. Even so, we should not therefore conclude that there is anything deficient per se with the procedure of recusal as institutionalized in Spain.

But recusal is not the only procedural mechanism in place intended to secure judicial independence. Perhaps deficiencies in other aspects of the Court's institutional design can be blamed for its current state of alleged "politicization": for example, in the guidelines governing the nomination of justices or the conditions of their tenure.

Here again, however, in comparative perspective, the institutional design of the Spanish Court, like that of the German one in whose image it was explicitly fashioned, comes across as solid. In particular, the procedures in place with respect to both the machinery for judicial selection and the conditions of tenure in the United States seem significantly inferior to those in place in Spain and Germany when it comes to safeguarding judicial independence and thereby avoiding the "politicization" of the Court as an institution.

For starters, nowhere does the Constitution of the United States stipulate the numerical composition of Supreme Court Justices, a fact that leaves the door at least theoretically open for Presidents to use their executive prerogative to "pack the Court," as Roosevelt famously threatened to do.[28] By contrast, Article 159.1 of the Spanish Constitution explicitly dictates that the Constitutional Tribunal is to be composed of 12 justices.

Concerning the nomination of justices, Article II, Section 2, states that Presidents "shall nominate, and by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court." The mode by which the advise and consent of the Senate has been incorporated is as follows: "(1) The President usually will consult with Senators before announcing a nomination; (2) When the President nominates a candidate, the nomination is sent to the Senate Judiciary Committee for consideration; (3) The Senate Judiciary Committee holds a hearing on the nominee. The Committee usually takes a month to collect and receive all necessary records, from the FBI and other sources, about the nominee and for the nominee to be prepared for the hearings; (4) During the hearings, witnesses both supporting and opposing the nomination present their views. Senators question the nominee on his/her qualifications, judgment, and philosophy; (5) The Judiciary Committee then votes on the nomination and sends its recommendation (that it be confirmed, that it be rejected, or with no recommendation) to the full Senate; (6)

[28] See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford Univeristy Press, 1995).

The full Senate debates the nomination; (7) the Senate rules allow unlimited debates (a practice known as filibustering). To end the debate, it requires the votes of 3/5 of the Senate or 60 Senators (known as the cloture vote); (8) When the debate ends, the Senate votes on the nomination. A simple majority of Senators present and voting is required for the judicial nominee to be confirmed. If there is a tie, the Vice President who also presides over the Senate casts the deciding vote."[29]

Presidential prerogative in the machinery of judicial selection in the United States is not absolute. The veto power of the Senate provides a guarantee of a minimum degree of power sharing between the executive and legislative branches. Still, the initiative clearly belongs to the President. Moreover, at least since Roosevelt began to purposely make so-called "transformative judicial appointments," a tactic emulated with increasing frequency since the Reagan administration, this presidential prerogative to nominate has come to be seen as one of the main spoils of occupying the executive office. That is, the power to nominate is widely perceived as a prime political prize, offering the means by which a given President can embed his own agenda into the course of constitutional interpretation long after his term of office has expired.

By contrast, the procedure of nominating justices in Spain – like the one in Germany – requires a much higher degree of power sharing, both among branches as well as between the main party and the opposition. To be precise, Article 159.1 stipulates that of the Court's twelve magistrates, four are proposed by a super-majority of three-fifths in the Congress; another four are proposed by the same super-majority in the Senate; two are proposed by the Government, and two are proposed by the *Consejo General del Poder Judicial*. The comparatively high degree of power-sharing thus entailed renders purposively transformative appointments much more difficult to pull off than in the United States.[30] What's more, the power given to the *CGPJ* reflects the strength and the recognition of the corporate interests of the judiciary as part of the civil service, whose comparative weakness in the United States was long ago lamented by the likes of C. Wright Mills.

In sum, the mode of nomination in the United States contributes to a more transparently "politicized" process, one recognized as such by both political elites as well as the broader public. The transparently "political" nature of the appointment process is compounded further by the public hearings held by the Senate Judiciary Committee. In Spain, as in Germany, by contrast, there are no

[29] http://www.ll.georgetown.edu/guides/supreme_court_nominations.cfm.

[30] It is worth noting that recently some nationalists in Catalonia have begun to demand an extension of the power-sharing mechanisms embedded in nomination process, so as to include a consociational guarantee that a certain number of appointed judges hail from Catalonia and/or the Basque Country. Such consociational guarantees are in fact in place in Canada, where "since 1949, a pattern of regional representation has been maintained under which three judges come from Quebec as required by statute, while by informal custom, there is a rough allocation (that is varied from time to time) of three judges from Ontario, two from the western provinces and one from the Atlantic provinces …" (http://www.solon.org/Constitutions/Canada/English/Committees/Meech_Lake_1987/mlr-ch8.html)

public hearings on judicial nominees. As a result, many of those appointed to the Court are entirely unknown to the general public. Indeed, as Donald Kommers has noted with respect to Germany, "public hearings reminiscent of the congressional inquiry into the background and qualifications of Robert Bork for a seat on the Supreme Court of the United States would be unthinkable in the Federal Republic. Many Germans would regard such hearings as an assault on the institutional integrity of the Constitutional Court itself. Any public fixation on how a judicial nominee would vote in a particular case or in a wide range of cases would be seen as a potential threat to the independence of the nominee. By the same token, any interest group lobbying on behalf of a particular judicial nominee, accompanied by threats of retaliation against lawmakers who vote the wrong way, would be regarded as interference with the independence of those entrusted with the duty of selecting justices."[31]

The transparency of the nomination process in the United States, compared with its opacity in Spain and Germany, certainly contributes to the higher degree of "politicization" in the former context. However, this does not mean that the process in the latter two is bereft of "politics." To the contrary, as Kommers has again described with respect to Germany, "The Judicial Selection Committee, which consists of senior party officials and the top legal experts of each parliamentary party, conducts its proceedings behind closed doors and after extended consultation with the Bundesrat. Although the parliamentary parties may not legally instruct their representatives on the JSC how to vote, committee members do in fact speak for the leaders of their respective parties. The two-thirds majority required to elect a justice endows opposition partiesin the JSC with considerable leverage over appointments to the Constitutional Court. Social and Christian Democrats are in a position to veto each other's judicial nominees, and the Free Democratic party, when in coalition with one of the larger parties, occasionally wins a seat for itself through intracoalition bargaining. Compromise is thus a practical necessity."[32] By "politicized," then, we might conclude that what is implied is "conflictual." Transparency can render "consensus" more difficult among political elites, and therefore lead to perceptions among the public at large of "politicization." By contrast, opacity can facilitate "consensus" among political elites, thereby rendering political bargaining compatible with the maintenance of a veil of institutional autonomy and/or independence.

What about the conditions of tenure? Have the guidelines in place in Spain contributed to the Court's "politicization"? Again such seems not to be the case. To the contrary, in comparative perspective, it is the Supreme Court of the United States whose guidelines appear to contribute to "politicization" vis-à-vis either its Spanish or German counterparts. This is because the lifetime tenure granted Supreme Court justices in the United States, which has often been defended as a means of insulating justices from political pressures and thereby securing judicial autonomy, actually paradoxically raises the stakes involved in the process of judicial selection. Such lifetime tenure is stipulated in Article III, Section 1, of the U.S. Constitution, which states that "[t]he Judges, both of the supreme and inferior

[31] Donald Kommers, ibid., p.534, fn 110.
[32] Kommers, ibid., p.22.

courts, shall hold their offices during good behaviour and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." By contrast, in Spain, in accordance with Article 159.3 of the Constitution, magistrates for the Constitutional Tribunal are appointed to nine-year terms (and in Germany to twelve-year terms), with the composition of a third of the Court being renewed every three years. The result being that in Spain or Germany, less is at stake in the nomination process, which facilitates political bargaining and the avoidance of conflict, and thereby the absence of "politicization."

On all counts thus far considered, the institutional design of the Constitutional Court in Spain seems to offer it a comparatively higher degree of insulation from "politicization" than that of the Supreme Court of the United States. There is, however, one element of institutional design which renders the Spanish Constitutional Court comparatively less insulated: namely, the question of case selection. Because the Supreme Court in the United States, unlike the Constitutional Courts in Europe, stands at the apex of a unified judiciary system in which all courts have the power to declare a law unconstitutional, only a very few of the cases in which challenges to constitutionality of a law are made end up before the Highest Court, and the Supreme Court has complete discretion over which cases it decides to hear. By contrast, in Spain, like in Germany, given the Court's unique function and its formal detachment from the judiciary, whose judges are not authorized to declare any law unconstitutional, "once constitutional review processes have been activated, constitutional judges are legally obligated to render a decision."[33]

The Supreme Court in the United States is thus empowered to exercise discretion over which cases it decides to hear. This degree of discretion allows it to skirt coming down on particularly controversial cases, should it so desire. The Court in Spain, by contrast, can only exercise discretion by delaying coming down on a given case. It cannot, however, decide not to decide. Consequently, should a "hot potato" be passed its way, as has happened with the Catalan Statute, the Court is forced to catch it, even if that means having its hands burned.

This last element of institutional design notwithstanding, it seems safe to conclude that the current situation of "politicization" of the Constitutional Court in Spain about which so many activists and observers have complained cannot be attributed to defects in institutional design.

IX. What is a "Politicized Court" Anyway? And What is the Way Forward for the Purpose of Avoiding Further "Politicization"?

It is at first blush difficult to decipher the significance of the charge that the Constitutional Court in Spain has become "politicized." After all, the Court is a political organ. It was established by a political document, the 1978 Constitution, a document approved in the Spanish Congress and subsequently ratified by the Spanish people in a referendum, Title IX of which spells out the Court's integral role in the Spanish political system. Its basic functioning was further regulated by

[33] See Alec Stone Sweet, *Governing with Judges* (op. cit.), p.46.

the passage of an Organic Law. As such, the complaint that the institution has become "politicized" can strike an outside analyst as somewhat perplexing, to say the least.

Given the high degree of political polarization between the country's two main parties throughout the process of elaboration and passage of the Catalan Statute, the Court's role as ultimate arbiter of the document's fate meant that it was bound to come under a considerable amount of critical scrutiny. Regardless of what it did, its prestige and its perception as independent from political pressures were almost certain to suffer in at least some people's eyes. The recourse to recusal has clearly exacerbated the amount of scrutiny to which the Court as an institution has been exposed – if only by reinforcing the impression that the balance of political sensibilities among the members of the Court can have a decisive influence on the decision it comes to. For both of these reasons, by this point, much "damage" to the image of the institution has already been done. The question therefore arises: How can and/or should the Court in Spain proceed from here to protect itself from further damage (that is, from the charge of even further "politicization")?

Much of course depends on the precise meaning we give to the term "politicization." The term "politicized" is often treated as an antonym for "impartial," "autonomous," or "independent." But it can also be employed to signify "conflictual" rather than "consensual," which in turn can imply "transparent" rather than "opaque." There is of course some tension between these different meanings of the term. For indeed, "above politics" is not the same as middle-of-the-road. An "impartial," "autonomous," or "independent" court need not be composed of middle-of-the-road magistrates whose qualifications can be agreed upon by all main political parties. Moreover, from the standpoint of democratic theory, the consociational bent built into institutional mechanisms that facilitate elite consensus, especially when they do so by rendering the process of political bargaining itself opaque, are suspect at best.[34] Consequently, for a Court to become "politicized" is not necessarily such a bad thing, particularly when it merely means that the political determinations of the Court's functioning have become more transparent to the public at large.

Whence, then, the concern about the Court's "politicization"? The concern seems to be directed in many instances against the prospect that the Court might come down decidedly against a given commentator's own political preferences. For such commentators, a "politicized" Court is merely one with whose judgments they themselves happen to disagree. But not all commentators are so cynical. Some harbor more substantial objections – having to do either with beliefs about the proper separation of powers or about the perceived legitimacy of the Court as an institution.[35]

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[34] For the classic critique of consociationalism along such lines, see Brian Barry, "The Consociational Model and its Dangers," *European Journal of Political Research* 3, 1975: 33-411; as well as Ian Lustick, "Stability in Deeply Divided Societies: Consociationalism versus Control," *World Politics* 3, 26, 1979.

[35] We do not mean to suggest that specific judgments with respect to a given case at hand can be directly inferred from different theoretical beliefs or general frameworks. In the American context, for example, Scott Gerber ("Privacy and Constitutional Theory," *Social*

In what follows, we will respond to such substantial objections by outlining the way forward for the Court according to five distinct and influential conceptions of its function in a democratic polity.

What are the alternative ideals of a "non-politicized" Court to which those who harbor such substantial objections must at least implicitly appeal? Perhaps the most commonplace, but at the same time least plausible alternative, is that of a purely positivist conception, according to which the Court should limit itself to determining in a technical and therefore neutral fashion whether the tenets of a given statute in question stand in conflict with the principles enshrined in the highest law of the land.[36] However, the impossibility of avoiding interpretive ambiguities, combined with the inevitably value-laden and politically-loaded content of all interpretive lenses, render such an ideal hopelessly naïve.[37] This is so

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Philosophy and Policy 17, 165, 2000) has ably argued that all of the most influential philosophies of constitutional interpretation can be plausibly wielded both in favor and against the recognition of a right to privacy. Be that as it may, different theoretical positions nevertheless clearly load the dice in favor or against different particular interpretations in asymmetrical ways. As David Dyzenhaus (*Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermen Heller in Weimar*, Oxford: Clarendon Press, 1997) has convincingly argued: "[P]hilosophies of law and politics are … elaborations and justifications of packages of political commitments … [W]hile one should not expect there to be crude causal links between theory and practice, such links as can be shown are important for evaluating particular theories."

[36] The "legal positivist" conception of the proper role of Courts is perhaps associated most closely with the work of Hans Kelsen. Alec Stone Sweet has recently summarized the legal positivist position in the following terms: "Grossly simplifying, for positivists, the law is the corpus of prescriptions that some person or group (the law-maker) has made, that are enforceable by courts and other state institutions, and that are meant to apply authoritatively to specific situations" (op. cit., p.35).

[37] We do not mean to imply that the text of the Constitution and of the given statute in question need not be consulted. However, we do mean to insist that, on points of contention, neither the meaning of the Constitution nor the compatibility with it of the given statute can be determined by interpretive techniques alleged to be "neutral" (i.e. devoid of substantive political content) and available to independent jurisprudential "experts." In the pending case regarding the Catalan Statute, for example, the most contentious clauses include: (1) the use of the term "nation" to refer to Cataluña, alongside references to "the powers of the Generalitat emanating from the Catalan people" as well as to "the historic rights of the Catalan people" (preamble; art. 2.4 and art. 5); (2) the obligation to know the Catalan language (art. 6.2); (3) the establishment of rights and duties for citizens of Cataluña (arts. 15-36); (4) the attribution of competences to the *Sindic de Greuges* formerly exercised by the *Defensor del Pueblo* (or "Ombudsman") (art. 78); (5) the establishment of the Tribunal Superior de Justicia de Cataluña as the "última instancia jurisdiccional de todos los procesos iniciados en Cataluña" (art. 95.2); (6) the so-called "blindaje" (or "armored plating") of both "exclusive" and shared competences (arts. 110 and 111); (7) excessive recourse to the principle of "bilateralism," especially the establishment of a "bilateral commission between the Generalitat and the State," intended to "constitute the general and permanent framework of relations between the Governemtns of the Generalitat and of the State" (art. 183); (7) the Generalitat's assumption of a power to regulate its own international relations (art. 193.2); and (8) the establishment of an exclusive competence for the Generalitat "for regulating and ordering its revenues" and for

even in contexts such as the contemporary United States, where no relevant political actors question the fairness of the constitutional framework itself; but in contexts such as Spain, where significant actors do challenge the fairness of the basic "rules of the game," the problems with this ideal are compounded further still.

A second ideal of a "non-politicized" Court to which commentators sometimes at least implicitly appeal is of one of a Court that is maximally deferential to the other branches of government. According to this minimalist conception, the Court should at all costs avoid encroaching upon (or usurping) the powers that rightly pertain to the legislature and/or executive.[38] Such a minimalist conception of the Court is of course inspired by the democratic critique of Courts for the so-called "counter-majoritarian difficulty" which they allegedly confront. The minimalist conception therefore can be traced back to the suspicion towards constitutions as such harbored by the likes of Thomas Jefferson.[39] In the Spanish context, the echoes of Jefferson's voice are apparent in the opinions registered by commentators who caution the Court against striking down a Statute approved by the Catalan Parliament, revised and passed by the Spanish *Congreso de Diputados*, and then ratified by the Catalan population in a popular referendum.

The minimalist conception has frequently been countered by a third ideal, one much more compatible with a pro-active role for high Courts. According to this activist conception, the Court should serve as the ultimate guarantor of the fundamental rights of individuals against tyrannical majorities. Defenders of such an activist conception nevertheless tend to deny that their vision implies the "politicization" of the Court, insofar as they contend that the fundamental rights the Court is supposed to defend constitute but the minimal procedural requisites for

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"establishing the limits and conditions of budgetary stability" (arts. 215 and 218). With respect to each of these, reasonable arguments can be made for interpreting the clause as either compatible or incompatible with the Constitution. As a result, no "purely positivist" technique is available for resolving such interpretive disputes.

[38] The classic articulation of the tension between judicial review and the principle of democratic "majoritarianism" is Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1996). In recent years, numerous models of "judicial minimalism" have been advocated by scholars associated with a variety of different political persuasions. On the "progressive left," minimalism has been advocated perhaps most forcefully by Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press, 1999), as well as by Ian Shapiro, *The State of Democratic Theory* (Princeton, N.J.: Princeton University Press, 2003) and Michael Walzer, "Philosophy and Democracy," *Political Theory* 9, pp.379-399, 1981; from the center, it has been by the likes of Robert Dahl, *How Democratic is the American Constitution?* (New Haven: Yale University Press, 2003) and Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton, N.J.: Princeton University Press, 1999); and on the right, it has been championed by the infamous Robert Bork, *Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990).

[39] On Jefferson's aversion to "constitutional binding" of democratic voice, see Stephen Holmes, "Precommitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (New York: Cambridge University Press, 1997), pp.199-205.

meaningful democratic competition.[40] However, the highly contested content of fundamental rights renders the credentials of this activist conception as an ideal for a "non-politicized" Court dubious at best.[41] But by all means, in cases such as that of the Catalan Statute currently under consideration in Spain, where the issues involved do not revolve around questions of fundamental rights but rather (at least mostly) around jurisdictional competence, this activist conception does not necessarily differ from minimalist counterpart in counseling deference towards the decisions of democratically-elected legislatures.

Not all ideals of a "non-politicized" Court seem to prescribe similarly high levels of judicial deference with respect to cases like the one of the Catalan Statute. Indeed, a fourth such ideal would demand much less deference. According to this ideal, which we can label "conservationist," the Court should protect and defend the basic foundations of substantive political consensus and compromise at the core of the constitutional order. In so doing, the Court can be said to serve as a bulwark for the existing socio-political order and as a brake on politicians who attempt drastic change.[42]

There are two different versions of this "conservationist" creed – one more "presentist," the other more "historicist," so to speak. The "presentist" version of the conservationist ideal would prescribe a Solomonic judgment of sorts – one intended to respond to at least some of the preferences and to placate at least some of the concerns of all the main contending political forces involved.[43] In short, a decision with no clear winners and no clear losers.

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[40] In the American context, this "activist" conception is popularly associated with the jurisprudence of the Warren Court. At the theoretical level, John Hart Ely's justification of judicial review as providing the "procedural safeguards" for the proper functioning of democracy (*Democracy and Distrust*, Cambridge, Mass: Harvard University Press, 1980), as well as Ronald Dworkin's alternative justification of constitutional jurisprudence guided by enlightening "moral reasoning" to defend the fundamental individual right to be treated with "equal consideration" against encroachment by tyrannical majorities (*Freedom's Law: The Moral Reading of the Constitution*, Cambridge, Mass: Harvard University Press, 1996), can both be grouped under an "activist" rubric, broadly understood. For another influential "activist" defense of judicial review in terms of the protection of individual rights, see Rebecca L. Brown, "Accountability, Liberty, and the Constitution" *Columbia Law Review* 531 (1988). For an attempt to tread a middle ground between the "minimalist" and "activist" conceptions, see Rogers M. Smith, *Liberalism and American Constitutional Law* (Cambridge, Mass: Harvard University Press, 1985); as well as his "The Errors of Liberal Ways and Means: Problems of Modern Equal Protection Remedies," *Journal of Political Philosophy* 1:185-212, 1993.

[41] For a particularly influential critique of Ely's purely "proceduralist approach" as impossible, see Laurence H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories," 89 Yale Law Journal 1063 (1980).

[42] "Conservationists" contend that the Court is more capable of protecting the basic foundations of substantive political consensus and compromise than is the legislature precisely because of its relative insulation from direct electoralist pressures. They therefore turn the Court's "democratic deficit" into a definite virtue, due to its lower level of permeability to polarizing populist incentives.

[43] In the American context, the jurisprudence of Justice Sandra Day O'Connor is perhaps most representative of this approach. More generally, the "presentist" variant of what we

As for the "historicist" version, it would prescribe an even further degree of judicial over-ride or "interference"; for it would leave to the Court the task of conserving the substantive political consensus and compromise of the constituent moment itself. This historicist version of the conservationist ideal is inspired by the belief that the wisdom and achievements of successful founding generations should not be underestimated.[44] It can therefore be traced back to the suspicion towards "normal" democratic politics harbored by the likes of James Madison, as evidenced in his "constitutionalist" response to the radical-democratic convictions of Jefferson.[45] In the Spanish context, the echoes of Madison's voice are apparent in the opinions registered by commentators who call for the Court to defend the founding constitutional consensus and who consequently criticize the current socialist government for its alleged complicity with the attempted unilateral break from below with that compromise on the part of nationalists in the periphery.

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have here labeled "conservationism" has much affinity with the approach espoused by advocates of the so-called "living constitution," who have frequently defended a vision of the role of the Court as authorized to interpret the Constitution "in accordance with evolving societal standards." In this vein, see Herman Belz, *A Living Constitution or Fundamental Law? American Constitutionalism in Historical Perspective* (Lanham, MD: Rowman and Littlefield, 1998). For an argument about the death penalty that argues explicitly along "Solomonic" lines, see Michael J. Perry, "Is Capital Punishment Unconstitutional? And Even If We Think It Is So, Should We Want the Supreme Court to So Rule?" *Emory Public Law Research Paper No. 06-29*, Jan. 2007). Also see Robert Post's *Constitutional Domains: Democracy, Community, Management* (Cambridge, Mass: Harvard University Press, 1995), a theoretical treatise that is likewise rife with "Solomonic" appeals to substantive "common grounds."

[44] In the American context, the jurisprudence of Justice's Antonin Scalia and Clarence Thomas are perhaps most representative of this approach. More generally, the "historicist" variant of what we have here labeled "conservationism" has much affinity with the approach espoused by advocates of "originalism," who have frequently defended a vision of the role of Courts as authorized to interpret the Constitution in accordance with either the "original intent" of the Framers or of the "original understanding" of the meaning of the clauses in question. On "originalism," see Earl .M. Maltz, *Rethinking Constitutional Law: Originalism, Interventionism, and the Politics of Judicial Review* (Lawrence, Kan: University Press of Kansas, 1994), and Christopher Wolfe, *How to Read the Constitution: Originalism, Constitutional Interpretation, and Judicial Power* ((Lanham, MD: Rowman and Littlefield, 1996).

[45] Jefferson had vigorously objected to the idea that a constitution could last more than a generation without turning into a tyranny of the dead over the living. He argued: "Each generation is as independent of the one preceding, as that was of all which had gone before. It has, then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness … [T]he dead have no rights." Madison would retort with the prediction that Jefferson's proposal for generational independence would surely produce "the most violent struggles … between the parties interested in reviving, and those interested in reforming the antecedent state of property" Cited by Cass R. Sunstein, "Constitutions and Democracies: An Epilogue," in Elster and Slagstad, eds., *Constitutionalism and Democracy*, op. cit., p.327.

Modern-day historicist constitutional "conservationists" can of course be criticized for engaging in a type of ancestor worship that stands in much tension with the basic tenets of democratic governance.

There is, however, a fifth ideal for the Court that manages to incorporate the Madisonian suspicion against "normal" democratic politics while nevertheless avoiding buying into such excessive ancestor worship. This ideal, which we can label as "dualist," envisions the Court as the guardian of the outcomes achieved during "constitutional moments." The "dualist" conception attempts to tread a difficult middle ground between the Madisonian suspicion towards "normal" democratic politics and the suspicion towards constitutions harbored by the likes of Thomas Jefferson. With Jefferson, the dualist conception privileges the democratic voice of the people as the sole source of legitimate political authority; but with Madison, it displays distrust of whether the outcome of the democratic process can aptly be characterized as embodying the "voice of the people," save on very rare occasions. According to the dualist ideal, only during "constitutional moments" is the voice of the people heard. During most periods of "normal politics," no such voice can be discerned.[46]

The foremost proponent of the dualist conception, Bruce Ackerman, has rendered explicit useful criteria for identifying the existence of "constitutional moments."[47] According to him, they come about in a five-stage historical process, which can be summarized in the following schematic form:

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[46] The "dualist" ideal arguably remains overly-sanguine in equating the outcome of such "constitutional moments" with the "voice of the people." In committing this conflation, it downplays the dynamics of coercion and silencing inevitably involved in all patterns of political mobilization (much less revolutionary ones), and thereby ends up legitimating and perpetuating the mystifications and distortions of the victors in these decisive struggles. But recognizing the significance of "constitutional moments" does not require equating their outcome with any authentic popular will. Rather, it can be taken as an important empirical description of two distinct modes of political struggle within (and about) "democratic" political institutions. For indeed, the "dualist" conception can be reformulated in Gramscian terms to prescribe that the High Court, rather than serving as the guardian of the "authentic voice of the people," serves as the guardian of the hegemonic consensus among conflicting fractions of dominant segments in society (or the "ruling class"). Such a reformulation has recently been provocatively advanced in a comparative context by Ran Hirschl, who, like dualists such as Ackerman, rejects the vision of Courts as neutral arbiters of procedural rules or protectors of individuals rights, but unlike Ackerman, goes on to insist: "Critical scholars who have focused on the history of the U.S. Supreme Court's constitutional rights jurisprudence have suggested that the Court's actual record of rights jurisprudence is far less impressive than its public image. According to their studies, the Court's rights jurisprudence has been inclined to reflect and promote national metanarratives, prevailing ideological and cultural propensities, and the interests of ruling elites and economic power-holders." See Hirschl, *Towards Juristocracy* (Cambridge, Mass: Harvard University Press, 2004), p.100.

[47] Of course, the distinction between "constitutional moments" and "normal politics," which lies at the core of the dualist conception can be subjected to much criticism. For after all, "constitutional moments," like "critical junctures," are not self-evident occurrences – and they therefore raise the suspicions of those who interpret social reality (and who judge the social sciences) through either narrowly-positivist or thoroughly post-

Constitutional Impasse → Electoral Mandate → Challenge to Dissenting Institutions → Switch in Time → Consolidating Elections.[48]

Every generation invariably faces its own constitutional impasse(s), which make up the first phase of any would-be "revolution;" but not every generation is destined to successfully consummate a "revolutionary" moment. The relevance of such a generational factor for understanding the current constitutional crisis in Spain should not be underestimated. For the Court in Spain is now forced to confront the "distinctive challenges of a second full generation of judicial review."[49]

The current controversy over the Catalan Statute fits nicely into the "dualist" interpretive framework. It can very plausibly be seen as constituting a constitutional impasse over the as-yet unsettled and increasingly salient issue of the ultimate territorial configuration of the Spanish state.

Zapatero's electoral mandate has been from the outset disputed by significant elements on the Spanish right, for whom the defeat of the conservative PP in the 2004 general election came quite unexpectedly and therefore traumatically. By all means, the outcome of that election arguably had more to do with the rejection of Aznar's widely unpopular decision to support and participate in the invasion of Iraq than it did with anything else. The Atocha bombing, combined with the perception that the government was manipulating information about the bombing in its immediate aftermath, rapidly transformed what had hitherto remained widespread but nevertheless latent discontent with the government for its disastrous foreign policy into a mobilized critical mass capable of demanding accountability by "throwing the bums out." Zapatero immediately delivered on this demand and brought the troops home. But he then proceeded to forge ahead with other aspects of his platform as well – aspects for which his electoral mandate was much more dubious. Among the most controversial of these moves would be his unwavering support for the Catalan Statute.

There has of course been much debate among both constitutional lawyers as well as political activists about the extent to which the wording of the Statute can be rendered compatible with the Constitution, with opinions again predictably dividing rather neatly along regional, ideological, and party lines. However, from the perspective of the dualist conception, what stands out as most significant about the whole affair has less to do with highly contested arguments about the juridical content of the Statute per se than with the undeniable fact of the political controversy surrounding its passage. The intensity of the conflict between the

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modernist lenses as constituting mere narrative tropes. However, such criticisms point in quite opposite directions: the former attack the concept of the "constitutional moment" for its alleged lack of empirical traction, while the latter dismiss it as hopelessly ensnared in the futile search for such traction. For a vigorous defense of the dualist ideal, see Ackerman, "Neo-Federalism?" in Elster and Slagstad, *Constitutionalism and Democracy* (op. cit.), pp. 153-193.

[48] Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass: Harvard University Press, 1998), p.20.

[49] Bruce Ackerman, "The Rise of World Constitutionalism," *Virginia Law Review* (Volume 83, Number 4, May 1997), p.774.

country's two principle political parties on the issue signifies a fundamental break from the basic features of consensus and compromise that had previously characterized the politics of territorial configuration of the Spanish state, so much so that such consensus and compromise was consubstantial with the constitutional order itself.

The Statute proposal was initially an attempt on the part of Maragall and the Catalan branch of the socialist party to capture and channel a certain escalation of territorial aspirations on the part of nationalists in Catalonia, at a time when the moderate nationalist minority coalition then governing the region, *Convergència i Unió*, had its hands tied by the support provided for them by the conservative *Partido Popular*. Coming on the heels of the threat of a unilateral move to convoke a referendum on the part of the Basque nationalists, as contained in the so-called *Plan Ibarretxe*, Maragall's proposal met with the approval of Zapatero, both because it constituted a more moderate alternative to the *Plan Ibarretxe* in its own right and as a means of forging a "popular front" of sorts with peripheral nationalist political forces, one promising sufficient electoral weight to force the PP back into the opposition.

Zapatero's decision to support the proposal for the Catalan Statute and thus to break from the other main statewide party in matters having to do with the territorial configuration of the Spanish state has thus provoked the current constitutional impasse. Like the historicist version of the "conservationist" creed, the "dualist" conception would therefore seem to prescribe that the Court strike down significant parts of the Statute, in the name of conserving the prior consensus. However, unlike the historicist version of the "conservationist" creed, the "dualist" conception would also allow for the possibility that, in the aftermath of such a decision by the Court, should Zapatero, with the implicit support of or even in explicit coalition with nationalists from the periphery, successfully campaign in the upcoming general election and thereby receive a clear electoral mandate in favor of something like the Statute reform, the Court would no longer be legitimated to strike down any further proposal similar in kind, lest it risk losing its prestige. Of course, the complicated politics involved in achieving such a clear mandate, given the current distribution of public opinion as well as mobilizational capacity in Spain, much less the obstacles in the way of repeating any attempts at Statute reform in Catalonia, render such a scenario highly unlikely. Thus, the current constitutional impasse is likely to last for some time to come. In the meantime, given the high stakes involved, continuing attacks from all sides on the Court for its alleged "politicization" should be expected.

X. Conclusion

In this article, we have sought to place the recent controversy over the recusal of Pérez Tremps in both comparative and theoretical perspective. We began by reviewing the ambiguous standards for recusal in place in the Spanish context, and likened them to similar ones in effect in the United States. We next turned to consider the charge that the recent motion of recusal has resulted in the "politicization" of the Court in Spain. We did so first by examining a host of

institutional mechanisms that have been designed to avoid such "politicization," again making use of the comparison between the Spanish context and that of the United States. We then questioned the concept of a "politicized" Court altogether. We concluded by providing an overview of the prescriptions entailed by each for the particular case at hand (as well as the more general problems with) five alternative ideals for the Court – namely, the positivist, the minimalist, the activist, the conservationist, and the dualist conceptions.

