“I RESPECTFULLY DISSENT”: RATE OF DISSENT IN THE NORTH CAROLINA COURT OF APPEALS AND ITS IMPACT ON THE APPELLATE PROCESS

By

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Executive Summary

Cases addressed by the North Carolina Court of Appeals are reviewed by panels composed of three judges. A majority opinion requires the agreement of at least two judges; therefore, a dissent by one judge is possible, and frequently occurs. This capstone paper examines (1) whether the rate of dissent has increased between 1999 and 2008 and (2) the ultimate impact dissent has on the appellate process in the State of North Carolina.
Introduction

North Carolina appellate procedure, in large part, defines the working relationship between the North Carolina Supreme Court and Court of Appeals. Court of Appeals decisions frequently trigger mandatory or discretionary Supreme Court jurisdiction depending on the issues presented by the case and the final disposition by the Court of Appeals.

Discretionary jurisdiction generally applies to any decision the Supreme Court identifies as implicating significant issues related to legal doctrine or public policy. In contrast, mandatory jurisdiction applies to decisions involving constitutional issues or Court of Appeals decisions containing dissenting opinions. The difference between mandatory and discretionary jurisdiction is fundamental: regarding the former, the Supreme Court controls the matters it considers; whereas, in the latter, review is statutorily required. Therefore, any decision warranting mandatory review establishes a direct causal relationship between the workload of the Court of Appeals and the Supreme Court. The only remaining requirement is a litigant’s exercise of the right of appeal defined in N.C.G.S. § 7A-30.

The causal relationship is significant regarding Court of Appeals decisions containing dissenting opinions. The Court of Appeals is currently composed of fifteen judges, each of whom sits on rotating panels composed of three judges. A majority opinion requires the agreement of at least two judges, providing the opportunity for dissent by one panel member. Therefore, the opportunity to dissent effectively allows one judge to unilaterally create an automatic right of appeal to the Supreme Court under N.C.G.S. § 7A-30(2).

Within this context, this capstone paper examines (1) whether the rate of dissent in Court of Appeals decisions increased between 1999 and 2008 and (2) the ultimate impact dissent-based jurisdiction has on the appellate process in North Carolina. In addressing these issues, this paper first provides background information regarding the relationship between the Court of Appeals and the Supreme Court. This paper next describes the methodology used to answer the research questions identified above. The results are then presented: during the ten year period examined, the rate of dissent increased slightly, but remained relatively constant. Litigants also exercised their rights of appeal based on dissent, resulting in a significant portion of non-unanimous Court of Appeals decisions reaching the Supreme Court for final disposition. This paper concludes by recommending review of the right of appeal created by N.C.G.S. § 7A-30(2), given the substantial impact this form of jurisdiction has on the appellate process in North Carolina.

Background Information

The Court of Appeals was established in the late 1960s as a response to the tremendous caseload of the Supreme Court. In the 1955–56 reporting year, 362 opinions were issued by the Supreme Court; however, by the 1967 calendar year, that number had increased to 465. As a response to this increasing burden, two underlying objectives supported the General Assembly’s

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2 N.C.G.S. § 7A-30 (2009); see also ANN. REP., supra note 1, at 3. Other avenues of Supreme Court jurisdiction exist, see N.C.G.S. § 7A-27(a) (2009) (death penalty appeals); N.C.G.S. § 7A-29(b) (2009) (general rate appeals from the Utilities Commission).
5 Id. at 552.
6 See id. at 549 n.9 (noting an accurate total of 473 opinions for 1967).
creation of the Court of Appeals: the Supreme Court (1) would not be overwhelmed by unimportant or well-settled issues and (2) could invest more resources in the cases it did consider.\footnote{Id. at 554. Shortly after the creation of the Court of Appeals, the Administrative Office of the Courts stated that "the Court of Appeals has provided much needed relief for the previously overburdened court. This leaves the Supreme Court free to examine carefully the truly significant questions of law." Victor Eugene Flango & Nora F. Blair, Creating an Intermediate Appellate Court: Does it Reduce the Caseload of a State’s Highest Court?, 64 JUDICATURE 75, 76 (1980) (citation omitted).}

In contrast, the number of signed opinions currently issued by the Supreme Court has been declining.\footnote{See Sylvia Adcock, Writer’s Block?, N.C. LAWS, WKL., Nov. 1, 2010, at 1, 1; see also SCOTT W. GAYLORD, THE NORTH CAROLINA SUPREME COURT IN 2010: IS IT TIME FOR REFORM? 4–5 (2010), available at http://www.fed-soc.org/doclib/20101027_NC2010WP.pdf (describing University of Chicago Law School Study that ranked the North Carolina Supreme Court near the bottom of state highest appellate courts in terms of productivity from 1998 to 2000 and identifying further decreases in productivity since that time).}

As a result, much speculation exists about the reasons for this recent trend:

- "[I]t could be that the Court of Appeals is doing such a good job . . . that [the Supreme Court does not] need to issue another opinion."
- Or the decline may be, in part, the result of “more unanimous decisions by the Court of Appeals."\footnote{Adcock, supra note 8, at 8.}

The latter speculation is negated by the data collected for this study; nevertheless, these theories represent anecdotal evidence of the interconnectedness of the Court of Appeals and the Supreme Court. Particularly relevant to this study is the fact that a dissent by one judge of the Court of Appeals creates an automatic right of appeal to the Supreme Court. The rate of dissent in the Court of Appeals, as a result, may have a significant impact on the volume and characteristics of the Supreme Court’s overall caseload.

**Methodology**

The data for this study were gathered from a variety of sources. First, the official *North Carolina Court of Appeals Reports* were referenced to document the number of published decisions by the Court of Appeals containing a dissenting opinion.\footnote{Unpublished opinions were not considered for this study. Under the North Carolina Rules of Appellate Procedure it is unlikely that an unpublished opinion could contain a dissent. See N.C. R. APP. P. 30(e)(1).} Volumes 132 through 194 were reviewed, totaling 63 volumes of published decisions. These volumes span a ten-year period dating from January 19, 1999 to January 6, 2009.\footnote{This review period was selected in order to analyze five years of service for the two most recent Court of Appeals chief judges, thus allowing for a comparison of two different leadership periods.} Each dissenting opinion during this period was recorded by the name of the dissenting judge, along with the date of filing.\footnote{Certain publishing irregularities did occur. For example, in *State v. Cao*, 175 N.C. App. 434 (2006), the non-majority opinion is labeled as a concurrence, however, it is a dissent in substance.}

The published case index of each volume was then referenced in order to calculate the total number of issued decisions within each volume.\footnote{Each case is indexed twice by each party’s name; therefore, the index total was divided by two in order to calculate the number of published opinions per volume. Indexing errors appeared common in this context, based on numerous non-integer results. This issue was addressed by rounding any non-integer calculation.}

The published case index was selected from the 739 dissents recorded within this review period - the truly significant questions of law.’ Victor Eugene Flango & Nora F. Blair, Creating an Intermediate Appellate Court: Does it Reduce the Caseload of a State’s Highest Court?, 64 JUDICATURE 75, 76 (1980) (citation omitted).
Findings

Question One: Did the rate of dissent increase between 1999 and 2008?

Though small, the rate of dissent did increase between 1999 and 2008 (see Appendix A). This conclusion is based on the percentage of dissent per volume contained in the North Carolina Court of Appeals Reports. This data is best understood, however, by providing a contextual note. On January 31, 2004, Court of Appeals Chief Judge Sidney S. Eagles Jr. retired from the court. This date represents an approximate mid-point during the ten-year review period examined by this study. For the remainder of the review period, Chief Judge John C. Martin served as the leader of the Court of Appeals.

Prior to taking on this role, Judge Martin stated that “his first order of business would be to ‘get everybody on the same team.’” At the time, many new judges had joined the Court of Appeals—over half joined after January 2001. Interestingly, Judge Martin stated that “[w]ith that amount of turnover, we haven’t developed collegiality and teamwork the court needs. I’ll try to develop that, with the hope of having all judges invested in the court so we all work together.”

Given the scope of this study, what triggered Judge Martin’s comments may only be speculated; however, an increasing rate of dissent may often affect collegiality, work load, and loss of reputation for a court. In contrast, a “collegial” tradition and judicial leadership may “dampen” the rate of dissent within a court.

Therefore, this study examined the differences between rate of dissent during each five year period of Chief Judge Eagles’ and Martin’s service. Within this review period, thirty volumes were published during Eagles’ service and thirty-three volumes were published during Martin’s service. Interestingly, as a percentage of decisions published per volume, the percentage of dissents was higher during Martin’s service. For the full review period, the average percentage of dissent was 13.9 percent. During Eagles’ service, the percentage was 13.7 percent and 14.1 percent during Martin’s service.

In total, however, the average number of dissents was lower during Martin’s service. The average number of dissents per volume was 11.73 for the full review period. During Eagles’ service there were 11.9 dissents per volume and 11.576 dissents per volume during Martin’s service. The difference in percentage and number of dissents per volume may be attributed to the lower average

15 Id.
16 Id. Of particular importance, during Chief Judge Eagles’ service, which began May 1, 1998, the court had been expanded from twelve to fifteen members. See Press Release, North Carolina Administrative Office of the Courts, Judge Eagles Named Chief Judge of Court of Appeals (Apr. 21, 1998), available at http://www.aoc.state.nc.us/www/public/aoc/pr/eagles.html.
17 Dayton, supra note 14, at 1, 4.
19 Lawrence M. Friedman et al., State Supreme Courts: A Century of Style and Citation, 33 STAN. L. REV. 773, 792 (1981). A potential opportunity for further research may exist in analyzing the individual behavior of judges over time. Though more observations are needed—requiring a larger review period—length of service likely impacts a judge’s tendency to dissent on the Court of Appeals. In effect, as a judge’s length of service increases, it is likely that their rate of dissent stabilizes in the long-term and more closely resembles the average rate of dissent of other judges in the short-term. If correct, the predictive value of this information could be invaluable in estimating the rate of dissent in high- and low-turnover court environments.
number of decisions published per volume during Martin’s service. Specifically, during Eagles’ service eighty-nine decisions per volume were published, compared to eighty-four decisions per volume during Martin’s service.

The rate of dissent—as measured by the slope of trend lines from the dissent data described above—was higher during Eagles’ service. The difference, however, was minimal:

<table>
<thead>
<tr>
<th>Percentage per Volume</th>
<th>Ten-Year Review Period (Slope)</th>
<th>Eagles’ Service (Slope)</th>
<th>Martin’s Service (Slope)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage per Volume</td>
<td>0.000498</td>
<td>0.001779</td>
<td>0.001426</td>
</tr>
<tr>
<td>Total per Volume</td>
<td>0.015265</td>
<td>0.115017</td>
<td>0.073529</td>
</tr>
</tbody>
</table>

Broad generalizations are difficult to draw based on this data. Though increasing, the change in rate of dissent was relatively low. Furthermore, it is not possible to quantitatively determine whether Chief Judge Martin accomplished his stated goal of “collegiality and teamwork.” As a practical matter, many factors may contribute to an increased rate of dissent, including larger court membership and ideological shifts in the court’s membership.20

**Question Two: Does rate of dissent impact the appellate process in the State of North Carolina?**

If measured by the rate at which dissenting opinions are subsequently appealed to the Supreme Court, the rate of dissent has a pronounced impact on the appellate process in North Carolina. Based on the random sample from the ten-year review period, thirty-seven (74%) were subsequently appealed to the Supreme Court under N.C.G.S. § 7A-30(2).21 If this percentage is applied to the 739 observed dissents, then approximately 547 Court of Appeals decisions were likely appealed under N.C.G.S. § 7A-30(2). Given the approximately 5,450 published opinions within this review period, over ten percent of these decisions were appealed under N.C.G.S. § 7A-30(2).22 Furthermore, of the thirty-seven N.C.G.S. § 7A-30(2) appeals within the sample, nine (24.3%) of these cases were reversed based solely on the dissenting opinion, providing no further explanation of the law.23 It is questionable, however, whether this form of final disposition represents good public policy.24 If for no other reason, “dissents tend to be looser and more flamboyant than majority opinions.”25

The policy rationale for N.C.G.S. § 7A-30(2) was based, in part, on the belief that these cases would represent situations in which the final outcome would affect the state of the law more

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20 See Epstein et al., supra note 18, at 20. In contrast, it has been shown that the rate of dissent is “negatively and statistically related” to a court’s caseload. See id. Though declining slightly after 2005–06, the number of filings in the Court of Appeals has generally increased over time. See ANN. REP., supra note 1, at 8.

21 One of the thirty-seven in this category was appealed under N.C.G.S. § 7A-30(2), but was filed late. It was subsequently considered under discretionary review.

22 By comparison, past research has shown that only forty percent of state court of appeals cases nationwide are appealed to state supreme courts. Flango & Blair, supra note 7, at 77. “Between 8 and 25 percent of these cases (the median is about 15 percent) are actually accepted by state courts of last resort.” Id.

23 Two of the nine in this category were reversed “in part” only.

24 See generally Interview by Sarah Lindemann Buthe with James A. Wynn, Jr., Senior Associate Judge, North Carolina Court of Appeals (October 20, 2006) [hereinafter Wynn Interview], available at http://womblencappellate.blogspot.com/2006/10/spotlight-on-judges-series-judge-james_20.html (“[W]ith the Supreme Court issuing less written opinions and affirming our opinions based on dissents, I believe the judges on this Court feel a greater need to explain the law and engage in dicta.”).

25 Cf. Friedman et al., supra note 19, at 785.
broadly.\textsuperscript{26} However, even for the majority of the remaining twenty-eight cases appealed based on N.C.G.S. § 7A-30(2), the Supreme Court generally issued one page per curiam opinions affirming the Court of Appeals decision.\textsuperscript{27} Consequently, a method of appeal that was designed to develop the law may no longer be fulfilling its intended purpose.

\textbf{Conclusion}

In 1971, shortly after the creation of the Court of Appeals, the \textit{Wake Forest Law Review} published an article entitled \textit{The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience}. This article stated that the right of appeal based on dissent should be retained, in part, because dissent bearing decisions likely represented areas of unsettled law or matters well suited for reexamination.\textsuperscript{28} This conclusion was based on data from 1969, when this method of appeal produced only two cases for the Supreme Court’s review.\textsuperscript{29} In contrast to the two cases appealed in 1969, which resulted in one affirming opinion\textsuperscript{30} and one reversal,\textsuperscript{31} each containing approximately six pages, N.C.G.S. § 7A-30(2) appeals within the review period for this study frequently resulted in one page per curiam opinions either affirming without opinion or reversing based solely on the dissenting argument. More importantly, the rate of dissent slowly increased during this period and litigants clearly exercised their rights under N.C.G.S. § 7A-30(2). If these trends continue, it represents an opportunity for even greater quantities of one page per curiam decisions in the future.

The North Carolina Courts Commission, therefore, should reexamine N.C.G.S. § 7A-30(2) and its potential impact on the caseload of the Supreme Court, focusing on whether dissent-based appeal is serving its intended policy purpose. If not, the General Assembly should consider repeal of this form of mandatory jurisdiction,\textsuperscript{32} providing the Supreme Court with more discretion over the cases it does review.\textsuperscript{33} An alternative approach would be to allow the discretionary certification of questions by the Supreme Court from panels of the Court of Appeals.\textsuperscript{34} Using certification in this manner is unique,\textsuperscript{35} but so is the dissent-based right of appeal.\textsuperscript{36} In effect, certification is implicitly occurring already; however, it is originating from the dissent of one judge in the Court of Appeals.\textsuperscript{37}

\begin{footnotesize}
\footnotetext{26}{See Groot, \textit{supra} note 4, at 557. Interestingly, the \textit{Groot} article also speculates that “appeal from a split court of appeals can be expected to produce additional dissents, since it is more likely that if the second highest court splits on an issue, the highest court will also,” \textit{id}. at 559, however, this does not appear to be the case.}
\footnotetext{27}{Sixteen were affirmed through one page per curiam opinions—one was based on the concurring opinion alone.}
\footnotetext{28}{See \textit{id}. at 570–71; \textit{see also} Richard A. Mann, \textit{The North Carolina Supreme Court 1977: A Statistical Analysis}, 15 Wake Forest L. Rev. 39, 41 n.15 (1979) (describing a relative increase in dissent containing appeals in 1977).}
\footnotetext{29}{See Groot, \textit{supra} note 4, at 570–71.}
\footnotetext{31}{Hicks v. Hicks, 275 N.C. 370 (1969).}
\footnotetext{33}{\textit{Cf}. \textit{id}. at 274 n.101 (describing the difference between “error correction and law development” in North Carolina’s “two tier appellate court system”).}
\footnotetext{34}{\textit{Cf}. Wynn Interview, \textit{supra} note 24 (stating that panels may not “certify issues to the Supreme Court”).}
\footnotetext{35}{\textit{Compare LA. REV. STAT. ANN.} § 13:4449 (2006) (allowing certification of questions between the Louisiana Court of Appeals and Louisiana Supreme Court), \textit{with Unif. Certification of Questions of Law Act} §8 (amended 1995) (allowing certification between different legal jurisdictions, including different states).}
\footnotetext{37}{See Wynn Interview, \textit{supra} note 24.}
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Appendix A

Percentage per Volume

Total Dissents