

Quiet Justice:

Unreported Opinions of the United States Courts of Appeals – A Modest Proposal for Change

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As the number of appeals continues to grow, the United States courts of appeals are increasingly choosing not to publish large numbers of their decisions, including decisions in civil appeals. The growing volume of litigation – and the small number of cases heard by the Supreme Court – have resulted in the courts of appeals becoming virtually the nation's courts of last resort. Accordingly, the ways in which these courts control publication of their decisions is important to litigants and the public.¹ This article explores how unreported appellate decisions differ from reported ones, and whether court policies and practices regarding non-publication of decisions should be revised.

Part I provides the historical background and reviews some of the literature regarding unreported circuit court decisions, most of which disapproves of non-publication, though frequently with little empirical data to support the criticisms. Part II presents an empirical analysis of reported and unreported decisions. Focusing on 1992 through 1995, the most recent years for which information is available, data are compiled for every appellate case across a series of variables. The data include information on the types of decisions that are published and not published, and answer the previously unexplored issue of whether cases with unpublished decisions are resolved significantly faster than those in which the court chooses to publish its decisions. Part III describes each circuit's local rules regarding publication, and examines whether the data suggest that the circuits follow these rules. Finally, Part IV sets forth proposed revisions to court policies regarding publication, and assesses the possible benefits and burdens of the suggested changes.

PART I: BACKGROUND

The genesis of limited publication rules was the 1973 report of the Advisory Council for Appellate Justice² urging courts to reduce the number of published opinions. The report recommended the adoption of limited publication plans by the appellate courts, proposing that an opinion be published only if it 1) establishes a new rule of law, or alters or modifies an existing rule, 2) involves a legal issue of continuing public interest, 3) criticizes existing law or 4) resolves a conflict of authority. By 1977, most of the circuits had adopted limited publication plans, although with considerable variation in the criteria used to determine whether a decision should be published, how many votes are required to publish an opinion, and whether unpublished opinions may be cited.³ As discussed in Part III below, such variations persist more than twenty years after the adoption of limited publication plans.

Limited publication rules have drawn considerable criticism. One commentator suggests that critiques of limited publication plans may be grouped into five broad categories: judicial accountability, review by higher court, predicting precedential value, equality of access, and judicial and litigant economy,⁴ each discussed in turn herein.

Reynolds and Richman, two “judicial accountability” critics of limited publication rules, have attacked limited citation rules as allowing courts to decide behind closed doors “troublesome cases presenting issues the court does not want to address in public.” Although commentators have demonstrated that there are, indeed, instances of cases that should have been published but were not, perhaps due to an intentional failure to comply with the rules, none of the critics have

Footnotes

1. Concerns about delay at the district court level led to passage of the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (1990) (codified as amended at 28 U.S.C. §§ 471-82), but as yet no such reform effort has reached the appellate level.
2. Committee on the Use of Appellate Energies, Advisory Council for Appellate Justice, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973). For a more detailed explanation of the Advisory Committee report, see Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J. L. REF. 119 (1995) (hereinafter “Martineau”).
3. 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 (1978) (hereinafter “Reynolds & Richman I”). See also, 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) (hereinafter “Reynolds & Richman II”); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L. J. 807, 809; Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L. J. 155 (1992); Milton J. Silverman, *The Unwritten Law: The Unpublished Opinion in California*, 51 CAL. ST. B. J. 33 (1976); Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977); Donald R. Songer, Danna Smith and Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 964 (1989).

4. Martineau, *supra* note 2, at 128-145.

undertaken a detailed study of all of the circuits. Thus, they are vulnerable to counter-criticism that there has been no systematic showing of increased "judicial irresponsibility"⁵ as a consequence of the adoption of limited publication rules.

Intriguingly, one defense to the "judicial accountability" critics is that judges on an appellate panel who disagree with the court's decision will provide a concurring or dissenting opinion, and the majority and minority opinions would then qualify for publication.⁶ However, as demonstrated in Part II below, significant numbers of cases with concurring or dissenting opinions go unpublished. Thus, even in cases in which appellate judges disagree about the law or its application to the facts the court nevertheless decides not to make this dispute public. Moreover, it is possible that an unprincipled but unanimous court might decide not to publish its opinion, even when it otherwise clearly met publication criteria.

Critics of limited publication plans have also argued that limited publication hampers judicial review by higher courts, as unpublished opinions could be used to hide embarrassing information about litigants or their counsel,⁷ or to send messages to government agencies on future cases without disapproving of past cases.⁸ Moreover, the prospects for the further review of unreported appellate panel decisions are diminishing. For example, as set forth below, in 1995 the United States courts of appeals issued opinions in 30,240 cases, 22,054 of which were unpublished. By contrast, in its 1995 Term, the Supreme Court issued opinions in only sixty-four cases arising from the circuits, two of which were appeals from unpublished dispositions.⁹ The growing caseload of the circuits has resulted in "making the 13 intermediate appellate courts more and more the nation's courts of last resort."¹⁰

Critics also argue that judges are poor predictors of whether their decisions will be useful as precedent, and even advocates of limited publication usually concede this point. Part III of this article concludes that the variation in publication rates among the circuits cannot be explained by the local rules, suggesting that the circuits may not be following their own rules. This practice adds to the mounting evidence that there is a small but significant problem with courts and litigants relying on unpublished decisions despite rules to the contrary.¹¹

Equality of access is also a substantial factor identified by critics of limited publication rules.¹² The use of computer technology by even solo practitioners may level the playing field, although several circuits refuse to provide unpublished opinions to computer-assisted legal research firms.¹³ However, just as new published opinions now are generally made available to the public on the Internet, unpublished dispositions also could be made available on the Internet.

The judicial and litigant economy criticisms of limited publication suggest that there is little evidence that non-publication rules result in added productivity of the judiciary. However, analysis of data collected from each case should be useful in answering whether non-publication does save time.

Part II examines this question and demonstrates that cases with unpublished opinions are resolved substantially faster than those in which the opinion is published. Moreover, decisions without publication are resolved more quickly than published decisions in every category analyzed: the action taken by the court, the subject matter of the appeal, the type of appeal, whether the government is a party, the circuit in which the appeal is heard, and whether the case is heard on oral argument or decided on briefs alone.

Whether the benefit of this time savings outweighs the

5. *Id.* at 130. By their very nature, unreported decisions are not usually easily accessible to the public, so access to data about unreported decisions has been difficult for researchers not affiliated with the courts.

6. *Id.* at 129.

7. Judge Nichols of the Federal Circuit reports that in his experience as a visiting judge the Fifth and Eleventh Circuits will issue an opinion which reads in its entirety "AFFIRMED. See Loc. R. 47.6" in cases in which "the case presents no genuine appealable issue and the parties who initiated the appeal should have known this and probably did," which he terms "a rebuke for misuse of the appellate process, but one administered with true Southern courtesy." Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 55 AM. U. L. REV. 909 (1986).

8. *Id.* at 133. Table 6 sets forth data regarding unreported cases in which the government was a party.

9. The two cases are *Behrens v. Pelletier*, 516 U.S. 299 (1996) (reversing an unpublished Eleventh Circuit opinion), and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) (affirming an unpublished Sixth Circuit opinion). In addition, the Court noted in *Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235 (1996) that it granted *certiorari* to resolve a conflict between the Fourth Circuit's reported decision, a reported decision of the Tenth Circuit, and unreported decisions from the Second, Sixth and Ninth Circuits. *Id.* at 239. During the 1996 Term, the Court

reviewed two unpublished opinions of the circuits, *Lynce v. Mathis*, 519 U.S.433 (1997) (reversing an unpublished Eleventh Circuit opinion), and *Old Chief v. United States*, 519 U.S. 172 (1997) (reversing an unpublished Ninth Circuit opinion).

10. Federal Judicial Center, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (1990). The Report notes that while the Supreme Court granted *certiorari* in 157 of the 1,992 appellate cases decided in 1945 (7.9 percent of all decisions of the circuits), the 142 grants of *certiorari* in the 19,178 cases decided by the circuits in 1989 amounted to review of less than one percent of the appellate court's decisions.

11. See, e.g., Foa, *supra* note 3; Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); Songer, Smith & Sheehan, *supra* note 3; Peter J. Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 GOLDEN GATE U. L. REV. 277 (1988).

12. See, e.g., Foa, *supra* note 3; Robel, *supra* note 11; Reynolds & Richman II, *supra* note 3; Peter J. Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 GOLDEN GATE U. L. REV. 277 (1988).

13. At last report, the Second, Third, Fifth and Eleventh Circuits did not make unreported opinions available to electronic publishers. Martineau, *supra* note 2, at 144.

costs is a more difficult policy question.¹⁴ The literature leads to several questions that may be answered by the empirical data. First, is the number of unreported decisions growing? Second, are cases that should be published improperly relegated to unpublished status? Third, are unpublished opinions used only in cases involving routine subject matters or only in certain types of appeals? Fourth, is there a variation in publication among the circuits, and if so, may that variation be explained by the variations in publication rules? Finally, are cases with unpublished decisions resolved more quickly than those in which the court writes a published decision, and if so, is there a variation in the amount of time saved?

PART II: THE DATA

This study examines all decisions of the United States courts of appeals in which opinions were issued from 1992 through 1995.¹⁵ For each case terminated, the clerk completes a form setting forth basic data about the case. These forms are compiled by the Federal Judicial Center, and the data are then made available to researchers by the Interuniversity Consortium for Political and Social Research,¹⁶ based at the University of Michigan.¹⁷

The number of unreported opinions has increased just as dramatically as the growth of appellate litigation. In 1981, the courts decided 18,885 appeals and just under half of decisions were unpublished,¹⁸ but in 1995, more than seventy percent of the 30,240 opinions of the circuits were unpublished dispositions. Table 1 sets forth the total numbers of published and unpublished decisions from 1992 to 1995, demonstrating the overall trend toward increased use of unreported decisions. It is apparent that one mechanism the circuits have used to cope with an increasing caseload is the increased use of limited publication rules.

Table 1: Publication Rates by Year

YEAR	PUBLISHED	UNPUBLISHED	TOTAL	PERCENT UNPUBLISHED
1992	11811	22331	34142	65.4%
1993	8927	21526	30453	70.7%
1994	8538	20165	28703	70.3%
1995	8186	22054	30240	72.9%

Table 2 sets forth data on the number of cases published by the action taken on the merits. As one might expect, more than ninety percent of all cases dismissed as frivolous resulted in an unpublished decision. But the courts have frequently resorted to unpublished opinions in cases in which the lower court was reversed or remanded, in whole or in part. In 8,583 cases, the appellate court reversed or remanded, at least in part, yet the opinion of the appellate court was not published. These cases represent decisions where a reviewing court disagreed with the lower court, and therefore are decisions that, under most circuit rules, probably should have been published. As Table 2 also indicates, these reversals were accomplished more rapidly than in cases with published opinions, and the dismissals of frivolous appeals occurred considerably sooner when the opinion was not published. While the mean number of days pending¹⁹ for appeals with published affirmances was 450, unpublished affirmances occurred in just 326 days. The disparity was somewhat less for outright reversals, with published opinions issued 456 days after the record was complete, compared to 406 days for unpublished opinions. By contrast, unpublished dismissals of frivolous appeals occurred after a mean of 221 days, or less than half the time of published reversals.

14. Although there is a substantial body of opinion that there is a "crisis of volume" facing the courts, a significant minority opinion that suggests that the "crisis" may be overstated. *Compare* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE at 109-110, with the minority report, *id.* at 123-24. The Report notes that the courts have coped with increasing caseloads "by adopting truncated procedures that probably have reached the limits of their utility without compromising the quality of the process." *Id.* at 111. Judge Posner reviews the limited publication rules and trends towards curtailing the number of oral arguments and concludes that the benefits of what he terms a "streamlined" appellate process outweigh the costs. Richard A. Posner, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 163-189 (1996).
15. Many appellate cases are resolved without judicial involvement, either by procedural default (such as the failure to comply with rules requiring the filing of the record) by settlement, or by voluntary dismissal by the appellant. This study examines only those cases where an opinion is issued on the merits. In addition, the data for 1992 reflect the conversion to a different reporting year and thus include 15 months of cases.
16. In slightly less than five percent of the cases data such as the dates of commencement or termination of the case, type of appeal, or

- category of appeal were missing. Consequently, calculations of mean days pending were made only for those cases in which data were present to permit the calculation. Because of missing data in some variables, the total number of cases is not the same for each table.
17. The data for this study are from ICPSR project 8429, and may be downloaded in SAS or SPSS format via the Internet at <<http://www.icpsr.umich.edu>>.
18. Donna Steinstra, *UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS* at 3 (1985) (finding that 49 percent of decisions in 1981 were not published). Data on the numbers of unpublished opinions have been reported in the Annual Reports of the Administrative Office only since 1989. One study indicated that non-publication rates in the 1960s were low as 16 percent. J. Woodford Howard, Jr., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS* (1981).
19. The mean days pending was calculated from the date the record was complete until the date of final judgment, rather than from the date the appeal was filed, so that delays in assembling the lower court's record would not be included.

Table 2: Publication and Mean Days Pending by Type of Action Taken on the Merits

Action on the Merits	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
Affirmed or Enforced	19521	65328	77.0%	450	326	362
Reversed or Vacated	7563	4543	37.5%	456	406	437
Affirmed in Part and Reversed in Part	5404	2690	33.2%	531	447	503
Dismissed - Frivolous	460	5384	92.1%	382	221	234
Remanded	886	1350	60.4%	487	363	412
Other	514	952	64.9%	489	412	439
ALL CASES	34348	80247	70.0%	465	337	375

Table 3 indicates that there were 1,063 cases in which a separate concurring or dissenting opinion was filed. This relatively low figure suggests that publication of all cases in which a member of the panel disagrees with the majority would not be an undue burden on publishers or the legal community.²⁰ Indeed, inclusion of these 1,063 cases would increase the total number of published opinions by less than three percent. Moreover, as also demonstrated by Table 3, the time cost of publication for these decisions does not appear to be significant. Although unpublished opinions in which there was a concurrence were resolved ninety days sooner than published cases, unpublished cases in which a dissent was filed were resolved only seven days sooner than published cases with a dissenting opinion. Thus, publication of all cases in which there is a dissenting or concurring opinion would come at little cost, either in time or volume.

20. The underlying assumption behind presumptive publication of such cases would be that they are likely to illuminate disagreements about developing legal issues. However, as Judge Nichols has noted, in some cases concurrences or dissents may not be based upon issues of law. Nichols, *supra* note 7 at 925. Moreover, Judge Nichols notes that publication of a decision in which he dissents would make the majority decision a binding precedent, a result many dissenters wish to avoid. *Id.* On the other hand, Robel indicates that mere information about the opinion of an individual judge may be valuable to litigants. Robel, *supra* note 11 at 947.

Table 3: Publication and Mean Days Pending by Existence, Types of Separate Opinions

Opinions	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
No separate opinion	33021	88689	72.9%	403	306	335
Dissenting opinion	2917	641	18.0%	457	450	456
Concurring opinion	1364	400	22.7%	467	377	448
Both concurring and dissenting opinion	168	20	10.6%	429	391	425
Both concurring and dissenting opinion - <i>en banc</i>	117	2	1.7%	412	N/A	412
ALL CASES	37587	87752	70.0%	409	308	340

The data in Table 4 on publication by case category²¹ are equally illuminating. Publication rates vary considerably with case category, but in most categories at least half of the decisions are not published. Table 4 shows that eighty-five percent of Social Security appeals and almost ninety percent of decisions involving prisoner petitions were not published, as one might expect given the growing volume of litigation in these categories.²² But even in categories such as contract, real property and bankruptcy actions, more than half of the decisions went unpublished. Prisoner petitions accounted for nearly half of all the unpublished decisions. As also shown by Table 4, in every case category, unpublished decisions were resolved more quickly than published decisions, and in some categories unpublished cases were completed as many as 100 days sooner.

21. The category of cases is derived from information contained on the civil cover sheet filed at the commencement of every case at the lower court. Case category, date of completion of the record, and/or date of termination is missing in some cases, so the total number of cases in these tables does not add to the total number of terminations on the merits.

22. See, Carol Krafka, Joe S. Cecil and Patricia Lombard, *STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS 4* (1985) (concluding that “growth in appellate caseloads has been partly attributable to increasing rates of appeal in prisoner actions and, to a lesser extent, civil rights cases”).

Table 4: Publication and Mean Days Pending by Category of Case

Category	PUBLISHED		UNPUBLISHED		ALL CASES	MEAN DAYS PENDING		
	Number	Percent of all Pub.	Number	Percent of all Unpub.	Percent Unpub.	Pub.	Unpub.	Cases
Contract	2375	11.6%	3252	6.3%	57.8%	388	309	342
Real Property	390	1.9%	608	1.2%	60.9%	438	344	382
Torts	2675	13.1%	4048	7.8%	60.2%	397	304	340
Civil Rights	4559	22.3%	9865	19.1%	68.4%	402	295	331
Prisoner Petition	3037	14.9%	25122	48.7%	89.2%	435	286	305
Forfeiture/ Penalty	208	1.0%	369	0.7%	64.0%	392	322	348
Labor	1724	8.4%	1618	3.1%	48.4%	407	328	368
Bankruptcy	11	0.1%	18	0.0%	62.1%	345	283	305
Property Rights	408	2.0%	360	0.7%	46.9%	393	322	360
Social Security	410	2.0%	2290	4.4%	84.8%	425	302	317
Federal Tax	387	1.9%	588	1.1%	60.3%	419	333	369
Other Statutes	4245	20.8%	3452	6.7%	44.8%	410	327	375
ALL CASES	20429	100%	51590	100%	71.6%	407	299	334

Table 5 presents data on publication rates and mean days pending by type of appeal. Considerable variation exists in publication rates among the different types of appeals. Notably, nearly seventy percent of all civil private cases were resolved without a published opinion;²³ three-quarters of civil

23. "Civil, private cases" includes many cases that fall into the "prisoner petition" category brought not as criminal appeals but as civil actions against state officials. Most of the remaining categories are self-explanatory. The "Criminal" category was replaced in January 1988 with the implementation of sentencing guidelines with five new categories: Guideline case - general; Pre-guideline case or other; Guideline case - sentence only; Guideline case - conviction only; Guideline case - sentence and conviction. "Original proceeding" includes petitions for writs of prohibition or mandamus, but not writs of habeas corpus. CODEBOOK FOR APPELLATE AND CIVIL DATA, (1997), available via the Internet from Inter-university Consortium for Political and Social Research at <<http://www.icpsr.umich.edu>>.

24. As discussed in n. 15, *supra*, the data for 1992 in this study include 15 months of cases due to the conversion to a different reporting year.

cases involving the United States were not published; and two-thirds to four-fifths of cases under the federal sentencing guidelines were unpublished dispositions.

Table 5 also demonstrates that in nearly every type of appeal, unpublished cases were completed more quickly than those cases with published opinions. Unpublished civil cases were resolved in as much as 100 days less than were cases with published opinions. Unpublished criminal decisions also were generally resolved in less time than were cases with published opinions. A small subset of unpublished criminal decisions — cases arising prior to the adoption of sentencing guidelines — were pending for an astounding mean of 1,821 days, but this would appear to be attributed to a statistical anomaly, since only fifteen unpublished cases fell into this category.

Table 5: Publication and Mean Days Pending by Type of Appeal

Type of Appeal	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
Admin. Review	2742	4304	61.1%	400	314	351
Admin. Enforcemt.	334	894	72.8%	394	235	296
Civil, U.S.	4959	14922	75.1%	403	294	326
Civil, Private	16511	38245	69.8%	408	303	338
Criminal	35	15	30.0%	878	1821	1119
Original Proceeding	163	2307	93.4%	384	317	364
Bankruptcy, from BAP	94	187	66.5%	568	502	524
Bankruptcy, from Dist. Ct.	1276	1630	56.1%	394	296	339
Pre-guidelines	1467	2447	62.5%	443	304	352
Guidelines - general	232	986	81.0%	424	270	299
Guidelines - sentence only	1999	5876	74.6%	368	299	315
Guidelines - conviction only	1808	3593	66.5%	428	329	360
Guidelines - sentence & conviction	5697	11946	67.7%	418	331	357
ALL CASES	37587	87752	70.0%	409	308	340

Publication rates dropped considerably when the United States was not the appellant. Table 6 shows that while just over half of cases in which the United States was the appellant had unpublished opinions, over seventy percent of cases in which the government was not the appellant had unreported opinions. The disparity was slightly less when the government prevailed at the lower court. Table 6 also shows that when the government was involved, unpublished cases were concluded more quickly than the published counterparts, just as was true in cases generally.

Table 6: Publication and Mean Days Pending by United States Status as a Party

Party	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
Non-U.S. Appellant	34789	84590	70.9%	411	309	341
U.S. as Appellant	2798	3162	53.1%	384	270	328
Non-U.S. Appellee	21299	45241	68.0%	406	300	337
U.S. as Appellee	16288	42511	72.3%	415	316	344
ALL CASES	37587	87752	70.0%	409	308	340

Table 7 shows that wide variation in publication rates continued to exist among the circuits, ranging from 41 percent of cases unpublished in the First Circuit to 84 percent of cases unpublished in the Fourth Circuit. Table 7 also reveals that there were similar variations in the mean days pending for appeals, with a high of 408 days in the Seventh Circuit to a low of 215 days in the Second Circuit. In every circuit, unpublished cases were resolved more quickly than cases with published opinions, and in some circuits, such as the Ninth and Eleventh, cases with published opinions often took substantially longer to resolve. Further research may demonstrate whether this variation can be explained by variation in the circuits as to judicial workload, presence or absence of senior or visiting judges, or the number of vacant judgeships.

Table 7: Publication and Mean Days Pending by Circuit

	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
D.C. Circuit	1985	2391	54.6%	355	269	325
1 st Circuit	2063	1458	41.4%	316.71	220.52	277.90
2 nd Circuit	3125	5263	62.7%	265	185	215
3 rd Circuit	1885	7089	79.0%	325	204	231
4 th Circuit	1946	10363	84.2%	354	292	309
5 th Circuit	4728	12457	72.5%	360	234	272
6 th Circuit	2268	8211	78.4%	425	273	307
7 th Circuit	4770	3806	44.4%	437	372	408
8 th Circuit	4620	5354	53.7%	365	262	331
9 th Circuit	4750	16265	77.4%	576	435	467
10 th Circuit	2765	4917	64.0%	386	250	308
11 th Circuit	2682	10178	79.1%	521	338	377
ALL CASES	37587	87752	70.0%	409	308	340

The data clearly demonstrate that cases selected for oral argument are more frequently those in which a published opinion will issue. Whether a case is heard on oral argument does not determine whether an opinion will be published. Indeed, it is somewhat surprising that decisions in forty-four percent of cases judged significant enough to merit oral argument were not deemed worthy of publication. It is clear that oral argument increases the amount of time a case remains pending. Given the need for notice to the parties and time for the court and litigants to prepare for oral argument, it is not surprising that cases which were argued took an average of more than 100 days longer to resolve than those that were submitted solely on briefs. In contrast, lack of publication saved only fifty-five days for cases that were heard on oral argument. Courts would apparently save considerably more time by selecting fewer cases for oral argument than by reducing publication rates.

Table 8: Publication & Mean Days Pending by Existence of Oral Argument

	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
Argued	26801	21375	44.4%	415	360	391
Not Argued	2661	41465	94.0%	349	281	285
ALL CASES	29462	62840	68.1%	409	308	340

With only one anomalous exception, already discussed, in every one of the variables examined by this study, cases with unpublished decisions were completed in considerably less time than cases with published decisions. It is impossible to determine without a detailed examination of each opinion whether this is because less care was taken with opinion writing in unpublished cases or simply because these cases were easier to resolve. But the data clearly demonstrate that there is a significant time savings associated with the increased reliance on limited publication rules.

PART III: THE RULES AND WHETHER THEY ARE FOLLOWED

As noted in Part I, when the circuits originally adopted limited publication plans, there was considerable variation in the criteria used to determine whether a decision should be published, how many votes were required to publish an opinion, and whether unpublished opinions could be cited. These variations persist today and have resulted in significant disparities in publication rates. Table 9 sets forth the local rules of each circuit regarding publication of opinions. Four circuits have a presumption in favor of publication of opinions, and six have a presumption against publication. Criteria for publication range from specific to vague, or none at all. In some circuits one member of a panel can decide that the opinion should be published, and in others a majority is required. Most courts disfavor the citation of unreported opinions, and some prohibit citation.

Some evidence from other researchers suggests that these rules are not always followed, usually through review of the content of the unreported opinions to determine whether they made new law. Careful comparison of publication rates by circuit (in Table 7) with each court's local rules regarding presumptions about publication (in Table 9) provides additional evidence that the criteria in the courts' local rules may not always be followed. Two circuits with rules favoring publication nevertheless maintain high rates of unpublished decisions. Some seventy-eight percent of decisions went unpublished in the Sixth Circuit, while seventy-two percent of decisions were not published in the Fifth Circuit, two courts with rules favoring publication of opinions. The Seventh Circuit has a rule disfavoring publication, yet at forty-four percent had the second lowest rate of non-publication. Thus, although the local rules state each circuit's policy regarding publication, the data suggest that these policies are not uniformly implemented.

PART IV: RECOMMENDATIONS AND CONCLUSION

The data presented in this article demonstrate that significant time savings occur through the use of limited publication plans by the appellate courts. With each variable examined, unpublished cases were concluded more quickly than published cases, and in some cases several months sooner.

The courts certainly use limited publication to resolve routine cases more quickly. The data show that many decisions on prisoner petitions and administrative appeals are not published, but at the same time large numbers of cases in non-rout-

Table 9: 1998 Circuit Rules Regarding Publications

Circuit	Presumption Regarding Publication	Criteria for Publication	Limited Citation	Votes Required for Publication
D.C.	In favor: Rule 36(a)	Specific: Rule 36(a)(2)	Prohibited: Rule 28(c)	
1 st	In favor: Rule 36.2	Specific: Rule 36.2(b)	Prohibited: Rule 36.2(b)(5)	One Judge: Rules 36.2(b)(2) & 36.2(b)(3)
2 nd			Oral decisions from bench not to be cited: Rule §0.23	
3 rd	Against: IOP 5.3	Vague: IOP 5.3	Court "by tradition" does not cite: IOP 5.8	Majority: IOP 5.1
4 th	Against: Rule 36(a)	Specific: Rule 36(a)	Disfavored: Rule 36(b)	Author or majority: Rule 36(a)
5 th	In favor: Rule 47.5.2	Specific: Rule 47.5.1	Allowed: Rule 47.5.4, but see Rule 47.5.3 for opinions before 1996	One Judge: Rule 47.5.2
6 th	In favor: Rule 24(b)	Specific: Rule 24(a)	Disfavored: Rule 24(c)	Majority may decide not to publish: Rule 24(b)
7 th	Against: Rule 53	Specific: Rule 53(c)	Prohibited: Rule 53(b)(2)(iv)	Majority: Rule 53(d)
8 th	None	Specific: Plan for Publication of Opinions	"Generally should not cite": Rule 28A(k)	One judge: Plan for Publication of Opinions
9 th	Against: Rule 36-2	Specific: Rule 36-2	Prohibited: Rule 36-3	Majority: Rule 36-5
10 th	Against: Rule 36.1	Specific for appeals of published decisions: Rule 36.2	Not favored: Rule 36.3	"The court": Rule 36.2
11 th	Against: Rule 36.1	Specific: Rule 36-1	May be cited: Rule 36-2	Majority: Rule 36-2

tine categories also go unpublished.

The data also indicate that a rule requiring the publication of cases with dissents or concurrences would not be a substantial burden, increasing the total number of published cases over four years²⁴ by only 1,063, an increase of just over one percent. A significantly higher number of cases would be added to publication if all reversals²⁵ were published, adding 8,583 cases to the 37,462 decisions published during the four years, an increase of ten percent.

The benefits of publication of all cases with separate opinions (dissents or concurrences) and of all reversals appears to outweigh the burden of publication. Such a rule would make public judicial expositions about the law or its application to the facts in cases in which reasonable minds may differ. These modifications of the rules could quell criticism of limited publication rules on the basis of judicial accountability at minimal cost to judicial efficiency. Finally, revision of publication rules in these ways would help the public and legal community understand what appellate judges are thinking about the evolution of the law.

Additional research may be needed to understand fully the appellate courts' use of limited publication. Continued examination of the content of unreported opinions would help determine the extent to which the courts do not follow their stated criteria for publication. Review of unpublished opinions also would reveal whether unreported cases themselves rely on other, unpublished decisions. Finally, the effect of workload, judicial vacancies, and the use of visiting and senior judges should also be studied. There is considerable variation in publication among the circuits, and these factors might help explain that variance.

If "justice delayed is justice denied," limited publication rules do reduce delay and resulting injustice. However, the modest revisions suggested here to current limited publication rules would help ensure that justice would be rendered publicly without substantial delay.



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25. This calculation includes cases which were reversed, vacated, remanded, or reversed in part.

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