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Fourth Circuit Publication Practices

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Carl Tobias*

Table of Contents

I. Introduction	1733
II. A Brief Analysis of the Commission and Its Work.....	1734
III. Analysis of the Commission's Fourth Circuit Snapshot	1736
A. Descriptive Analysis.....	1736
1. An Introductory Word.....	1736
2. The Commission Data on the Fourth Circuit	1739
3. A Closer Comparison of the Fourth Circuit with Other Courts.....	1743
4. Additional Insights on the Fourth Circuit.....	1745
B. Critical Analysis	1746
IV. Suggestions for the Future.....	1747
A. Additional Study.....	1748
B. Miscellaneous Recommendations.....	1750
1. Responses to Issues that the Commission and Others Raise	1750
2. A Word About Experimentation	1754
V. Conclusion.....	1755

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Certain publication practices, especially dependence on issuing unpublished opinions, are one major response of federal courts to the increasing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which have remained strikingly constant, on each court.¹ Because Fourth Circuit's publication practices and reliance on unpublished decisions allow the court to manage a large docket and suggest that it may not enunciate the common law, this Article scrutinizes those practices.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.² Congress authorized the Commission mainly in response to concerns about the Ninth Circuit.³ The court's size has led to calls for bifurcation.⁴

1. See generally COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT (Dec. 18, 1998) [hereinafter COMMISSION REPORT] (providing the data that the Commission compiled), available at <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf>.

2. See, e.g., Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887 (1999) [hereinafter Hug, *Analysis*] (analyzing the Commission's final report); Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189 (1997) [hereinafter Tobias, *Suggestions*] (discussing past assessments of the appeals courts and suggestions for the future).

3. See COMMISSION REPORT, *supra* note 1, at 33 (discussing the long history of calls to split the Ninth Circuit); Arthur Hellman, *The Unkindest Cut: The White Commission's Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377, 379-80 (2000) [hereinafter Hellman, *The Unkindest Cut*] (assessing the introduction of S. 956 to split the Ninth Circuit); S. REP. NO. 104-197, at 3 (1995) (analyzing the proposal to split the Ninth Circuit). The concerns, however, are not peculiar to the Ninth Circuit.

4. E.g., Ninth Circuit Judgeship and Reorganization Act of 2005, H.R. 212, 109th Cong. (2005) (proposing to split the Ninth Circuit); Ninth Circuit Court of Appeals Reorganization

Since 1983, lawmakers have attempted to divide the court.⁵ In 1997, Congress prescribed a study,⁶ 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.⁷

The Commission carefully followed the mandate.⁸ It sought written input and held six hearings,⁹ but no one urged major Fourth Circuit reforms.¹⁰ The Federal Judicial Center (FJC) and the Administrative Office of the U.S. Courts (AO) assisted the Commission.¹¹ FJC staff performed numerous analyses and helped fashion surveys requesting judges' and lawyers' views.¹² 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

Act of 1995, S. 956, 104th Cong. (1995) (same). *See generally* *Federal Courts—Proposed Changes to the Ninth Circuit and the Federal Courts of Appeals*, 113 HARV. L. REV. 822 (2000) (evaluating proposed changes to the Ninth Circuit).

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).

6. Act of Nov. 26, 1997, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491; *see also* Hellman, *The Unkindest Cut*, *supra* note 3, at 378–81 (evaluating the congressional call for a study); Hug, *Analysis*, *supra* note 2, at 892–93 (same); Jennifer E. Spreng, *Three Divisions in One Circuit?*, 35 IDAHO L. REV. 553, 560 (1999) [hereinafter Spreng, *Three Divisions*] (same).

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).

9. *See* COMMISSION REPORT, *supra* note 1, at 2–3, 100 (explaining the Commission's actions); *see also* Joseph N. Akrotirianakis et al., *Jerry-Building the Road to the Future: An Evaluation of the White Commission Report on Structural Alternatives for the Federal Courts of Appeals*, 36 SAN DIEGO L. REV. 355, 362 (1999) (discussing the Commission's procedure).

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).

1970.¹³ The Commission examined all of the material that it received, issued a draft report and proposals,¹⁴ and afforded thirty days for public comment.¹⁵ Little input addressed the Fourth Circuit.¹⁶ 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.¹⁷ 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.¹⁸ The data relate to numerous factors, including how many opinions tribunals publish, and what standards courts apply "to measure

13. See COMMISSION REPORT, *supra* note 1, at 21–25, 39 (explaining the growth in importance of the circuit in the federal appeals system); see also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE REPORT] (stating that caseload increases have transformed the regional circuits).

14. COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, TENTATIVE DRAFT REPORT (1998), available at <http://www.library.unt.edu/gpo/csafca/report/appstruct.pdf>.

15. See COMMISSION REPORT, *supra* note 1, at 2–6 (outlining the Commission's search for information); see also Hug, *Analysis*, *supra* note 2, at 893–94 (describing the comments the Commission received); Spreng, *The Icebox*, *supra* note 5, at 877 (noting the comment period).

16. Most relevant to the issues treated in this Article were views of former Fourth Circuit Chief Judge J. Harvie Wilkinson, III and six other chief judges who criticized draft ideas, namely district court appellate panels, which were flawed "conceptually and practically." Harry T. Edwards et al., Comments to the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 10, 1998), available at <http://www.library.unt.edu/gpo/csafca/report/comments.html>; see also COMMISSION REPORT, *supra* note 1, at 60–62 (discussing the structure of the courts of appeals and district court appellate panels).

17. See COMMISSION REPORT, *supra* note 1, at iii, 40–47, 59–76 (describing the Commission's final recommendations); see also Hellman, *The Unkindest Cut*, *supra* note 3, at 381–93 (describing the Commission's divisional plan); Hug, *Analysis*, *supra* note 2, at 897–98 (same); Spreng, *Three Divisions*, *supra* note 6, at 577–86 (same); Tobias, *Federal Appellate System*, *supra* note 8, at 304–10 (same).

18. Below are annual data for the 1997 fiscal year and for the most recent year they are available; see also *infra* notes 30–31, 34–35 and accompanying text (affording examples of how the data have remained constant).

the [courts'] performance and efficiency."¹⁹ The Commission also used subjective criteria, namely circuit law's consistency, that defy analysis in part by surveying judges and counsel.²⁰ 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.²¹ 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.²² 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.²³ Appellate justice and effective operation, which the Commission seemed to use,²⁴ 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.

22. See FED. R. CIV. P. 1 (prescribing the "just, speedy, and inexpensive" resolution of disputes); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1286 n.90 (1996) (suggesting that the ideal expressed in Rule 1 should be equally applicable to appellate procedure). See generally Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995) (discussing Rule 1).

23. See, e.g., THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 14-30* (1994) (discussing the appellate ideal); JUDITH MCKENNA, *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 9-11* (1993) (same); FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 13, at 109 (same).

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

25. See BAKER, *supra* note 23, at 14–30 (discussing appellate procedure and the phenomena of case load growth and stagnant resources); Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts of Appeals*, 1996 WIS. L. REV. 11, 25–28 (describing the current state of the appellate system); Carl Tobias, *Dear Justice White*, 30 ARIZ. ST. L.J. 1127, 1127–30 (1998) (explaining the problems caused by the growth in appeals and stagnant resources).

26. See COMMISSION REPORT, *supra* note 1, at 39–40 (detailing criteria used in evaluating courts of appeals); Gilbert S. Merritt, *Judges on Judging: The Decision Making Process in the Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1386 (1990) (criticizing the problems that appeals courts face); Tobias, *Federal Appellate System*, *supra* note 8, at 278 (detailing the increased workload of appellate courts).

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.³⁰ In FY 1997, the court decided 2387 appeals on the merits, which was fourth greatest in the system.³¹ The tribunal resolved 159 cases per authorized active judge, the fifth largest,³² surpassing the national average of 155.³³ The court granted arguments in 30% of matters, tying three circuits for the lowest, a number well below the 40% average.³⁴ It published opinions in 11% of the appeals,³⁵ the lowest among the circuits and twelve points under the average.³⁶ The tribunal decided 17% of its cases on the merits following argument.³⁷ The Fourth Circuit and two others were next to last overall and were 5% below the average.³⁸ 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 39 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.³⁹ It tied the Tenth for seventh fastest, while the average was 12.4 months.⁴⁰ The Commission gathered additional data on management practices, finding virtually no aspects of Fourth Circuit operations distinctive.⁴¹ For instance, the court uses a "mediation or conference program" to settle appeals, with little judicial input.⁴²

The Commission specifically assessed opinion publication. It found the formal rules on opinion publication and citation to unpublished opinions similar among the courts, but the courts' practices diverge.⁴³

39. WORKING PAPERS, *supra* note 12, at 95 tbl.7; see JUDICIAL BUSINESS, *supra* note 30, at 97 tbl.B-4 (showing that the median time interval for Fourth Circuit resolution of these cases was seven and a half months in 2004).

40. WORKING PAPERS, *supra* note 12, at 95 tbl.7. 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. *Id.*

41. 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).

42. WORKING PAPERS, *supra* note 12, at 102; see 4TH CIR. R. 33 (outlining appeals conference procedures); ROBERT NIEMIC, FEDERAL JUDICIAL CENTER, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 39-45 (1997) (outlining the Fourth Circuit's pre-argument conference program); *Conserving Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth and Eleventh Circuits: Hearings Before the S. Judiciary Subcomm. On Admin. Oversight & the Courts* 17 (Feb. 5 & June 7, 1997) [hereinafter Wilkinson Statement] (statement of Fourth Circuit Chief Judge Wilkinson) (same). The Fourth Circuit's judges, like many, do not initially screen cases for argument, but the chief judge often designates a panel to review a pending matter for disposition with no, or restricted, argument while panel members who want more analysis can request it. For the initial screening idea, see WORKING PAPERS, *supra* note 12, at 103-04. For the others, see 4TH CIR. R. 34, I.O.P. 34.2; Senator Charles E. Grassley, Chairman's Report on the Appropriate Allocation of Judgeships in the United States Courts of Appeals, Analysis of the Fourth Circuit 3 (1999), at <http://www.senate.gov/~grassley/p9r03-07.htm>. For analysis of practices in assigning judges to panels, see J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069-88 (2000) (exploring current assignment practices analyzing both circuit rules and case studies).

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.⁴⁴ Former Chief Judge J. Harvie Wilkinson, III found the criteria inexact and that tribunals distinguish precedential appeals from those "chiefly for the immediate parties."⁴⁵ The courts tender explanations of differing specificity and clarity in unpublished opinions and variously describe them for reporting purposes.⁴⁶ The Fourth Circuit even invalidated a federal statute and treated issues as crucial in unpublished decisions.⁴⁷ The tribunal published 19% of its merits dispositions in 1987, 15% in 1993, and 11% in 1997.⁴⁸ 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).

47. See, e.g., *Edge Broad. Co. v. United States*, 956 F.2d 263 (4th Cir. 1992) (overturning a federal statute in an unpublished opinion), *rev'd*, 509 U.S. 418 (1992); *Strickler v. Greene*, 149 F.3d 1170 (4th Cir. 1998), *aff'd*, 527 U.S. 263 (1999) (citing and discussing unreported opinions from both the district court and the court of appeals); *Wright v. Universal Mar. Serv. Corp.*, 121 F.3d 702 (4th Cir. 1997), *vacated and remanded*, 525 U.S. 70 (1998) (citing and discussing a Fourth Circuit unpublished opinion). Other circuits have decided critical issues in unpublished opinions that the Supreme Court resolved in substantive ones. See, e.g., *Murphy v. UPS*, 141 F.3d 1185 (10th Cir. 1998) (using unpublished opinion to comply with Supreme Court mandate), *aff'd*, 527 U.S. 516 (1999); *Haddle v. Garrison*, 132 F.3d 46 (11th Cir. 1997) (same), *rev'd*, 525 U.S. 121 (1998); *Reeves v. Sanderson Plumbing Prods.*, 180 F.3d 263 (5th Cir. 1999) (same), *rev'd*, 530 U.S. 133 (2000); see also *Miller-El v. Dretke*, No. 00-10784, 2005 U.S. App. LEXIS 15206 (5th Cir. July 25, 2005) (same).

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.⁴⁹

The raw data suggest that the Fourth Circuit might perform and enunciate the common law better. The data on opinion publication is instructive.⁵⁰ 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.⁵¹ The tribunal functions rather effectively in terms of certain parameters; it matches the system average for numerous TTD factors and for terminations per judge.⁵² 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.⁵³ The court is also below national levels for other measures.⁵⁴ The objective data alone, thus, do

appellate ideal and suggest they may not work well, deliver justice, or articulate the common law. See Merritt, *supra* note 26, at 1388 (criticizing the reduction in the percentage of oral arguments granted); *supra* notes 23, 35–38 (noting that many circuits deny oral argument to those who seek it, compromising the health of the decisionmaking process).

49. The Fourth Circuit was also 16%, 14%, and 13% beneath the average for argued cases, reversals, and opinions with a dissent. WORKING PAPERS, *supra* note 12, at 110 tbl.8; see, e.g., *id.* at 23–29 (stating that the Circuit's appeals and district judges and appellate attorneys in survey responses seem satisfied with circuit law's consistency and predictability and overall operation).

50. See *supra* notes 35–38 and accompanying text (discussing statistics regarding oral arguments and decisions on the merits in the Fourth Circuit).

51. See *supra* notes 19, 46 and accompanying text (discussing empirical data and their relation to a circuit's effectiveness); see also Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1466–71 (1987) (analyzing process values). The percentage of published opinions is more critical than use of judges who are not permanent court members. Visitors can offer benefits but may inflate parameters, namely TTD factors and terminations per judge.

52. See *supra* notes 32–33, 40 and accompanying text (noting that the Fourth Circuit surpassed the national 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).

53. See WORKING PAPERS, *supra* note 12, at 93 tbl.1 (showing case load information for the courts of appeals); *id.* at 95 tbl.7 (providing the median time to termination for counseled civil nonprisoner cases during FY 1995–97).

54. See, e.g., *id.* at 94 tbl.5 (giving the disposition methods for the courts of appeals in FY 1997); *id.* at 96 tbl.9 (showing the percentage of cases terminated after oral argument when at

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—

least one visiting judge was involved); *id.* at 97 tbls.11 & 12 (providing the percentage of cases terminating after oral argument and resulting in a published opinion when at least one within-circuit district judge participated).

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.⁶² A majority of each court's active members has requested Congress not to authorize more positions,⁶³ but the conservative docket and resource estimates on which the U.S. Judicial Conference bases judgeship proposals indicate the three tribunals need more seats.⁶⁴ Fourth Circuit judges also affirmatively responded by the highest percentages to some Commission survey questions about expanding the tribunal's judicial complement.⁶⁵

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.⁶⁶ 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.⁶⁷ 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.⁶⁸ 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.⁶⁹ Moreover, Local Rule 36

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.

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."); 4TH CIR. LOC. R. 36(b)–(c) (detailing the rules involving unpublished dispositions and citation of unpublished dispositions); 4TH CIR. I.O.P. 36.3 (detailing the internal operating procedures involving "Summary Opinions"). The study's scope, little empirical data, and apparently political nature are controversial, but the Senate has authority to monitor the courts, and it did gather data and seek judges' views that experience informs.

70. 4TH CIR. LOC. 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;
or

It involves a legal issue of continuing public interest; or

It criticizes existing law; or

It contains a historical review of a legal rule that is not duplicative; or

It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

Id.

record-keeping preclude comparisons with "nationally reported data."⁷¹ 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.⁷² 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

73. NINTH CIRCUIT EVALUATION COMM., INTERIM REPORT 8-16 (March 2000) (reporting on issues pertaining to the court, the court's constituency, and the geographical area it serves). See generally Hellman, *The Unkindest Cut*, *supra* note 3, at 379-80 (discussing the establishment of the White Commission, the proposed divisional structure of the Ninth Circuit, and the rationale behind the Commission's recommendation); Procter Hug, Jr., *Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 325 (2000) [hereinafter Hug, *Potential Effects*] (evaluating the procedures and conclusions of the White Commission); David Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365 (2000) (discussing the role of the Evaluation Committee).

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.⁷⁵ Tracking many cases might elucidate related issues, such as whether litigants correctly request publication and judges agree or furnish it sua sponte, when necessary.⁷⁶ Relevant survey answers resemble the objective data.⁷⁷ 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.⁷⁸

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.⁷⁹ Evaluators should

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?").

78. See Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE 55–90 (Arthur D. Hellman ed., 1990) (discussing potential approaches to maintain consistency within the application of federal law and their analysis). See generally Arthur D. Hellman, *Breaking the Banc: The Common Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991) (discussing various classification schemes that can be used to analyze a large percentage of a circuit's work); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989) (discussing the procedures adopted by the Ninth Circuit, a theory of intracircuit conflict, the measure of such conflict within the Ninth Circuit, and the implications of research on uniformity); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999) (considering the practice and implications of en banc review of cases within the U.S. courts of appeals and their en banc review's analysis).

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,⁸¹ which appears to underlie limited publication, a phenomenon that the Commission documents.⁸² These ideas mean two primary approaches exist. First, legislators might reduce appeals by narrowing federal jurisdiction,⁸³ but this option appears impractical as Congress lacks incentives to restrict jurisdiction.⁸⁴ 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,⁸⁵ and the subcommittee and Judge Wilkinson urged that thirteen active judges are enough.⁸⁶ The Judicial Conference also suggests no more seats⁸⁷ because court growth may be inefficient and impose related disadvantages.⁸⁸ 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).

86. Grassley, *supra* note 42, Fourth Circuit Analysis, at 1; Wilkinson Statement, *supra* note 42, at 16–17. They urged that two vacancies not be filled, but President George W. Bush has submitted nominees for them. VACANCIES IN THE FEDERAL JUDICIARY—109TH CONGRESS (Sept. 7, 2005), <http://www.us.courts.gov/judicialvac.html>; Charles Hurt, *Bush Resends Judicial Picks*, WASH. TIMES, Feb. 15, 2005, at 1.

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.⁸⁹ Legislative and judicial resistance, thus, could jettison this prospect.⁹⁰

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,⁹¹ but increasing their numbers or tasks may further bureaucratize the court.⁹²

Congress and the Fourth Circuit might evaluate other, direct responses that observers assess.⁹³ 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).⁹⁴ 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.

90. Compare Newman, *supra* note 88 (arguing for a limit on the growth of the judiciary) with Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52–54 (proposing that Congress double the size of the courts of appeals). See generally GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993), available at <http://www/fjc.gov/public/pdf.nsf/lookup/impomora/pdf>.

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

92. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 26–28 (1985) (describing proliferation of non-Article III personnel); CHRISTOPHER E. SMITH, *JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION* 94–125 (1995) (discussing growth of federal judicial bureaucracy and its effects); see also MCKENNA, *supra* note 23, at 49–53 (discussing criticism of expansion of non-judicial staff); COMMISSION REPORT, *supra* note 1, at 23–25 (assessing concerns about undue delegation to staff). The survey responses suggest that delegation to staff is not a problem. WORKING PAPERS, *supra* note 12, at 103.

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).

94. See Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L. J. 181, 182–87 (1989) (describing and analyzing the use of BAPs in the Ninth Circuit). The Ninth Circuit deployed them so well that Congress requested that each tribunal analyze them. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109–10 (1994); see also Michael Berch, *The Bankruptcy Appellate Panel and Its Implications for Adoption of Specialist Panels in the Courts of Appeals*, in RESTRUCTURING JUSTICE, *supra* note 78, at 165 (advocating the use in other circuits of specialized panels based on the BAPs model).

established BAPs,⁹⁵ 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.⁹⁶ However, these devices may threaten integral values of the judiciary, including open access, accountability, and visibility.⁹⁷

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.⁹⁸ 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.⁹⁹

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 238 (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).

99. See WORKING PAPERS, *supra* note 12, at 114 tbl.A (listing criteria for publication by circuit); see also *supra* notes 44, 77 and accompanying text (describing Fourth Circuit publication and citation rules). 4TH CIR. LOC. R. 36(b) allows parties to request publication with reasons therefor. The court could further restrict litigant ability to cite unpublished decisions; this would limit judicial citation and lingering unfairness which disparate access to unpublished opinions fosters. Martin, *supra* note 43, at 194–97. However, Rule 32.1's proposed amendment rejects this idea. ADVISORY COMM. ON APPELLATE RULES, REPORT OF ADVISORY COMMITTEE ON APPELLATE RULES .27–36 (May 22, 2003), available at <http://www.uscourts.gov/rules/app0803.pdf>. It does mandate uniformity, thus saving expense that diverse local rules impose. See WORKING PAPERS, *supra* note 12, at 116 tbl.B (listing local citation rules by circuit); Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 25–34 (1997) (discussing the deleterious effects of nonuniformity of local rules).

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,¹⁰⁷ but these seats have often become permanent and a Fourth Circuit majority opposes new judgeships.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.

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.

107. See *supra* note 88 and accompanying text (noting judicial opposition to expanding the federal judiciary).

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.