



## *The Sixth Circuit Review: Inaugural Edition*



### **Foreword: The Sixth Circuit in Review**

CHIEF JUDGE R. GUY COLE, JR.\* & NOAH LITTON†

#### TABLE OF CONTENTS

I. INTRODUCTION .....	248
II. THE RICH HISTORY OF THE SIXTH CIRCUIT .....	249
III. THE SIXTH CIRCUIT TODAY .....	253
IV. THE FUTURE OF THE SIXTH CIRCUIT .....	255
V. CONCLUSION .....	258

Welcome to the inaugural edition of the *Ohio State Law Journal's* Sixth Circuit in Review! On behalf of the judges, staff, and practitioners of our court, I would like to extend a heartfelt “thank you” to the leadership of the *Journal* for establishing this very timely public forum. In the years to come, I imagine we will look back on this day as an important milestone for our court and the people it serves.

---

\* Chief Judge, United States Court of Appeals for the Sixth Circuit; Adjunct Lecturer at The Ohio State University Moritz College of Law. Chief Judge Cole was nominated to the bench by President William Jefferson Clinton and confirmed by the United States Senate in December 1995. He served as an active judge for nineteen years before assuming the role of Chief Judge in August 2014. Prior to joining the Sixth Circuit, Chief Judge Cole served as a partner at Vorys, Sater, Seymour and Pease LLP (Columbus); as a trial attorney for the Civil Division of the United States Department of Justice; and as a Bankruptcy Judge for the United States District Court for the Southern District of Ohio. Thank you to my talented staff, including Angela Vann and Diane Stash, for their assistance with this Foreword.

† Associate, Jones Day (Columbus). Noah Litton is a member of Jones Day’s Business and Tort Litigation Group. Prior to joining the firm, he served as a law clerk to Chief Judge Cole from 2013 to 2014. Noah is a proud graduate of the Ohio State University Moritz College of Law, where he was a Managing Editor of the *Ohio State Law Journal*. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm with which he is associated.

## I. INTRODUCTION

Now, just as ever before, the work of the federal courts matters. In the past year alone, the Sixth Circuit heard several cases of exceptional public importance. Last summer, our court held an unprecedented three hour's worth of oral argument in a series of appeals seeking the recognition of same-sex marriages in all four states of our circuit.<sup>1</sup> Ultimately, a divided panel of the court concluded that the United States Constitution does not require states to recognize same-sex marriages, though the Supreme Court recently granted certiorari to resolve a circuit split on this issue.<sup>2</sup> We also heard and decided several challenges to the contraception coverage mandates under the Affordable Care Act.<sup>3</sup> At least one litigant asked us to weigh in on the limits of presidential powers under the Recess Appointments Clause.<sup>4</sup> And, as has become a biennial rite of passage, we adjudicated a late-breaking challenge to Ohio's election laws.<sup>5</sup> Time and again, our court found itself in the thick of difficult issues that impact the very fabric of our society. In addition, more routine matters such as criminal sentencing appeals, contract disputes, and immigration cases continue to play a large role on our docket and remain important to the individual litigants involved.

It therefore benefits us all—judges, attorneys, scholars, and students alike—to visit this digital public square to discuss both the pressing issues of

---

<sup>1</sup>Erik Eckholm, *One Court, Three Judges and Four States with Gay Marriage Cases*, N.Y. TIMES (Aug. 6, 2014), <http://www.nytimes.com/2014/08/07/us/one-court-three-judges-and-four-states-with-gay-marriage-cases.html>, archived at <http://perma.cc/27FY-4NNG>.

<sup>2</sup>*DeBoer v. Snyder*, 772 F.3d 388, 396, 411 (6th Cir. 2014) (reversing district court decisions in Michigan, Ohio, Kentucky, and Tennessee that had, in one form or another, recognized a constitutional right to same-sex marriage), *cert. granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-574).

<sup>3</sup>*Mich. Catholic Conference Servs. v. Burwell*, 755 F.3d 372, 378 (6th Cir. 2014) (upholding the mandate, including its exemptions and accommodations for non-profit religious organizations, with respect to a group of Catholic churches), *questioned in Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2810 (2014) (granting an emergency injunction temporarily barring enforcement of the mandate with respect to a religious higher education institution); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625 (6th Cir. 2013) (upholding the mandate with respect to closely held, for-profit corporations whose owners express religious beliefs opposed to contraception), *overruled by Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

<sup>4</sup>*Long Mech., Inc.*, 358 N.L.R.B. No. 98 (Aug. 9, 2012), *appeal docketed*, No. 12-2693 (6th Cir. Dec. 31, 2012) (dismissed per FED. R. APP. P. 42 on Dec. 20, 2013); *cf. NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556–57 (2014) (overturning President Obama's 2012 recess appointments to the National Labor Relations Board but establishing that the Recess Appointments Clause permits both intra-session recess appointments and recess appointments for vacancies that arise while the Senate is still in session).

<sup>5</sup>*Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 529 (6th Cir. 2014) (affirming the grant of a preliminary injunction that would have halted Ohio's restrictions on early in-person voting), *stay granted by* 135 S. Ct. 42 (2014).

our time and the legal doctrines that federal courts employ on a daily basis. By establishing the Sixth Circuit in Review, and by inviting leading court watchers to comment on the work we do, the *Ohio State Law Journal* is serving an important public purpose in its own right. For that, the *Journal* and the Moritz College of Law have my thanks and the thanks of our court. Frankly, I cannot picture a more fitting home for the Sixth Circuit in Review than right here, at the flagship law school of our circuit's home state.

The inaugural edition, available online at <http://moritzlaw.osu.edu/students/groups/oslj/>, has much to offer. Articles include discussions on ethics and professionalism, pro se litigation, applications of Rule 32.1 in district courts, as well as critiques of whistleblower protections, summary dispositions, First Amendment balancing, and scienter pleading standards in securities fraud litigation.<sup>6</sup> I invite you all to participate in this collaborative endeavor in the finest tradition of American civic engagement. Read the articles. Consider their merits. Respond in kind. Most importantly, *create and sustain a true discussion*. Only through a frank and ongoing dialogue will our court ever achieve its fullest potential. I promise you this: the judges of our circuit and their law clerks will surely read in earnest whatever you write.

In the following pages, I provide some of my own thoughts on the rich history of the Sixth Circuit, where we stand today as an institution, and where our court might head in the years to come. For reasons of comity and professionalism, I have avoided commenting directly on the substance of the cases our court recently decided. I leave that discussion to the other authors of this edition and to the authors of editions yet to come.

## II. THE RICH HISTORY OF THE SIXTH CIRCUIT

*It started with a spy.* Fanciful as it sounds, the Sixth Circuit began with a Civil War spy who rode the circuit. That's right: Halmor Hall Emmons, the first judge of our court, served as a secret agent for the Union during the Civil

---

<sup>6</sup> See Steve Delchin, *Ethics and Professionalism in the Sixth Circuit*, 76 OHIO ST. L.J. FURTHERMORE SIXTH CIRCUIT REV. 18 (2015); Collin R. Flake, *Contrary to Popular Opinion: Why the Sixth Circuit's Omnicare Decision Should Be Reversed*, 76 OHIO ST. L.J. FURTHERMORE SIXTH CIRCUIT REV. 22 (2015); James M. Hafner, Jr., DeBoer, Baker, and Summary Dispositions: *In Defense of Appellate Court Restraint*, 76 OHIO ST. L.J. FURTHERMORE SIXTH CIRCUIT REV. 27 (2015); Katherine M. Maskell, *Speech and Safety: Interest Balancing in First Amendment Analysis As Applied to Bible Believers v. Wayne County*, 76 OHIO ST. L.J. FURTHERMORE SIXTH CIRCUIT REV. 37 (2015); Coulter Paulson, *Will a Judge Read My Brief? Prejudice to Pro Se Litigants from the Staff Attorney Track*, 76 OHIO ST. L.J. FURTHERMORE SIXTH CIRCUIT REV. 1 (2015); Liane Rousseau, *Whistle While You Work: The Gap in Whistleblower Protection Exposed by the Sixth Circuit*, 76 OHIO ST. L.J. FURTHERMORE SIXTH CIRCUIT REV. 43 (2015); W. Hunter West, *The Sixth Circuit's In re Omnicare, Inc. Securities Litigation Holding: New Standard. New Results?*, 76 OHIO ST. L.J. FURTHERMORE SIXTH CIRCUIT REV. 49 (2015); Larisa Vaysman, *Obedience vs. Accuracy: How District Courts Apply Sixth Circuit Rule 32.1*, 76 OHIO ST. L.J. FURTHERMORE SIXTH CIRCUIT REV. 9 (2015).

War.<sup>7</sup> Emmons led a corps of detectives that routinely traveled to Canada to glean intelligence about Confederate war efforts.<sup>8</sup> At one point during his travels, Emmons nearly started a brawl at a boarding house in Quebec after he chastised a group of southern exiles who were celebrating a Union setback on the battlefield.<sup>9</sup> Yet Emmons, ever the diplomat, ultimately cooled the situation and emerged in good standing.<sup>10</sup>

Following the war, President Grant nominated Emmons to serve as a United States Circuit Judge covering the federal courts of Michigan, Ohio, Kentucky, and Tennessee.<sup>11</sup> He was confirmed by the Senate one week later and received his commission on January 17, 1870—thereby becoming the first judge of the modern Sixth Circuit.<sup>12</sup>

Judge Emmons served with great wisdom and distinction. During his first appearance presiding over court in Memphis, he deftly handled a dispute involving lasting animosity over Civil War Reconstruction.<sup>13</sup> Local members of the bar, many having served in the Confederate Army, complained that the officers of the court “were all Republicans appointed by a carpetbag state administration,” who had in turn improperly selected the jury.<sup>14</sup> The attorneys argued that it would be “a travesty of justice” to try cases under those circumstances.<sup>15</sup> Rather than pressing ahead in the face of such public criticism, Judge Emmons outflanked the disgruntled attorneys. He invited them to his chambers, where he asked them to provide a list of “the best men in [their] respective communities,” whom he subsequently appointed to the jury.<sup>16</sup> Trial commenced, and “[i]n the end, nearly all of the accused,” who were charged with crimes against the United States, “were convicted by the jurymen selected by the lawyers themselves.”<sup>17</sup> By the time the court term

---

<sup>7</sup> David A. Couch, *Sixth Circuit Judge Halmor H. Emmons*, CT. LEGACY (HIST. SOC’Y FOR THE U.S. DISTRICT COURT FOR THE E.D. MICH.), Sept. 2001, at 1, 3, *available at* [http://www.fbamich.org/Portals/31/Documents/Newsletters/200109\\_Court\\_Legacy.pdf](http://www.fbamich.org/Portals/31/Documents/Newsletters/200109_Court_Legacy.pdf), *archived at* <http://perma.cc/626W-MLLT>.

<sup>8</sup> *Id.* (One of the Confederate war efforts involved “[a] Rebel conspiracy to introduce rags infected with yellow fever into the ports of the northern states.”).

<sup>9</sup> *Id.* at 4 (“Standing on a stairway in the office and overlooking the crowd, [Emmons] bitterly denounced the southern men present as traitors to their country and taunted them with cowardice for hiding in a foreign land instead of remaining at home and fighting for their principles.”).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.*; *History of the Federal Judiciary: Biographical Directory of Federal Judges*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=707&cid=999&ctype=na&instat=na> (last visited Jan. 9, 2015), *archived at* <http://perma.cc/E7YL-7RWZ>.

<sup>13</sup> Couch, *supra* note 7, at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (“Some eight or ten of them, beginning with General Forest, a Rebel Cavalry leader, addressed the court in turn.”).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

ended, Judge Emmons was on “excellent terms” with members of the local bar, including a former Confederate general, who wryly remarked, “My dear Judge, we don’t care about selecting any more jurymen. Please do it yourself in the future.”<sup>18</sup>

Respect for Judge Emmons extended far past the four corners of our circuit. He was known in national legal circles as “a jurist of great ability,” whose loss would mark “a national tragedy.”<sup>19</sup> When Judge Emmons fell terminally ill in 1877, even the Chief Justice of the United States considered Emmons’s condition a “subject of deep solicitude.”<sup>20</sup>

Some court watchers probably see flashes of the modern Sixth Circuit in Judge Emmons. Just like Judge Emmons, our judges are quick-witted and fiercely opinionated. And in the end, our judges are equally esteemed in national legal circles and equally capable of rising to the moment in nearly any situation. I am proud to call them my colleagues, and I think our first judge would have been proud to do the same.

The rich history of the Sixth Circuit does not start and stop with Judge Emmons. Our courtroom walls are lined with portraits of judges who have made history and served our country with distinction. For example, the courthouse where we sit in Cincinnati is named after Potter Stewart, who sat on our court from 1954 to 1958 and went on to serve as an Associate Justice of the United States Supreme Court for twenty-two years.<sup>21</sup> During his time on the High Court, Justice Stewart made significant contributions to criminal justice reform, civil rights, access to the courts, and Fourth Amendment jurisprudence.<sup>22</sup>

William Howard Taft, who served on our court from 1892 to 1900, was later elected the twenty-seventh President of the United States and ultimately appointed as the tenth Chief Justice of the United States Supreme Court.<sup>23</sup> As Chief Justice, he “laid the ground work for the later adoption of the federal rules of procedure” and personally lobbied for the authorization and erection of the Supreme Court building.<sup>24</sup> President Taft remains the only person in our nation’s history to lead both the Executive and the Judicial Branches of the federal government.<sup>25</sup>

Florence Allen, who served on our court from 1934 to 1959, was a true trailblazer for women pursuing the practice of law: she was the first female

---

<sup>18</sup> *Id.*

<sup>19</sup> Couch, *supra* note 7, at 5.

<sup>20</sup> *Id.*

<sup>21</sup> See Harry Phillips, *The Courts*, in HISTORY OF THE SIXTH CIRCUIT: A BICENTENNIAL PROJECT 1, 72–73 (Bicentennial Comm. of the Judicial Conference of the U.S. ed., 1976).

<sup>22</sup> See *id.* at 73.

<sup>23</sup> *Id.* at 67. Mr. Taft served as President from 1909 to 1913 and as Chief Justice of the United States Supreme Court from 1921 to 1930. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 66–67.

justice of a state supreme court (Ohio), the first female Article III judge, and the first female to serve as Chief Judge of a United States Court of Appeals.<sup>26</sup> Judge Allen gained a reputation for bravely enduring the slights of her colleagues. When she was excluded from all-male court gatherings at a local establishment, she resorted to dining in her chambers on a hot-plate.<sup>27</sup> The table on which Judge Allen's hot-plate sat has been passed down as a badge of honor from one female judge to another and still serves as a cogent reminder of just how far we have come as a court and as a society.<sup>28</sup> Judge Allen's legacy endures to this day.

Finally, Judge Damon J. Keith, who continues to serve on our court as he has since 1977, remains a true legend in the law.<sup>29</sup> Throughout his career, Judge Keith has gone to bat for our deepest constitutional values, even in the face of overreaching Presidents,<sup>30</sup> eloquently reminding us along the way that "Democracies die behind closed doors."<sup>31</sup> Judge Keith is the focus of a recent biography that I recommend to anyone seeking a greater understanding of our court and our country.<sup>32</sup>

These four judges represent just a fraction of those who have come before us to make the Sixth Circuit the court it is today. Their accomplishments and service to country will not soon be forgotten. I am confident that our current judges will continue to impact the law in ways large and small, in a nod to our esteemed predecessors who paved the way.

---

<sup>26</sup> *The Judges*, in HISTORY OF THE SIXTH CIRCUIT: A BICENTENNIAL PROJECT, *supra* note 21, at 111. The Attorney General of the United States, in commenting on her appointment to the Sixth Circuit Court of Appeals, stated: "Florence Allen was not appointed because she was a woman. All we did was to see that she was not rejected because she was a woman." C. William O'Neill, *Florence Ellenwood Allen: A Pioneer in Law*, OHIOANA LIBRARY, <http://www.ohioana.org/features/women/fallen.asp> (last visited Jan. 6, 2015), archived at <http://perma.cc/3HZX-WDG9>.

<sup>27</sup> *Female Judges of the Sixth Circuit Court of Appeals: The Role of a HotPlate in Sixth Circuit History*, SQUIRE PATTON BOGGS SIXTH CIRCUIT APP. BLOG (Mar. 9, 2012), <http://www.sixthcircuitappellateblog.com/news-and-analysis/the-women-of-the-sixth-circuit-court-of-appeals-at-the-forefront/>, archived at <http://perma.cc/9394-2HKW>.

<sup>28</sup> *See id.*

<sup>29</sup> In 1998, Judge Keith was chosen to receive the Edward J. Devitt Distinguished Service to Justice Award, the highest honor bestowed to a member of the federal bench. *Judge Damon J. Keith*, WAYNE ST. U., <http://law.wayne.edu/keithcenter/biography.php> (last visited Jan. 6, 2015), archived at <http://perma.cc/A34M-6SMG>. Judge Keith's name also appears on every federal courthouse in the country for his service as Chair of the Judicial Conference Committee on the Bicentennial of the Constitution. *The Story*, WALK WITH ME: JUDGE DAMON J. KEITH DOCUMENTARY PROJECT, <http://www.thedkdoc.com/#!/the-story/c1h6e> (last visited Feb. 22, 2015), archived at <http://perma.cc/9827-5GJZ>.

<sup>30</sup> *See, e.g.*, *United States v. Sinclair*, 321 F. Supp. 1074, 1080 (E.D. Mich. 1971) (Keith, J.), *aff'd sub nom.*, *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 324 (1972) (unanimous opinion).

<sup>31</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (Keith, J.).

<sup>32</sup> *See generally* PETER J. HAMMER & TREVOR W. COLEMAN, *CRUSADER FOR JUSTICE: FEDERAL JUDGE DAMON J. KEITH* (2014).

## III. THE SIXTH CIRCUIT TODAY

Today, our court looks very different than it did when Judge Emmons first rode the circuit. For starters, we no longer even ride the circuit. Instead, our fifteen active judges (with one vacancy)<sup>33</sup> and eight senior judges hear most cases in Cincinnati, where our administrative offices—including the clerk of court and circuit executive—are housed.<sup>34</sup>

We are a large court, and our territorial jurisdiction extends over one of the most diverse regions of the country. Our four states, two northern and two southern, stretch from the Canadian border in the north to the Mississippi Delta in the south and from the Appalachian Mountains in the east to the Mississippi River in the west. Together, they have a combined population of over 32 million residents. We hear cases from major urban centers like Detroit and Cleveland, in addition to cases from the foothills and hollers of Appalachia, and nearly everywhere in between. The economies of our circuit depend on a variety of industries, including agriculture, manufacturing, mining, banking, finance, higher education, and logistics, to name just a few. Put simply, our court is larger and more diverse in every sense of the word than ever before: geographically, economically, culturally, racially, and ethnically.

As former Supreme Court Justice Potter Stewart, who once sat on our court, stated nearly fifty years ago, “the Sixth Circuit is not a regional court but in every sense a national one. Its workload reflects the pluralism and diversity of our national life.”<sup>35</sup> And it truly does.

As you might imagine, the size and diversity of the court make for interesting legal disputes and equally interesting resolutions. We constantly grapple with some of the more complex and trying issues that our society faces. Sometimes this leads to honest and spirited differences in opinion, and naturally, those cases draw the most attention from court observers. Therefore, it may come as a surprise that we actually resolve an overwhelming number of

---

<sup>33</sup> With sixteen active judgeships, we are the third largest of the thirteen circuits. *See* 28 U.S.C. § 44(a) (2012); *Current Judicial Vacancies*, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx> (last updated Mar. 5, 2015), *archived at* <http://perma.cc/DV4T-PZNX>.

<sup>34</sup> Not all circuits adhere to this practice. For example, the Ninth Circuit routinely sits in multiple cities, including Seattle, Portland, San Francisco, and Pasadena. *See About the Court*, U.S. CTS. FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/information/> (last visited Jan. 15, 2015), *archived at* <http://perma.cc/ABG7-67UP>. The First, Third, Fifth, Eighth, Eleventh, and Federal Circuits also report regular sittings in cities outside of their primary bases of operation. *See, e.g.*, LAURAL HOOPER ET AL., FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 87, 109, 149, 203, 213 (2d ed. 2011); *Calendar Information*, U.S. CT. OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov/calendar-information> (last visited Jan. 15, 2015), *archived at* <http://perma.cc/7C7A-4VKQ>.

<sup>35</sup> Potter Stewart, *Preface to The Sixth Circuit Review 1968–69*, 2 U. TOL. L. REV. 49, 49 (1970).

our cases unanimously. Recent figures peg this number at roughly ninety-six percent of the cases we decide.<sup>36</sup> True enough, our judges do not always see eye-to-eye. But when we disagree, we do our level best to root those differences in the law and to explain them in a dignified and professional manner. We owe the litigants who come before us nothing less.

When I first joined the court, we had a long tradition of granting oral argument in any case where one party requested it. Our circuit stood apart from others for many years in this regard. Over time, we recognized that with the volume and complexity of our docket, which consistently approaches 5,000 appeals filed annually,<sup>37</sup> we simply could not continue to hear arguments in most every case while resolving disputes in a timely fashion.<sup>38</sup> Appreciating that we were one of the few remaining circuits (if not the last) that did not “screen” cases for oral argument, we decided to make the leap, and in 2011, we began screening cases.

Under our case-screening procedures, each panel now previews the cases assigned to it and decides in advance which cases merit oral argument and which cases should be decided on the briefs alone.<sup>39</sup> In a perfect world, we might have continued our tradition of hearing oral argument in most every case. But recognizing that justice delayed so often was justice denied, we elected to apply our scarce judicial resources where they would matter most, by dedicating oral argument only to those cases that truly warrant it. Presently, the court offers oral argument in approximately 700 individual cases each year.<sup>40</sup>

Thankfully, our new procedures are working. Since 2010, we have reduced the median time from notice of appeal to final disposition from 15.5 months to 9.8 months.<sup>41</sup> And from 2010 to September 2014, we moved from eleventh position out of thirteen circuits to eighth position for the timeliness of our dispositions. Because these timelines matter so greatly to the individual

---

<sup>36</sup>In 2013, the Sixth Circuit issued 3,350 merits terminations, with 86 terminations including a dissent—reflecting a unanimity rate of 97.5%. Letter from Susan Rogers, Chief Deputy Clerk of the U.S. Court of Appeals for the Sixth Circuit, to authors 1 (Dec. 11, 2014) (on file with author). As of December 10, 2014, we issued 2,928 merits terminations, with 104 terminations including a dissent—reflecting a unanimity rate of 96.4%. *Id.*

<sup>37</sup>The Administrative Offices of the United States Courts maintains statistical information for all federal courts. Many of the statistics reviewed in preparation of this Foreword were derived from that source, including some reports not publicly available. *Id.* at 2. See generally *Statistics*, U.S. CTS., <http://www.uscourts.gov/Statistics.aspx> (last visited Mar. 5, 2015), archived at <http://perma.cc/JF5X-3X79>.

<sup>38</sup>By 2010, the median time interval for a merit termination (measured as the time between the docketing of a notice of appeal and the date of the last opinion or order) in our circuit had reached sixteen months. Letter from Susan Rogers to authors, *supra* note 36, at 2–3.

<sup>39</sup>In some circuits, staff attorneys perform this initial screening, but in the Sixth Circuit, the judges of the panel do so.

<sup>40</sup>Letter from Susan Rogers to authors, *supra* note 36, at 3.

<sup>41</sup>*Id.*



litigants involved, we will continue to do our best to reduce them further. We are fortunate to have the help of eight dedicated senior judges and a bevy of district court judges who graciously pitch in whenever asked to do so. Without them, we could not manage our caseload as effectively.

Today, our docket reflects a broad array of cases. Roughly one-third of the appeals we decide stem from prisoner habeas corpus petitions and related prisoner civil rights suits.<sup>42</sup> Federal criminal appeals and sentencing disputes comprise the second largest portion of our docket, clocking in at roughly twenty-two percent of our cases. Next come federal-question cases (roughly eleven percent); administrative filings (roughly eight percent); and diversity cases (roughly seven percent). And the rest of our docket includes original actions, non-prisoner civil rights filings, and admiralty cases from the Great Lakes and other navigable waters.

Because of this broad mix of cases, we truly are generalists at the court of appeals. We therefore depend on the appellate bar to get it right when framing the issues and setting out the relevant legal principles. Oftentimes, this is no easy task. Yet from my time on the court, I can state without hesitation that we are blessed at the Sixth Circuit to have such able appellate advocates. The quality of their briefing and oral advocacy shows, and hopefully, we reflect that same level of quality and dedication in our opinions.

One Sixth Circuit tradition that we still adhere to, and rightfully so, is disposing of all cases via reasoned opinions, even for unpublished opinions, which do not establish precedent. Many circuits do not follow this practice; instead, they issue simple journal entries or shorter “memorandum dispositions” in non-precedential cases. It takes more time and effort to issue a reasoned opinion than a journal entry or memorandum disposition, but we feel we owe it to the parties to give them a sense of our decision-making, so we will continue this practice for the foreseeable future.

In sum, our court and the jurisdiction it covers have come a long way since the days of Judge Emmons. We have many fine traditions at the Sixth Circuit, most of which we still adhere to today. And if you were to ask any of our judges, staff, or members of the bar, I think they would agree: the Sixth Circuit is a wonderful place to practice law.

#### IV. THE FUTURE OF THE SIXTH CIRCUIT

Given the rich history of our court and the state of present affairs, one naturally might ask, “What’s next?”

If I (or anyone else) knew for certain, I would be the first to share. But judging remains a reactionary endeavor, and for good reason. The Sixth Circuit, like every court, hears the cases that make their way to us. We cannot prod these cases along or forecast, with much accuracy, what they will look like when they do reach us. My best guess is that the cases we hear in the years

---

<sup>42</sup> *Id.*

to come will continue to reflect the larger problems of our society: business relationships gone bad; government initiatives that go too far or not far enough (depending on the eye of the beholder); criminal justice disputes; demands for equal treatment under the law, be they based on race, sex, sexual orientation, income, or other categories; and power struggles between the coordinate branches of the federal government and between the federal government and the states.

Aside from the uncertain nature of our future caseload, one question on everyone's mind is who will join us on the court. Presently, we have fifteen active judges and one vacancy.<sup>43</sup> Our sixteenth judgeship has sat vacant for roughly two years now. While some court watchers have speculated over whom the President might nominate,<sup>44</sup> we are no closer today to knowing that answer than we were when Judge Boyce Martin retired. A related question is whether our sixteenth judge will elect to reside in Cincinnati. Unlike in the past, we have not had a resident judge in Cincinnati since Judge David Nelson passed away in 2010. Regardless of who is appointed and where he or she resides, this much is certain: the judges of the court will welcome our newest colleague with open arms, just as I was welcomed nearly twenty years ago.

Another question on judges' minds is how we will operate in the face of continued budgetary constraints. The judiciary is no more immune to fiscal belt-tightening than any other branch of government. Years of flat funding followed by the recent budget sequestration hit our circuit and the district and bankruptcy courts we cover hard, threatening the constitutional mission of the courts and jeopardizing the rights of individual litigants.<sup>45</sup> Sequestration hit federal public defenders and attorneys appointed under the Criminal Justice Act to represent indigent litigants particularly hard.<sup>46</sup> In the Southern District

---

<sup>43</sup> Judge Boyce Martin, Jr., of Kentucky, retired from the court in August 2013, creating a vacancy among our active judges. *See Current Judicial Vacancies, supra* note 33.

<sup>44</sup> Pierre Bergeron, *Potential New Sixth Circuit Judge?*, SQUIRE PATTON BOGGS SIXTH CIRCUIT APP. BLOG (Mar. 12, 2014), <http://www.sixthcircuitappellateblog.com/news-and-analysis/potential-new-sixth-circuit-judge/>, *archived at* <http://perma.cc/QEB2-PF58> (noting a Louisville Courier-Journal article suggesting that the President might nominate Kentucky Supreme Court Justice Lisabeth Hughes Abramson to fill Judge Martin's seat).

<sup>45</sup> *See* Bill Mears, *Delays, Furloughs, Security Cuts: Sequester Hits Judiciary Hard*, CNN (July 23, 2013, 4:57 PM), <http://www.cnn.com/2013/07/23/politics/sequester-courts/>, *archived at* <http://perma.cc/6JBH-2NRR> (noting a \$350 million cut to the Federal Judiciary and the emergency measures courts employed in response); *see also Sequestration and the U.S. Courts*, U.S. CTS., <http://news.uscourts.gov/issues/sequestration> (last visited Jan. 6, 2015), *archived at* <http://perma.cc/V5UV-4F93> (describing the impact of sequestration on the Federal Judiciary).

<sup>46</sup> *See* Letter from William B. Traxler, Jr., Chairman of the Exec. Comm., Judicial Conference of the U. S., to Hon. Catherine C. Blake, Chief Dist. Judge (Aug. 16, 2013), *available at* <http://news.uscourts.gov/sites/default/files/Executive-Committee-Letter-Defender-Services.pdf>, *archived at* <http://perma.cc/4UDL-BRJZ> (describing an across-the-board cut to all Criminal Justice Act attorneys).

of Ohio, the Chief Federal Public Defender, Steven Nolder, even “fired himself” to avoid further layoffs within his office.<sup>47</sup> With this harsh budgetary environment in mind, we took the unusual step of cancelling the Sixth Circuit’s annual judicial conference in 2014.<sup>48</sup>

Fortunately, judges across the country, including Chief Justice John Roberts and our very own Judge Julia Smith Gibbons, were able to impress upon Congress the importance of restoring funding to pre-sequestration levels to avoid further staffing cuts and reductions to public-safety functions like probation and pre-trial services.<sup>49</sup> Despite this temporary reprieve, we cannot know how future Congresses will respond to the needs of the courts. We’ll have to wait and see.

One area of the law that will continue to change (for the better) is our increased reliance on mediation to resolve disputes, even at the appellate level. The Sixth Circuit’s mediation office has led the way nationally, due in large part to the skill and attention of Robert Rack, Jr., our first Chief Mediator, and his successor, Paul Calico.<sup>50</sup> Although litigants might, at first blush, seem less amenable to mediation on appeal, our mediators succeed nearly forty percent of the time,<sup>51</sup> thereby allowing the parties to control their own destiny and the court to focus its attention on other, more intractable, matters. And word to the wise: take the panel’s advice if it ever suggests mediation to you or opposing counsel during the course of oral argument! Though we cannot force anyone into a mediated settlement on appeal, we generally have a sense of which cases will fare better with Mr. Calico and his team.

Finally, I would be remiss not to mention the importance of law schools and their graduates to the future of our court. At the most basic level, we judges depend heavily on a fresh crop of talented, eager, and earnest law clerks

---

<sup>47</sup> Debra Cassens Weiss, *PD Explains Why He Fired Himself*, ABA J. (Aug. 12, 2013, 4:37 PM), [http://www.abajournal.com/news/article/pd\\_explains\\_why\\_he\\_fired\\_himself/](http://www.abajournal.com/news/article/pd_explains_why_he_fired_himself/), archived at <http://perma.cc/9658-BTTF>.

<sup>48</sup> See Pierre Bergeron, *Sixth Circuit Not to Hold Judicial Conference in 2014*, SQUIRE PATTON BOGGS SIXTH CIRCUIT APP. BLOG (Sept. 6, 2013), <http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-not-to-hold-judicial-conference-in-2014/>, archived at <http://perma.cc/HD96-VR6S>.

<sup>49</sup> *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, U.S. CTS. (Sept. 16, 2014), <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>, archived at <http://perma.cc/U8UB-ZEA7>; see Michael Lipkin, *Budget Plan for Judiciary Restores Most Sequestration Cuts*, LAW 360 (Jan. 14, 2014, 8:27 PM), <http://www.law360.com/articles/501296/budget-plan-for-judiciary-restores-most-sequestration-cuts>, archived at <http://perma.cc/8XV6-GKGS>.

<sup>50</sup> Craig A. Marvinney, *Mediation in the United States Courts of Appeals: A Survey*, 64 FED’N DEF. & CORP. COUNS. Q. 53, 60 (2014).

<sup>51</sup> Pierre Bergeron, *Mediation at the Sixth Circuit: An Interview with Chief Circuit Mediator Paul Calico*, SQUIRE PATTON BOGGS SIXTH CIRCUIT APP. BLOG (June 21, 2012), <http://www.sixthcircuitappellateblog.com/interviews/mediation-at-the-sixth-circuit-an-interview-with-chief-circuit-mediator-paul-calico/>, archived at <http://perma.cc/85VK-LBP5>.

each year. Working alongside our clerks is one of the true joys and privileges of the job, and for that, we are thankful. At another level, the legal academy and the courts have a long tradition of continued dialogue over the authentic development of the rule of law. That dialogue must continue. To that end, our court has, on occasion, conducted oral argument at various law schools throughout the circuit. I hope we will continue this tradition in the future as a means of engaging the students, faculty, and staff of our great law schools—just as I hope the Sixth Circuit in Review will engage them today.

#### V. CONCLUSION

It is an honor to serve as the Chief Judge of the Sixth Circuit, just as it is an honor to help kick-start the *Ohio State Law Journal's* Sixth Circuit in Review. Yet neither effort is an individual pursuit. We are grateful, as a court, to have so many dedicated staff members and practitioners doing their part. Now it's up to you—the reader—to do your part with respect to the Sixth Circuit in Review. Enjoy the articles that follow, and be sure to stop back often to keep the discussion going.