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Chief Judge Martin and the Modern Sixth Circuit

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ARTICLE

CHIEF JUDGE MARTIN AND THE MODERN SIXTH CIRCUIT

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INTRODUCTION

Chief Judge Boyce F. Martin, Jr. has recently and eloquently championed judicial reliance on unpublished opinions.[1] Judge Martin, who speaks from more than two decades of service on the United States Court of Appeals for the Sixth Circuit, substantially improves understanding of this court. Judge Martin informally and pragmatically scrutinizes critical problems that confront the modern regional circuits through the prism of unpublished determinations while elucidating judicial dependence on these decisions. Judge Martin apologizes for the dearth of empirical data on the decisions' invocation, but the jurist affords subjective opinions, personal views, and revealing anecdotes based on practical experience.

Judge Martin also impeccably timed his article's publication, which coincided with the December 1998 issuance by the Commission on Structural Alternatives for the Federal Courts of Appeals (the Commission) of its final report and suggestions.[2] The Commission had one year to study the appellate "system, with particular reference to the Ninth Circuit," and to write a report with recommendations for such change as may be appropriate for prompt, fair, and effective caseload resolution.[3] The thorough Commission evaluation illuminates Judge Martin's endeavor and supplies some information that Judge Martin did not. For example, the commissioners indicate the percentage of oral arguments provided and visiting judges employed by each court.[4] These propositions mean that Judge Martin's *In Defense of Unpublished Opinions*[5] warrants a response and that its ideas can be usefully compared with the Commission work. This essay undertakes that effort.

First, the Essay descriptively assesses Judge Martin's account of the modern Sixth Circuit, attempting to derive instructive perspectives

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1. *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999).

2. *See* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT (Dec. 18, 1998), *available at* http://app.comm.uscourts.gov/final/appstruc.pdf [hereinafter COMMISSION REPORT].

3. *See* Pub. L. No. 105-119, § 305(a)(1), 111 Stat. 2440, 2491 (1997) (detailing the establishment and responsibilities of the Commission on Structural Alternatives for the Federal Courts of Appeals).

4. *See* COMMISSION REPORT, *supra* note 2, at 22, tbl. 2-6 (affording the percentage of cases decided on the merits that had oral arguments; for example, in 1997 the 6th Circuit held oral argument in 50% of cases and the 9th Circuit in 39%); COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, WORKING PAPERS 108, Tbl. 6a (1997) [hereinafter WORKING PAPERS] (illustrating the frequency with which visiting judges decide appeals on the merits).

5. *See* Martin, *supra* note 1.

from it.[6] This Essay finds that Judge Martin's article yields helpful insights, especially regarding use of those decisions and concepts which he premises on twenty years of dispute resolution. Despite the value of his views, however, few of these ideas have empirical support and the emphasis on unpublished determinations is rather narrow, thus complicating the formulation of definitive conclusions about how the Sixth Circuit actually functions.

Second, this Essay descriptively evaluates the Commission study in an effort to enhance comprehension of the Sixth Circuit.[7] I ascertain that the Commission assembled, analyzed, and synthesized much empirical data. This information advances appreciation of the Sixth Circuit, particularly by facilitating comparisons, which confirm and challenge perspectives articulated by Judge Martin. The material correspondingly suggests that the court may perform less well than it could and less effectively than numerous other tribunals. However, the Commission's ideas, even in combination with Judge Martin's views, are not broad or refined enough to permit conclusive findings.

Third, this Essay provides recommendations to increase understanding of the Sixth Circuit and improve its operations.[8] For instance, the collection, assessment, and synthesis of additional empirical data, especially together with the information compiled by Judge Martin and the Commission, would yield more certain determinations. The court should also consult ways that the tribunal works less efficaciously than it might and adopt measures that would enhance circuit operations.

I. ANALYSIS OF *IN DEFENSE OF UNPUBLISHED OPINIONS*

A. Descriptive Analysis

Judge Martin persuasively defends invocation of unpublished opinions while providing valuable perspectives on the Sixth Circuit. The jurist opens his article, *In Defense of Unpublished Opinions*, by asserting that the growth in caseloads and concomitantly published dispositions threatens to overwhelm the courts.[9] Judge Martin

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6. *See infra* notes 9-60 and accompanying text.
7. *See infra* notes 61-116 and accompanying text.
8. *See infra* notes 118-53 and accompanying text.
9. *See* Martin, *supra* note 1, at 177 (stating that appellate judges are encumbered by "the weight of tens of thousands of appeals every year, and [that] our 'multiplied utterances' would increase beyond all reason were we forced to publish all our opinions"); *see also* Gilbert S. Merritt, *The Decision Making Process in the Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1386 (1990) (stating that an increase in caseloads has overburdened judges and diminished the quality of opinions).

contends that unpublished decisions are a "pressure valve . . . a way to pan for judicial gold while throwing the less influential opinions back into the stream."[10] He also claims that the federal appellate judiciary considers unpublished determinations a "necessary, and not necessarily evil, part of the job."[11] Judge Martin predicted that these ideas would receive support from responses to an informal Judicial Conference survey—respecting courts' inconsistent use and citation of unpublished decisions and continuing designation of some dispositions as unpublished—because his colleagues on the Sixth Circuit and other tribunals are satisfied with the status quo.[12] Judge Martin proved prescient, as the courts' chief judges voiced nearly unanimous opposition to change.[13] Judge Martin juxtaposes the above views with those of legal academicians who find that unpublished opinions create many systemic problems.[14] He enumerates a litany of criticisms—"loss of precedent, sloppy decisions, lack of uniformity, difficulty of higher court review,

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10. Martin, *supra* note 1, at 178 (arguing that unpublished opinions serve to filter unnecessary information and reduce the publication burden of the court). *See generally* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL— THE PROBLEMS OF THE U.S. COURTS OF APPEALS 119-35 (1994) (arguing that unpublished opinions serve to filter unnecessary information and lessen the publication burden of the courts' opinions).

11. Martin, *supra* note 1, at 178-79 (citation omitted); *see, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 171 (1996) (contending that the benefits of limited publication of opinions generally outweigh the costs of not doing so); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 921 (1986) (stating that although an opinion that is rejected for publication may later prove valuable, this does not of itself justify an abandonment of the current system of selective publication).

12. *See* Letter from Circuit Judge Will L. Garwood, Chair, Advisory Comm. on Appellate Rules, to Chief Judge Harry T. Edwards, U.S. Court of Appeals for the D.C. Circuit (Jan. 28, 1998) (on file with *American University Law Review*) (arguing that most members of the court feel strongly that some opinions should remain unpublished); *see also* 28 U.S.C. § 331 (1994) (stating that the Judicial Conference is the federal courts' policymaking arm); Martin, *supra* note 1, at 179-80 (citations omitted). *But cf.* Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (holding unpublished opinions unconstitutional), *vacated en banc*, 2000 U.S. LEXIS 32055 (Dec. 18, 2000).

13. *See, e.g.*, Letter from Ralph K. Winter, U.S. Court of Appeals for the Second Circuit, to Circuit Judge Will L. Garwood, Chair, Advisory Comm. on Appellate Rules (Feb. 4, 1998) (on file with *American University Law Review*) ("I strongly believe that Courts of Appeals should be permitted to continue to designate some opinions as unpublished . . . ."); *see also* Memorandum re: Item No. 91-17, from Patrick J. Schiltz, Reporter, Advisory Comm. on Appellate Rules, to Advisory Comm. on Appellate Rules (Mar. 12, 1998) (on file with *American University Law Review*).

14. *See, e.g.*, PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 39-41 (1976) (arguing in favor of published opinions and analyzing the problems of reliance on unpublished opinions); Martin, *supra* note 1, at 180 (presenting a list of common criticisms of unpublished opinions); 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, 946 (1989) (relating common concerns about the use of unpublished opinions).

unfairness to litigants, less judicial accountability, less predictability"—which scholars have leveled at judges for relying on these dispositions.[15]

The second section of Judge Martin's article justifies the use of unpublished determinations because the appeals courts receive too many cases that lack sufficient importance.[16] Judge Martin explains that federal jurisdiction's inexorable expansion, steady docket growth, and parties' enhanced willingness to appeal mean that caseloads have "become larger and more diluted in merit."[17] Judge Martin believes that none of these trends regarding input will change.[18] Judge Martin thus broaches the possibility of modifying output by requiring the publication of all decisions.[19] He rejects this prospect because it would reduce quality "by stretching judicial resources even more" through increases in "remarkably brief and uninformative, but nonetheless 'published,' opinions."[20] Judge Martin premises these quantitative and qualitative ideas on "personal experience" and on anecdotes derived from his service as a law clerk;[21] however, he bolsters other views with empirical data.[22]

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15. Martin, *supra* note 1, at 180; *see, e.g.*, POSNER, *supra* note 11, at 165-68 (highlighting several criticisms of unpublished opinions, including lack of careful preparation, the suppression of opinions with high precedential value, and disadvantages to one-shot litigants who may have difficulty accessing unpublished materials); Robert Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 120 (1995) (evaluating criticisms of restricting publication, namely loss of judicial accountability, the difficulty of appellate review, the problem of predicting precedential value, and inequalities of access to unpublished opinions).

16. *See* Martin, *supra* note 1, at 181-83 (addressing the problems caused by the volume of briefs submitted to the court); *see also* Nichols, *supra* note 11, at 919 (arguing that the large number of federal appeals filed necessitates a selective publication policy).

17. Martin, *supra* note 1, at 183. For analysis of the first three ideas, see COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 10-16, 44-45 (1995) [hereinafter LONG RANGE PLAN]; JUDITH MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 9-53 (1993).

18. *See* Martin, *supra* note 1, at 182; *see also* FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) [hereinafter REPORT OF THE FEDERAL COURTS STUDY COMMITTEE] (addressing the "crisis of volume" in federal appellate courts); Merritt, *supra* note 9, at 1388 (stating that parties to cases generally seek oral argument, even though the appellate courts are moving away from argument because of rising caseloads). *But see* WORKING PAPERS, *supra* note 4, at 128-33 (challenging the widely-held view that the increase in caseloads in the Courts of Appeals is attributable to an across-the-board desire to appeal).

19. *See* Martin, *supra* note 1, at 183; *see also* William M. Richman & William L. Reynolds, *Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 339-42 (1996) (making a similar proposal).

20. Martin, *supra* note 1, at 183.

21. Judges today hear more oral arguments per sitting and receive larger briefs. Martin reflects on his own experience as a law clerk on the Sixth Circuit by

The third section of Judge Martin's article offers historical material on the unpublished opinion. Judge Martin first traces its origins to a 1964 Judicial Conference resolution, which admonished judges to publish only decisions that have general precedential value and to make the decisions succinct.[23] During the 1970s, the Federal Judicial Center (FJC) issued a report proposing standards which recognized that judges must devote more resources to providing a published opinion than a written explanation.[24] By 1974, every regional circuit had adopted a publication plan that prescribed guidance for issuing published determinations.[25] Judge Martin astutely observes that today "unpublished opinion" is "a fine, almost meaningless distinction in a world of electronic legal research," which enables all appellate decisions to be published in some form.[26]

Judge Martin then reviews the status of unpublished determinations. He observes that the Sixth Circuit has a presumption in favor of publishing opinions and against publishing orders.[27] Judges must evaluate many factors when deciding whether to publish. Although the court's local rules do not mandate publication of determinations that overturn district court decisions or that include dissents or concurrences, the jurist claims that the circuit usually publishes reversals and opinions with dissents.[28] Three-judge

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recounting that during a three-week sitting, his judge heard as many as twenty-seven cases, which is three cases a day, three days a week. *See id.* at 182.

22. In 1945, one in forty cases was appealed, but in 1988, one in eight cases was appealed. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 110 (offering statistical data on the increase in caseloads for appellate judges); *see also* Martin, *supra* note 1, at 183.

23. *See* Martin, *supra* note 1, at 184 (recalling that during Judge Martin's clerkship in 1963-64, nearly all opinions were published, but courts were on the "cusp of change"); *see also* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

24. *See* ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 3, 22-23 (Federal Judicial Center Research Series No. 73-2, 1973); *see also* 28 U.S.C. § 620 *et seq.* (1994) (authorizing the FJC as the research arm of the federal courts).

25. *See* William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 806, 808 (stating that the limited publication plans had the immediate effect of reducing the number of published opinions from 48.4% to 37.2% between 1973 and 1977); *see also* Martin, *supra* note 1, at 184-85 (arguing that the reduction in unpublished opinions would reduce the quality of the opinions).

26. Martin, *supra* note 1, at 185-86 (citation omitted); *see also infra* note 93 and accompanying text (stating that the commission report found all but three appeals courts make unpublished opinions available on Lexis and Westlaw).

27. *See* Martin, *supra* note 1, at 186; *see also* 6TH CIR. R. 206(b) (formerly 6TH CIR. R. 24(b)) ("Designation for Publication. An opinion or order shall be designated for publication upon the request of any member of the panel.").

28. *See* 6TH CIR. R. 206(a) (formerly 6TH CIR. R. 24(a)) (providing criteria for publication of decisions). For example, Sixth Circuit Rule 206(a)(4) considers "whether [the Sixth Circuit decision] is accompanied by a concurring or dissenting

panels make the publication determination after oral argument and generally the decisions are published, unless a majority rejects publication; formal votes are rare and judges typically defer to any panel member who strongly urges publication.[29]

This subsection of Judge Martin's article provides informative insights on appellate courts' operations. Perhaps most revealing is the striking inconsistency that attends the courts' reliance on unpublished opinions. Illustrative are the criteria that govern issuance of a published decision, the weight assigned unpublished determinations, and litigants' ability to cite them.[30] Several tribunals specifically mandate publication when opinions include concurrences or dissents or reverse published district court judgments.[31] Others entrust publication to judicial discretion, but even their decisional processes vary.[32] Most appeals courts permit nonpublication on a unanimous or majority panel vote,[33] although a few leave the determination to individual judges' discretion[34] and one

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opinion." 6TH CIR. R. 206(a)(4). Rule 206(a)(5) considers "whether [the Sixth Circuit decision] reverses the decision below...." 6TH CIR. R. 206(a)(5); *see also* Martin, *supra* note 1, at 186-87 (stating that "[i]t is fair to say that reversals or opinions with dissents are almost always published" in the Sixth Circuit); Reynolds & Richman, *supra* note 25, at 810-14, 821-33 (affording history of publication of decisions in the Sixth Circuit); *infra* note 115 and accompanying text (examining Judge Martin's assertion that reversals and opinions with dissent are usually published).

29. *See* Martin, *supra* note 1, at 187-88. The Sixth Circuit has no mechanism for litigants to submit publication requests, but some courts do. *See id.* at 188; *see also* 4TH CIR. R. 36(b) ("Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result."); 11TH CIR. R. 36-3 (providing that, upon motion by a party, the panel may by unanimous vote order a previously unpublished decision to be published).

30. *See* Martin, *supra* note 1, at 186-88. *See generally* Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997) (discussing procedural variances from court to court).

31. *See, e.g.*, D.C. CIR. R. 36(a) (providing that the court publishes "opinions and explanatory memoranda that have general public interest," i.e., cases of first impression, or if reversing a "published agency or district court decision"); 9TH CIR. R. 36-2 (providing the criteria necessary for the publication of an opinion, including if it includes a concurrence or a dissent); *see also* Martin, *supra* note 1, at 187.

32. *Compare* 4TH CIR. R. 36(b) (affording the court discretion to provide limited explanations without facts or background, but providing no guidance as to which opinions should be published), *with* 8TH CIR. R. APP. I (allowing a court to decide whether to publish an opinion and providing scenarios when publishing an opinion would be appropriate), *and* Martin, *supra* note 1, at 187 n.46 (discussing the collegial way Sixth Circuit judges determine whether to publish an opinion). *See also* Reynolds & Richman, *supra* note 25, at 810-14, 821-33 (providing history of the publication decision in the Fourth Circuit).

33. *See, e.g.*, 1ST CIR. R. 36.2(b) (stating that panel members shall discuss and decide the publication status of a case); 3D CIR. I.O.P. 5.3 (according the majority of the panel the authority to determine publication status); *see also* Martin, *supra* note 1, at 187 (discussing the panel decision regarding publication in the Sixth Circuit).

34. *See supra* note 32 (comparing appeals court practices).

allows nonpublication unless a majority chooses to publish.[35]

The third subpart examines the prevalence of unpublished opinions. Judge Martin finds historical data on their numbers scarce; however, he does muster some information.[36] The author consults current material on unpublished decisions maintained by the Administrative Office of the United States Courts (Administrative Office), the federal courts' administrative arm, and claims that the Sixth Circuit approximates the national average by issuing unpublished dispositions in seventy-nine percent of its cases.[37]

Section four of Judge Martin's article supplies practical and policy justifications for using unpublished opinions. First, selective publication has the pragmatic benefit of increasing the courts' productivity.[38] The writer asserts that he and his clerks spend about half the time on an average unpublished decision as a published opinion because the unpublished decision is fact-driven, requires only four typewritten pages, and implicates clear points of law.[39] "The relative straightforwardness of the legal questions in an unpublished opinion also saves research time," as the issues' recurring nature reduces the need for novel research.[40] The author admonishes that practicality is only one, and never a dispositive, element as the publication decision is merit-based.[41] Second, Judge Martin enunciates a policy rationale. He contends that courts must distinguish "opinions worthy of publication, and of making a meaningful contribution" to precedent, from ones that "merely apply

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35. *See* 11TH CIR. R. 36-2 ("An opinion shall be unpublished unless a majority of the panel decides to publish it."); *see also* Merritt, *supra* note 9, at 1386 (finding similar diversity among Courts of Appeals in decisions about whether to publish an opinion); Nichols, *supra* note 11, at 924-27 (same); Martin, *supra* note 1, at 188 (stating that in the Sixth Circuit, "[o]pinions are published unless a majority of the panel votes against publication").

36. *See* Martin, *supra* note 1, at 188-89; *see also* Reynolds & Richman, *supra* note 25, at 814-16 (providing historical data on the Fourth and Sixth Circuits).

37. *See* Martin, *supra* note 1, at 189 (citation omitted); *see also* 28 U.S.C. § 601 *et seq.* (1994) (authorizing the Administrative Office).

38. *See* Martin, *supra* note 1, at 189-91; *see also* Nichols, *supra* note 11, at 927-28 (contending that selective publication avoids the "absurdity of destroying forests to distribute masses of prolix and repetitious material").

39. *See* Martin, *supra* note 1, at 189-91; *see also* Merritt, *supra* note 9, at 1392 (asserting that publishing every opinion provides only marginal benefits); Reynolds & Richman, *supra* note 25, at 816-21 (analyzing opinions' length and the time to produce them).

40. Martin, *supra* note 1, at 190 (finding that the legal questions are easily answered after many years on the bench and assuming that his "colleagues have the same experience").

41. *See id.* at 191 (claiming that the decision to publish is based on the merits of each case with the practical benefits of saving paper and library space seldom factoring into the consideration); *see also* Reynolds & Richman, *supra* note 25, at 807-08 (surveying practical rationales).

settled law to decide a dispute between parties."[42] This differentiation maintains a cohesive, understandable corpus of law, and emphasizing important appeals responds to the information explosion.[43] The Sixth Circuit resolves seven percent of argued cases without opinion from the bench, but Judge Martin finds the number too high and claims that most litigants "deserve a cogent, written explanation."[44]

He calls for sharply restricted party citation to unpublished determinations because this will maintain the decisions' non-precedential status: "as strongly as I believe in the production of unpublished opinions, I am just as adamantly opposed" to their citation.[45] Judge Martin asserts that precluding citation conserves the research time of judges and litigants and minimizes any remaining unfairness that may result from parties' unequal access to unpublished determinations by limiting the creation of a secret body of law.[46]

Judge Martin urges that his Sixth Circuit colleagues tighten the local rules that govern citation to provide that "unpublished opinions have no precedential value and are not even the least bit persuasive."[47] The jurist lacks "encyclopedic knowledge" of publication practices but believes that he possesses sufficient familiarity to state that the court permits rather liberal citation.[48] His

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42. *See* Martin, *supra* note 1, at 189; *see also* Merritt, *supra* note 9, at 1392 (asserting that only case law expounding or creating new law warrants publication).

43. *See* Martin, *supra* note 1, at 191-92 (insisting that judges can make this distinction "in an extremely high percentage of the cases"); *see also* Nichols, *supra* note 11, at 924 (maintaining that judges sometimes err in deciding to publish or not to publish their decision, but that these errors are not so extensive that the selective publication system should be abandoned).

44. *See* Martin, *supra* note 1, at 192-93 (citation omitted); *see also id.* at 193 n.69 (stating that the Second Circuit is the only other court that employs this practice and only in a few appeals); Merritt, *supra* note 9, at 1386, 1394 (explaining history of the practice in the Sixth Circuit); Reynolds & Richman, *supra* note 25, at 807-08 (surveying policy rationales); 2D CIR. R. 0.23 (providing for disposition of cases in court or by summary order); 6TH CIR. R. 19 (allowing a panel to dispose of a case in open court after oral argument if every judge on the panel believes there is no jurisprudential purpose to providing a written opinion).

45. Martin, *supra* note 1, at 193 (stating that "[t]his is the gravamen of this article"); *see also* Nichols, *supra* note 11, at 928 (maintaining that the "prohibition against citing unpublished material should be maintained, and those materials should continue to be nonprecedential").

46. *See* Martin, *supra* note 1, at 194-97 (arguing that citing unpublished decisions creates a larger body of law which is less accessible and results in research being more difficult and more expensive).

47. *Id.* at 194-95. Several courts so provide. *See, e.g.*, D.C. CIR. R. 28(c) (stating that unpublished orders, judgments and dispositions shall not be cited as precedent); 5TH CIR. R. 47.5.4 (stating that unpublished decisions are "not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case," but may still be persuasive).

48. *See* Martin, *supra* note 1, at 194. Some courts also permit liberal citation. *See, e.g.*, 10TH CIR. R. 36.3 (allowing unpublished opinions to be cited as persuasive

survey of many tribunals' strictures once again shows the great disparity because, for example, some allow citation for various purposes, even as others explicitly provide that unpublished dispositions lack any precedential value.[49]

B. Critical Analysis

Judge Martin significantly enhances understanding of the Sixth Circuit through the lens of unpublished decisions and two decades of experience. Perhaps most important, the judge perceptively reveals the enormous discrepancies in system-wide publication practices. He specifically finds that the Sixth Circuit's use of unpublished opinions approximates the national average[50] while opining that the tribunal assigns the determinations too much weight and permits their overly frequent citation.[51]

The jurist provides numerous instructive insights on how the Sixth Circuit functions that he derives primarily from practical, daily dispute resolution. Judge Martin seems to state expressly, or at least strongly implies, that he believes the court operates effectively by, for instance, providing published decisions in appeals that merit them[52] and delivering appellate justice by, for example, promptly, economically, and fairly treating cases.[53] The writer apparently admits, however, that the appeals courts fail to attain the appellate ideal: merit-based disposition of every appeal after full briefing and oral argument, close consultation among three active circuit judges,

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authority, but as not binding precedent); 11TH CIR. R. 36-2 (same).

49. *See* Martin, *supra* note 1, at 194-95 (explaining the use of unpublished decisions by some appeals courts and problems resulting from this use); *see also* Merritt, *supra* note 9, at 1386 (finding similar diversity among Courts of Appeals concerning citation of unpublished opinions).

50. *See* Martin, *supra* note 1, at 189 (positing that the national average for unpublished decisions for cases terminated on the merits after oral hearing or submission on briefs in 1995-1996 was 76% while the Sixth Circuit average was 78.9%).

51. *See id.* at 194 (noting that the Sixth Circuit liberally uses unpublished decisions).

52. *See id.* at 191 (maintaining that, although unpublished opinions save time, publication decisions are based primarily on the merits). The Commission finds that every appeals court so operates and seems to define this idea in terms of satisfactory performance vis-à-vis the parameters that it assessed. *See* COMMISSION REPORT, *supra* note 2, at ix-xi, 29-30; *infra* notes 70-94 and accompanying text (discussing the Commission's findings).

53. *See* FED. R. CIV. P. 1 (stating that the rules of the U.S. district courts shall secure a "just, speedy, and inexpensive determination"); *see also* Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1331-92 (1995) (commenting on the construction of Rule 1 of the Federal Rules of Civil Procedure to ensure a speedy trial); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1286 n.90 (1996) (discussing Rule 1).

and issuance of a published opinion that thoroughly explicates the decision reached.[54] Indeed, too great reliance on unpublished determinations could be one telling indicator that a tribunal performs less efficaciously than it might and may not be dispensing justice, while widespread dependence on these opinions shows that modern courts no longer even aspire to achieve this ideal.[55]

Despite Judge Martin's valuable contributions to understanding the Sixth Circuit, he incompletely describes the court. In fairness, the judge does not purport to afford a comprehensive account of circuit performance, and the jurist candidly concedes that he premises many perceptions on practical experience, personal knowledge, and anecdotes, rather than empirical data that has been systematically collected, assessed, and synthesized.[56] For instance, readers profit from knowing that the tribunal resolves seven percent of argued appeals orally[57] and from Judge Martin's opinion that he and his colleagues can correctly identify cases that should be published, that the judges rarely differ on this determination,[58] and that selective publication improves productivity.[59] However, these and other ideas that Judge Martin expresses are controversial and critics have contested several of them, although much that the jurist states is empirically verifiable or at least could be informed by carefully assembled empirical data.[60] More specifically, it is difficult to ascertain whether courts' publication determinations are accurate without evaluating the legal and factual issues posed in many specific appeals to determine whether the issuance of published dispositions would have improved dispute resolution. Regardless of how instructive unpublished decisions are in fact, they cannot serve as a surrogate for overall circuit operations, which range across a broad spectrum as concrete as courthouse construction and as abstract as circuit law's coherence.

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54. *See, e.g.*, BAKER, *supra* note 10, at 14-30 (outlining the ideal adjudicative process for appeals courts); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 109 (highlighting some of the hallmarks of our appellate justice system).

55. *See* sources cited *supra* note 54; Merritt, *supra* note 9, at 1388 (suggesting that oral arguments afforded can serve as a measure of a court's health).

56. *See* Martin, *supra* note 1, at 186 (relating Judge Martin's observations of the manner in which the Sixth Circuit addresses cases).

57. *See id.* at 193.

58. *See id.* at 190-91.

59. *See id.* at 190.

60. *See infra* notes 126-51 and accompanying text (supporting the idea that certain information, including some information that Judge Martin and the Commission produced, cannot support definitive conclusions); *see also supra* notes 14-15 and accompanying text (contesting some of Judge Martin's views and methods).

In short, the limited empirical data that Judge Martin supplies and his somewhat narrow focus on unpublished opinions restrict efforts to determine with confidence how well the Sixth Circuit actually functions. This Essay's second section, therefore, consults the work of the Commission on Structural Alternatives for the Federal Courts of Appeals to ascertain whether its empirical nature or breadth permits more definitive conclusions.

II. ANALYSIS OF THE COMMISSION'S WORK

A. Descriptive Analysis

1. Authorization of the Commission and a description of its work

The history of the Commission requires relatively little evaluation here, as the background has been rather thoroughly assessed elsewhere.[61] Nonetheless, some treatment is warranted because this can enhance appreciation of the Commission's endeavor while facilitating comparison with Judge Martin's *In Defense of Unpublished Opinions*[62] and the formulation of more certain determinations related to the Sixth Circuit.

The genesis of the Commission was a lengthy dispute that principally implicates the large size of the Ninth Circuit. Since 1983, there have been many attempts to restructure the court; however, in 1997, Congress authorized a study of the appellate system, which was to emphasize this tribunal.[63] Chief Justice William H. Rehnquist chose as commissioners retired United States Supreme Court Justice Byron R. White, Sixth Circuit Judge Gilbert S. Merritt, Ninth Circuit Judge Pamela Ann Rymer, District Judge William D. Browning of Arizona, and immediate past American Bar Association (ABA) President N. Lee Cooper.[64]

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61. *See* COMMISSION REPORT, *supra* note 2, at 1-6 (discussing the creation, mission, and activities of the Commission). Other authors have discussed relevant background material relating to the Commission. *See, e.g.*, Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887 (1999) (outlining the Commission's draft report and arguing against a reconfiguration of the Ninth Circuit); Jennifer Spreng, *Three Divisions in One Circuit? A Critique of the Recommendations from the Commission on Structural Alternatives for the Federal Court of Appeals*, 35 IDAHO L. REV. 551 (1999) (listing and discussing the Commission recommendations); Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189 (1997) (recommending specific modes of study for the Commission).

62. *See* Martin, *supra* note 1.

63. *See infra* note 64 (discussing the formation of the Commission).

64. *See* COMMISSION REPORT, *supra* note 2, at 92 app. B (listing the Commission

During 1998, the commissioners sought much relevant information in six public hearings, in surveys of appeals and district judges and appellate attorneys, and in studies performed by the Federal Judicial Center (FJC) staff. The Commission specifically gathered material regarding the courts' work. For example, it assembled data on the percentage of appeals that the appellate courts afforded oral arguments and published opinions, on the time that the tribunals need to resolve cases, and on the measures that the courts use to address the steadily growing dockets which have dramatically changed them since the 1970s.[65]

The Commission analyzed all of the information that it had accumulated or had received, and on October 7, 1998, the commissioners issued a tentative draft report and suggestions for which they solicited public comment over a thirty-day period.[66] Few people who responded or testified at the earlier hearings were judges of, or practiced before, the Sixth Circuit, although a tiny number of witnesses or submissions expressly mentioned this tribunal.[67] After the Commission reviewed the public input, the entity made minimal changes and issued a final report that essentially recommended a divisional arrangement for the Ninth Circuit and the other courts as they grow.[68] The commissioners also collected valuable empirical

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members and their relevant biographical information); *see also* Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491 (1997). The Act assigned the Chief Justice of the United States the power to appoint five members to the Commission and assigned the Commission three functions:

> (i) study the present division of the United States into the several judicial circuits;
>
> (ii) study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit; and
>
> (iii) report to the President and the Congress its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process.

Id. § 305(a)(1)(B), § 305(a)(2)(A).

65. *See* COMMISSION REPORT, *supra* note 2, at 21-25, 39 (examining two recent innovations in the federal appellate courts: the adoption of differentiated decisional processes and the use of central staff attorneys); *see also* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 109 (stating that caseload increases have transformed the circuits).

66. *See* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, TENTATIVE DRAFT REPORT (Oct. 7, 1998), *available at* http://app.comm.uscourts.gov/report/appstruc.pdf.

67. *See* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, PUBLIC HEARINGS AND TESTIMONY (Mar. 19, 1999), *available at* http://app.comm.uscourts.gov/schedule.htm (providing witness lists and testimony from all hearings, including testimony submitted by persons who did not appear at the public hearings).

68. *See* COMMISSION REPORT, *supra* note 2, at 57 (recommending that it is better

data on the Sixth Circuit.[69]

2. Commission data on the Sixth Circuit

The United States Court of Appeals for the Sixth Circuit is in the middle or upper range of the appeals courts based on numerous, applicable considerations, all involving size but only one of which measures performance. The circuit serves the second biggest population (30 million people), encompasses the fifth largest geographic area (178,000 square miles), ties three courts for the third highest number of federal districts (9), has the third largest complement of active appellate judges (16), equals two other tribunals for the third largest number of district judges (62), annually receives the sixth greatest number of cases (4,600), and each year resolves the fifth highest number of appeals (4,600).[70]

Throughout the 1997 fiscal year, members of the Sixth Circuit decided 2,100 cases on the merits, which was the fifth largest statistic in the appellate system.[71] The court concomitantly terminated 132 appeals on the merits per authorized active judgeship, as compared to the national average of 155.[72] This meant that the Sixth Circuit concluded the seventh highest number of cases per authorized judgeship.[73]

During the 1997 fiscal year, judges of the Sixth Circuit granted oral arguments in fifty percent of the appeals in which the court resolved the issue on the merits.[74] The figure was considerably higher than the system-wide average of forty percent, was surpassed only in the First, Second and Seventh Circuits and was twenty percentage points greater than the numbers compiled by the Third, Fourth, Tenth and Eleventh Circuits, which conducted oral arguments in only thirty percent of their cases.[75]

For the 1997 fiscal year, Sixth Circuit judges issued published

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for California, which contributes the most to the caseload of the Ninth Circuit, to be subject to division within the same circuit than to be split between two circuits, which would divide the common body of law on issues important in the Pacific Rim).

69. *See id.* at 13-14 (describing the research and analyses performed by the Commission).

70. *See* COMMISSION REPORT, *supra* note 2, at 27, tbl. 2-9 (listing the circuit population, size, composition, and number of judgeships for the appeals courts); WORKING PAPERS, *supra* note 4, at 93, tbl. 1 (listing the number of appellate judgeships, appeals filed, and appeals terminated by any method). The data listed in the Essay are for the 1997 fiscal year, unless otherwise indicated.

71. *See* WORKING PAPERS, *supra* note 4, at 93, tbl. 1.

72. *See id.*

73. *See id.*

74. *See id.* at 93, tbl. 2.

75. *See id.*

opinions in eighteen percent of the appeals that the court decided on the merits.[76] This statistic was five percentage points beneath the national average and was higher than only the Third, Fourth, and Eleventh Circuits.[77] In the 1997 fiscal year, members of the Sixth Circuit correspondingly terminated twenty-four percent of the cases on the merits after oral argument.[78] The figure was two percent greater than the system-wide average and higher than seven other courts.[79]

Throughout the 1997 fiscal year, thirty-four percent of three-judge panels that concluded cases after oral argument in the Sixth Circuit included at least one visiting appellate or district court judge, while only eight of the 168 panels constituted had three active Sixth Circuit members.[80] The thirty-four percent figure was one point above the national average and was the sixth largest.[81] By way of comparison, zero and sixty-four percent of three-judge panels assembled respectively in the District of Columbia and Eleventh Circuits had a participant who was not an active member of the appellate court.[82]

Between the 1995 and 1997 fiscal years in the Sixth Circuit, the median time interval for counseled, civil, non-prisoner cases that the court resolved after hearing or submission was sixteen months from the notice of appeal to final disposition.[83] The Sixth Circuit was slower than every other court, except the Ninth Circuit which needed 18.2 months, while the systemwide average during this period was 12.4 months.[84] Moreover, the Sixth Circuit ranked tenth for one and eleventh for two other indicia that the commissioners used in calculating time to disposition, even though the court was faster than the national average vis-à-vis the remaining two parameters.[85]

The Commission compiled additional material that implicates management practices.[86] The entity considered distinctive virtually

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76. *See id.* at 93, tbl. 3. This confirms the figure that Judge Martin supplied. *See supra* notes 36-37 and accompanying text (stating that Judge Martin found the Sixth Circuit issued unpublished decisions approximately 80% of the time).

77. *See* WORKING PAPERS, *supra* note 4, at 93, tbl. 3.

78. *See id.* at 94, tbl. 5.

79. *See id.*

80. *See id.* at 108, tbl. 6a (providing a 34% figure); CHARLES E. GRASSLEY, CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS, ANALYSIS OF THE SIXTH CIRCUIT 3 (1999) (asserting that eight out of 168 panels had three active Sixth Circuit members).

81. *See* WORKING PAPERS, *supra* note 4, at 108, tbl. 6a.

82. *See id.*

83. *See id.* at 95, tbl. 7.

84. *See id.*

85. *See id.*

86. *See id.* at 101-16 (summarizing management practices within the existing appeals courts).

no aspect of Sixth Circuit operations involving staff organization and general duties, alternative dispute resolution (ADR), case screening, and non-argument decisionmaking. For example, the court, as all circuits, uses a "mediation or conference program to resolve some appeals by settlement, with little or no judicial intervention"[87] and, like most tribunals, does not employ judges to screen cases for oral argument.[88]

The Commission also provided information on important issues regarding opinions and publication. It found different publication rates across tribunals, but relatively consistent "formal criteria that courts say govern their decisions about what to publish."[89] Between the 1995 and 1997 fiscal years, the Sixth Circuit compiled figures measuring opinion publication, which were respectively twenty, seventeen, and twelve percentage points lower than the system-wide average for orally argued appeals for decisions with a dissent and for reversals.[90] The Commission concomitantly observed that the courts have long followed diverse traditions for publishing and that all tribunals "(except D.C.) have, since 1987, even further reduced their publication rates."[91] The Sixth Circuit published twenty-two percent of its merit terminations in 1987, a statistic that declined to seventeen percent by 1993 and remained constant at eighteen percent in 1997.[92] The Commission correspondingly reported that every court, except the Third, Fifth and Eleventh Circuits, makes unpublished opinions available on LEXIS and Westlaw.[93] Moreover, the entity found "substantial variation" in courts' practices and policies respecting the citability of unpublished decisions but "no significant disuniformity of procedure among" tribunals allowing citation for any persuasive value it might have.[94]

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87. *Id.* at 102. *See generally* JAMES B. EAGLIN, FEDERAL JUDICIAL CENTER, THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS: AN EVALUATION 1 (1990) (listing the three purposes behind Sixth Circuit Local Rule 18: "(1) explore settlement possibilities, (2) resolve procedural issues, and (3) clarify issues in the appeal"); ROBERT J. NIEMIC, FEDERAL JUDICIAL CENTER, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS 52-57 (1997) (describing the pre-argument conference program for the Sixth Circuit).

88. *See* WORKING PAPERS, *supra* note 4, at 103-04.

89. *Id.* at 110.

90. *See id.*

91. *Id.* at 111-12.

92. *See id.* at 112, tbl. 10.

93. *Id.* at 112; *see also* Merritt, *supra* note 9, at 1392-93 (describing criticisms that arise when opinions are reported on LEXIS and Westlaw but not in the official reporters, including "the definitional problem of what is an opinion," but noting the limited availability of unpublished opinions).

94. *See* WORKING PAPERS, *supra* note 4, at 112. Sixth Circuit appellants, district judges and appellate attorneys surveyed by the Commission seemed relatively satisfied with the court's consistency and predictability as well as with the court's

3. A closer comparison of the Sixth Circuit with other courts

My critical analysis addresses major difficulties that complicate efforts to reach definitive determinations about any court's performance.[95] For example, the material collected by the Commission apparently lacks certain qualities, such as sufficient comprehensiveness and refinement to sustain concrete conclusions.[96] Despite those problems, this Essay evaluates the Sixth Circuit by attempting to provide for the difficulties and by comparing its performance with that of other tribunals using the factors for which the Commission assembled information.

Consideration of all the material above indicates that the court functions less well than it might. Instructive examples include the rather few appeals that the court terminates on the merits per authorized active judgeship, the relatively low percentage of cases that receive published opinions, the comparatively high percentage of visiting judges whom the tribunal employs, and the statistics that involve most of the criteria deployed in assessing time to disposition.[97] Even when the Sixth Circuit attains or approximates the national average, as the court does respectively for two indicia regarding speed of resolution and percentage of visitors, the tribunal compiles numbers that only differ minimally from this systemic figure.[98]

The above criteria are valuable measures of efficacious operation and appellate justice principally because they involve important process values such as broad court access.[99] The rather low percentage of published opinions issued specifically suggests that the Sixth Circuit might work more ineffectively, and dispense less justice,

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overall performance. *See id.* at 19-21, 23-24, 47 (summarizing the results of a 1998 FJC survey of circuit and district judges).

95. *See supra* notes 53-60 and accompanying text (analyzing the incompleteness of Judge Martin's explanation of the publication decision process in the Sixth Circuit).

96. *See supra* notes 56-59 and accompanying text (noting the lack of empirical data to support some conclusions about courts' decisions not to publish).

97. *See supra* notes 72-73, 76-77, 80-85 and accompanying text (demonstrating the large number of cases decided in the Sixth Circuit, the high number of unpublished cases, and the court's need for visiting judges to meet its scheduling demands).

98. *See supra* notes 80-81, 85 (showing that the Sixth Circuit was one of the lowest-ranked courts in terms of speed of case resolution).

99. *See generally* ROBERT COVER & OWEN FISS, THE STRUCTURE OF PROCEDURE (1979); *see also* Stephen B. Burbank, *The Cost of Complexity and Complex Litigation*, 85 MICH. L. REV. 1463, 1467-68 (discussing process values); 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, 775-76 (1995) (arguing that public access to judicial opinions "allow[s] citizens to act lawfully, enable[s] parties to determine when litigation is appropriate, permit[s] trial courts to reach correct results in most cases, and ensure[s] that appellate courts can decide future cases fairly and efficiently").

than the court could, as publication can increase judicial accountability and visibility as well as fairness to parties. The Sixth Circuit does perform relatively well in terms of some parameters, however. Most important, the court holds oral arguments in half of the appeals concluded on the merits, a number ten percentage points higher than the national average and twenty points greater than four tribunals.[100] Nonetheless, the Sixth Circuit seems to be functioning less efficaciously than it might and than numerous other courts, vis-à-vis the objective data gathered by the Commission.

It might be useful to compare the tribunal with courts that operate more or less well in terms of these indicators. The First and Seventh Circuits apparently perform best. The First Circuit decides the largest percentage of cases on the merits in which there is oral argument and that result in published opinions,[101] while the Seventh Circuit compiles the third and second highest percentages respectively for these measures.[102] The First Circuit also terminates cases most quickly from the notice of appeal to final disposition and from last brief to hearing or submission.[103] The Seventh Circuit ties another court as the second fastest from notice of appeal to last brief, although a minuscule one percent of its panels includes visitors.[104] The tribunals do not operate as effectively, however, in terms of every criterion. For instance, only two courts resolve fewer appeals per authorized judgeship than the First Circuit,[105] and the Seventh Circuit decides cases rather slowly in terms of certain factors.[106] In short, this review leaves uncertain which court is best, although both seem to

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100. *See supra* notes 74-75 and accompanying text (noting that the Sixth Circuit is more likely than other circuits to grant oral arguments in cases decided on their merits); *see also* Merritt, *supra* note 9, at 1388 (suggesting that one valid measure of the health of the appellate decisionmaking process is the percentage of cases argued orally). The figure may reflect the attention that the court devotes to some appeals and explain why it resolves rather few cases per authorized judgeship.

101. *See* WORKING PAPERS, *supra* note 4, at 93-94, tbls. 2 & 5.

102. *See id.* at 93, tbl. 2. Indeed, the two tribunals issue published opinions in more than twice the percentage of appeals as the national average and exceed virtually all of the remaining courts. *See id.*

103. *See id.* at 95, tbl. 7. The First and D.C. Circuits tie in the second category. The median time interval from last brief to hearing or submission is 1.7 months for both of these courts, while the Sixth Circuit's median interval is 8.6 months. *Id.*

104. *See id.* at 95, tbl. 7 (presenting statistics concerning median time intervals); *id.* at 108, tbl. 6a (presenting statistics on number of visiting judges participating in decisions). A quarter of the First Circuit panels had visitors. *See id.*

105. *See id.* at 93, tbl. 1. The First Circuit decided a total of 116 appeals per authorized judgeship in 1997. *Id.* The Tenth Circuit decided 115, and the D.C. Circuit, whose docket includes many administrative appeals, decided 61 appeals in 1997. *Id.*

106. *See id.* at 95, tbl. 7. These aspects of both courts' performance might explain how each is able to furnish so many published opinions and why the First Circuit is so prompt.

work better than the other courts of appeals.

It may also be helpful to contrast Sixth Circuit operations with those of courts that function rather poorly vis-à-vis the objective indicators. The comparison suggests that the Third, Fourth, and Eleventh Circuits apparently perform least well. They are among the four tribunals resolving the lowest percentages of appeals on the merits in which oral argument is conducted[107] and hearing the largest percentages of cases with visitors,[108] even though the three courts write the smallest percentages of published opinions.[109] Indeed, the Eleventh Circuit has the greatest percentage of visiting judges—sixty-four—a number almost two times the national average and twenty-one points higher than any other court.[110] The parameters are significant measures for determining whether tribunals work efficaciously and dispense justice. The three courts do function comparatively well in terms of some indicia. For example, the Third and Fourth Circuits are among the tribunals that most expeditiously decide appeals vis-à-vis certain factors for measuring time to disposition.[111] The Eleventh Circuit also terminates substantially more cases on the merits per authorized judgeship than all of the courts: the tribunal's statistic is 275, the Fifth Circuit is second with 202 and the system-wide average is 155.[112]

In the final analysis, the Sixth Circuit may not function as well as it could, and apparently delivers less justice than the tribunal might, particularly when compared to the remaining courts. Were the twelve tribunals placed on a spectrum, the Sixth Circuit would be closer, and probably next, to the three which seem to operate least effectively. For instance, the Sixth Circuit affords a rather small percentage of published opinions, decides comparatively few appeals per authorized judgeship, relies substantially on visitors, and resolves cases quite slowly vis-à-vis several measures.[113]

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107. *See id.* at 93, tbl. 2.

108. *See id.* at 108, tbl. 6a.

109. *See id.* at 93, tbl. 3. The Third and Eleventh Circuits provide fewer than one-third the percentage of published opinions as the First Circuit, and the Fourth Circuit issues less than one-quarter of that court's percentage. *See id.*

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

111. *See id.* at 95, tbl. 7. The small percentages of oral arguments and published opinions afforded and the large number of visitors used may explain rather prompt resolution.

112. *See id.* at 93, tbl. 1. The Eleventh Circuit figure might mean that active appellate judges of the court grant these cases comparatively limited attention.

113. *See supra* notes 72-84 and accompanying text (explaining these factors).

4. Other insights on the Sixth Circuit

The Commission's material provides numerous, informative perspectives on the contemporary Sixth Circuit and the appellate system. Most relevant to the issues treated here, some information reaffirms, substantiates or elucidates concepts that other observers, especially Judge Martin, have illuminated. For example, the material confirms the percentage of published opinions that the Sixth Circuit affords and the diverse publication practices that courts follow, in attempting to address the docket growth that has transformed the tribunals.[114] The information also questions or clarifies certain notions propounded by Judge Martin. For instance, the Sixth Circuit apparently affords published opinions in appeals that involve reversals and dissents somewhat less frequently than the author suggests.[115]

B. Critical Analysis

The Commission substantially increases understanding of the Sixth Circuit, particularly by providing much relevant empirical data which reaffirms, complements, or elaborates Judge Martin's account. Notwithstanding this important contribution, the Commission's effort, in conjunction with Judge Martin's article, is insufficiently broad or refined to support conclusive determinations about the court's condition. For example, the empirical data on the percentages of oral arguments afforded and the percentages of visiting judges employed, considered alone, lack enough applicability. Knowing only that the Sixth Circuit relies on unpublished decisions to terminate nearly eighty percent of its appeals is similarly uninstructive, absent comparison with the figures compiled by other courts.[116] Even consultation of the raw numbers for every appellate court may be unilluminating, as caseload complexity and appeals' treatment can vary significantly among the courts.[117] For instance, one tribunal might receive many pro se cases and choose to address the docket by affording a high percentage of oral arguments and a low percentage of published opinions, while another court could

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114. *Compare supra* text accompanying note 38, *with supra* text accompanying notes 76, 92.

115. *Compare supra* text accompanying note 28, *with supra* text accompanying note 90.

116. *See generally* WORKING PAPERS, *supra* note 4 (comparing the various appeals courts by studying the structure and alignment of the federal appellate system).

117. *See, e.g.*, COMMISSION REPORT, *supra* note 2, at 16, tbls. 2-4, 2-5; at 24, tbl. 2-8; at 27, tbl. 2-9; MCKENNA, *supra* note 17, at 31-32; Carl Tobias, *Some Cautions About Structural Overhaul of the Federal Courts*, 51 U. MIAMI L. REV. 389, 395 (1997).

have substantially fewer pro se appeals and elect to resolve its caseload in the opposite manner, yet each tribunal may perform efficaciously.

C. *Summary By Way of Transition*

In sum, the ideas expressed by Judge Martin, especially together with the information that the Commission adduced, improve comprehension of the modern Sixth Circuit. However, Judge Martin's article and the commissioners' work, in combination, do not show with adequate clarity that the court's situation is problematic enough to deserve remediation. Accordingly, the third section of this essay offers suggestions for the future.

III. SUGGESTIONS FOR THE FUTURE

The above assertion that the Sixth Circuit's circumstances remain unclear could make the court reluctant to act; however, the tribunal need not eschew all possibilities. For example, the Sixth Circuit may examine some of the ideas expressed by Judge Martin in addition to the Commission material and other existing information as a prelude to its own study; it might experiment with salutary approaches, including proposals proffered by the judge and the Commission; and it could employ other measures that have promise. The court's scrutiny of this material, its own condition and that of the remaining tribunals may correspondingly improve circuit operations.

An expert, independent entity might assume primary responsibility for the analysis. The Circuit Judicial Council, the governing body, however, could assemble a group premised on the Ninth Circuit Evaluation Committee.[118] Chief Judge Procter Hug, Jr., of that court, recently appointed this entity to reassess circuit operations in response to the commissioners' work and to develop constructive suggestions for improvement.[119] A similar Sixth Circuit committee should include Judge Martin and Judge Gilbert Merritt. Each jurist might draw on his service as chief judge and his experience on the court for two decades, while Judge Merritt could invoke his experience as a Commission member and chair of the Judicial

118. *See Hearings on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals Before the House Judiciary Subcomm. on Courts and Intellectual Property*, 106th Cong. 61-66 (1999) (statement of Ninth Circuit Judge David Thompson) (discussing the panel's process, findings and recommendations).

119. *See* NINTH CIRCUIT EVALUATION COMMITTEE, INTERIM REPORT (2000). *See generally* Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CAL. L. REV. 1657-71 (2000) (discussing the work and conclusions of the Ninth Circuit Evaluation Committee).

Conference Executive Committee.[120]

A. Additional Study

The court should carefully collect, analyze, and synthesize the maximum empirical data, which will show as conclusively as possible whether its situation is sufficiently troubling to require treatment. The Sixth Circuit must closely consult and capitalize on available applicable material, particularly the valuable perspectives of Judge Martin and the Commission,[121] while attempting to resolve difficult, unanswered questions. If evaluators definitively conclude that the court needs attention, they should institute efforts to identify precisely why and to delineate the best remedies.

Assessors could seek the ideas of appeals and district judges and appellate attorneys on controversial issues raised by the writer or the commissioners. For instance, evaluators may want to interview counsel for insights on the author's claim that the tribunal properly designates appeals that do not merit publication. They might inquire about matters that the Commission analyzes by, for example, interviewing: appellate judges for input on collegiality and whether selective publication improves productivity, district judges for opinions on circuit law's predictability, and lawyers for views on dispositions' speed, expense, and fairness. Assessors should also follow other approaches, however, because these observers' self-interest and experiences could intrinsically limit the accuracy of their ideas.

Evaluators thus may want to track specific cases from filing to resolution. This query can illuminate whether the court correctly identifies appeals that deserve to be published. Integral to these inquiries will be determining whether the provision of unpublished opinions with written determinations explicating the results suffices for parties and maintains uniform, coherent, certain and predictable circuit law.[122] These are difficult, and possibly intractable, questions,

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120. *See supra* note 64 (listing the members of Commission on Structural Alternatives, which was charged, among other things, with examining the structure of the Ninth Circuit); *see also* Merritt, *supra* note 9, at 1386 (stating the author's intent to address criticisms of the judicial decisionmaking process by drawing primarily upon his experience with the Sixth Circuit); *infra* note 132 and accompanying text (discussing Judge Merritt's proposal in the Commission report to limit federal civil or criminal jurisdiction in an effort to reduce the number of appeals).

121. The Sixth Circuit Executive Office, the FJC and the Administrative Office are obvious sources.

122. *See* COMMISSION REPORT, *supra* note 2, at 34-45, 39-40, 47-49. Evaluators might also probe whether rulings from the bench afford an adequate basis for litigants to perfect appeals and for judges to reflect on decisions. *See* Merritt, *supra* note 9, at

but separate, recent studies of consistency and the *en banc* process may offer instructive guidance.[123]

Assessors could concomitantly attempt to discern why the Sixth Circuit ranked tenth or below for four of the six parameters employed by the Commission in evaluating time to disposition, how the court compiled one of the lowest termination rates per authorized judgeship, and why the tribunal relied substantially on visitors. Especially important will be the correlation, if any, between those phenomena and circuit size.

Should evaluators conclusively decide that the court's present condition necessitates remediation, they must consider many potential solutions. Helpful sources will be the commissioners, their forerunners—including the United States Judicial Conference Long Range Planning Committee and the Federal Courts Study Committee—and scholars, who have surveyed numerous responses.[124] Assessors might also explore many constructive approaches that other tribunals have instituted or tested. For example, every court uses various forms of ADR and rather refined docket management mechanisms.[125]

In short, evaluators must attempt to elucidate the important, unclear aspects of Judge Martin's article and the Commission work

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1394 (stating that the Sixth Circuit makes limited use of bench decisions, but only when all three judges agree that there is no precedential reason for a written opinion).

123. *See, e.g.*, Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 220 (1999) (analyzing the process of *en banc* review and concluding that such factors as "reversal of a lower court or agency ruling, filing a dissent by a panelist, and a liberal ruling" determine whether a court will rehear a panel decision); Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit, in* RESTRUCTURING JUSTICE 55-90 (Arthur D. Hellman ed., 1990) (examining the maintenance of uniformity in the application of federal law by federal appellate courts and focusing on the strengths and weaknesses of the Ninth Circuit and its *en banc* process); Arthur D. Hellman, *Breaking the Banc: The Common Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 921 (1991) (providing further evaluation of inconsistency and conflict in appellate panel decisions of the Ninth Circuit and of *en banc* process); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 547 (1989) (addressing the trends of the en banc process in the Ninth Circuit).

124. *See, e.g.*, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 109-23; LONG RANGE PLAN, *supra* note 17, at 67-70, 131-33; BAKER, *supra* note 10, at 106-286; COMMISSION REPORT, *supra* note 2, at 21-25, 59-74.

125. *See, e.g.*, JOE CECIL, FEDERAL JUDICIAL CENTER, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985); RESTRUCTURING JUSTICE, *supra* note 123; COMMISSION REPORT, *supra* note 2, at 31 (discussing such measures as an "inventory system" of appeals that facilitates routing of cases with similar issues to the same panel of judges, and maintenance of a team of six to eight attorneys charged with identifying cases for the court's mediation program); *supra* notes 86-88 and accompanying text (summarizing the Commission's criticisms of the Sixth Circuit's management practices, including ADR and case screening).

while ascertaining more definitively whether the Sixth Circuit warrants treatment and, if so, designate the most appropriate remedies. The above propositions mean that additional study would be preferable because it should permit comparatively certain conclusions and facilitate experimentation and reform.

B. A Miscellany of Ideas

As demonstrated by the analysis above, more study appears to be the best approach. However, members of Congress or the Sixth Circuit might reject this notion because, for instance, they might think that the court has received adequate examination or that prompt action is imperative. Legislators or judges may want to consider, and could implement, numerous approaches to modernize the court, some of which Judge Martin or the commissioners mention and most of which would be compatible with a study.

1. Responses to specific issues that Judge Martin or the Commission raise

The Sixth Circuit should address specific issues raised by Judge Martin and the Commission. Illustrative are the jurist's proposals that his colleagues restrict litigant ability to cite unpublished opinions, correspondingly limit their own citation to those determinations, and replace undue reliance on resolution from the bench with cogent, written justifications for decisions that most parties deserve.[126] Reducing litigant capacity to cite would decrease judicial citation, and each phenomenon could minimize the remaining inequity that attends unequal access to unpublished opinions.[127] The restriction, or elimination, of rulings from the bench and the concomitant provision of written explanations would afford several benefits, such as greater fairness for parties and increased judicial visibility and accountability. These actions would also conform Sixth Circuit practices more closely to those of other courts,[128] and perhaps save some expense and time which dissimilar local appellate strictures can impose.[129]

Both Judge Martin and the commissioners confirm the

126. *See supra* notes 48-55 and accompanying text (presenting Judge Martin's assessment that certain appeals courts rely too heavily on unpublished opinions and thereby fail to dispense justice effectively and uphold the appellate ideal).

127. *See supra* note 53 and accompanying text (describing Judge Martin's view that effective court operation entails prompt, economic and fair treatment of cases).

128. *See supra* notes 48-49, 60-65 and accompanying text (surveying courts' policies regarding issuance of and citation to unpublished opinions).

129. *See* Sisk, *supra* note 30, at 25-34 (describing the delays and costs imposed by conflicting procedural rules between the appeals courts).

conventional wisdom that the Sixth Circuit has confronted, and may well continue to face, burgeoning caseloads with relatively limited resources.[130] Indeed, these very circumstances prompted Judge Martin to defend, and the court to rely on, unpublished decisions. The Commission's study correspondingly suggests that an insufficient number of published opinions are afforded, and appeals per authorized judgeship are terminated, by the Sixth Circuit, while it depends substantially on visiting judges and may resolve cases too slowly.[131] These concerns strongly implicate docket growth and scarce resources. Congress and the court, therefore, have two principal means of responding. One alternative would be a reduction in the number of appeals, essentially by limiting federal civil or criminal jurisdiction, an idea which Judge Merritt broached in the Commission report.[132] This prospect lacks promise, however, because senators and representatives appear reluctant to restrict jurisdiction.[133] The second option, accordingly, would be the direct treatment of caseload increases.

A rather controversial way to address growing dockets would be expansion of the Sixth Circuit's judicial and general resources. For instance, if lawmakers authorized several additional judgeships, the court could issue more published opinions, rely less on visitors and expedite resolution. A valuable source for the exact number of judges who might be needed is the Judicial Conference's suggestions for Congress, which it bases on relatively conservative calculations of appeals and judges' workloads.[134] Those recommendations propose

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130. *See supra* notes 16-18 and accompanying text (describing the increase in appellate dockets, and discussing the causes); COMMISSION REPORT, *supra* note 2, at ix (finding that increasing caseloads have transformed the role and function of U.S. Courts of Appeals).

131. *See supra* notes 72-73, 76-77, 80-85 and accompanying text.

132. *See* COMMISSION REPORT, *supra* note 2, at 77-88 (urging Congress to adopt a reformed diversity jurisdiction, which would require a showing of local bias or complexity of interstate litigation before suit in federal court would be permitted). *See generally* LONG RANGE PLAN, *supra* note 17, at 134; MCKENNA, *supra* note 17, at 141-53.

133. *See* Judge Stephen G. Breyer, *The Donahue Lecture Series: Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 34-37 (1990) (tracing Congress' reluctance to reduce federal jurisdiction to its reluctance to overburden state courts, its perception that doing so will make little overall difference, its desire to avoid raising specialist versus generalist controversies, and a fear that constituents will perceive the reduction as eroding other, more fundamental aspects of federal jurisdiction); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 722-25 (1995) (outlining political pressures faced by Congress to federalize law that traditionally has been the province of the states); Martin, *supra* note 1, at 181 (describing the majority of congressional statutes as increasing the caseload of the federal courts).

134. *See* Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 753 (1997) (naming the factors considered by the

two new judicial positions for the Sixth Circuit and are included in a Senate bill,[135] although the questions of whether more judges are necessary and, if so, how many, remain controversial. For example, Judge Martin has argued that the "court's existing caseload justifies at least 18 judgeships."[136] Nevertheless, Senator Charles Grassley (R-Iowa), whose judiciary subcommittee has studied the allocation issue, recently considered "significant that the vote of the Sixth Circuit judges to request additional judgeships was not unanimous," while he asserted that "it is not clear that new judgeships should be created" for the court until the tribunal "takes alternative approaches to manage its caseload efficiently."[137] Moreover, an increase in circuit membership can reach a point of diminishing returns.[138] Thus, this option might be unrealistic, particularly in light of much congressional and judicial opposition to expanding the bench.[139] If these views persist, temporary judgeships could be a practical compromise.

An infusion of nonjudicial resources might be responsive to the above concerns. For instance, enlarging the number of staff attorneys or their responsibilities may decrease the time which judges spend on administrative tasks, so that they can devote greater effort to the production of published opinions and perhaps increase the dispositions per judgeship and limit reliance on visitors. Indeed, Senator Grassley found that the court's resistance to enhanced use of the attorneys in preparing decisions has "foreclosed an opportunity for judges to reduce the circuit's workload."[140] Expanding staff size,

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Judicial Conference when making recommendations for additional judgeships). *But see* GRASSLEY, *supra* note 80, at 2-7 (criticizing the Judicial Conference factors).

135. *See* S. 1145, 106th Cong. (1999) (providing for the appointment of two additional Federal Circuit judges for the Sixth Circuit; last referred to the Judiciary Committee on May 27, 1999); S. 3071, 106th Cong. (2000) (same). *See generally* William H. Rehnquist, *1999 Year-End Report on the Federal Judiciary* (1999).

136. *See* GRASSLEY, *supra* note 80, at 1.

137. *See id.* at 4.

138. *See* COMMISSION REPORT, *supra* note 2, at iii, 29-30 (contending that an increase in the number of judges often reduces the effectiveness of the court); *see also* Jon O. Newman, *1000 Judges—The Limit for an Effective Judiciary*, 76 JUDICATURE 187 (1993) (arguing that the size of the federal judiciary should be limited to 1000 judges so it does not become a vast and ineffective bureaucracy). *See generally* BAKER, *supra* note 10, at 135.

139. *Compare* Newman, *supra* note 138, at 187 (opposing the increase in size of the federal judiciary), *with* Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 (urging an increase in size of the federal judiciary). *See generally* GORDON BERMANT ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998).

140. GRASSLEY, *supra* note 80, at 2.

or duties, however, could additionally bureaucratize the tribunal.[141] The court should explore other ways to conserve judicial resources. One helpful example involves bankruptcy appellate panels ("BAPs"), which the Ninth Circuit applied so successfully that Congress required every court to consider their implementation.[142] This device minimizes the energy that appellate judges must devote to bankruptcy cases by invoking decisionmakers, namely bankruptcy judges, who are not appeals court members and possess specialized expertise.

One constructive idea that the Senate and the President could rather felicitously implement is promptly filling the present Sixth Circuit judicial vacancies. Since 1995, the court has operated without the full complement of sixteen active judges whom Congress has authorized.[143] This situation forced the tribunal to rely even more on visitors and to cancel sixty oral arguments in 1997, imposing unwarranted cost and delay.[144] Expeditious confirmation of nominees for the four current openings would enable the circuit to afford higher percentages of published opinions, deploy fewer visiting judges, and decide cases quicker.

The court might also evaluate those tribunals that function best, especially vis-à-vis the parameters for which it performs less well, to determine whether these courts use measures that could improve circuit operations. For example, scrutiny of the Eleventh Circuit may indicate how the tribunal resolves twice the number of appeals per authorized judgeship.[145] Seventh Circuit analysis might show how it issues published opinions at a rate thirty-two percent higher, while employing visitors at a rate thirty-three percent lower,[146] and deciding

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141. *See, e.g.*, POSNER, *supra* note 11, at 26-28 (discussing changes in number of personnel and increases in budget of the federal judiciary over the last 50 years); CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 94-125 (1995) (discussing the systemic development of the federal judicial bureaucracy); *see also* COMMISSION REPORT, *supra* note 2, at 23-25 (discussing the expansion of the number and responsibilities of central staff and law clerks); MCKENNA, *supra* note 17, at 49-55 (same); Reynolds & Richman, *supra* note 25, at 836-37 (commenting on the danger of having large central staffs with significant roles).

142. *See generally* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109-10 (codified as amended in scattered sections of 11 U.S.C.); *see also* LONG RANGE PLAN, *supra* note 17, at 47 (analyzing BAPs and statute).

143. *See* 28 U.S.C. § 44(a) (1994) (indicating that this number of judges is authorized).

144. *See Chronic Federal Judge Shortage Puts Lives, Justice on Hold*, LAS VEGAS REV. J., Aug. 13, 1997, at A9; *see also* Bill Kisliuk, *Judges' Conference Clams Circuit—Splitting Vacancies*, THE RECORDER, Aug. 19, 1997, at 1 (analyzing the problems that numerous, prolonged vacancies create).

145. *See* WORKING PAPERS, *supra* note 4, at 93, tbl. 1 (indicating that 275 appeals per authorized judgeship are decided on their merits in the Eleventh Circuit).

146. *See id.* at 108, tbl. 6a (documenting reliance on visiting judges).

cases along five important measures faster, than the Sixth Circuit.[147]

Congress and the court could examine, and consider prescribing, direct approaches to docket increases, which observers—including Judge Martin, scholars, as well as the Commission and its predecessors—have thoroughly canvassed during the last half-century.[148] They should attempt to identify measures that would be most responsive to ways in which the circuit might work better, but that impose the fewest disadvantages. Illustrative are mechanisms which would enable the court to expedite resolution by conserving resources of the appellate judiciary. BAPs would seemingly permit the tribunal to conclude appeals faster and save time of circuit members by capitalizing on bankruptcy judges' expertise and resources with little detriment. Two-judge panels, or district court appellate panels[149] and ADR would facilitate disposition and save resources of the circuit judiciary.[150] However, the decisional entities and the alternatives might erode significant process values, such as judicial visibility and accountability.[151] Restricting litigants' procedural opportunities, namely oral arguments, would apparently have similar effects. These phenomena could concomitantly attend reliance on unpublished opinions, despite Judge Martin's persuasive defense. Judges may be able to designate easily appeals not meriting publication and to afford written explanations that suffice for parties, maintain consistent, coherent and predictable circuit law, expedite appeals, save appellate resources, and honor process values. Nonetheless, the limited scrutiny accorded unpublished opinions' invocation precludes very certain conclusions today.

2. A word about experimentation

The earlier discussion indicates that additional study is best,

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147. *See id.* at 95, tbl. 7 (referring to the number of months, on average, the court takes in terminating a case after a hearing or submission, and finding that the Seventh Circuit is faster than the Sixth).

148. *See, e.g.*, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 18, at 110-25; COMMISSION REPORT, *supra* note 2, at 67-76; BAKER, *supra* note 10, at 151-85, 229-86.

149. *See* LONG RANGE PLAN, *supra* note 17, at 131-32; *see also* COMMISSION REPORT, *supra* note 2, at 62-65. Judge Martin thought that "2-judge panels had merit and should be authorized in the circuits on a trial or pilot basis." GRASSLEY, *supra* note 80, at 3.

150. *See* Breyer, *supra* note 133, at 44 (discussing the recent popularity of non-judicial dispute resolution, especially in matters where the costs of using courts and the legal system are so exhorbitant that injustice may arise). *See generally* BAKER, *supra* note 10, at 197.

151. *See* Merritt, *supra* note 9, at 1388 (favoring the continuance of oral arguments before judges because it is consistent with proper standards of visibility, accountability, and care). *See generally* BAKER, *supra* note 10, at 197.

however, the Sixth Circuit could institute a few actions without additional findings that would clearly improve its operations. Moreover, there might currently be adequate information to institute productive testing, although some measures' efficacy remains unclear. These ideas mean that Congress and the court may want to consider experimentation with promising approaches, which could proceed simultaneously with more study.

The court should closely examine its operations, while the tribunal might attempt to specify aspects that deserve treatment and test responsive measures. The circuit could assess the ideas of Judge Martin and the commissioners to designate ways in which the court seems to function less well than it might. For example, some Commission information suggests that the tribunal relies too much on unpublished opinions and visitors and resolves appeals rather slowly.

After the court has identified features of circuit performance that could be improved, it should delineate mechanisms that warrant experimentation. The tribunal can derive these devices by identifying courts that operated well vis-à-vis the Commission indicia, by communicating with other circuits and by contacting the FJC and the Administrative Office of the U.S. Courts, which are repositories for relevant information. The court might specifically evaluate the larger tribunals, namely the Fifth, Ninth, and Eleventh Circuits, which have faced docket growth, and should remember that the Ninth Circuit has experimented with innovative approaches to caseload increases for many years.

The Sixth Circuit could also consider the Commission suggestions in addition to the divisional concept. The court's large, expanding docket may lead it to apply two-judge, or district court appellate, panels. These bodies might foster prompt and inexpensive disposition of numerous appeals and conserve resources, but the panels can jeopardize fair decisionmaking and undermine the judiciary's accountability and visibility.[152] The tribunal could respond to Senator Grassley's overture by placing greater reliance on staff attorneys in the preparation of opinions, but this may increase bureaucratization.[153] Once the court has identified salutary approaches, it should carefully apply them.

The experimentation conducted must receive rigorous analysis.

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152. *See supra* notes 150-51 and accompanying text (discussing the tradeoff between non-judicial dispute resolution and advantages of judges' visibility).

153. *See supra* notes 140-41 and accompanying text (describing the possible dangers of expanding staff size).

Testing should continue for a sufficient period in diverse enough contexts to discern confidently the measures' effectiveness. An expert, independent evaluator must systematically gather, assemble, assess, and synthesize the maximum applicable empirical data. After experimentation has received analysis, it should be possible to determine with great certainty whether the circuit needs remediation and, if so, why and to designate the best solutions.

Congress and the Sixth Circuit should institute the above suggestions for several reasons. First and foremost, the ideas would enable the tribunal to enhance operations in areas that Judge Martin or the commissioners indicate need improvement. Moreover, the proposals are a good faith attempt to ascertain more clearly whether the Sixth Circuit in fact requires treatment, and, if so, to delineate effective remedies. Finally, the approach could test the accuracy of the assertions posited by Judge Martin and the Commission.

CONCLUSION

Judge Martin has provided valuable perspectives on the Sixth Circuit, as witnessed through the prism of unpublished opinions. His focus on these decisions, however, is overly narrow, while he provides minimal empirical data. The Commission study elaborates the jurist's work, yet its endeavor is insufficiently comprehensive and refined, even in combination with Judge Martin's ideas, to support conclusive determinations. Therefore, more study, perhaps in conjunction with experimentation, is warranted, while the court should implement measures that promise to improve its present operations.