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A Fourth Circuit Photograph

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A FOURTH CIRCUIT PHOTOGRAPH

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INTRODUCTION

Numerous observers believe that the United States Court of Appeals for the Fourth Circuit is the most ideologically conservative appellate tribunal. Critics have seized on a plethora of rulings that epitomize its jurisprudence. Quintessential is the Fourth Circuit's dependence on an obscure, rarely invoked 1968 statute to alter the Supreme Court's *Miranda v. Arizona* decision, even though the Justices flatly rejected this interpretation and no appellate court had seriously entertained the argument that it should overrule the landmark determination.[1] The Fourth Circuit issued three opinions in a major "war on terror" action challenging an American's detention—which the Supreme Court vacated and remanded—while the en banc Fourth Circuit published eight opinions about litigation disputing military authority to incarcerate a lawful permanent resident.[2] The appellate court will probably hear other terrorism appeals because the government has prosecuted many suspects, in

* Williams Professor, University of Richmond School of Law. Thanks to Peggy Sanner for ideas, Beth Garrett for processing, and Russell Williams for generous support. Errors that remain are mine.

1. *See* Dickerson v. United States, 530 U.S. 428, 431–32 (2000) (reversing the Fourth Circuit and stating "that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress"). During that same Term, the Court also reversed Fourth Circuit cases that invalidated a statute that protected drivers' privacy and that eviscerated citizen suits in environmental litigation. *See* Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 173–74 (2000); Reno v. Condon, 528 U.S. 141, 147–48 (2000). The Supreme Court did affirm cases that held unconstitutional the civil rights remedy in the Violence Against Women Act ("VAWA") and the Food and Drug Administration's power to regulate nicotine as a drug. *See* United States v. Morrison, 529 U.S. 598, 601–02 (2000); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

2. *See* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated and remanded*, 129 S. Ct. 1545; Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *vacated and remanded*, 542 U.S. 507 (2004); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002). *See generally* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003) (discussing terrorism appeals cases and calling the United States Court of Appeals for the Fourth Circuit "the most conservative federal appellate court in the country"); A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309.

particular Zacarias Moussaoui, in the U.S. District Court for the Eastern District of Virginia and has imprisoned Ali al-Marri and Jose Padilla in the Charleston Consolidated Naval Brig.[3] The media also perennially touted as potential Supreme Court appointees Fourth Circuit members J. Harvie Wilkinson and J. Michael Luttig.[4] The *New York Times* apparently deemed the court so influential that its Sunday *New York Times Magazine* published a thorough, nuanced article on the tribunal's judges, replete with vignettes and a glossy photograph.[5]

One striking omission characterizes these perspectives. They ignore how the appellate court delivers justice and resolves every appeal in a substantial caseload, phenomena that profoundly affect the vast majority of litigants. Nonetheless, a study that took a valuable Fourth Circuit picture elucidates how the tribunal dispenses appellate justice. The Commission on Structural Alternatives for the Federal Courts of Appeals (the "Commission") issued a report and proposals after carefully evaluating the appellate system for a year, while the data have minimally changed since the report's issuance.[6] The Commission's principal focus was the Ninth Circuit, as Congress had instructed, yet the Commission assembled much useful information on each circuit court of appeals and found that all operate efficaciously. Because how the Fourth Circuit addresses a large docket is critical to appellate justice, the Commission's analysis of the tribunal and the court itself merit scrutiny, which this Article undertakes.

Part I of this Article examines the Commission's background and its study. Part II assesses the Commission's review in an effort to increase appreciation of the modern Fourth Circuit. The Commission gathered, analyzed, and synthesized considerable empirical data. The Commission's particular information suggests that the tribunal functions less effectively than it might. For instance, six percent of appeals currently receive a published

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3. *See* United States v. Moussaoui, 333 F.3d 509, 510 (4th Cir. 2003); *see, e.g.*, *Al-Marri*, 534 F.3d at 219; Padilla v. Hanft, 389 F. Supp. 2d 678, 680 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005).

4. *See* Kenneth L. Manning et al., *George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?*, 85 JUDICATURE 278, 280 (2002); Tony Mauro, *D.C. Circuit Judge Gets on Supreme Court Short List*, LEGAL TIMES, Feb. 22, 2005, at 1. The Wilkinson and Luttig opinions in the VAWA case that the Supreme Court affirmed warrant comparison. *See generally* Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 2000). Judge Luttig resigned in May 2006. Jess Bravin & J. Lynn Lunsford, *Short Circuit: Breakdown of Trust Led Judge Luttig To Clash with Bush*, WALL ST. J., May 11, 2006, at A1.

5. *See* Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, (Magazine), at 38.

6. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT (1998) [hereinafter COMM'N REPORT], http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf.

opinion—the lowest nationwide—while two of the fifteen active circuit judgeships are vacant.[7] Yet, these data were not refined or broad enough to ascertain definitively how the court actually performs. Indeed, the Commission made no attempt to correlate the tribunal's operations and political reputation, and the group frankly acknowledged that it lacked time for a statistically meaningful assessment of the Ninth Circuit. Part III thus proffers recommendations that emphasize greater Fourth Circuit study and includes miscellaneous ideas, such as the application of concepts, namely filling all the open judgeships, that should improve the tribunal's performance.

I. THE COMMISSION'S ORIGINS, DEVELOPMENT, AND STUDY

The Commission's history might appear to require comparatively terse evaluation here, as some authors have already canvassed its origins, development, and activities.[8] Nevertheless, considerable analysis is warranted because this Article's review should promote understanding of the Commission's Fourth Circuit work and afford more conclusive determinations about the tribunal. Lawmakers instituted the Commission primarily as a response to longstanding debate over the Ninth Circuit,[9] whose substantial magnitude has animated calls for its reconfiguration.[10] During the past few decades, western lawmakers have sponsored bills that

7. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 42 tbl.S-3 (2009) [hereinafter ANNUAL REPORT], http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf; *see also United States Courts, Archive of Judicial Vacancies*, USCOURTS.GOV, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx (last visited Nov. 2, 2010).

8. *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, 889–95 (1999); Jennifer E. Spreng, *Three Divisions in One Circuit? Critique of the Recommendations from the Commission on Structural Alternatives for the Federal Courts of Appeals*, 35 IDAHO L. REV. 553, 554–58 (1999); Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 192–214 (1997).

9. *See* COMM'N REPORT, *supra* note 6, at 33–34. *See generally* S. COMM. ON THE JUDICIARY, NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. REP. NO. 104-197 (1995); Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal To Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377 (2000).

10. *E.g.*, Circuit Court of Appeals Restructuring and Modernization Act of 2009, S. 1727, 111th Cong. (2009); S. 956, 104th Cong. (1996). *See generally* Recent Cases, *Federal Courts—Proposed Changes to the Ninth Circuit and the Federal Courts of Appeals—Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals; and S. 253, the Ninth Circuit Reorganization Act*, 113 HARV. L. REV. 822 (2000).

would divide the tribunal.[11] However, in 1997, Congress authorized a study[12] that granted the Commission one year to assess court structure and alignment, with a particular emphasis on the Ninth Circuit, and to issue a report and proposals for any boundary or structural changes that "may be appropriate for" expeditious and fair docket resolution.[13]

The Commission seemingly discharged its responsibilities with care.[14] The group solicited written public input and staged multiple hearings,[15] although the ninety witnesses who testified urged a minuscule number of Fourth Circuit modifications.[16] The Commission received assistance from the Federal Judicial Center ("FJC") and the Administrative Office of the United States Courts, the judiciary's research and administrative arms, which Congress perceptively authorized the Commission to deploy.[17] FJC staff undertook numerous evaluations and crafted survey instruments for gleaning perspectives about tribunal operations from appellate and district court judges and appellate lawyers.[18] Moreover, the commissioners gathered and reviewed statistical data, namely circuit tribunals' arguments, and published opinions, the time required for deciding cases and the mechanisms employed to address increased filings, which have transformed the appeals courts since the 1970s.[19]

The Commission analyzed the material that it had collected or

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11. COMM'N REPORT, *supra* note 6, at 33; *see also* Jennifer Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 876 (1998); John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. TIMES, Apr. 25, 2010, at A33.

12. Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491–92 (1997); *see also* Hellman, *supra* note 9, at 378–81; Hug, *supra* note 8, at 892–93; Spreng, *supra* note 8, at 560; Tobias, *supra* note 8, at 206–08, 214.

13. Pub. L. No. 105-119, § 305(a)(1)(B), 111 Stat. 2491; *see also* Tobias, *supra* note 8, at 206–11.

14. I rely substantially in this paragraph on COMM'N REPORT, *supra* note 6, at 1–6, 100; and Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275, 295–98 (1999).

15. COMM'N REPORT, *supra* note 6, at 2–3, 100; *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).

16. I base this on analysis of the transcripts.

17. COMM'N REPORT, *supra* note 6, at 2–4; *see also* 28 U.S.C. § 620 (2006) (authorizing the FJC); *id.* § 601 (authorizing the Administrative Office); Pub. L. No. 105-119, § 305(a)(4)(D); Hug, *supra* note 8, at 893.

18. COMM'N REPORT, *supra* note 6, at 3–4; COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, WORKING PAPERS § 2 (1998) [hereinafter WORKING PAPERS]; *see also* Akrotirianakis et al., *supra* note 15, at 362 n.217.

19. COMM'N REPORT, *supra* note 6, at 21–25; *see also* JUDICIAL CONFERENCE OF THE U.S., FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMISSION 109 (1990) [hereinafter STUDY COMM. REPORT] (finding that caseload increases have transformed the appellate courts).

received and published a tentative draft report and suggestions while affording the public thirty days to submit input.[20] Virtually no comments addressed the Fourth Circuit. Most pertinent to the notions that I assess were the concepts articulated by then-Chief Judge Wilkinson and his analogues on six other tribunals who challenged a few approaches,[21] especially district court appellate panels, which the jurists believed were flawed "conceptually and practically."[22] After the commissioners analyzed the public comments, they issued a final report that minimally differed from the draft and basically recommended a divisional arrangement for the Ninth Circuit and the remaining appeals courts as they expand.[23] Moreover, the Commission assembled helpful information on the Fourth Circuit.

II. EVALUATION OF THE COMMISSION'S FOURTH CIRCUIT WORK

A. *Descriptive Assessment*

1. *Introduction*

The commissioners gathered, assessed, and synthesized certain empirical data and other pertinent information, essentially from the 1997 fiscal year ("FY")—the most recent time when it was available—but most numbers have remained strikingly constant.[24] The objective data relate to several factors, which include the time appellate tribunals consume when deciding appeals, and the standards "routinely used in court administration to measure the performance and efficiency."[25] The Commission also invoked

20. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, TENTATIVE DRAFT REPORT 4 (1998), http://www.library.unt.edu/gpo/csafca/report/appstruc.pdf. *See generally* Hug, *supra* note 8, at 893–94; Spreng, *supra* note 11, at 877–78.

21. *See* Memorandum from Harry T. Edwards, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, et al., to Members of the Comm'n on Structural Alternatives for the Fed. Courts of Appeals (Nov. 10, 1998) [hereinafter Memo from Edwards], *available at* http://www.library.unt.edu/gpo/csafca/report/comments/becker.htm. *See generally* COMM'N REPORT, *supra* note 6, at 64–66.

22. Memo from Edwards, *supra* note 21; *accord* DOJ, Comments of the U.S. Department of Justice on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998), *available at* http://www.library.unt.edu/gpo/csafca/report/comments/doj.htm.

23. *See* COMM'N REPORT, *supra* note 6, at iii, 40–47, 59–76; *see also* Hellman, *supra* note 9, at 381–93; Hug, *supra* note 8, at 897–98; Spreng, *supra* note 8, at 577–86; Tobias, *supra* note 14, at 304–10.

24. *See, e.g.*, *infra* notes 38–39, 42, 44 and accompanying text. Below I reproduce annual data for the 1997 fiscal year and for 2009, the most recent year for which the material is available.

25. COMM'N REPORT, *supra* note 6, at 39. These factors include how many cases a tribunal decides vis-à-vis the number filed, how many appeals receive oral argument and published opinions, the "time from filing to disposition, and how often the court relies on visiting judges from outside the circuit." *Id.*

subjective phenomena, such as circuit law's uniformity and predictability, which are "obviously more difficult to evaluate but are widely regarded as a high priority," in effect by circulating surveys to appellate and district court judges as well as appellate counsel.[26]

Analyzing the material for an individual tribunal yields a composite snapshot. Comparing the figures on each court with the system averages and other tribunals indicates how the court works, subject to applicable caveats. Objective data, namely the arguments and published opinions that tribunals furnish, generally are quite relevant and dependable. The data suggest how courts honor process values that implicate access to justice and are more reliable than canvassed survey answers, which can be subjective and evidence the biases of those polled. Notwithstanding this dependability, the information frequently must be contextualized, refined, or elaborated. For instance, the above statistics and a court's total filings, particularly vis-à-vis its terminations, are not very edifying, unless augmented with information on individual appeals, such as docket complexity.[27]

If these examples could be addressed, however, there would remain vexing, and perhaps insolvable, complications, particularly defining and measuring the related, somewhat theoretical notions of appellate justice, efficacious circuit operation, and the appellate ideal. One useful definition of appellate justice, and perhaps of effective functioning, is prompt, inexpensive, and equitable resolution.[28] There is some consensus that the appellate ideal is disposition of every case on the merits after comprehensive briefing, oral argument, and consultation among three court of appeals judges who issue a published opinion that thoroughly justifies the conclusion.[29] I stress here appellate justice and efficacious performance; they have lucid meaning and clarify the appellate ideal, which resists precise calibration. The commissioners also

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26. *Id.*; *see also supra* note 18 and accompanying text; *infra* note 36 and accompanying text.

27. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.1; *supra* note 25 and accompanying text. This suggests the need to allow for relevant variables, to refine, and to contextualize. *See infra* notes 31–33, 65, 102 and accompanying text.

28. *See* FED. R. CIV. P. 1; *see also* 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, 1326–27 (1995); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1286 n.90 (1996).

29. *See, e.g.*, STUDY COMM. REPORT, *supra* note 19, at 109; *see also* THOMAS E. BAKER, JUSTICE RESEARCH INST., RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 14–30 (1994); JUDITH MCKENNA, FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 9–11 (1993). *See generally infra* notes 34–36, 102–03 and accompanying text.

seemed to use effective operation, an indicium that they may have considered lenient by finding "no persuasive evidence" that any tribunal works inefficaciously.[30]

Even if those ideas could be defined more felicitously, they are relative terms, whose application is often contextual and necessitates exact measurement, because increases in docket size and scarce resources have altered the courts and frustrated efforts to dispense justice, perform well, and honor the appellate ideal.[31] The concepts examined suggest that tribunals might resolve increasing appeals of diverse complexity with their varied resources in different ways that are equally satisfactory.[32] For instance, one tribunal could operate best through provision of numerous written, if laconic, justifications, yet grant few arguments and published decisions, and another may work effectively by offering considerable argument and little publication.[33] These and certain other responses to burgeoning dockets with static resources, therefore, might prove acceptable. Conclusive findings about a tribunal concomitantly defy articulation without investigation of numerous, specific filings.

The commissioners may have appreciated these propositions by recognizing that they lacked time to conduct a "statistically meaningful analysis of [Ninth Circuit] opinions as well as unpublished dispositions, dissents, and petitions for rehearing en banc to make [their] own, objective determination."[34] The Commission could not "say that the statistical criteria [reviewed] tip decisively in one direction . . . . [Variations] in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute [tribunals' differences] to any single factor such as size."[35] The Commission also remarked that consistency and predictability were too subtle, the "decline in quality too incremental, and the

30. COMM'N REPORT, *supra* note 6, at ix–xi, 29–30. For purposes of this assessment, a regional circuit that, absent explanation, operates much below the national average (1) for multiple, objective commission criteria may not deliver justice or (2) for one criterion may work inefficaciously.

31. I rely substantially in this paragraph on BAKER, *supra* note 29, at 14–30, 287–302; Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 39–45; and Carl Tobias, *Dear Justice White*, 30 ARIZ. ST. L.J. 1127, 1130–34 (1998).

32. *See* COMM'N REPORT, *supra* note 6, at 39; Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1386 (1990); Tobias, *supra* note 14, at 278.

33. The first tradition has seemed to function in the Ninth Circuit and the second in the Second Circuit. *See* Interview with Jose Cabranes, Second Circuit Judge, in Las Vegas, Nev. (Jan. 21, 1999) (on file with author); Interview with Procter Hug, Jr., Ninth Circuit Chief Judge, in Las Vegas, Nev. (May 7, 1999) (on file with author); *see also* WORKING PAPERS, *supra* note 18, at 93 tbls.2 & 3.

34. COMM'N REPORT, *supra* note 6, at 39; *see also supra* note 13 and accompanying text.

35. COMM'N REPORT, *supra* note 6, at 39.

effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment," yet proffered the basically unsupported assertions that the notions involve the law's coherence enunciated over time and that the law's uniform, predictable, and coherent articulation is best fostered in a decisional unit small enough to be collegial—an idea resisting exact quantification or measurement, which the appellate process highly values.[36]

Despite those phenomena, this Article can analyze the Fourth Circuit by allowing for most problems and using the Commission's objective data. The Article assesses how the tribunal, the remaining courts, and the system work vis-à-vis that information, yet briefly treats the subjective evidence, as numerous ideas are essentially personal opinions and the Fourth Circuit material yields little insight. The Article then attempts to evaluate whether the tribunal delivers justice and functions well by comparing its effort with that of other circuits. I lastly tender additional perspectives on the court.

2. *Commission Information Regarding the Fourth Circuit*

The Fourth Circuit is situated in the middle range vis-à-vis numerous applicable parameters, all relating to size and one of which measures performance.[37] The tribunal serves the fifth-largest population (twenty-five million), includes the seventh-greatest land base (152,000 square miles), equals three circuits for the third-most federal districts (nine), has the fourth-biggest contingent of active circuit judges (fifteen), includes trial courts that have the seventh-highest number of district judges (fifty-two), annually receives the fifth-largest quantity of cases (4754), and decides the fourth-most cases (4629).[38]

In FY 1997, the Fourth Circuit terminated 2387 appeals on the merits, which was the fourth-most in the federal appeals court system.[39] The tribunal decided 159 cases per active circuit judgeship, the fifth greatest,[40] eclipsing the national average of

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36. *Id.* at 40; *see also* 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) (arguing that the proposed Ninth Circuit split is unnecessary and would be detrimental to decisional process).

37. *See* COMM'N REPORT, *supra* note 6, at 27 tbl.2-9; WORKING PAPERS, *supra* note 18, at 93 tbl.1.

38. *See* COMM'N REPORT, *supra* note 6, at 27 tbl.2-9; WORKING PAPERS, *supra* note 18, at 93 tbl.1. In 2009, the Fourth Circuit received 5311 filings and decided 5282 appeals. ANNUAL REPORT, *supra* note 7, at tbl.2; *see also* David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421, 431 (2010).

39. WORKING PAPERS, *supra* note 18, at 93 tbl.1; *see also* ANNUAL REPORT, *supra* note 7, at 40 tbl.S-1 (stating the court decided 2926 appeals on the merits in 2009); Stras & Pettigrew, *supra* note 38, at 431 (same). Data in this paragraph are for merits dispositions in FY 1997, unless otherwise indicated.

40. WORKING PAPERS, *supra* note 18, at 93 tbl.1; *see also infra* notes 66, 72 and accompanying text.

155.[41] The court permitted oral arguments in thirty percent of filings, which tied the Third, Tenth and Eleventh Circuits for the lowest and was considerably under the average of forty percent.[42] The First and Second Circuits comparatively held oral arguments for twice the percentage of their cases.[43] Fourth Circuit judges wrote published opinions in eleven percent of the matters,[44] a figure that was lowest and was twelve percentage points beneath the system average.[45] It concomitantly resolved seventeen percent of filings on the merits after oral argument;[46] the court and two others were second-to-last and were five percentage points below the average.[47] Thirty-nine percent of Fourth Circuit three-judge panels that decided cases following oral argument included at least one participant who was not an active or senior court member.[48] That number was the fourth highest and was six percentage points over the average; in contrast, the Eleventh and District of Columbia Circuits registered sixty-four and zero, respectively.[49] The Fourth Circuit follows a "'longstanding practice' of inviting" visitors to help, a notion that makes the tribunal "less parochial" and acquaints "district judges with the work of the circuit" and appellate members with the trial bench's concerns and perspectives.[50]

Between FYs 1995 and 1997, the tribunal's median time interval for counseled civil, nonprisoner appeals concluded after

41. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.1; *see also* Stras & Pettigrew, *supra* note 38, at 426; *infra* note 79 and accompanying text.

42. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.2; *see also* ANNUAL REPORT, *supra* note 7, at 40 tbl.S-1 (stating that the Fourth Circuit granted oral arguments in twelve percent of the court's filings in 2009).

43. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.2; *see also* Stras & Pettigrew, *supra* note 38, at 433–34; *supra* note 33; *infra* notes 68–69, 74 and accompanying text.

44. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.3; *see also* ANNUAL REPORT, *supra* note 7, at 42 tbl.S-3 (showing that the Fourth Circuit issued published opinions in six percent of its appeals resolved on the merits in 2009).

45. WORKING PAPERS, *supra* note 18, at 93 tbl.3; *see also* Stras & Pettigrew, *supra* note 38, at 438–39; *infra* notes 68–69, 75 and accompanying text.

46. *See* WORKING PAPERS, *supra* note 18, at 94 tbl.5.

47. *See id.*; *see also* Stras & Pettigrew, *supra* note 38, at 433–34; *supra* note 33; *infra* notes 68–69, 74 and accompanying text.

48. WORKING PAPERS, *supra* note 18, at 108 tbl.6a; *see also* ANNUAL REPORT, *supra* note 7, at 41 tbl.S-2 (stating that 2.4% of three-judge panels included visitors in 2009); Stras & Pettigrew, *supra* note 38, at 428–30.

49. WORKING PAPERS, *supra* note 18, at 108 tbl.6a; *see infra* notes 74, 76 and accompanying text.

50. 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) [hereinafter FOURTH CIRCUIT ANALYSIS]; *Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth, and Eleventh Circuits: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 17 (1997) [hereinafter *Hearings*] (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III).

hearing or submission was 12.6 months from the notice of appeal to final disposition.[51] The Fourth Circuit tied the Tenth Circuit for seventh fastest circuit, while the national average was 12.4 months.[52] The tribunal was also quickest from district court filing to final appellate resolution and matched the average for three of the five other indicia that the commissioners applied when calibrating time to disposition.[53]

The Commission assembled information regarding management practices.[54] The commissioners found distinctive virtually no aspects of Fourth Circuit endeavors, such as staff organization and general duties, alternatives to dispute resolution ("ADR"), as well as case screening and nonargument decision making. For example, the appellate court, like all tribunals, uses a "mediation or conference program to resolve some appeals by settlement, with little or no judicial intervention."[55] Fourth Circuit judges, like numerous courts' members, do not initially screen filings for oral argument, although the chief judge frequently designates a panel to review a pending case for disposition without, or with limited, argument, although panel members who believe that greater evaluation is necessary can request it.[56]

The Commission assembled material about opinions and publication. It thought the formal standards governing publication by tribunals and citation to unpublished opinions comparable but believed that their practices diverge.[57] The Fourth Circuit resembled many courts whose local appellate strictures essentially incorporated *Federal Rule of Appellate Procedure* 36's guidance for limited publication, and a few that opposed citation yet allowed it if

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51. WORKING PAPERS, *supra* note 18, at 95 tbl.7; *see also* ANNUAL REPORT, *supra* note 7, at 103 tbl.B-4 (showing median time interval was 8.2 months in 2009); Stras & Pettigrew, *supra* note 38, at 430–31.

52. WORKING PAPERS, *supra* note 18, at 95 tbl.7; *see also infra* notes 77, 86 and accompanying text.

53. *See* WORKING PAPERS, *supra* note 18, at 95 tbl.7; *see also infra* note 66 and accompanying text.

54. *See* WORKING PAPERS, *supra* note 18, at 101–16; *see also* MCKENNA, *supra* note 29, at 40–42.

55. WORKING PAPERS, *supra* note 18, at 102; *see also* 4TH CIR. R. 33. *See generally* ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS 39–45 (1997); *Hearings*, *supra* note 50, at 17 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III).

56. For elaboration of the idea that the clerk's office initially screens cases, see WORKING PAPERS, *supra* note 18, at 103–04. For the other ideas, see 4TH CIR. R. 34(a), I.O.P. 34.2; FOURTH CIRCUIT ANALYSIS, *supra* note 50. For analysis of circuit 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, 1070–71, 1075–88 (2000).

57. WORKING PAPERS, *supra* note 18, at 110, 112. *See generally* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541 (1997).

no published decision would serve as well.[58] Judge Wilkinson admitted that these criteria resist very exact formulation and that tribunals distinguish appeals with "precedential value and those whose interest is chiefly for the immediate parties"—a method that he deemed fair.[59] The appellate courts also tender explanations of differing specificity and clarity in unpublished opinions and variously denominate them for reporting purposes.[60] The Fourth Circuit also overturned a federal enactment and resolved issues almost as critical in unpublished dispositions.[61] The Commission remarked that the tribunals have long followed diverse publishing traditions and that "all . . . (except D.C.) have, since 1987, even further reduced their publication rates"; the Fourth Circuit published nineteen percent of its merits terminations in 1987, fifteen percent in 1993, and eleven percent in 1997.[62] Between FYs 1995 and 1997, the Fourth Circuit issued published decisions at both the lowest overall rate and at the lowest rate for pro se filings—a published decision rate that was 16, 14, and 13 percent beneath the average for orally argued cases, reversals, and opinions with a dissent.[63]

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58. WORKING PAPERS, *supra* note 18, at 114 tbl.A, 116 tbl.B; *see also* FED. R. APP. P. 36; 4TH CIR. R. 36. *See generally* William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 814 (tracing the Fourth Circuit history of publication and citation). Federal Rule of Appellate Procedure 32.1 alters this citation regime by permitting citation to unpublished opinions. FED. R. APP. P. 32.1

59. Letter from J. Harvie Wilkinson, III, Fourth Circuit Chief Judge, to Circuit Judge Will Garwood, Chair, Advisory Comm. on Appellate Rules (Feb. 3, 1998) (on file with author); *accord* Martin, *supra* note 57, at 178, 189.

60. *See* WORKING PAPERS, *supra* note 18, at 110–11; *see also infra* note 102 and accompanying text.

61. *See, e.g.*, Edge Broad. Co. v. United States, No. 90-2668, 1992 WL 35795 (4th Cir. Feb. 27, 1992), *rev'd*, 509 U.S. 418 (1992); *see also* Strickler v. Pruett, Nos. 98-29, 97-30, 1998 WL 340420 (4th Cir. June 17, 1998), *aff'd*, 527 U.S. 263 (1999); Wright v. Universal Mar. Serv. Corp., No. 96-2850, 1997 WL 422869 (4th Cir. July 27, 1997), *vacated*, 525 U.S. 70 (1998). Other regional circuits have decided critical issues in unpublished opinions that the Supreme Court resolved in substantive ones. *See, e.g.*, Ricci v. Destefano, 530 F.3d 88 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009); Murphy v. United Parcel Serv., No. 96-3380, 1998 WL 105933 (10th Cir. Mar. 11, 1998), *aff'd*, 527 U.S. 516 (1999); Haddle v. Garrison, 132 F.3d 46 (7th Cir. 1997) (unpublished table decision), *rev'd*, 525 U.S. 121 (1998); *see also* Reeves v. Sanderson Plumbing Prods., No. 98-60334, 1999 WL 274579 (5th Cir. Sept. 13, 2000), *rev'd*, 530 U.S. 133 (2000); Rettele v. Los Angeles Cnty., No. 04-55614, 2006 WL 1749956 (9th Cir. June 21, 2006), *rev'd*, 550 U.S. 609 (2007).

62. *See* WORKING PAPERS, *supra* note 18, at 111–12; ANNUAL REPORT, *supra* note 7, at 42 tbl.S-3 (stating that the Fourth Circuit published six percent of its cases in 2009). This and the oral argument data mean that courts do not achieve the appellate ideal and can indicate the courts' work less effectively than they could and may not deliver justice. *See* Merritt, *supra* note 32, at 1388; *supra* notes 29, 42–47 and accompanying text.

63. *See* WORKING PAPERS, *supra* note 18, at 110. The court's appellate judges and district judges and appellate counsel in survey responses appear rather

Evaluation of the Commission raw data suggests that the Fourth Circuit may perform less well than it could. Informative examples are the few arguments granted and published opinions issued.[64] These are valuable yardsticks of appellate justice and effective performance that implicate crucial process values, such as broad access to courts, as argument and publication can increase judicial accountability, visibility, and litigant fairness.[65] The court does operate somewhat efficaciously vis-à-vis particular criteria: it meets the national average for several resolution-time measures and for terminations per judgeship.[66] However, closer analysis shows that the information lacks clarity. The apparently negative dimensions of court functioning are illustrative. The Fourth Circuit compiles quite low numbers for only two, albeit significant, parameters, and four appeals courts tie it for one. The statistics would prompt less concern if those parties refused argument and cases refused publication deserve neither, or if protections safeguard those litigants who warrant the opportunities. Moreover, the visitor figure is not inordinately high, and visiting judges do afford benefits, namely fresh outlooks, but may also impose disadvantages, such as limited familiarity with the court. Nonetheless, the seemingly positive aspects of tribunal performance remain as unclear. The court exceeds the average for two of six resolution-time criteria—and by a mere four dispositions per judge—and visitor reliance inflates the resolution time.[67] The tribunal is also beneath system-wide levels for other parameters. The objective data alone, therefore, fail to show that the Fourth Circuit operates less efficaciously than it might, although its overall comparison with those having better or worse numbers may elucidate the circumstances.

3. A Comparison of the Fourth Circuit and Other Appeals Courts

The First and Seventh Circuits seem to perform best. The First grants the second largest percentage of oral arguments and releases the largest percentage of published opinions, and the Seventh

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satisfied with circuit law's uniformity and predictability and the court's overall operation. *See, e.g.*, *id.* at 23–26, 28–30, 52. *But see infra* note 108 and accompanying text.

64. *See supra* notes 42–47 and accompanying text; *infra* notes 67–68 and accompanying text.

65. *See supra* notes 25, 62 and accompanying text; *see also* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1466–68 (1987) (assessing process values). These seem more important than reliance on visitors who can offer benefits but may inflate parameters.

66. It was quickest in 2009. *See supra* notes 40–41, 51, 53 and accompanying text.

67. *See* WORKING PAPERS, *supra* note 18, at 95 tbl.7, 101 tbl.1.

compiles the third and second highest figures, respectively.[68] Both easily surpass the Fourth Circuit with the First Circuit, offering two and four times the percentages of arguments and published decisions granted by the Fourth Circuit.[69] It terminates cases most rapidly from the notice of appeal to final disposition and from last brief to hearing or submission, while the Seventh Circuit ties the Second Circuit as second quickest from notice of appeal to final brief[70] and uses visiting judges at a minuscule two percent rate.[71] However, neither tribunal functions as well on all standards. For example, only two courts resolve fewer matters per judgeship than the First Circuit,[72] and the Seventh Circuit treats filings somewhat inexpeditiously by certain measures.[73] The review, therefore, leaves unclear whether the First or Seventh Circuit is superior, but each court apparently works better than the others.

Comparing the Fourth Circuit with tribunals that seem to perform less well might also help. The Commission's data suggest that the Third, Fourth, and Eleventh Circuits appear to operate least effectively. They are among the five appellate courts that grant the fewest oral arguments and that employ the most visiting judges.[74] The three tribunals also issue the smallest percentages of published opinions.[75] The Eleventh Circuit uses the greatest number of visitors—sixty-four percent, a figure practically twice the system average and twenty-one percentage points higher than any court.[76] The three do function relatively well vis-à-vis other parameters. The Third and Fourth Circuits offer prompt disposition by some measures.[77] The Eleventh Circuit decides substantially more appeals per judge than all other tribunals: it resolves 275, the Fifth Circuit is second with 202, and the national average is 155.[78]

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68. *See id.* at 93 tbls.2 & 3. Both issue published opinions at more than twice the rate the system averages, surpassing nearly all of the other courts. *See id.* tbl.3.

69. *See id.* tbls.2 & 3.

70. *See id.* at 95 tbl.7. The Seventh Circuit ties the D.C. Circuit in the "submission to final disposition" (not orally argued) category. *See id.*

71. *See id.* at 108 tbl.6a. Nearly a fifth of the First Circuit's panels include visitors. *Id.*

72. *See id.* at 93 tbl.1. One is the D.C. Circuit, whose docket has many administrative appeals.

73. *See id.* at 95 tbl.7.

74. *See id.* at 93 tbl.2, 108 tbl.6a; *see also supra* notes 42–43, 48–50 and accompanying text.

75. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.3. The Third and Eleventh Circuits resolve the highest percentages of cases on the merits using "without comment" dispositions. *Id.* at 111 tbl.9.

76. *See id.* at 108 tbl.6a. A high percentage of pro se appeals may also explain the statistic, but a few regional circuits receive larger percentages and absolute numbers of the appeals. *See id.* at 93 tbl.1.

77. *See id.* at 95 tbl.7; *see also supra* notes 51–53, 65 and accompanying text.

78. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.1.

A majority of then active Third, Fourth, and Eleventh Circuit members has requested that Congress not authorize more positions for their courts.[79] However, the conservative estimates of dockets, workloads, and resources on which the Judicial Conference of the United States bases judgeship proposals for lawmakers could indicate that these tribunals need more seats.[80] Fourth Circuit judges affirmatively responded by the highest percentages to the Commission survey question whether expansion would help the tribunal "correct prejudicial errors," "minimize appellate litigation costs," "avoid creating [national and intra-circuit disuniformity],"and "hear oral argument."[81]

The Commission data thus suggest that the Fourth Circuit may not work as efficaciously—or deliver as much justice—as the court might, particularly when compared to other tribunals. Were the twelve circuit courts arrayed on a spectrum, the Fourth Circuit would be one that seems to perform least well, but additional ideas derived from related studies should yield greater clarity.

4. More Insights Pertaining to the Fourth Circuit

The Commission offers many informative perspectives on the Fourth Circuit and the modern appellate system. The commissioners generally reaffirm much conventional wisdom. For instance, each tribunal faces growing dockets of varying size and complexity with diverse, limited resources and with myriad approaches.[82] The Commission specifically confirms, illuminates, or elaborates on notions discussed in prior or contemporaneous assessments.

Quite applicable is an evaluation undertaken by the United States Senate Judiciary Subcommittee on Administrative Oversight and the Courts.[83] The commissioners reaffirm numerous subcommittee ideas. They observe that no tribunal works inefficaciously, which resembles this study's finding of effective Fourth Circuit operation, and they agree with the subcommittee assertions that new judgeships may threaten efficient resolution

79. *See* FOURTH CIRCUIT ANALYSIS, *supra* note 50; *see also* Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 749 (1997). *See generally Hearings*, *supra* note 50, at 15 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III).

80. *See* Tobias, *supra* note 79, at 753. *But see* FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 2–7; J. Harvie Wilkinson, III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1161–63 (1994) (acknowledging "countervailing pressures" to increasing the number of judges). *But cf.* Federal Judgeship Act of 2009, S.1653, 111th Cong. (proposing the addition of only one new seat for the Third Circuit and no new seats for the Fourth and Eleventh).

81. *See* WORKING PAPERS, *supra* note 18, at 18–19.

82. *See supra* notes 20, 33, 36 and accompanying text.

83. *See* FOURTH CIRCUIT ANALYSIS, *supra* note 50. Senator Charles Grassley (R-Iowa) chaired the subcommittee.

and circuit law's clarity and stability, in part by fostering disuniformity and greater reliance on the en banc process.[84] Moreover, the Commission echoes the study's notion that the appeal rate's upward drift implicates only a few case types, such as prisoner filings.[85] The commissioners do elucidate or dispute certain subcommittee views. For example, they state that the Fourth Circuit terminates appeals in 12.6 months, placing it sixth, which differs from the study's assertions that the Fourth Circuit needs only 7.8 months, is "fastest," and is "by this important measure . . . in excellent shape."[86] To the extent that Commission data, namely regarding limited oral argument, opinion publication, and significant dependence on visitors, indicate the tribunal functions less well than it might, the commissioners disagree with the subcommittee. The subcommittee claims that protections, such as a panel member's opportunity to reject disposition without argument or use of a summary opinion, address the low numbers, while visitors reduce parochialism and visiting district court judges enlarge a mutual appreciation of their duties and those of circuit members.[87] The study also contends the tribunal performs well. For instance, the court judiciously uses 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 prepublication circulation of opinions to encourage uniformity.[88]

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84. FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 2. *Compare* COMM'N REPORT, *supra* note 6, at 29–30, *with* FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 1, 3. For thorough exposition of then-Chief Judge Wilkinson's perspectives that agree with the study, see *Hearings*, *supra* note 50, at 13, 16 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III); Wilkinson, *supra* note 80, at 1173–74.

85. *Compare* WORKING PAPERS, *supra* note 18, at 127–33, 141 fig.7, *with* FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 1. Chief Judge Wilkinson also agreed with the study. *See Hearings*, *supra* note 50, at 14 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III).

86. *Compare supra* notes 51–52 and accompanying text, *with* FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 2. For other perspectives, see *Hearings*, *supra* note 50, at 13, 17 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III) (agreeing with the study) and David G. Savage, *Clinton Losing Fight for Black Judge; His Nominees to All-White 4th Circuit Are Blocked by Sen. Helms*, L.A. TIMES, July 7, 2000, at A1 (same). The disparity could derive from differences in the time period when each of the two assessors measured or the yardsticks that each of the assessors employed.

87. For assessment of litigant safeguards, see 4TH CIR. I.O.P. 34.2, 36.3; FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 1. For assessment of visitors, see *supra* note 50 and accompanying text. The percentage of visitors has also declined substantially in recent years. *See supra* note 48.

88. *See* FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 2; *see also* 4TH CIR. R. 33, 34(a)–(b), 34(d)–(e), 36 (a)–(b), I.O.P. 34.2, 36.3; *Hearings*, *supra* note 50, at 16 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III). The court resolves cases rather promptly, and delay attributable to prepublication circulation may be offset by increased intracircuit consistency. *See* FOURTH

Most approaches conserve resources—but a few and other measures, such as basically trusting publication and the appointment of counsel for impecunious pro se litigants to a single judge's discretion—may restrict access.[89]

The Commission's work on the en banc process informs three other studies, which assert that a Fourth Circuit majority invokes the technique to overturn rulings with which it disagrees politically.[90] One analysis states that when the "conservative majority on the full court [learns of] a panel decision they don't like, they just take it en banc and reverse it,"[91] and that the appellate tribunal "is probably unique in believing it has both the right and duty to reverse a decision the majority" opposes.[92] A second evaluation analogously claims, "In the thirty en banc cases examined, the conservative bloc proved extremely cohesive. Chief Judge Wilkinson and Judges Wilkins, Williams, Russell, and Luttig (all appointed by a Republican president) voted together on every case."[93] Two other empirical studies reach analogous, if more general, conclusions.[94] Democratic judicial appointees' sharp dissents from en banc opinions might also reaffirm this dynamic, while their growing numbers may reverse it.[95] The Commission

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CIRCUIT ANALYSIS, *supra* note 50, at 2; *see also* 4TH CIR. R. 36(a); *Hearings*, *supra* note 50, at 14 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III); *supra* notes 53, 83 and accompanying text.

89. *See* 4TH CIR. R. 34(b), 36(a). The study's scope, few empirical data, political nature, and surveys of how judges use their time are controversial. However, the subcommittee clearly has authority to monitor the courts and their resources, and it did gather data and seek judges' views, which are informed by experience.

90. *See* Brown & Lee, *supra* note 56, at 1111; Mark Hansen, *Mid-Atlantic Drift*, 85 A.B.A. J., Aug. 1999, at 66, 67–68; Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1.

91. Neil A. Lewis, *supra* note 90, at A22 (internal quotation marks omitted).

92. Hansen, *supra* note 90, at 68 (internal quotation marks omitted); *see also* Brooke A. Masters, *Fourth Circuit Pushing to Right*, WASH. POST, Dec. 19, 1999, at C1 (stating that the Fourth Circuit "may be the most conservative [court] in the country").

93. *See* Brown & Lee, *supra* note 56, at 1111.

94. *See* Tracey E. George, *The Dynamics and Determinants of the Decision To Grant En Banc Review*, 74 WASH. L. REV. 213, 273–74 (1999); Phil Zarone, *Agenda Setting on the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J. APP. PRACT. & PROCESS 157, 189 (2000).

95. *See, e.g.*, Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 183 (4th Cir. 2009) (Michael, J., dissenting); Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 905 (4th Cir. 1999) (Motz, J., dissenting); Riley v. Dorton, 115 F.3d 1159, 1169 (4th Cir. 1997) (Michael, J., dissenting); *see also* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1669–94 (1998); *supra* note 90. President Barack Obama's appointment of five new judges may change the dynamic, but his selection of centrist, diverse, sitting judges and the early timing make accurate prediction premature. Carl Tobias, *Fourth Circuit Judicial Appointments*, 61 S.C. L. REV. 445, 451–62 (2010); *see also* Mark Hansen, *Logjam*, A.B.A. J., June 2008, at 38; Jerry Markon, *The Politics of the*

finds that the Fourth Circuit reheard en banc the highest percentage of matters in all four years that preceded its work, but the tables' rather unrefined nature means they cannot verify the assessments.[96]

It is difficult to correlate Fourth Circuit operations with its politically conservative reputation. There are the phenomena scrutinized above and designating, isolating, and allowing for pertinent variables, such as diverse caseloads and resources. Moreover, the political disposition of institutions that are as complex and organic, and whose decisional processes are so arcane, as these courts, resists felicitous identification. The fortuity of the specific appeals that lawyers and clients decide to take and the issues that they raise, the often-changing tribunal membership exemplified by the five appointees whom President Obama will name, and the several thousand combinations of randomly assembled three-judge panels that litigants might draw give political complexion a fleeting quality. Nevertheless, an effort can be made by attempting to provide for the relevant factors and by depending on some Commission statistics.

Insofar as limited access for litigants corresponds with political conservatism, the tribunal may seem conservative. For example, restricted argument and publication might indicate that the court narrows access and is conservative. However, the Fourth Circuit appears to screen filings carefully and does offer litigant protections; its numbers resemble several other courts, two of which grant numerous merits terminations, no arguments, or "reasoned opinions."[97] Comparing the Fourth Circuit oral argument, opinion publication, and visitor data with those of the Seventh Circuit (which is viewed as conservative) and the Ninth Circuit (which is perceived as rather moderate or liberal) is no clearer, because those for the Fourth and Ninth are more analogous than the Seventh.[98]

Federal Bench: Obama's Appointments Are Expected To Reshape the U.S. Legal Landscape, WASH. POST, Dec. 8, 2008, at A1; J. Harvie Wilkinson III, *Storming the 4th Circuit*, WASH. POST, Jan. 23, 2009, at A15.

96. WORKING PAPERS, *supra* note 18, at 23 tbl.6a, 94 tbl.6 (stating that all the judges rated the court's "en banc performance in resolving conflicts in the circuit's law" most highly); *see also* 4TH CIR. R. 35. The number greatly declined in 1998 and has since remained constant. *See* ANNUAL REPORT, *supra* note 7, at 40 tbl.S-1 (stating that the court held one en be rehearing in 2009). The Commission data on pro se cases may inform, but are insufficiently refined to verify, an analysis of death-penalty appeals. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.1 (data); Hansen, *supra* note 90 (analysis); Masters, *supra* note 92 (same); *see also* John H. Blume, *The Dance of Death or (Almost) "No One Here Gets Out Alive": The Fourth Circuit's Capital Punishment Jurisprudence*, 61 S.C. L. REV. 465, 473 (2010).

97. *See supra* notes 74–75, 87 and accompanying text; *see also* Blume, *supra* note 96 (suggesting narrow court access for death-penalty appeals may correlate with conservatism).

98. *See* WORKING PAPERS, *supra* note 18, at 93 tbls.2 & 3, 108, tbl.6a. The

The tribunal's operation, accordingly, may reflect its political reputation. The above phenomena, however, especially the court's new composition, mean that accurate conclusions defy articulation.

To the extent that the Fourth Circuit was conservative when President George W. Bush assumed office, the court seems less so now, in particular vis-à-vis the admittedly crude yardsticks of who appointed its members and of the new jurists whom Obama will choose. In January 2001, the Fourth Circuit included six active judges whom Republican chief executives had named, five whom Democratic presidents had appointed, and five openings.[99] The court today has eight active jurists whom Democratic chief executives selected and five whom Republicans appointed, as well as two vacancies.[100] Openings arose during the George W. Bush years because President Bush rarely consulted home-state lawmakers or proposed consensus nominees who might have secured appointment.[101] Judges William Wilkins, Emory Widener, and Karen Williams, who had quite conservative reputations, occupied two of the vacancies that Obama will fill.[102] The four empty seats that remained at the Bush administration's conclusion represented lost opportunities to increase the tribunal's conservatism and

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data may reflect dockets and resources but by these measures the Fourth and Seventh are more similar. *Id.* at 93 tbl.1; *see also* COMM'N REPORT, *supra* note 6, at 24 tbl.2-8, 27 tbl.2-9. For the courts' reputations, see *supra* notes 91–92 and accompanying text.

99. *See Archive of Judicial Vacancies*, USCOURTS.GOV, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx (follow "2001" hyperlink; then follow "Judicial Vacancy List" hyperlink under "January 4, 2001") (last visited Oct. 24, 2010); *Biographical Directory of Federal Judges*, USCOURTS.GOV, http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (follow "select research categories" hyperlink; then select "court" and press "continue"; then select "U.S. Court of Appeals for the Fourth Circuit" from the drop-down menu and press "search") (listing King, Traxler, Motz, Michael, Williams, Luttig, Niemeyer, Wilkins, Wilkinson III, and Widener) (last visited Oct. 24, 2010); *United States Court of Appeals for the Fourth Circuit, Historical Listing of Judges by Commission Date*, USCOURTS.GOV, http://www.ca4.uscourts.gov/pdf/HistoryJudges.pdf (last visited Oct. 24, 2010).

100. *See Archive of Judicial Vacancies*, *supra* note 99 (follow "2010" hyperlink; then follow "Judicial Vacancy List" hyperlink under "August 1, 2010"); *Fourth Circuit Judges*, USCOURTS.GOV, http://www.ca4.uscourts.gov/judges.htm; *Historical Listing of Judges by Commission Date*, *supra* note 99.

101. Carl Tobias, *Filling Federal Appellate Vacancies*, 41 ARIZ. ST. L.J. 829, 855 (2009); Tobias, *supra* note 95, at 449.

102. *See Archive of Judicial Vacancies*, USCOURTS.GOV, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx (follow "2010" hyperlink; then follow "Judicial Vacancy List" hyperlink under "March 1, 2010") (last visited Nov. 3, 2010); *Historical Listing of Judges by Commission Date*, *supra* note 99. Judge Keenan was confirmed to Judge Widener's seat. Judge Diaz was nominated to and may be confirmed for Judge Wilkins's seat. There is no nominee yet for Judge Williams's seat.

efficiency.

Finally, certain performance indicia, such as limited oral argument and opinion publication, might suggest that the Fourth Circuit neglects to dispense justice or to work as effectively as it might, although its resolution times, dispositions per judgeship, and litigant protections suggest otherwise. In the end, the dearth of broad, refined, and uniform information prevents conclusive determinations.

B. Critical Assessment

The commissioners have improved understanding of the modern Fourth Circuit. The Commission collects substantial pertinent data; implies that the court delivers justice through, for instance, expeditious disposition; and adduces minimal persuasive evidence that any tribunal fails to operate efficaciously. Notwithstanding this valuable contribution, the work is neither sufficiently refined nor comprehensive enough to yield definitive findings about the Fourth Circuit. Even those data that most strongly indicate that the tribunal could afford greater justice or function better remain unclear. For example, knowing only that the court holds arguments in thirty percent of its matters and issues published opinions in eleven percent is not determinative. Comparing these data and raw figures for every tribunal appears uninformative, because case mixes, resources, and the techniques that courts apply differ. In fact, the Commission found that the varying specificity of "without comment" resolutions and their diverse characterization for record keeping purposes mean "it is not possible to" compare dependably the regional circuits "on this dimension using nationally reported data."[103]

Thus, although Fourth Circuit oral argument and opinion publication numbers might be inadequate, they could well suffice. For instance, the meticulous enforcement of a few practices or safeguards and the holdings' thorough, clear explication with unpublished opinions may temper seemingly restricted argument. Even were the available information clearer, it might not comprehensively describe overall performance that ranges from the ethereal idea of judicial collegiality to routine, daily court administration.[104] It thus may be impossible to depict precisely the

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103. WORKING PAPERS, *supra* note 18, at 111. The ideas in the text, case complexity, and visitors' inflation of a few indicia show the need to refine data. *See supra* notes 27, 65–66 and accompanying text. The Commission refines some data. For example, it does not treat a circuit's senior judges as visitors. *See* WORKING PAPERS, *supra* note 50, at 108 tbl.6a.

104. *See* FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (1994); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1639–52 (2003); Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585, 585–92 (1995). *See generally supra* note 36 and accompanying text.

court's existing condition without additional and more refined information, such as the notions that analysis of many, particular cases might afford. In fairness, the commissioners and other evaluators did not canvass all tribunals or relevant empirical material. For example, having the Commission and subcommittee judgments that the Fourth Circuit performs well and decides cases rather expeditiously is helpful. Nonetheless, these and analogous insights that observers proffer are controversial, and most of the ideas can be empirically tested or improved with systematically collected empirical information, but a few—namely the twelve courts' optimal membership—seemingly require policy trade-offs among incommensurable considerations.

In sum, the material that the commissioners and others gathered is not so refined or broad as to permit definitive conclusions about whether the Fourth Circuit furnishes justice or operates efficaciously. However, the data are sufficient to raise concerns about the tribunal, to support additional work that might better answer the questions, and to offer numerous suggestions for the future.

III. RECOMMENDATIONS FOR THE FUTURE

The uncertainty that I find may warrant caution. Nevertheless, the Fourth Circuit should implement numerous relevant changes. The tribunal could undertake more assessment; institute salutary notions; and experiment with promising measures by reviewing available information, its own circumstances, and the other appellate courts. An expert, independent person, or body such as the RAND Corporation might assume lead responsibility, but the court may want to employ an initiative modeled on the "Evaluation Committee," which analyzed the Ninth Circuit in the commission study.[105]

A. More Study

The assessors must gather, analyze, and synthesize the maximum pertinent information that will yield more conclusive determinations about the Fourth Circuit's present condition. Assessors should review and capitalize on existing applicable material, namely the useful perspectives of the Commission and the subcommittee, and should address the complex, unresolved questions regarding the court. They must, in essence, complete the statistically meaningful analysis that the commissioners lacked time to undertake. If evaluators conclusively ascertain that the court fails to provide justice or operate well, they should delineate why

105. *See* NINTH CIRCUIT EVALUATION COMM., INTERIM REPORT 1–16 (2000). *See generally* Hellman, *supra* note 9; David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365 (2000).

and identify the best remedies.

Assessors might secure the views of circuit and trial judges and appellate counsel on disputed issues that the Commission or others raised. For instance, evaluators could interview appellate court members for their opinions on judicial collegiality; district judges for their ideas about circuit law's coherence; and attorneys for their views on whether the court properly identifies filings that deserve specific measures—especially oral argument and published opinions—which would probe the subcommittee's idea that the tribunal appropriately designates these cases. Nonetheless, analysts should consider additional prospects because respondents' experiences and self-interests may limit their objectivity.

Evaluators, therefore, should review numerous individual appeals from the time litigants file until the time when judges resolve them. This could be the preferable means of ascertaining whether the Fourth Circuit delivers justice, functions well, and correctly affords procedural opportunities. Essential to the answers will be measuring certain alternatives' impacts by calculating their advantages and detriments and ameliorative techniques' effects.[106] Assessors might specifically attempt to determine whether furnishing published opinions in six percent of appeals maintains uniform, coherent, and predictable circuit law and accommodates litigant needs. Those queries will require scrutinizing matters' factual assertions and legal contentions, assiduously comparing disposition of cases that raise analogous issues, and seeing how broadly and lucidly unpublished opinions explain the conclusions.[107] Analysts could institute a similar endeavor to detect whether offering arguments for twelve percent of cases is adequate. This will necessitate exploring how submission on written briefs influences litigant presentation, judicial appreciation, and the ultimate disposition of the questions that are at stake.[108]

Tracking numerous appeals may clarify related, important

106. *See supra* notes 87–89 and accompanying text. This will demand a finely calibrated, cost-benefit review of the devices and ameliorative measures. Examples of benefits are greater court access and judicial visibility; examples of detriments are decreased circuit resources; and examples of ameliorative measures are party safeguards.

107. *See* COMM'N REPORT, *supra* note 6, at 39–54. Determining why the Fourth Circuit allows oral argument at twice the rate that it publishes opinions and assessing the various screening methods employed in the circuit could also inform these queries. *See supra* notes 42, 54–58 and accompanying text. The final question in the text may clarify the question of diverse resolution and record keeping. *See supra* notes 60, 103 and accompanying text.

108. Employment of protective mechanisms and unpublished dispositions' clarity and detail may also be relevant. Evaluators might attempt to detect if a circuit majority employs the en banc measure in political ways. *See supra* notes 91–96 and accompanying text. A majority's effects on the en banc process may resist verification because of difficulties in identifying the impact of politics and assessing how judges decide.

features of circuit performance, such as whether the seemingly generous opportunities and protections tendered are in fact sufficient. It thus might be helpful to know if parties correctly seek oral argument and publication of decisions and whether judges grant the motions or offer both sua sponte, when indicated. Survey answers that involve these matters resemble objective information. For example, lawyers find the Fourth Circuit second least responsive in furnishing argument when they seek it and third for whether securing "needed oral argument is a moderate or greater problem."[109] Some of these queries are complex and perhaps unanswerable; however, evaluations implicating consistency and the en banc technique provide instructive guidance because they suggest how to analyze the law, facts, and decision-making process.[110]

If assessors find that the court now faces problems requiring amelioration, they should explain why—an effort that will foster careful matching of difficulties and remedies. For instance, if examination of appeals shows that limited resources or gigantic numbers of pro se filings restrict oral argument and opinion publication too substantially, additional judicial positions or court staff may be warranted. Evaluators must analyze a plethora of feasible approaches. Instructive sources are the Commission; its progenitors—mainly the United States Judicial Conference Long Range Planning Committee and the Federal Courts Study Committee; and scholars, who have reviewed a number of options.[111] Assessors must scrutinize certain promising alternatives that regional circuits used or with which they experimented, namely the alternatives deployed by the tribunals that function most effectively in terms of the parameters for which the Fourth Circuit appears to operate less efficaciously. Studying the Seventh Circuit might demonstrate how its smaller judicial contingent decides more appeals and furnishes significantly higher percentages of arguments and published opinions[112]—phenomena that the tribunal's creative

109. *Compare* WORKING PAPERS, *supra* note 18, at 73, 105 tbl.3c, *with id.* at 93 tbl.2.

110. *See generally* Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, *in* RESTRUCTURING JUSTICE 55, 55–90 (Arthur D. Hellman ed., 1990) [hereinafter Hellman, *Maintaining Consistency*]; Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989); *supra* notes 91–94.

111. *See, e.g.*, BAKER, *supra* note 29, at 106–286; COMM'N REPORT, *supra* note 6, at 21–25, 59–74; JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FED. COURTS 67–70, 131–33 (1995) [hereinafter LONG RANGE PLAN]; STUDY COMM. REPORT, *supra* note 19, at 109–23.

112. *See* COMM'N REPORT, *supra* note 6, at 27 tbl.2-9 (documenting judges). For the other ideas, see WORKING PAPERS, *supra* note 18, at 93 tbls.1–3 and *supra* notes 38, 42–45, 65 and accompanying text.

staffing may explain.[113] All courts also employ diverse case management and alternatives to dispute resolution, such as Ninth Circuit screening panels that resolve 140 filings each month with limited review and a wide range of mediation and conference processes that facilitate settlement.[114]

Analysts, therefore, must elucidate the integral, unclear aspects of the Fourth Circuit's present state and address the important queries that the Commission's work and similar efforts have not answered. These ideas, which relate to lingering uncertainty, indicate that additional study is preferable because it should foster more definitive conclusions as well as experimentation and reform.

B. A Miscellany of Suggestions

Greater exploration of alternatives seems more feasible today, although lawmakers or the Fourth Circuit may reject this proposition. Congress and judges might think that the court functions effectively, that assessment is unnecessary, or that now is the time for action. Legislators and the tribunal, accordingly, could analyze and consider prescribing numerous devices, such as those that the commissioners and others reviewed, while most techniques can be deployed as a study proceeds.

1. Responses to Questions of the Commission and Additional Observers

The Fourth Circuit should address the primary questions raised by the Commission and additional evaluators who affirm the conventional wisdom that it has faced rising appeals with somewhat limited resources.[115] These circumstances seem to explain the few arguments and published opinions issued—factors that the commissioners reaffirmed.[116] The notions examined suggest that there are two major alternatives. One is for Congress to decrease the number of appeals—essentially by narrowing federal civil or criminal jurisdiction—as two Commission members proposed.[117]

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113. *See* WORKING PAPERS, *supra* note 18, at 102 (asserting that the "Seventh Circuit's nonjudicial staffing is distinctive"); Stras & Pettigrew, *supra* note 38, at 443–44; *supra* notes 38, 42, 44, 98 and accompanying text.

114. *See* COMM'N REPORT, *supra* note 6, at 31; Hug, *supra* note 8, at 906–07; *supra* notes 54–56 and accompanying text. *See generally* JOE CECIL, FED. JUDICIAL CTR., ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985), http://www.fjc.gov/public/pdf.nsf/lookup/9cirinnv.pdf/$file/9cirinnv.pdf; Hellman, *Maintaining Consistency*, *supra* note 110.

115. *See supra* notes 19, 82 and accompanying text. *But see supra* note 85 and accompanying text.

116. *See supra* notes 42–45, 48–49 and accompanying text.

117. *See* COMM'N REPORT, *supra* note 6, at 77–88; *see also Hearings*, *supra* note 50, at 18 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III); FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 19; LONG RANGE PLAN, *supra* note 111, at 134; MCKENNA, *supra* note 29, at 141–53; William H. Rehnquist,

Nonetheless, the approach lacks practicality because lawmakers have few incentives to cabin jurisdiction.[118]

The other prospect, thus, is directly addressing the caseload expansion. One response is to increase the number of judges, who could furnish greater numbers of arguments and published decisions; however, this option sparks controversy. For instance, a majority of Fourth Circuit judges has rejected augmentation of the fifteen current seats,[119] and the subcommittee echoed Judge Wilkinson's 1997 admonition that two vacancies remain unfilled because thirteen judgeships is "an appropriate number."[120] The Judicial Conference has also recommended no additional positions to Congress.[121] Moreover, a few people and institutions believe enhancing a tribunal's size can be inefficient and lead to other difficulties.[122] Nonetheless, the court's members agreed most strongly with the proposition that new judicial seats would improve five critical aspects of tribunal operations.[123] Resistance from Congress and the appellate bench, therefore, might undermine this possibility.[124]

One valuable measure that the White House and the Senate could felicitously implement is to fill quickly the existing vacancies in two of the tribunal's judgeships. The President should consult home-state legislators who represent the jurisdictions on the court, and they ought to suggest consensus prospects the White House would then nominate. The Senate must correspondingly accord those nominees prompt Judiciary Committee hearings and votes,

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1999 Year-End Report on the Federal Judiciary, THIRD BRANCH, Jan. 2000, at 1, 3.

118. *See* Stephen Breyer, *The Donahue Lecture Series: "Administering Justice in the First Circuit"*, 24 SUFFOLK U. L. REV. 29, 34–37 (1990); Dragich, *supra* note 31, at 16; Martin, *supra* note 57, at 181; Wilkinson, *supra* note 80, at 1180–83.

119. *See supra* notes 79–80 and accompanying text.

120. *Hearings*, *supra* note 50, at 15–16 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III); FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 4. George W. Bush tapped nominees for vacancies but left four openings at his administration's end, and Obama has filled three and will fill at least two more. *Archive of Judicial Vacancies*, USCOURTS.GOV, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx (last visited Oct. 24, 2010); Hansen, *supra* note 95; Markon, *supra* note 95; Tobias, *supra* note 95; Wilkinson, *supra* note 95.

121. *See supra* note 80; *see also* Rehnquist, *supra* note 117.

122. *See supra* note 84 and accompanying text; *see also* BAKER, *supra* note 29, at 202; Jon O. Newman, *1000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 187–88 (1993).

123. *See supra* note 81 and accompanying text. Confirming judges for the two seats that are presently open would facilitate more argument and publication. *See supra* note 120.

124. *Compare* Newman, *supra* note 122, *with* Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea To Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52. *See generally* GORDON BERMANT ET AL., FED. JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES (1993). If opposition continues, temporary judgeships may be a pragmatic compromise.

and expeditious floor debates and votes. This interbranch cooperation would rapidly fill the empty seats and permit the tribunal to operate at full capacity, so that it could easily grant more arguments and published opinions.

Supplementing nonjudicial resources may concomitantly address increasing caseloads. For example, increasing the number or responsibilities of staff attorneys should decrease the time that appellate judges must commit to administrative and related duties. The subcommittee suggested that the counsel expedite filings,[125] but augmenting the contingent or their obligations might additionally bureaucratize the court, which already has a large complement.[126]

Lawmakers and the tribunal may want to explore similar direct responses. Observers have thoroughly scrutinized numerous ideas.[127] Congress and the Fourth Circuit must delineate the best options with a meticulously calibrated analysis of considerations, such as inexpensive processing and broad court access. The clearest generic example is alternatives that conserve appellate bench resources, thereby increasing argument and publication.

A helpful, particular illustration is bankruptcy appellate panels ("BAPs"), which rely on bankruptcy judges' expertise and time, thereby minimizing the effort the court of appeals judges commit to bankruptcy filings. Indeed, the Ninth Circuit employed the BAP so well that Congress requested that all courts assess the panels.[128] The Fourth Circuit has not instituted a BAP;[129] however, the panels' virtues suggest that the tribunal carefully evaluate them. District court appellate and two-judge panels (which the commissioners suggest), ADR, and appellate commissioners[130] would analogously save circuit resources.[131] Nonetheless, these ideas might erode critical values, namely generous court access and circuit bench

125. *See supra* note 88 and accompanying text.

126. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS 26–28 (1985); CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST 94–125 (1995); *see also* COMM'N REPORT, *supra* note 6, at 23–25; MCKENNA, *supra* note 29, at 49–53. The survey answers indicate that delegation to staff is not a concern. *See* WORKING PAPERS, *supra* note 18, at 103.

127. I address some. *See supra* notes 111–14 and accompanying text; *accord* Wilkinson, *supra* note 80, at 1178–88.

128. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109–10; *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 110, at 165, 165. *See generally* Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181 (1989).

129. *See* 4TH CIR. I.O.P. 6.1.

130. *See, e.g.*, COMM'N REPORT, *supra* note 6, at 31, 62–65; *supra* note 55; *see also* LONG RANGE PLAN, *supra* note 111, at 68, 131–32. *See generally* FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 19.

131. *See* BAKER, *supra* note 29, at 197; Breyer, *supra* note 118, at 44; Tobias, *supra* note 8, at 238 (arguing that district court appellate panels capitalize on larger district judge capacity).

accountability and visibility.[132]

The Fourth Circuit should review additional devices for resolving its cases efficiently. One such device is the Ninth Circuit screening panels and the creative manner in which all tribunals deploy staff who are not attorneys.[133] The Fourth Circuit may analyze related ways of enlarging court access, such as local strictures that require opinion publication when a judge dissents or when the panel reverses a district court,[134] or reduction in the number of unpublished dispositions, particularly summary opinions.

2. Possible Experimentation

These notions indicate that more study would be beneficial. However, enough information is now available to structure profitable experimentation that would capitalize on earlier and present Fourth Circuit testing.[135] Legislators and the court thus might experiment using salutary techniques, a number of which I discussed above, and this endeavor could be undertaken simultaneously with an assessment. The tribunal should investigate its circumstances, pinpoint aspects that require change, and test efficacious mechanisms.

The Fourth Circuit's substantial docket and somewhat limited resources may warrant analysis of options that facilitate disposition and honor process values. The tribunal's condition might prompt it to evaluate the Fifth, Ninth, and Eleventh Circuits, which have many appeals and relatively few resources.[136] Two concepts that the Ninth Circuit Evaluation Committee believes will improve productivity without expense deserve application. They are greater "batching" of matters that involve related enactments or similar issues before one argument panel for quicker resolution, and designating "lead cases" in which the panel opinion would affect

132. *See* BAKER, *supra* note 29, at 197; LONG RANGE PLAN, *supra* note 111, at 67–70, 131–33; MCKENNA, *supra* note 29, at 105–21; Merritt, *supra* note 32, at 1388; *supra* note 21 and accompanying text; *see also supra* notes 106–07 and accompanying text (suggesting that more limitation of argument and publication in some appeals would free up resources to permit them in others, but that restricting access and limiting the number of judges may pinpoint cases not meriting publication and may afford written explanations that suffice, but acknowledging that further study is required).

133. *See supra* notes 105, 114. Most devices may save resources but can restrict access.

134. *See* WORKING PAPERS, *supra* note 18, at 114 tbl.A; *see also supra* notes 58, 109 and accompanying text. 4TH CIR. R. 34(a) and 36(b) authorize parties to request argument and publication with reasons thereof. 4TH CIR. R. 34(a)–(b).

135. *See Hearings*, *supra* note 50, at 17 (statement of Fourth Circuit Chief Judge J. Harvie Wilkinson, III); *supra* notes 87–88 and accompanying text.

136. *See* WORKING PAPERS, *supra* note 18, at 93 tbl.1. The Ninth Circuit has conducted much cutting-edge experimentation, but every court has undertaken some testing. *See supra* note 114.

numerous later appeals that pose a common question.[137] The Fourth Circuit may also address its huge pro se docket, be responsive to the subcommittee's concern, and save judicial time and effort through increased dependence on staff.[138]

The Fourth Circuit might want to analyze the Commission's suggestions apart from the divisional arrangement. The tribunal could experiment with district court appellate or two-judge panels. The commissioners asked that Congress authorize circuit testing of district court appellate panels.[139] The subcommittee believed the two-judge entities to be so promising that it urged legislative and judicial consideration of experimentation, which may determine whether they facilitate workload management.[140] Each type of body would conserve resources and foster the prompt and inexpensive resolution of many appeals, but they could erode fair disposition and restrict the circuit judiciary's accountability.[141] The court might employ temporary judgeships in particular to detect whether larger membership will influence efficiency, although these seats frequently become permanent and numerous Fourth Circuit members have opposed new positions.[142]

After the tribunal has identified promising ideas, it should apply them in sufficiently diverse contexts for enough time to support defensible conclusions about their effectiveness. This testing warrants stringent review. An independent, expert analyst must rigorously collect, investigate, and synthesize the maximum pertinent empirical information, which ought to afford confident judgments regarding efficacy.

Congress and the Fourth Circuit should implement these recommendations because the recommendations are a conservative, constructive attempt to illuminate more definitively whether the court actually requires improvements and, if so, to delineate salutary measures. For instance, were the existing vacancies filled or new judgeships authorized, the tribunal could grant more arguments and write more published opinions. The suggestions may concomitantly affirm the legitimacy of some determinations that the commissioners and additional observers proffered.

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137. *See* NINTH CIRCUIT EVALUATION COMM., *supra* note 105, at 7. *See generally* Hug, *supra* note 8

138. These could foster bureaucratization. *See supra* notes 85, 88–89, 125–26 and accompanying text.

139. *See supra* note 129 and accompanying text.

140. FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 19; *see also supra* notes 129–31 and accompanying text.

141. *See supra* notes 21, 129–31 and accompanying text. ADR could have similar effects.

142. *See supra* note 121 and accompanying text; *see also* FOURTH CIRCUIT ANALYSIS, *supra* note 50, at 19 (urging temporary judgeships when the need for permanent ones is unclear). Senate Bill 1653 authorizes temporary judgeships. *See* Federal Judgeship Act of 2009, S. 1655, 111th Cong. (2009).

CONCLUSION

The Commission on Structural Alternatives for the Federal Courts of Appeals posited valuable Fourth Circuit insights, mainly on day-to-day operations, which the court's critics have neglected. However, this study and analogous evaluations are neither sufficiently refined nor broad to yield dispositive findings about whether the court actually delivers justice and works effectively or about whether tribunal operations reflect the court's conservative reputation. Accordingly, lawmakers and the Fourth Circuit should perform more assessment and consider restricted experimentation, while the President and the Senate must work together and appoint judges for the court's two vacancies.