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Fourth Circuit Publication Practices

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Carl Tobias*

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I. Introduction

Certain publication practices, especially dependence on issuing unpublished opinions, are one major response of federal courts to the increasing

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number of appeals. Few observers have assessed how specific tribunals employ these practices, although a recent study elucidates them. The Commission on Structural Alternatives for the Federal Courts of Appeals (Commission) gathered much useful data, which have remained strikingly constant, on each court. Because Fourth Circuit’s publication practices and reliance on unpublished decisions allow the court to manage a large docket and suggest that it may not enunciate the common law, this Article scrutinizes those practices.

The Article first describes the Commission’s background and study and then examines that work to improve appreciation of the modern Fourth Circuit. The Commission assembled, evaluated, and synthesized voluminous data, some of which indicated that the tribunal could operate better. Most critically, the court now publishes opinions in a tenth of its appeals, which is the lowest percentage among the twelve regional circuits. This small percentage might show that the tribunal has ceased articulating the common law. However, the data lack sufficient refinement and breadth to ascertain precisely how the court functions. The last part of this Article offers suggestions, which emphasize greater study, and ideas that should ameliorate the common law heritage’s apparent decline.

II. A Brief Analysis of the Commission and Its Work

The Commission history warrants limited review, as it has been analyzed elsewhere. Congress authorized the Commission mainly in response to concerns about the Ninth Circuit. The court’s size has led to calls for bifurcation.


Since 1983, lawmakers have attempted to divide the court. In 1997, Congress prescribed a study, granting the Commission a year to assess the appellate system, with an emphasis on the Ninth Circuit, and requiring the Commission to issue a report and proposals for such changes "as may be appropriate for" fair, expeditious and effective caseload disposition.

The Commission carefully followed the mandate. It sought written input and held six hearings, but no one urged major Fourth Circuit reforms. The Federal Judicial Center (FJC) and the Administrative Office of the U.S. Courts (AO) assisted the Commission. FJC staff performed numerous analyses and helped fashion surveys requesting judges' and lawyers' views. The Commission also collected statistical data, including the oral arguments and published opinions granted, the time to disposition (TTD), and the measures courts used to treat docket increases which have modified the tribunals since


5. See COMMISSION REPORT, supra note 1, at 33–34 (recounting the historical background). See generally Jennifer E. Spreng, The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split, 73 WASH. L. REV. 875, 876 (1998) [hereinafter Spreng, The Icebox] (reporting that efforts to split the Ninth Circuit have been ongoing for many years).


7. § 305(a)(1)(B), 111 Stat. at 2491. See Tobias, Suggestions, supra note 2, at 206–11 (detailing the congressional call for a study).

8. See COMMISSION REPORT, supra note 1, at 1–6, 100 (describing the Commission's efforts to fulfill its mission); see also Carl Tobias, A Federal Appellate System for the Twenty-First Century, 74 WASH. L. REV. 275, 295–98 (1999) [hereinafter Tobias, Federal Appellate System] (discussing the Commission's activities).


10. I premise this on a review of the transcripts. See Spreng, Three Divisions, supra note 6, at 561–62 (examining the Commission's transcripts and report).

11. The FJC and AO are the judiciary's research and administrative arms. See COMMISSION REPORT, supra note 1, at 3–4 (describing the FJC's and the AO's assistance to the Commission); § 305(a)(4)(D), 111 Stat. at 2492 (requiring the AO and FJC to assist the Commission); 28 U.S.C. § 620 (1994) (authorizing FJC); id. § 601 (authorizing AO).

12. COMMISSION REPORT, supra note 1, at 4; see also COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, WORKING PAPERS ii, 3–91 (1998) [hereinafter WORKING PAPERS] (detailing the results of the judicial survey); Akrotirianakis et al., supra note 9, at 362 (discussing judicial surveys).
1970. The Commission examined all of the material that it received, issued a
draft report and proposals, and afforded thirty days for public comment. Little input addressed the Fourth Circuit. After the Commission scrutinized
the public views, it released a final document that proffered a divisional approach
for the Ninth Circuit and the remaining courts as they grow. The Commission
also assembled much information on the Fourth Circuit.

III. Analysis of the Commission's Fourth Circuit Snapshot

A. Descriptive Analysis

1. An Introductory Word

The Commission gathered, assessed, and synthesized objective empirical
data and other relevant material, primarily from the 1997 fiscal year (FY), the
most recent year that the information was available, although much of the data
remains similar today. The data relate to numerous factors, including how
many opinions tribunals publish, and what standards courts apply "to measure
the [courts'] performance and efficiency. The Commission also used subjective criteria, namely circuit law's consistency, that defy analysis in part by surveying judges and counsel. Review of all the material for a court offers a composite picture. Comparing the statistics on each tribunal with others and the national average indicates how the court works, subject to applicable caveats. Objective data are generally relevant and reliable, suggesting how courts honor process values that involve access to justice and whether they articulate the common law, but the data must often be contextualized, refined, or elaborated. It is also critical to define and measure the related notions of appellate justice, effective operation, the appellate ideal, and the common law's enunciation. One helpful definition of appellate justice, and perhaps efficacious functioning, is prompt, inexpensive, and fair resolution. There is consensus that the appellate ideal consists of disposition on the merits of every case after briefing, argument, and consultation among three circuit judges, who publish an opinion which fully explicates the result. Appellate justice and effective operation, which the Commission seemed to use, have clear meaning.

19. COMMISSION REPORT, supra note 1, at 39. These standards include how many appeals a court resolves vis-à-vis the number filed, how many cases are orally argued, how many receive published opinions, the "time from filing to disposition, and how often the court relies on visiting judges from outside the circuit." Id. at 39 n.92.

20. See id. (explaining the criteria used); see also supra note 13 and accompanying text (citing influential reports); infra note 29 (affording examples of the data collected).

21. For example, the above data and a court's cases, especially vis-à-vis its terminations, might help little unless augmented with material on specific appeals, including docket complexity. See WORKING PAPERS, supra note 12, at 93 tbl.1 (affording a snapshot of the appellate caseloads for 1997); supra note 19 (describing the many factors that affect the appeals courts). The data are more dependable than surveys, which are subjective and can evidence bias.


24. The Commission viewed this yardstick as lenient by finding "no persuasive evidence" that any court works ineffectively. See COMMISSION REPORT, supra note 1, at ix–xi, 29-30 (describing why splitting the Ninth Circuit is not necessary for efficacy). For purposes of my analysis, a court that, absent explanation, performs much below the average (1) for multiple, objective criteria may not deliver justice or articulate the common law, or (2) for one criterion may operate ineffectively.
and inform the appellate ideal that defies precise calculation. Moreover, publication practices can suggest whether a court articulates the common law.

Even if appellate justice and efficacy were easier to define, they are relative terms, which demand exact measurement, in part because caseload growth and stagnant resources have modified the courts and frustrated efforts to deliver justice, operate well, honor the appellate ideal, and enunciate the common law.25 The notions above suggest tribunals might treat burgeoning appeals of different complexity with varied resources in diverse, equally acceptable ways.26 For instance, one may perform best and articulate the common law, if it offers many written, albeit terse, explanations but few oral arguments and published opinions, and a second might do so by granting limited argument and much publication.27 These and certain other responses to docket increases with scarce resources, thus, might all be satisfactory.28 Moreover, definitive conclusions require scrutiny of numerous, individual filings.29 This Article, nonetheless, assesses how the Fourth Circuit, the remaining courts, and the


27. The first tradition has apparently operated in the Ninth Circuit and the second in the Second Circuit. See Interview with Procter Hug, Jr., Ninth Circuit Chief Judge, in Las Vegas, Nev. (May 7, 1999) (describing the tradition of written, albeit terse, unpublished opinions and few published opinions and oral arguments) (summary on file with the Washington and Lee Law Review); Interview with Jose Cabranes, Second Circuit Judge, in Las Vegas, Nev. (May 7, 1999) (describing the tradition of rendering published decisions in a high percentage of cases though allowing limited oral argument) (summary on file with the Washington and Lee Law Review); see also Working Papers, supra note 12, at 93 tbls.2 & 3 (presenting data on oral arguments and published opinions).

28. Increased use of staff and visitors are examples of approaches that I assess below.

29. The Commission seemed to appreciate my ideas, saying it lacked time for a statistically reliable analysis of all Ninth Circuit decisions to make an objective finding. See Commission Report, supra note 1, at 39 (stating that the Commission lacked sufficient time to undertake a statistically meaningful assessment of all Ninth Circuit determinations). The entity could not say that the statistical data "tip decisively in one direction"; variations in judicial vacancies, cases, and rules preclude attributing court differences to one factor, such as size. Id. at 49; see Aaron H. Caplan, Malthus and the Court of Appeals: Another Former Clerk Looks at the Proposed Ninth Circuit Split, 73 WASH. L. REV. 957, 981–84 (1998) (stating that no one, other than the judges themselves, can predict the actions of a circuit court).
system work in terms of the objective data. It then evaluates whether the tribunal dispenses justice, functions well, and articulates the common law by comparing it with others. I next tender additional views on the court.

2. The Commission Data on the Fourth Circuit

The Fourth Circuit occupies the middle range vis-à-vis certain relevant parameters, which mainly implicate size. In FY 1997, the court decided 2387 appeals on the merits, which was fourth greatest in the system. The tribunal resolved 159 cases per authorized active judge, the fifth largest, surpassing the national average of 155. The court granted arguments in 30% of matters, tying three circuits for the lowest, a number well below the 40% average. It published opinions in 11% of the appeals, the lowest among the circuits and twelve points under the average. The tribunal decided 17% of its cases on the merits following argument. The Fourth Circuit and two others were next to last overall and were 5% below the average. Between FY 1995 and FY 1997, the court’s median time for

30. The Fourth Circuit serves the fifth largest population (24,829,436), includes the seventh greatest land base (152,289 square miles), equals three courts for the third most federal districts (9), has the fourth largest complement of active circuit judges (15), includes trial courts with the seventh highest number of district judges (52), annually receives the fifth largest quantity of cases (4750), and decides the fourth most appeals (4600). COMMISSION REPORT, supra note 1, at 27 tbl.2-9; WORKING PAPERS, supra note 12, at 93 tbl.1. In 2004, the court received 4957 filings and decided 4713 appeals. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 76, app. tbl.B (2004) [hereinafter JUDICIAL BUSINESS].

31. WORKING PAPERS, supra note 12, at 93 tbl.1; see JUDICIAL BUSINESS, supra note 30, at tbl.S-1 (stating that the Fourth Circuit decided 2424 merits appeals in 2004). Data in this paragraph are for FY 1997 merits dispositions, unless otherwise indicated.

32. WORKING PAPERS, supra note 12, at 93 tbl.1.

33. Id.

34. The other appeals courts were the Third, Tenth, and Eleventh Circuits. WORKING PAPERS, supra note 12, at 93 tbl.2; see JUDICIAL BUSINESS, supra note 30, at tbl.S-1 (stating that the Fourth Circuit granted oral arguments in 17% of its filings in 2004). The First and Second Circuits held oral arguments for more than twice that percentage. WORKING PAPERS, supra note 12, at 93 tbl.2.

35. WORKING PAPERS, supra note 12, at 93 tbl.3; see also JUDICIAL BUSINESS, supra note 30, at tbl.S-3 (stating that the Fourth Circuit issued published opinions in 9.2% of its appeals resolved on the merits in 2004).

36. WORKING PAPERS, supra note 12, at 93 tbl.3.

37. See id. at 94 tbl.5 (stating that in 1997 the Fourth Circuit decided 17% of its cases on the merits following an oral argument).

38. See id. (showing that the Fourth, Fifth, and Tenth Circuits decided 17% of cases on the merits with only the Third Circuit deciding fewer (16%)).
counseled civil, non-habeas cases terminated after hearing or submission was 12.6 months from notice of appeal to final disposition. The Tenth Circuit was quickest from lower court filing to final appellate resolution and almost matched the average for three of the five other indicia the commission used to measure TTD. 40 These practices involve staff organization and duties, alternatives to dispute resolution (ADR), and case screening and nonargument decisionmaking. Working Papers, supra note 12, at 101–16; see McKenna, supra note 23, at 40–42 (observing that most circuits use similar pre-argument or pre-briefing programs).


43. See Working Papers, supra note 12, at 110, 112 (stating that, despite relatively similar publication criteria, average overall publication rates between 1995 and 1997 ranged from 10% in the Fourth Circuit to 51% in the First Circuit). See generally Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J. 177 (1999) (discussing the necessary relief that unpublished opinions provide the judicial system while emphasizing the importance of limiting their precedential value); Kirt Shuldberg, Comment, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. L. Rev. 543 (1997) (endorsing a rule of limited publication that permits citation to unpublished opinions for their persuasive value).
The local Fourth Circuit rules basically incorporate the federal guidance for limited publication and oppose citation yet allow it if no published decision would serve as well. Former Chief Judge J. Harvie Wilkinson, III found the criteria inexact and that tribunals distinguish precedential appeals from those "chiefly for the immediate parties." The courts tender explanations of differing specificity and clarity in unpublished opinions and variously describe them for reporting purposes. The Fourth Circuit even invalidated a federal statute and treated issues as crucial in unpublished decisions. The tribunal published 19% of its merits dispositions in 1987, 15% in 1993, and 11% in 1997. Between

44. Most courts are similar. See WORKING PAPERS, supra note 12, at 114 tbl.A, 116 tbl.B (noting that the Fourth Circuit disfavors citing unpublished opinions, but permits it when no published opinion would serve as well); see also FED. R. APP. P. 36 (providing that a court may enter a judgment of affirmance without opinion, but stating that such a judgment would have no precedential value); 4TH CIR. R. 36 (providing a similar publication policy, stating that citation is disfavored save to establish res judicata, estoppel, or the law of the case); William L. Reynolds & William M. Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 DUKE L. J. 806, 814 (tracing Fourth Circuit publication and citation history). See generally Penelope Pether, Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts, 56 STAN. L. REV. 1435 (2004) (same).

45. Letter from J. Harvie Wilkinson, III, Fourth Circuit Chief Judge, to Will Garwood, Chair, Advisory Committee on Appellate Rules (Feb. 3, 1998) (on file with the Washington and Lee Law Review) (stating that Judge Wilkinson deemed this fair); accord Martin, supra note 43, at 178, 189 (stating that many federal appellate cases are not novel and policy and practicality suggest distinguishing between worthy, precedential, publishable cases and those that merely concern a dispute between parties that are readily resolved through settled law).

46. See WORKING PAPERS, supra note 12, at 111 (stating that courts differ in their specificity and clarity regarding dissents and concurrences, the correlation between case outcome and publication, and the lack of uniformity in what constitutes a "reasoned" or "without comment" opinion); see also infra note 74 and accompanying text (examining the criteria for determining a circuit's effectiveness).


48. Courts have long followed diverse traditions. All, but the U.S. Court of Appeals for the District of Columbia Circuit, have reduced publication since 1987. WORKING PAPERS, supra note 12, at 111–12; see JUDICIAL BUSINESS, supra note 30, at tbl.S-3 (stating that the Fourth Circuit published 9% in 2004). This and argument data show courts do not aspire to the
FY 1995 and FY 1997, this court published at rates lowest overall and lowest for pro se filings.  

The raw data suggest that the Fourth Circuit might perform and enunciate the common law better. The data on opinion publication is instructive. This is a helpful measure of appellate justice, efficacious operation, and the common law's articulation, which implicates process values, namely broad court access, while publication enhances judicial accountability and visibility and litigant fairness. The tribunal functions rather effectively in terms of certain parameters; it matches the system average for numerous TTD factors and for terminations per judge. Closer scrutiny reveals that the raw data are not conclusive. The seemingly negative features of circuit performance are illustrative. The tribunal registers very low numbers for only two, albeit important, standards: opinion publication and oral argument. The small figures would evoke less concern, if those denied argument and publication warrant neither or safeguards protect litigants who deserve the opportunities. However, circuit operations' apparently positive dimensions remain equally unclear. The tribunal exceeds the average for one of six TTD criteria and surpasses the per judge dispositions by a mere four terminations per judge. The court is also below national levels for other measures. The objective data alone, thus, do
not show that the Fourth Circuit works, or articulates the common law, less well than the tribunal might, although its overall comparison with additional courts helps clarify the situation.

3. A Closer Comparison of the Fourth Circuit with Other Courts

The First and Seventh Circuits seem to perform best. The First grants the second largest percentage of arguments and opinions, and the Seventh furnishes the third.\(^55\) The First decides cases quickest by two measures, while the Seventh ties the District of Columbia Circuit as second fastest from notice of appeal to final brief.\(^56\) However, neither court functions as well vis-à-vis all standards. For example, only two tribunals resolve fewer matters per judge than the First,\(^57\) and the Seventh treats filings rather slowly by certain measures.\(^58\) The Fourth Circuit might also be compared with tribunals which seem to perform less well. The Third, Fourth, and Eleventh appear to operate least effectively. They are among the four granting the fewest arguments,\(^59\) while the three publish the smallest percentages of opinions.\(^60\) They do function relatively well vis-à-vis other parameters. The Third and Fourth promptly resolve cases by some measures.\(^61\) The Eleventh decides substantially more appeals per judge—

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\(^55\) Id. at 93 tbl.2. Both publish opinions in more than twice the percentage of cases as the national average and exceed virtually all the other courts. Id. at 93 tbl.3. Both easily surpass the Fourth Circuit with the First offering two and four times the percentages of arguments and published decisions respectively. Id. at 93 tbls.2 & 3.

\(^56\) Id. at 95 tbl.7. The First Circuit is quickest from the notice of appeal to final disposition and from last brief to hearing or submission. Id.

\(^57\) See id. at 93 tbl.1 (charting a "Snapshot of Appellate Caseloads, FY 1997"). One is the D.C. Circuit, whose docket includes many administrative appeals and which resolves fewer matters per judge than the First. Id.

\(^58\) Id. at 95 tbl.7. It remains unclear which circuit works best, but each seems to work better than all the others.

\(^59\) Id. at 93 tbl.2; see also supra note 34 and accompanying text (describing courts that granted arguments in only 30% of matters).

\(^60\) See WORKING PAPERS, supra note 12, at 93 tbl.3 (providing the percentage of opinions that the three courts publish). The Third and Eleventh Circuits terminate the highest percentages of appeals on the merits employing "without comment" dispositions. Id. at 111 tbl.9.

\(^61\) See id. at 95 tbl.7 (charting the "Median Time Intervals (in Months) in Counseled Civil Non-prisoner Cases Terminated After Hearing or Submission, FY 1995–1997"); see also supra note 52 and accompanying text (showing that the Fourth Circuit surpassed the national
275—than any other tribunal. A majority of each court's active members has requested Congress not to authorize more positions, but the conservative docket and resource estimates on which the U.S. Judicial Conference bases judgeship proposals indicate the three tribunals need more seats. Fourth Circuit judges also affirmatively responded by the highest percentages to some Commission survey questions about expanding the tribunal's judicial complement.

The Commission data, thus, suggest that the Fourth Circuit may not work as efficaciously, or articulate the common law as fully, as the court might, particularly when compared to other tribunals. Were the twelve courts arrayed on a spectrum, the Fourth Circuit would be one which seems to perform less well and to enunciate the common law less thoroughly, but additional ideas derived from related work should yield greater clarity.

average of cases resolved per authorized active judge and that it nearly matched the national average for speed in counseled civil, nonprisoner cases terminated after a hearing or submission).

62. WORKING PAPERS, supra note 12, at 93 tbl.1. The Fifth Circuit is second with 202; the national average is 155. Id.

63. See Grassley, supra note 42, Third, Fourth and Eleventh Circuit Analyses (discussing the ruminations of active court members within the Third, Fourth, and Eleventh Circuits); Carl Tobias, Choosing Federal Judges in the Second Clinton Administration, 23 HASTINGS CONST. L.Q. 744, 749 (1997) [hereinafter Tobias, Choosing Federal Judges] ("However, a few appellate courts have officially declined to seek more judgeships and the Senate did not fill an existing opening on the D.C. Circuit in 1996, ostensibly finding the present judicial complement sufficient."); Wilkinson Statement, supra note 42, at 15 ("Uncontrolled growth in judges and jurisdiction is the single greatest problem the federal judiciary has to confront." (quoting Judge J. Harvie Wilkinson, III)).

64. See Tobias, Choosing Federal Judges, supra note 63, at 753 ("Most Conference recommendations for additional judgeships are carefully considered, comparatively conservative, and premised on relatively objective factors, such as complexity and size of caseload per judge in circuits and districts."). But see Grassley, supra note 42, General Findings, at 2-7 ("The use of mechanical formulae as a benchmark for federal judgeship needs has significant drawbacks."); J. Harvie Wilkinson, III, The Drawbacks of Growth in the Federal Judiciary, 43 EMORY L.J. 1147, 1161-63 (1994) [hereinafter Wilkinson, Drawbacks of Growth] (arguing that the "statistical profile" employed by the Judicial Conference does not provide a complete view of whether additional judgeships are needed); Federal Judgeship Act of 2003, S.920, 108th Cong. (2003) (recommending additional active judgeships).

65. The Commission asked if expansion would help the court "correct prejudicial errors, minimize litigation expenses," avoid national and intracircuit disuniformity, and hear argument. See WORKING PAPERS, supra note 12, at 18-19 (charting "Commission on Structural Alternatives for the Federal Courts of Appeals Summary Data from the FJC Survey of United States Circuit Judges").
4. Additional Insights on the Fourth Circuit

The Commission increases Fourth Circuit comprehension by reaffirming conventional wisdom. For instance, the tribunal, as all courts, uses myriad approaches to treat growing dockets with few resources. The commission confirms or illuminates notions in related studies. Most applicable is an evaluation by the U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts. The commissioners reaffirm a number of the subcommittee's ideas. They say that all tribunals work efficaciously, which resembles this study's finding of effective Fourth Circuit operation, and agree with its assertions that more judges may threaten efficient resolution and circuit law's clarity and stability, in part by fostering disuniformity and greater reliance on the en banc process. To the extent Commission data, namely limited argument and publication, indicate the court articulates the common law less fully than it might, the Commission questions the study. The subcommittee contends that protections, such as a panel member's opportunity to reject use of a summary opinion, address the low numbers. Moreover, Local Rule 36

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66. See supra notes 30–52 and accompanying text (discussing the Commission data on the Fourth Circuit); see also supra notes 13, 26, 29 and accompanying text (discussing the types of changes that result from the growing number of cases, the increasing diversity of appeals, and continued research and surveys).

67. Grassley, supra note 42. Senator Charles Grassley (R-Iowa) chaired the subcommittee.

68. Compare COMMISSION REPORT, supra note 1, at 29–30 (stating that restriction on the number of judges will produce efficiency, reduce inconsistency, and lead to "more coherent and predictable law that provides sound guidance to lawyers and judges who are governed by it") with Grassley, supra note 42, Fourth Circuit Analysis, at 1, 3 (advocating that "current judicial vacancies in the Fourth Circuit should not be filled, nor should additional judges be allocated"). See Wilkinson, Drawbacks of Growth, supra note 64, at 1173–74 (stating the views of former Chief Judge Harvie Wilkinson); Wilkinson Statement, supra note 42, at 13, 16 (same). The court’s performance exhibits judicious use of staff attorneys; screening, through telephone conferences and restricted argument in "more significant cases" and none in "routine" appeals; related devices, namely informal briefs and summary dispositions; and opinions’ prepublication circulation to encourage uniformity. See also Grassley, supra note 42, Fourth Circuit Analysis, at 2 (highlighting the unique approaches taken by the Fourth Circuit); Wilkinson Statement, supra note 42, at 16 (discussing the Fourth Circuit’s ability to remain efficient through specifically tailored approaches to judging, rather than the addition of more judges); 4TH CIR. LOC. R. 33, 34, 36 (stating Fourth Circuit local rules pertaining to "Circuit Mediation Conferences," oral arguments, informal briefs, court sessions, argument time, and entry of judgment and notice); 4TH CIR. I.O.P. 36.3 (noting Fourth Circuit internal operating procedures pertaining to summary opinions). Most ideas conserve resources, but a few, such as trusting publication to one judge’s discretion, may restrict access. See 4TH CIR. LOC. R. 34(b), 36(a) (stating Fourth Circuit local rules pertaining to "Informal Briefs" and "Publication of Decisions").

69. See Grassley, supra note 42, Fourth Circuit Analysis, at 1 ("The circuit, however, has
requires publication, if the "author or a majority . . . believes the opinion satisfies one or more" standards and authorizes counsel to seek an unpublished opinion's publication by citing reasons therefor.\(^70\)

Finally, some performance measures, including restricted publication, may show the court fails to deliver justice, to work, or to develop the common law, as well as the tribunal might, although its TTD, dispositions per judge, and party safeguards indicate otherwise. In the end, the lack of refined, broad, and consistent material precludes determinative findings.

\section*{B. Critical Analysis}

The Commission enhances appreciation of the Fourth Circuit. The commissioners offer much relevant data while implying that the tribunal dispenses justice through, for instance, prompt resolution and adduce little strong evidence that the court does not articulate the common law. Despite this helpful contribution, the study is not refined or thorough enough to yield dispositive conclusions. Even the information which most persuasively suggests the court might espouse the common law better remains unclear. For example, learning only that the tribunal publishes opinions in 11\% of appeals is not definitive. Comparing this and raw numbers on all courts seems as unhelpful, because case mixes, resources, and the measures tribunals use to resolve growing appeals differ. In fact, the Commission found that the diverse specificity of "without comment" resolutions and their varied description for safeguard mechanisms to ensure that every litigant has his/her due process rights maintained. For example, if any single judge believes a case should be orally argued, the judge may put it on the scheduling calendar.

\textit{Id.} 4TH CIR. Loe. R. 36(a). This rule states:

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

- It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit;
- It involves a legal issue of continuing public interest;
- It criticizes existing law;
- It contains a historical review of a legal rule that is not duplicative;
- It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

\textit{Id.}
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record-keeping preclude comparisons with "nationally reported data." Thus, while Fourth Circuit publication may be deficient, it could suffice. For instance, meticulous use of a few safeguards and comprehensive, lucid explanation of holdings in unpublished dispositions may ameliorate seemingly limited publication. Even were the available material clearer, the information might not fully depict overall performance that ranges from the esoteric notion of judicial collegiality to mundane, daily court administration. In short, it may be impossible to characterize exactly the tribunal's state without additional, and more refined, material, namely the ideas which review of many appeals could yield. In fairness, the Commission and other assessors did not survey all pertinent empirical data. For example, their judgments that the Fourth Circuit operates well are useful. Nevertheless, this and other insights are controversial, but most can be tested empirically or their understanding improved with carefully gathered material, although a few, such as optimal circuit size, might require incommensurable policy trade-offs.

In sum, the data accumulated by the Commission and additional evaluators are not refined or broad enough to permit conclusive determinations about whether the Fourth Circuit affords justice, works effectively, or articulates the common law. The information, however, suffices to raise concerns about the tribunal, to justify further investigation which should better answer the questions, and to posit miscellaneous recommendations for the future.

IV. Suggestions for the Future

This lack of clarity suggests caution, but the Fourth Circuit may institute several actions. The tribunal might conduct greater analysis, implement salutary ideas, and test promising devices through review of existing material,

71. WORKING PAPERS, supra note 12, at 111 (arguing that it is not possible to compare reliably the dispositions of the courts of appeals because of a lack of uniformity within court records). This, case complexity, and visitors' inflation of a few indicia show the need to refine data. See supra note 21 and accompanying text (discussing the ideal process for analysis of data, specific appeal information, and docket complexity simultaneously). The Commission refines some data. For example, it does not treat a circuit's senior judges as visitors. See WORKING PAPERS, supra note 12, at 108 tbl.6a (charting the "Appeals in Which at Least One Visiting Judge Participated, FY 1997 and a 5-Year Average").

72. See generally Harry T. Edwards, The Effects of Collegiality on Judicial Decision Making, 151 U. PA. L. REV. 1639 (2003) (discussing the role that collegiality plays within the judicial function); Deanell Reece Tacha, The "C" Word: On Collegiality, 56 OHIO ST. L.J. 585 (1995) (discussing the important role collegiality, as well as statistics, have in the evaluation of the judiciary); supra note 29 and accompanying text (discussing the need to investigate multiple areas before forming conclusions about current judicial effectiveness).
its own situation, and the other courts. An independent expert could undertake a study, but the tribunal may want to create a group like the "Evaluation Committee," which assessed the Ninth Circuit in light of the Commission's work. 73

A. Additional Study

The assessors must analyze and synthesize the maximum, relevant information that will yield more definitive conclusions about the tribunal's current state. Evaluators should review and capitalize on existing material, namely the helpful Commission and subcommittee ideas and treat the difficult, unresolved issues. They must finish the statistically meaningful analysis which the Commission lacked time to perform. If assessors definitively find that the tribunal does not enunciate the common law, they should identify why and pinpoint the best solutions.

Evaluators could seek insights of judges and counsel on unclear questions. For example, assessors might interview attorneys for ideas on whether the tribunal correctly designates appeals that warrant measures, namely opinion publication, thus probing the subcommittee notion that the court accurately delineates these matters. However, evaluators should think about other possibilities because respondents might not be objective. Assessors, thus, could monitor numbers of cases from filing to disposition. This is the best way to elucidate whether the Fourth Circuit appropriately grants procedural opportunities and espouses the common law. Central to the queries will be the detection of various options' effects, through scrutinizing their benefits and detriments and ameliorative measures' impacts. 74 Evaluators might attempt to determine whether the 9% publication rate suffices for parties, especially by


74. See supra notes 70–71 and accompanying text (discussing the most comprehensive way to analyze the effectiveness of a particular circuit). This will require a finely calibrated, cost-benefit analysis of the measures and ameliorative devices. Examples of benefits are greater court access and judicial visibility. An illustration of the disadvantages is reduced circuit resources. An example of ameliorative devices is litigant safeguards. Id.
articulating the common law. These inquiries will necessitate reviewing cases’ factual allegations and legal theories, meticulously comparing resolution of appeals with similar issues and finding how broadly and clearly unpublished decisions explicate the results. Tracking many cases might elucidate related issues, such as whether litigants correctly request publication and judges agree or furnish it sua sponte, when necessary. Relevant survey answers resemble the objective data. A few questions are complex and may be insolvable, but studies of uniformity and the en banc measure offer valuable guidance, as they show how to review the law, facts, and decisional process in many cases.

If evaluators ascertain that the tribunal presently confronts difficulties necessitating remediation, they must attempt to identify why, an endeavor which will facilitate solutions. For instance, should docket analysis suggest that overwhelming pro se matters or scarce resources limit publication too much, enhanced judgeships or staff might be warranted. Assessors must consider many feasible remedies. Useful sources are the Commission, its predecessors, and scholars, who have canvassed numerous measures.

75. See Commission Report, supra note 1, at 39–54 (discussing both the criteria for analysis and the potential outcome of restructuring the Ninth Circuit Court of Appeals). Argument’s provision in thrice the percentage of appeals as receive publication, safeguards’ employment, and the citation practices deployed may also inform these inquiries. See supra notes 44–45 and accompanying text (discussing the Fourth Circuit rules for publication and the position Fourth Circuit Judge J. Harvie Wilkinson, III assumes on such procedures).

76. Assessors may ask if unpublished opinion citation rules suffice by ascertaining how much parties and judges honor them and how rigorously judges enforce them, but proposed Rule 32.1’s adoption will obviate this inquiry.

77. See Working Papers, supra note 12, at 113 tbl.12, 116 tbl.B (rating the Fourth Circuit second on whether limiting “citation to unpublished opinions is a moderate or greater problem”). The Commission asked whether unpublished opinions’ unavailability was a problem but not whether securing published ones was. See id. at 87 (charting the responses to the question: "For you or your clients, how big a problem is the unavailability of unpublished decisions of the court of appeals?").


79. See Federal Courts Study Committee Report, supra note 13, at 109–23 (detailing
review certain productive options applied or tested by courts, namely those that work best vis-à-vis the standards for which the Fourth Circuit may function less well. Seventh Circuit analysis could show how its fewer judges resolve larger filings and publish 37% more opinions. 80

In short, assessors must clarify the Fourth Circuit's unclear dimensions and treat the important questions that prior studies have not answered. The above notions, which involve lingering uncertainty, suggest further exploration is better, as it should promote more conclusive determinations, testing, and reform. Congress or the court, however, may believe it operates well, that scrutiny is unwarranted, or that now is not the time to act. Lawmakers and the tribunal, thus, could examine and think about prescribing a number of measures, which the Commission and others could review, while most can be applied simultaneously with an investigation.

B. Miscellaneous Recommendations

1. Responses to Issues that the Commission and Others Raise

The Fourth Circuit should address the leading issues which previous evaluators broached. They reaffirm the conventional wisdom that the

the federal judiciary's concern that the appellate courts have too many cases); JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 67-70, 131-33 (1995) [hereinafter LONG RANGE PLAN] (detailing recommendations for case management in the courts of appeal, including the potential restructuring of appellate review, limitations on the rights to appeal, and reallocation of trial court resources); see also BAKER, supra note 23, at 106-286 (discussing reforms in the U.S. courts of appeals); COMMISSION REPORT, supra note 1, at 21-25, 59-74 (detailing the development of new procedures and supporting personnel, the structural options for the courts of appeals, and appellate jurisdiction).

80. COMMISSION REPORT, supra note 1, at 27 tbl.2-9 (documenting judgeships); see WORKING PAPERS, supra note 12, at 93 tbls.1-3 (charting the "Caseload Information for the Regional Courts of Appeals"); supra notes 30, 35-38, 61 and accompanying text (discussing the Fourth Circuit's size, as well as its number of unpublished opinions, oral arguments, and decisions on the merits and comparing its speed with that of the First Circuit); see also WORKING PAPERS, supra note 12, at 102 (finding Seventh Circuit nonjudicial staffing distinctive). Each court also uses diverse case management and ADR; these include Ninth Circuit screening panels that decide 140 appeals per month with truncated oversight and various mediation and conference programs which encourage settlement. See COMMISSION REPORT, supra note 1, at 31 (discussing the case management system of the Ninth Circuit and its court of appeals). See generally Hug, Potential Effects, supra note 73 (discussing how the White Commission's recommendations could affect the Ninth Circuit's operations); supra notes 41-42 and accompanying text (describing the common case management system of the Fourth Circuit); JOE CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985) (describing the innovative practices within the Ninth Circuit); RESTRUCTURING JUSTICE, supra note 78 (same).
tribunal has faced an increasing docket with few resources, which appears to underlie limited publication, a phenomenon that the Commission documents. These ideas mean two primary approaches exist. First, legislators might reduce appeals by narrowing federal jurisdiction, but this option appears impractical as Congress lacks incentives to restrict jurisdiction. The second approach is direct treatment of rising caseloads. One such possibility is to add judges, who could publish more decisions. This notion is controversial, as a majority of Fourth Circuit members oppose supplementation of the fifteen positions now authorized, and the subcommittee and Judge Wilkinson urged that thirteen active judges are enough. The Judicial Conference also suggests no more seats because court growth may be inefficient and impose related disadvantages. However, the tribunal’s judges agreed most strongly with the idea that new

81. See supra note 13 and accompanying text (assessing docket increases and their effects).
82. See supra notes 35–38 and accompanying text (documenting the Fourth Circuit’s below average publication rate).
83. Two commissioners urged limiting criminal or civil jurisdiction. COMMISSION REPORT, supra note 1, at 77–88; see also LONG RANGE PLAN, supra note 79, at 134–35 (suggesting various restrictions on federal jurisdiction); McKENNA, supra note 23, at 141–53 (same); CHIEF JUSTICE WILLIAM H. REHNQUIST, 1999 YEAR-END REPORT ON THE FEDERAL JUDICIARY, THE THIRD BRANCH 2–3 (2000) (suggesting that restricting jurisdiction could relieve docket backlogs); Wilkinson Statement, supra note 42, at 18 (same).
84. See Stephen Breyer, Administering Justice in the First Circuit, 24 SUFFOLK U.L. REV. 29, 34–37 (1990) (observing that many of the suggested restrictions are politically controversial); Dragich, supra note 25, at 16 n.21 (summarizing sources addressing Congress’s lack of inclination to restrict jurisdiction); Martin, supra note 43, at 181 & n.15 (noting that most statutes increase, rather than decrease, the caseload); Wilkinson, Drawbacks of Growth, supra note 64, at 1180–82 (discussing several proposals to change federal jurisdiction).
85. See supra note 63 and accompanying text (stating that Third, Fourth, and Eleventh Circuits oppose new positions).
87. See Grassley, supra note 42, General Findings, at 2–3 (stating that the Judicial Conference is not seeking new seats for the Fourth Circuit); Rehnquist, supra note 83, at 3 (same).
88. See BAKER, supra note 23, at 202–04 (noting the inefficiencies of larger courts); Jon O. Newman, 1000 Judges—The Limit for an Effective Judiciary, 76 JUDICATURE 187 (1993) (arguing that larger courts could result in inconsistencies and a lack of transparency); see also supra note 68 and accompanying text (describing the disadvantages of additional judgeships).
positions would enhance five integral dimensions of circuit operations. Legislative and judicial resistance, thus, could jettison this prospect.

Augmentation of nonjudicial resources as well might treat mounting dockets. For instance, enlarging the complement or obligations of staff attorneys should reduce the time circuit judges must devote to administrative and similar responsibilities. The subcommittee finds that staff lawyers expedite appeals, but increasing their numbers or tasks may further bureaucratize the court.

Congress and the Fourth Circuit might evaluate other, direct responses that observers assess. Lawmakers and the tribunal must delineate superior measures through a finely-calibrated review of phenomena, such as economical processing and broad court access. An obvious, general example is techniques which save the circuit judiciary’s resources, thus facilitating increased publication. A specific illustration is bankruptcy appellate panels (BAP).

BAPs invoke bankruptcy judges’ time and skill, thus minimizing effort that the circuit bench devotes to bankruptcy appeals. The Fourth Circuit has not.

89. See supra note 65 and accompanying text (discussing FJC survey results). Filling the two vacancies would permit more opinion publication.


91. See supra note 68 and accompanying text (noting the Fourth Circuit’s efficiency gains through creative staff use).


93. I treat some. See Wilkinson, Drawbacks of Growth, supra note 64, at 1178–88 (discussing various proposed solutions to the problems of growth); see also sources cited supra notes 79–82 (same).

FOURTH CIRCUIT PUBLICATION PRACTICES

established BAPs, but it should consider doing so. District court appellate panels (DCAPs) and two-judge panels, which the commission recommends, ADR, and appellate commissioners could similarly conserve resources. However, these devices may threaten integral values of the judiciary, including open access, accountability, and visibility.

The tribunal should review other methods to process its docket efficiently, such as Ninth Circuit screening groups and the imaginative ways all courts use nonlawyer staff. The tribunal might consider related means of enunciating the common law and broadening access, such as local rules that mandate publication when an opinion has a dissent or reverses a district judge, or the issuance of fewer unpublished dispositions, especially summary opinions.

95. See 4TH CIR. I.O.P. 6.1 ("The Fourth Circuit has not established panels of three bankruptcy judges to hear appeals from bankruptcy courts.").

96. See, e.g., BAKER, supra note 23, at 197 (describing how ADR would reduce the demands on judicial resources); COMMISSION REPORT, supra note 1, at 31, 62–66 (discussing the benefits of DCAPs, two-judge panels, and appellate commissions); Grassley, supra note 42, General Findings, at 19 (observing that cost savings and efficiencies can be achieved through additional use of innovative programs, techniques, and alternative case management); LONG RANGE PLAN, supra note 79, at 68, 131–32 (recommending use of ADR, appellate commissioners, and DCAPs); Breyer, supra note 84, at 44–45 (stating that ADR and settlement counsel "offer considerable promise" for improved efficiency); Tobias, Suggestions, supra note 2, at 19 (stating that DCAPs capitalize on district courts' larger judicial capacity); sources cited supra note 42 (describing the success of the Fourth Circuit's conference program).

97. See, e.g., BAKER, supra note 23, at 197 (noting that "there remains a good deal of uncertainty about ADR"); Merritt, supra note 26, at 1388 (same); see also supra notes 75–76 and accompanying text (suggesting that further restriction of publication in some cases might permit publication in others, but could limit access unless judges offer sufficient written explanations for their substantive decisionmaking in particular cases). See generally BAKER, supra note 23 (assessing other measures); MCKENNA, supra note 23 (same); LONG RANGE PLAN, supra note 79 (same).

98. See sources cited supra notes 79–80 (discussing solutions for problems of growth). Most may save resources but can restrict access. See supra notes 96–97 and accompanying text (discussing the benefits and drawbacks of many of the proposed measures).

2. A Word About Experimentation

Greater study is preferable, but there currently is adequate material to structure beneficial testing, and it would capitalize on prior and modern Fourth Circuit experimentation. 100 Congress and the tribunal, accordingly, might test salutary measures. That work could proceed simultaneously with an evaluation. The court should review its situation, delineate features which need change, and experiment with promising approaches. The Fourth Circuit's large caseload and scarce resources may specifically encourage it to assess courts with huge dockets and limited resources. 101 Two Ninth Circuit ideas, which enhance productivity yet impose no cost, are greater "batching" of appeals that implicate analogous questions or similar legislation before one argument panel and designating "lead cases" in which the panel opinion would affect a group of subsequent matters presenting a common issue. 102 The Fourth Circuit may also facilitate resolution of the numerous pro se appeals, respond to Senate importuning, and conserve judicial resources through increased staff use. 103 The court might want to test prior study proposals, namely DCAPs and two-judge panels. In fact, the Commission urged lawmakers to authorize experimentation with DCAPs, 104 while the subcommittee found the two-judge bodies so promising that it called for a test endeavor which might ascertain if they improve workload management. 105 Both entities would save resources, allow more publication, and foster the prompt, inexpensive disposition of cases; however, they could undermine equitable resolution and limit circuit bench accountability. 106 The court might also use temporary judgeships to discern

100. See Wilkinson Statement, supra note 42, at 17 (describing previous experimentation with the rules and operations of the Fourth Circuit).

101. Examples are the Fifth, Ninth, and Eleventh Circuits. See Working Papers, supra note 12, at 93 tbl.1 (listing caseloads by circuit). The Ninth Circuit has instituted much cutting-edge experimentation, but each appeals court has performed at least some.

102. See Ninth Circuit Evaluation Comm., supra note 73, at 7 (describing the Ninth Circuit's use of lead cases and batching).

103. This could foster bureaucratization, however. See supra note 92 and accompanying text (addressing growth of nonjudicial staff and bureaucratization of the courts).

104. See Commission Report, supra note 1, at 64-66 (recommending use of DCAPs). But see supra note 16 and accompanying text (documenting criticism of DCAPs by several chief judges).

105. See Grassley, supra note 42, General Findings, at 19 (suggesting a pilot program to study two-judge panels); see also supra note 96 and accompanying text (discussing two-judge panels among other proposals).

106. See supra notes 16, 97 and accompanying text (noting criticism of various methods to address increasing appellate dockets). ADR could have similar effects. See Breyer, supra note 84, at 44 (suggesting lack of formal procedures in reviewability of ADR would lead to unfair results).
whether size will affect efficiency,\textsuperscript{107} but these seats have often become permanent and a Fourth Circuit majority opposes new judgeships.\textsuperscript{108}

Once the court has identified responsive techniques, it must apply them in diverse situations and provide adequate time to permit confident judgments about their efficacy. This testing deserves rigorous analysis. An independent, expert assessor should carefully gather, evaluate, and synthesize the optimal, relevant empirical data. It may then be possible to determine the measures' effectiveness.

Lawmakers and Fourth Circuit judges should implement the ideas above because they represent a conservative, constructive effort to ascertain whether the tribunal in fact articulates the common law and, if not, to identify remedies. For example, adding judges or staff could yield more published decisions and limit the use of summary opinions. My proposals might also confirm the validity of the Commission's findings and those of others.

\textit{V. Conclusion}

The Commission on Structural Alternatives for the Federal Courts of Appeals offers revealing insights on Fourth Circuit operations and publication practices, especially regarding unpublished opinions. However, the commissioners' work and similar analyses are neither refined nor broad enough to support dispositive ideas about whether the court provides justice, functions efficaciously, or articulates the common law. Thus, Congress and the tribunal should undertake additional study and perhaps modest testing which focus on the common law's enunciation.

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\textsuperscript{107} See supra note 88 and accompanying text (noting judicial opposition to expanding the federal judiciary).

\textsuperscript{108} See Grassley, supra note 42, General Findings, at 19 (urging temporary judgeships when the need for permanent ones is unclear). S.920, 108th Cong. (2003) would have authorized temporary judgeships.