

TENTH CIRCUIT DATABASE PROJECT: AN UPDATE AND PREVIEW

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ABSTRACT

This Article provides an update on the Tenth Circuit Database Project, which collects data on the decisions of the U.S. Court of Appeals for the Tenth Circuit. The Article explains recent developments in the project, including updates on methods and capacity. The Article then offers a preview of the regular tables that the project will provide annually, inspired by the *Harvard Law Review*'s regular tables on Supreme Court decision-making. The preview uses data collected from the Tenth Circuit's decisions issued in May 2020 and illustrates how the project contributes to the larger study of judicial behavior.

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I. INTRODUCTION

One goal of the Tenth Circuit Database Project is to provide annual statistics on the decisions of the Tenth Circuit to the *Denver Law Review*. This idea is inspired by the *Harvard Law Review*'s regular tables on Supreme Court decision-making, and our goal is to provide a circuit-specific version adjusted to present information relevant to the Tenth Circuit's work. The purpose of this Article is to explain recent developments in the project and to offer a preview of these regular tables using data collected from the Tenth Circuit's decisions issued in May 2020. An

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additional goal of the tables offered here is to illustrate the project's contributions to the larger study of judicial behavior.

II. UPDATES ON METHOD AND CAPACITY

The project set out to code a full year's worth of data for publication in this Issue, but two barriers prevented this. First, the team was not able to code the volume of decisions issued by the court at the team's initial capacity, leading to gaps in the dataset over the course of the year. Second, the COVID-19 pandemic slowed both the team's work and plans to increase the team's capacity. Through continued support of the Hughes-Rudd Research Fund and the *Denver Law Review*, the team was able to increase its capacity in the summer of 2020 to include a team of three coders. This additional capacity will allow the team to fill gaps in the database while reliably coding decisions moving forward.

This increased capacity has also allowed the project to test for potential areas of variability within the coding methodology. As explained in the prior issue, the project makes use of a coding methodology developed for updating the Court of Appeals Database.¹ Using this methodology comes with several benefits, but also some downsides. For example, the initial research team had identified variability and insensitivities in the issue- and outcome-coding variables, and we highlighted those as places for potential improvement moving forward.²

The current team's increased capacity allows us to test for variability by having multiple coders code a randomized set of the same decisions—or in other words, the team has incorporated a measure of inter-coder reliability. This testing has already improved the team's work, revealing, for example, high levels of inconsistency in coding for litigants (party type, attorneys, amici, etc.) and at the most specific issue-type variables.³ Identifying these areas of variability has allowed the team to target problem areas for greater attention, resolve inconsistencies, and improve overall quality of the data. Testing has also shown consistency across most other variables, including particularly important variables such as the more general case- and issue-type variables and how judges vote.⁴ All told, the team's additional capacity will allow the project to fill its backlog and produce higher-quality data moving forward.

1. Wyatt G. Sassman, *Introducing the Tenth Circuit Database Project*, 97 DENV. L. REV. 383, 389–91 (2020).

2. *Id.* at 392.

3. *See id.* at 390–93 (describing coding variables such as party type and attorneys). Generally, each case is coded for case and issue type at three “levels.” The first two levels correspond to the general nature of the case and issue involved. The third level corresponds to a three-digit issue code identifying the specific issue in the case. Testing has shown substantial variability at this third level and more consistency at the first two levels.

4. *See id.* (describing coding variables such as votes).

III. PREVIEW: MAY 2020

This Part provides a preview of the kinds of statistics this project can produce. The tables included here are meant as examples of the kind of information the project will contribute to the *Denver Law Review*, and they do not exhaust the data the project collects. We intend certain tables to be consistent across issues. But we will also adjust how we present our results to reflect interesting trends in the data as we find them.

For this preview, we focused on a single month—May 2020—to illustrate the project’s capabilities. We selected May 2020 for two primary reasons. First, the data collected for this month reflects our improved methods in light of the team’s increased capacity. Second, the court issued more published decisions than average in that month. The higher number of published decisions helps us better emphasize the value of coding both published and unpublished decisions, a key contribution of this project, with a smaller dataset.

Nevertheless, it is important to remember that the tables in this preview are only meant as an illustration. Because this data only reflects one month’s decisions, readers should not draw general conclusions about the court’s work from these results. The tables below are only intended to illustrate the project’s capacity to produce data on these issues and preview future tables based on the project’s full dataset.

The tables below are divided into two sections. The first section offers some observations on all cases decided by the Tenth Circuit in May 2020. The second section draws out some comparisons between published and unpublished decisions.

A. All Cases

Coding all cases—both published and unpublished—allows the project to present a more complete picture of each judge’s contributions to the court’s work over the relevant period of time. Table 1 gives a picture of each judge’s contribution over May 2020.

TABLE 1: *Actions of Individual Judges (All Cases)*⁵

	Opinions Written (All Cases)				Votes Cast (All Cases)			Total
	Majority	Concurr.	Dissent	Concurr./Dissent	Majority	Concurr.	Dissent	
Baldock	5				12			12
Ebel					2			2
McKay					1			1
Seymour					4			4
Kelly	1				10			10
Briscoe	6	1	1		10	1	1	12
Lucero	2				8			8
Murphy	1				3			3
Porfilio								
Hartz	4	1	1		9	1	1	11
O'Brien								
Tymkovich	3				8			8
Holmes	4				8			8
Matheson	10			1	18	1	1	20
Phillips	3				16			16
Bacharach	5	1			15	1		16
Eid	4				11			11
Moritz	1				17			17
McHugh	2				10			10
Carson	1		1		11		1	12
Total	52	3	3	1	173	4	4	181

Among other things, this data gives a picture of the judges' individual contributions as well as the different workloads between active and senior judges. For example, Judge Matheson wrote more majority opinions and cast more votes than any other judge,⁶ revealing a potential influence that Judge Matheson in particular had on the court's work in May. By contrast, Judge Moritz wrote one opinion yet cast the second-most votes behind Judge Matheson, demonstrating how judges' influence can extend beyond writing opinions.⁷ And finally, Judge Baldock is a senior judge who wrote more opinions and cast more votes than all other senior judges and some of the active judges.⁸ Tracking each judge's actions can help reveal things like judges' influence through opinions, through votes, and the particular influence of senior judges.

Coding every decision also allows the project to illustrate how frequently judges vote with each other and against each other across the full range of the court's work. The circuit courts do most of their work unanimously.⁹ But variabilities in how panels are composed over time means

5. The May decisions used to create the Tables in this Article can be accessed through the U.S. Court of Appeals for the Tenth Circuit website. *See Opinion Search Results: Start: 5/1/2020, End: 5/31/2020, THE U.S. CT. OF APPEALS FOR THE TENTH CIR.*, <https://www.ca10.uscourts.gov/?q=opinion/search/results&query=start:5/1/2020,%20end:5/31/2020> (last visited Dec. 20, 2020). Table 1 does not include per curiam opinions. In May, the court issued nine per curiam opinions.

6. *See supra* Table 1.

7. *See supra* Table 1.

8. *See supra* Table 1 (senior judges include Judge Seymour, Judge Porfilio, Judge Ebel, Judge Kelly, Judge Murphy, and Judge O'Brien).

9. *See infra* Table 2.

that judges do not necessarily have equal opportunities to sit with each other.¹⁰ Observing voting alignments between the judges over time can help reveal potential trends, as Appendix A and B illustrate. In Appendix A and B, the x-axis lists the voting judge while the y-axis lists the judge that the voting judge voted with or against, respectively.

These voting alignments can help identify particular areas of agreement or disagreement. Here, for example, there are notably high levels of agreement between Judges Kelly and Matheson and Judges Matheson and Phillips, and yet one of the few dissenting votes cast by Judge Matheson was against an opinion joined by Judges Kelly and Phillips.¹¹ This sample is too limited to draw any conclusions, but this effect shows how tracking voting alignments over a longer period of time can help reveal trends among the judges. Here, for example, Judge Matheson's overall agreement with Judges Kelly and Phillips across a wider range of cases casts Judge Matheson's dissenting vote—uncommon as it is—in a different light than if viewed in isolation. Looking at Judge Matheson's work with the other judges could help isolate other potential variables at play in the disagreement.

Coding every decision also gives a more complete picture of how frequently judges on the Tenth Circuit write separate concurring or dissenting opinions, allowing us to better assess unanimity on the court over time. Table 2 lists all separate writings in May 2020.

TABLE 2: *Separate Writings (All Cases)*

Unanimous	54 of 61	88%
Dissent	3 of 61	5%
Concurrence	3 of 61	5%
Concurr./Dissent	1 of 61	2%

Likewise, coding all decisions gives a more complete picture of how the court resolves its cases.¹² Tables 3 details the disposition of all cases decided in May 2020, separating published and unpublished decisions.

10. See generally, e.g., Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 65–71, 78–92 (2017) (describing how panels are composed in various courts of appeals).

11. See *infra* Appendix A, B.

12. This does not include cases that are not decided by opinion.

TABLE 3: *Disposition (All Cases)*¹³

	Affirm	Reverse	In Part	Other	Total
All	41	9	4	7	61
Published	15	8	2	0	25
Unpublished	26	1	2	7	36

Notably, there was only one reversal by an unpublished decision; nearly all reversals were done in a published opinion.¹⁴ Table 4 further separates these dispositions by general case type.

TABLE 4: *Disposition by Case Type*

Criminal and Prisoner Petitions					Prisoner Civil Rights				
Affirm	Reverse	In Part	Other	Published	Affirm	Reverse	In Part	Other	Published
12	1	2	5	9	3	0	2	1	0
Civil - Government Regulation					Civil - Private				
Affirm	Reverse	In Part	Other	Published	Affirm	Reverse	In Part	Other	Published
6	2	0	0	5	16	5	0	1	10
Diversity					Other				
Affirm	Reverse	In Part	Other	Published	Affirm	Reverse	In Part	Other	Published
0	1	0	0	1	4	0	0	0	0

Notably here, there was only one reversal (although a fair number of reversals in part) in either the broad category of criminal cases (which includes habeas cases) or prisoner civil rights cases.¹⁵ Rather, most reversals came in civil cases.¹⁶

The project also codes for the directionality of decisions, meaning roughly whether the decision corresponds to a “conservative” or “liberal” ideological outcome. For example, in civil cases the liberal outcomes typically favor plaintiffs, economic underdogs, or government regulation, whereas the conservative outcomes would be the opposite.¹⁷ Likewise in criminal cases, the liberal outcome favors the criminal defendant, while the conservative outcomes would not.¹⁸ Tables 5a, 5b, 5c, and 5d detail the directionality of the court’s dispositions, separated by civil and criminal cases and published and unpublished decisions.

13. For purposes of generating the Tables 3, 4, and 5a, 5b, 5c, and 5d, “Reverse” includes cases where the lower court decision was vacated and the case remanded. “In Part” includes cases that were affirmed in part and reversed in part. “Other” includes cases where the lower court decision was vacated (but the case was not remanded), cases where a petition was denied or the appeal was dismissed, and opinions that certified a question to another court. In this dataset, all “Other” dispositions involve cases where the appeal was dismissed.

14. See *supra* Table 3.

15. See *supra* Table 4.

16. See *supra* Table 4.

17. More detail about the directionality of decisions can be accessed in the codebooks developed for updating the Court of Appeals Database. See Laura Moyer et al., *Ancillary Resources*, CIR. CTS. DATA, <http://www.circuitcourtsdata.com/other-resources/> (last visited Dec. 20, 2020) (providing links to the publicly available codebooks).

18. *Id.*

TABLE 5A: *Disposition by Directionality (Civil – Published)*

Affirm		Reverse		In Part	Other	
Plaintiff	Not	Plaintiff	Not	Mixed	Plaintiff	Not
7	2	4	3	0	0	0

TABLE 5B: *Disposition by Directionality (Civil – Unpublished)*

Affirm		Reverse		In Part	Other	
Plaintiff	Not	Plaintiff	Not	Mixed	Plaintiff	Not
2	15	1	0	2	0	1

TABLE 5C: *Disposition by Directionality (Criminal – Published)*

Affirm		Reverse		In Part	Other	
Defendant	Not	Defendant	Not	Mixed	Defendant	Not
0	6	1	0	2	0	0

TABLE 5D: *Disposition by Directionality (Criminal – Unpublished)*¹⁹

Affirm		Reverse		In Part	Other	
Defendant	Not	Defendant	Not	Mixed	Defendant	Not
0	6	0	0	0	0	5

These tables add further detail to the raw case outcomes. For example, published civil cases—regardless of disposition—favored the plaintiff or liberal outcomes, whereas unpublished decisions in civil cases favored conservative outcomes and were primarily affirmances.²⁰ By contrast, only one decision in a criminal case outright favored the criminal defendant, and no unpublished opinions favored the criminal defendant.²¹

B. Unpublished and Published Decisions

The project data can also compare the court’s published and unpublished decisions. This is a particularly valuable element of the project’s work for several reasons, including because the court sets precedent through published decisions. The project’s dataset can isolate this precedent from the rest of the court’s work and draw comparisons between these published decisions and the remainder. The following tables are examples of information that can be drawn from this dataset, such as differences in case type between published and unpublished decisions

19. Four cases were coded as “no direction.” These cases involved a grant of summary affirmance in criminal cases as a result of a recent Supreme Court decision, each expressly reserving the criminal defendant’s right to petition for certiorari.

20. See *supra* Tables 5a, 5b.

21. See *supra* Tables 5c, 5d.

(Tables 6 and 7)²² and frequency of separate writings in published and unpublished cases (Tables 8 and 9).²³

TABLE 6: *Published Decisions by Case Type*

	Criminal	Civil - Regulation	Diversity	Civil - Private	Other
Cases	9	5	1	10	0
Percentage	36%	20%	4%	40%	0%

TABLE 7: *Unpublished Decisions by Case Type*

	Criminal	Civil - Regulation	Diversity	Civil - Private	Other
Cases	17	3	0	12	4
Percentage	47%	8%	0%	33%	11%

Comparing Tables 6 and 7 confirms that most published decisions stem from civil cases.²⁴ But this comparison also reveals that civil cases involving government regulation made up a higher percentage of published decisions than cases stemming from private claims or damages claims, which made up a much higher percentage of unpublished decisions in civil cases.²⁵ The percentages of unpublished decisions, by contrast, were comparable for civil and criminal cases (47% criminal to 41% civil) even though the court decided more criminal cases during the period of time.²⁶

TABLE 8: *Separate Writings (Published and Unpublished)*

	Unanimous	Concurrence	Dissent	Concurr./Dissent	Total
Published	20	2	2	1	5
	80%	8%	8%	4%	20%
Unpublished	34	1	1	0	2
	94%	3%	3%	0%	6%

TABLE 9: *Separate Writings (As Percentage of All Cases)*

	Published	Unpublished	Total
Unanimous	34%	56%	90%
Dissent	3%	2%	5%
Concurrence	3%	2%	5%
Concurr./Dissent	2%	0%	2%
Separate Writings	8%	3%	11%

Tables 8 and 9 show that separate opinions are generally uncommon, but they are more common in published cases than unpublished cases.²⁷ Indeed, one in every five published cases involved a separate

22. See *infra* Tables 6, 7.

23. See *infra* Tables 8, 9.

24. Compare *supra* Table 6, with *supra* Table 7.

25. Compare *supra* Table 6, with *supra* Table 7.

26. See *supra* Table 7.

27. See *supra* Tables 8, 9.

writing.²⁸ While these tables represent a small dataset, they largely conform to intuitions about the courts of appeals practices towards published and unpublished opinions. By collecting this data and presenting it through tables like these, the project can help test these intuitions across a longer timeline and larger dataset.

IV. CONCLUSION

All told, the project's data offers a more complete picture of the court's work than currently available. As the tables in this brief preview show, the dataset allows for observation and analysis of each individual judge's contributions, how frequently judges vote with each other and against each other, how and in what types of cases judges write separately, how and in what manner the court decides its cases, and comparisons between published and unpublished decisions. These examples draw on the strengths of the dataset in coding all of the Tenth Circuit's decisions, both published and unpublished, and do not exhaust the range of other variables the project codes such as case origin, case participants, and whether or not the case was decided with oral argument. The project looks forward to providing future results in future issues of the *Denver Law Review*.

28. See *supra* Table 8.

APPENDIX A

VOTES CAST FOR (ALL CASES)

The x-axis lists the voting judge while the y-axis lists the judge that the voting judge voted with.

	Voting Judge																			
	Baldock	Ebel	McKay	Seymour	Kelly	Briscoe	Lucero	Murphy	Portillo	Hartz	O'Brien	Tynkovich	Holmes	Matteson	Phillips	Bacharach	Eid	Moritz	McHugh	Carson
Baldock					2	2				2		3	1	2	1	2	1	2		6
Ebel										1				2						
McKay														1						
Seymour										2		1	1	1		1		1		
Kelly	2											1		9	4		3		1	
Briscoe	2									1		1				3		4		3
Lucero						1				1				1		3	2	6		1
Murphy															3					3
Portillo																				
Hartz	2	1		2		1	1					1	2	2			2			2
O'Brien																				
Tynkovich	3			1	1	1				1			2			1	1	1	1	4
Holmes	1			1		1				3		2			2	1	1	1		2
Matteson	2	2	1	1	9		1			2					9	4	2	3		
Phillips	1				4		1	3					2	9		4	4	4		1
Bacharach	2			1		3	3						1	4	4		3	4		1
Eid	1				3	1	2						2	3		3	1	2		
Moritz	2		1	1		4	6					1	1	3	4	4	2			
McHugh				1	1	4	1	3				1			3	3		3		
Carson	6					3				3		4	2		1	2				

