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David R. Stras

Shaun M. Pettigrew

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THE RISING CASELOAD IN THE FOURTH CIRCUIT: A STATISTICAL AND INSTITUTIONAL ANALYSIS

DAVID R. STRAS* & SHAUN M. PETTIGREW**

I. INTRODUCTION

The dockets of the United States Courts of Appeals have exploded in size over the past forty years.¹ Commentators have proposed a number of hypotheses to explain the growth, including increasing numbers of administrative appeals² and appeals from collateral orders issued by district courts;³ the heightened federalization of criminal law;⁴ and the growing number of summary dispositions in the district courts.⁵ Regardless of the cause, calls for reform from legislators, judges, and scholars have been widespread.⁶

Over the past thirty years, various committees and commissions have been charged with identifying potential systemic reforms for the federal courts.⁷ One idea popular from the 1970s through the 1990s was to establish a National Court of Appeals to provide greater guidance to lower courts on pressing and divisive legal issues that the Supreme Court has failed to address through its discretionary docket.⁸ Others have discussed increasing the number of specialized courts, like the United States Court of Appeals for the Federal Circuit, to hear appeals on

* Vance K. Opperman Research Scholar, University of Minnesota Law School. We would like to express our appreciation to the members and editors of the *South Carolina Law Review* for allowing us to participate in this Symposium and for their patience during the writing and editing process. Special thanks also go to the other participants in the Symposium for their excellent remarks and suggestions. Finally, we would be remiss if we did not thank David Couillard for his superb research assistance.

** J.D. 2007, University of Minnesota.

1. See Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 473–75 (2009).

2. *Id.* at 477–78.

3. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 118–19 (2d ed. 1996).

4. See O'Scannlain, *supra* note 1, at 477.

5. POSNER, *supra* note 3, at 121.

6. See, e.g., Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395, 396, 399, 408–09 (2000) (“Over the past generation, there has been a long line of studies, committees, commissions . . . which have focused on the United States Courts of Appeals, to assess their status, to evaluate the harms from their increasing workload, and to make recommendations for their reform.”); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 692 (2000–2001) (stating that many judges have critiqued judicially imposed procedural innovations designed to address the growing federal caseload).

7. See Baker, *supra* note 6, at 396.

8. See THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 242–52 (1994) (examining variations of an additional, national appellate court).

certain technical subjects calling for special expertise.⁹ Still others have recommended abolishing diversity jurisdiction or curtailing the scope of federal question jurisdiction.¹⁰ Less popular reform ideas have included permitting two-judge panels for appeals,¹¹ establishing appellate panels comprised of district court judges,¹² splitting large circuits to create greater efficiencies,¹³ and vesting circuit courts with a discretionary docket like the Supreme Court.¹⁴ The White Commission, which was charged with studying the Ninth Circuit,¹⁵ even recommended splitting the Ninth Circuit into three divisions.¹⁶

None of these reform measures, however, has taken hold because of political or practical difficulties. Instead, the basic appellate structure in the federal court system has remained largely—though not completely—unchanged since 1960.¹⁷ Nevertheless, despite ever-expanding caseloads, the dominant rhetoric in recent years has shifted from warnings of an impending “crisis”¹⁸ to more moderate concerns surrounding the “challenges”¹⁹ and “stresses”²⁰ facing the federal

9. See *id.* at 221–24; POSNER, *supra* note 3, at 244–70; REPORT TO THE FEDERAL COURTS STUDY COMMITTEE OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES (1990), reprinted in FED. COURTS STUDY COMM., 1 WORKING PAPERS AND SUBCOMMITTEE REPORTS 119–21 (1990).

10. BAKER, *supra* note 8, at 187–92; DEP’T OF JUSTICE COMM. ON REVISION OF THE FED. JUDICIAL SYS., THE NEEDS OF THE FEDERAL COURTS 11–15 (1977); POSNER, *supra* note 3, at 210–21.

11. COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 62–64, app. C(2) at 96–98 (1998) [hereinafter WHITE COMM’N FINAL REPORT].

12. *Id.* at 64–66, app. C(3) at 98–99; Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 58–62.

13. BAKER, *supra* note 8, at 215–21.

14. Dragich, *supra* note 12, at 63–66; O’Scannlain, *supra* note 1, at 480.

15. WHITE COMM’N FINAL REPORT, *supra* note 11, at ix.

16. *Id.* at 40, 60–62, app. C(2) at 96–98.

17. Two major changes occurred in the early 1980s. The Fifth Circuit was split in 1980 into two circuits: the Fifth and Eleventh Circuits. *Id.* at 21. In addition, the Federal Circuit was created in 1982 to exercise national jurisdiction over certain subject matters, including patent appeals. *Id.* at 72.

18. See, e.g., RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, at vii (1st ed. 1985) (“My intent is to . . . register my concern that the [federal judicial] system is on the verge of being radically changed for the worse under pressure of the rapid and unremitting growth in caseload . . .”). But see Jack M. Beermann, *Crisis? What Crisis?*, 80 NW. U. L. REV. 1383, 1390 (1986) (“[F]ederal courts have done an excellent job in coping with the increased business.”) (reviewing POSNER, *supra*).

19. See POSNER, *supra* note 3, at xiii (“The success of the federal courts in coping with a caseload that ten years ago I would have thought wholly crippling, and the recession of caseload in all but the courts of appeals, have led me to change the subtitle of the book . . . , substituting ‘Challenge’ for ‘Crisis.’ It is inaccurate to describe the situation of the federal courts as critical, although it may become so in the future . . .”).

20. Baker, *supra* note 6, at 412 (noting that the Federal Judicial Center’s 1993 report on alternatives for the federal courts of appeals “eschew[ed] the term ‘crisis’” in favor of “stresses” (quoting FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 11 (1993))).

courts.²¹ The shift in rhetoric likely derives largely from the ability of the circuit courts to accommodate caseload growth through changes in personnel and procedures.²²

This Essay will explore the transformation of the United States Courts of Appeals through the lens of the Fourth Circuit. It proceeds in three parts. Part II explores the expanding dockets of the United States Courts of Appeals, including the Fourth Circuit. Part III then examines how changes in practices and procedures have permitted the federal appellate courts to handle a caseload that has nearly tripled since 1979. Finally, Part IV explains the systemic changes that have been instituted since 1970, such as an increase in the number of law clerks and staff attorneys, in order to accommodate the rising caseload.

II. THE RISING CASELOAD

When judges and commentators discussed a “crisis” in the federal courts during the late 1980s, the number of appeals filed annually in the United States Courts of Appeals was much lower: 33,360 appeals for the year ending June 30, 1985,²³ and 39,734 by 1989.²⁴ Twenty years later, as the rhetoric has become more measured regarding the capacity of the federal courts to handle an expanded docket, the federal appellate courts are now regularly handling more than 60,000 appeals per year.²⁵ The overall caseload in both the district and circuit courts is “trending upward” as one recent commentator has noted, placing great strain on the ability of federal courts to give comprehensive consideration to every case.²⁶ “[W]ith only slight exaggeration,” Ninth Circuit Judge Diarmuid O’Scannlain has called the current federal system “assembly-line justice.”²⁷ Whatever the appropriate phrase to describe the phenomenon, the statistics reveal that the federal courts are experiencing a deterioration of the “appellate

21. For example, in the *2009 Year-End Report on the Federal Judiciary*, Chief Justice Roberts stated, “The courts are operating soundly, and the nation’s dedicated federal judges are conscientiously discharging their duties.” *2009 Year-End Report on the Federal Judiciary*, 42 THIRD BRANCH (Admin. Off. U.S. Courts Off. Pub. Aff.), Jan. 2010, available at <http://www.uscourts.gov/ttb/2010-01/index.cfm>. But see O’Scannlain, *supra* note 1, at 474 (“As a judge on the United States Court of Appeals for the Ninth Circuit for over twenty years, I can attest that the crisis has not passed.”).

22. See DANIEL J. MEADOR ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL* 459 (2d ed. 2006); see also POSNER, *supra* note 3, at xiii (identifying chapter on process alterations as “most clearly” reflecting the author’s “change in outlook”).

23. ADMIN. OFFICE OF THE U.S. COURTS, *ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS* 244 tbl.B-1 (1985).

24. ADMIN. OFFICE OF THE U.S. COURTS, *ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS* 137 tbl.B-1 (1989).

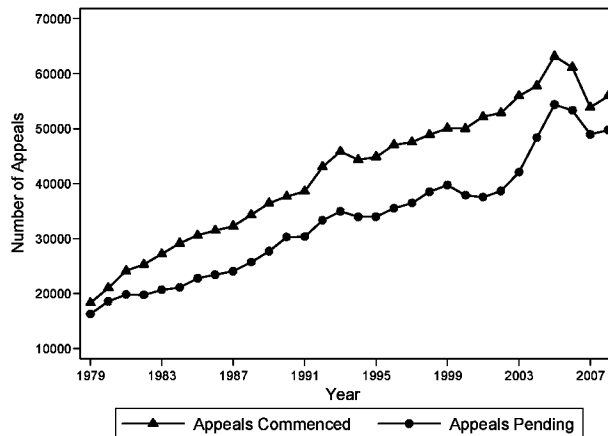
25. O’Scannlain, *supra* note 1, at 474–75 (citing ADMIN. OFFICE OF THE U.S. COURTS, 2008 *ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS* 96 tbl.B-3 (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf>).

26. *Id.*

27. *Id.* at 476 (internal quotation marks omitted).

ideal,” which “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.”²⁸

FIGURE 1
Number of Federal Appeals, Excluding the Fourth Circuit,
1979–2008²⁹



Excluding appeals filed in the Fourth Circuit, Figure 1 graphically displays the unprecedented growth in the dockets of the United States Courts of Appeals since 1979. From a low of 18,294 appeals filed in 1979,³⁰ the caseload in the other circuits ballooned to a modern plateau of over 63,000 appeals filed in 2005.³¹ Yet the number of active and senior circuit judges has not kept pace with the increasing size of the docket.³² For all circuits, the caseload per authorized

28. Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733, 1737 (2005).

29. Data for this chart were taken from statistical reports produced by the Administrative Office of the U.S. Courts. From 1979 through 1992, statistics were drawn from Table B-1 of the *Annual Report of the Director of the Administrative Office of the United States Courts*. From 1993 onward, the data were taken from Table B-1 of the *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. Beginning in 1992, statistics were calculated as of the year ending September 30. Before 1992, statistics were calculated as of the year ending June 30. *Judicial Business of the United States Courts* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>. Unless otherwise noted, data from the United States Court of Appeals for the Federal Circuit are not included in any figure in this Essay.

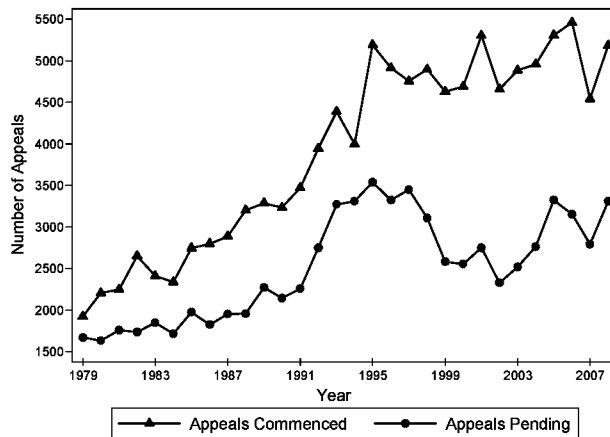
30. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 344–45 tbl.B-1 (1979).

31. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-1 (2005), <http://www.uscourts.gov/judbus2005/contents.html>.

32. See Pamela Ann Rymer, *How Big Is Too Big?*, 15 J.L. & POL. 383, 383 (1999).

circuit judge had increased from just below 500 cases per judge in 1979 to more than 900 cases per judge by 2000.³³

FIGURE 2
Number of Appeals in the Fourth Circuit, 1979–2008³⁴



The trends in the Fourth Circuit's docket, reflected in Figure 2, have largely mirrored national trends. In 1979, just 1,925 appeals were filed in the Fourth Circuit.³⁵ By 1992, the docket had doubled to nearly 4,000 appeals.³⁶ In 1995, the number of appeals suddenly spiked 30% from the year before to 5,193, and it has since fluctuated between 4,500 and 5,500 cases.³⁷ As with other circuits,³⁸ the number of Fourth Circuit judges has not increased nearly as rapidly as the size of the court's docket. The Fourth Circuit had ten authorized judgeships until 1984, when Congress increased the total number to eleven.³⁹ In 1990, Congress created four additional judgeships, which brought the total number to fifteen, the

33. Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CAL. L. REV. 1029, 1034 (2003). Professor Yoon's figures for caseload per circuit judge account for the fact that circuit judges sit in three-judge panels when considering cases, but they do not account for senior judges. *Id.* n.12.

34. Data for this chart were taken from the same sources as Figure 1.

35. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 345 tbl.B-1 (1979).

36. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 131–32 tbl.B-1 (1992).

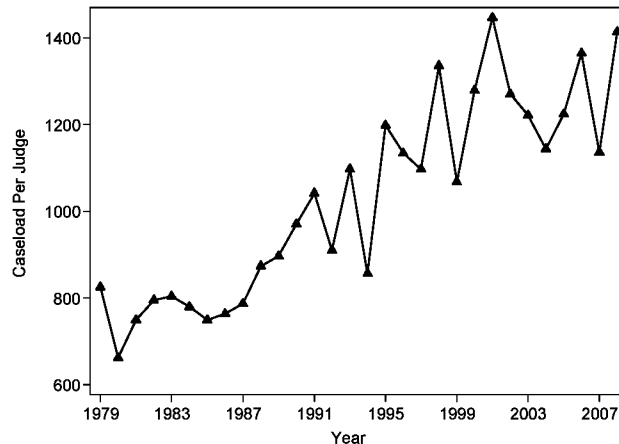
37. Despite the increase in the number of appeals filed, the Fourth Circuit has accommodated its rising caseload through implementing mechanisms to improve efficiency. *See* discussion *infra* Parts III–IV. As a result, the number of appeals pending in the Fourth Circuit began to stabilize and decrease beginning in 1995. *See supra* fig.2.

38. *See* Rymer, *supra* note 32, at 383.

39. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333, 346–47 (codified as amended at 28 U.S.C. § 44 (Supp. IV 1986)).

same number of judges authorized today.⁴⁰ Since 1990, however, anywhere from one to five judgeships have been vacant at any given time, and thus the court has not operated at full capacity since the addition of the new judgeships.⁴¹ Figure 3 reflects the extraordinary burden on each active circuit judge in the Fourth Circuit as a result of its ballooning docket.

FIGURE 3
Average Caseload for Each Active Fourth Circuit Judge, 1979–2008⁴²



In the Fourth Circuit, the caseload for each active circuit judge was 825 cases in 1979.⁴³ Between 1994 and 1995 this statistic increased from 856 to

40. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 201, 104 Stat. 5089, 5098–99 (codified as amended at 28 U.S.C. § 44 (2006)).

41. See U.S. Courts, Judicial Vacancies, Archives, <http://www.uscourts.gov/vacancies/archives.cfm> (last visited Mar. 29, 2010) (providing statistical information on federal judicial vacancies from January 1, 1981, to the present).

42. Each data point is calculated by dividing the total number of cases filed for a given year by the number of judges who were active for at least six months during that year and then multiplying the result by three (to reflect three-judge panels). Only counting judges who were active for at least six months in a given year avoided double counting if an active judge took senior status early in a calendar year and then a replacement was confirmed to the position before the end of the year. Data for the total number of cases filed were taken from statistical reports produced by the Administrative Office of the U.S. Courts. From 1979 through 1992, statistics were drawn from Table B-1 of the *Annual Report of the Director of the Administrative Office of the United States Courts*. From 1993 onward, the data were taken from Table B-1 of *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. Beginning in 1992, statistics were calculated as of the year ending September 30. Before 1992, statistics were calculated as of the year ending June 30. The number of judges who were active is based on the calendar year. Information about judges' active status can be found at <http://www.fjc.gov/history/index.html>. *Judicial Business* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>.

43. See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 344–45 tbl.B-1 (1979); Federal Judicial Center, U.S. Court of Appeals for the Fourth Circuit: Judges, <http://www.fjc.gov/history/index.html> (follow

1198.⁴⁴ Since 1995, the average caseload for each active Fourth Circuit judge has not been below 1000, reaching a zenith of 1446 appeals in 2001.⁴⁵

A natural response to a rising caseload is to increase the number of judges available to hear and decide cases.⁴⁶ Such an increase can be accomplished most directly through congressional legislation to increase the number of authorized judgeships for a particular court. Congress, however, has not provided for any additional circuit judges since 1990,⁴⁷ and thus the number of authorized judgeships has not kept pace with the rate of growth in the dockets of the United States Courts of Appeals over the past thirty years. For the most part, the failure to increase the number of judges is a product of politics. Ever since the controversial midnight judges were appointed by President John Adams in 1801, political parties have been hesitant to grant opportunities for a president affiliated with another party to make additional judicial appointments.⁴⁸

Moreover, as one of us has written previously, the new politics of judicial appointments means that fewer circuit judges are getting confirmed by the Senate, and those that are confirmed languish before the Senate Judiciary Committee for months or even years prior to their confirmation.⁴⁹ In other

“Courts of the Federal Judiciary” hyperlink; then follow “U.S. Courts of Appeals” hyperlink; then follow “Fourth Circuit” hyperlink; then follow “Judges” hyperlink). The caseload growth for each active Fourth Circuit judge has risen sharply even if procedural terminations are excluded from the analysis. Figure 3, of course, includes *all* filings in the Fourth Circuit in order to maintain consistency with the other figures in this Essay examining the size of appellate caseloads.

44. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, at A1-3–A1-5 tbl.B-1 (1994); ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 87–88 tbl.B-1 (1995); Federal Judicial Center, *supra* note 43.

45. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-1 (2001), <http://www.uscourts.gov/judbus2001/contents.html>; Federal Judicial Center, *supra* note 43.

46. MEADOR ET AL., *supra* note 22, at 459 (“The typical first response to [backlogs and delay] is to consider adding judges to the court.”); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 277 (1996) (“[T]he one obvious solution [is] to ask Congress for a radical increase in the number of judges.” (footnote omitted)).

47. See 28 U.S.C. § 44 amends. (2006); POSNER, *supra* note 3, at 130 (“No effort has been made to expand the number of judges in proportion to the increase in caseload.”). On September 8, 2009, Senator Patrick Leahy introduced the Federal Judgeship Act of 2009, S. 1653, 111th Cong. (2009), which would authorize twelve new circuit judgeships. Press Release, Sen. Patrick Leahy, Leahy Introduces Bill to Authorize Federal Judgeships (Sept. 8, 2009), http://leahy.senate.gov/press/press_releases/release/?id=4d88b834-11b7-477e-a4c9-1f05b07dfe39.

48. See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1028–39 (2007).

49. David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033, 1057–78 (2008) (book review) (explicating politicization of the judicial confirmation process); see also Cooper & Berman, *supra* note 6, at 710 (“Given the slow pace at which existing vacancies have been filled over the past decade, as well as the disdain with which elected officials from each major party decry the ‘activism’ of judges nominated by presidents of the other party, it seems highly unlikely that a plan calling for the doubling or tripling of the size of the federal judiciary could be passed into law.”); Carl Tobias, *The New Certiorari and a National*

words, partisan intransigence and increased divisiveness in Washington are preventing existing judicial vacancies from being filled, which substantially affects the ability of many federal courts around the country to do their work in the same meticulous manner as three decades ago.

Though politics is the predominant reason for an understaffed federal judiciary, some commentators have presented serious and thoughtful arguments against expanding the size of the federal judiciary.⁵⁰ Those arguments include the increased cost of additional judges;⁵¹ the possibility of unwieldy bureaucratic courts that lose their sense of collegiality;⁵² increased intercircuit and intracircuit splits;⁵³ a decline in the quality of the federal judiciary as a result of a reduction in the prestige of the office;⁵⁴ federalism concerns reflecting the ratchet-like relationship between the addition of federal judges and the expansion of federal jurisdiction;⁵⁵ and the stopgap nature of adding new judgeships.⁵⁶ Whatever the reasons, it is clear that the addition of federal judges has not compensated for the caseload growth in the United States Courts of Appeals.

Nor has the Fourth Circuit made liberal use of senior circuit judges, visiting circuit judges, or visiting district court judges to accommodate its rising docket.⁵⁷ Senior judges, who largely work for free because they are entitled to full pension benefits (without salary increases) if they fully retire upon satisfying

Study of the Appeals Courts, 81 CORNELL L. REV. 1264, 1279–80 (1996) (identifying political roadblocks to expanding the federal judiciary).

50. Strong arguments have also been made for increasing the size of the judiciary. *See, e.g.*, William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37, 39 (1999) (“Relying on a series of logically flawed and empirically baseless arguments, the Judicial Establishment has steadfastly resisted the one obvious solution: to ask Congress for a radical increase in the number of judges.”); Richman & Reynolds, *supra* note 46, at 299 (“The Judicial Establishment has consistently lobbied *against* the single most obvious solution to the caseload glut—the creation of additional judgeships.”).

51. BAKER, *supra* note 8, at 203.

52. *Id.* at 202; GORDON BERMANT ET AL., FED. JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 23 (1993); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1674–75 (2003).

53. BAKER, *supra* note 8, at 202; BERMANT ET AL., *supra* note 52, at 23; POSNER, *supra* note 3, at 132–33. *But see* Arthur D. Hellman, *Assessing Judgeship Needs in the Federal Courts of Appeals: Policy Choices and Process Concerns*, 5 J. APP. PRAC. & PROCESS 239, 254–55 (2003) (rejecting the argument that adding judges will reduce consistent and uniform decisions).

54. BAKER, *supra* note 8, at 204; BERMANT ET AL., *supra* note 52, at 23; POSNER, *supra* note 3, at 132 (“The individual judge’s influence and status would be significantly diminished by such numerosity, and it is unlikely that Congress would respond by substantially increasing judicial salaries.”); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1169 (1994).

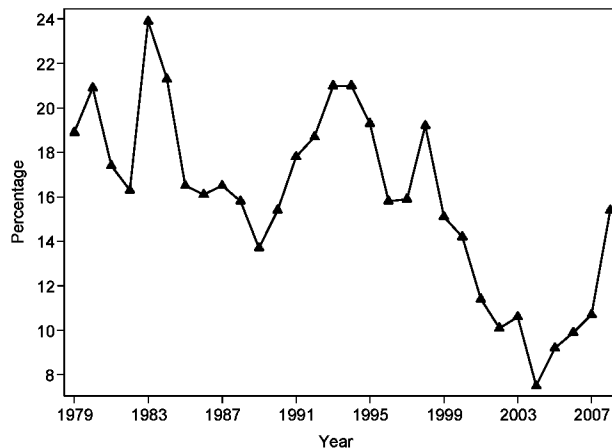
55. BERMANT ET AL., *supra* note 52, at 26; Wilkinson, *supra* note 54, at 1164–67.

56. BAKER, *supra* note 8, at 202–03.

57. *See infra* fig.4 and accompanying text.

the “Rule of Eighty,”⁵⁸ have long been used to allay the caseload burden in some circuits.⁵⁹ Visiting active district and circuit judges, by contrast, are not long-term answers to an understaffed federal judiciary because they do not add to “the overall judge supply,” but instead just borrow judging capacity from other courts.⁶⁰

FIGURE 4
Percentage of Case Participations by Senior and Visiting Judges on Fourth Circuit Panels, 1979–2008⁶¹



In the Fourth Circuit, case participation by senior and visiting judges peaked at 24% in 1983.⁶² By 2004, however, that statistic had declined to just 7.5%.⁶³

58. The Rule of Eighty permits federal judges to retire or to elect senior status “when the sum of their age and years of service on the federal bench reaches eighty.” David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 460 (2007).

59. BAKER, *supra* note 8, at 198; *see also* Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 412–14 (1990) (providing statistics regarding the use of senior judges); Stras & Scott, *supra* note 58, at 455 (noting use of senior judges to “ameliorate[] the problems of expanding caseloads”). *But see* Cooper & Berman, *supra* note 6, at 694 (“As caseloads have grown, the courts have come to rely *increasingly* on senior judges, as well as judges from other circuits and the district courts, to fill out the panels required to deal with the burgeoning dockets.” (emphasis added)).

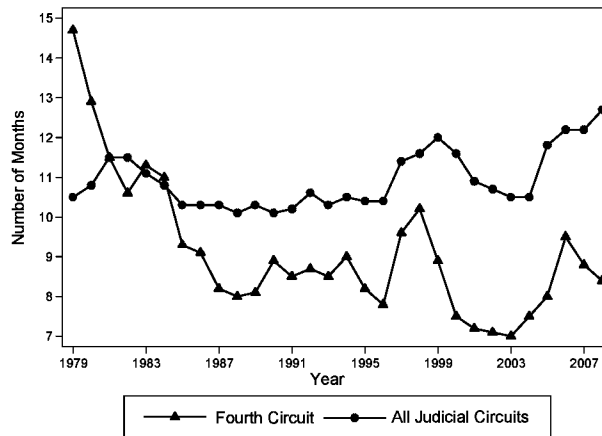
60. BAKER, *supra* note 8, at 198.

61. Each year’s percentage was computed by subtracting from 100% the percentage of appeals terminated on the merits by active judges. As with other data in this Essay, beginning in 1992, figures represent totals as of the year ending September 30. Prior to 1992, figures represent totals as of the year ending June 30. The data represented in Figure 4 can be found in *Federal Court Management Statistics*, a report published annually by the Administrative Office of the United States Courts. Reports from years 1997–2008 can be found at <http://www.uscourts.gov/fcmstat/index.html>.

62. *See* ADMIN. OFFICE OF THE U.S. COURTS, *FEDERAL COURT MANAGEMENT STATISTICS* 5 (1984).

Since then, case participation by senior and visiting judges has gradually increased to a high of around 15% by 2008.⁶⁴ Thus, in the Fourth Circuit, the use of senior and visiting judges on panels has largely declined over the past thirty years (at least until 2004), which means that the court has accommodated its rising caseload to a great extent not through a greater number of judges but by procedural and systemic mechanisms to improve efficiency.

FIGURE 5
Median Number of Months from the Filing of a Notice of Appeal to
Final Disposition, 1979–2008⁶⁵



Nowhere are those efficiencies more evident than in the substantial decrease in the appellate life cycle in the Fourth Circuit over the past thirty years. While other circuits have largely accommodated increased caseloads and stagnant judging capacity by maintaining the status quo or even taking longer to decide appeals, the Fourth Circuit has actually decreased the average time from the filing of a notice of appeal to final disposition by between 40% and 50% since 1979. While it is true that the Fourth Circuit has arguably become less efficient since 2003 when it had reduced the appellate life cycle to a mere seven months,

63. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 10 (2005), available at <http://www.uscourts.gov/cgi-bin/cmsa2005.pl>.

64. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS (2008), <http://www.uscourts.gov/cgi-bin/cmsa2008.pl>.

65. Data for this chart were taken from statistical reports produced by the Administrative Office of the U.S. Courts. From 1979 through 1992, statistics were drawn from Table B-4, which appears in the *Annual Report of the Director of the Administrative Office of the United States Courts*. From 1993 onward, the data were taken from Table B-4 of *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. Beginning in 1992, statistics were calculated as of the year ending September 30. Before 1992, statistics were calculated as of the year ending June 30. *Judicial Business* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>.

it is still far ahead of where it started in the late 1970s and early 1980s when the caseload was less than half of its present size.

TABLE 1
The Fourth Circuit Docket, 1979–2008⁶⁶

Year	Active Judges	Total Filings	Merits Terminations	Appeals Pending
2008	11	5185	2581	3310
2007	12	4542	2741	2793
2006	12	5460	3206	3152
2005	13	5307	2590	3321
2004	13	4957	2424	2766
2003	12	4887	2419	2519
2002	11	4658	2628	2326
2001	11	5303	2768	2751
2000	11	4689	2423	2551
1999	13	4627	2644	2581
1998	11	4897	2569	3109
1997	13	4754	2387	3448
1996	13	4914	2885	3325
1995	13	5193	3009	3540
1994	14	3994	2537	3311
1993	12	4390	2264	3272
1992	13	3943	2140	2748
1991	10	3472	2141	2259
1990	10	3235	2154	2145
1989	11	3287	1794	2270
1988	11	3203	1910	1957
1987	11	2886	1685	1952
1986	11	2799	1743	1826
1985	11	2747	1553	1976

66. The data represented under the columns “Total Filings,” “Merits Terminations,” and “Appeals Pending” were taken from statistical reports produced by the Administrative Office of the U.S. Courts. From 1979 through 1992, statistics were drawn from Table B-1 of the *Annual Report of the Director of the Administrative Office of the United States Courts*. From 1993 onward, the data were taken from Table B-1 of *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. Beginning in 1992, statistics were calculated as of the year ending September 30. Before 1992, statistics were calculated as of the year ending June 30. A change in the statistical reporting criteria in 1985 prevents comparison of “Merits Terminations” data gathered before 1985. *Judicial Business* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>. The data represented under the column “Active Judges” can be found at <http://www.fjc.gov/servlet/nGetCourt?cid=20&order=c&ctype=ac&instat=04>.

1984	9	2338	1716
1983	9	2411	1850
1982	10	2651	1738
1981	9	2247	1759
1980	10	2206	1634
1979	7	1925	1670

Uncovering and discussing the procedural and systemic mechanisms that have made the Fourth Circuit more efficient (or at least quicker) in deciding appeals will be the focus of the remainder of this Essay.

III. CHANGES IN PRACTICES AND PROCEDURES

The United States Court of Appeals for the Fourth Circuit has adopted certain procedural reforms to adapt to its increased caseload. The most important and controversial of these reforms is a reduction in the percentage of cases allotted oral argument time and an increase in the percentage of cases decided through unpublished opinions.

The benefits of oral argument are well-known. Oral argument permits judges to question the attorneys representing the litigants, promotes uninterrupted focus by the panel on the case being argued, and encourages judicial preparation for the hearing.⁶⁷ The importance of these benefits is reflected by the requirement in the Federal Rules of Appellate Procedure that argument be heard in every case unless all three judges on the panel agree after examination of the briefs and record that: “(A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.”⁶⁸ Despite the benefits and general presumption in favor of oral argument,⁶⁹ fewer appeals receive argument time today than in past decades.⁷⁰

That is not to say that all appeals deserve oral argument time.⁷¹ The vast majority of cases can be decided on the briefs pursuant to Federal Rule of

67. POSNER, *supra* note 3, at 161; *see also* Cooper & Berman, *supra* note 6, at 700–01 (discussing the value of oral argument).

68. FED. R. APP. P. 34(a)(2).

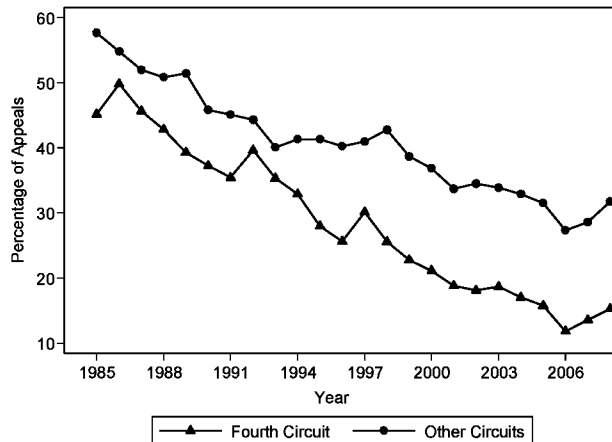
69. Rule 34(a) of the Fourth Circuit’s rules instructs litigants that “[i]n furtherance of the disposition of pending cases under this rule, parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their opinion, oral argument should be heard.” 4TH CIR. R. 34(a) Requiring the parties to make a showing as to why oral argument is necessary or beneficial is arguably in tension with a presumption in favor of oral argument.

70. POSNER, *supra* note 3, at 160; Cooper & Berman, *supra* note 6, at 700.

71. *See* POSNER, *supra* note 3, at 161; Cooper & Berman, *supra* note 6, at 700; Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 11–12 (1986) (acknowledging benefits of oral argument but maintaining that

Appellate Procedure 34(a)(2).⁷² Nonetheless, critics rightly maintain that the curtailment of oral arguments in the courts of appeals has gone so far that even cases that would benefit from oral argument are decided solely on the briefs with the assistance of staff attorneys and law clerks.⁷³

FIGURE 6
Percentage of Appeals Terminated on the Merits after a Hearing, 1979–2008⁷⁴



Two statistics demonstrate the startling rate of decrease in the frequency of oral arguments before the Fourth Circuit. The first is the most straightforward: the percentage of cases terminated on the merits following oral argument. The decline in this statistic has been pronounced in the Fourth Circuit. Between 1985 and 1987, the Fourth Circuit terminated 45% to 50% of appeals on the merits. That number dropped to 43% in 1988 and has steadily declined ever since, reaching a modern low of 12% in 2006. Other circuits, while deciding a higher proportion of cases after a hearing, have experienced a rate of decline since 1985 similar to, but less pronounced than, the Fourth Circuit. In 1985, other circuits terminated 58% of appeals on the merits after oral argument, and that percentage

determining when argument is required “should be the focus of debate, rather than the question of how to preserve oral argument in every case”).

72. See FED. R. APP. P. 34(a)(2).

73. See BAKER, *supra* note 8, at 113; Richman & Reynolds, *supra* note 46, at 278–81.

74. Data for this chart were taken from statistical reports produced by the Administrative Office of the U.S. Courts. From 1979 through 1992, statistics were drawn from the *Annual Report of the Director of the Administrative Office of the United States Courts*. From 1993 onward, the data were taken from *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. Beginning in 1992, statistics were calculated as of the year ending September 30. Before 1992, statistics were calculated as of the year ending June 30. *Judicial Business* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>. Unless otherwise noted, data from the United States Court of Appeals for the Federal Circuit are not included in any figure in this Essay.

continued to drop to a modern low of 27% in 2006. Following a steady decline from 1985 to 2008, the Fourth Circuit has remained well below the aggregate oral argument rates of the other circuits.⁷⁵

The second statistic that accounts for a portion of the decrease in the percentage of cases receiving oral argument consideration is the percentage of cases procedurally terminated. Reasons for procedural terminations include default by one of the parties,⁷⁶ settlement of an appeal before final disposition,⁷⁷ the presence of jurisdictional defects in the appeal,⁷⁸ or refusal by a panel to issue a certificate of appealability to a habeas corpus petitioner under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁷⁹

75. As noted earlier, the pre-1985 data for merits terminations are not comparable to the data gathered beginning in 1985. See *supra* note 66. As a result, the pre-1985 oral argument data also cannot be directly compared with the data from 1985–2008. Nonetheless, it is interesting to note that, of the “cases disposed of after hearing or submission” between 1979 and 1984, the Fourth Circuit had a far higher percentage of cases that it terminated after a hearing than the other circuits. Between 1979 and 1984, the Fourth Circuit disposed of 83% to 95% of those cases following oral argument. In the other circuits, by contrast, that percentage ranged from between 62% and 70%.

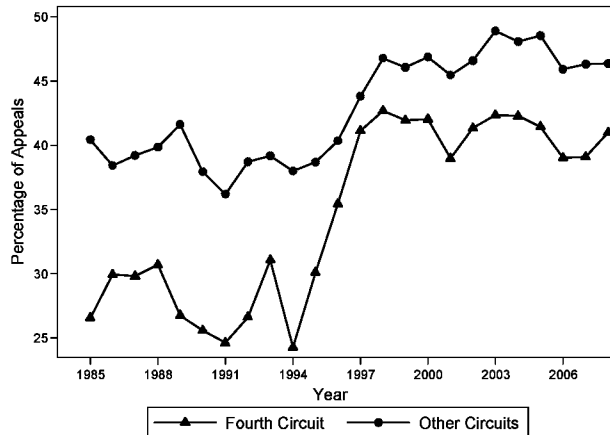
76. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-5A (2004), available at <http://www.uscourts.gov/judbus2004/appendices/b5a.pdf> (listing data for procedural terminations to include default).

77. See FED. R. APP. P. 42(b).

78. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-5A (2004), available at <http://www.uscourts.gov/judbus2004/appendices/b5a.pdf> (listing data for procedural terminations to include jurisdictional defects).

79. Pub. L. No. 104-132, sec. 102, § 2253, 110 Stat. 1214, 1217–18 (codified as amended at 28 U.S.C. § 2253(c) (2006)).

FIGURE 7
Percentage of Appeals Procedurally Terminated, 1985–2008⁸⁰



As illustrated by Figure 7, the percentage of appeals procedurally terminated in the Fourth Circuit ranged between 20% and about 30% of the total caseload from 1985 to 1995. Following the passage of AEDPA in 1996, the percentage of procedural terminations rose to over 40% in 1997. Since that time, the percentage of appeals procedurally terminated has vacillated between 39% and 43%. And although other circuits have experienced a similar increase in procedural terminations, the Fourth Circuit's increase has been far more pronounced, likely reflecting heavier reliance on AEDPA's provisions. Figure 7 also demonstrates that, during the period between 1985 and 2008, the percentage of appeals procedurally terminated has always been lower for the Fourth Circuit than the aggregate figures for other circuits. Thus, it is possible that the increase in procedural terminations in the Fourth Circuit reflects not only the passage of AEDPA, but also changes in membership in the Fourth Circuit through the appointments made by Presidents Ronald Reagan and George H.W. Bush,⁸¹

80. Data for this chart were taken from statistical reports produced by the Administrative Office of the U.S. Courts. From 1985 through 1992, statistics were drawn from Table B-1 of the *Annual Report of the Director of the Administrative Office of the United States Courts*. From 1993 onward, the data were taken from Table B-1 of *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. Beginning in 1992, statistics were calculated as of the year ending September 30. Before 1992, statistics were calculated as of the year ending June 30. *Judicial Business* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>. Unless otherwise noted, data from the United States Court of Appeals for the Federal Circuit are not included in any figure in this Essay.

81. President Ronald Reagan appointed four judges to the Fourth Circuit during his tenure in office: Robert F. Chapman, Emory N. Sneed, J. Harvie Wilkinson, and William W. Wilkins. See Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/history/judges.html> (last visited Mar. 30, 2010). Meanwhile, President George H.W. Bush also appointed

changes in the jurisdictional law of the circuit, and even decisions by the Supreme Court in the early to mid-1990s that caused the Fourth Circuit to procedurally terminate a greater number of cases.⁸²

Finally, beginning in 1964 with “a general recommendation [from the Judicial Conference] that judges publish only those opinions ‘which are of general precedential value,’”⁸³ the use of unpublished opinions has proliferated. These opinions range from short summary dispositions affirming or reversing the district court to opinions similar in “length and intellectual rigor” to a typical published opinion.⁸⁴ The Fourth Circuit publishes opinions only if the appeal is fully briefed and received oral argument.⁸⁵ Even then, the opinion is not published unless the author of the opinion or “a majority of the joining judges” determine the following:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
- ii. It involves a legal issue of continuing public interest; or
- iii. It criticizes existing law; or
- iv. It contains a historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.⁸⁶

The widespread use of unpublished opinions by the courts of appeals has been criticized. Much of the criticism focuses on the rules limiting the citation or the precedential effect of unpublished opinions, which involves issues of constitutional dimension that have been extensively debated elsewhere and are

four judges: Clyde H. Hamilton, Paul V. Niemeyer, J. Michael Luttig, and Karen J. Williams. *See id.* Of that list, only Judges Wilkinson and Niemeyer remain on active status today. *See id.*

82. *See, e.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (restricting further the doctrine of standing).

83. Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 761 (1995) (quoting ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 11 (1964)).

84. Cooper & Berman, *supra* note 6, at 702. Fourth Circuit Local Rule 36(b) provides that “[u]npublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court.” 4TH CIR. R. 36(b).

85. JUDITH A. MCKENNA ET AL., FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 102 (2000).

86. 4TH CIR. R. 36(a). The rule also permits counsel to “move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.” *Id.* R. 36(b). For early analyses of publication practices in the courts of appeals, see generally William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981), and William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807 (1979).

beyond the scope of this Essay.⁸⁷ Other critiques focus on the policy justifications for issuing unpublished opinions.⁸⁸ Similar to the concerns raised in this Essay about the declining percentage of cases receiving oral argument, some commentators contend that unpublished opinions are released in cases that deserve published treatment.⁸⁹ For instance, some panels issue unpublished opinions when the judges cannot reach agreement on the legal rules governing the case or to avoid extensive treatment of issues that may be politically sensitive or controversial.⁹⁰ In such instances, unpublished opinions serve to “reduce[] predictability, accountability, responsibility, and reviewability.”⁹¹

87. See, e.g., Caleb E. Mason, *An Aesthetic Defense of the Nonprecedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure*, 55 UCLA L. REV. 643, 646 & nn.10–14 (2008) (citing numerous examples of criticisms of nonprecedential opinions); Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 958–60 & nn.14–19 (2009) (citing many “separation of powers, due process, and First Amendment” based criticisms of local rules that allow unpublished opinions); Michael B.W. Sinclair, Anastasoff *Versus* Hart: *The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 705–10 (2003) (reviewing competing cases concerning the constitutionality of rules prohibiting citation of unpublished opinions in the Eighth and Ninth Circuits). Some of the constitutional concerns raised by rules prohibiting the citation of unpublished opinions have been allayed by Federal Rule of Appellate Procedure 32.1, which prevents circuit courts from restricting the citation of opinions issued after January 1, 2007, that have been “designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like.” FED. R. APP. P. 32.1. *But cf.* 4TH CIR. R. 32.1 (discouraging citation of unpublished dispositions issued before January 1, 2007).

88. See, e.g., Christian F. Southwick, *Unprecedented: The Eighth Circuit Repaves Antiquas Vias with a New Constitutional Doctrine*, 21 REV. LITIG. 191, 209–211 & nn.93–101 (2002) (identifying critiques and gathering sources).

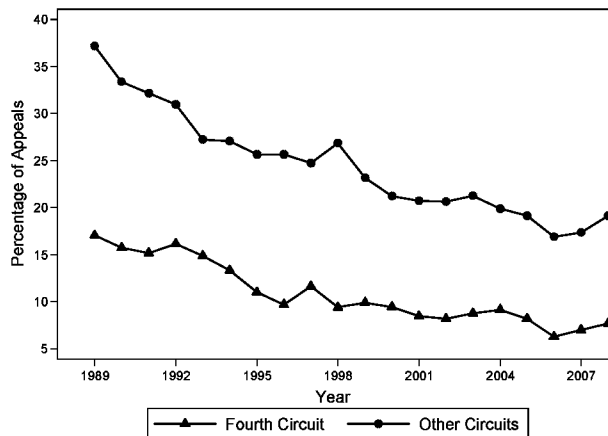
89. See, e.g., POSNER, *supra* note 3, at 165 (“What is new is that many appeals that formerly would have been decided in a published opinion . . . are now decided in an unpublished opinion. . . . They call for an opinion and they get it, but it is not published.”); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1192 (1978) (“A good deal of evidence suggests . . . that many lawmaking opinions are in fact going unpublished.”). One prominent recent example is the summary order issued in *Ricci v. DeStefano*, 264 F. App’x 106 (2d Cir. 2008), *withdrawn*, 530 F.3d 87 (2d Cir. 2008), *rev’d*, 129 S. Ct. 2658 (2009), which affirmed the district court’s decision “substantially for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below.” *Id.* at 107. The panel later withdrew the summary order and issued a published per curiam order adopting the district court’s reasoning in its entirety. *Ricci v. DeStefano*, 530 F.3d 87, 87 (2d Cir. 2008) (per curiam), *rev’d*, 129 S. Ct. 2658 (2009). In his dissent from the denial of rehearing en banc, Judge Jose Cabranes characterized the issues presented by the case as “indisputably complex and far from well-settled,” implicitly criticizing the panel for its cursory treatment of the legal questions the case presented. *Ricci v. DeStefano*, 530 F.3d 88, 94 (2d Cir. 2008) (Cabranes, J., dissenting). The Supreme Court eventually reversed in a 5–4 decision. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

90. Reynolds & Richman, *supra* note 89, at 1175 (suggesting courts may issue unpublished decisions “to duck issues, avoid making troublesome decisions, or conceal divisions within the court or the panel”).

91. Richman & Reynolds, *supra* note 46, at 284; see also POSNER, *supra* note 3, at 165–67 (presenting arguments against a “class” of unpublished opinions); Reynolds & Richman, *supra* note 89, at 1199–204 (describing arguments against unpublished opinions).

Nonetheless, much like oral arguments, not all appeals warrant a published opinion.⁹² For instance, some cases are directly controlled by *published* precedent.⁹³ Still others are subject to an obvious jurisdictional bar or fail to meet the threshold of alleging or presenting a legally sufficient case.⁹⁴ In other words, there are a variety of legitimate reasons why panels may elect to decide cases through cursory opinions in order to leave greater time for cases that present thorny legal issues.

FIGURE 8
Percentage of Appeals Terminated on the Merits by a Published Opinion, 1989–2008⁹⁵



In the Fourth Circuit, 17.05% of appeals terminated on the merits in 1989 were decided by a published opinion.⁹⁶ Between 1999 and 2008, by contrast, that

92. See POSNER, *supra* note 3, at 164–65.

93. See Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 190 (1999) (“Unpublished decisions tend to involve straightforward points of law—if they did not, they would be published.”).

94. See, e.g., POSNER, *supra* note 3, at 166–67 (suggesting that fewer criminal appeals opinions could be published because most criminal appeals are meritless).

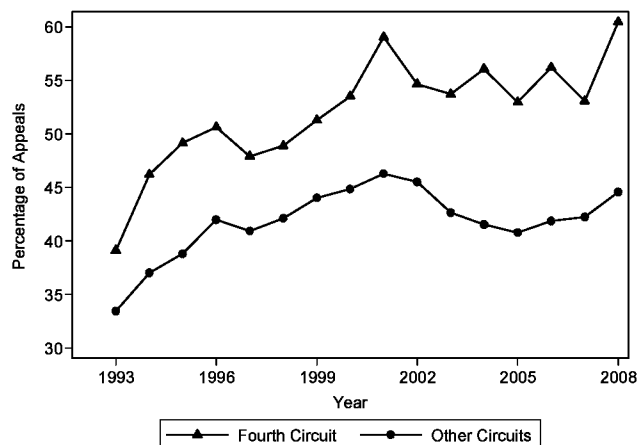
95. Data for this chart were taken from statistical reports produced by the Administrative Office of the U.S. Courts. From 1989 through 1992, statistics were drawn from Table S-5 (for 1989) or Table S-3 (for other years) of the *Annual Report of the Director of the Administrative Office of the United States Courts*. From 1993 onward, the data were taken from Table S-5 of *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. Beginning in 1992, statistics were calculated as of the year ending September 30. Before 1992, statistics were calculated as of the year ending June 30. *Judicial Business* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>. Unless otherwise noted, data from the United States Court of Appeals for the Federal Circuit are not included in any figure in this Essay. These statistics represent cases terminated on the merits after oral hearing or submission on briefs.

96. See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 109 tbl.S-5 (1989).

percentage fluctuated between 6% and 10%. Though the other circuits experienced a similar rate of decline in published opinions since 1989, the Fourth Circuit consistently published proportionately fewer opinions than its peers. In fact, as Figure 8 illustrates, the Fourth Circuit's 1989 *high* point for published opinions in cases terminated on the merits is approximately 0.3% lower than the recent 2006 *low* of 17.35% for all other circuits combined.

A number of factors could explain the remarkable decrease in published opinions and oral arguments in the Fourth Circuit over the past thirty years. One likely factor is the increase in the percentage of pro se appeals filed in the Fourth Circuit since 1979.⁹⁷ Similar to the increase in *in forma pauperis* petitions for certiorari before the Supreme Court,⁹⁸ the Fourth Circuit has experienced approximately an 83% increase in the sheer number of pro se appeals since 1993.⁹⁹ It is no surprise that an increase in the number of pro se appeals has been accompanied by a corresponding increase in the number of unpublished opinions and cases submitted on the briefs without oral argument.

FIGURE 9
Percentage of Appeals Filed Pro Se, 1993–2008¹⁰⁰



The statistics are striking. In 1993, approximately 39% of appeals in the Fourth Circuit were filed pro se,¹⁰¹ but by 2008, that percentage climbed to

97. See *infra* fig.9.

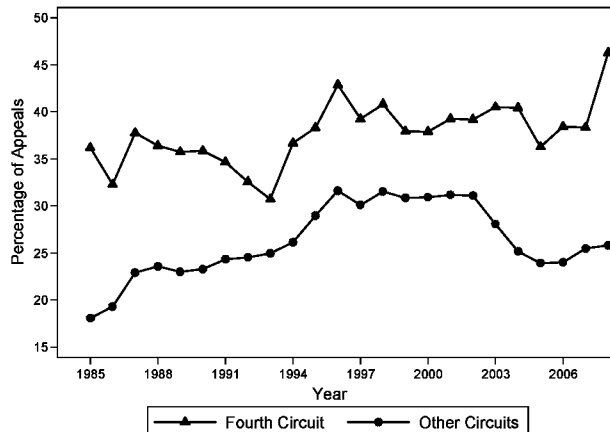
98. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 1.20, at 58 (8th ed. 2002) (noting a “spectacular rise” in *in forma pauperis* filings following the 1985 term).

99. See *infra* fig.9.

100. Data for this chart were taken Table B-9 of *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. *Judicial Business* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>. Unless otherwise noted, data from the United States Court of Appeals for the Federal Circuit are not included in any figure in this Essay.

60%.¹⁰² By contrast, other circuits experienced an increase in the percentage of pro se appeals, but the rate of increase has been slower than in the Fourth Circuit. In 1993, 33% of appeals in other circuits were filed pro se and that percentage peaked in 2001 at 46% and has remained relatively steady since then.

FIGURE 10
Percentage of New Appeals Consisting of Prisoner Petitions,
1985–2008¹⁰³



Predictably, the increase in pro se filings coincided with an increase in the percentage of the docket consisting of prisoner petitions, which are often filed on a pro se basis. In contrast to other circuits, where prisoner petitions are a smaller proportion of new appeals,¹⁰⁴ the Fourth Circuit's proportion of prisoner petitions to its new appeals has consistently fluctuated between 32% and 41% until 2007, when the percentage of such petitions spiked to an unprecedented 48% in 2008. Accordingly, the data demonstrate that the increases in the number of pro se filings and prisoner petitions as a percentage of the Fourth Circuit's

101. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at A1-44 to -46 tbl.B-9 (1993).

102. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 129–32 tbl.B-9 (2008).

103. Data for this chart were taken from statistical reports produced by the Administrative Office of the U.S. Courts. From 1985 through 1992, statistics were drawn from Table B-1 of the *Annual Report of the Director of the Administrative Office of the United States Courts*. From 1993 onward, the data were taken from Table B-1 of *Judicial Business of the United States Courts*, the annual report of the Director of the Administrative Office of the Courts. Beginning in 1992, statistics were calculated as of the year ending September 30. Before 1992, statistics were calculated as of the year ending June 30. *Judicial Business* reports from 1997 onward are available at <http://www.uscourts.gov/judbususc/judbus.html>. Unless otherwise noted, data from the United States Court of Appeals for the Federal Circuit are not included in any figure in this Essay.

104. The average percentage of prisoner petitions for the other circuits in the aggregate ranged from 18% in 1985 to nearly 32% of the total docket in 1996 and 1998. See *supra* fig.10.

new appeals were important developments that allowed the Fourth Circuit to deal with consistently rising caseloads since 1979.

But changes in caseload characteristics alone do not explain the Fourth Circuit's ability to adapt to increasing caseloads. Instead, as the foregoing discussion explains, the court also increased the proportion of cases decided without oral argument and through unpublished opinions, which permitted it to continue to decrease the length of the appellate lifecycle while experiencing largely stagnant judging capacity over the past thirty years.

IV. SYSTEMIC CHANGES

Because judgeships have not kept pace with caseload growth, the federal courts have grown more bureaucratic by delegating many functions to court staff, particularly law clerks and staff attorneys. Prior to 1970, circuit judges were allotted only one law clerk, but the number of law clerks grew to two in 1970 and then three in 1980.¹⁰⁵ Today, a circuit judge has a total of five staff positions, which often includes three law clerks and two assistants or four law clerks and one assistant, depending on the judge's preferences.¹⁰⁶ The growth in the clerkship institution has unsurprisingly coincided with increased reliance on law clerks by judges. The exact nature of a law clerk's work varies from court to court, judge to judge, and even case to case,¹⁰⁷ but there is no question that in the aggregate, law clerks play a more influential role in the work of the federal judiciary than they did thirty or forty years ago.

The expanded role of law clerks at every level of the federal judiciary has been controversial.¹⁰⁸ Some judges argue that law clerks perform nothing more than a screening, editing, and idea-generating function, while ultimate decision-making authority and opinion-writing responsibilities, which are essential attributes of the judicial function, remain with the judge.¹⁰⁹ Few commentators would argue that using law clerks in such a limited fashion constitutes an improper delegation of the judicial role.

105. POSNER, *supra* note 3, at 139.

106. *Id.* at 141 n.29.

107. See JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 90–117 (2002).

108. See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 961–62 (2007) (book review) (arguing that law clerks may have a powerful role in influencing how judges decide cases); see also BAKER, *supra* note 8, at 141–43 (noting arguments that law clerks are increasingly being tasked with too much of the judicial function).

109. See, e.g., J. Daniel Mahoney, *Foreword: Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 327–28 (1988) (“While it may be generally recognized that a majority of appellate law clerks today draft preliminary opinions, some may be confined to research, screening, and editorial or sounding board functions.”); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 154 (1990) (“Different judges use clerks differently, some only to exchange ideas, or to check footnotes, or to research records, others, after discussion, to draft opinions.”).

Other judges openly admit, however, that though the final decision-making authority rests with the judge, law clerks research and write first drafts of opinions.¹¹⁰ According to critics, such a broad role for law clerks in the decision-making process is problematic. First, it is unclear the extent to which deciding cases can be wholly divorced from the opinion-writing process.¹¹¹ Numerous stories exist where cases have come out the other way because the author of the opinion discovers during the writing process that the original disposition “just won’t write.”¹¹² Delegating drafting to inexperienced law clerks can reduce the likelihood of such a revelation. Second, the role of an editor is significantly different from the role of a writer.¹¹³ Writing an opinion forces the author to wrestle with all of the thorny facts and legal issues presented in a case, which can sometimes escape the attention of an editor. Third, with a cadre of law clerks working on multiple opinions simultaneously, the judge’s role reflects the role of administrator more than decision maker.¹¹⁴ In other words, as the last three critiques suggest, the greater the amount of drafting work delegated to law clerks, the greater the distance of the judge from the decision-making process. Finally, some critics point out that excessive reliance on law clerks has the potential to “jeopardize the tradition that federal judges are respected and respectful because they do their own work.”¹¹⁵

Other commentators maintain that even though delegation of opinion-drafting duties to law clerks has certain drawbacks, it is necessary to accommodate a circuit judge’s workload.¹¹⁶ After all, law clerks can be helpful in discovering jurisdictional defects presented by cases, in identifying important facts in the record, and in putting together a draft opinion that can serve as a springboard in the writing process for a judge.¹¹⁷ In other words, law clerks are simply a way to make judges more efficient in carrying out their responsibilities. And with particular relevance to the thesis of this Essay, more law clerks free up judges to divide their attention among a greater number of cases, permitting the federal courts to continue to function without increasing the number of judges.

110. BAKER, *supra* note 8, at 141–42 (citing Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 41 & n.158) (calling law clerks authoring initial draft opinions the “federal appellate paradigm”); Mahoney, *supra* note 109, at 332–33.

111. See Mahoney, *supra* note 109, at 339; Richman & Reynolds, *supra* note 46, at 288–89.

112. Richman & Reynolds, *supra* note 46, at 288.

113. *Id.* at 288–89.

114. See Mahoney, *supra* note 109, at 337; Richman & Reynolds, *supra* note 46, at 289 (“The judge/clerk relationship, in short, has become less personal, and more bureaucratic.”).

115. BAKER, *supra* note 8, at 143 (citing CHARLES E. WYZANSKI, JR., *WHEREAS—A JUDGE’S PREMISES* 61 (1965)).

116. See POSNER, *supra* note 3, at 140, 145–57; see also Mahoney, *supra* note 109, at 340–44 (arguing that the practice of using law clerks to draft opinions is inevitable because of the judicial workload and not necessarily detrimental to the quality of judicial opinions).

117. See Mahoney, *supra* note 109, at 340–44.

The staff attorney position was created in 1973 to accommodate rising caseloads.¹¹⁸ Although only 117 staff attorneys existed nationwide in 1980, the number of staff attorneys working for the United States Courts of Appeals has now grown to more than 380 attorneys, which constitutes a greater than 300% growth in the last 30 years.¹¹⁹ The busiest appellate court, the Eleventh Circuit, has the largest staff attorney office.¹²⁰

Staff attorneys perform a variety of functions “rang[ing] from screening all appeals, to drafting proposed opinions on preliminary matters, to preparing proposed orders, to reviewing pro se appeals for issues warranting oral arguments.”¹²¹ For appeals on the nonargument track, staff attorneys often recommend a decision on the merits of the case and draft an order or proposed opinion.¹²² In the Fourth Circuit, staff attorneys perform an initial screening function of all counseled appeals “to determine whether preargument review of the case by a panel is warranted.”¹²³ Upon determining that preargument review is warranted, the staff attorney refers the appeal to a panel for review.¹²⁴ The appeal is submitted without argument only if all judges on the panel agree that oral argument is unnecessary.¹²⁵ Furthermore, staff attorneys in the Fourth Circuit provide a “workup” in “[a]ll pro se appeals and all habeas corpus and § 2255 appeals in which a certificate of appealability is needed.”¹²⁶

Similar to law clerks, staff attorneys have been subject to enduring criticism.¹²⁷ Unlike law clerks, staff attorneys are not assigned to a particular judge but instead work for the court as a whole.¹²⁸ As a result, staff attorneys are closely supervised only by the senior staff attorney in each circuit, not a single judge or even group of judges.¹²⁹ That lack of close supervision further distances Article III judges from the task of deciding cases, particularly in nonargued cases where staff attorneys prepare recommended dispositions for a panel.¹³⁰

118. Press Release, Admin. Office of the U.S. Courts, Staff Attorney Offices Help Manage Rising Caseloads (Feb. 17, 2004), <http://www.uscourts.gov/newsroom/stffattys.htm>.

119. *See id.*

120. *Id.*

121. *Id.*

122. *See* MCKENNA ET AL., *supra* note 85, at 12.

123. *Id.* at 97.

124. *Id.*

125. *Id.*

126. *Id.*

127. *See, e.g.,* Richman & Reynolds, *supra* note 46, at 290 (commenting on the vagueness of the role of staff attorneys); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 778–79 (1983) (“I fear this ‘completed staff work’ mode needs careful watching lest it result in too ready approval by overworked judges of the work of court staff who are less likely than the elbow clerks to reflect the same intense familiarity with the judges’ style and thinking.”).

128. *See* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1467 (1983).

129. *See id.*; Press Release, Admin. Office of the U.S. Courts, *supra* note 118.

130. *See* MCKENNA ET AL., *supra* note 85, at 100.

Nonetheless, staff attorneys have been a critical component of the United States Courts of Appeals' ability to cope with rising caseloads. As the senior staff attorney for the Eighth Circuit has stated, "judges would not be able to give the pro se and other non-argued cases the amount of time needed to cull out the important issues, because there are just too many cases and not enough judges."¹³¹ That sentiment is echoed by some circuit judges. Judge Rhesa Barksdale of the Fifth Circuit believes that the circuit "could not survive without [staff attorneys]," and Judge Joel Dubina maintains that the Eleventh Circuit "could not handle [its] caseload without the assistance of staff attorneys. The staff attorney office is an integral part of [the] court."¹³² Accordingly, like law clerks, staff attorneys have become an entrenched component of the federal judiciary, allowing courts like the Fourth Circuit to continue to accommodate rising caseloads without adding judges.¹³³

V. CONCLUSION

Like many federal courts, the Fourth Circuit has experienced escalating caseloads over the past thirty years. To accommodate the greater number of appeals, the court has implemented a number of procedural and systemic reforms, allowing it to decide nearly twice as many cases with the same number of active judges as it had in 1984. To be sure, other circuits have undergone similar transformations, but the Fourth Circuit in particular has made robust use of reforms such as decreasing the number of cases receiving oral argument, writing more unpublished opinions, and increasing the number of procedural terminations as a percentage of the total docket. Those reforms have been bolstered by an expansion in the number of law clerks and growth of the staff attorney's office, all of which have greatly reduced the appellate lifecycle and made the Fourth Circuit one of the most efficient appellate courts in the country.

131. Press Release, Admin. Office of the U.S. Courts, *supra* note 118.

132. *Id.*

133. See BAKER, *supra* note 8, at 144–45.