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AN EMPIRICAL STUDY OF THE POLITICAL PARTY BALANCE REQUIREMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND ITS PREDECESSOR-COURT, THE UNITED STATES COURT OF MILITARY APPEALS, FROM 1951 TO 2016

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For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics . . . .[1]

I. Introduction

Currently under the Uniform Code of Military Justice (UCMJ),[2] the United States Court of Appeals for the Armed Forces (CAAF), the

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military's highest appellate court, is comprised of five judges appointed from civilian life by the President of the United States for a term of 15 years and confirmed by the Senate.[3] Created by Congress under its power to regulate the armed forces,[4] the CAAF was established as "a sort of civilian 'Supreme Court' of the military"[5] to hear appeals from court-martial convictions in which either a punitive discharge or confinement for one year or more was adjudged.[6] Although certain court-martial convictions may be appealed to the United States Supreme Court,[7] the CAAF acts in reality as the civilian overseer of the military justice system.[8]

From 1951 to 2016, perhaps the most unique aspect of the CAAF and its predecessor court, the United States Court of Military Appeals (COMA), was its political party balance requirement. Until the end of 2016, according to the CAAF's organizational statute, "[n]ot more than three of the judges of the court may be appointed from the same political

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[1] Justice Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. *457, 469 (1897)*.

[2] 10 U.S.C. §§ 801-946 (2012).

[3] 10 U.S.C. § 942(a)-(b) (2012).

[4] U.S. CONST. art. I, § 8, cl. 14 (The Congress shall have power "[t]o make Rules for the Government and Regulation of the land and naval Forces.").

[5] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

[6] The CAAF has jurisdiction to hear (1) all cases in which a sentence to death has been approved, (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to it; and (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the CAAF has granted review. 10 U.S.C. § 867(a) (2012). The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. 10 U.S.C. § 866(b) (2012). A Court of Criminal Appeals is the first line appellate court for court-martial convictions, and each panel of that court, established by the Judge Advocate General of each service, is composed of not less than 3 appellate military judges. 10 U.S.C. § 866(a) (2012).

[7] *See* 10 U.S.C. § 867a(a) (2012) ("Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.").

[8] Jonathan Lurie, *Military Justice 50 Years After Nuremberg: Some Reflections on Appearance v. Reality*, 149 MIL. L. REV. 189, 191 (Summer, 1995).

party."[9] And when the Court was initially conceived as the United States Court of Military Appeals, it consisted of three judges appointed from civilian life by the President for a term of 15 years, and "[n]ot more than two of the judges of such court shall be appointed from the same political party."[10] Thus, a political party balance requirement, that permitted no more than a bare majority of the Court to be from the same political party, was in the UCMJ from its effective date in 1951 through 2016. On December 23, 2016, in the National Defense Authorization Act for Fiscal Year 2017, at the CAAF's own request, Congress eliminated the political party requirement.[11] In the CAAF's recommendation to Congress, the Court argued that after sixty-five years, "the party balance requirement ha[d] outlived its usefulness, imposing an irrelevant limitation on who may be nominated and confirmed to sit on the Court."[12]

In an effort to determine whether the political party of the appointed judge was irrelevant or if, in fact, it had any impact of a judge's judicial behavior, I conducted an empirical study of the votes of all the judges who have served on the Court (to include both the CAAF, and its predecessor-court, the COMA) from 1951 to 2016.[13] My purpose was to employ a quantitative analysis in an attempt to confirm or reject the significance of the political balance requirement, as well as various other hypotheses of judicial behavior.

II. Background

The CAAF is one of only a few federal courts that had a political party balance requirement.[14] In general, Congress has limited the imposition of

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9 10 U.S.C. § 942(b)(3) (2012).

10 *Art. 67(a)(1), Uniform Code of Military Justice*, PUB. L. 506 (81st Cong.), ch. 169 (2d Sess.), 64 STAT. 107, 129 (Act of May 5, 1950, PUB. L. 506, 1950 U.S.C.C.A.N., Vol. 1 at 130).

11 *§541(c), National Defense Authorization Act for Fiscal Year 2017*, PUB. L. 114-328 (114th Cong. 2d Sess.), 130 STAT. 2000 (Dec. 23, 2016).

12 Email from Judge Scott Stucky entitled *Political Party*, to the author (Mar. 22, 2017) (on file with author).

13 References to the Court will include both the CAAF and COMA.

14 The United States Court of International Trade, an Article III court, is comprised of nine judges appointed by the President with the advice and consent of the Senate, and "[n]ot more than five of such judges shall be from the same political party." 28 U.S.C. § 251 (2012). The United States Court of Appeals for Veterans Claims, an Article I court, is comprised of at least three and not more than seven judges, and "[n]ot more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party." 38 U.S.C. § 7253 (2012).

a political party balance requirement to independent administrative agencies, ostensibly in order to ensure non-partisanship.[15] For example, no more than three of the six members appointed by the President to the Federal Election Commission "may be affiliated with the same political party."[16] With respect to the five member Federal Communications Commission appointed by the President, "[t]he maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission."[17] No more than three of the five commissioners appointed by the President to the Federal Trade Commission "shall be members of the same political party."[18] No more than three of the five commissioners appointed by the President to the Federal Maritime Commission "may be appointed from the same political party."[19] No more than three of the five members appointed by the President to the National Transportation Board "may be appointed from the same political party."[20] No more than three of the five members appointed by the President to the Nuclear Regulatory Commission "shall be members of the same political party."[21] And as to the five commissioners appointed by the President to the Securities and Exchange Commission, "[n]ot more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable."[22]

The constitutionality of a political party balance requirement for officers of the United States who require nomination by the President and confirmation by the Senate has been disputed.[23] In a Memorandum Opinion for the General Counsels' Consultative Group, the Office of Legal Counsel of the United States Department of Justice concluded that the political party balance requirement violated the Appointments Clause of

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[15] Matthew A. Samberg, Note, *'Established by Law': Saving Statutory Limitations on Presidential Appointments From Unconstitutionality*, 85 N.Y.U. L. REV. 1735, 1750-51 (2010) (noting that independent federal regulatory agencies "play critical roles in promoting the national welfare, and Congress has decided that the important decisions they make require bipartisan input").
[16] 2 U.S.C. § 437c.(a)(1) (2012).
[17] 47 U.S.C. § 154(b)(5) (2012).
[18] 15 U.S.C. § 41 (2012).
[19] 46 U.S.C. § 301(b)(1) (2012).
[20] 46 U.S.C. § 1111(b) (2012).
[21] 42 U.S.C. § 5841(b)(2) (2012).
[22] 15 U.S.C. § 78d.(a) (2012).
[23] Samberg, *supra* note 15, at 1737.

the United States Constitution.[24] The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[25] The Office of Legal Counsel reasoned that such a limitation was "an unconstitutional attempt to share in the appointment authority which is textually committed to the President alone."

The only congressional check that the Constitution places on the President's power to appoint "principal officers" is the advice and consent of the Senate. As Justice Kennedy recently wrote for himself and two other members of the Court:

> By its terms, the [Appointments] Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the Senate's power to give or withhold its 'Advice and Consent.' No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment. *Public Citizen v. Department of Justice*, 491 U.S. 440, 483 (1989)(Kennedy, J., concurring).[26]

Thus, the principal argument against the political party balance requirement is a textual one. "[T]he text of the Constitution gives the legislative branch one method—and one method only—to restrict the President's appointment power: by providing or withholding the advice and consent of the Senate."[27] Several commentators and scholars have also argued that the political party balance requirement "violates traditional separation of power principles": "Limitations on the President's nomination power, it is argued, should be suspect under the separation of powers set up by the U.S. Constitution as a congressional encroachment on an executive prerogative."[28]

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[24] *Common Legislative Encroachments on Executive Branch Authority*, 13 OP. O.L.C. 248, 250 (1989) (superseded by *The Constitutional Separation of Powers Between the President and Congress*, 20 OP. O.L.C. 124, 124 n.* (1996)).
[25] U.S. CONST. art. II, § 2, cl. 2.
[26] *Common Legislative Encroachments*, *supra* note 24, at 250.
[27] Samberg, *supra* note 15, at 1752.
[28] Samberg, *supra* note 15, at 1735-36. *See* Hanah M. Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 754, 747

> Limitations on appointments involve Congress statutorily tying the hands of the President in his executive prerogative of choosing officers, a process in which Congress normally has no power. The Senate . . . has only the power to veto, never to choose. Giving the Senate a choosing role—and giving the House any role—is a case of congressional incursion and aggrandizement, and it is thus properly examined as an incursive separation of powers problem.[29]

However, the counter argument in favor of Congressional limitations on appointments by the President, such as a political balance requirement, is a strong one and lies in the Necessary and Proper Clause of the Constitution.[30] That clause provides Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution [all of its Article I, Section 8] Powers."[31] Under this clause, Congress is given plenary power to create and structure "a vast and varied federal bureaucracy,"[32] and from this power, Congress may have the inherent power to specify eligibility requirements for officers within that bureaucracy.[33]

& n.12 (2008); Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1926 (2007); Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women's Bureau at the Department of Labor?*, 37 LOY. U. CHI. L.J. 43, 46 (2005); Adam J. Rappaport, Note, *The Court of International Trade's Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429 (2001); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 534-35 (1998); Richard P. Wulwick & Frank J. Macchiarola, *Congressional Interference with the President's Power to Appoint*, 24 STETSON L. REV. 625, 643-45 (1995).

[29] Samberg, *supra* note 15, at 1754.

[30] U.S. CONST. art. II, § 2, cl. 18.

[31] *Id.*

[32] Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S.Ct. 3138, 3155 (2010) ("No one doubts Congress's power to create a vast and varied federal bureaucracy.") and *see id.* at 3165 (Breyer, J. dissenting) ("[T]he Necessary and Proper Clause affords Congress broad authority to 'create' governmental 'offices' and to structure those offices 'as it chooses.'") (quoting Buckley v. Valeo, 424 U.S. 1, 138 (1976) (*per curiam*)).

[33] Samberg, *supra* note 15, at 1753.

The United States Supreme Court has never specifically addressed the constitutionality of the political party balance restriction on a President's choice of nominees to a federal court or administrative agency.[34] And additionally, no court has addressed what the effect on the court or agency would be if the political party balance were upset by an existing member changing his party affiliation from one party to another.[35] However, in *Myers v. United States*, a case in which the Supreme Court invalidated a Congressional statute requiring the consent of the Senate for the President to remove an executive officer from office,[36] the Court in dictum appeared to approve of the power of Congress to prescribe qualifications for office:

> It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation. As Mr. Madison said in the First Congress:
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> "The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. In this point of

[34] *Id.* at 1737, 1740-42, 1747.

[35] *See id.* at 1756 ("[W]hat if the Commission's political balance was thrown off because an existing member changed his party affiliation from Republican to Democratic?"). However, the de facto officer doctrine would appear to validate the decision of a court with a defective member. This doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of [his] appointment to office is deficient." Ryder v. United States, 515 U.S. 177, 180 (1995).

[36] Myers v. United States, 272 U.S. 52 (1926). The *Myers* court invalidated the statute because it held that under Article II of the Constitution, the President had sole power to remove as an incidence of his power to appoint.

> view, we shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the legislative and executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the government." 1 Annals of Congress, 581, 582.
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> The legislative power here referred to by Mr. Madison is the legislative power of Congress under the Constitution, not legislative power independently of it. Article 2 expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise provided by the Constitution.[37]

Even Justice Brandeis, who in dissent in *Myers* argued that "[t]here is not a word in the Constitution which in terms authorizes Congress to limit the President's freedom of choice in making nominations for executive offices," recognized that Congress had continually exercised that power and that Presidents had acquiesced to it:

> But a multitude of laws have been enacted which limit the President's power to make nominations, and which through the restrictions imposed, may prevent the selection of the person deemed by him best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the government. Every President has approved one or more of such acts. Every President has consistently observed them. This is true of those offices to which he makes

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[37] *Myers*, 272 U.S. at 128-29.

> appointments without the advice and consent of the Senate as well as of those for which its consent is required.
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> Thus Congress has, from time to time, restricted the President's selection by the requirement of citizenship. It has limited the power of nomination by providing that the office may be held only by a resident of the United States; of a state; of a particular state; of a particular district; of a particular territory; of the District of Columbia; of a particular foreign country. It has limited the power of nomination further by prescribing specific professional attainments, or occupational experience. It has, in other cases, prescribed the test of examinations. It has imposed the requirement of age; of sex; of races; of property; and of habitual temperance in the use of intoxicating liquors. Congress has imposed like restrictions on the power of nomination by requiring political representation; or that the selection be made on a nonpartisan basis.[38]

If Congress's power to create a federal bureaucracy under the Necessary and Proper Clause is considered in conjunction with its specific power in the Constitution "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[39] then its ability to set a political balance requirement for a Presidential appointment may be secure. As one federal court has concluded:

> The Constitution vests in Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces,' U.S. Const. Art. I, § 8, and it is within this power that the Uniform Code of Military Justice . . . resides. Proceedings under this Code are not required to conform with the Due Process Clause of the Fifth Amendment to exactly the same degree as proceedings in civil courts. Nevertheless, though greater latitude

[38] *Id.* at 265-71 (footnotes omitted).
[39] U.S. CONST. art. II, § 2, cl. 14 and 18.

> respecting due process is allowed military tribunals, due process is requisite.[40]

It is within that greater latitude respecting due process that the political balance requirement may find its Constitutional justification. Still, as noted by one commentator, the constitutional question of the validity of statutory restrictions on the appointment of a principal officer no doubt "will depend on whether the Court views them as permissible restrictions or prohibited usurpations."[41]

III. Legislative History

Whether the political party balance requirement, which limits eligibility for presidential appointments, is constitutional or not, it was, nonetheless, a statutory requirement for the Court that had been in the UCMJ since its inception and remained in place for sixty-five years. The legislative history behind the establishment of the requirement and the retention of the requirement over the years is a lengthy tale.

At the end of World War II, many complaints surfaced about grave miscarriages in the application of military justice.[42] As a result, in July, 1948, the Secretary of Defense appointed a special committee chaired by Professor Edmund M. Morgan, Jr., of Harvard Law School, to establish a Uniform Code of Military Justice applicable to all the services in times of war and peace.[43] "The spirit of the new act was to grant an accused more protection when he was being investigated about, charged with, and tried for an offense, and to extend to him the right of review by a body divorced from the military system."[44] Seven months later, Professor Morgan transmitted a draft Uniform Code of Military Justice to the Secretary of Defense, and the Secretary then transmitted it forthwith to Congress on February 8, 1949.[45] The Morgan draft recommended an appellate review

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[40] Gallagher v. Quinn, 363 F.2d 301, 303-04 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966) (internal citations omitted).
[41] Samberg, *supra* note 15, at 1748.
[42] JONATHAN LURIE, ARMING MILITARY JUSTICE (VOLUME 1 – THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950)128-35 (1992).
[43] *Id.* at 154-61.
[44] United States v. Merritt, 1 C.M.A. 56, 61, 1 C.M.R. 56, 61 (1951).
[45] LURIE, *supra* note 42, at 193-203.

system of military justice headed by a civilian "Judicial Council."[46] Paragraph (a) of the proposed Article 67 [Review by the Judicial Council] of the Morgan draft UCMJ, provided:

> There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than three members. Each member of the Judicial Council shall be appointed by the President from civilian life and shall be a member of the bar admitted to practice before the Supreme Court of the United States, and each member shall receive compensation and allowances equal to those paid to a judge of a United States Court of Appeals.[47]

Professor Morgan commented that this tribunal was "necessary to insure uniformity of interpretation and administration throughout the armed services" and that it was "consistent with the principle of civilian control of the armed forces that a court of final appeal on the law should be composed of civilians."[48] No political balance requirement was inserted in this initial bill (H.R. 2498).

The bill was then referred to a subcommittee of the House Armed Services Committee that "conducted hearings 6 days a week for almost 5 weeks, during which time a total of 28 witnesses testified" and "a transcript of 1542 pages" was prepared.[49] On the last day of these hearings, Article 67 was debated and a proposal to add a political party balance requirement was discussed as follows:

> Mr. BROOKS [Rep. T. Overton Brooks, D-LA, Chairman of Subcommittee]. Do you have any suggestion, Mr. Elston, on (the proposed Art. 67, UCMJ)?

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[46] *Uniform Code of Military Justice* (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 565-1307 (March 7, 8, 9, 10, 14, 16, 17, 18, 21, 22, 23, 24, 25, 26, 30, 31, April 1,2, and 4, 1949) at 582.
[47] *Id.*
[48] *Id.* at 604.
[49] 95 CONG. REC. 5719-20 (1949).

Mr. ELSTON [Rep. Charles H. Elston, R-OH]. ... I think there should also be a provision that the members should not all be of the same political party.

Mr. RIVERS [Rep. L. Mendel Rivers, D-SC]. That is right. Like the Commissions. The Federal Communications Commission, and so on.

Mr. ELSTON. Yes.

Mr. BROOKS. You might write in there something about bipartisanship. I don't know whether men should be selected, though, because of their affiliation with a political party. I don't think that ought to be the test, but, rather, the ability to do the job.

Mr. ELSTON. I am sure they could find men of ability in both parties.

Mr. RIVERS. Yes; we have ample precedent for that.

Mr. ELSTON. Yes.

Mr. LARKIN [Mr. Felix E. Larkin, Assistant General Counsel, Office of the Secretary of Defense]. I don't think there is a limitation on the Federal court, but I don't recall. I know it doesn't apply to the Court of Claims, anyhow.

Mr. ELSTON. But it is a requirement with respect to a number of boards, such as the Federal Trade Commission ---

Mr. LARKIN. That is right.

Mr. RIVERS. The Federal Communications Commission.

Mr. ELSTON. The Maritime Commission, the Federal Communications Commission ---

Mr. LARKIN. I know the Federal Trade Commission, specifically, has such a requirement.

Mr. ELSTON. Yes, and I think some of the others.

Mr. HARDY [Rep. Porter Hardy, Jr., D-VA]. I wonder if that is a good idea with respect to judicial people. I wouldn't think that in normal practice it would happen, but I wonder if it is a good thing to require.

Mr. RIVERS. It won't hurt.

Mr. BROOKS. Well, I don't know. What concerns me is, when you say there must be a bipartisan board, whether or not the political qualification should be considered in appointment.

Mr. ANDERSON [Rep. John (Jack) Z. Anderson, R-CA]. Mr. Chairman, is it required by any Federal courts?

Mr. RIVERS. I don't think so.

Mr. BROOKS. No Federal courts.

Mr. RIVERS. I don't think so.

Mr. BROOKS. As a matter of fact, however, it has happened in a great many cases with the Supreme Court. I can recall ---

Mr. RIVERS. Harold Burton.

Mr. BROOKS. I can recall the last justice we had from Louisiana was appointed by a Republican President. He was made the Chief Justice subsequently.

Mr. RIVERS. Couldn't we put something in the commentary or the record to say that it is the sense of this group that the judicial qualification must predominate and where possible a bipartisan selection shall be encouraged?

Mr. BROOKS. Yes.

Mr. RIVERS. Just say in the same manner in which the President takes cognizance of this in his selection of the members of the Supreme Court.

Mr. HARDY. For myself, I will subscribe to that statement in the record here as being the sense of my angle on this committee.

Mr. DEGRAFFENRIED [Rep. Edward deGraffenried, D-AL]. I will, too.

Mr. RIVERS. Don't say "bipartisan" because there may be another strong party in the next election.

Mr. DEGRAFFENRIED. Certainly, the National Military Establishment or any court within it wants to and endeavors continually to stay out of politics. We don't regard it as a political branch of the Government, and I don't think Congress does, either.

Mr. ELSTON. No, and that is the reason for my suggestion.

Mr. DEGRAFFENRIED. Yes.

Mr. ELSTON. Because I don't want it to be political. But appointments are made that are political, and certainly there have been many where, in Federal courts, you get an unbalanced court. Take the Supreme Court of the United States today. I don't want to make any comment on it because everybody knows about it, but there have been times when Republicans appointed Democrats, as was pointed out. President Taft appointed Chief Justice White from Louisiana, wasn't it?

Mr. BROOKS. Yes.

Mr. RIVERS. That is right.

Mr. ELSTON. And they have followed a policy of trying to keep the courts nonpartisan and nonpolitical. But it can be abused. For my part, I feel like we ought to say we want it that way.

Mr. RIVERS. Yes.

> Mr. HARDY. Let us do it in the record, Mr. Elston, and not in the law.
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> Mr. ELSTON. Well, that might be the solution of it, although I don't want to just foreclose myself from probably bringing it up again. I just want it certain that this court which is going to be an exceedingly important court is not filled by political appointments.
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> Mr. BROOKS. Let me suggest this thought: don't you think when we make it confirmable by the Senate that you are reaching at the same idea that you have in mind?
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> Mr. ELSON. I don't think that quite reaches it.
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> Mr. ANDERSON. I suggest, Mr. Chairman, that Mr. Smart be authorized to place in the record the views of this committee as expressed by the gentlemen here, that the court be nonpolitical and bipartisan.
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> Mr. BROOKS. Well ---
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> Mr. ANDERSON. That we not put it in the law at the present time---
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> Mr. BROOKS. The question is nonpartisan instead of bipartisan.
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> Mr. ANDERSON. Either way, which is the best legal term, and that we let Mr. Elston reserve the right to raise the issue later on if he so desires. That is just a suggestion.[50]

While Representative Elston's recommendation for a political party balance requirement was left unresolved, several of his other recommendations with respect to Article 67 were adopted by the subcommittee. The name "Judicial Council" was changed to the "Court of Military Appeals," and the number of judges on the Court was set at three by striking the words, "not less than."[51] As a result of subcommittee

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[50] *Uniform Code of Military Justice*, *supra* note 46, at 1272-73.
[51] *Id.* at 1277-80.

amendments to H.R. 2498, on April 7, 1949, Representative Brooks, with the unanimous vote of the subcommittee, reintroduced a clean UCMJ bill, H.R. 4080, to the full House Committee on Armed Services.[52] Paragraph (a) of Article 67 [Review by the Court of Military Appeals], UCMJ, had been rewritten as follows:

> There is hereby established in the National Military Establishment the Court of Military Appeals which shall consist of three judges who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate. No person shall be eligible for appointment to the Court of Military Appeals who is not a member of the bar of a Federal court or of the highest court of a State. The three judges of the Court of Military Appeals shall hold office during good behavior and shall receive the compensation, allowances, perquisites, and retirement benefits of judges of the United States Court of Appeals.[53]

On April 27, 1949, H.R. 4080 was debated before the full House Committee on Armed Services.[54] During this debate, Representative Elston again introduced his recommendation that the Court of Military Appeals provision include a political party balance requirement:

> Mr. ELSTON. . . . I offered another amendment in the [sub]committee which we considered. I understand the chairman has also thought about the matter. That was, with respect to the Court of Military Appeals, that provision be made that no more than two of the members of the court shall be of the same political party.
>
> The CHAIRMAN [Rep. Carl Vinson, D-GA]. I may suggest, Mr. Elston, I am going to offer that amendment for the consideration of the full committee. I think in view of the fact that this is a new military court of civilians, it

[52] H.R. 4080, 81st Cong., 1st Sess. (April 7, 1949).
[53] *Id.* at 54-55.
[54] Full Committee Hearings on H.R. 3341 and H.R. 4080 (No. 44): House of Representatives, Committee on Armed Services (April 27, 1949).

> is nothing but right and proper that it be a nonpartisan court.
>
> Mr. ELSTON. I say, if the chairman offers that, I will be glad to support it. The reason we didn't write it in the subcommittee was I think because we felt we were going to make the court conform as nearly as possible to our United States courts of appeals.
>
> The CHAIRMAN. That is right.
>
> Mr. ELSTON. And there is no provision in the law whereby they shall be bipartisan. However, this is a special court, and I believe that the amendment would be in order. . . .
>
> The CHAIRMAN. Thank you, Mr. Elston.
>
> The CHAIRMAN. May I suggest to my distinguished friend from Texas [speaking to Rep. Paul Kilday, D-TX] the only amendment we ought to put in this:
>
> *Not more than two judges of such court shall be appointed from the same political party.*
>
> I am offering, on page 55, line 4, after "Senate," insert the following new sentence,
>
> *Not more than two judges of such court shall be appointed from the same political party.*
>
> I hope the committee will adopt it because I think it gives strength to it. It makes it nonpartisan and shows the whole tendency of the armed services to be a nonpartisan organization all down the line.
>
> Without objection, the amendment the chairman has offered is agreed to.[55]

Based on this abbreviated dialogue, on April 27, 1949, the House Committee on Armed Services unanimously approved the political party

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[55] *Id.* at 1335-36, 1340, 1350.

balance amendment, and with another unanimous vote sent the UCMJ to the full House of Representatives.[56] Professor Lurie, a history professor at Rutgers University, found that it was, "admittedly, difficult to follow the reasoning behind Elston's and Vinson's support for this change."[57] He wrote the following summary and offered his own negative editorial comments:

> The subcommittee had failed to resolve one final issue before its members unanimously reported the revised draft of the UCMJ (now called H.R. 4080) for favorable consideration to the full House Armed Service Committee. Ohio Representative Elston and others on the subcommittee had wanted appointments to the new court to be nonpolitical and nonpartisan. When the full committee met on April 27, Elston stated that originally he had even intended to propose amending article 67 to include a section that "Not more than two judges of such court shall be appointed from the same political party." The committee chairman, Carl Vinson, now endorsed this amendment. Because "this is a new military court of civilians, it is nothing but right and proper that it be a nonpartisan court."
>
> There was no provision in existing law that federal courts be bipartisan. But Elston claimed that "this is a special court." Granting this premise, the question can be asked how it becomes nonpartisan in nature when two of its three [now five] judges can be from the same political party. Moreover, if the committee had truly desired to make the new court nonpartisan, it would have been just as easy to stipulate in article 67 that specific party affiliation should not be the basis for judicial appointment. To put it another way, if this tribunal was to be like other federal appeals courts – except in its scope of jurisdiction – why should it be necessary to provide

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[56] *Id.* at 1340, 1349-50.
[57] LURIE, *supra* note 42 at 229.

> such a stipulation here, but not for these other judicial bodies?[58]

On April 28, 1949, Representative Brooks, from the House Committee on Armed Services, submitted Report No. 491 to the whole House of Representatives to accompany H.R. 4080.[59] This report commented on the substantive amendments that had been made to the original bill.[60] With respect to the political party balance requirement, the report asserted that "[t]he committee [wa]s of the opinion that it is desirable to remove every possible criticism from the proposed code and that a limitation on the number of judges who may be appointed from the same political party is not only appropriate but highly desirable."[61] On May 5, 1949, the bill H.R. 4080 passed in the full House.[62] Article 67(a) now read as follows:

> There is hereby established in the National Military Establishment the Court of Military Appeals which shall consist of three judges who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate. Not more than two of the judges of such court shall be appointed from the same political party. No person shall be eligible for appointment to the Court of Military Appeals who is not a member of the bar of a Federal court or of the highest court of a State. The three judges of the Court of Military Appeals shall hold office during good behavior and shall receive the compensation, allowances, perquisites, and retirement benefits of judges of the United States Court of Appeals.[63]

A Senate subcommittee of the Senate Committee on Armed Services conducted hearings on the Senate's version of the UCMJ bill, S. 857, in conjunction with H.R. 4080.[64] Article 67(a) in the S. 857, mirrored the

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58 *Id.* at 228-29 (footnote omitted).
59 H.R. REP. NO. 491 (81st Cong., 1st Sess. 1949).
60 *Id.* at 9.
61 *Id.*
62 95 CONG. REC. 5744 (1949).
63 H.R. 4080, 81st Cong. 1st Sess., H.R. REP. NO. 491, Union Calendar No. 190 (April 28, 1949) at 56.
64 *Uniform Code of Military Justice*: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services, 81st Cong., 1st Sess. 1-334 (April 27, and May

provision in the Morgan draft.[65] With respect to Article 67(a), debate in the Senate subcommittee focused on whether the members of the Judicial Council should be appointed for life or a term of years and whether to stagger the terms of the judges, as well as on salary and retirement benefits.[66] No discussion was made as to the need for a political party balance requirement. However, when the subcommittee referred the UCMJ bill to the full Senate Committee on Armed Services on June 10, 1949, it was a revised version of H.R. 4080 that included the political balance requirement and read as follows:

> There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the National Military Establishment. The Court of Military Appeals shall consist of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of eight years. Not more than two of the judges of such court shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. Each judge shall receive a salary of $17,500 a year and shall be eligible for reappointment. The President shall designate from time to time one of the judges to act as Chief Judge. The Court of Military Appeals shall have power to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum. A vacancy in the court shall not impair the right of the remaining judges to exercise all the powers of the court.[67]

The full Senate then considered H.R. 4080, as amended, and on February 3, 1950, the bill passed.[68] In conference between the two houses of Congress, the House and Senate compromised on the term of office,

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4, 9, and 27, 1949). *See* H.R. 4080 in the Senate of the United States, 81st Cong., 1st Sess. (May 6, 1949).

[65] *Compare id.* at 18 *with Uniform Code of Military Justice*, *supra* note 46, at 582.

[66] *Uniform Code of Military Justice*, *supra* note 64, at 43, 311-15.

[67] H.R. 4080 in the Senate of the United States, S. REP. NO. 486, Calendar No. 481, 81st Cong., 1st Sess. (June 10, 1949), Art. 67(a)(1) at 159.

[68] 96 CONG. REC. 1292-1310; 1353-70; 1412-17; 1430-47 (1950).

salary, and benefits accorded the judges, but no change was made to the political party balance requirement.[69] The UCMJ was approved by Congress on May 5, 1950, signed into law by President Truman on May 6, 1950, and went into effect on May 31, 1951.[70] The political party balance requirement was now law:

> There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the Department of Defense. The Court of Military Appeals shall consist of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of such court shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. Each judge shall receive a salary of $17,500 a year and shall be eligible for reappointment. The President shall designate from time to time one of the judges to act as Chief Judge. The Court of Military Appeals shall have power to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum. A vacancy in the court shall not impair the right of the remaining judges to exercise all the powers of the court.[71]

Several years after the political party balance requirement was written into the UCMJ, the first Chief Justice of the Court, Robert E. Quinn, sought to have legislation passed in both 1956 and 1957 that would have

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[69] *See* CONF. REP. NO. 1946, Uniform Code of Military Justice Conference Report to accompany H.R. 4080 (April 24, 1950) at 4.

[70] *Uniform Code of Military Justice*, PUB. L. 506 (81st Cong.), ch. 169 (2d Sess.), 64 STAT. 107 (Act of May 5, 1950, Pub. L. 506, 1950 U.S.C.C.A.N., Vol. 1 at 110). The original 140 articles of the UCMJ were codified at 50 U.S.C. (Chap. 22) §§ 551-736 and enacted into positive law at 10 U.S.C. §§ 801-810 in 1956 (Act of August 10, 1956, PUB.L. 1028 (84th Cong.), ch. 1041 (2d Sess.), 70A STAT. 36, 1956 U.S.C.C.A.N., Vol. 1 at 1336, 1379-1431. *See* LURIE, *supra* note 42, at 255. *See also* Art. 140, Sec. 5, UCMJ, Act of May 5, 1950, PUB. L. 506, 1950 U.S.C.C.A.N., Vol. 1 at 145 (providing that the UCMJ will become effective on the last day of the twelfth month after approval of the Act).

[71] *Art. 67(a)(1), UCMJ*, Act of May 5, 1950, PUB. L. 506, 1950 U.S.C.C.A.N., Vol. 1 at 130.

deleted the requirement that no more than two of the judges be from the same political party.[72] Both of these attempts were unsuccessful.[73]

In 1979, the General Counsel for the Department of Defense (DoD) circulated a draft staff paper on possible legislative changes to the Court.[74] After receiving public comment on the draft paper, DoD "formulated an administration proposal (H.R. 6298, 96th Cong., 2d Sess.) and submitted it to Congress on January 24, 1980 (126 Cong. Rec. 636)."[75] One of the provisions of that bill "eliminated the political qualifications test (i.e., no more than two from same political party) and substituted a requirement that appointments be made only on basis of fitness to perform duties of office and age (under 65 years old at time of appointment)."[76] During Congressional hearings on this bill, one of the Court's judges stated that the Court was "pleased to see the elimination of the political party criteria for selecting further judges."[77] "Judicial competence," he continued, "[was] the Court believes, a far better yardstick."[78] During the Congressional markup of the bill, the proposed elimination of the political party balance requirement was discussed, and Representative Richard White of Texas defended the elimination by noting that "to my knowledge, there are no other judicial appointment provisions that have that type of language in them" and that "the testimony at the time was that they wanted to make it nonpolitical [and] that they felt this [political party provision] was not needed."[79] Representative Marjorie Holt of Maryland, however, then offered an amendment to reintroduce the political party balance

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[72] JONATHAN LURIE, PURSUING MILITARY JUSTICE (VOLUME 2 – THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980) 125-27, 138-39 (1998).
[73] *Id.*
[74] Draft, *Reform of the Court of Military Appeals*, Office of the General Counsel, Department of Defense, May 7, 1979 (located in the Law Library, United States Court of Appeals for the Armed Forces, 450 E St, NW, Washington, D.C.).
[75] *Report of Department of Defense Study Group on the United States Court of Military Appeals*, Office of the General Counsel Department of Defense, July 25, 1988 at 11 (located in the Law Library, United States Court of Appeals for the Armed Forces, 450 E St, NW, Washington, D.C.).
[76] *Id.*
[77] *Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process*, Hearings on H.R. 6406 and H.R. 6298 before the Military Personnel Subcommittee of the Committee on Armed Services, House of Representatives, 96th Cong., 2d Sess., Feb, 7, Mar. 6, and Sept. 23, 1980 (H.A.S.C. NO. 96-55, G.P.O. Washington, DC 1980) at 77, 80 (testimony and written statement of Hon. A. B. Fletcher, Jr., Chief Judge of the U.S. Court of Military Appeals).
[78] *Id.*
[79] *Id.* at 99-100.

requirement, commenting that "I think it has worked well to have some representation of both political parties on the court and I see no reason to change it."[80] In a voice vote, the amendment to reintroduce the political party balance requirement passed.[81] A clean bill (H.R. 8188) that included this amendment "was passed by the House on October 2, 1980 (126 Cong. Rec. 29011-29013) and referred to the Senate on October 8, 1980, but no further action was taken on this bill."[82]

The political party balance requirement was next mentioned again in a January 27, 1989, report of a United States Court of Military Appeals Committee chaired by Professor James Taylor, Jr., of Wake Forest University School of Law.[83] That report commented:

> Article 67(a)(1) provides that no more than two of the three judges may be from the same political party. That provision was apparently included, at least initially, to prevent the incumbent President in 1950 from appointing all three judges from his political party to the then new Court of Military Appeals. The Committee believes that the language regarding party affiliation is an anachronism and should be removed.[84]

The committee specifically recommended that "Article 67, U.C.M.J. should be amended by removing the 'same political party' limitation in the appointment of judges."[85]

The next reference to the Court's political party balance requirement came in an article, "Going on Fifty: Evolution and Devolution in Military Justice," by Mr. Eugene R. Fidell, a frequent commentator on military justice matters. He wrote about the political party requirement in these terms: "Less happily, despite the 1989 recommendation of the court committee headed by Dean James Taylor Jr., the political balance requirement remains on the books, even though many think that such

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[80] *Id.*
[81] *Id.* at 100.
[82] *Report of Department of Defense Study Group*, *supra* note 75, at 12.
[83] *United States Court of Military Appeals Committee Report*, January 27, 1989 (located in the Law Library, United States Court of Appeals for the Armed Forces, 450 E St, NW, Washington, D.C.).
[84] *Id.* at 12.
[85] *Id.* at 26.

requirements are both inappropriate for a criminal appellate court and so easily manipulated as to be meaningless (aside from bringing the nomination process into disrespect and thereby needlessly detracting from the court's standing in the American judicial pantheon)." [86] In a later law review article, "The Next Judge," Mr. Fidell outlined what he believed should be the qualifications of the next judge to be appointed to the CAAF, and with respect to the political balance requirement, he argued:

> The third qualification for appointment to the Court of Appeals springs from the political balance requirement. This indefensible provision, which has been in the UCMJ from the beginning, permits no more than a bare majority of the court to be members of the same political party. It is easily circumvented. For example, a candidate may be (or become) a registered Independent, or may be a merely nominal member of one party but enjoy strong political support from legislators of the other party. This provision should be repealed, but as long as it is on the books it must be complied with.[87]

Finally, in the recent hornbook, *Court-Martial Procedure*, the qualifications for the Court were described in these terms:

> It is composed of five civilian members appointed by the President with the advice and consent of the Senate for a term of fifteen years. No military experience or affiliation is required for service on the court. Instead, political affiliation is of statutory concern as not more than two members of the court may be appointed from the same political party.[88]

In a footnote to that passage, it was noted that the first panel of judges on the Court chosen by President Truman in 1951 were all reserve officers,

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[86] Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1218 (1997) (also reprinted in EUGENE R. FIDELL & DWIGHT H. SULLIVAN, EDS., EVOLVING MILITARY JUSTICE (2002) at 18).

[87] Eugene R. Fidell, *The Next Judge*, 5 J. NAT'L SECURITY L. & POL'Y 303, 308 (2011).

[88] FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE (3d ed. 2006), Vol. 2 at § 25-61.00 at 25-33 (footnotes omitted).

with one from each branch of the military service.[89] During the Senate hearings preceding the enactment of the UCMJ, the issue as to whether judges on the Court should be statutorily required to have had some military experience was debated, but rejected, and military experience was never a prerequisite for appointment to the Court.[90] In 1956, President Eisenhower appointed the first judge without prior military experience to the Court when he appointed former Republican Senator Homer Ferguson to the Court.[91] In 1990, Congress specifically amended the qualification statute to prohibit appointment to the Court of military officers who had retired from active duty after 20 years.[92] In 2013, the Congress, however, modified that rule to allow officers who had retired from active duty after 20 years as long as the appointment occurred seven years after the retirement.[93] Despite this tinkering to the civilian/military aspect of the qualifications necessary for appointment to the Court, Congress did not tinker with the political party balance requirement again until 2016. And as noted by Professor Lurie, political considerations have been an integral part of presidential appointments to the Court since 1951:

> It is certainly no secret that judicial appointments are not always based on merit. Nor should one be surprised that selections to a court such as USCMA [COMA] are considered less important than appointments to other federal appellate benches. On the other hand, by refusing

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[89] *Id.* at § 25-61.00 at 25-33 n.214.

[90] WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 49 (1973). *See also Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, *supra* n.46, at 1275-76; *Full Committee Hearings on H.R. 3341 and H.R. 4080 (No. 44): House of Representatives, Committee on Armed Services*, *supra* note 54 at 1339-40; LURIE, *supra* note 42, at 227.

[91] *Id.*

[92] *See National Defense Authorization Act for Fiscal Year 1991*, PUB. L. NO. 101-501, 104 STAT. 1485 (Nov. 5, 1990) at § 541(f) (providing that "[f]or purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life"). This change did not alter the President's ability to appoint retired reserve officers to the Court, as long as they had not served on active duty for 20 or more years.

[93] *See National Defense Authorization Act for Fiscal Year 2014*, PUB. L. NO. 113-66, 127 STAT. 672 (Dec. 26, 2013) at § 531(a) (providing that "a person may not be appointed as a judge of the court within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force"). This cooling off period is similar to that used for the appointment of the Secretary of Defense. *See* 10 U.S.C. § 113 (2012) ("A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force.").

> to equate USCMA judges with other federal appellate judges by granting them life tenure, Congress in effect belittles the importance of the court it created more than forty years ago. Similarly, by keeping the USCMA under the jurisdiction of the Armed Services Committee rather than the Judiciary Committee, Congress further ensures that the tribunal's future rests with a body for whom qualifications of legal ability and jurisprudential distinction are secondary to political connections and expediency. This pattern in appointments became well established during the Truman, Eisenhower, Kennedy and Johnson eras.[94]

In 2016, the CAAF judges forwarded several recommended legislative changes to the General Counsel of the Department of Defense.[95] These included a modification to the term of service of two of the judges, a modification to the daily rate of compensation for its senior judges when performing duties with the Court, an increased authority to administer oaths, a repeal of the dual compensation provision relating to its judges, and a repeal of the political party balance requirement.[96] The Court offered the following rationale with respect to the recommended elimination of the political party provision:

> It is somewhat ironic that in attempting to avoid politicizing the court [when the political balance amendment was initially proposed], the amendment inserted politics into the selection process by requiring that the President consider the political affiliation of each potential nominee. Everyone agrees that this court – as all courts – should be nonpartisan. However, after 65 years of operation, there appears little reason to continue

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[94] Jonathan Lurie, *Presidential Preferences and Aspiring Appointees: Selections to the U.S. Court of Military Appeals 1951-1968*, 29 WAKE FOREST L. REV. 521, 555-56 (1994).
[95] Email from Court Executive to the author entitled *Tentative Legislative Package* dated 5 January 2017 (on file with author).
[96] *Id.*

> the requirement that political affiliation be a consideration for appointment to the court.[97]

The General Counsel's office reviewed the recommended legislative changes but felt they had been submitted too late in the term to be included in the current year's National Defense Appropriation Act.[98] That office recommended that the Court submit its recommendations directly to Congress.[99] One CAAF judge, Judge Stucky, had previously been the majority counsel to the Senate Armed Services Committee. On behalf of the Court, on April 11, 2016, he forwarded the suggested changes to Congress.[100] With respect to the political balance requirement, the Court noted, as mentioned earlier, that the provision had "outlived its usefulness" and imposed "an irrelevant limitation on who may be nominated and confirmed to sit on the Court."[101] The Court also stated that "[i]t does not appear that any other Federal court includes a party balance requirement."[102] This latter statement was incorrect because, as previously discussed, both the United States Court of International Trade and the United States Court of Appeals for Veterans Claims have this requirement. Nonetheless, without discussion or comment, Congress approved all of the CAAF's recommended legislative changes, and the political balance requirement ended on December 23, 2016.[103]

IV. Literature Review

I am unaware of any previous empirical scholarship on the judicial ideology of the CAAF from its inception to the present or on the impact that the political party balance requirement has had on that ideology. In

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[97] Copy of proposed amendment rationale provided by the Chief Judge Erdmann to the author on 2 March 2017 (on file with author).
[98] Emails from Chief Judge Erdmann to the author entitled *CAAF Legislative Package*, *Legislative Sitrep*, and *Legislative Proposals* dated 2 March 2017 (on file with author); email from Dwight Sullivan, DoD GC's office, entitled *A Little Help* dated 15 February 2017 (on file with author).
[99] *Id.*
[100] Emails from Chief Judge Erdmann to the author entitled *CAAF Legislative Package*, *Legislative Sitrep*, and *Legislative Proposals* dated 2 March 2017 (on file with author); email from Judge Stucky to author entitled *Political Party* dated 22 March 2017 (on file with author).
[101] *Id.*
[102] *Id.*
[103] *§541(c), National Defense Authorization Act for Fiscal Year 2017*, PUB. L. 114-328 (114th Cong. 2d Sess.), 130 STAT. 2000 (Dec. 23, 2016).

fact, two military authors recently commented that "[t]here have been few, if any, statistical reviews or empirical military law articles published in academic journals to date."[104] As support for this statement, they conducted a Boolean search using the word "empirical" in the Westlaw Legal Research Search Engine and found no military justice articles with that word in the title.[105]

In addition, the CAAF lacks any sort of comprehensive statistical database for its opinions from its inception in 1951 to its current 2016-2017 term. As a consequence, no statistics exist with respect to the individual vote of each judge in each published case, the decisional outcome in each case (for the government or for the appellant), or whether the decision was a reversal or affirmance of the decision below. And as a further consequence, no empirical analysis has been conducted on the judicial behavior of judges on the CAAF. The only resource that I could find that touched on the judicial ideology of the Court was a partial statistical overview of the Court's recent opinions that has been provided annually for the years 2006 to 2016 by a blog, www.caaflog.com.[106] This overview focused on the voting patterns of the judges (e.g., who are most likely to vote together and who are most likely to vote in favor of the government), but it made no attempt to analyze the judicial ideology of the Court or the impact of the political party balance requirement.

Unlike the complete lack of empirical research and statistical analysis for the CAAF, a plethora of data and empirical research exist with respect to the judicial behavior of the United States Supreme Court and the U.S. Courts of Appeals. In fact, large, publicly available datasets exist for both the United States Supreme Court and the United States Courts of Appeals.[107] The Supreme Court Database was produced by Professor Harold J. Spaeth of Michigan State University under a grant from the National Science Foundation (NSF), and it contains over two hundred

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[104] John A. Sautter & J. Derek Randall, *A Jury of One's Peers: An Empirical Analysis of the Choice of Members in Contested Military Courts-Martial*, 217 MIL. L. REV. 91, 100 (2013).
[105] *Id.* at 100 n.56.
[106] *See* CAAFLOG, http://www.caaflog.com/category/end-o-term-stats (last visited Nov. 20, 2017).
[107] *See* http://supremecourtdatabase.org/ or http://scdb.wustl.edu/ or http://artsandsciences.sc.edu/poli/juri/sct.htm [United States Supreme Court Database]; http://artsandsciences.sc.edu/poli/juri/appct.htm [U.S. Courts of Appeals Database]; http://artsandsciences.sc.edu/poli/juri/attributes.htm [Judicial Attributes Database of U.S. Courts of Appeals].

pieces of information about each case decided by the Court between the 1946 and 2015 terms, including the court whose decision the Supreme Court reviewed, the parties, the legal provisions in the case, and the votes of the justices.[108] A new legacy, but more limited, database has been added for Supreme Court cases from 1791 to 1945, which includes information about the individual dispute involved and the votes of the individual justices.[109] Two datasets exist for the U.S. Courts of Appeals: a standard voting/decisional database and a judicial attributes database.[110]

The first database, referred to simply as the Courts of Appeals Database, was compiled by Professor Donald Songer of the University of South Carolina, also under a NSF grant, and it contains the votes and decisions in published opinions from each circuit court decided during the period from 1925 to 1996, as well as numerous other variables.[111] That database was updated for the period 1997 to 2002 by Professor Ashlyn Kuersten of Western Michigan University and Professor Susan Haire of the University of Georgia.[112] The second database, referred to as the Judicial Attributes Database, was produced by Professor Gary Zuk, Professor Deborah Barrow, and Professor Gerard Gryski, all of Auburn University, under a separate NSF grant, and it includes personal information about individual judges who served on the courts of appeals during the period from 1801 to 1994, to include race, gender, religion, appointing president, and previous occupational background.[113]

With respect to written empirical studies of the judicial behavior of the federal judiciary, numerous books and law review article exist. In his seminal book from 1959, *Quantitative Analysis of Judicial Behavior*, Professor Glendon Schubert of Michigan State University offered the

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108 *The Supreme Court Database*, WASH. U. L., http://supremecourtdatabase.org (last visited Nov. 20, 2017).
109 *Id.*
110 *U.S. Appeals Courts Database*, U. S. C., http://artsandsciences.sc.edu/poli/juri/appct.htm (last visited Nov. 20, 2017); *Attributes of U.S. Federal Judges Database*, U. S. C., http://artsandsciences.sc.edu/poli/juri/attributes.htm (last visited Nov. 20, 2017).
111 *U.S. Appeals Courts Database*, U. S. C., http://artsandsciences.sc.edu/poli/juri/appct.htm (last visited Nov. 20, 2017).
112 *Id.*
113 *U.S. Federal Judges Database*, U. S. C., http://artsandsciences.sc.edu/poli/juri/attributes.htm (last visited Nov. 20, 2017).

following observations about the empirical analysis of judicial behavior through counting:

> All quantitative analysis begins with counting and with simple arithmetic. In many instances, these everyday numerical operations yield new data and shed new light on hitherto unresolved questions. Judicial behavior, no less than many other realms of human activity, can be illuminated if one pays careful attention to the quantities of cases which are handled in various ways. At the very least, such quantitative analyses can yield important information for policy makers, administrators and scholars interested in the administrative aspects of judicial processes. But they can accomplish a great deal more: we shall endeavor to show how such data can be used to confirm or infirm meaningful hypotheses about the activities of judges.[114]

He then proceeded to count the individual votes of the justices on the United States Supreme Court (members appointed by the President with life tenure) in all the published, non-per curiam opinions from the 1946 term to the 1957 term;[115] he also counted the individual votes of the justices on the Michigan Supreme Court (members who are nominated for election by state party conventions and elected for eight-year terms) in all of that Court's published opinions from its 1955 term through its 1957 term.[116] Using this data, he conducted a majority and dissenting voting bloc analysis of the opinions.[117] In his own words, this bloc analysis "focuse[d] upon the recurring uniformities in the interaction among individuals in a small group, and it permit[ted him] to make inferences about both the effect of the group upon individual justices and the effect of individual justices upon the Court."[118] After conducting this bloc analysis, he found that "there appeared to be no significant partisan dimension to the [voting] blocs on the United States Supreme Court."[119] However, with respect to the Michigan Supreme Court, he found that

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[114] GLENDON A. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 25 (1959).
[115] *Id.* at 77-129.
[116] *Id.* at 129-142.
[117] *Id.* at 77-142.
[118] *Id.* at 16.
[119] *Id.* at 129.

"partisanship produced changes in the group behavior of the justices."[120] He concluded his analysis with this thought: "[T]he partisan political affiliations of the justices appear to have been irrelevant to the group behavior of the United States Supreme Court; while bloc analysis suggests its primary importance in the case of the Michigan Supreme Court. There may, after all, be validity in the assumption that life tenure makes for independence of judges."[121]

In 1993, in their book, *The Supreme Court and the Attitudinal Model*, Professor Spaeth of Michigan State University and Professor Jeffrey Segal of Stony Brook University, conducted a quantitative analysis of the much larger Spaeth Supreme Court Database and concluded that the justices' behavior was structured largely by their individual preferences toward public policy issues, with liberal justices on the Supreme Court consistently reaching liberal decisions and conservative judges consistently reaching conservative decisions.[122] In their 2002 follow-up book, *The Supreme Court and the Attitudinal Model Revisited*, they confirmed their earlier findings that the decisions of the Supreme Court are best explained by the policy preferences of the justices.[123]

In 2006, in one of the next books to study judges with numbers, *Are Judges Political? An Empirical Analysis of the Federal Judiciary*, Professor Cass Sunstein of the University of Chicago, Professor David Schkade of the University of California-San Diego, and two other authors "attempt[ed] to explore . . . the question whether . . . appellate judges can be said to be 'political'."[124] They hypothesized that in ideologically contested cases, "as a statistical regularity, judges appointed by Republican presidents . . . will be more conservative than judges appointed by Democratic presidents," that "a judge's ideological tendency is likely to be dampened if [that judge] is sitting with two judges of a different political party," and that "a judge's ideological tendency . . . is likely to be amplified if [that judge] is sitting with two judges from the same political party."[125] After examining a total of 6,408 published three-judge panel

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[120] *Id.*
[121] *Id.* at 142.
[122] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).
[123] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).
[124] CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN, & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY vii (2006).
[125] *Id*. at 6-9.

decisions of U.S. Courts of Appeals and the 19,224 associated votes of individual judges, in cases involving 23 areas of the law, and then applying a logistic regression analysis to the results, they concluded that "in numerous areas of the law, all three hypotheses were strongly confirmed."[126] Thus, based on their quantitative empirical study, it was clear: "Republican appointees and Democratic appointees differ[ed] in their voting patterns, often very significantly."[127]

A year later, in the next book outlining a quantitative empirical study of the federal judiciary, *Decision Making in the U.S. Courts of Appeals*, Professor Frank Cross of the University of Texas School of Law, examined the role of judicial politics in the decisionmaking of the U.S. Courts of Appeals using the Courts of Appeals Database and the Judicial Attributes Database referenced above and applying logistical regression analysis to the results.[128] He initially noted the irony of examining the role of judicial politics in decisionmaking in the appellate courts: "Beginning with ideology might seem surprising, because judges are expected to follow the law and eschew politics when making decisions."[129] Nonetheless, he came to a similar conclusion as Professors Spaeth, Sanger, Sunstein, and Schkade: "[Political] ideology has a statistically significant effect on decisions. Judges appointed by more conservative presidents consistently produce more conservative decisions on the bench."[130] In other words, "Republican appointees were consistently more conservative, on average, than the Democratic appointees,"[131] and he emphasized that using the appointing President of a judge seemed "a reasonable proxy for judicial ideology."[132] In arriving at his conclusion, Professor Cross also provided certain insights into the limitations of a quantitative analysis. First, he noted that "[u]sing quantitative empirical methods to analyze judicial decisions has some inherent limitations because it is simply impossible to control for all the relevant factors underlying a decision."[133] And second, he noted that certain relevant factors could not be objectively measured:

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[126] *Id.* at 8-18.
[127] *Id.* at vii.
[128] FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007).
[129] *Id.* at 11.
[130] *Id.* at 7.
[131] *Id.* at 22.
[132] *Id.* at 24.
[133] *Id.* at 6.

> For example, the database can characterize outcomes as liberal or conservative but cannot estimate *how* liberal or *how* conservative that decision was. It cannot segregate moderately liberal from extremely liberal results. The coding is also contingent on the facts of the case. For example, a court may reach an outcome classified as liberal only because the alternative position was an extremely conservative one that even conservative judges found unacceptable. This inevitably creates some inaccuracies in the specification of the variables . . . and [t]hese specification errors typically cause an underestimation of a true relationship.[134]

Despite these limitations, however, he contended that "such [quantitative] analyses provide important information and are valuable as rigorous tests of theories that otherwise rely on anecdotal evidence or simple assumptions."[135] What he discovered by his quantitative analyses, in addition to confirming that political ideology did indeed have an effect on judicial decisionmaking, was that legal threshold requirements, such as jurisdiction and standing, and judicial review standards (such as abuse of discretion) that require a degree of legal deference to the decisions of the lower courts, also had a significant effect on decisionmaking.[136] He also found that the collegiality or interactive effects between the panel members "was at least as powerful as the individual judge's own preferences" in decisionmaking.[137] With respect to judicial attributes, such as race, gender, religion, and previous life experiences, however, he found relatively little effect on decisionmaking.[138] In this area, he noted only two matters – that female and minority judges appeared more liberal

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[134] *Id.* at 5. He also commented:

> An empirical researcher does not need a perfect measure of variables to reach conclusions. Imperfections in measurement tend to obscure results rather than produce spurious positive results. If research with imperfect measurements nevertheless produces a statistically and substantively significant finding, that research probably understates the true result.

Id. at 20-21.

[135] *Id.* at 6.

[136] *Id.* at 7-9.

[137] *Id.* at 9.

[138] *Id.* at 7-8.

in criminal cases and that judges of greater net wealth appeared to render more conservative decisions.[139]

In the latest book concerning an empirical quantitative study of federal judges, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, Professor Lee Epstein from Washington University in St. Louis, Professor William M. Landes, and U.S. Circuit Court Judge Richard A. Posner, provided a comprehensive overview of past statistical empirical studies of federal judges and provided their own statistical analysis of the votes of the entire Article III judiciary, to include the United States Supreme Court, the U.S. Courts of Criminal Appeals, and U.S. District Court judges.[140] They first presented what they believed to be a realistic model of judicial behavior and then tested it empirically by analyzing the voting behavior of the judges using regression analysis. Their model conceived of a judge "as a participant in a labor market [who] can be understood as being motivated and constrained, as other workers are, by costs and benefits both pecuniary and nonpecuniary, but mainly the latter: nonpecuniary costs such as effort, criticism, and workplace tensions, nonpecuniary benefits such as leisure, esteem, influence, self-expression, celebrity (that is, being a public figure), and opportunities for appointment to a higher court; and constrained also by professional and institutional rules and expectations and by a 'production function' – the tools and methods that the worker used in his job and how he uses them."[141] In the case of the Supreme Court, they found, consistent with early studies, that "Justices appointed by Republican Presidents vote more conservatively on average than Justices appointed by Democratic ones," and in the cases of the courts of appeals, they found that "the judges of these courts are less ideological than Supreme Court Justices on average, but not that ideology plays a negligible role in their decisions."[142] In fact, they found that "ideology influences judicial decisions at all levels of the federal judiciary," but that the strength of that influence simply "diminishes as one moves down the judicial hierarchy."[143] Finally, using statistical methodology to test their labor-market model, they found that

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[139] *Id.* at 8.

[140] LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013).

[141] *Id.* at 5.

[142] *Id.* at 8-9.

[143] *Id.* at 385.

many judges, like other workers, prefer leisure, are effort averse, angle for promotion, and seek celebrity status.[144]

In the law review article, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, Professor Daniel R. Pinello of the John Jay College of Criminal Justice, City University of New York, stated that "public-law scholars traditionally have used judges' political party affiliations as proxies for judicial ideology" and that "conventional wisdom today among students of judicial behavior sees party as a dependable yardstick for ideology: Republican judges are conservatives; Democrats, liberals."[145] He then asked: "Is there truly an empirically verified connection between judges' party identification and their behavior on the bench?"[146] To answer this question, the author "identified 140 books, articles, dissertations, and conference papers in the legal and political science literatures between 1959 and 1998 revealing empirical research pertinent to a link between party and modern judicial ideology in the United States."[147] Synthesizing this group down to eighty-four studies through certain specific inclusion criteria, the author then applied a meta-analysis to these studies.[148] From this analysis, he concluded that (1) "the most cautious conclusion from the meta-analysis about the relationship between judges' political party affiliation and their ideology is that there is a relationship: Democratic judges indeed are more liberal than Republican ones," (2) "[p]arty is a stronger attitudinal force in federal courts than in state tribunals," (3) and "'scholars' use of only nonunanimous appellate opinions overestimates party's effect on the broad range of judicial action."[149]

In the article, *What is Judicial Ideology, and How Should We Measure It?*, the authors, Professor Joshua B. Fischman of the University of Virginia and Professor David S. Law of Washington University in St. Louis, discussed the difficulties inherent in empirical scholarship on the

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[144] *Id.* at 385-86.
[145] Daniel P. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 220 (1999).
[146] *Id.*
[147] *Id.* at 221.
[148] *Id.* at 221-24. Meta-analysis is defined as "quantitative statistical analysis that is applied to separate but similar experiments or studies of different and usually independent researchers and that involves pooling the data and using the pooled data to test for statistical significance." *Meta-analysis*, MERRIAM-WEBSTER UNABRIDGED, http://unabridged.merriam-webster.com/browse/meta-analysis (last visited Nov. 20, 2017).
[149] Pinello, *supra* note145, at 240-43.

subject of judicial ideology.[150] They also identified and reviewed the relative merits of three popular ways to measure judicial ideology: "the use of proxy measures, the assessment of judicial ideology based on the actual behavior of the judges in a particular context, and the transplantation of ideology measures developed in one context into other contexts involving partly or wholly different data."[151] They found that the actual behavior measure may deserve greater attention than the more popular proxy measure.[152] Nonetheless, they ultimately concluded that (1) "no measurement approach is ideal in all respects," (2) "all three approaches are likely to yield results of overwhelming statistical significance," (3) the "measurements and estimates that rely upon party of appointment have the added advantage of being easy to interpret," and (4) "simpler may indeed be better."[153]

With respect to using party affiliation as an ideological measure, the authors wrote:

> A particularly obvious and convenient proxy for a judge's ideology is that of membership in a political party. The linkage between a judge's party affiliation and his or her voting behavior has long been established. One of the earliest empirical studies to examine differences among judges by party affiliation dates back to 1959, when

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[150] Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 136 (2009) ("Empirical scholarship on the subject of judicial ideology is vulnerable to two sets of difficulties, which tend to blend into one another. The first set is theoretical; the second set is methodological. … [T]he theoretical problem [is] that scholars use the term 'judicial ideology' in the absence of any widespread agreement or clear understanding as to what the term means in the first place. It is difficult for scholars to devise appropriate and broadly acceptable measures of judicial ideology when they and their readers have different concepts—or perhaps no coherent concept at all—of 'judicial ideology' in mind. As a result, bona fide intellectual disagreement over the nature of judicial behavior is too easily compounded by outright misunderstanding. … [As to the methodological difficulty, there are] three … significant and common practical obstacles to the measurement of judicial ideology. First, ideology is not a tangible phenomenon that can be directly observed. Second, judicial behavior is often open to multiple interpretations. Third, judicial ideology may be a multidimensional phenomenon, such that a judge who is liberal in one context may be moderate or conservative in another, or the labels 'liberal,' 'moderate,' and 'conservative' may not seem applicable at all.").

[151] *Id.*

[152] *Id.* at 137.

[153] *Id.* at 204-05.

Glendon Schubert analyzed decisions in workmen's compensation cases from the Michigan Supreme Court and found that judges who belonged to the Democratic Party were substantially more likely to favor employee claimants in these cases. Two years later, Stuart Nagel published a comprehensive study in which he examined differences in voting behavior among the nation's nearly three hundred state and federal supreme court justices. He found jurists who identified themselves as Democrats to be significantly more liberal than those who identified themselves as Republicans in every issue area he examined, including criminal law, administrative law, civil liberties, tax, family law, business, and personal injury.

The most popular proxy for a judge's ideology, however, has been the party of the official who appointed the judge. The enduring popularity of this measure most likely derives from a combination of two factors. First, the party affiliation of the President or other elected official responsible for appointing a particular judge is easy both to observe and to interpret. Second, the correlation between party of appointing official and judicial ideology has long been observed over a variety of courts, time periods, and issue areas: Democratic appointees are typically more liberal on a variety of issues than Republican appointees.

The appointing-party measure has been especially dominant in studies of the federal courts. As of 1999, one paper had identified forty-one empirical studies that examined differences by party of appointing president on the circuit courts, and twenty-five such studies on the district courts. Although a comprehensive treatment of this literature would be far beyond the scope of this Article, it would suffice to say that party of appointment has been shown consistently to be a statistically significant predictor of votes in most types of cases in the

> courts of appeals, but is less consistently correlated with judicial decision-making in the district courts.[154]

Nonetheless, the article also delineates certain difficulties in measuring judicial ideology by political party:

> The phenomenon of panel composition effects poses a number of related methodological challenges, among them the problem of observational equivalence. Over a decade ago, Professor Revesz and Professors Cross and Tiller discovered that the voting behavior of federal appeals court judges tends to vary with the partisan composition of the panels on which they happen to sit. On a three-judge panel, a Democratic appointee tends to vote more liberally if paired with at least one other Democratic appointee than if he or she is the lone Democratic appointee, and to vote even more liberally if all three members of the panel are Democratic appointees; likewise, Republican appointees tend to vote more conservatively when they are in the majority than when they find themselves in the minority, and to vote even more conservatively when there is no Democratic appointee present at all. One challenge that empirical scholars must address, therefore, is the fact that panel composition effects can conceal the true extent of a judge's ideological leanings. Because the influence of ideology on a judge's voting behavior may be muted unless he or she is paired with at least one likeminded colleague, a simple analysis of individual judicial voting records that fails to control for panel composition is likely to underestimate the true extent of the judge's ideological preferences.
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> The other challenge that scholars face, however, is that of explaining why panel composition effects exist at all. The finding that judges tend to vote differently depending upon the partisan composition of the panel is open to a variety of explanations. One is the "whistleblower"

[154] *Id.* at 167-68.

> hypothesis: on this view, the minority judge moderates the behavior of the other judges by threatening to expose "manipulation or disregard of the applicable legal doctrine." A second explanation is the "dissent hypothesis": on this view, the judges moderate their positions in order to avoid the costs involved in writing and responding to a dissent. A third explanation is the "deliberation hypothesis": on this view, the judges on an ideologically divided panel converge in their views as a result of substantive deliberation. All three theories predict that judges on homogenous panels will show stronger ideological voting tendencies than judges on heterogeneous panels. If, however, the only behavior we ever observe is consistent with all three theories, then we have no way of ruling out any of the theories.[155]

In the article, *Judged by the Company You Keep: An Empirical Study of Ideologies of Judges on the United States Court of Appeals*, Professor Corey R. Yung of John Marshall Law School related that three major approaches have been used to measure judicial ideology: case outcome coding, external proxies, such as the political party of the appointing president, and agnostic measures, such as identifying voting blocs in cases to determine which judges are most often aligned.[156] He noted that the most popular method for determining a judge's ideology has been the political party of the official who appointed the judge.[157] In this regard, researchers have presumed that judges appointed by Democrats are ideologically liberal whereas those appointed by Republicans are ideologically conservative.[158]

In his empirical study of judicial ideology, the author attempted to identify the judicial ideology of federal appellate judges by determining the degree to which these judges "agree and disagree with their liberal and

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[155] *Id.* at 149-50.
[156] Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of Ideologies of Judges on the United States Court of Appeals*, 51 B.C. L. REV. 1113, 1144-53 (2010).
[157] *Id.* at 1148.
[158] Pinello, *supra* note 145, at 220.

conservative colleagues at both the appellate and district court levels."[159] He relied on a basic assumption about determining ideology: "agreement and disagreement between judges is indicative of shared values,"[160] i.e., "like-minded judges will vote together more often."[161] His study also incorporated the factor of standard of review, among others.[162] Through his ideology scoring and regression analysis, he concluded that "judges appointed by Republican presidents were more ideological than those appointed by Democratic presidents," and that "prior government work experience and elite law school attendance were strongly correlated with political liberalism on the bench."[163]

Finally, in the article, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, the authors, U.S. Circuit Court Judge Harry T. Edwards and Professor Michael A. Livermore of New York University School of Law, discussed what they considered to be the limitations of empirical legal studies of judicial ideology.[164] Their primary criticism was that these empirical studies fail to account for the core determinants of appellate decisionmaking: (1) case records on appeal, (2) applicable law, (3) controlling precedent, and (4) judicial deliberations.[165] According to the authors, "[b]y failing to take account of these core determinants – in part, perhaps, because they cannot be easily or accurately measured – the field of empirical legal studies fails to provide a nuanced understanding of how legal and extralegal factors interact to generate judicial decisions, and likely overemphasizes extralegal factors."[166]

Nonetheless, from all the books and law review articles on the empirical analysis of judicial behavior, it appears that "[e]mpirical facts are difficult to dispute," and as a result, in the last two decades, "[t]he

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[159] Yung, *supra* note 156, at 1138 ("By identifying voting blocs, assessments can be made about the ideologies of the judges that form those blocs."). *See also id.* at 1143 ("This study compares judges to determine which ones are more conservative or liberal relative to their colleagues based upon whom they most often vote with and against.").
[160] *Id.* at 1191.
[161] *Id.* at 1153.
[162] *Id.* at 1159-60.
[163] *Id.* at 1201.
[164] Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).
[165] *Id.* at 1899.
[166] *Id.*

growth of empirical legal studies has been explosive."[167] As noted by one author, "by definition, empirical means working with observed data or experimental observations. Observations and data are facts. The inferences researchers make based on them might be flawed and not factual, but empirical research essentially involves collecting factual information and using it to draw conclusions."[168] In other words, "sifting through data can provide insight even if it does not provide definitive answers."[169]

V. The Court and Its Workload

From November 8, 1951, through December 31, 2016, the CAAF issued a total of 7,298 published opinions that were decided by a total of 23 judges. Of those opinions, 2,227 opinions (approximately one-third) had a least one dissenting vote.

For the first forty years of its existence, the Court was a three-judge court. Since 1991, the Court has been a five-judge court. The names of each judge, their terms and total years of active service, their appointing President, their political affiliation, their law school, whether or not they had prior military service, the states from which they were appointed, and whether or not they were a minority are listed below:

> Robert E. Quinn – 1951-75 (24 years) – Appointed by President Truman – Democrat – Harvard Law School – Judge on the Rhode Island Superior Court (previously served as Lieutenant Governor and Governor of Rhode Island) – Served as an officer in the U.S. Navy – From Rhode Island – White male
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> George W. Latimer – 1951-61 (10 years) – Appointed by President Truman – Republican – University of Utah College of Law – Justice on the Utah Supreme Court –

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[167] Mark Klock, *Cooperation and Division: An Empirical Analysis of Voting Similarities and Differences During the Stable Rehnquist Court Era – 1994 to 2005*, 22 CORNELL J.L. & PUB. POL'Y 537, 540-41 (2013).
[168] *Id.* at 542-43.
[169] *Id.* at 554.

Served as an officer in the U.S. Army – From Utah – White male

Paul W. Brosman – 1951-55 (4 years) – Appointed by President Truman – Democrat – University of Illinois College of Law – Dean, Tulane University Law School (and at the time of his appointment, he had been recalled to active duty and was serving in the Office of the Judge Advocate General of the Air Force) – Served as an officer in the U.S. Air Force – From Louisiana – White male

Homer Ferguson – 1956-76 (20 years) – Appointed by President Eisenhower – Republican – University of Michigan Law School – U.S. Senator from Michigan (had lost re-election bid and had been appointed as ambassador to the Philippines and served for a year) – No military service – From Michigan – White male

Paul J. Kilday – 1961-68 (7 years) – Appointed by President Kennedy – Democrat – Georgetown University Law Center – U.S. Congressman from Texas – No military service – From Texas – White male

William H. Darden – 1968-73 (5 years) – Appointed by President Johnson – Democrat – University of Georgia School of Law – Staff member (Chief of Staff), Senate Armed Services Committee – No military service – From Georgia – White male

Robert M. Duncan – 1971-74 (3 years) – Appointed by President Nixon – Republican – Ohio State University College of Law – Justice on the Ohio Supreme Court – Served as a officer in the U.S. Army – From Ohio – African-American male

William H. Cook – 1974-84 (10 years) – Appointed by President Ford – Republican – Washington University School of Law (St. Louis, Missouri) – Staff member (Minority General Counsel), House Armed Services Committee – Served as an officer in the U.S. Army – From Illinois – White male

Albert B. Fletcher, Jr. – 1975-85 (10 years) – Appointed by President Ford – Republican – Washburn University Law School – Trial judge, Kansas – No military service – From Kansas – White male

Matthew J. Perry – 1976-79 (3 years) – Appointed by President Ford – Democrat – South Carolina State College School of Law (segregated), Attorney, private practice in Columbia, South Carolina – No military service – From South Carolina – African-American male

Robinson O. Everett – 1980-92 (12 years) – Appointed by President Carter – Democrat – Harvard Law School – Professor, Duke University School of Law – Served as a judge advocate in the U.S. Air Force – From North Carolina – White male

Walter T. Cox III – 1984-2000 (16 years) – Appointed by President Reagan – Democrat – University of South Carolina School of Law – Trial judge, South Carolina – Served as a judge advocate in the U.S. Army – From South Carolina – White male

Eugene R. Sullivan – 1986-2002 (16 years) – Appointed by President Reagan – Republican – Georgetown University Law Center – General Counsel of the U.S. Air Force – Served as an officer in the U.S. Army – From Missouri – White male

Susan J. Crawford – 1991-2006 (15 years) – Appointed by President George H.W. Bush – Republican – New England School of Law – Inspector-General, U.S. Department of Defense (previously served as General Counsel of the U.S. Army) – No military service – From Pennsylvania – White female

H.F. "Sparky" Gierke – 1991-2006 (15 years) – Appointed by President George H.W. Bush – Republican – University of North Dakota School of Law – Justice, North Dakota Supreme Court – Served as a judge advocate in the U.S. Army – From North Dakota - White male

Robert E. Wiss – 1992-1995 (3 years) – Appointed by President George H.W. Bush – Democrat – Northwestern University School of Law – Attorney in Chicago at the law firm of Foran, Wiss, & Schultz – Retired RADM, JAGC, U.S. Naval Reserve – From Illinois – White male

Andrew S. Effron – 1996-2011 (15 years) – Appointed by President Clinton – Democrat – Harvard Law School – Staff member (Minority General Counsel), Senate Armed Services Committee – Served as a judge advocate in the U.S. Army – From Virginia – White male

James E. Baker – 2000-2015 (15 years) – Appointed by President Clinton – Democrat – Yale Law School – Special Assistant to the President of the United States and Legal Advisor, National Security Council – Served as an officer in the U.S. Marine Corps – From Virginia – White male

Charles E. "Chip" Erdmann – 2002-present (15 years) – Appointed by President George W. Bush – Republican – University of Montana School of Law – Judicial Reform and International Law Consultant in Serbia and Bosnia (previously served as a Justice on the Montana Supreme Court and as the Chief Judge of the Bosnian Election Court) – Retired Colonel, JAGC, Montana Air National Guard (previously served as an enlisted man in the U.S. Marine Corps) – From Montana – White male

Scott W. Stucky – 2006-present (11 years) – Appointed by President George W. Bush – Republican – Harvard Law School – Staff member (Majority General Counsel), Senate Armed Services Committee – Retired Colonel, JAGC, U.S. Air Force Reserve – From Maryland – White male

Margaret A. Ryan – 2006-present (11 years) – Appointed by President George W. Bush – Republican – University of Notre Dame Law School – Attorney in Washington, DC at the law firm of Wiley, Rein, & Fielding – Served as judge advocate in the U.S. Marine Corps – From Virginia – White female

> Kevin A. Ohlson – 2013-present (4 years) – Appointed by President Obama – Democrat – University of Virginia School of Law – Chief, Professional Misconduct Review Unit, U.S. Department of Justice (previously served as Chief of Staff and Counselor to the Attorney General of the United States) – Served as a judge advocate in the U.S. Army – From Virginia – White male
>
> John E. Sparks, Jr. – 2016-present (1 year) – Appointed by President Obama – Democrat – University of Connecticut School of Law – Commissioner, U.S. Court of Appeals for the Armed Forces – Served as a judge advocate in the U.S. Marine Corps – From Virginia – African-American male[170]

During its forty year existence as a three-judge court from 1951 to 1991, the Court received an average of 1703 petitions per year, it granted an average of 189 petitions per year, and heard an average of 118 oral arguments per year. During its twenty-five year existence as a five-judge court from 1991 to 2016, the Court received an average of 981 petitions per year, it granted an average of 170 petitions per year, and heard an average of 77 oral arguments per year. Clearly, the Court's workload has diminished in recent years, hearing only 28 oral arguments in the 2016 term, even though the number of its judges has almost doubled.

VI. Process and Hypotheses

At issue is whether the statutory political party balance requirement for the CAAF had any tangible effect on the judicial decisions of that Court. And the question to answer is whether there was an empirically verified connection between the judges' party identification and their behavior on the bench: Were Democrat judges on the Court more liberal or more conservative than Republican ones or did party affiliation not matter at all? In other words, did political party affiliation relate to judicial policymaking or was party affiliation not important to judicial action at all? And, if party affiliation had no significant effect, then the political

[170] Judge Sparks did not participate in any of the counted dissenting opinions in this empirical study.

party balance requirement was unnecessary and should have been eliminated.

To examine the connections between judicial ideology and political party at the CAAF, I conducted an actual behavior measure of each Republican and Democrat judge by coding their votes in every published, nonunanimous opinion, either in favor of the government or in favor of the appellant from 1951 to 2016. To do this, I first compiled a database of all of the Court's published opinions in which there was at least one dissent. This database included (1) each case name and citation, (2) the case type, (3) the judges involved, (4) their votes – either for the government or for the appellant, (5) the decision of the lower court, (6) the contested issues, (7) the Court's decision, and (8) the opinion type.

In compiling this database, however, I noticed that certain cases would be problematic to include in any statistical analysis because (1) they simply defied characterization as a true dissent on any issue (e.g., the dissent was merely a disagreement on a matter of dicta; agreeing in result, but for different reasons), (2) there were conflicting votes among the judges for the government or for the appellant on the issues, (3) there was an absence of votes for the government or for the appellant on the issues, (4) the dissents were not on the issues but on the remedy, or (5) an Article III judge was sitting by designation (i.e., the presence of an interloper judge). As a result, I removed 125 cases from the statistical database. The overall statistical database, without the problematic cases, was comprised of 2,102 cases.

In addition, I compiled five separate databases of dissenting opinions involving the following case subtypes: (1) speedy trial-speedy review, (2) challenges to court members, (3) command influence, (4) ineffective assistance of counsel, and (5) jurisdiction. The "Speedy Trial-Speedy Review Database" was comprised of 37 cases. The "Challenges to Court Members Database" was comprised of 40 cases. The "Command Influence Database" was comprised of 44 cases. The "Ineffective Assistance of Counsel Database" was comprised of 54 cases. And the "Jurisdiction Database" was comprised of 135 cases.

The five case subtypes were chosen for study because they involved issues that did not tend to overlap with other issues and the votes cast appeared clearly either in favor of the government or the appellant. Most

of the other issues identified were not as unique and the votes not as definitive.[171]

I then coded votes in the database based on political party, prior military service, attendance at an elite (top ten) law school,[172] and all five of the case subtypes.[173] Once all of the votes were coded, six logistic regression analyses were conducted using a statistical software package for the social sciences (SPSS).

A logistic regression analysis is a statistical estimation that computes the significance of a relationship between a dependent variable and one or more independent variables.[174] In my study, the first regression analysis included political party, prior military service, and attendance at an elite law school as the independent variables and the vote cast as the dependent variable. Independent variables are the factors investigated to see if they are related to the dependent variable.[175] Five additional regression analyses were conducted that investigated the relationship between political affiliation and the vote among each case subtype. Votes favoring

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[171] Other issues identified in the database included general categories of due process/legal procedure, legal sufficiency, admissibility of evidence, substantive offenses and defenses, providence of guilty pleas, instructions, lesser-included offenses, prosecutorial misconduct, rights to counsel and confrontation, Article 31 rights and the right against self-incrimination, multiplicity, unreasonable multiplication of charges, mental responsibility, and pretrial and post-trial processing. With regard to many of the cases, the votes fell with the category of due process/legal procedure with a subtopic of "material prejudice" or "waiver." In such cases, the real issues in the case were avoided with the following rationales: "Even if error, there was no material prejudice"; and "Even if error, there was no objection and the matter was waived."

[172] The top ten list was based on the latest ranking in US News and World Report. *See* https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?int=a1d108. Although this type of list did not exist throughout the history of the Court, I used it as a rough measure of what law schools are considered elite.

[173] I coded the variables as follows: Political affiliation: 0 = Republican; 1= Democrat ; Prior military experience: 0 = No prior military experience; 1 = Prior military experience; Attendance at elite law school: 0 = Did not attend elite law school; 1 = Did attend elite law school. Votes were coded as follows: 0 = Government; 1= Appellant. And case subtypes were coded as follows: 5 = Speedy trial; 6 = Challenges to court members; 7 = Command influence; 8 = Ineffective assistance of counsel; 9 = Jurisdiction.

[174] Sautter & Randall, *supra* note 104, at 106. Of course, one drawback to this method is that "because case coding relies upon a wholly binary construction of concept," it may lack "significant nuance in particular cases." Yung, *supra* note 156, at 1146-47.

[175] Sautter & Randall, *supra* note 104, at 106.

the appellant were considered liberal; those for the government were considered conservative.[176]

Based on the prior empirical studies conducted on federal appellate courts discussed earlier in the literature review section, I made the following hypotheses with respect to my databases:

1. As a statistical regularity, Republican judges on the Court will be more conservative than Democrat judges.

2. As a statistical regularity, prior military service will have an effect on case outcome being more conservative than liberal.[177]

3. As a statistical regularity, attendance at an elite law school will have an effect on case outcome being more liberal than conservative.

4. As a statistical regularity, Republican judges on the Court will be more conservative on the issue of speedy trial/speedy review than Democrat judges.

5. As a statistical regularity, Republican judges on the Court will be more conservative on the issue of challenges for cause than Democrat judges.

6. As a statistical regularity, Democrat judges on the Court will be more liberal on the issue of command influence than Republican judges.

7. As a statistical regularity, Democrat judges on the Court will be more liberal on the issue of ineffective assistance of counsel than Republican judges.

8. As a statistical regularity, Democrat judges on the Court will be more liberal on the issue of jurisdiction than Republican judges.

Finally, I attempted to measure the ideology of the judges by determining the degree to which the judges agreed and disagreed with their

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[176] This coding is consistent with how criminal cases are coded in The Supreme Court Database Codebook. *See* http://scdb.wustl.edu/_brickFiles/2013_01/SCDB_2013_01_codebook.pdf.

[177] In a Gallup poll, military veterans of all ages tend to be more Republican than are those of comparable ages who are not veterans. http://www.gallup.com/poll/118684/military-veterans-ages-tend-republican.aspx (last visited on Apr. 11, 2017).

Republican or Democrat colleagues. This involved identifying voting blocks (i.e., by examining the number of agreements and disagreements with Republicans and Democrats for each judge) in all of the Court's published, nonunanimous opinions from 1951 to 2016.[178]

VI. Findings

Based on an analysis of the CAAF dissent database, the following general descriptive statistics were revealed:

(1) Of all the 7,411 votes cast, 46.6% were by Democrat judges and 53.4% were by Republican judges.

(2) Of all the 7,411 votes cast, 47.9% were for the government and 52.0% were for the appellant.

(3) Of all the 7,411 votes cast, 32.0% were by judges with no military experience and 68.04% were by judges with military experience.

(4) Of all the 7,411 votes cast, 52.8% were by judges who did not attend an elite law school and 47.2% were by judges who did attend an elite school.

A logistic regression analysis was conducted to investigate the relationship between political affiliation, elite law school attendance, and prior military experience and voting for the appellant.

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[178] Of course, there are drawbacks to this method. One such drawback is that it cannot make use of unanimous opinions, because "it is impossible to draw any inference about the relative positions of the judges from the voting alignment in a unanimous decision." Another drawback is that "ideology in this context only measures how often particular judges vote with each other, and not how often they support particular types of outcomes." And a third drawback is that this measure is a one-dimensional approach, when judicial "ideology is never perfectly one-dimensional." Fischman & Law, *supra* note 150, at 165-66.

The overall model was significant $\chi^2(3) = 475.07$[179]; $p < .001$.[180] The model explained 8.3% (Nagelkerke R^2)[181] of the variance in votes.[182]

Prior military experience was significantly associated with vote $B = -.857$; *Wald Z* = 253.498; $p < .001$; *Exp(B)* = .425.[183] The odds of voting for the appellant decreased by a factor of .425 for votes cast by judges with prior military experience.[184]

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[179] The chi-square (χ^2) test tests if the overall model is significant. That is, it tests if there is an effect of the independent variables taken together on the dependent variable. In this case, it is significant, which indicates that the independent variables, political affiliation, military experience, and elite law school, when taken together have an effect on the dependent variable. If the chi square test was not significant (as in some of the logistic regressions looking at each case type individually), this means that it is not a good model and the predictor variables (independent variables) are not affecting the dependent variable.

[180] Conventionally, a p value .05 or less is considered significant, from .05 to .1 is considered marginally significant, and anything larger than .1 is not significant.

[181] The Nagelkerke R^2 value provides an indication of how large an effect the independent variables have on the dependent variable. In this case, political affiliation, military experience, and elite law school are only explaining about 8% of the variance in vote. This is relatively low and means that there is a large degree of unexplained variance in vote (i.e., political affiliation, military experience, and elite law school do not explain all of the variation in vote). There are likely other factors such as case facts.

[182] With an extremely large sample size, sometimes differences (e.g., differences between votes cast by those who attended an elite law school and those who did not) will be significant ($p < .05$) even when the difference is really small. This is because as the sample size increases, the power to detect even tiny differences between groups increases. Therefore, just because something is statistically significant ($p < .05$) with a large sample size is not always meaningful or practically relevant. Typically, to tell if a result is "practically meaningful," effect sizes are examined. This is a little less clear in logistic regression, but one way to do this is the Nagelkerke R^2, which is a pseudo-R^2 measure (a measure designed to evaluate goodness-of-fit logistic models). As already discussed, the R^2 value (about 9%) is quite small.

[183] *B* is the regression coefficient. The Wald Z statistic tests the statistical significance (indicated by the associated p value). The Exp(B) value is the odds ratio (e.g., "The odds of voting for the appellant decrease by a factor of .424 for votes cast by judges with prior military experience.").

[184] As a hypothetical, suppose two judges are identical with respect to all other variables except that one did not attend an elite school and one did. Because the elite school variable is coded as 0 for did NOT attend elite school and 1 for DID attend elite school, "changing" from did NOT attend to DID attend is a one-unit change in the elite school variable. If the odds ratio value for this variable is 2.15, this means that the odds that the judge who DID attend an elite law school votes for the appellant (liberal) are about 2.15 times the odds that the "equivalent" judge who did NOT attend elite school would vote for the appellant. If the Odds Ratio = 1, then elite school attendance does not affect the odds of outcome (voting for appellant). If the Odds Ratio is > 1, elite school attendance increases the odds of outcome (voting for appellant). If the Odds Ratio is <

Attending an elite law school was significantly associated with vote $B = -.767$; *Wald Z* = 227.60; $p < .001$; *Exp(B)* = 2.15. The odds of voting for the appellant increased by a factor of 2.15 for votes cast by judges who did attend an elite law school.

Political affiliation was marginally significantly associated with vote $B = -.088$; *Wald Z* = 2.95; $p = .086$; *Exp(B)* = .916. The odds of voting for the appellant decreased by a factor of .916 for votes cast by Democrat judges.

Five additional logistic regressions were conducted to investigate if among the five case subtypes, political affiliation was related to vote.

The first logistic regression only included votes with the issue of "Speedy Trial-Speedy Review" in the analysis. One-hundred and eighteen votes were cast for cases that had "Speedy Trial-Speedy Review" as the only issue in the case. The overall model was significant $\chi^2(1) = 4.145$ $p = .042$. The model explained 4.6% (Nagelkerke R^2) of the variance in votes. Among these cases, political affiliation was significantly related to vote $B = -.758$; *Wald Z* = 4.07; $p = .044$; *Exp(B)* = .468. The odds of voting for the appellant decreased by a factor of .468 for votes cast by Democrat judges.

The second logistic regression only included votes with the issue of "Challenges to Court Members" in the analysis. One-hundred and sixty-four votes were cast for cases that had "Challenges to Court Members" as the only issue in the case. The overall model was significant $\chi^2(1) = 11.296$; p = .001. The model explained 8.9% (Nagelkerke R^2) of the variance in votes. Among these cases, political affiliation was significantly related to vote $B = 1.083$; *Wald Z* = 10.857; $p = .001$; *Exp(B)* = 2.953. The odds of voting for the appellant increased by a factor of 2.953 for votes cast by Democrat judges.

The third logistic regression only included votes with the issue of "Command Influence" in the analysis. One-hundred and fifty-two votes were cast for cases that had "Command Influence" as the only issue in the case. The overall model was not significant $\chi^2(1) = .429$; $p = .429$.

1, then elite school attendance decreases the odds of outcome (voting for appellant). *See*: http://stats.idre.ucla.edu/spss/output/logistic-regression.

The fourth logistic regression only included votes with the issue of "Ineffective Assistance of Counsel" in the analysis. Two-hundred and twenty-six votes were cast for cases that had "Ineffective Assistance of Counsel" as the only issue in the case. The overall model was significant $\chi^2(1) = 7.314$; $p = .007$. The model explained 4.3% (Nagelkerke R^2) of the variance in votes. Among these cases, political affiliation was significantly related to vote $B = .752$; *Wald Z* = 7.119; $p = .008$; *Exp(B)* = 2.121. The odds of voting for the appellant increased by a factor of 2.121 for votes cast by Democrat judges.

The fifth logistic regression only included votes with the issue of "Jurisdiction" in the analysis. Four-hundred and forty-one votes were cast for cases that had "Jurisdiction" as the only issue in the case. The overall model was not significant $\chi^2(1) = 1.14$; $p = .286$.

VII. Conclusions and Discussion

Based on the logistic regression, my first hypothesis (that as a statistical regularity, Republican judges on the Court will be more conservative than Democrat judges) was not supported: Political affiliation was not significantly related to vote.[185]

Based on the logistic regression, my second hypothesis (that as a statistical regularity, prior military service will have an effect on case outcome being more conservative than liberal) was supported: Prior military service was associated with decreased odds of voting for the appellant.

Based on the logistic regression, my third hypothesis (that as a statistical regularity, attendance at an elite law school will have an effect on case outcome being more liberal than conservative) was supported: Attending an elite law school was associated with increased odds of voting for the appellant.

[185] Interestingly, by running the same logistic regression on just the three-judge cases, the political affiliation would have been significant (i.e., the odds of voting for the appellant would increase for votes cast by Democrat judges); however, by considering just the five-judge cases, the political affiliation would not have been significant. And with all the cases considered together, the result is that political affiliation was not significantly related to vote.

Based on the logistic regression, my fourth hypothesis (that as a statistical regularity, Republican judges on the Court will be more conservative on the issue of speedy trial/speedy review than Democrat judges) was not supported: The odds of voting for the appellant decreased for votes cast by Democrat judges.

Based on the logistic regression, my fifth hypothesis (that as a statistical regularity, Republican judges on the Court will be more conservative on the issue of challenges for cause than Democrat judges) was supported: The odds of voting for the appellant increased for votes cast by Democrat judges.

Based on the logistic regression, my sixth hypothesis (that as a statistical regularity, Democrat judges on the Court will be more liberal on the issue of command influence than Republican judges) was not supported: Political affiliation was not significantly related to votes.

Based on the logistic regression, my seventh hypothesis (that as a statistical regularity, Democrat judges on the Court will be more liberal on the issue of ineffective assistance of counsel than Republican judges) was supported: The odds of voting for the appellant increased for votes cast by Democrat judges.

Finally, based on the logistic regression, my eighth hypothesis (that as a statistical regularity, Democrat judges on the Court will be more liberal on the issue of jurisdiction than Republican judges) was not supported: Political affiliation was not significantly related to votes.

With respect to voting blocks, there were 1518 three-judge cases in which there was a dissenting opinion.[186] In 1066 of these 1518 cases, one Republican judge voted with one Democrat judge. In other words, in 70 percent of the three-judge cases with a dissent, there was clearly an empirical lack of partisanship shown. In addition, there were 557 five-judge cases in which there was at least one dissenting opinion. Of these 557 cases, only 17 cases (3 percent) had votes along a straight party line. In 540 cases (97 percent), at least one Republican judge voted with a Democrat judge. In fact, there were only 127 of the 557 cases (22 percent) where two judges of the same party voted together in dissent. The voting

[186] Note that 27 three-judge cases in the database in which there was a dissent were not counted because all of the judges on the panel were Republican.

block evidence provides further support for the logistic regression conclusion that political affiliation was not significantly related to votes.

The key conclusion from this study is that there was not an empirically verified connection for the CAAF between the judges' party identification and their behavior on the bench during the period from 1951 to 2016. In other words, during the Court's sixty-five year history, the political affiliation of a judge on the Court was not significantly related to that judge's vote either for the government or for the appellant.[187] As noted earlier, in the latest book concerning an empirical quantitative study of federal judges, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, the authors found that "ideology influences judicial decisions at all levels of the federal judiciary," but that the strength of that influence simply "diminishes as one moves down the judicial hierarchy."[188] Because judges on the CAAF are at a lower level of the federal judiciary and are vetted through the less political Senate Armed Service Committee as opposed to the more political Senate Judiciary Committee, they are undoubtedly less partisan than their contemporaries on the federal circuit courts and the United States Supreme Court. The logistic regression confirms that lack of partisanship.

The results that judges having prior military service are more pro-government in their votes and that judges from elite law schools are more liberal in their votes are confirmed by prior polls and studies.

In the results of case subtypes, I was not surprised that in matters of command influence and jurisdiction, politics played no significant role. These are two areas of the law that are well defined and leave little to dispute. I was mildly surprised that Democrat judges voted more conservatively on matters of speedy trial and speedy review than their Republican counterparts. I would have thought Republican judges would be more time sensitive than Democrat ones. Finally, I was not surprised that Republican judges were more conservative on challenges for cause than the Democrat judges. In my opinion, Republicans tend to see less actual and implied bias in people than the Democrats.

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[187] As noted in footnote 185 above, if just the three-judge cases would have been considered, the political affiliation would have been significant; this result differs for the five-judge cases and with the cases consolidated. Why a three-judge court would be more apt to be influenced by the political party balance requirement than a five-judge court is a matter left for future study.

[188] EPSTEIN, LANDES, & POSNER, *supra* note 140, at 385.

Finally, I note that when one the original judges of the Court, Judge Quinn, died in 1975, and before the soon-to-be Judge Perry was nominated and confirmed, Senior Judge Ferguson filled in as the third judge on the panel. For approximately eight months then, the Court was comprised of all Republican judges (Judges Cook, Fletcher, and Ferguson). If political affiliation was significant, then the majority of opinions during that time frame would have been unanimous decisions, without any dissents. In the 125 opinions of the Court issued during that period, there were 27 dissents. Obviously, with a 22 percent dissension rate among a fully Republican Court, political party affiliation lacked great significance.

For sixty-five years, the political party balance requirement existed as a key component of the appointment process for judges on the CAAF. The justification for the requirement was to ensure non-partisanship on the Court, and it was introduced by one Congressional Representative who argued that this "exceedingly important court" not be filled "by political appointments." Despite the fact that many other Congressional Representatives argued against the requirement, noting that at the time no other federal court possessed such a limitation, it became law with the passage on the Uniform Code of Military Justice. Over the next six decades, judges at the CAAF, the General Counsel's Office at the Department of Defense, and various military commentators argued unsuccessfully to eliminate the requirement. This past year, the judges at the CAAF again asked Congress to eliminate the requirement, suggesting, without any evidence of any kind, that the basis for the party balance restriction had outlived its usefulness and that it imposed an irrelevant limitation on who may be nominated and confirmed to sit on the Court. Without discussion or comment, Congress adopted the CAAF's suggestion, and the requirement was eliminated. Were the judges of the CAAF and Congress correct in eliminating the requirement? In light of all of the empirical evidence presented in this study, I submit that the political balance requirement for the CAAF was properly eliminated in the National Defense Authorization Act for Fiscal Year 2017.

However, in light of the statistical evidence, I suggest that Congress may wish also to consider removing the political balance requirement from the United States Court of International Trade and the United States Court of Appeals for Veterans Claims, the remaining two federal courts with this requirement. For the CAAF, if Congress wishes to add certain criteria to better balance the Court, it could consider adding prior military service and elite law school restrictions to its appointment criteria: "Not more than three of the judges appointed to the court may have prior military

service and not more than three of the judges appointed to the court may have graduated from an elite law school (a law school ranked in the top ten of the best law schools as determined by the President at the time of the appointment)." From a statistical standpoint, these restrictions would appear to have more significance to balance the Court than the now-defunct political balance requirement.