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# Partisanship On An Apolitical Court: The United States Court of Claims

JUSTIN J. GREEN\*

The relationship between political party affiliation and the voting behavior of the judiciary has been a source of much literature. This paper will focus primarily on the United States Court of Claims and the relationship of its voting behavior between 1964 and 1967 to the political partisanship of its individual justices. To provide a proper foundation for such an analysis, a brief examination of the background, history and composition of the court is in order, as well as an overview of the jurisdictional and procedural changes the court has undergone in recent times.

## I. BACKGROUND AND HISTORY

The first Court of Claims was established by an act passed February 24, 1855.<sup>1</sup> Three judges were appointed to the bench and began the task of investigating claims against the government referred to them by Congress. The court functioned exclusively as a fact finding body, much as did the Congressional committees.<sup>2</sup>

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1. 10 Stat. 612 (1955).

2. As our infant nation grew beyond the Appalachians and stretched onto the midwestern plains, the federal government found itself performing an ever widening variety of functions, and employing an increasing number of persons. With the federal government's expansion, citizens increasingly complained of being unfairly treated. The several wars between 1800 and 1860 aggravated the situation by broadening the potential for claims against the government vis-à-vis complex military procurement systems. Yet the doctrine of sovereign immunity banned the judiciary from hearing damage suits against the federal government. Congress,

Although the court determined the factual validity of claims and submitted a report on each claim to Congress, the power to grant the claim was retained by Congress.<sup>3</sup>

After less than a decade of experience it became clear that the court's task was too great for a fact finding body. In 1861, President Lincoln asked Congress to bestow on the court the "power of making judgments final."<sup>4</sup> Congress responded somewhat halfheartedly in 1863 by expanding the court's authority to render final judgments, but used the appropriations process to retain control over some cases.<sup>5</sup> Congress also expanded the membership of the court by providing two additional judges.<sup>6</sup> This legislation, showing all the characteristics of a compromise, generated one of the more curious Supreme Court cases.

In 1864, the Supreme Court ruled that it could not hear cases appealed from the Court of Claims.<sup>7</sup> The Court reasoned that since judgments of the Court of Claims were not final and were reviewed by the Secretary of the Treasury, appeals from such judgments did not fall within the Supreme Court's jurisdiction.<sup>8</sup> The Court of Claims was thus held to be essentially a legislative court and the Supreme Court could not exercise judicial power over its decisions.<sup>9</sup> In 1866, however, Congress relinquished all appellate power over the court, thereby giving its decisions the finality found lacking by the Supreme Court.<sup>10</sup>

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apparently empathic, utilized the private bill system to dispose of complaints against the "sovereign." Eventually the Congressional committee system was overwhelmed by private bills. The onslaught, in addition to problems associated with role changes from legislator to judge then back to law maker, threatened the integrity of the entire legislative process. As a solution Congress created a court to serve as a fact-finder and to provide a recommended decision.

3. *Id.* Although it was called a court, the Court of Claims, pursuant to said act, merely took evidence in the case and reported its conclusions to Congress. Congress additionally retained the prerogative of independently studying the evidence and determining an appropriate remedy. See Madden, *Aspects of Litigation in the Court of Claims*, 25 JOURNAL OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA 397, 398-99 (1958). It was not until 1863 that the Court of Claims was authorized by Congress to serve more as a true court.

4. Madden, note 3 *supra*, at 399. See also Evans, *The United States Court of Claims*, 17 FEDERAL BAR JOURNAL 85, 86; The President's Annual Message to Congress, Dec. 3, 1861, CONG. GLOBE 37th Cong. 2d Sess. 2 app. (1861).

5. 12 Stat. 765 (1863). The judgments of the Court of Claims were not to be paid until "estimated for" by the Secretary of the Treasury. *Id.*

6. *Id.*

7. *Gordon v. United States*, 69 U.S. 561 (1864).

8. The *Gordon* decision was announced without written opinion. Since Chief Justice Taney died that year, no opinion was forthcoming from the court. Twenty years later, in 1886, a draft opinion was published at 117 U.S. 697 (1886).

9. The theory was that reviewing a Court of Claims decision after, in effect, being authorized by the Secretary of Treasury would be an exercise of original jurisdiction and not appellate jurisdiction. Such a grant was not given the Supreme Court. *Id.* See also U.S. CONST. art. 3, § 2, Madden, note 3 *supra*, at 399.

10. 14 Stat. 9 (1866). See also, *Miles v. Graham*, 268 U.S. 501 (1925) where it was held that the Court of Claims was a court created under art. 3, § 2 of the Con-

The next major change in the court's structure occurred in 1925 with the establishment of the Commissioner system.<sup>11</sup> Prior to this time the Court of Claims had utilized Reporter-Commissioners many of whom served on a part time basis. The exclusive duty of these Reporter-Commissioners was to supervise the taking of depositions which comprised the evidence presented to the court. Although there were some problems with this system of taking evidence, the Reporter-Commissioners continued to function with relative efficiency until after World War I had begun. The press of claims arising out of wartime purchasing activities, however, amply demonstrated that the court's procedures had become outmoded. Relief was found in the reform of the commissioner system to resemble the judicial system of special masters.<sup>12</sup>

The inauguration of the commissioner system allowed the court to bring its docket up to date by sparing judges the time consuming process of taking evidence and hearing witnesses. The commissioners assumed the evidence gathering task and reported findings of fact, supported by reasons, to the court. In 1948, the commissioners were permitted, upon request of the court, to make findings of law as well,<sup>13</sup> and in 1964, this task became mandatory.<sup>14</sup> Currently, cases are assigned to a Commissioner, now referred to as a Trial Judge,<sup>15</sup> who holds all the powers that would be held by a Judge of the District Court in a nonjury case.<sup>16</sup>

The Commissioner-Trial Judge system has served the court well. By every report, the court's docket is not seriously backlogged, in large part because it functions as an appellate court leaving the task of assembling the record to the Trial Judge. This

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stitution. *Compare*, however, language in *Williams v. U.S.*, 289 U.S. 553 (1933) which states that the Court of Claims is an arm of Congress in its art. I function "to pay the debts of the United States." *See* U.S. CONST. art I. Later, in 67 Stat. 226 (1953) it was expressly declared that the Court of Claims was "a court established under article III of the Constitution of the United States." *Id.*

11. 43 Stat. 964 (1925).

12. *See* the contrast by Bennett, *The United States Court of Claims; A 50-Year Perspective*, 29 FEDERAL BAR JOURNAL 284, 293-95 (1970).

13. 62 Stat. 923 (1948).

14. Ct. Cl. Rules, Rule 13(6). This same rule provided for the Commissioner to make findings of fact in such other cases as the court may direct. *Id.*

15. General Order Number 2 of 1973, August 1, 1973.

16. *Id.* If facts are undisputed, one of the parties may move for Summary Judgment in which event the trial court will render a decision. If a factual question arises the case can be remanded for trial. When Summary Judgment proceedings are inappropriate, the Trial Judge's report, with findings of fact and conclusions of law, serves as the basis for proceedings before the court.

system also serves the public well in that Trial Judges may travel to any convenient location to obtain evidence or to hear witnesses. What has emerged from the original Reporter-Commissioner structure is a system of portable trial courts meeting the needs of both court and litigants.<sup>17</sup>

The most recent change in the structure of the Court of Claims occurred in 1966.<sup>18</sup> Legislation passed at that time expanded the court to seven members and permitted it to sit in panels of three judges which has now become the standard procedure of the court. Under current court rules, a case may be heard *en banc* initially by order of a majority of the judges in active service or by the Chief Judge, and a rehearing may be ordered by a majority of the active judges upon petition of one of the litigants.<sup>19</sup> According to the rule, such *en banc* hearings are reserved for cases in which uniformity of precedent is an important question or for cases presenting a "question of exceptional importance or difficulty."<sup>20</sup>

Finally, since 1925, appeal from the Court of Claims is to the Supreme Court by writ of *certiorari*.<sup>21</sup> Although the record shows that review is seldom granted, the Supreme Court has used such cases to affect the Court of Claims jurisdiction and its procedure in handling contract disputes.<sup>22</sup> More will be said about the effect of the Supreme Court on the activities of the Court of Claims as part of a review of the court's jurisdiction.

## II. JURISDICTION

The legislation of 1855 establishing the Court of Claims set out broad jurisdiction for the court. It authorized the court to hear: "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the Government of the United States. . . ." <sup>23</sup> Although the court had only the power to investigate and recommend a disposition of the claim, it possessed this ability over an

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17. See Bennett, note 12 *supra*; Evans, *The United States Court of Claims*, 17 FEDERAL BAR JOURNAL 85, 90-93 (1957); Madden, note 3 *supra*.

18. Public Law 89-425, 80 Stat. 139 (1966). For a commentary on the advisability of adopting this change see Jacoby, *Recent Legislation Affecting the Court of Claims*, 55 GEORGETOWN LAW JOURNAL 397 (1967).

19. Ct. Cl. Rules, Rule 7.

20. *Id.*

21. 43 Stat. 939 (1925) (codified at 28 U.S.C. § 1255 (1976)).

22. Each volume of the Court of Claims Reports includes information on *certiorari* petitions; the annual report of the Clerk summarizes the data for each year. The current Clerk of the Court reports that over a ten year period ending September 30, 1966, the Supreme Court received 332 petitions for *certiorari* and granted

23. See Peartree, *Statistical Analysis of the Court of Claims*, 55 GEORGETOWN LAW JOURNAL 541 (1967). Inspection of the data for more recent years reveals that the Supreme Court still grants petitions for review in substantially less than 10 percent of the cases in which it is sought. See also Bennett, note 12 *supra*, at 287-88.

23. Note 1 *supra*.

exceptionally broad spectrum of cases. The court possessed no equity jurisdiction; it had power only to order payment of money by the sovereign for damages or losses arising from any of the enumerated causes.<sup>24</sup> The bulk of the court's jurisdiction under the 1855 law consisted of contract disputes and tax cases. The Tucker Act of 1887<sup>25</sup> added claims based upon the Constitution to the court's jurisdiction.<sup>26</sup> This Act also gave the court jurisdiction over claims "for damages, liquidated or unliquidated, in cases not sounding in tort. . . ."<sup>27</sup>

Twentieth century legislation brought other kinds of cases within the court's jurisdiction. Patent infringement by the government was made a cause of action in 1910<sup>28</sup> and copyright infringement was added in 1960.<sup>29</sup> The most important recent legislation enabling the court to order relief incidental and collateral to the awarding of damages was passed in 1972.<sup>30</sup> Two cases decided prior to the 1972 enactment prompted Congress to pass this legislation and alleviate the uncertainty over the jurisdiction of the court. In *Moore-McCormack Lines, Inc. v. United States*,<sup>31</sup> the Court of Claims carefully reasoned that its extensive jurisdiction over monetary claims could logically be interpreted to grant the court some measure of equitable powers as well. Indeed, the strength of the court's reasoning is quite apparent in cases where it has found a valid claim, yet the damages continue to accrue. Quite often this is the situation when civilian or military pay cases are decided against the government. The plaintiff typically claims an improper discharge, dismissal, demotion or failure to promote and seeks back salary and/or retirement benefits. If the court decides in favor of the plaintiff, then the government is liable for damages up to the date of the judgment, unless some prior

24. See *King v. United States*, 182 Ct. Cl. 631, 390 F.2d 894 (1968), rev'd, 395 U.S. 1 (1969) wherein it was observed that the Court of Claims does not have jurisdiction over cases seeking equitable relief; but only those seeking monetary damages. See also, *United States v. Aire*, 73 U.S. (6 Wall.) 573 (1867); *Zimmerman v. United States*, 422 F.2d 326 (3d Cir. 1970), cert. denied, 399 U.S. 911, rehearing denied 400 U.S. 855 (1970).

25. 24 Stat. 505 (1887). Existing jurisdiction of the court was retained.

26. *Id.*

27. Kipps, *A Unique National Court: The United States Court of Claims*, 53 AMERICAN BAR ASSOCIATION JOURNAL 1025, 1026 (1967).

28. 36 Stat. 851 (1910).

29. 74 Stat. 855 (1960).

30. 86 Stat. 652 (1972) (codified at 28 U.S.C. § 1491 (1976)); Ct. Cl. Rules, Rule 14(c). For comment, see Marchetta, *Equitable Relief in the United States Court of Claims Under Public Law 92-415*, 23 AMERICAN UNIVERSITY LAW REVIEW 465 (1973).

31. 188 Ct. Cl. 641 (1969).

event has already terminated the claim. But, if the government fails to correct its original error, then a fresh cause of action may be created immediately. Furthermore, a correction of the administrative record may be an important objective in itself. Compliance by satisfying the judgment but refusal to remedy errors, in an employment record for example, may have a substantial detrimental effect on the plaintiff in the future. The court therefore sought to grant collateral relief by ordering the government to take action beyond merely paying the judgment. The Supreme Court rejected the Court of Claims' attempt to establish this power in *United States v. King* in 1969.<sup>32</sup> Congress responded three years later by giving the court the power to order "incidental and collateral" relief, an option which has been exercised by the court on a number of occasions.<sup>33</sup>

To recapitulate, the Court of Claims has jurisdiction over virtually any monetary claim against the federal government as long as the claim does not sound in tort,<sup>34</sup> and, except in tax cases, the court's jurisdiction is exclusive when the case involves \$10,000 or more.<sup>35</sup> The District Court possesses concurrent jurisdiction over all claims for less than that amount and in all tax cases.<sup>36</sup>

There is a continuing controversy over the court's jurisdiction and its method of hearing the four types of cases that account for 80 percent or more of its docket: 1) contract disputes, 2) tax cases, 3) claims for civilian or military pay, and 4) cases and claims for retirement and disability benefits.<sup>37</sup> While the purpose of this pa-

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32. 395 U.S. 1 (1969).

33. 28 U.S.C. § 1491 (1976). The operative passage states:

To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any judgment issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.

34. 28 U.S.C. § 1491 (1976) states that the suable claims are claims founded upon the Constitution, or upon an act of Congress, a regulation of an executive department, any express or implied contract with the United States, or upon a claim for damages liquidated or unliquidated "not sounding in tort."

35. See 28 U.S.C. § 1346 (1976) wherein the District courts are given concurrent jurisdiction with the Court of Claims of "[a]ny other civil action or claim against the United States, not exceeding \$10,000." (Emphasis added).

36. *Id.*

37. Patent and copyright infringement cases and eminent domain proceedings are other identifiable types of cases, but there is a small percentage of cases that defy classification. Two other tasks assigned to personnel of the Court of Claims merit brief attention even though they are excluded from the research design.

First, private bills seeking relief are still introduced by members of Congress. By resolution, a chamber can refer them to the Court of Claims for investigation and a suggested disposition. Until recently, the court handled these cases as it did all others, however, in 1966, the procedure was changed. See 80 Stat. 958 (1966); *Glidden v. Zdanok*, 370 U.S. 530 (1962). The change was necessitated by the Supreme Court's decision in *Glidden* holding that the Court of Claims is an Article III court. Congressional reference cases are now sent to the Chief Trial Judge

per is not to conduct a *tour de force* of the court's jurisdiction and procedure, a brief review of the literature in each of these areas is appropriate in order to create the proper environment for the data analysis which will follow.

### A. Contract Disputes

Perhaps more than any other type of case, contract disputes have posed major jurisdictional and procedural problems for the Court of Claims. As Judge Bennett wrote in 1970, "this is not the place to get into any serious discussion of a problem that cannot be resolved by another law review article,"<sup>38</sup> but a brief summary of court procedure and the events of the last three decades may illustrate the problems confronting the court and litigants in this area.

Initially, all contract disputes are reviewed first by the agency that is signatory to the agreement. This informal review culminates with an agency board of contract appeals which renders the final administrative word on the claim. When brought before the Court of Claims, the court treats such disputes as it does all other types of claims brought to it, *i.e.*, the case is re-

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who assigns them to a Trial Judge for the usual fact finding process. The report of the Trial Judge is reviewed by a panel of three other trial judges who then transmit the recommended disposition to the originating chamber. Since adoption of the recent legislation, judges of the Court of Claims have no contact with congressional reference cases. For further information on this subject see Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 AMERICAN UNIVERSITY LAW REVIEW 595 (1976); McDermott, *The Court of Claims: The Nation's Conscience*, 57 AMERICAN BAR ASSOCIATION JOURNAL 594 (1971); Comment, *The Congressional Reference Case in the United States Court of Claims*, 10 CATHOLIC UNIVERSITY OF AMERICA LAW REVIEW 35 (1961).

The other type of case heard by the Court of Claims consists of appeals from the Indian Claims Commission. This body, and the court's appellate jurisdiction over its decisions, was created by Congress in 1946 for many of the reasons that led to the creation of the Court of Claims itself. See 60 Stat. 1049 (1946). Congress discovered that the resolution of these claims, often based on treaties concluded a century or more ago, was not only time consuming but was not amenable to the legislative process. The Commission investigates the tribe's claim and renders a decision. The first appeal is to the Court of Claims with further appeal to the Supreme Court by writ of *certiorari*. The Commission is scheduled to terminate its activities on September 30, 1978, and unless its life is prolonged by Congress, the Court of Claims will probably assume the responsibility of trying these cases through a Trial Judge as well as exercising the first appellate review of the decision. See Barker, *The Indian Claims Commission: The Conscience of the Nation in Its Dealings With the Original Americans*, 20 FEDERAL BAR JOURNAL 240 (1960); Pierce, *The Work of the Indian Claims Commission*, 63 AMERICAN BAR ASSOCIATION JOURNAL 227 (1977).

38. Bennett, note 12, *supra* at 299.



ferred to a commissioner for findings of fact and conclusions of law. During this process, the commissioner and the litigants are free to examine factual issues that had been resolved by the appeals board. Thus, the proceedings before the commissioner and the court amounted to a trial of the entire matter *de novo*.

In *Wunderlich v. United States*<sup>39</sup> the Supreme Court ruled that such a trial *de novo* was appropriate only if there was an allegation of conscious fraud in the administrative proceedings. Absent such a showing, factual determinations by the board were not reviewable by the Court of Claims. Congress took steps to re-establish the old system by passage of the Wunderlich Act in 1954.<sup>40</sup> The objective of this Act was to restore the previous standard of judicial review by requiring that board determinations be supported by "substantial evidence" and further restoring the power to the court to set aside administrative actions that were arbitrary, capricious or that implied a decision in bad faith.<sup>41</sup>

Armed with this legislation the Court of Claims resumed its practice of conducting trials *de novo* on both factual and legal issues. Subsequently, the Supreme Court in *United States v. Bianchi*<sup>42</sup> tried once again to reduce the scope of review by holding that unless allegations of fraud were involved, the Court of Claims would be bound by the administrative record. The apparent intent of the Supreme Court was to make two major changes in the existing order. First, the respective boards of contract appeals were elevated to the status of regulatory agencies with an accompanying increase in freedom from judicial supervision despite the fact that neither their personnel nor their procedures were of the quality generally expected of regulatory agencies.<sup>43</sup> Second, the Court of Claims was converted into a strictly appellate body functioning in a manner similar to that of the Court of Appeals in their review of agency decisions. Whereas other appellate courts have inadequate facilities, procedures or personnel for retrying factual questions, the trial judges of the Court of Claims are amply qualified and supported to perform this function. The *Bianchi* holding, thus, amounts to wasting one of the principle assets of the Court of Claims.<sup>44</sup> While the end of the debate may not necessarily be in sight, the close analysis of the issues it has produced has led the court into thoughtful considera-

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39. 342 U.S. 98 (1951).

40. 68 Stat. 81 (1954).

41. *Id.*

42. 373 U.S. 709 (1963).

43. Shea, *Statutory Jurisdiction of the Court of Claims: Past, Present and Future*, 29 FEDERAL BAR JOURNAL 157, 161-62 (1970).

44. Note 43 *supra*, at 161-65. Shea ably argues this and several other points in opposition to the *Bianchi* holding. He also documents in greater detail the court's attempt to escape both *Wunderlich* and *Bianchi*.

tion of its powers and procedures.<sup>45</sup>

### B. Tax Cases

Although contract cases may be the most troublesome to the Court of Claims because of the dual objectives of reaching a proper decision and using the correct procedure, claims for tax refunds are the most numerous type of case filed in the court.<sup>46</sup> The principal problem with the court's tax jurisdiction is not one of complexity, but that the potential plaintiff has a choice of courts in which to bring an action. The Court of Claims, the district court and the Tax Court can each adjudicate some types of suits involving payment of taxes.

The Court of Claims, as previously noted, has jurisdiction only over claims for actual compensation, hence the taxpayer must first pay what the Internal Revenue Service asserts is owed and then bring a suit for a refund. The court, even after the passage of the 1972 legislation granting the court power to give collateral relief does not have the authority to render declaratory judgments. The district court's jurisdiction is similarly circumscribed: only claims for refunds can be adjudicated.<sup>47</sup> In contrast, the Tax Court can review the Service's deficiency notices and avoid the situation in which the taxpayer is required to pay first and ask questions of the court later. With three courts from which to

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45. The literature on *Wunderlich* and *Bianchi* is voluminous and detailed. Shea, note 44 *supra* and Bennett, note 1 *supra* provide a précis of the controversy with editorial comment and references to the more detailed literature. Other highly useful and informative chronological studies of the events are E. Seltzer and Ryan, "The Court of Claims Review of Administrative Decisions," 5 BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW 103 (1963); G.A. Cuneo and D.V. Anthony, "Beyond *Bianchi*: The Impact of *Utah* and *Grace* on Judicial Review of Contract Appeals Board Decisions," 55 GEORGETOWN LAW JOURNAL 602 (1967); Note, "*Bianchi*, the Court of Claims, and Trial *de novo*," 54 GEORGETOWN LAW JOURNAL 644 (1966); H.C. Miller, "Administrative Determination and Judicial Review of Contract Appeals," 5 BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW 111 (1963). The most recent thorough review directed toward potential counsel is such cases is D.V. Anthony and B. White, "Contract Suit Practice and Procedure in the United States Court of Claims," 49 NOTRE DAME LAWYER 276 (1973). There is a wealth of literature, which is continuously expanding, concerning specific questions associated with government contract disputes. Annual compilations appear in the *Yearbook of Procurement Articles*. For an argument that the court could and should expand the types of relief granted in bidding disputes see Note, "*Government Contract Bid Protests: Judicial Review and the Role of the Court of Claims*," 39 UNIVERSITY OF CHICAGO LAW REVIEW 814 (1972).

46. Peartree, note 22 *supra*. See also the data to be displayed *infra*.

47. See *Flora v. United States*, 362 U.S. 145 (1960).

choose, an obvious potential source of friction is the practice of forum shopping.

Generally, courts frown on the practice of forum shopping, especially on collegial courts when the attorney simply takes an argument to one judge after another until he finds one to grant the relief sought. Forum shopping has historically had a negative connotation, however, it is not necessarily an intrinsically evil practice as it applies to the filing of tax refund suits. A parallel situation exists in diversity actions in which damages in excess of \$10,000 are sought where the district courts and the state courts possess concurrent jurisdiction. Similarly, when a person is charged with violating both state and federal penal laws the respective prosecutors might well engage in a bit of forum shopping. In this sense, forum shopping simply means searching the legal landscape to determine which court is more likely to favor the client's position. Once the action is begun, obviously, transfers are not looked upon favorably by any court, but a shopping expedition prior to filing is a part of an attorney's obligation to give the client the best representation possible.<sup>48</sup>

The question then arises as to how an attorney may choose the most favorable court in which to bring the suit. A combination of practical, legal and behavioral factors should be considered in the decision. First, in considering the practical limitations, if a client cannot pay the disputed tax before litigating, then there is no alternative: the Tax Court is the only available forum. Assuming that money is no obstacle, how should the attorney choose from among the three courts? Again, a practical question arises. The Tax Court and the Court of Claims have Commissioners and Trial Judges, respectively, who will travel to a location convenient to the taxpayer to take evidence and hear witnesses. Generally, the district court is just as convenient since the personnel of both of the other courts typically use the district court's facilities. If further review is desired, however, Tax Court and Court of Claims proceedings must be held in Washington, D.C. Although only counsel need appear in person if oral argument is heard, this necessity will substantially increase the cost of the litigation. Further, in the Court of Claims, the plaintiff will significantly improve the probability of a favorable decision if Washington counsel is retained.<sup>49</sup> Finally, in a comparison between the Court of Claims

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48. In an interesting comment Shea, note 43 *supra* at 167, suggests that forum shopping be encouraged by giving all three courts involved concurrent jurisdiction. His claim is that the present arrangement forces some plaintiffs into Tax Court because they cannot pay the assessment and then litigate. He would prefer to end the discrimination involved and give all prospective plaintiffs the same choices.

49. Pavenstedt, *The United States Court of Claims as a Forum for Tax Cases (First Installment)*, 15 TAX LAW REVIEW 1, 12 (1959). According to Pavenstedt's

and the district court, it was discovered that the Court of Claims required an average of thirty-four months to dispose of tax cases, whereas the analogous figure for all district courts was twenty-three months.<sup>50</sup> Court of Claims decisions, however, may only be further appealed to the Supreme Court. To bring district court cases to the same level of finality, *i.e.*, a review by the Court of Appeals, requires an average of sixteen additional months for a total of thirty-nine months.<sup>51</sup>

Consideration of the legal factors involved in the choice of a forum presents a plethora of issues. Drawing comparisons on particular issues is at best a difficult task due to the fact that the three courts can try the same types of cases and that there are ninety-three district courts with several hundred judges. Pavenstedt<sup>52</sup> lists several dozen topics in his comparison of decisions by the three courts during the period 1949-1958. In a subsequent study, Miller did likewise for the 1961-1966 period in a lengthy appendix.<sup>53</sup> Pavenstedt perhaps best summarizes the situation: the attorney with a tax case to litigate should investigate the decisions of the Tax Court, the Court of Claims and the appropriate district court to determine whether a favorable precedent can be found.<sup>54</sup>

Although the courts have not established general behavioral patterns in their handling of tax cases, some tendencies have been noted, though their utility for the practitioner appears to be somewhat limited. Pavenstedt often favors the Court of Claims because of the activist stance generally taken by the court.<sup>55</sup> He notes that the Court of Claims has a "non-technical attitude," that it is more interested in equity than in the letter of the regulation,

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study conducted between 1949 and 1958, Washington counsel won 62 percent of their cases which was a substantially better winning ratio than that of non-Washington counsel.

50. Miller, *Tax Litigation in the Court of Claims*, 55 *GEORGETOWN LAW JOURNAL* 454, 471 (1967). The datum is based on the period June 30, 1960, to June 30, 1965.

51. *Id.*

52. Note 49 *supra*.

53. Note 50 *supra*.

54. Note 49 *supra*, at 11-20, 28-33. *See also*, Pavenstedt, *The United States Court of Claims as a Forum for Tax Cases (Second Installment)*, 15 *TAX LAW REVIEW* 201, 201-23 (1959). The Pavenstedt articles explore the subject of how to make the choice of a forum in much greater detail than is presented here. Although Pavenstedt's citation of precedent is dated and thus may no longer be accurate, his general approach to the question is orderly and thorough. For a more recent review of decisions *see* Brown, *Tax Refund Cases in the Court of Claims*, 32 *NEW YORK INSTITUTE OF FEDERAL TAXATION* 1305 (1974).

55. Note 49 *supra*.

and that it displays no reluctance to challenge either the tax bureaucracy or other court.<sup>56</sup> Although Pavenstedt implies that the Court of Claims is favorably oriented toward taxpayers, neither his data nor Miller's findings support such an argument. In fact, Pavenstedt concludes that the Court of Claims is "not a taxpayer's court," any more so than are the district courts.<sup>57</sup> Miller's analysis shows that the Court of Claims is slightly less inclined to favor taxpayers, ruling in favor of the plaintiff in 38 percent of the cases, compared to the district court's 48 percent, and the Tax Court's 29 percent.<sup>58</sup> In sum, there is little assistance to be gleaned from aggregate data analysis; thus, Pavenstedt's often painstaking approach is by far the best method by which to resolve the question.

### C. Pay Cases

There are few significant jurisdictional or procedural issues associated with the Court of Claims' power to adjudicate claims for civilian or military pay. Since such cases account for approximately 20 percent of the court's workload, it is appropriate to review the sparse literature in this field. As previously noted, the most significant problem in this area of the court's jurisdiction was resolved in 1972 when Congress gave the court power to order collateral relief, such as correcting administrative records, thus filling a substantial gap in the court's authority.<sup>59</sup>

Persons who claim improper dismissal or discharge or failure to obtain promotion may sue for compensatory damages. A substantial number of such cases, particularly involving the military, come to the court in the context of computing retirement benefits. Several claims seek to contest declarations of disability and entitlement to associated benefits. Each plaintiff must first exhaust all administrative remedies including, for civilians, the Civil Service System of appeals, and, in the case of military personnel, procedures for obtaining the correction of military records. The plaintiff may then file suit in the Court of Claims. Unlike contract cases, the court is free to try each case *de novo*. It is perhaps an indication of the strength of the average case as well as a reflection on the quality of the administrative process that the government's most common defenses are laches, a failure to exhaust administrative remedies and the expiration of the statute of limitation.

Two commentators have summarized the behavioral tendencies

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56. Note 49 *supra*, at 28-33.

57. Note 49 *supra*, at 10.

58. Note 50 *supra*, at 473.

59. 86 Stat. 652 (1972). See also note 34 *supra*.

of the court in deciding pay cases although neither provide specific data to support their assertions. Heise<sup>60</sup> claims that, in civilian pay cases decided between 1949 and 1961, the court was "liberal", that is, it viewed plaintiffs' claims with relative favor.<sup>61</sup> Since 1961, however, the government has strengthened its defenses and plaintiffs in this group have been less successful.<sup>62</sup> Similarly, Johnson<sup>63</sup> examined cases in the area of military retirement pay and concluded that the decisions "evidence a trend toward a liberal construction of retired pay laws."<sup>64</sup> As in the discussion of tax cases, the commentators' observation of a "liberal" trend, or a pro-taxpayer bias, is particularly relevant to the present inquiry into the voting behavior of the court and the extent to which political party affiliation explains the patterns that are observed.

### III. AN OVERVIEW OF COURT DECISIONS

The principal focus of this paper is the behavior of the Court of Claims between 1964 and 1976. To facilitate analysis, this period has been divided into three shorter terms, each identified with specific events in the court's recent history, and data have been collected on cases decided by the court during each of the three periods.

The first part of the data set consists of 376 cases handed down between October 1, 1964, and September 30, 1966. During this two year period, the bench was composed of five judges. Table 1 in the appendix presents some basic information on each.<sup>65</sup> Two aspects of these judges' careers are of great interest. First, with one exception, they came to the court from positions of significant sta-

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60. Heise, *Civil Pay Cases Before the Court of Claims*, 55 GEORGETOWN LAW JOURNAL 497 (1966).

61. *Id.* at 505.

62. *Id.* at 497-98.

63. Johnson, *Court of Claims Decisions in the Field of Military Retired Pay*, 23 FEDERAL BAR JOURNAL 374 (1963).

64. *Id.* at 394. For additional commentary on military pay cases see Glasser & Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 AMERICAN UNIVERSITY LAW REVIEW 391 (1973); Harmel, *Military Pay Cases Before the Court of Claims*, 55 GEORGETOWN LAW JOURNAL 529 (1966).

65. Background information was obtained primarily from Judge Bennett's biographies of the judges who have served on the Court of Claims contained in 211 Ct. Cl. 1, 1-235 (1976). See also, notes 3 & 4 *supra*; Ellison, *The United States Court of Claims: Keeper of the Nation's Conscience for One Hundred Years*, 24 GEORGE WASHINGTON LAW REVIEW 251 (1956); Wiecek, *The Origin of the United States Court of Claims*, 20 ADMINISTRATIVE LAW REVIEW 387 (1968).

tus and prestige, and second, none displays a strong partisan political background.<sup>66</sup> In fact, none of these judges had ever held an elected non-judicial office, though Judge Collins had been an active Democrat in Florida between 1930 and 1936.<sup>67</sup> Thus, insofar as background characteristics are concerned, the Court of Claims between 1964 and 1966 was composed of nonpartisan, relatively apolitical, judges.

In 1966, Congress authorized two additional judgeships for the court.<sup>68</sup> President Johnson nominated, and the Senate confirmed, Byron Skelton and Philip Nichols for these positions. Skelton had held only local political offices, but was an active Democrat serving once as National Committeeman and as a delegate to four national conventions.<sup>69</sup> As such, he was much more of a practical politician than any of his colleagues. Nichols was a judge of the United States Customs Court at the time of his appointment and had served previously as Commissioner of Customs.<sup>70</sup> A Democrat also, Nichols was not an active partisan and held no party offices although his wife was a secretary and administrative assistant to Lyndon Johnson at various times throughout his long political career.<sup>71</sup> The second part of the data set consists of 202 cases decided by this seven judge court between December 1, 1969, and July 31, 1971. Whereas the court during Period I was as evenly divided as possible insofar as partisan affiliation is concerned, the court in Period II consisted of a majority of Democrats.

Judges Durfee and Laramore, both Republicans, accepted Senior Judge status and retired from active service in 1972. President Nixon appointed two active Republicans, Shiro Kashiwa and Robert Kunzig, to replace them. Kashiwa, who came to the court from the office of Assistant Attorney General, Land and Natural Resources Division, had been active in Republican circles in Hawaii, once serving as Vice Chairman of the party.<sup>72</sup> Kunzig was Administrator of the General Services Administration when he accepted the nomination to the court.<sup>73</sup> Although he had never held an elected office, Kunzig was very active in the Republican Party in Pennsylvania as an administrative assistant and campaign manager for former Senator Hugh Scott and several other Republican candidates.<sup>74</sup>

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66. Note 65 *supra*.

67. Note 65 *supra*.

68. Note 18 *supra*.

69. Note 65 *supra*.

70. Note 65 *supra*.

71. Note 65 *supra*.

72. Note 65 *supra*.

73. Note 65 *supra*.

74. Note 65 *supra*.

Marion T. Bennett was chosen by President Nixon to replace Judge Collins who died in 1972. Judge Bennett was formerly a Republican member of the House of Representatives from Missouri.<sup>75</sup> In 1949, he was selected to serve as a Commissioner of the Court of Claims and "renounced further active participation in politics."<sup>76</sup> The confirmation of Judge Bennett returned the court's complement to seven judges, but 1972 saw a major change in partisan alignment. From a bench that was marginally Democratic, the court returned to the politically even division which was characteristic of Period I. The distribution was now three Democrats (Cowen, Skelton, and Nichols), three Republicans (Kashiwa, Kunzig, and Bennett) and one independent (Davis). Perhaps more importantly, the bench was now significantly more politicized: four of the seven judges had been at some point in their careers active partisans. The three Republican judges fit into this category as did Democratic Judge Skelton. Data were collected on 192 cases decided by this court between January 1, 1975, and October 31, 1976, which will be referred to as Period III.

The above data on partisan affiliation and political activity levels will be correlated to judicial votes at a later point in this analysis. Prior to addressing the principle research questions of the role of partisanship in Court of Claims decisions and the changes in court activities that might reasonably be expected to occur in conjunction with changes in the court's membership, it is appropriate to examine the court's decisions at an aggregate level, although this type of analysis is almost totally descriptive in nature and lacking in detail.

There are some significant changes in decisional patterns of the Court of Claims over the three time periods. The court of Period I (1964-66) ruled in favor of the government in 59.5 percent of its decisions. In Period II (1969-71), the government and plaintiffs each won exactly one-half of the cases. By Period III (1975-76), governmental dominance had reasserted itself prevailing in 57.5 percent of the courts' decisions. These statistics also indicate the existence of a source of variance that operates with a different effect in each time period. Since the assessment and evaluation of change

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75. All of the judges serving on the court between 1964 and 1976 were chosen by Presidents who shared their party affiliation. Judge Davis, an Independent nominated by President Kennedy, is the only exception. This tendency for Presidents to choose federal judges is a well documented phenomenon. See H. ABRAHAM, *JUSTICES AND PRESIDENTS*, 60 (1974).

76. 211 Ct. Cl. 214. Bennett served as a Commissioner and then as Chief Commissioner of the court until his nomination to the bench.



over time is one of the research objectives, there is potential profit in investigating, first, the correlates of success in a suit and, second, the stability of these relationships over time. In social science literature, one of the most frequently used variables in the study of judicial decisions is the nature of the litigants. In Court of Claims cases this is not only an appropriate variable, in part because the federal government always defends in actions, but also because several interesting relationships materialize as Table 2 (in appendix) demonstrates.

It is apparent that the changes in decision patterns are not identical for the two types of plaintiffs over the three time periods. Although business experienced significant changes in their success rate, the variance for individual plaintiffs was much larger. There were no major changes in the court's jurisdiction or procedures that would explain this result. Breaking down the cases by type of claim, however, does shed a little more light as to the source of this substantial variance.

Business claims nearly always involve either contract or tax disputes. Individuals file a few contract cases, but most of their claims are based on taxes or on their employment by the government. The changes in the ratio of claims granted in the contract, tax, and military pay areas over the three time periods are generally consistent with the overall percentages. In Period I the court granted only 20.5 percent of the civilian pay claims. In Period II, the proportion of successful claims rose to 47.1 percent but then fell back to 29.0 percent in Period III. A number of the articles reviewing the civilian pay literature suggest a reason for these extraordinary fluctuations. Heise may, however, have identified the solution when he referred to the court as being "liberal" in these cases between 1946 and 1961.<sup>77</sup> Given the absence of a legal reason for the changes, it could be hypothesized that the aggregate structure of judicial attitudes during the period 1969-71 was one that tended to look with favor on claims pressed by persons for pay due them in their capacity as federal civilian employees.

#### IV. THE COMMISSIONER SYSTEM

As previously noted, the Commissioners, or Trial Judges as they were designated in 1973, play an important role in the court's handling of claims. Even though the court has original jurisdiction, it functions primarily as an appellate court. Procedurally, the court functions as do most appellate courts, in that it reviews briefs and hears arguments rather than taking testimony.<sup>78</sup> Thus,

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77. Note 60 *supra*.

78. The testimony is given to the Commissioner in a trial. The evidence is then transcribed and made a part of the Commissioner's report. This report, along

Court Rule 7 accurately describes the Court of Claims as an appellate court, in spite of how it may appear on an organizational chart of the federal judiciary.<sup>79</sup>

The fact that the Trial Judges are part of the Court of Claims raises an interesting question. Typically, appellate courts review decisions of courts that are organizationally inferior to them and with which they have few direct relationships. The Court of Claims is somewhat different, however, in that the Trial Judges constitute a department within the court. Due to the proximity of the Court of Claims to its trial division, there exists the possibility that the Trial Judge is the true decision maker rather than the court. There are two ways in which to evaluate this statement: first, by an examination of the extent to which the court accepts the Trial Judge's findings, and, second, by comparison of the results of cases that have been heard by the Trial Judges to the courts' decisions on motions for Summary Judgments. In neither case is the data analysis conclusive as both approaches to the question involve assumptions of randomness and the absence of prejudicial exogenous sources of variance. In spite of the uncertainty involved, the significance of the question justifies the inquiry. As the situation stands the data amounts to a *prima facie* case that the judges and not the Trial Judges are making the decisions. The rather significant increase in the frequency with which the Trial Judge's decision is set aside is unsettling and at a minimum demands further inquiry.

Focusing initially on the manner in which the court disposes of the Trial Judge's findings, it is evident from the data that the court is not inclined to affirm arbitrarily their recommendations. In the first time period (1964-66), the court rejected 4.2 percent of the recommendations and modified another 30.6 percent. The court in Period II (1969-71) rejected 7.3 and modified 14.5 percent. The most recent court (1975-76) reversed the Trial Judge in 15.6 percent of the relevant cases and modified 12.5 percent of the recommended decisions. A total absence of rejections or modifications, however, would not have led to a determinative conclusion, since it is possible that the court carefully examined each case and decided to adopt the Trial Judge's recommended decision.<sup>80</sup>

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with the oral argument of the parties, is presented to the court which, subsequently, makes its ruling. See generally, note 12 *supra*.

79. Ct. Cl. Rules, Rule 7.

80. Given the highly complimentary statements about the trial division that appear in literature, such a lack of disagreement would not have been too surpris-

The data relevant to the second part of the question, relating to the comparative differences between the results of cases heard by the Trial Judge and those decided by the court on motions for Summary Judgment are presented in Table 4 (in appendix). These data show a mixed result. If the court were to accept uncritically the Trial Judge's decision and the court and the trial division did not share the same perspectives on law and on policy then there would be substantial differences in decisional patterns between cases disposed of on Summary Judgment and the recommended result filed by the Trial Judge. Clearly, such evidence is not present in the first time period: there is a difference of only 2.2 percent between the two claim denial rates. The subsequent time periods present greater difficulty since the differences of 13.1 percent and 16.9 percent are relatively high.<sup>81</sup>

A conservative interpretation of the data indicates that the court is performing a substantial review function. Thus, when analysis of judicial votes is undertaken, the votes are best accepted as valid expressions of judicial opinions and not as echoes of the trial division. Indeed, there is a clear indication that the Trial Judges and the court are following divergent paths. The reversal rate in Period III is approaching the frequency with which the courts of appeal reverse district courts.<sup>82</sup> Further, the data in Table 4 suggest that the court and the trial division have some fundamental disagreements. These disagreements are most notable in the area of civilian pay cases and several explanations of this phenomenon are possible. Earlier tables have indicated that the court has fluctuated rather wildly in its propensity to grant claims particularly those involving civilian pay claims. Some disparity in patterns and a relatively low reversal rate would be expected due to the fact that court precedents are always too late to affect those cases in which the Trial Judge has already filed a decision. When the court shifts positions as widely as it did during these time periods, the trial division may well find the court's decisions confusing and of diminished value as guidelines. Thus, the patterns reported here may be a reflection of this factor. The decision to use panels of three judges to decide cases rather than to have them heard *en banc* may be another relevant factor.<sup>83</sup> This, however, applies only to the third time period and will be considered as part of the investigation of judicial voting behavior.

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ing had it occurred. All of the literature describing the Commissioner system reflects this point. See notes 3 & 4 *supra*.

81. Analyzing the type of cases reveals that civilian pay cases account for much of this disparity.

82. The reversal rate by courts of appeals in cases appealed from district courts between July 1, 1972, and June 30, 1973, is 17.9 percent. S. EARLY, JR., CONSTITUTIONAL COURT OF THE U.S. 34 (1977).

83. See, note 19 *supra* and accompanying text.

## V. PARTISANSHIP ON THE COURT OF CLAIMS

The relationship between judges' political party affiliation and their votes has been a principle focus of the judicial behavior literature. No generalizations are immediately apparent from an examination of the literature, and it seems clear that, if the relationship is to be identified precisely, more courts must be investigated. Previous research suggests that three situational variables determine, at least in part, the extent to which judicial votes correlate with judges' party affiliation: 1) the extent to which the court is politicized, 2) the physical structure of the court, and 3) the types of cases that the court decides.

Adamany<sup>84</sup> speculated that the involvement of the court in partisan politics would affect the voting behavior of the judges. He tested the accuracy of his observation by comparing the Supreme Courts of Wisconsin and Michigan. The Michigan court was widely recognized as a politicized institution, and studies by Feeley,<sup>85</sup> Schubert,<sup>86</sup> and Ulmer<sup>87</sup> reported partisan affiliation to be an axis of division. The Wisconsin Supreme Court is less closely related to partisan politics, particularly insofar as judicial selection is concerned, and party affiliation explains less of the variance in voting behavior than in Michigan.<sup>88</sup> Beiser and Silberman,<sup>89</sup> reporting on the New York Court of Appeals, draw conclusions similar to those of Adamany for the same general reason: the level of politicization. The lower federal courts, including the Court of Claims, would certainly qualify as partisan in nature, primarily because of the distinctive relationship between party and judicial selection.<sup>90</sup> Goldman,<sup>91</sup> studying the United States Court of Appeals from 1961 to 1964, found a correlation between partisan affiliation and decisions in several areas. Walker,<sup>92</sup> ana-

84. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AMERICAN POLITICAL SCIENCE REVIEW 57 (1969).

85. Feeley, *Another Look at the "Party Variable" in Judicial Decision Making: An Analysis of the Michigan Supreme Court*, 4 POLITY 91 (1971).

86. Schubert, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR, 129 (1959).

87. Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 JOURNAL OF PUBLIC LAW 352 (1962).

88. Note 84 *supra*, at 73.

89. Beiser & Silberman, *The Political Party Variable: Workmen's Compensation Cases in the New York Court of Appeals*, 3 POLITY 521 (1971).

90. With one exception all the judges on the Court of Claims were nominated by presidents of their own party. See note 75 *supra*.

91. Goldman, *Voting Behavior on United States Courts of Appeals 1961-64*, 60 AMERICAN POLITICAL SCIENCE REVIEW 374 (1966).

92. Walker, *A Note Concerning Partisan Influences on Trial-Judge Decision Making*, 6 LAW AND SOCIETY REVIEW 645 (1972).

lyzing the decisions of district court judges, did not find partisan influences in civil liberties cases, but did not investigate the civil areas in which Goldman found most of the significant associations. Thus, the political attributes of the court must be the starting point for developing a general statement concerning the relationship between party affiliation and judicial decisions.

After observing the differences between the Wisconsin and Michigan Supreme Courts in terms of the party variable, Adamany speculated that the physical environs of the decision making process are material to the existence of the relationship.<sup>93</sup> He argued that on a court such as the Wisconsin Supreme Court in which the members frequently interact, conflicts are resolved more often than on "loner" collegial courts such as the Michigan Supreme Court, hence stifling party based disagreement.<sup>94</sup> It appears that although physical arrangements might be relevant to the level of dissent on a court, they are at best tangentially related to the type of disagreement. Through frequent informal consultation and the imposition of stringent deadlines for the filing of dissenting opinions, a court might acquire unanimity in nearly all of its decisions, but, when dissenting judges fail to form blocs based on party affiliation the physical structure of the court is not an immediately obvious cause. Thus, Canon and Jaros<sup>95</sup> might profitably have included such a variable in their analysis of the level of dissent on state supreme courts, but any correlation with partisan voting would be fortuitous.

The third factor in the analysis of this particular aspect of judicial behavior regarding the types of cases decided by the courts is more descriptive of the research design employed than of the courts involved. Such considerations may well affect the conclusions drawn and thus should be noted. With the success that students of judicial behavior have experienced in the scaling and bloc analysis of United States Supreme Court civil liberty decisions, it seems odd that whenever criminal or civil liberty decisions of any court are examined for evidence of partisan influence, the search is often fruitless. Because judicial analysts have generally confined their research designs to one or two types of cases, their conclusions about judicial behavior are content specific. Relationships seem to appear and vanish depending upon the manner in which cases are chosen. For example, Goldman<sup>96</sup> and Nagel<sup>97</sup> found evidence of partisan influence only in certain types of economic cases. These peculiarities of re-

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93. Note 84 *supra*.

94. *Id.*

95. Canon & Jaros, *State Supreme Courts: Some Comparative Data*, 42 STATE GOVERNMENT 260 (1969).

96. Note 91 *supra*.

search design make it difficult to derive a generalization, a problem Adamany claims can be resolved only by "more careful conceptualization and more rigorous testing of a provocative hypothesis."<sup>98</sup>

The Court of Claims presents an intriguing combination of variables and, therefore, possesses considerable potential for a useful and productive investigation of the issue. Since the partisan nature of the court has changed between each of the three time periods, the Court of Claims is a superb source of data to test Adamany's conclusions about the role of partisanship. The court is also a collegial body similar to the Wisconsin Supreme Court. Although often divided into panels, it sits together and the members have frequent formal and informal contact with each other. The biographies written by Judge Bennett often refer to the spirit of collegiality on the court and the friendship and respect which the judges have for each other.<sup>99</sup> Fortunately, the court hears only those cases involving economic issues which are likely to display a correlation between partisan affiliation and voting behavior. Every case pits a claimant against the federal government. Using the concept of partisanship elaborated upon by Schubert<sup>100</sup> early in the study of judicial behavior, it seems reasonable to expect the following manifestations of partisanship in judicial voting: Democratic judges are expected to vote in support of suits by private individuals and against business claims. However, the type of hypothesis to be tested is more ambiguous. In general, because of the relatively nonpartisan and highly collegial nature of the bench in Period I, an association between party affiliation and judicial voting is *not* expected. It is more likely that a relationship will appear in Periods II and III due to the change in the court's personnel. Hence, it is hypothesized that the relationship between party affiliation and judicial voting will increase over time.

The method of testing such hypotheses has also been considered in the literature. Nagel<sup>101</sup> simply calculated the number of times that each judge voted in the expected direction and then evaluated the scores in terms of a court mean. Democrats were

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97. S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* 227 (1969).

98. Note 84, *supra* at 73.

99. Note 64 *supra*.

100. Schubert, *The 1960 Term of the Supreme Court: A Psychological Analysis*, 56 *AMERICAN POLITICAL SCIENCE REVIEW* 90 (1962).

101. Note 97 *supra*.

expected to cluster to one side of the mean, Republicans to the other. Adamany<sup>102</sup> found this approach to be inadequate. Adamany prefers the attitudinal scaling approach of Ulmer,<sup>103</sup> Schubert,<sup>104</sup> and others, but argues strongly that the techniques used to study collegial courts can be borrowed from research on legislative behavior.<sup>105</sup> However, a problem arises in that the data may not be amenable to such highly sophisticated statistical manipulations, *i.e.*, the technique must be appropriate for the data.

Using the Nagel approach, pro-business and pro-individual support scores were calculated for each judge. Table 5 (in appendix) displays these as a percentage of the votes cast in all cases to which each type of plaintiff was a party. For convenience, the judges are listed in order of seniority and the party affiliation of each judge is indicated.

As indicated above, the first hypothesis was that there would be no relationship between party affiliation and voting behavior in Period I. Table 5 shows conclusively that this hypothesis should be accepted. The mean support scores in business cases for Democrats and Republicans are virtually identical and the difference in cases involving individuals as plaintiffs is not significant. Furthermore, in the latter category, the scores are in the opposite direction from that predicted by the hypothesis: both Democratic judges voted for the individual less often than did the two Republican judges. It seems obvious that partisan affiliation is not correlated with judicial voting behavior in Period I.

The hypothesis specified that the party/voting behavior correlation would be higher in the second time period because the bench consisted of a Democratic majority and included at least one additional judge with a background as an active partisan.<sup>106</sup> Again, however, the table displays little evidence of a relationship between the two variables. Contrary to expectations the mean support score for Democratic judges is higher than for Republicans in business cases and a Democrat, Collins, has the highest support rate. The means for cases brought by individuals are as expected but are so similar that party identification is not associated with voting behavior.

Period III presents more complicated patterns. Eighteen of the twenty *en banc* cases heard during the period were brought by businesses. An examination of the votes in these cases reveals

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102. Note 84 *supra*, at 58-59.

103. Note 87 *supra*.

104. Note 100 *supra*.

105. For an introduction to these methods *see* L. ANDERSON, M. WATTS JR., & A. WILEO, *LEGISLATIVE ROLL-CALL ANALYSIS* (1966).

106. This method of counting partisans is quite conservative since other judges may be just as committed to the programs, etc. of their party and been nearly as active in the party but not have held a formal office.

a very high relationship between party and voting behavior. The means for each party are significantly different and, as expected, the three Republican judges favored the claim most often whereas the three Democratic judges least often. Although the bench was evenly divided between the parties, at least four judges had partisan backgrounds. Examination of *en banc* cases shows that this increased level of politicization is identifiable in the judges' votes.<sup>107</sup>

Votes cast by members of panels do not fall into such an identifiable pattern. In business cases, a Democrat (Nichols) was more supportive than expected, and a Republican (Bennett) was far less inclined to support the claim than either of his colleagues. Hence, although the means differ in the expected direction, the amount of the difference is too small to support the conclusion that party affiliation is a relevant variable. In cases brought by individuals, the mean support scores are significantly different, but in the opposite direction than was expected. It must therefore be concluded that the relationship between party identification and voting behavior, so clearly manifested in *en banc* cases, did not exist in cases heard by panels. Thus, in general, when using this type of analysis, the Court of Claims is not a court in which party affiliation and voting behavior are related.<sup>108</sup>

Simply put, the Court of Claims appears to be a very harmonious court.<sup>109</sup> In Period I, nearly all of the dissenting votes were cast by retired Court of Claims Judge Samuel E. Whitaker sitting by designation. The dissent rate for the five appointed judges was .3 percent. In Period II, the effects of politicization might be demonstrated by the dissent rate which increased substantially to 7.4 percent. The two new judges, Nichols and Skelton, were most active with dissent rates of 4.0 percent and 3.5 percent, respectively. In nearly all cases, their dissents were solitary which is most unusual for new judges on collegial courts. Typically, they do not draw attention to themselves by casting the sole dissenting vote, indeed, the prospect of a solitary dissent appears to present strong psychological and social barriers to be overcome. In Period III, there were a total of 21 cases in which one or more dissenting

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107. The hypothesis cannot be tested for cases involving claims by individuals since only two such cases were heard *en banc*.

108. The demand that more sophisticated blocking and scaling techniques be used cannot be met with these data.

109. Note 95 *supra*. Such apparent harmony can be deceptive, see Atkins & Green, *Consensus on the United States Courts of Appeals: Illusion or Reality?*, 20 AMERICAN JOURNAL OF POLITICAL SCIENCE 735 (1976).



votes were cast. However, only eleven of these cases were heard by panels even though panels hear 89.6 percent of the cases. Clearly, the pressures against solitary dissents are very strong on the Court of Claims as they are on all other three member courts.<sup>110</sup> As the data in Table 5 suggest, the dissenting votes in *en banc* cases fall into patterns related to party affiliation, but due to the relatively small number of votes involved, a more intensive analysis appears appropriate.

## VI. CONCLUSION

Although additional data sources, such as conference notes, are desirable for this analysis, it is obvious that the Court of Claims underwent two major changes between 1964 and 1976. At first, it presented the image of a monolithic court in which dissent was not condoned and partisanship was totally absent. When the bench was expanded in 1966 by the addition of two Democrats, the court greatly modified its general assessment of civilian pay claims just as one would expect if there was pressure to suppress opposition to the newly formed Democratic majority. However, little else changed; businesses slightly improved their prospects of winning a suit, but not to the extent of the change in disposition of civilian pay cases. The dissent rate in this period increased by nearly 2500 percent. This can be attributed, in part, to the expansion of the court which provided a greater opportunity for finding partners in dissent, but the active roles of the new members as dissenters is an unexplained phenomenon.

The changes in both personnel and procedure between 1969-71 and 1975-76 raise a number of questions that are left unanswered by the data. Businesses won 65 percent of their cases that were tried *en banc*, but only 39.2 percent of their panel cases. Partisanship and dissent behavior are evident on the *en banc* court, but exist at a minimal level, if at all, on the panels. There are legal and/or sociological factors at work here which remain hidden at this time.

With respect to the basic focus of the research, the role of the party variable, the Court of Claims leaves few unanswered questions. Partisanship was not a factor in the court's decisions, indeed, Judge Bennett's renunciation of partisan activity when he became a Commissioner of the court appears to reflect a strongly felt court norm. The data contradict Adamany's expectation that partisanship in judicial recruitment is associated with partisanship in judicial voting. Alternatively, Adamany is accurate in his

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110. Atkins, *Judicial Behavior and Tendencies Toward Conformity in a Three Member Small Group: A Case Study of Dissent Behavior on the U.S. Court of Appeals*, 54 SOCIAL SCIENCE QUARTERLY 41 (1973).

claim that, if future research on the "provocative hypothesis" is to be fruitful, then more innovative operationalizations of the party variable are essential preconditions.<sup>111</sup> This study of the Court of Claims may be a significant source of ideas for the completion of that task.

## APPENDIX

Table 1

## Judges of the Court of Claims: 1964-66

Name	Date of Appointment	Political Party Affiliation	Immediate Prior Position
Wilson Cowen (Chief Judge)	1964	Democrat	Chief Commissioner, Court of Claims
Don N. Laramore	1954	Republican	Circuit Judge, Indiana
James R. Durfee	1960	Republican	Chairman, Civil Aeronautics Board
Oscar H. Davis	1962	Independent	First Assistant Solicitor-General
Linton M. Collins	1964	Democrat	Private practice, Washington, D.C.

Table 2

## Decisions According to Type of Plaintiff\*

Disposition	Period I (1964-1966)		Period II (1969-1971)		Period III (1975-1976)	
	Busi- ness**	Individual	Busi- ness**	Individual	Busi- ness**	Individual
Denied	51.4%	67.5%	47.1%	56.3%	50.5%	64.8%
Granted	48.6%	32.5%	52.9%	43.8%	49.5%	35.2%
	N = 185	N = 191	N = 138	N = 64	N = 115	N = 71

\* Decisions to remand are excluded from this and all further tables.

\*\* Includes cases filed by corporations, partnerships and individuals in a business capacity.

111. Note 84 *supra*, at 73.

Table 3  
Changes in Proportion of Claims Won, Over Time

	Period I v. Period II	Period II v. Period III	Period I v. Period III
Business	+ 4.3	- 5.4	+ .9
Individuals	+11.3	- 8.6	+ 2.7
Total	+ 4.5	- 5.7	+ 2.0

Table 4  
Comparison of Summary Judgments and Recommended  
Decisions by Trial Judges

	Period I (1964-66)		Period II (1969-71)		Period III (1975-76)	
	Summary Judg- ments	Recom- mended Decision	Summary Judg- ments	Recom- mended Decision	Summary Judg- ments	Recom- mended Decision
Denied	61.2%	59.0%	57.6%	44.5%	63.4%	47.0%
Granted	38.8%	41.0%	42.4%	55.5%	36.1%	53.0%

Table 5  
Plaintiff Support Scores (In percentages)

Judge	Pro-Business				Pro-Individual			
	Period I (1964-66)	Period II (1969-71)	Period III* (1975-76)	Period III** (1975-76)	Period I (1964-66)	Period II (1969-71)	Period III* (1975-76)	Period III* (1975-76)
Cowen (D)	48.6	53.6	53.3	37.5	32.8	43.8		34.8
Laramore (R)	48.8	51.8		50.0 <sup>1</sup>	33.2	42.2		33.3 <sup>3</sup>
Durfee (R)	46.6	53.6		36.4 <sup>2</sup>	33.5	42.2		33.3 <sup>4</sup>
Davis (I)	47.7	51.4	62.5	56.3	33.1	42.2		48.0
Collins (D)	46.4	56.5			32.2	45.3		
Skelton (D)		53.6	44.4	32.3		43.8		29.6
Nichols (D)		52.6	64.7	52.2		39.1		27.6
Kunzig (R)			72.2	47.1				41.2
Kashiwa (R)			76.5	44.4				35.0
Bennett (R)			72.2	34.3				35.7
Democratic Mean	47.5	54.1	54.1	40.7	32.5	43.0		30.7
Republican Mean	47.7	52.7	73.6	41.9	33.4	42.2		37.3
Court Mean	47.6	53.3	63.7	43.4	33.0	42.7		36.0

\* *En banc* cases only (N=18), all filed by businesses  
\*\* Panel cases only

<sup>1</sup> Sat by designation in 10 cases

<sup>2</sup> Sat by designation in 22 cases

<sup>3</sup> Sat by designation in 9 cases

<sup>4</sup> Sat by designation in 15 cases