United States Court of Appeals
For the Sixth Circuit

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03-AP-269

CHAMBERS OF
THE CHIEF JUDGE
Emeritus

Room 209
601 West Broadway
Louisville, KY 40202

February 5, 2004

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I have read with a degree of dismay proposed Federal Rule of Appellate Procedure 32.1. I understand that I am in good company in joining the growing group of United States Circuit Judges who feel this rule is inappropriate and unnecessary. I have taken the liberty of including with this letter a copy of a pertinent article that I published several years ago in the Ohio State Law Journal entitled, "In Defense of Unpublished Opinions." I have read with interest Circuit Judge Alex Kozinski's testimony of last summer, as well as his letter to the Committee of this past week. I share in Judge Kozinski's well-expressed concerns and commend his thorough presentation and detailed analysis. I write only to add the following thoughts on why I believe the proposed rule is unworkable.

Prior to writing the article for the Ohio State Law Journal, I did a considerable amount of research concerning the application and precedential value of unpublished opinions among the circuits around the country. I agree that the rules with respect to the restrictions placed upon citing unpublished opinions vary from circuit to circuit, but I do not believe that this justifies the creation of a generalized, mandatory rule. Rather, I believe that this issue is best left to the discretion of the circuit courts to create a localized rule reflecting the needs and experiences of each circuit, as the Ninth Circuit has done. Circuit courts differ widely in their methods for addressing the growing federal appellate docket and

in their internal administration and procedure, which the proposed rule ignores. For example, our circuit follows the formalized appendix rule that was in practice forty years ago, as compared to those other circuits which use excerpts from the record below. We also grant to any party that asks fifteen minutes of oral argument, as well as fifteen minutes for the opposing party. Additionally, we prepare in every case–from a straightforward motion to dismiss to a complex case–a written opinion that sets out the facts, the law and the application which we are making. Even in the simplest of *pro se* prisoner appeals, we prepare a document that can extend from two to ten or more pages so that the litigant understands the reasoning behind our decision. As you are certainly aware, other circuits do not follow these policies. Based on the current climate in the Sixth Circuit, I doubt that we could agree on any change in policy.

I echo the concern of Judge Kozinski that a reasoned distinction between citability and precedential value cannot be made. I emphasize that I would hope that the denial of precedential value to unpublished opinions would remain a part of our jurisprudence. If it does not, I believe that I will fall into the same trap that many other jurists have already forecast. That is, I will be forced to choose between expending a considerably greater amount of time and energy on cases which add little to our jurisprudence and could be more expeditiously handled in a short unpublished opinion or writing single word opinions–"affirmed" or "reversed"–thereby denying the litigant the deserved benefit of a reasoned explanation for the court's decisions, but in the words of my colleague Judge Kozinski, "make them safe as precedent." As discussed, the later would be completely out of sync with our circuit's preference for providing a written explanation for our decisions.

I am well aware of the change in the statute, and certainly this rule is being considered in an attempt to comply with that statute. I, however, continue to believe that the use and citation of unpublished opinions should remain within the jurisdiction and discretion of the given circuit. Thus, for our circuit the rule would remain that an opinion can be unpublished but it will not be given precedential value. To me that it is the optimum compromise, but others are certainly free to disagree–at least until the Committee adopts proposed rule 32.1, which again I believe would be ill-advised.

As an example of a potential problem the adoption of rule 32.1 could create, I offer the following. In sitting and preparing for oral arguments this past week, I came across several opinions that were marked as unpublished, no

precedential value, that appeared inconsistent with our published opinions. If the proposed rule is adopted, it will create an enormous burden not only for trial judges and practicing attorneys, but also for the judges themselves on our court. That is, we will have to carefully scrutinize the implications of every subtle variation in language between published and unpublished opinions that, from my experience, is typically meaningless and may involve nothing more than the drafter's attempt to creatively restate a thoroughly ingrained proposition of law without resorting to a string of verbatim quotations. Moreover, if presented with a true inconsistency between a published and unpublished opinion, our internal circuit rule, which forbids one three-judge panel from reversing a previous panel's decision, would undoubtedly only complicate matters further.

In conclusion, I believe the adoption of rule 32.1 would create a greater problem than it sets out to solve. If the rule is adopted as proposed, I foresee far more complaints from practicing attorneys and certainly far more prisoner petitions where they claim the court of appeals failed to pay any heed to their complaints.

In hopes that the Committee will reconsider, I remain,

Sincerely,

Boyce F. Martin, Jr.

BFM,jr:dp

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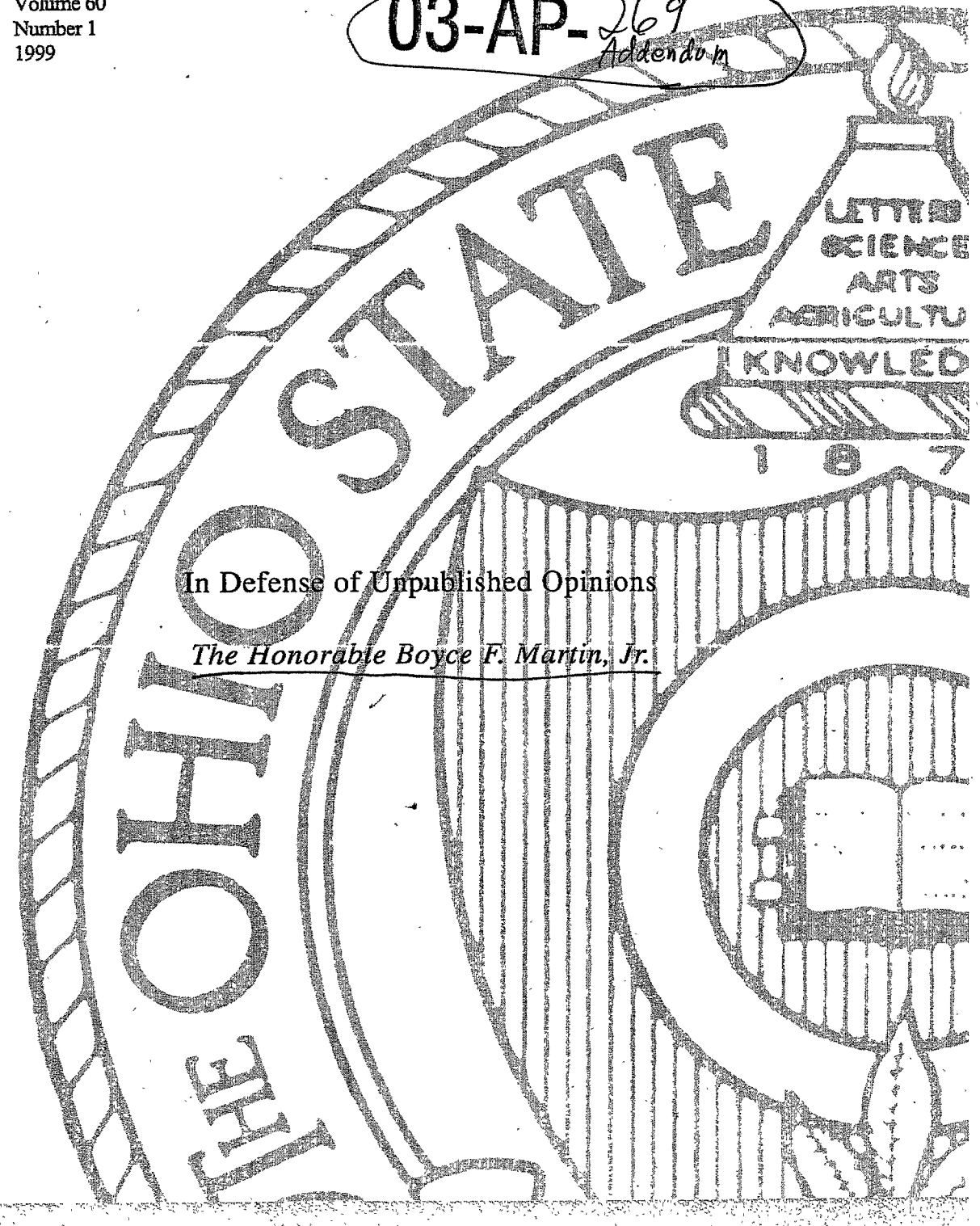

In Defense of Unpublished Opinions

The Honorable Boyce F. Martin, Jr.

In Defense of Unpublished Opinions

THE HONORABLE BOYCE F. MARTIN, JR.*

What role in today's legal environment should the unpublished opinion play? In this Article, Judge Martin explores both the explosion of litigation that is increasingly taxing the federal courts' resources and the stopgap method of the unpublished opinion. Utilizing published resources as well as his twenty-plus years on the federal bench, he argues that the unpublished opinion will help to conserve judicial resources, will not result in a significant loss to the corpus of federal law, and will perhaps help to streamline the judicial process.

"In my view, multiplied judicial utterances have become a menace to orderly administration of the law. Much would be gained if three-fourths (maybe nine tenths) of [the opinions] published in the last twenty years were utterly destroyed. Thousands of barren dissertations have brought confusion, and often contempt."

—Justice McReynolds [1]

I. INTRODUCTION

Justice McReynolds wrote those words more than sixty years ago, but his sentiments ring true today. Appellate judges continue to labor under the weight of tens of thousands of appeals every year, and our "multiplied utterances" would increase beyond all reason were we forced to publish all our opinions.

When I came on the bench in 1979, we were at Volume 602 of the F.2d. Now we are into the F.3d. The last time I checked my overburdened shelves, we were pushing past Volume 133. In 1996 alone, we went from 73 F.3d to 103 F.3d, filling more than 45,000 pages with appellate opinions. At this rate, we will go into the F.4th sometime around 2025. This Article is not about judges' lack of shelf space for the kudzu-like growth of *Federal Reporters*, but the growth is indicative of too much written material creating too little new law.[2] As

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* Chief Judge, United States Court of Appeals for the Sixth Circuit; A.B. 1957, Davidson College; J.D. 1963, University of Virginia School of Law. This Article is the product of a number of discussions in Louisville, Cincinnati, and as we drove between the two with my law clerk Brendan Healey, without whose help this Article would not have been completed.

[1] Thatch v. Livingston, 56 P.2d 549, 549–50 (Cal. Dist. Ct. App. 1936) (quoting Justice McReynolds).

[2] *See* Hon. Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 913 n.13 (1986) (noting rapid growth in publishing rate during his tenure on the federal appellate bench and that "[t]his was when the Judicial Conference selective publication plans had been several years in effect. Without them, one can only guess what the