UNPUBLISHED JUDICIAL OPINIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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UNPUBLISHED JUDICIAL OPINIONS

THURSDAY, JUNE 27, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:20 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. The Subcommittee will come to order.

Ladies and gentlemen, pardon my immodesty, but this Subcommittee has an enviable record for punctuality, today notwithstanding. We had votes on the floor. In fact, one vote is just now being finalized, and that is why we are belated. My good friend, the Ranking Member, Mr. Berman, just joined us, so we will get underway. I thank you all for your patience in waiting for us to return.

Today we will examine an issue which has long been the subject of debate; that is, unpublished judicial opinions. Permit me, if you will, to begin by echoing my sentiments from a previous hearing on the operations of the Federal judicial misconduct statutes.

Overall, I believe that the Federal judiciary functions very well. At the same time, however, no branch of the government, including the third branch, is immune from evaluation. So that is one reason why we are assembled here today, to determine if there is in fact a problem with regard to the administration of justice in our country and, if so, to explore how we should fix or repair the problem.

More specifically, we are trying to determine if the administrative practices of limited publication and noncitation of opinions among the circuits are fair, both to litigants who want to know what a court was thinking when it rendered a decision, as well as to attorneys attempting to scour the law for precedential authority when advising their clients.

In conclusion, I want to extend my gratitude to everyone on the panel for your patience in working around the evolving Subcommittee schedule in preparation for this hearing. You will recall it was previously scheduled, and we had to reschedule for today. I hope that did not unduly inconvenience you. You have been very tolerant in this regard, and I appreciate your flexibility.

I am now pleased to recognize my good friend, the distinguished gentleman from California and Ranking Member of this Subcommittee, Mr. Berman, for his opening statement.

[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Good morning. The Subcommittee will come to order.

Today we will examine an issue which has long been the subject of debate: unpublished judicial opinions. Allow me to begin by echoing my sentiments from a previous hearing on the operations of the federal judicial misconduct statutes: Overall, I believe that the federal judiciary functions very well. At the same time, however, no branch of the government (including the Third Branch) is immune from evaluation. So that is why we are assembled today—to determine if there is a problem with regard to the administration of justice in our country; and if so, to explore how we should fix the problem.

More specifically, we are trying to determine if the administrative practices of limited publication and non-citation of opinions among the circuits are fair, both to litigants who want to know what a court was thinking when it rendered a decision, as well as to attorneys attempting to scour the law for precedential authority when advising their clients.

In conclusion, I want to extend my gratitude to everyone on the panel for his patience in working around the evolving Subcommittee schedule in preparation for this hearing. You have all been very tolerant in this regard, and I very much appreciate your flexibility.

I now recognize my good friend, the Ranking Member from California, Mr. Berman, for an opening statement.

Mr. BERMAN. Thank you very much, Mr. Chairman. Thank you for calling the hearing. This is obviously an issue, the issue of unpublished judicial decisions, which has many in the judicial-legal communities quite exercised, and I think you are to be commended for your diligent efforts throughout this Congress to conduct oversight of those matters that fall into this Committee's jurisdiction.

I couldn't help but notice your comment about it is appropriate to evaluate the role of the third branch. I think probably as we talk, the House of Representatives, on the floor, is evaluating the role of the third branch, or at least a decision of the third branch; but then the third branch constantly evaluates our work as well, and they actually might be able to do it with more effectiveness than we can evaluate theirs.

But the issue before us today, that is, unpublished judicial decisions, poses important questions relating to the U.S. Constitution, the framers' intent, judicial efficiency, and the fairness of our judicial system. While we certainly will not resolve these questions here now, I expect our learned witnesses will provide us with strong insights on these issues.

I particularly want to thank Judge Kozinski from the Ninth Circuit for shuffling his schedule and traveling across the country to be with us today. I have long respected his thinking on many issues and know that his presence here indicates the importance he attaches to the issues before us.

I am interested in the ancillary issue that is raised by Judge Kozinski in his testimony. Specifically, without regard to what we might think about the pros and cons of unpublished judicial decisions, what is there that we can really do beyond being providing a forum for discussion?

The independence of the judiciary is an integral aspect of our form of Government. Having sat on the Subcommittee for nearly 20 years, I have developed a healthy respect for the need to ensure that the legislative branch not interfere with the independence of the judiciary. Even where I have strongly disagreed with the direction of the judiciary, and in the administrative as opposed to the court decision context, for instance, on the judicial privacy issue, I

still try to pursue solutions that leave it up to the judiciary to manage itself.

It appears that the issue of unpublished judicial decisions is one that naturally lends itself to resolution by judges themselves. Whether the judicial resolution comes through court decisions interpreting the U.S. Constitution or new administrative rules, the judiciary is capable of grappling with this issue itself. In fact, it may be an issue that under the U.S. Constitution only the courts can resolve.

Anyway, Mr. Chairman, I look forward to hearing our witnesses, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman from California. Thank you.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

I am pleased to join you today for this oversight hearing on "Unpublished Judicial Decisions." This is obviously an issue that has many in the judicial and legal communities quite exercised. You have shown significant foresight in bringing the issue to the attention of myself and other Subcommittee Members. In fact, you are to be commended for your diligent efforts throughout this Congress to conduct oversight of those matters that fall into our Courts jurisdiction.

The issue before us today—unpublished judicial decisions—poses important questions related to the U.S. Constitution, the Framers' intent, judicial efficiency, and the fairness of our judicial system. While we certainly won't resolve these questions here and now, I expect that our learned witnesses will provide us with strong insights on these issues.

I particularly want to thank Judge Kozinski from the Ninth Circuit for shuffling his schedule and traveling across the country to be with us today. I have long respected his thinking on many issues, and know that his presence here indicates the importance he attaches to the issues before us.

While I am certainly interested in our witnesses' analyses of the pros and cons of unpublished judicial decisions, I am also interested in an ancillary issue that was raised by Judge Kozinski in his testimony. Specifically, what, if anything, can or should Congress do—besides providing a forum for discussion?

The independence of the Judiciary is an integral aspect of our form of government. Having sat on this Subcommittee for nearly twenty years, I have developed a healthy respect for the need to ensure that the Legislative Branch not interfere with the independence of the Judiciary. Even where I have strongly disagreed with the direction of the Judiciary, as with the judicial privacy issue, I still pursue solutions that leave it up to the Judiciary to manage itself.

It appears that the issue of unpublished judicial decisions is one that naturally lends itself to resolution by judges themselves. Whether the judicial resolution comes through court decisions interpreting the U.S. Constitution or new administrative rules, the Judiciary is capable of grappling with this issue itself. In fact, it may be an issue that, under the U.S. Constitution, only the courts can resolve.

Anyway, Mr. Chairman, I look forward to hearing our witnesses go at it.

I yield back the balance of my time.

Mr. COBLE. Again I say to the panelists, good to have you all with us. Not necessarily in order of appearance, but I will introduce our first witness, an old friend and frequent visitor, whom I have not seen in a good while. Professor Arthur Hellman is Professor of Law at the University of Pittsburgh, where he teaches courses in Federal court, civil procedure and constitutional law. Earlier this year, Professor Hellman received the Chancellor's Distinguished Research Award as a faculty member who has an outstanding and continuing record of research and scholarly activity. Professor Hellman received his B.A. Magna cum laude from Harvard University and his J.D. From the Yale Law School, and has

been a member of the faculty at the Pittsburgh School of Law since 1975.

Our next witness is Judge Alex Kozinski, who was appointed United States Circuit Judge for the Ninth Circuit about 15, 16, 17 years ago, I guess, Your Honor; 1985, I think. Prior to his appointment to the appellate bench, Judge Kozinski served as the Chief Judge of the United States Claims Court, worked in the Reagan administration, practiced law, and was a clerk to former Chief Justice Warren Burger. The judge received his B.A. And his J.D. Degree from UCLA.

Our next witness is Mr. Kenneth Schmier. Although she is not a Member of our Committee, Congresswoman Lee, the gentlewoman from California, has requested permission to introduce Mr. Schmier.

Ms. LEE. Thank you very much, Mr. Chairman. Let me just thank you for this privilege to be able to be with you today to make this introduction of my constituent, Mr. Kenneth Schmier. Let me just mention a couple of things about his background so you really can get a sense, the body, of who he is.

He is Chairman of the Board and Founder of NextBus Information Systems, Inc. This information system actually operates in over 20 cities nationwide, including here in Washington, D.C., back in Oakland, California, San Francisco, and many other parts of the Bay area.

Mr. Schmier is here today to testify on an issue to which he has really devoted considerable time and energy: the publication of appellate court decisions. He is chairman of the Committee of the Rule of Law, an ad hoc group which includes on its advisory board the district attorney of the City and County of San Francisco, the Dean of the Golden Gate School of Law, and the former D.A. Of San Francisco, and many other distinguished attorneys and Government leaders.

So it is my pleasure to welcome Mr. Schmier to Washington, D.C., to introduce him to the distinguished Members of this Subcommittee. I would like to say in closing that Mr. Schmier has a J.D. Degree from Hastings Law School.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you. Mr. Schmier, my able counsel advises me that I badly butchered the pronunciation of your name, so I will correct it now. Mr. Schmier.

Our final witness is the Honorable Samuel Alito, who is a judge for the U.S. Court of Appeals for the Third Circuit. Judge Alito was nominated by President Bush and confirmed by the Senate on June 15, 1990. He was awarded his B.A. From Princeton and his J.D. From Yale. Judge Alito was admitted to the New Jersey Bar and the U.S. District Court of New Jersey.

Good to have all of you with us. We have written statements from each of you. I ask unanimous consent that these statements be submitted into the record in their entirety.

Gentleman, as you will recall, we have previously requested that you limit your oral testimony to 5 minutes. I don't like to muzzle witnesses, but in the interest of time, we have votes that are ongoing on the floor, your statements have been read and will be reread, so don't think that we are hustling you in and hustling you

out. But when you see the red light appear in your face at the panel on the desk, that will be your signal that you have exhausted your time limit. You won't be keelhauled if you take another second or two, but try to wrap up at that point.

Mr. COBLE. Judge Alito, why don't we start off with you, Sir?

STATEMENT OF HONONORABLE SAMUEL A. ALITO, JR., JUDGE, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND CHAIR, ADVISORY COMMITTEE ON THE FEDERAL RULES OF APPELLATE PROCEDURE

Judge ALITO. Thank you very much, Mr. Chairman. It is a pleasure for me to be here this afternoon to try to explain the ways in which——

Mr. COBLE. I am not sure you have that mike activated.

Judge ALITO. There it is. I apologize. It is a pleasure for me to be here this afternoon to explain the ways in which the Federal judiciary is attempting to address this important subject through the rules process.

The term that is used customarily in this area—unpublished opinions—is, of course, familiar to all of us, and I think the people who are familiar with the area know what it means. But I believe it is worth a minute at the outset to make sure that nobody is misled, because as a result of some recent developments and, in particular, technological changes, the term can be very misleading.

The fact of the matter is that today the vast majority of opinions, even if they are not printed in the traditional source, the Federal Reporter, are published in any sense of the word. They are available to subscribers to services such as LEXIS and WESLAW. They are now printed in a separate series of case reports called the Federal Appendix, which is available in most law libraries. All of the courts of appeals now have web sites, and most of them now post all of their opinions on those web sites so that anybody with access to the Internet can have easy and cheap access to all of those opinions.

So the term "unpublished opinion" has really become somewhat misleading. But whatever we call these opinions, they are vitally important to the work of the courts of appeals. The courts of appeals issue thousands of them each year, and I don't think it is an exaggeration to say that if the courts of appeals were required tomorrow to decide every case with the kind of opinion that is published in the Federal Reporter, either the courts would shut down or their work would be radically transformed in undesirable ways.

The issue of these unpublished or "non-precedential" opinions, as some of us now call them, seems to raise three major questions. They are related, but I think it is worth trying to keep them separate.

The first is the question of public access. Are these opinions readily available to members of the public and to the bar?

The second is the question of citation. Should lawyers be restricted in their ability to cite those opinions in their briefs?

The third is the question of precedential value. Should these opinions, should the decisions that are memorialized in these opinions, be binding in future cases?

The first issue, the issue of public access, has, I believe, been solved to a large degree by the advances that I mentioned first. As I said, I think these opinions are now, in the main, very broadly available to the public at little cost.

The third issue, the question of precedential value, of course, implicates the doctrine of stare decisis, which has traditionally been developed by the courts in the course of deciding cases. This is an area in which there have been some very interesting developments in recent years. There has been a renewal of academic interest in the area, there have been some very interesting and provocative judicial decisions in the area, and I think it is the overwhelming sentiment of the judiciary that this development should continue in this manner in the common law tradition and should not be regulated by the national rules process.

That leaves the second question, the question of citation, and that is the one with which I am most directly concerned. At this time, the issue is left to each court of appeals and the courts of appeals have different approaches. Some allow free citation of all opinions. The rest restrict citation to various degrees.

The Justice Department has recommended that the Federal Rules of Appellate Procedure be amended so that there would be a national uniform rule on this question that would allow the citation of all opinions for certain purposes, including, most importantly in this connection, in an instance in which an opinion that is not printed in the Federal Reporter has persuasive value that is greater than any other opinion that is available in a traditional printed form.

This proposal has been debated and discussed by the committee that I chair, the Advisory Committee on Appellate Rules, at several meetings. We surveyed the chief judges of the circuits on the proposal and, not surprisingly, they were sharply divided. Some were in favor, others were opposed. Others had mixed views on the question.

We are scheduled to take this question up again at our next meeting in November, and I expect that at that time we will vote either in favor of recommending the adoption of the Department of Justice proposal or some alternative, or perhaps the vote will be against any change in the current practice.

But the point I want to make is that we are very actively engaged in the process of considering and debating this issue, and we welcome your oversight on the question and the new information that this will bring to light.

Thank you.

Mr. COBLE. Thank you, Your Honor.

[The prepared statement of Judge Alito follows:]

PREPARED STATEMENT OF SAMUEL A. ALITO, JR.

Mr. Chairman and members of the subcommittee, I am Samuel A. Alito, Jr., judge of the United States Court of Appeals for the Third Circuit. I appear today on behalf of the Judicial Conference of the United States, which is the policy-making arm of the federal courts. I chair the Advisory Committee on the Federal Rules of Appellate Procedure. Thank you for the opportunity to share the views of the federal judiciary on "unpublished" courts of appeals opinions.

Court of appeals decisions are and always have been public. But not all opinions have been reported and included in printed volumes issued by the major legal publishers. Traditionally, major legal printers published only opinions that were sub-

mitted for that purpose by the judges authoring them. About forty years ago, the federal judiciary instituted a policy discouraging the publication of all "non-precedential" opinions in order to cope with the exponentially expanding volume of litigation. This policy was adopted for a variety of reasons, including to conserve opinion-writing time for precedent-setting decisions, to preserve the consistency and quality of precedential opinions, and to save time and money for attorneys, who would otherwise find it necessary to research a hugely increased body of case law and to pay for a great many additional volumes of case reports. Presently, most final decisions of the courts of appeals are "unpublished"—that is, they are not printed in the *Federal Reporter*.

Soon after the "unpublished-opinions" policy took effect, courts of appeals developed local procedural rules to restrict the citation of "unpublished" opinions. This was done in large part for the purpose of dispelling any suspicion that institutional litigants and others who might have ready access to collections of unpublished opinions had an advantage over other litigants without such access. Thus, lawyers were prevented from citing "unpublished" opinions in their briefs primarily as a matter of fairness. With the advent of computer assisted legal research, however, the reference to "unpublished" opinions is now something of a misnomer since the overwhelming majority of opinions are now readily available to the public, often at minimal or no cost because they are posted on court web sites and are now printed in a new series of casebooks called the *Federal Appendix* that is available in most law libraries.

Although the justification for prohibiting citation to "unpublished" opinions as a matter of fairness may no longer be viable because most opinions are available electronically, several courts of appeals continue for other reasons to prohibit or otherwise limit citation to "unpublished" opinions. They remain concerned that the problems that prompted the adoption of the Judicial Conference's "unpublished-opinions" policy may be exacerbated by a policy permitting universal citation. The debate engendered over the appropriate use and precedential value of "unpublished" opinions implicates important competing interests, and the federal judiciary continues to study this subject carefully and to confer with the bar. The effort has now focused on a draft rule amendment governing "unpublished" opinions that has been proposed by the Department of Justice and will be considered by the Advisory Committee on the Federal Rules of Appellate Procedure at its November 2002 meeting.

HISTORY OF JUDICIARY ACTIONS REGARDING "UNPUBLISHED" OPINIONS

The federal courts of appeals have a longstanding practice of designating certain decisions as "unpublished opinions." Faced with an overwhelming and growing volume of reported court decisions, the Judicial Conference in 1964 began to encourage judges to report only opinions that were of general precedential value. In 1972, the Conference asked each court to develop a formal publication plan restricting the number of opinions being reported. The Federal Judicial Center surveyed the courts and recommended criteria to help them designate which opinions should be forwarded to be published. By 1974, each court of appeals had a plan in operation.

By the 1980's and 1990's, one of the justifications for limited publication no longer applied, because new technologies facilitated electronic storage and easy retrieval of immense quantities of data. In 1990, the Federal Courts Study Committee recommended that the Judicial Conference establish an ad hoc committee to study whether technological advances gave reason to reexamine the policy on "unpublished" opinions. The committee did not endorse a universal publication policy, but it noted that "non-publication policies and non-citation rules present many problems." The Conference did not act on that recommendation.

During the past decade, amendments to the rules have been periodically proposed to the Advisory Committee on the Federal Rules of Appellate Procedure to establish uniform procedures governing "unpublished" opinions. In 1998, the former chair of the advisory committee surveyed the chief circuit judges and received a virtually unanimous response that uniform rules were unnecessary. In January 2001, the Solicitor General, on behalf of the Department of Justice, proposed specific language amending the Federal Rules of Appellate Procedure to provide for uniform procedures governing the citation of unpublished opinions. The committee is now studying the Justice Department proposal.

LIMITING PUBLICATION OF OPINIONS

"(A)ppellate opinions serve essentially two functions: to resolve particular disputes between litigants and to clarify or redefine the law in some manner." [1] Up until the 1960's, the volume of appellate opinions was sufficiently manageable to allow careful writing for virtually all decisions. The well-documented explosion in the appellate workload since then has been thought by the judiciary to present compelling doctrinal and practical reasons to limit the "publication"—that is, the public dissemination—of opinions.

First, the judiciary has been concerned that important precedential opinions will be obscured by the thousands of opinions that are issued each year by the courts of appeals to decide cases that do not present any questions of significant precedential value. Opinions dealing with the easy application of established law to specific facts have little use as precedent for other litigants or posterity. A brief written opinion is all that is necessary to inform the litigants of the outcome and the reasons for it.

Second, the judiciary has been concerned that the universal publication of opinions would either produce a deterioration in the quality of opinions or impose intolerable burdens on judges in researching and drafting opinions. Drafting an opinion that is to be applied as a precedent in future cases is a time-consuming task. All of the relevant facts and all of the relevant aspects of the procedural history of the case must be set out. In addition, the discussion of all pertinent legal authorities and the holding must be phrased so that the opinion will not be misunderstood. The opinion must be crafted with the recognition that some future litigants may seize on any ambiguity in order to achieve an unwarranted benefit or escape the opinion's force. It would be virtually impossible for the courts of appeals to keep current with their case loads if they attempted to produce such an opinion in every case. Responsible appellate judges must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand). This is not to say, of course, that the decision in the latter type of case is unimportant or that *the decision* may be made with less care. But because the primary function of *the opinion* in such a case is to inform the parties of the basis for decision, not to serve as a guide for future litigation, the opinion need not be as detailed or formal.

Most of the courts of appeals have a local rule governing the citation of "unpublished" or "non-precedential" opinions. Many of the courts initially prohibited citation of such opinions because, as mentioned, they were largely unavailable to the public. Although technology has mooted the "fairness" justification for prohibiting citation to "unpublished" opinions, some courts believe that limiting citation is useful for other reasons. Three of the circuits generally forbid citation, except under very limited circumstances (First, Seventh, and Ninth circuits). Others either generally permit citation or allow citation for limited purposes, such as to establish res judicata or collateral estoppel (D.C., Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits). Although permitting citation, some of these local rules explicitly state that "unpublished" opinions lack precedential value. Still others recognize that unpublished opinions may have persuasive value (Fifth, Eighth, Tenth, and Eleventh Circuits). All courts of appeals agree that unpublished opinions are not binding precedent. A few courts of appeals have rules permitting counsel to recommend to the court that it "publish" a particular opinion.

A variety of recent developments have led courts of appeals to reexamine and in some instances alter their rules and practices regarding "unpublished" or non-precedential opinions. As noted, the vast majority of non-precedential opinions issued by the courts of appeals are now readily available to attorneys and the public. In the past few years, judicial decisions and scholarly articles have begun to explore the question whether the Constitution limits the authority of the federal courts to issue non-precedential opinions.[2] The judiciary is also acutely aware that past practices regarding non-precedential opinions have led to misperceptions and that some schol-

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[1] Federal Courts Study Committee, *Working Papers and Subcommittee Reports*, Volume 1, p. 82 (July 1, 1990).

[2] *See Anastasoff* v. *United States*, 223 F.3d 898 (8th Cir. 2000) (holding local rule unconstitutional), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000). A subsequent Ninth Circuit opinion found that a local rule prohibiting citation of an unpublished opinion was not unconstitutional. *Hart* v. *Massanari*, 266 F.3d 1155 (9th Cir. 2001). *See also, e.g.*, Thomas R. Lee and Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 Notre Dame L. Rev. 135 (2001); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L. J. 503 (2000).

ars, practitioners, and others have voiced strong arguments against the continuation of some of those practices.

PRESENT WORK OF THE APPELLATE RULES COMMITTEE

The Department of Justice proposal to which I referred emerged from this backdrop. As noted, the Department of Justice has proposed an amendment to the Federal Rules of Appellate Procedure governing unpublished opinions. It is deliberately narrow and permits citation to an "unpublished" opinion only if: (1) it directly affects a related case, e.g., by supporting a claim of res judicata or collateral estoppel, or (2) "a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue." The proposal also requires that a copy of the "unpublished" opinion be attached to any document in which it is cited. The proposal takes no position on the precedential value of an "unpublished" opinion and does not dictate whether or to what extent a court should designate opinions as "unpublished." The Department of Justice continues to endorse the proposal. As a litigant in all the circuits, it believes that a uniform national rule would be beneficial.

In response to the Justice Department proposal, the advisory committee undertook a review of the extensive number of articles and surveys on the subject and found that these express conflicting views. In accordance with its past practices, the committee surveyed the various courts of appeals. The responses from the courts of appeals manifested no consensus on the proposal advocated by the Justice Department. Unlike earlier surveys, however, several courts expressed no objection to implementing a rule on the citation of unpublished opinions. Others continued to express strong reservations. The complexity and competing interests were summed up in one response, which concluded that "the difficulty is that the decisions as to whether and when to publish, what kind of explanation to give, and what force should be given to a limited or no citation opinion are bound up together and are substantially affected by conditions that may vary from one circuit to another." The concern is shared by others who fear that permitting citation to "unpublished" or "non-precedential" opinions will inexorably cause judges to try to draft those opinions in the same manner as precedential opinions and that this will substantially disrupt the efficient functioning of the courts.

The Advisory Committee on Appellate Rules discussed the Justice Department proposal at its last meeting in April 2002 and will again consider the Department of Justice proposal at its November 2002 meeting.

CONCLUSIONS

The subject of unpublished opinions raises many difficult issues that must be addressed on several different levels. At the same time, the practices governing "unpublished" opinions continue to evolve in the respective courts of appeals, with a majority permitting citation under certain circumstances. For example, the D.C. Circuit very recently amended its local rules to eliminate a former prohibition against citing unpublished opinions. It now permits citation "as precedent" of any decision issued by the court after January 1, 2002.

The doctrine of precedent *(stare decisis)* was established as part of the common law, and the development of this doctrine has long been committed primarily to the stewardship of the Third Branch. As part of its "unpublished-opinions" policy, the Judicial Conference has deliberately promoted experimentation by giving the respective courts of appeals local discretion in this area. Whether the benefits of uniform procedures governing citation of opinions outweigh the flexibility of local procedures is subject to no easy answer. The federal judiciary is actively engaged in studying the experiences of the courts and all the implications regarding the appropriate use of "unpublished" opinions.

We welcome the oversight of Congress and look forward to any new information that it may gather on this important issue. Thank you again for the opportunity to express the judiciary's views.

Mr. COBLE. Judge Kozinski.

STATEMENT OF HONORABLE ALEX KOZINSKI, JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Judge KOZINSKI. Good afternoon, Mr. Chairman. Thank you so much for inviting me. I feel privileged to be able to speak on the topic.

I do want to say a word on behalf of the Committee staff that was so helpful to me: Melissa McDonald, Eunice Goldring, Alec French. I came all the way from California and had logistical problems. They couldn't have been more helpful or courteous. I really appreciate it.

Mr. COBLE. Is that the way they told you to tell us that, Judge?

Judge KOZINSKI. Their mother called me.

Mr. COBLE. Judge, we are very high on the staff on both sides. Thank you for mentioning that.

Judge KOZINSKI. We deal with the public as well, of course, and we believe that how staff deals with members of the public reflects on us, and I think it really reflects well with the Committee how well your staff did. I don't want to belabor the point.

May I also introduce two gentlemen in the audience, Judge William Bryson from the Court of Appeals of the Federal Circuit, who spent many years in the Justice Department, including 8 years in the Solicitor General's Office. The Federal Circuit is another large circuit and has problems maybe somewhat different from ours. I asked Judge Bryson to be here, and conceivably with the permission of the Committee, if I get a question that bears on something, I may consult with him.

I also want to acknowledge Thomas Healy, a lawyer in town, a former law clerk of the Ninth Circuit, who wrote I think—and I have made copies of this as an exhibit—a Law Review article that goes into the very question of precedent, which is at the very heart of what these hearings are about. And it is such a scholarly piece that I believe the subject should be started by reading and understanding what Mr. Healy has said. Again, I may call on him if I get in too deeply.

I want to echo what Judge Alito said. Unpublished dispositions don't mean secret law. They never have meant secret law. Published has a specific meaning in the Federal courts, and what it means is it is those opinions through which the courts of appeals speak to the other judges of our circuit—of the circuit, by which we give guidance as to what the law is.

We decide many cases. In our circuit, we decide 4,500 cases or more a year, and we have a complement of about two dozen judges, with some help from senior judges, and we have to decide those cases, and we look at all of them very closely in deciding them. But some cases are such that they require an elucidation of the law and require guidance to other judges, to the judges of the district courts, the judges of bankruptcy courts, magistrate judges, and also notice to the public of how the law is developed. Those are the published opinions.

Quite simply, deciding some cases by unpublished disposition, which is simply a letter to the parties telling them who won and who lost, and why, frees us up to spend the time that needs to be spent on published opinions, the ones that actually shape the law.

Those are very difficult indeed. If one has not worked on a judicial opinion, one might think you write it down and it all comes out of the pen, but in fact it is a very time-consuming process, because you are thinking not only about the case before you, but you are thinking of all the cases in the future that will be governed by this principle. You have to put in not too much, not too little. You have

to put in a principle that will apply to this case, but also correctly predict the result in other cases.

I have been doing it for 20 years. I clerked on the Ninth Circuit, as the Chairman pointed out. I have been 17 years on the Ninth Circuit. I was a judge before that on the Court of Federal Claims. And there is an incredibly difficult and time-consuming task involved in writing opinions. We all do these things. We write in our chambers; 30, 40, 50, 60, 80 drafts of an opinion are not at all unusual.

Now, that kind of effort simply cannot be spent on 150 cases that each judge has to dispose of a year, and an additional 300 cases that each judge has to—is on a panel with two other judges and has to review and approve.

In my view, requiring that all of those dispositions be published would result in simply chaos in the law. It would not allow us to spend the time needed to write opinions of that matter whereby we speak to our lower court judges and explain what the law is, and it would become a hunting ground for lawyers to find spurious distinctions, small changes in wording, that make no difference at all to the outcome, but give them a chance to try to say a case that otherwise is clear winds up being unclear, leading to more litigation, more expense, more delay for the litigants.

This is not a new process. As Mr. Healy points out in his article, this has been going on since the early days of the common law. Lord Coke complained there were too many cases cluttering up the law, making it difficult to figure out what the law is, not easier. In fact, appended to my statement are the practices in the State courts. As you will see, 38 States have some form of strict noncitation, nonpublication rule. There is much wisdom in the States. They decide far more cases than the Federal courts. They believe this is a tool that is necessary for the management of the case law. I believe this is something that speaks to the legitimacy of the practice.

Thank you very much.

Mr. COBLE. Thank you, Your Honor. The Subcommittee will welcome your companions as well, and your former law clerk. Good to have you all with us as well.

[The prepared statement of Judge Kozinski follows:]

PREPARED STATEMENT OF ALEX KOZINSKI

Mr. Chairman and Members of the Subcommittee. My name is Alex Kozinski and I am a judge of the Court of Appeals for the Ninth Circuit, where I have served since 1985. Prior to that time I served for three years as Chief Judge of the United States Claims Court, now called the United States Court of Federal Claims. Immediately after law school, I clerked for then-Judge (now Justice) Anthony M. Kennedy on the Ninth Circuit. I have thus spent over two decades working for courts that issue both published and unpublished rulings, which are the subject of these oversight hearings.

I thank the subcommittee for giving me the opportunity to state my views. I was invited to speak as an individual and not on behalf of my court or the federal judiciary. The views I express are therefore my own, although I believe that they reflect the views of a substantial majority of my Ninth Circuit colleagues and many other federal appellate judges as well.

WHAT ARE UNPUBLISHED DISPOSITIONS?

As Judge Alito points out in his testimony, the term "unpublished" is an anachronism, dating back to the days when failing to designate a disposition for inclusion

in a national reporter meant that it would not be published at all, and therefore unavailable to most members of the bar. Even at that time, unpublished did not mean secret. Like all court records, unpublished dispositions are available to the parties and the public from the clerk of the court. Today, of course, all dispositive rulings, whether designated for inclusion in an official reporter or not, are widely available online through Westlaw and Lexis, as well as in hard copy in West's Federal Appendix.

Unpublished dispositions differ from published ones in only one respect—albeit an important one: They may not be cited by or to the courts of our circuit. Ninth Circuit R. 36–3. (As Judge Alito explains, the rule operates somewhat differently in other circuits.) With minor exceptions dealing with subjects like res judicata and double jeopardy, none of the judges of our circuit—district judges, magistrate judges, bankruptcy judges, even circuit judges—may rely on these unpublished dispositions in making their decisions. And, in order to help them avoid the temptation to do so, we prohibit the lawyers from citing them in their briefs. The rule only applies to practice in the courts of our circuit; lawyers are free to cite our unpublished dispositions to other courts, who may give them whatever weight they deem appropriate; they may write about them in law review articles or post them on websites. There is no general prohibition against citing, discussing, criticizing or deconstructing unpublished dispositions. The prohibition is narrow: It prohibits citation to or reliance on unpublished dispositions where this would influence the decision-making process of a judge of one of the courts of our circuit. In that context, and that context alone, the unpublished disposition may not be considered.

WHY THE PROHIBITION AGAINST CITATION?

The answer to this question is fairly straightforward: Prohibiting citation to, and reliance on, unpublished dispositions helps our court to maintain consistency and clarity in the law of the circuit—the law applied by lower-court judges in their courtrooms, by our panels in later cases, and by lawyers advising clients about the likely consequences of various courses of action. Maintaining a consistent, internally coherent and predictable body of circuit law is a significant challenge for a collegial court consisting of a dozen or more judges (more than two dozen in our case) who sit in ever-changing panels of three. Appellate courts nevertheless have to speak with a consistent voice. If they fail to do so—if they leave the law uncertain or in disarray—they will make it very difficult for lawyers to advise their clients and for lower-court judges to decide cases correctly. The ripple effect of uncertain or unclear caselaw is felt acutely by those caught up in legal disputes, who must litigate their case all the way to the court of appeals if they want to know how the dispute would be decided.

In order to maintain a clear and consistent body of caselaw, appellate judges spend much of their time working on published opinions—those that announce and calibrate the circuit's decisional law. To someone not accustomed to writing opinions, the process may seem simple or easy. But those of us who have actually done it know that it's very difficult and delicate business indeed.

A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule while rejecting others. We must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.

While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and half the time of their clerks, to cases in which they write opinions, dissents or concurrences. (Attached as an exhibit is an article titled *How To Write It Right* by Fred Bernstein, one of my former law clerks. Fred discusses how it's not unusual to go through 70–80 drafts of an opinion over a span of several months.)

Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions or additions. Judges frequently exchange lengthy inter-chambers memoranda about a proposed opinion. Sometimes, differences can't be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of an unpublished dis-

position is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Opinions take up a disproportionate share of the court's time even after they are filed. Slip opinions are circulated to all chambers and many judges and law clerks review them for conflicts and errors. Petitions for rehearing en banc are filed in about half the published cases. Off-panel judges frequently point out problems with opinions, such as conflicts with circuit or Supreme Court authority. A panel may modify its opinion; if it does not, the objecting judge may call for a vote to take the case en banc. In 1999, there were 44 en banc calls in our court, 21 of which were successful.

Successful or not, an en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion, and the panel must respond. Frequently, other judges circulate memoranda in support or opposition. Many of these memos are as complex and extensive as the opinion itself. Before the vote, every active judge must consider all of these memos, along with the panel's opinion, any separate opinions, the petition for rehearing and the response. The process can take months to complete.

If the case does go en banc, eleven judges must make their way to San Francisco or Pasadena to hear oral argument and confer. Because the deliberative process is much more complicated for a panel of eleven than for a panel of three, hammering out an en banc opinion is even more difficult and time-consuming than writing an ordinary panel opinion.

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4500 cases on the merits, approximately 700 by opinion and 3800 by unpublished disposition. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 unpublished dispositions—per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 unpublished dispositions circulated by other judges with whom we sat.

Writing twenty opinions a year is like writing a law review article every two and a half weeks; joining forty opinions is like commenting on an article written by someone else nearly once every week. It's obvious just from the numbers that unpublished dispositions get written a lot faster—about one every other day. It's also obvious that explaining to the parties who wins, who loses and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. We seldom review unpublished dispositions of other panels or take them en banc. Not worrying about making law in 3800 unpublished dispositions frees us to concentrate on those decisions that will affect others besides the parties to the appeal.

If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns. And while three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule that would be binding in future cases if the decision were published. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even where those differences had no bearing on the case before them. In short, we would have to start treating the 130 unpublished dispositions for which we are each responsible and the 260 unpublished dispositions we receive from other judges as mini-opinions. We would also have to pay much closer attention to the unpublished dispositions written by judges on other panels—at the rate of ten per day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15% of the cases already and may well have to reduce that number. Or, we could write opinions that are less carefully reasoned. Or, spend less time keeping the law of the circuit consistent through the en banc process. Or, reduce our unpublished dispositions to one-word judgment orders, as have other circuits. None of these is a palatable alternative, yet something would have to give.

DO WE GIVE SHORT SHRIFT TO CASES DECIDED BY UNPUBLISHED DISPOSITIONS?

The answer to this question is no. Much of the time spent in deciding a case is not reflected in the length or complexity of the disposition: we read briefs, review the record, read the applicable authorities. All this behind-the-scenes work goes into every case and necessarily takes a substantial amount of time. How much? There is no set amount. Some cases have a large record, yet have a dispositive issue—such

as a jurisdictional defect—right near the surface. Others require a deeper examination before a dispositive issue is identified, although in the end, the resolution may be quite straightforward. The written dispositions in both cases may be short, they may look quite similar in structure and detail, yet they reflect very different time commitments.

Writing up an unpublished disposition is infinitely easier than writing a published opinion. To begin with, the facts need not be recited in detail because the parties to the dispute—the only ones for whom the disposition is intended—already know them. Nor is it important to be terribly precise in phrasing the legal standard announced, or providing the rationale for the decision. Most importantly, the judge drafting the disposition need not ponder how the disposition will be applied and interpreted in future cases presenting slightly different facts and considerations. The time—often a huge amount of time—that judges spend calibrating and polishing opinions need not be spent in cases decided by an unpublished disposition that is intended for the parties alone. Is this time taken away from the case? Is this an illegitimate shortcut? Not at all, because when judges do write opinions, much of the time they spend in the drafting process doesn't go toward actually deciding the case, but rather to making the reasoning consistent with the existing body of circuit caselaw and useful for other decisions in the future.

Lawyers sometimes darkly suggest that unpublished dispositions make up a secret body of law wholly at odds with our published decisions—that unpublished dispositions mark out a zone where no law prevails, but only the predilections and preferences of the judges. We have discussed this among the judges of my court and are, frankly, baffled by the claim because none of us perceives that this is what we are doing. These claims are always made with reference to some unnamed earlier case; lawyers seldom, if ever, present concrete evidence of lawlessness in unpublished dispositions to back up their claims. This is surprising because if the practice were happening with any frequency, the losing lawyers would have every incentive to make a fuss about it.

Nevertheless, we have worried about claims like these, and so in recent years we have taken two initiatives to help discover whether unpublished dispositions are, in fact, in wholesale, lawless conflict with published precedents. First, in February and March 2000 we distributed a memorandum to all district judges, bankruptcy judges, magistrate judges, lawyer representatives, senior advisory board members, and law school deans within the Ninth Circuit, as well as other members of the academic community, seeking information on unpublished dispositions that conflicted with other published or unpublished decisions. The memorandum was also posted on the court's website. Responses were collected by e-mail, fax, and a response form at the website. Only six responses were received. Of these, we found two to be meritorious and, despite our instructions, both responses identified conflicts between two *published* Ninth Circuit decisions—conflicts of which we were already aware. No one identified an unpublished disposition that conflicted with a published opinion or with another unpublished disposition.

Second, for a 30-month period beginning July 2000, we relaxed the court's rules barring citation of unpublished dispositions to allow their citation in requests for publication and in petitions for rehearing. For the first nine months, court staff examined all requests for publication filed. Only fifteen requests for publication were received, and none of these identified a legitimate conflict among unpublished dispositions or published opinions.

We are certainly not infallible, and I will not try to persuade this subcommittee that we never make a mistake when we decide 4500 cases a year. But I can state with some confidence that the sinister suggestion that our unpublished dispositions conceal a multitude of injustices and inconsistencies is simply not borne out by the evidence. I feel so confident of this point, having participated in rendering thousands of these dispositions myself, that I would welcome an audit or evaluation by an independent source.

How About That Claim of Unconstitutionality?

Two years ago, in *Anastasoff* v. *United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000), Judge Richard Arnold of the Eighth Circuit set this area of law ablaze by holding that stare decisis in the strict form—an obligation to follow earlier opinions of the court, published or not—was part and parcel of the Article III judge's obligation to apply the law. If Judge Arnold were correct, this would mean that every one of our 3800 yearly unpublished dispositions is binding on every federal judge in our circuit. Lawyers would have a field day digging for superficial inconsistencies or imprecisions in wording, and we'd do little but hear cases en banc to settle claimed conflicts of authority.

Fortunately, *Anastasoff* turned out to be a false alarm. Judge Arnold is one of the ornaments of the federal judiciary, a judge widely respected for his erudition and

wisdom. But even Homer nods, and Judge Arnold took a big nod on this one. While his argument in *Anastasoff* has superficial appeal, closer examination exposes its flaws. I reached the opposite conclusion in an opinion I wrote by the name of *Hart* v. *Massanari*, 266 F.3d 1155 (9th Cir. 2001), a copy of which is attached as an exhibit. More recently, attorney Thomas Healy thoroughly examined Judge Arnold's constitutional claim in an article titled *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43 (2001). Mr. Healy concluded, as I had, that the historical record comes nowhere near supporting Judge Arnold's thesis, and in fact refutes it. Mr. Healy's article is also attached as an exhibit.

Finally, some legal scholars have suggested that there may be First Amendment problems with a citation ban. No case of which I am aware has addressed this claim, but it seems implausible on its face. As noted, our rule doesn't prevent people from talking about unpublished cases. Its prohibition is limited to what lawyers may say in their briefs and arguments in court. There are a multitude of restrictions on what lawyers may say in court, none of which raises First Amendment concerns. Lawyers may not, for example, knowingly leave the "nos" and "nots" out of the quotations in their briefs, or cite to evidence that's not in the record, or fail to cite applicable binding authority of which they are aware. A knowing violation of any of these rules may result in sanctions. Attempting to defraud the court in one's pleadings is the kind of conduct that may be punished, even if similar out-of-court conduct may not be. The prohibition against citation of unpublished dispositions addresses a specific kind of fraud on the deciding court—the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance. As the Massachusetts Appeals Court noted in *Lyons* v. *Labor Relations Commission*, 476 N.E.2d 243 (Mass. App. 1985), unpublished dispositions can be quite misleading to those other than the parties to the case: "[T]he so called summary decisions, while binding on the parties, may not disclose fully the facts of the case or the rationale of the panel's decisions. . . . Summary decisions, although open to public examination, are directed to the parties and to the tribunal which decided the case, that is, only to persons who are cognizant of the entire record." *Id.* at 246 n.7.

ARE FEDERAL COURTS UNIQUE IN PROHIBITING CITATION TO UNPUBLISHED DECISIONS?

The answer is emphatically no. The vast majority of state court systems restrict citation to unpublished decisions. Last year, an article in the Journal of Appellate Practice and Process provided a thorough catalogue of these rules at both the federal and state levels. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001). (A copy of this article is attached as an exhibit, and a summary of its findings appears at the end of my statement.)

Their findings are very revealing. Thirty-eight states (plus the District of Columbia) restrict citation to unpublished opinions to some degree; by far the largest number (35) have a mandatory prohibition that is phrased much like the Ninth Circuit's rule. (Like the Ninth Circuit, some of these states permit citation for purposes of establishing res judicata or law of the case.) A typical rule, that of Alaska, reads as follows: "Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state." Alaska R. App. P. 214(d). Only nine states have rules explicitly authorizing citation of unpublished cases as precedent, and only five have no rules at all on the matter. (The total comes out to fifty-two, plus the District of Columbia, because two states explicitly authorize citation of unpublished opinions as to some courts and explicitly deny it as to unpublished opinions of others.) Two states, California and Tennessee, have provisions that authorize the state's highest court to "de-publish" opinions of the lower courts, thereby depriving them of precedential authority and making them non-citeable.

The state courts, of course, hear vastly more cases in the aggregate than do the federal courts. That the overwhelming majority of states have adopted a prohibition against citation of, or reliance on, a large number of appellate decisions is significant in two respects. First, it shows that this is a legitimate and widely accepted practice in the legal community nationwide. Second, it discloses that many court systems in addition to the federal courts have found the non-publication/non-citation practice to be an important tool in managing the development of a coherent body of caselaw.

Are There Separation of Powers Concerns?

While I welcome this subcommittee's interest in the matter and the opportunity to address the issue, I do want to raise a red flag about the appropriateness and wisdom of congressional intervention. What lies at the heart of this controversy is the ability of appellate courts to perform one of their core functions, namely, over-

seeing the development of the law within their jurisdiction. The fact that so many state and federal courts have nonpublication rules and related prohibitions against citation suggests that this is an area of uniquely judicial concern.

There is not much recent authority on point, but almost 140 years ago the new state of California tried to impose, by statute, a requirement that "all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court." California Supreme Court Justice Stephen Field—the very same Justice Field who later sat on the United States Supreme Court and wrote that case we all remember so well from law school, *Pennoyer* v. *Neff*, 95 U.S. 714 (1877)—would have none of it. Speaking for a unanimous court, he held the law unconstitutional:

> [The statute] is but one of many provisions embodied in different statutes by which control over the Judiciary Department of the government has been attempted by legislation. To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?
>
> The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammeled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the Reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the Courts, in the instances mentioned, were discharging their entire constitutional obligations.
>
> The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the Judges, and taken down by the Reporters in short hand.
>
> In the judicial records of the King's Courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if Judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence*; and this is also worthy for learned and grave men to imitate."
>
> The opinions of the Judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the Court, and should guide litigants; and right-minded Judges, in important cases—when the pressure of other business will permit—will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion the authority of the Court is absolute. The legislative department is incompetent to touch it.

Houston v. *Williams*, 13 Cal. 24, 25–26 (1859) (citations omitted). Does this state the law today? I can offer no advisory opinion, but I do believe that Justice Field's observations are worthy of careful consideration. Perhaps the best approach is not to test the issue by staying far clear of a confrontation between the judicial and legislative branches.

WHAT ABOUT THE LAW OF UNINTENDED CONSEQUENCES?

It is the sad experience of mankind that often, in trying to make things better, we do something that has exactly the opposite effect. Unpublished, unciteable appellate decisions play an important role in the management of our dual responsibilities of deciding a multitude of cases, while keeping the law clear and consistent. Would it make things better if this tool were removed from the judicial arsenal?

To answer this question, I ask you to imagine a different kind of rule Congress might pass. Let's say Congress decided that we simply didn't have enough uniformity in the application of the law, and the reason was that the United States Supreme Court wasn't issuing enough opinions. So, in order to improve things, Congress passed a law that required the Supreme Court to grant review to, and decide, 1600 cases a year, rather than the 80 or so it decided this past Term. This would be only 178 case dispositions per Justice per year, less than half the number of the average Court of Appeals judge.

Assuming the Justices disagreed with Justice Field and did not see the law as an unconstitutional encroachment on their authority, what would be the consequences? It's unlikely that this enactment would cause the Justices to work twenty times harder to come up with twenty times the number of published opinions equal in caliber to their current opinions. My guess is that they'd write something in 1600 cases, but in the vast majority, it would not be something that was very good or very useful. In order to avoid having an avalanche of insignificant cases creating unintended conflicts and uncertainties, they would write "published" opinions that have very little useful content—akin to very abbreviated dispositions or judgment orders—that contain little more than the word "Affirmed."

Something like this will, I suspect, happen if courts of appeals are forced to accord precedential value to their unpublished dispositions: We would have a tendency to say much less in our unpublished dispositions, in order to avoid having them interfere with our principal mechanism for setting circuit law, namely, the published opinions.

And this would be too bad for the parties to those appeals. Under the current system, they at least get a reasoned disposition of some sort, a statement of their facts, however brief, and a genuine effort at explaining to them why they won or lost. If those words, now directed to the parties who know a lot about the case, must also be made usable by the multitudes who do not, we will simply say less, in order to protect the integrity and stability of our circuit law from those who would misconstrue or twist it.

CONCLUSION

The topic the subcommittee has chosen for its oversight hearings is certainly a timely one. As Judge Alito has suggested, we in the judiciary are in the process of reevaluating our rules. I hope, in the end, we will leave well enough alone, and allow each court to decide this issue according to its own customs and needs. However, whatever happens will be the action of the judiciary, taken after careful reflection and with full knowledge of the institutional constraints under which we operate. I hope that whatever rule we adopt—whether to stay with the current local option or to adopt a national rule—the political branches of government will accept and respect it.Citation Rules in State Courts

Citation Rules in State Courts

	Unpublished Opinions *Shall Not* Be Cited		Unpublished Opinions *Should Not* Be Cited		Unpublished Opinions *May* Be Cited	
	Supreme Court*	Intermediate App. Court**	Supreme Court	Intermediate App. Court	Supreme Court	Intermediate App. Court
Alabama	X+	X+				
Alaska	X	X				
Arizona	X!%	X!%				
Arkansas		X!				
California		X!				
Colorado	X					
Connecticut						X$
Delaware					X	
District of Columbia	X!					
Florida				X		
Georgia	X					
Hawaii		X+				
Idaho	X					
Illinois	X+					
Indiana		X!				
Iowa	X	X				
Kansas	X+	X+				
Kentucky		X				
Louisiana		X+				
Maine	X					
Maryland	X!	X!				
Massachusetts		X!				
Michigan						X
Minnesota						X
Mississippi	X+	X+				
Missouri	X					

Montana	X					
Nebraska	X	X !				
Nevada	X !					
New Hampshire	X					
New Jersey	X !	X !				
New Mexico	X	X				
New York						
North Carolina				X !		
North Dakota					X	
Ohio						X
Oklahoma	X !	X ! #				X #
Oregon				X	X	
Pennsylvania						
Rhode Island	X					
South Carolina			X !	X !		
South Dakota	X !					
Tennessee	X !					
Texas		X				
Utah	X !	X !				
Vermont					X	
Virginia						
Washington		X				
West Virginia						
Wisconsin	X+	X+				
Wyoming						
TOTAL	26	22	1	4	4	5
TOTAL (EITHER)	35		4		9	
TOTAL (EITHER)	39				9	

Source: Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001).

Notes:

* No entry may indicate that state requires its Supreme Court to publish all opinions and/or orders

** No entry may indicate that state has no intermediate appellate court

\+ Exceptions for res judicata, collateral estoppel, law of the case, etc.

% Exceptions for publication requests and petitions for rehearing.

$ All appellate opinions are published. Citation of unpublished out-of-state opinions is allowed.

\# Court of Criminal Appeals is citeable; Court of Civil Appeals is not.

Sample Language:

Shall Not Be Cited:

"Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state."

Alaska R. App. P. 214(d).

Should Not Be Cited:

"Cases affirmed without opinion by the Court of Appeals should not be cited as authority."

Or. R. App. P. 5.20(5).

May Be Cited:

"Unreported opinions or orders may be cited, but a copy must be provided."

Del. Sup. Ct. R. 14(b)(vi)(4).

Mr. COBLE. Mr. Schmier.

STATEMENT OF KENNETH SCHMIER, CHAIRMAN, COMMITTEE FOR THE RULE OF LAW

Mr. SCHMIER. Thank you, Mr. Chairman. Approximately 4 months ago we received a decision in Schmier versus the United States Court of Appeals for the Ninth District that found us without standing to ask constitutional questions of the Ninth Circuit in the district courts of that district. We thought that surprising, because it seemed that a lawyer should be able to inquire of the courts their rationale for rules that make it impossible for lawyers to know the law.

The appellate court told us we would have to press our matter before Congress, and we are here. I suppose that shows that disgruntled litigants can get here.

I think I can be most useful in pointing out to the courts what it feels like to be a litigant who receives one of these unpublished appellate opinions. As Judge Kozinski points out, there is much wisdom in looking to the States, and my experience has been primarily in California, but there are witnesses here in the room who would be happy to share experiences with the Federal courts.

Our family appealed a contractual dispute where the trial court had determined the matter by a rule of law clearly contrary to that of the civil code. There were a lot of shenanigans during the process of the appeal, like the appellate record was missing for a long time. But 2 days before the oral argument, the presiding judge took the case off calendar and the case disappeared for 5 months.

One month later when the opinion was issued, its result was based upon 10 principles of law that were unrecognizable and they were unsupported by sites of authority. So we petitioned the court for rehearing, asking the court to correct those errors of law, any one of which would require a different result.

At the same time, we petitioned the court to publish the opinion and make it the law for everyone, feeling that the court would have to choose between correcting its errors or publishing the case, making it the law for everyone, and turning the contract law of California absolutely upside down.

The court refused to do either. So the question we raise to you is, are we simply disgruntled litigants, or do we have a legitimate beef? If the court is unwilling to make its rules of novel statements of law, law for everyone, why should we be subject to it? It seems to us that the failure to make law the law for everyone denies us the basic warranty of justice; that is, that every case is decided according to principles of law that are applicable to everyone.

I can tell you that my experience in traveling around the State of California, speaking to community groups, is that the public is uniformly unaware that there is such a thing as a "no citation" rule operating in our courts. I can also tell you that they are horrified

to hear that such a thing could exist. After all, how is it possible that a criminal defendant in America can be deprived of the right to tell a trial court that there exists an appellate court decision that would exonerate?

And we asked other questions. We want to know how it is possible to carry out the promise of equal protection of the law. "equal justice under the law" is carved over our Supreme Court. How can we carry that out, even in theory, if we don't maintain a citable body of knowledge of what has been decided in other cases? How can anybody insist on equal protection of the law if they can't bring to a court's attention that which the courts have already decided?

Finally, we ask this question: How is it possible, in a country that values free speech and where content restrictions on free speech are presumptively invalid, that a court can prohibit the discussion of what is our law in our courts of law?

We think that all of these things create a prima facia case that these rules are unconstitutional. The courts have been unwilling to act, and we ask now for checks and balances.

Mr. COBLE. Thank you, Mr. Schmier.

[The prepared statement of Mr. Schmier follows:]

PREPARED STATEMENT OF KENNETH J. SCHMIER

Mr. Chairman:

Thank you for the opportunity to draw to the attention of this Subcommittee that the law of precedents, referred to as *stare decisis*, a fundamental element of the rule of law, has been rendered ineffective.

This is so because the vast majority of our appellate court determinations are now made in unpublished, unciteable, nonprecedential, decisions, but would be equally true if only a fraction of one percent of decisions were allowed to be so made. The choice to make decisions in this manner rests entirely with the panels that make them. There now exist vast expanses in which lawless decisions may rest without notice. This has led to inconsistent resolution of cases in many instances and renders our "System," once at least theoretically perfect, unreliable. We ask that this committee restore the law of precedents to its proper operation for the protection of all.

We maintain a Website, http://www.nonpublication.com/, which is a compendium of information on this subject.

One can only wonder why our free press has not brought this troubling change of judicial accountability to the attention of the American people.

From school children to Congress, to former Attorneys General, our citizenry are under the impression that all decisions of the appellate court become citeable precedents in other cases, and that the future effect of bad precedent is a strict control upon the discretion of judges. Our citizens are uniformly unaware of unpublished, unciteable opinions and the consequences to our democracy of allowing such practices to continue.

These citizens are incredulous that a "no citation rule" could possibly exist in America, or even that an appellate court of any kind could make a decision that is removed from the chain of precedents. That some of our appellate courts decide over 90% of their cases in this manner seems to them outrageous, as it should. Legal scholars, judges, lawyers, and citizens echo their outrage. How, after all, can it possibly be that a criminal defendant could be forbidden to cite an appellate decision that would exonerate?

Civics classes across the country teach our precedential system of common law, and the importance of the test case for the redress of grievances. The test case is a method of forcing a resolution of an issue for all see, be bound, and therefore concerned. But how does this mechanism work when appellate courts are free to decide test cases in unciteable and unpublished decisions applicable to no one but the parties?

When opinions are citeable we must all be concerned about their effect upon the status of our law, not because of its justice to others, but because any change potentially affects us as well.

Due Process and Freedom of Speech allow us to insist upon equal treatment. No-citation rules and unpublished opinions gut the salutary power of these doctrines and make it impossible for individuals to argue past judicial resolutions to gain equal treatment in our courts, and sedate similarly situated political constituencies to be unconcerned about injustices or error.

Moreover, these same rules make it impossible for our people to govern themselves. Our government must have a self-regulating cycle. The cycle is this: We elect representatives who make our laws, the laws are applied to us individually by our courts, through the mechanism of published opinions we are able to see how our laws are actually being applied, and because we are concerned for the establishment of precedent, various groups of citizens study our court decisions. These groups of citizens foment for change where required and cause us to demand of our representatives certain actions. If our representatives refuse to accommodate us, we may then replace them. That process is severed when the application of law is not reported back to the citizens as legal precedent. In short, unless all cases are precedent, each of us stands alone, without recourse, before the enormous and unaccountable power of the judiciary, with no real mechanism for correcting our law.

My family's experience in the courts of California, which have no-citation and non-publication rules exactly analogous to that of the 9th Circuit is exemplary of the kind of harm now experienced by litigants all over our country.

We appealed a contractual matter determined pursuant to obvious misstatements of contract law. The presiding judge of the appellate court took the case off calendar two days before oral argument and kept it off calendar for five months. That judge then wrote the decision for the court, and marked it "Not to Be Published in the Official Reports," meaning under California Rule 977 that the decision is not to be cited or relied upon in any other case. The decision rested upon many errors including numerous unrecognizable principles of law unsupported by any cites of authority, the correction of any one of which would force a different result. We petitioned the court for rehearing to correct error, or in the alternative, for the publication of the case to make it law for all, reasoning that the rules of law it contained would turn the contract law of California upside down and require the California Supreme Court to act.

The appellate court refused to correct the errors, and also refused to make its decision law for all, leaving us losing $700,000 according to statements of law unique for us and forbidden to be used to resolve any other case. Our petitions to the California and U.S. Supreme courts asking how we could be the subjects of law uniquely made for us were denied.

We believe the result determined by the California Court of Appeal in our case could not possibly have been the same were that decision written with knowledge that it would be citeable in other cases. We believe we were deprived of justice *under law* because the non-publication and no-citation rules combined to allow the judges to free themselves of the rule of law, and make rules that cannot possibly affect the public generally.

Despite the vast departures from law, our attempts to interest the press were futile. Had the decision been published as law for all, we would have been able to cry "look what they did to contract law" and enlist the support of all concerned about contract law. But because the decision was not law for all, we could say only, "look what they did to us." That cry went unheard.

The entire record of this case is available at www.nonpublication.com for those wishing to confirm our allegations.

A close friend was involved in another litigation matter in which three parties spent over $3,000,000 in attorneys' fees attempting to get an answer to a simple, but unprecedented, issue of landlord tenant law. In the end, an appellate court opinion resolved the issue, but its twenty five-page opinion is unpublished and unciteable, assuring that similarly situated parties will have to undergo the same expense and frustration attempting to get the same answer.

Six years of litigation and a year's effort of the appellate court will bring no enlightenment whatsoever to future litigants. Instead of citizens being able to peacefully resolve such a dispute by known principles developed by common law processes and recorded in official reports of the courts, citizens facing the same issues will have to repeat the same wasteful process and friends will be turned to bitter foes. It is hard for us to see the efficiency the court claims in such a process.

Perhaps the plight of E.J. Ekdahl, a prisoner at San Quentin, California is more pathetic.

According to his letter, Mr. Ekdahl obtained a writ of habeas corpus from a Superior Court ordering the California Board of Prison Terms to set a parole hearing for him in 90 days or for the prison system to release him. The appellate court reversed in an unciteable unpublished opinion ignoring the valid statutory principles relied

upon by the Superior Court. Query: where an appellate court reverses a trial court can it be said the case is routine? If the appellate court's decision is not published and cannot be cited, what chance does Mr. Ekdahl stand of attracting attention to his case, even if it embodies the grossest of injustices? Can he ever hope for a time when some other appellate court would be forced to overrule his case, forcing reconsideration of his rights? He cannot. His case is outside the system of precedents, and there is no systemic method of ever discovering any injustice to him.

In *Sorchini* v. *City of Covina, USCA 9th*, Judge Kozinski established the law of the 9th Circuit as "binding precedent" finding a violation of court rules by counsel's cite of an unpublished opinion directly relieving her client of liability:

"The only way Kish could help counsel's argument is prohibited by Ninth Circuit Rule 36–3—by persuading us to rule in the City's favor because an earlier panel of our court had ruled the same way."

There is more in this opinion to concern us than the end of the doctrine of *stare decisis* and freedom of speech to argue law in a court of law. Kozinski excuses counsel's conduct because the Kish court violated the 9th Circuit's General Order 4.3.a. prohibiting panels from discussing the facts of the case being decided in unpublished opinions, an order that also makes it impossible for court watchers to determine whether the circuit is consistent in its application of law.

Worse still, Kozinski finds this excuse valid only in this case, citing *Bush* v. *Gore* as authority to make rules of ephemeral application. The humor of this may be lost on future generations, but what is certain to survive is a combination of authority that judges are absolutely free to make decisions that do not create precedent, that they are required to ignore all cases marked unpublished no matter how relevant, and that they are free to make law of ephemeral application. It seems to us that such a combination of authority establishes the end of the rule of law in the 9th Circuit.

The *Sorchini* Court resolved whether the police could be liable for dog bite injury to an escaping arrestee where the police did not announce release of the dog. But the court withheld its resolution of this issue from its published decision regarding violation of no citation rules, and decided that portion in an unpublished decision. Therefore, notwithstanding that the 9th Circuit has now resolved that issue twice, in *Kish* and again in *Sorchini*, there exists no citeable authority from which the police may determine a legal course of conduct, nor any precedent to deter litigation by others. We cannot see any efficiency gained by this process.

In *Symbol Technologies* v. *Lemelson Medical*, USCA Fed 00–1583 (2002) the Federal Circuit "decline(d) to consider the nonprecedential cases cited by Lemelson," considering only the published authorities despite the argument that unpublished decisions compelled a different result. Query: In face of such a divergence in the law between unpublished and published opinions, how are lawyers to advise clients regarding law? Shall lawyers' advice reflect what our courts publicly state is the law, or the law they actually apply in the vast majority of cases that go unpublished? Without a universal process of reconciliation how can we have one law for all? In circuits that do not provide unpublished cases to legal research services, how is anyone to even know how that court is actually resolving a given issue?

Judges tell us that the increase in the number of opinions would impose a burden upon attorneys researching a point of law. But how can a rule, which deprives a criminal or civil defendant of the right to cite a known appellate decision that would exonerate him be said to benefit that defendant?

In Re Machiko Kamiyama, Cal.App.4th, Div. 3, G022140 (1998) a California appellate court resolved a habeas corpus petition. A woman had spent three months in prison because she left her eight-year-old child at home, in a gated community, without a sitter, while she went to work. The court expressly recognized that there was no California case on point, and despite a dissenting opinion, resolved the case in an unpublished, unciteable opinion. We ask, what institution is to resolve the law for us if it is not the appellate court? How can we reference this case if it is not published and indexed? It happens the court determined that whether good parenting or bad, having latch key children is not criminal, for to make that the law would make millions of parents criminals. Yet despite this resolution, neither police, nor social workers nor parents can have any idea what the law is, because a trial judge convicted, and the reversal is unpublished and unciteable. Are we citizens to live forever under the tyranny of doubt as to what of our actions may result in criminal liability? Absent a published opinion, what systemic mechanism of our democracy brings the need for debate of a narrow legal issue to the body politic? How will legal thought, experience, outcome, and knowledge be preserved and brought to wisdom without some method of preserving our past attempts at justice?

More importantly, consider the loss of protection to Ms. Kamiyama had her conviction been sustained in an unpublished opinion. The public would not have cared

because it was not law for all. But had the same decision become law for all, government would have received millions of calls from similarly situated parents wondering what to do.

Even ignoring computerized research techniques and their astounding ability to isolate relevant precedents, limiting the number of cases a litigant or his attorney can sift through can only have the effect of denying that litigant the opportunity to argue for some measure of equal protection of the law. Moreover, can it possibly be argued that preventing the mention of 90% or so of our body of common law, while permitting mention of virtually every other repository of knowledge in our courts of law, does not constitute a presumptively unconstitutional content based restriction on the right of free speech where it matters most—in the forums where our law is considered and applied to us as individuals?

In respect of our memory of our father, who was a prosecutor and later a professor of law, and all of those who have sacrificed for the American concept of Equal Justice under Law, we have endeavored to force the judiciary to face the many unanswerable questions raised by no-citation, non-publication rules. We have litigated the issue in *Schmier* v. *Jennings, Schmier* v. *Supreme Court of California, Schmier v. United States Court of Appeals for the 9th Circuit, and Schmier v. United State Court of Appeals for the 11th Circuit (Records available at www.nonpublication.com).* In all of this litigation, and at all levels of the judicial system, we have never been able to obtain answers to the issues raised. Rather, the matters have always been dismissed for want of standing.

This has left us wondering if as attorneys and citizens, we have a duty, if not standing, to challenge a systemic constitutional violation broadly implemented by the judiciary itself, that deprives the people of fundamental constitutional protections, or whether the law requires us to remain silent until such time as that rule creates an obviously unjust result to ourselves rather than others. We think history teaches us that ignoring systemic injustice in the bud is foolish.

Moreover, we believe that because the courts are entrusted with the duty to protect the constitutional rights of the people, the judiciary has the duty of a trustee to candidly answer questions regarding the propriety of rules like Court Rule 36–3 forthrightly and without evasion. Yet *Schmier* v. *USCA 9th* and *Schmier* v. *USCA 11th* refused to do so. The USCA 11th even refused to publish its decision or provide it to WestLaw, assuring, as best it was able, that court watchers would not even know that its practices have been questioned.

On April 2, of 2001 I sent a letter to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. That letter is attached hereto. I raised twenty questions regarding no-citation rules and unpublished opinions. The judges of that committee have never answered those questions.

The Subcommittee should be aware that files of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States contain many letters from chief circuit judges weighing in on this issue: Federal Circuit Chief Judge Haldane Robert Mayer wrote "Each court should be allowed to decide for itself the circumstances under which nonprecedential opinions may be cited." Similarly, 3rd Circuit Chief Judge Edward R. Becker wrote "the criteria for determining when an opinion should be legended 'not precedential' should be a matter for the respective Courts of Appeals" and that what opinions should be citeable "should be a matter for the Courts of Appeals IOP's, if at all." Circuit Judge Wilfred Feinberg of the 2nd Circuit wrote "I also feel that any attempt to specify uniform, national criteria for 'unpublished' opinions—would be unwise." 2nd Circuit Chief Judge Ralph K. Winter wrote "the FRAP should not attempt to specify uniform standards regarding unpublished opinions. There is no correct set of standards writ in stone, and the present diversity of practice allows each court to choose those standards it deems most appropriate." 7th Circuit Chief Judge Richard A. Posner wrote—I do think it is useful "very useful—to have a category of unpublished opinions, provided it is understood that such opinions cannot be cited. . . . I do not think written criteria for when to publish an opinion are useful or even feasible. I think it should be left to the judgment of the panel."

Perhaps 4th Circuit Chief Judge J. Harvie Wilkinson III summed up the judges position best, "there might be some advantage simply in leaving the subject alone."

We think demand for unlimited access to a mechanism allowing the trumping of the rule of law is inconsistent with American notions of limits on the exercise of power by any government official. To us, admissions that the use of unpublished unciteable opinions cannot be subjected to articulable legal principles constitute an admission that the activity itself is lawless.

In *Schmier v. USCA 9th*, the USCA 9th stated that "Schmier will have to press his concerns about unpublished opinions—to the Congress," perhaps anticipating that the difficulty of doing so would daunt us. We are here to do just that.

We ask you to recognize this as a point in history where the Congress must exercise its power of checks and balances or, as representatives of the people, knowingly yield the manifest protections of the law of precedents held by the people as protection from otherwise unfettered power of the judiciary. We ask you to consider as a warning Barbara Tuchman's book, *The March of Folly*, which carefully recounts how numerous civilizations have destroyed themselves by doing things *they knew were wrong at the time*, justifying their actions by an anticipated, if unproven, expediency.

Our hope is that as part of the consideration of this matter the Subcommittee on the Courts can obtain the answers to the questions we could not obtain in our litigations with the judicial system or our inquiry of the Committee on Rules of Practice and Procedure.

Before I close, let me be clear on what we think should be the rule. Precedent means simply, "that which was allowed before." Therefore, all decisions of cases are precedent as a matter of historical fact. That does not mean precedents must be followed. It means that relevant precedents must be considered, then followed, distinguished or overruled.

All cases should be decided by written decisions carefully written to explain who won and why, considering facts and the weight of all conflicting legal principles no matter how complex. Opinions should teach the parties and the public the appropriate law to be used in all factually similar cases, and explain why conflicting arguments and precedents are rejected. No working hypothesis of result should harden into a final result until it has survived thorough scrutiny by at least three well-trained and experienced minds considering legal argument and precedents that bring to bear the benefit of historical experience. All decisions must carry the warranty that they are decided by legal principles, right or wrong, that have been equally applicable to all similarly situated in the past, or will be for the foreseeable future. That warranty only becomes implicit when each decision becomes a part of the law itself.

This substantial effort is required so that all who submit their conflicts to the peaceful judicial processes may be assured of the utmost judicial care, infinitely respectful of each individual, which is the essential promise of our democracy. This methodology implements G-d's law, assuring all that we will not do unto anyone that which we would not do to ourselves if similarly situated.

In every case, courts should consider all relevant precedents brought to their attention or known to them, and should accord them weight according to the stature of the issuing court and respectful of the doctrine of *stare decisis*, yet free to follow, distinguish or overrule the dictates of any case as articulable reason supports as proper for that instant case, and all future cases of similar nature. In this way our system of citation indexes our legal knowledge so that, like the scientific method it inculcates, our legal knowledge tends always toward predictability, reconciliation, and improvement.

The concept of binding precedent, offered by Judge Kozinski as a reason all cases may not be precedent, must be ended because the institutional resistance the requisite of *en banc* hearing places upon the correction of error and improvement in our law is too extreme. As was written by Judge Kozinski in *Hart* v. *Massanari*, "Because they are so cumbersome, en banc procedures are seldom used merely to correct the errors of individual panels." Error should never be perpetuated simply for the convenience of the court. Democracy places no faith in univocalism as a device for finding or asserting truth. Rather, democracy expects to find ever-improving truth in a consensus of free speaking individuals.

The concept of binding precedent or law of the circuit must be ended in favor of the independence of panels, each subject to the flexible doctrine of *stare decisis*, so that controversy and inconsistency can draw enlightenment and recognition of noble truths. Moreover, our legal system should encourage citizens to find safe harbor in conduct that can be viewed as right from all perspectives, rather than encourage the nefarious to seek safe harbor in the precise language of one panel's "binding precedent."

Our *Official Reports*, which may be online and not in books, should include all appellate decisions. Each of these decisions should be indexed and made available for study by our entire community, and particularly its law schools and representatives, so that our judges are encouraged by the possibility of public and peer review, immediately or years in the future, to strive for that decision that stands as right from all perspectives. Also in this way our laws may be improved by criticism, reconciliation, and change, and our entire society can be involved in both learning and perfecting out law, and keeping our judges and our judicial system on track. All relevant decisions should be citeable to, and may be relied upon by any court, so that our law can, at least theoretically, be said to be equally applied to all.

Americans are the most productive people in the world. We are justice-loving people. We wage war only to protect our ideas of justice. Our government has no higher duty than to provide us equal justice under law, nor do we deserve any lesser standard in our own courts than careful decisions respectful of each individual citizen and the law, no matter what the cost.

President Kennedy pledged for us: *"we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to assure the survival and the success of liberty."* These noble words pledge us to meet the cost—if there actually is proof that a cost will be required.

The job of the judiciary is to provide the discipline of ideals to our system. They must tell us what is needed to do the job right, and if they cannot get our attention, then they must refuse to do the job wrong, at least until we affirmatively order a new method.

What the judiciary may not do, and must not be allowed to do, is to remove from us the protection of the rule of law without engaging our attention and careful consideration of the protections we surrender, and the existence and extent of the expediency promised to us in exchange.

Moreover, we should be allowed to offer alternative methods for correcting the real logistical problems facing the courts. For example, careful consideration might reveal that the flood criminal appeals swamping our appellate courts might be triaged more effectively for all concerned if court appointed attorneys were paid substantial success fees for successful appeals, rather than minimal retainers to mass file appeals.

We ask the Congress to draw wide attention to this matter, so that the public may fully appreciate the protections of liberty it has already lost, to recognize how easily it could lose its liberty entirely through laxness, and may insist upon restoration of *stare decisis* to its proper function in the processes of our judiciary.

Publish or Perish
Perspective From a Client
A response to Please Don't Cite This! By Judges Alex Kozinski and Stephen Reinhardt

By Kenneth J. Schmier
Chairman, Committee for the Rule of Law

Publish or Perish

Not as an attorney, but as a client and businessman, I'd like to offer a response to *Please Don't Cite This!* June '00. Judges Alex Kozinski and Stephen Reinhardt have written the first honest, if unsatisfying, defense of non-publication - no citation rules. These rules, unthinkable only a couple of decades ago, are presently rendering some 90% of the work product of the California Courts of Appeal and the Ninth Circuit official "nullities". What happened to *stare decisis?*

When I went to law school (Hastings '74) we occasionally ran into an opinion "limited to its facts". But such cases were unusual, and were the object of suspicion because they stretched the law. Now, in direct conflict with numerous constitutional principles, law, common sense, and *James B. Beam Distilling Co. v. Georgia* (1991) 501 U.S. 529, appellate court determinations, both criminal and civil, are only selectively prospective, and it is illegal to mention most of them in any court in the jurisdiction! Our justices have created justifications for no citation rules from emperor's magic cloth only court sycophants can see.

American courts were once renowned for their principled legal doctrine equally applicable to all – "Equal Justice Under Law" is carved over the entrance of our Supreme Court. This is no longer true, not even in theory. Cries of foul are heard regularly, and litigants are turning to private judges. Why? Because not only is the public court system unbearably cost and time inefficient, but the results it produces have become well-nigh random, and worse.

Commerce has changed greatly in the past twenty years, but there is no knowable record of how most of the commercial law issues presented to our courts during that time have been resolved. In the absence of such a record, how can the judiciary possibly deliver equal protection? Or sound judgments? Or even stay abreast of business realities?

The judges tell us that by using unciteable opinions, cases can be disposed of without stating their facts, nor need they "announce a rule general enough to apply to future cases" in their resolution. But this deprives business people of any real opportunity to chart safe conduct. Subtle rules often dictate the results of cases that preserve or destroy our lives and fortunes. We cannot plan for the consequences of rules that we don't know, and which are not citeable when discovered. Vague? It's crazy-making! The resulting fear and uncertainty greatly limit our productivity. We cannot nip errant rules in the bud when we don't know about them. And we cannot properly govern ourselves because we do not get reliable feedback as to how our law is being applied.

Can the result and the articulation of the principles upon which a case was determined be disconnected? The phrasing of legal principles determining a result *is the law.* A "result" cannot be right unless it flows logically from legal doctrine applied to a given fact situation. Moreover, three judges are supposed to work up appellate cases. By most accounts that is no longer the practice. Instead, much of the courts' output qualifies as "one-judge" or "no-judge" opinions, to borrow the words of retired Justice Robert S. Thompson.

We used to solicit observations from the multitude of perspectives that make up our community by publishing every decision. Legal scholars and representatives of constituencies threatened by any rule being applied by the judiciary could be counted upon to join the call for review or legislative correction. No more. Issuing decisions as "nullities" sedates public concern and keeps would-be commentators ignorant of development of the law.

But the harm is surfacing nonetheless. Chief Justice Ron George has said, "You'd have a difficult time separating the wheat from the chaff if you published [all appellate court opinions]." Kozinski and Reinhardt tell us, "Using the language of the memdispo to predict how the court would decide a different case would be highly misleading".
Deputy Attorney General Tom Blake, who defends the California Supreme Court in a challenge to its rules 976-979 said, "We'd need a hundred Supreme Court judges to correct all of the error coming out of the appellate courts." That's an argument that proves too much. Who is correcting all that error now?

What it all means is that appellate assembly lines have serious quality control problems.

According to Kozinski and Reinhardt these quality control problems are solved by the no citation rule because the court need not worry about propagation of error. Not so. It is scrutiny for potential propagation of error that protects each one of us individually as we stand one at a time before the awesome power and often-uncontrolled egos of our judges. Shall we tolerate injustice to others because no harm threatens us personally today? We know better.

The Judges tell us that the process of writing published opinions, "*Frequently brings to light new issues, calling for further research, which in turn, may send the author back to square one.*" But this only demonstrates that square one must be a "working hypothesis" rather than a "result".

No working hypothesis should harden into a result until it has survived thorough scrutiny by at least three well-trained and experienced minds applying legal principles that bring to bear the benefit of historical experience. The process allows us litigants to hold the law hostage for a right result. As the judges admit, frequently working hypotheses fail because of conflicts. Aren't those of us shunted to the "memdispo" track entitled to a change of result if law will not justify the working hypothesis? Given the treatment of petitions for rehearing, even those coupled with an alternative demand that the "new law" of the unpublished opinion be published, the answer is currently no. The judiciary regularly refuses both review and publication, effectively shooting the hostage.

What meaning is there in equal protection, if principles unknown to existing law can be used to resolve our cases yet be sheltered from public scrutiny by *laws* insuring that these novelties will never be cited again? How do we invoke the Rule of Law to correct obstinate rule of men, if the judiciary can refuse to make its pronouncements law for all? How do we bring a test case? We can't.

Ideas have consequences, and the consequence of the notion that a solemn judicial declaration of "the law" that dictates the resolution of a dispute, is not law at all when the next such dispute comes along, is simply a call for legal anarchy.

To bring this matter to the attention of the people and our lawmakers, we have formed the Committee for the Rule of Law. www.Nonpublication.com is our meeting place and our library. We encourage reports of abuse of unpublished opinions through the website.

We are speaking to every group that will listen. The public and its representatives are shocked to learn of no citation rules and the extent of their operation. They should be because these rules gut the promises of

equal treatment and freedom of speech that form the core of our democracy.

Please Don't Cite This! answered nothing; it only confirmed prevailing suspicions by conceding that most appellate decisions are the product of expediency, not principle, and that many of them are made not by judges, but by their clerks. As businesses often learn the hard way, the public is rarely fooled with inferior quality for long. The same is true of the courts. Polls consistently show that the stature of the Courts is declining. Sophisticated litigants are abandoning the public courts in droves. Respect for law may follow, for obedience to law can not be taught while judges ignore it.

Publication and citation of appellate decisions lead to knowledge of the laws and the reasons for the laws in the general populace, the perfection of the law itself, and voluntary obedience to the law. No citation rules ultimately must lead to lawlessness and chaos. Publish or perish.

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April 2, 2001

To the Committee:

As a citizen and not as a lawyer, I protest that your rules revision does not address the serious issue of non-publication/no-citation rules applied in varying ways among the circuits. The people depend upon you as its representatives to safeguard our concepts of liberty, which will only exist so long as we have equal justice under law.

I have learned from Mr. Rabiej that the committee understands the tremendous significance of this issue but has determined to ignore it because the chief judges of several appellate circuits complain of workload problems. Balderdash.

The committee needs to carefully rethink this issue for it has the last clear chance to save the rule of law, and all that it offers humankind, from those who would destruct it in the name of unproved expediency. Be warned: Do not confuse the lack of knowledge of no-citation rules and the concomitant decline in quality of appellate work among the general public for approval. The public understands the doctrine of precedent and has been taught the appropriate manner by which appellate courts operate in required civics classes.

No one, it seems, and certainly not the judiciary, has taken on the responsibility of engaging the public to either educate them about, or debate the wisdom of, these rules.

So unknown are these rules that five out of five former United States Attorneys General attending a recent event at Hastings Law School were unaware of their existence. Senators Rockefeller, Wyden,

Boxer and Feinstein were not aware. Nor were any of the entire congressional delegation coming from northern California. Even the general counsel of the House Judiciary Sub Committee on Courts and Intellectual Property was not aware of no-citation rules. Graduating Harvard, Boalt, Hastings, and Chicago Law School students had never been taught about theses rules! This is not to say others are aware of these rules, only that they have not been asked.

But it will become known, because our committee, among other dedicated citizens, will make it known. Already we have succeeded in getting bills before legislatures, and we are informed that the Congress will look into the matter this term.

As one who has spoken to hundreds of community groups regarding these rules, I can tell you that members of the public, from immigrant cab drivers to brain surgeons are uniformly horrified upon learning of no-citation rules, as they should be. Apparently only judges and a few lawyers so concerned with easing the burdens of judges, or just agreeing with them, or lessening a perceived malpractice liability, are comfortable overlooking the manifest protection of the public afforded by publication and citation.

Preliminarily let me observe that the opposite of justice is not injustice, it is expediency. No one intends injustice. Persons, whose actions seem unjust from a neutral perspective, only intend to expediently advance their own agenda over the rights of others, which they weigh to be less important. At bottom, this is the argument with which the judges have prevailed upon the committee, thereby earning the committee's complacency in the destruction of *stare decisis*, and with it, equal protection and the rule of law.

Committee members would do well to recall *Queens Bench v. Dudley and Stevens*. Necessity created by 28 days without food in a life boat did not warrant the taking of human life, for, even though the judges themselves doubted being able to withstand such compelling circumstances, the law must stand to encourage lawful conduct. So it should be reckoned with publication and citation. The law must stand to encourage judges to anticipate every circumstance, every perspective, every criticism, to solicit other observations of the same, and to criticize each other, all in order to assure each individual the height of justice humanly possible. We simply cannot ever attain the forward promise of *Justice for All* -- liberty as we know it -- unless we have justice for each. The judges of your committee would have us aim below this mark, making its achievement not only unlikely, but impossible.

Economic feasibility is not for your committee to debate. President Kennedy pledged for us: "*we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to assure the survival and the success of liberty*". The job of the judiciary is to provide the discipline of ideals to our system. They must tell us what is needed to do the job right, and if they cannot get our attention, then they must refuse to do the job wrong, at least until we affirmatively order a new method. What the judiciary may not, and must not, do is to sell out our values without engaging our attention.

As a nation, we go to war for justice, at the expense of human life. Therefore justice is more important to us than human life itself. That being so, the "necessity" defended by the workload of the appellate judiciary cannot support the renunciation of *stare decisis* and the rule of law.

Here are twenty questions the Committee for the Rule of Law has endeavored to have answered by the judiciary. But Court actions asking these questions have been dismissed to avoid them, not in the interests of the people, but rather in the interest of "collegiality", whatever that may be.

But perhaps there are persons among your committee who would candidly and publicly address them. To find out, I formally request, from the committee itself, a response to each of the following:

How can equal protection of law exist where courts have no institutional memory of the manner in which the law is applied in similar cases?

How can our courts learn from the mistakes of others, or keep abreast of changing conditions in the community generally, absent publication of decisions?

How can the public be certain that its judges correctly and honestly state the law when rulings and opinions are not made public for review and criticism?

To what effect is the doctrine of equal protection of the law if law can be applied to an individual without immediately causing others that would be affected to complain on that individual's behalf when the rule is unconstitutional, illegal or unjust?

Does the doctrine of *stare decisis* become totally inoperative only when our courts refuse to allow citation of 100% of appellate opinions, or is it made inoperative when any decision is removed from the control of the law of precedents?

Are no-citation rules consistent with freedom of speech and the right to petition government?

Are unpublished decisions selectively prospective?

By what mechanism is the rule of law to be invoked to control the caprice of judges if judges can make decisions of limited prospectivity?

How can the people govern themselves if the manner in which its laws are applied is not reported back to them for correction?

Is it just that a criminal defendant be prevented from informing a court that an appellate court decision exists that would – or even might- exonerate?

How can individuals be presumed to know the law if court decisions are not published?

Who corrects error of the appellate court contained in unpublished opinions?

How does one bring a test case if the judiciary retains the option to defeat its use as precedent?

If judges cannot do their jobs properly should they not object publicly, but rather engage in wanton negligence? Will the judiciary approve other workers, trades and professionals operating to this standard?

Whose word is acceptable to determine the extent of deviance from existing law in unpublished opinions?

1. Where a litigant has been denied a request for rehearing for error in the law, and where rules of law are announced without citation of existing authority and/or deviate from the common understanding of the law, and where a request for publication of the decision is also denied, should the resolution of his cause in an unpublished opinion be suspect of denial of equal protection, error, corruption, or tyranny?

2. How are the various organizations of the public – i.e. Law Schools, Community Organizations, Industry Organizations, Academics, Politicians, Journalists and Commentators, etc, motivated to review unpublished opinions or join in a call for review when the questioned opinion is unciteable and not law for the general community?

3. What warranty of correctness inheres in the unpublished unciteable decision for the benefit of the litigant burdened by an appellate court decision?

4. How shall members of the public learn law and justice if they are not involved in the process?

5. How will we ever simultaneously have *Liberty* and *Justice for All*, if there exists no mechanism for the learning, perfecting and embracing of an infinitely granular and just law among our people?

Each of the members of your committee has sworn an oath to protect and defend the Constitution of the United States. Non-publication and no-citation rules hold grave constitutional implications under *James B. Beam Distilling v. Georgia* (selective prospectivity), *Legal Services Corporation v. Valenzuela* (freedom of speech), and *Anastasoff v. United States of America* (Article Three and the essence of the rule of law). Given the oaths freely taken by yourselves, none of you have the luxury of ignoring the issues presented here, but have the affirmative duty to rectify them or publicly explain the basis for your refusal to do so. To do other wise is not only obliquity but should be carefully considered for its implication of treason.

We have been given a great doctrine, given to us for safe keeping at the expense of much life, limb, and property. It provides for the common welfare while simultaneously protecting and preserving respect for the individual. The control of its implementing system is that government should never act against an individual except where reason capable of articulate written statement, openly put to, and applicable to, all similarly situated, exists. For this reason government may never act against an individual without the imprimatur of a court. Any person affected by a court used to have the right to insist that the action taken by the government become part of our common law so as to warrant that the government would treat all others similarly. To be blunt, your committee is now complacent in the destruction of that control mechanism.

There is enormous protection for the individual in that control mechanism, for it raises anything that government may do to one individual to a potential threat against the entire community of persons that might, now or at some time in the future, be treated in the same way. It is the threat of propagation of error that causes each of us to look out for the other.

Because of this, we Americans have resolutely protected each other, insuring that our house may not be divided. The care and concern for others, or in other words, the respect for the humanity of others is regenerated and amplified by *stare decisis,* equal protection and the rule of law. Why is it so important? Because it is the direct implementation of the essence of G-d's law - Do not do unto others that which you would not have them do unto you. Our obedience to that doctrine is not because we are threatened by a greater force, but rather because we understand that *Justice for All* best protects us from whatever may be brought upon us.

The absence of the certain opportunity for every person to obtain a fully explicated opinion, warranted to be the law for all by its publication and the effect of *stare decisis*, threatens destruction of our nation. A powerful statement, but not alarmist, for to say otherwise is to negate the benefit of the rule of just law.

The judges of your committee must observe their courts from the perspective of the people they serve. Courts do not serve lawyers – they are part of that institution-and are not appropriate oversight. Courts serve people. Courts are the embodiment of government as it relates to individuals. Each wrong decision does at least quadruple damage. It rewards and encourages the scofflaw and harms and makes cynics of the law abiding. And the talk of the people quickly spreads the harm.

The problem is not the citation of erroneous decisions. The problem is the creation of erroneous decisions. The purpose of publication and citation is to discourage error, and also to enlist the whole community in identifying error and perfecting the law itself. Sedating public concern for error in individual cases improperly serves only to protect the courts and individual judges from public criticism, or having to criticize fellow judges for unwise decisions in the process of correcting the law, and has the negative effect of taking the public's eye off of the otherwise unrestricted power of the judiciary, and the need for constant governance of government by the people themselves.

Justice Anthony Kennedy told me that "It would take a thousand judges to do it right". Perhaps. But that figures to only twenty per state. It is a small enough cost for the many benefits of the rule of law, the *sine qua non* of civilization.

Sincerely

Kenneth J. Schmier
Chairman
Committee for the Rule of Law

Cc: Blaine Merrit
Counsel House Subcommittee for the Courts
William Glaberson, New York Times
Kim Curtis, Associated Press
Bridgid McMenamin, Forbes Magazine

Letter of Prisoner EJ Ekdahl (Retyped)

E.J. EKDAHL. #2N30L
P.O. Box C- 79199. CSP.
San Quentin, CA. 94694.

MICHEAL KALIK SCHMIER
1475 POWELL ST. #201.
EMERYVILLE, CA. 94608-2026

Dear Sir:

I am a prisoner serving a 15 years to life indeterminate sentence. After several parole hearings before the Board of Prison terms (B.P.T.) where the process was an illegal pro - forma type of hearing, I filed a writ of habeas corpus pro per. Marin County Superior Court granted the writ in Oct. 31, 1996. The court's order told the B.P.T. to set a parole date in 90 days or released me on parole. Of course the Attorney General asked for a stay and appealed the decision as he is his job.

What happened next is why I write to you in response to your paid political advertisement. By the way I told my family members who do vote about your campaign.

On Nov. 13, 1997., the Court of Appeal, First District, Division One, Case Number: A076671 Emil J. Ekdahl (Marin – County Super. Ct. No. SC088084.) issued its opinion. This order was marked **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

I am not making this up the opinion was so far out of what prior case law read. The court misquoted its own case law to the point of only an idiot would believe that is what those cases stood for.

So I believe this is a form a political repression on a class of politically unpopular prisoners. That the courts in California use unpublished opinions and summary denials to carry out this oppression. That through the use of unpublished decisions coupled with the use of summary denials of prisoners habeas petitions the rule of law is crippled to the point of anarchy.

While much could be said about poetic justice for a class of people who are convicted law breakers. It is the system which must uphold the higher standard, especially if it wishes to stand in judgment and impart morality to those they judge.

The law in question is Calif. Penal Code statute § 3041. The language of the law

is clear: " the Board shall normally set a parole date …" There are currently 24,500 inmates eligible for parole with 1200 of them over their prescribed matrix of suggested time to be served.

Sen. Polanco (D) currently has a bill pending that may fix the situation. See HTTP://www.sacbee.com/state - wire/v-prinst/ story/ 2208210p-2601878c.html.

Well good luck with your campaign and I know there must be thousands of ordinary Californian citizens who have also been politically repressed via the courts unpublished decisions practice and I hope you'll be able to bring in an end to this.

Sincerely

/s/ E.J. Ekdahl pro per…

Justice in The Dark

Brigid McMenamin, 10.30.00

THREE YEARS AGO A FEDERAL jury acquitted Vicki Lopez-Lukis, a former commissioner in Lee County, Fla., of bribery for letting her lover, a Goldman Sachs lobbyist, reimburse her for their personal phone calls. But, bizarrely, the jury convicted her of one count of using the mails to deprive her constituents of "honest services" in connection with the same alleged bribery. This didn't make any sense, so she appealed to the 11th Circuit Court of Appeals. But in a one-word decision--"affirmed"--the appeals court rejected her argument.

Blind justice? For Lopez-Lukis, more like justice in the dark. She has no idea what the appellate judges were thinking when they brushed aside the obvious inconsistency in the verdict. Forget further appeals. The Supreme Court rarely accepts cases for review--only 124 of 8,445 sent to it in the 1999-2000 season--and almost never accepts one if there is no published opinion to look at. Lopez-Lukis is serving a 27-month term in Coleman federal prison near Orlando.

Last year federal appeals judges disposed of 79% of the 26,819 cases they decided by issuing so-called unpublished decisions, up from 37% in 1977. Over 7% of the unpublished decisions consisted of a single word. Whether curt or long-winded, an unpublished decision isn't precedent. That means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings.

"This is judges disobeying the law," says William Richman, a University of Toledo law professor who has studied the problem.

At last, one federal appeals court has declared war on the practice. In August, in a case involving a late-filed tax refund claim, a three-judge panel in St. Louis, Mo. branded unpublished decisions unconstitutional. Despite the ruling, the taxpayer lost her refund.

The reasoning behind this momentous decision was that judicial decisions are intended not just to resolve particular disputes but also to tell Americans what the law is. So every decision must be a precedent. Though that decision is itself a precedent only in the 8th Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska and the Dakotas), litigants in other federal courts are starting to cite it. The Supreme Court will likely end up ruling on the matter.

The shortcut system began in the late 1960s when judges were

struggling to deal with an avalanche of social-justice litigation as well as a parade of *pro se* litigants from the jailhouse. True, the appellate backlog does get scary at times. But does this justify lazy law? "[Unpublished decisions] are not prepared with the same kind of exactness," admits Procter R. Hug Jr., chief judge of the 9th Circuit on the West Coast, though he contends that they are still sound.

Judges insist that they issue unpublished decisions only in simple, noncontroversial cases, where the answer is clear cut. The statistics say otherwise. Appeals courts issue unpublished decisions in 24% of the cases where various judges disagree so much that one writes a dissenting opinion, and in 37% of the cases where they're reversing the trial court.

The 9th Circuit Appeals Court recently saw proof that unpublished decisions mask plenty of inconsistency. The court had affirmed the conviction of Pablo Rivera-Sanchez, an illegal alien who sneaked back into the U.S. after being deported. His lawyer found, though, that the court had in the past issued 27 separate unpublished decisions applying three different rules to the same immigration issue.

Consider how unpublished decisions have nearly driven out of business Beehive Telephone, a Wendover, Utah-based rural phone company. Last year the Federal Communications Commission cut Beehive's rates by 66%. An appeals court, swayed by the FCC's claim that Beehive had made a procedural error that barred appellate review, refused to hear the case.

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Brigid McMenamin, 10.30.00

Beehive lawyer Russell Lukas dug up an earlier decision by the same court that said even if a company makes that error--which he insists Beehive did not--it doesn't disqualify an appeal. But Lukas couldn't cite one of the key cases--it was deemed unpublished. Completing the insult, the appeals court ruled against Beehive in another unpublished decision only one word long. "They can't justify what they're going to do, so they don't publish it," says Lukas, who works out of Washington, D.C. He asked the Supreme Court for review, but naturally, was denied.

Alcan Aluminum, the Ohio subsidiary of the Canadian-based giant Alcan Aluminium Ltd., was the victim of a court's unpublished opinion that directly contradicted its earlier decision in the same case. A federal court in Philadelphia held Alcan liable in 1991 for part of the cost of cleaning up Pennsylvania's Susquehanna River after a spill. An appeals court kicked the case back to the lower court, saying in a published decision that Alcan would be off the hook if it could show that its emulsion hadn't caused the pollution. Though Alcan proved that its waste hadn't caused the harm, the lower court still found it liable, applying a new and impossibly high standard. The company appealed again, to the same appellate court, but this time the judges batted it down with one of those one-word grunts. Penalty, $500,000.

There are better ways to deal with backlogs. Congress might appropriate the money to pay for more judges. Or perhaps shrink the overpowering role of federal law in our lives.

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Forbes Magazine
10.30.00
from Justice in The Dark

Secret Justice
Appeals courts are giving short shrift to cases-and not just frivolous ones.

79% of almost 27,000 federal appeals decided on merits last year;
24% of the 1998 cases close enough that a judge wrote a dissenting opinion;
37% of cases that reversed the trial court, a sign the law wasn't clear.
43% of cases in the New England circuit, and Puerto Rico.
90% of cases in the circuit including maryland, virginia, the carolinas.

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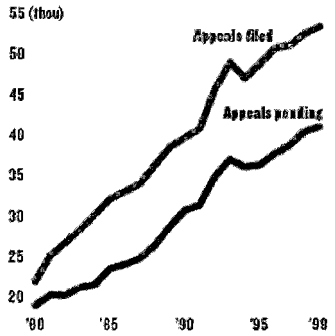
Looking for Justice
Forbes Magazine
10.30.00
from Justice in The Dark

Unpublished decisions haven't reduced the backlog, and the number of appeals continues to rise.



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Mr. COBLE. Professor Hellman.

STATEMENT OF ARTHUR HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Thank you, Mr. Chairman, and thank you for the opportunity to express my views today.

The problem of unpublished opinions actually encompasses three related but distinct issues. The first question is whether a court of appeals should provide some kind of explanation in every case that it decides on the merits. My answer is that it should, and the reason goes back to something basic that in fact is cited, I think, in the Massachusetts Constitution of 1780: We have a Government of laws and not of men.

When an appellate court decides a case, the court's explanation provides the tangible evidence that the decision is the product of the law and not simply the personal preferences of the judges who happen to sit on that panel. Deciding cases by judgment orders or their equivalent is an unacceptable practice that should not be considered among the options available to the courts of appeals as they consider the other issues.

Now, a related point involves the dissemination of opinions that Judge Alito has alluded to. Today, 11 of the 13 circuits make their unpublished decisions available to WESTLAW and LEXIS and other electronic publishers, and that includes the circuits that prohibit the citation of opinions as precedent. The courts do this, I think, at least in part, because they recognize that ready access to unpublished opinions is an important mechanism for accountability, whether or not those decisions are binding or even citable.

My own view is that the courts should make all of their unpublished opinions available to the electronic publishers, and if they are not willing to do it on their own, I would like to see the judicial conference take some steps.

That brings me to the second step of the major issues, the precedential status of unpublished opinions. I think this is a very difficult question. I had hoped to find some middle ground, but I have concluded that given the realities of the process by which cases with unpublished opinions are decided, there really is not a middle ground and the courts should not feel bound by any of those decisions.

Now, that does mean we are going to be compromising with the principle of treating like cases alike, and we should not do that easily or lightly. But I think it is going to happen here.

Fortunately, as a practical matter, not many cases will be affected. In any event, what is important is not the formal legal status of unpublished opinions, but their role in the adjudicative process.

That brings me to the issue that Judge Alito's committee is addressing: whether litigants should be permitted to cite unpublished opinions for their persuasive value when arguing later cases in the court of appeals.

Now, I think that the permissive citation rule that was endorsed provisionally by Judge Alito's committee just a few months ago, I think that is a good rule and I hope it will survive the long and arduous process of rulemaking under the enabling act.

I say that for a couple of reasons. Several of the circuits have been operating under variations of that rule for several years now,

and the problems that Judge Kozinski fears do not seem to have materialized. But it is not just the absence of negative effects that lead me to endorse the rule. There are positive reasons, and one is suggested in Judge Boudin's letter to Judge Alito. Litigants can provide information to the court that the court should have, but is not likely to get through other means.

More broadly, I believe that the task of creating a coherent and sensible body of law is not one that the judges carry out alone. On the contrary, under the adversary system, the judges work, or should work, in partnership with the lawyers. When a litigant, through counsel, informs the court that a prior panel has improvidently made new law in an unpublished opinion, the court should welcome that information and either assimilate the holding into the body of law, or forthrightly repudiate it.

Having said all that, I recognize the legitimacy of the concerns that have been articulated by Judge Kozinski and Judge Boudin, concerns that involve the effect of a permissive citation rule on the internal practices of the courts.

Now, I am not fully convinced by those arguments, but I do appreciate the value of the system of regional decentralization that our court of appeals system represents. So if the judges of a court of appeals, after formally and publicly consulting the bar of the circuit and other interested citizens, if they adhere to their view that a permissive citation rule would undermine circuit operations, the court should be allowed to opt out. I suggest that opt-out proviso.

My hope, though, is that the circuits that opt out will ultimately come around, and I think they will, because I think they will ultimately recognize that judges and lawyers together can do a better job than judges alone in realizing the ideals that underlie our system of precedent.

Thank you. And thank you again for holding the hearing on this important subject.

Mr. COBLE. Thank you, Professor.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Mr. Chairman and Members of the Subcommittee:

I appreciate your invitation to express my views at this oversight hearing on unpublished judicial opinions. By way of personal background, I am a professor of law and Distinguished Faculty Scholar at the University of Pittsburgh School of Law. I have been studying the operation of the federal appellate courts for more than 25 years, starting in the mid-1970s, when I served as Deputy Executive Director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission).

Since my days at the Hruska Commission, I have organized and participated in many other studies of the federal appellate courts. In the late 1980s I supervised a distinguished group of scholars in analyzing the innovations of the Ninth Circuit and its court of appeals. Not long after that, I was selected by the Federal Judicial Center to carry out a study of unresolved intercircuit conflicts requested by Congress in the Judicial Improvements Act of 1990. More recently, I served on the Ninth Circuit Court of Appeals Evaluation Committee appointed by Chief Judge Procter Hug, Jr. Of course, in my testimony today I speak only for myself; I do not speak for any court or other institution.

This statement is in six parts. After sketching the background (Part I) and outlining the issues (Part II), the statement deals with the obligation to explain (Part III), the precedential status of unpublished opinions (Part IV), and rules governing citation (Part V). The statement concludes with recommendations and reflections.

I. BACKGROUND

In the Anglo-American legal system, the decisions of appellate courts not only resolve the disputes between the parties immediately before them; they also establish precedents to guide courts and citizens in the resolution of future disputes. That, at least, is the tradition. In the 1970s, the federal courts of appeals, responding to unparalleled increases in the volume of cases, began to break from traditional practice. The courts designated some of their dispositions as "not for publication," and they prohibited lawyers from citing those dispositions. Court rules explicitly or implicitly announced that unpublished opinions "are not binding precedent." Today, "unpublished" opinions account for about 80% of the cases decided by the federal courts of appeals.

Non-publication and non-citation rules aroused controversy from the start, and several recent developments have added fuel to the debate. Among them:

- In an ironic counterpoint to court rules that draw a sharp distinction between published and unpublished opinions, the spread of computerized legal research has meant that "unpublished" opinions generally are as readily available as those designated as "published."
- Six of the 13 circuits now allow citation of unpublished opinions for persuasive value while retaining the rule that such decisions are not binding.
- Effective January 1, 2002, the District of Columbia Circuit has abandoned its restrictive rule on citation of unpublished decisions. The court now allows unpublished orders and explanatory memoranda to be "cited as precedent."
- West Group, publisher of the Federal Reporter System, has begun publication of the "Federal Appendix," a hard-cover series of reports of cases designated by the courts as "not for publication." In little more than a year, the series reached its 30th volume.
- The Third Circuit Court of Appeals, long a holdout against on-line publication of its "unpublished" opinions, began posting not-for-publication dispositions on its web site. Those opinions, complete with West headnotes, now appear in the Federal Appendix along with those of 10 other circuits.
- In *Anastastoff* v. *United States*, the Eighth Circuit Court of Appeals held that the circuit rule denying precedential status to unpublished opinions is unconstitutional under Article III. Although that decision was subsequently vacated by the en banc court, it has generated widespread commentary about the constitutionality—and the wisdom—of nonpublication rules.
- In April 2002, the Advisory Committee on Appellate Rules tentatively approved a proposal for an amendment to the Federal Rules of Appellate Procedure that would allow litigants to cite "non-precedential" decisions for their persuasive value.

In light of these developments, the time is ripe for a re-examination of the practice of designating opinions as "not for publication" and excluding them from the corpus of binding precedent. I applaud the Subcommittee for taking the initiative and holding an oversight hearing on these important questions.

II. SORTING OUT THE ISSUES

The problem of "unpublished opinions" actually encompasses three related but distinct issues. First, must a court of appeals provide some kind of explanation in every case that it decides on the merits? Second, may a court designate some of its opinions as "not for publication" and refuse to treat those opinions as binding precedent? Third, when a court designates an opinion as "not for publication," may the court forbid lawyers from citing that opinion when arguing future cases?

Before turning to these questions, three preliminary matters require attention. The first involves terminology. It is convenient to use the term "unpublished opinions," and I shall do so here. But as I have already indicated, "unpublished" does not mean unpublished in a literal sense. Today the term is no more than a shorthand for opinions that are designated by the court as "not for publication." That is the sense in which I use the term in my testimony today.

Second, there is the question of constitutionality. As already noted, the Eighth Circuit held, in the *Anastastoff* case,[1] that denying precedential status to unpublished opinions violates Article III of the Constitution. If *Anastastoff* is correct, the issues I have identified are not simply issues of policy; they also have a constitu-

[1] *Anastastoff* v. *United States*, 223 F.3d 898 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (en banc).

tional dimension. This in turn means that the courts—and of course Congress—are constrained in the solutions they can adopt.

I agree with Judge Kozinski (and other commentators) that the constitutional analysis in *Anastastoff* is flawed and the conclusion unpersuasive.[2] It is most implausible to suppose that the sparse language of Article III encompasses a command (or more accurately a set of commands) governing the precedential effect of intermediate appellate court decisions. Judge Arnold's analysis does not dispel the skepticism that his thesis engenders.

The final preliminary matter involves the allocation of responsibility between the courts and Congress. Without exploring the question in depth, I offer two observations. First, nothing in the existing statutory scheme limits the courts' freedom to determine the precedential status of their decisions or to regulate citation practices by counsel. Second, there is no need for Congress to take any action at this time. I have real doubts as to whether these matters are an appropriate subject for legislation; in any event, as already noted, the issues are being considered by the Advisory Committee on Appellate Rules. At least until that process has run its course, it is appropriate for Congress to stay its hand. (The question whether the rules should be determined by each court individually or should be uniform throughout the nation will be addressed in the final sections of this statement.)

III. THE OBLIGATION TO EXPLAIN

A. "Some record of the reasoning"

It might appear that the issue of whether courts must provide explanations for their decisions is entirely distinct from the policy issues raised by non-citation and non-publication rules. In theory, it is. But I have heard the suggestion that allowing citation of unpublished opinions is so undesirable that if non-citation rules are abandoned, courts should respond by disposing of cases with judgment orders or their equivalent—dispositions that announce a result but do not provide any kind of explanation.

I believe that deciding cases by judgment orders is an unacceptable practice that should not be considered among the alternatives available to the courts of appeals. More than a quarter of a century ago, the Hruska Commission endorsed the "basic proposition" that in every appellate case the court should provide "some record, however brief, and whatever the form, of the reasoning which impelled the decision."[3] Although time has outdistanced some of the Hruska Commission's recommendations, this one remains as cogent and compelling as it was in 1975. The reason is simple. We pride ourselves in having a government of laws, not of men. When an appellate court decides a case, the court's explanation—a "record [of the court's] reasoning"—provides tangible evidence that the decision is the product of the law, not simply the preferences of the judges who happened to sit on the panel.

The need for an explanation is particularly great when the case is decided—as most court of appeals cases are—without oral argument. An oral argument of even a few minutes assures the litigants that the case has been considered by the judges themselves and that the contentions of the losing party, although not persuasive, were at least heard. Without oral argument, that assurance disappears. An explanatory memorandum is not a substitute for oral argument, but it provides some evidence that the judges have confronted the issues presented by the appeal.

Although the Federal Rules of Appellate Procedure have not been amended to require the courts of appeals to provide "some record—of the reasoning which impelled the decision," as the Hruska Commission recommended, the practice in the circuits generally conforms to this precept.[4] For the reasons given, I believe that it should be taken as the starting-point in any discussion of rules governing the citation and publication of court of appeals decisions.

B. Availability in electronic form

When the Hruska Commission was writing its report, it could assume that if a court of appeals decided a case without a precedential opinion, the only reason for

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[2] *See Hart* v. *Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.).

[3] Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 258 (1975)

[4] According to Administrative Office data, only two circuits—the Eighth and the Eleventh—dispose of a substantial number of appeals "without comment." In the other circuits, all but a handful of cases receive "opinions or orders that expound on the law as applied to the facts of each case and that detail the judicial reasons upon which the judgment is based." See Table S–3 in the Annual Reports of the Director of the Administrative Office. Perusal of the Federal Appendix does not suggest a different conclusion; however, I do not know if the Federal Appendix includes all unpublished decisions.

providing "a record—of the reasoning underlying the decision" would be to satisfy the needs of the parties to the litigation. As a practical matter at that time, if an appellate disposition was not furnished to West Publishing Co. and other legal publishers, it would not be readily available to anyone other than the parties. Only those who took the trouble to visit or write to the Clerk's Office to obtain a copy of the document could find out what the court had said.

Today, of course, the situation is very different. Opinions—whether or not designated for publication—are produced electronically. And 11 of the 13 circuits make their "unpublished" opinions available to West, Lexis, and other electronic publishers.[5] This group includes the circuits that prohibit the citation of unpublished opinions as precedent. The courts thus recognize that ready access to "unpublished" opinions is an important mechanism for accountability irrespective of the decisions' binding effect.

Two circuits continue to withhold their "unpublished" opinions from electronic services. Ironically, both circuits—the Fifth and the Eleventh—allow citation of unpublished opinions as "persuasive" authority. But for most lawyers the authorization is hollow, because opinions that cannot be found on line are essentially unavailable.

I believe that all of the courts of appeals should make their unpublished dispositions available in electronic form to publishers and other information providers. Whether or not the decisions can be cited as precedent, members of the legal community and other citizens have a strong interest in knowing how the courts are carrying out their work of resolving disputes and applying the law. In all of the circuits, unpublished dispositions constitute a majority—generally a substantial majority—of the appeals decided on the merits. Thanks to modern technology, the practical obstacles that once stood in the way of allowing citizens to monitor this part of the courts' work no longer exist. Only by making all of their decisions available to publishers can the courts satisfy their obligations of accountability. There is no good reason why they should not do so.

IV. THE PRECEDENTIAL STATUS OF UNPUBLISHED OPINIONS

Although it might seem logical to consider the options available to lawyers at the argument stage before turning to the options available to the judges in deciding cases, I will reverse that sequence for what I hope will be an obvious reason. If judges must treat unpublished opinions as binding precedents, it would make no sense not to allow the lawyers to cite these decisions. On the other hand, if unpublished opinions are not binding, the desirability of a non-citation rule remains an open question. So I turn first to the precedential status of unpublished opinions.

To set the stage, it is necessary to outline the existing practices in the federal appellate system. Cases in the federal courts of appeals ordinarily are heard by panels of three judges selected at random from among a much larger number of judges (active, senior, and visiting). All of the circuits follow a rule under which published panel opinions are binding on subsequent panels of that court, unless overruled by the Supreme Court or by the court of appeals en banc.[6] The question is whether unpublished opinions should also be treated as binding.

Two prominent federal judges have addressed this question and have reached contrary conclusions. In an article that preceded the *Anastastoff* decision, Judge Richard Arnold took the position that unless "the parties concede that a prior panel opinion governs the issue" presented by a new case, "all decisions have precedential significance" and must be followed by subsequent panels.[7] Judge Alex Kozinski, writing in response, defended his circuit's rule that unpublished dispositions "are not binding precedent."[8]

I believe that both judges make two errors. First, they do not adequately address the antecedent question: binding as to what? What is it that a later panel would be obliged to follow if unpublished opinions were treated as binding precedent? Second, both judges assume that the precedential status of unpublished opinions is an all-or-nothing issue: either unpublished opinions must be treated in the same way

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[5] The Third Circuit joined this group only recently. The court announced that "beginning January 2, 2002, all opinions of the Court in counseled cases will be posted on the court's web site—and will be available for dissemination by legal publishers." From my own research, it appears that five other circuits—the First, Second, Fourth, Eighth, and Tenth—also post unpublished opinions on the courts' web sites.

[6] Not surprisingly, judges sometimes disagree over the effect of Supreme Court decisions on circuit precedent. See, e.g., South Camden Citizens in Action v. New Jersey Dep't of Envt'l Protection, 274 F.3d 771 (3d Cir. 2001); Johnson v. K Mart Corp., 273 F.3d 1035 (11th Cir. 2001); Shain v. Ellison, 273 F.3d 56 (2d Cir. 2001).

[7] Richard S. Arnold, Unpublished Opinions: A Comment, 1 J. App. Prac. & Process 219, 222 (2000).

[8] *Hart* v. *Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (quoting 9th Cir. R. 36–3).

as published opinions, or the courts should be free to disregard them. I believe that if we look more closely at what might be binding in an unpublished decision, we may find a middle ground on the question of what the rule should be. At least we will better understand what is at stake in the debate.

A. Binding as to What?

To think sensibly about the question whether unpublished opinions should be treated as binding precedent, we must ask: "binding as to what?" What is it that the later panel would be bound to if unpublished opinions were put on the same plane as published opinions of the same court?

There are, at bottom, two possible answers to this question. An unpublished opinion may announce a proposition of law that addresses one of the issues presented by the case now before the panel. Or, the unpublished decision may apply established law to a record which, in its relevant facts, cannot be distinguished from that of the new case.

1. Unpublished opinions as a source of legal rules

In Judge Kozinski's view, "the most serious implication" of a rule requiring later panels to follow unpublished opinions is that it "would preclude courts from developing a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the courts below them." The reason, Judge Kozinski explains, is that writing a "precedential opinion" is "an exacting and extremely time-consuming task." The volume of appeals in the federal appellate courts makes it impossible for judges "to write precedential opinions in every case that comes before them."[9]

The linchpin of this argument is the proposition that writing "precedential opinion" is "an exacting and extremely time-consuming task." Judge Kozinski elaborates on this point as follows:

> The rule of decision cannot simply be announced; it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed—which is often the case—the court must explain why it is selecting one rule and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it wil be applied in future cases.—[When a case is decided without precedential opinion,] the rule of law is not announced in a way that makes it suitable for governing future cases.[10]

The problem with this argument is that if courts are using unpublished opinions to announce new rules of decision, while self-consciously rejecting others that might plausibly be followed, they are violating their own standards for deciding cases without published opinions. The Ninth Circuit's rule, for example, provides that an opinion should be published if it "[e]stablishes, alters, modifies or clarifies a rule of law." Any opinion that fits Judge Kozinski's description will also fall with the category of opinions that warrant publication.

The courts of appeals do, on occasion, use unpublished opinions to announce new legal rules. One such case was *Christie*,[11] the unpublished Eighth Circuit decision that the *Ananastoff* panel relied on.[12] But Judge Kozinski does not suggest that this happens often, and my impression is that it does not (although this is a subject on which additional empirical research would be welcome). Under what circumstances, then, might a panel find that an unpublished opinion has announced a proposition of law that is not supported by binding published authority? I think there are two.

First, there is what might be called the "implicit holding." The implicit holding is a proposition of law that logically underlies a court's decision but is not stated. A common example involves the standard of appellate review. The court of appeals will summarize the appellant's challenge to a ruling by the trial court and then say, "We find no abuse of discretion. We therefore affirm."

As a matter of logic, this manner of approaching the issue certainly suggests that the particular trial court ruling is reviewed for abuse of discretion rather than de novo or by some other standard. And in the Ninth Circuit, at least, statements of

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[9] Hart, 266 F.3d at 1176–77.

[10] *Id.* at 1176.

[11] *Christie* v. *United States*, 1992 U.S.App. LEXIS 38446 (8th Cir. 1992). I believe that at the time of the *Anastastoff* decision, *Christie* was not available on line on either Westlaw or Lexis. It is now available on Lexis.

[12] The *Christie* disposition, in rejecting the taxpayers' statutory arguments, cited no precedents at all. Judge Jerry E. Smith has described *Christie* as "a textbook example of an unpublished opinion that in fact does announce a new rule of law." *Williams* v. *Dallas Area Rapid Transit*, 256 F.3d 260, 262 (5th Cir 2001) (dissent from denial of rehearing en banc).

that kind have been treated as holdings.[13] But in my view, whatever the label, such statements should not be treated as binding authority for the underlying proposition. And that is so whether or not the opinion is published.

The Ninth Circuit has actually addressed a very similar situation in an en banc opinion. In *Beisler* v. *Commissioner*,[14] the taxpayer asserted that certain payments were excluded from income under section 105(c) of the Internal Revenue Code. To qualify for the exclusion under the statute, the payments had to satisfy two conditions; for present purposes these may be referred to as (1) and (2). A prior decision, *Wood* v. *United States*,[15] held that the payments there were excluded. The taxpayer in *Beisler* argued that the court in *Wood*, in allowing the exclusion, necessarily found that condition (2) was satisfied.

The Ninth Circuit rejected that argument. The court acknowledged that the *Wood* opinion "recited" condition (2), but found that this was not the equivalent of a holding. All that could be said was that the *Wood* court "evidently assumed, without explanation, that [the requirements of condition (2)] were met." The en banc opinion continued: "Such *unstated assumptions on non-litigated issues* are not precedential holdings binding future decisions."[16]

The *Beisler* principle will cover many of the situations in which Judge Kozinski fears that unpublished opinions will make bad (or at least thoughtless) law. For example, in a recent panel discussion, Judge Kozinski described a Title VII retaliation case in which he was responsible for preparing an unpublished opinion. The opinion failed to make clear whether a particular employee was or was not a supervisor. Judge Kozinski correctly pointed out that in a Title VII case the nature and extent of the employer's liability may well depend on the supervisory status of the harassing employee. But under the *Beisler* principle, the Kozinski opinion (whether or not published) could not have been authority for any proposition relating to supervisory status. At most, references to supervisory status constituted "unstated assumptions on [a] non-litigated issue[]."

The *Beisler* principle may also apply to what I will call the "inadvertent" holding. Suppose that, in the example given above, the court, instead of saying, "Finding no abuse of discretion, we affirm," had said: "We review for abuse of discretion. Finding none, we affirm." Here the court is stating the standard of review rather than assuming it. But if the standard of review was not disputed by the parties, and there is nothing in the opinion to suggest that the court viewed the issue as open or contestable, is that sufficiently different from the implicit holding to warrant different treatment? I have real doubts that it is.

Even if inadvertent holdings are treated as precedential when found in published opinions, courts need not accord similar treatment to unpublished opinions. When a panel elects to publish an opinion, that determination triggers the elaborate process that Judge Kozinski describes. It is reasonable to assume that every proposition of law relied on in the opinion received some attention from the members of the panel. But when the opinion is unpublished, we have no such confidence. We can probably say that the judges believed that the result was not in conflict with any law cited by the lawyers or known to the members of the panel. But we cannot assume that the various intermediate steps received the kind of scrutiny that would warrant giving them binding effect in later cases.

2. Unpublished opinions and "case-matching"

As Judge Kozinski appears to recognize, most unpublished opinions do not involve law declaration at all; they apply accepted rules to new facts that in their broad outlines are very similar to those of one or more published decisions.[17] Yet this is where Judge Arnold takes his stand. He argues:

> To be sure, there are many cases that look like previous cases, and that are almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law. This holding is itself a conclusion of law with precedential significance.[18]

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[13] *See, e.g., Jarrow Formulas, Inc.* v. *Nutrition Now, Inc.*,—F.3d—(9th Cir. 2002) (citing *Tagaropulos, S.A.* v. *S.S. Santa Paula*, 502 F.2d 1171, 1171 (9th Cir. 1974)).

[14] 814 F.2d 1304 (9th Cir. 1987) (en banc).

[15] 590 F.2d 321 (9th Cir. 1979).

[16] *Beisler*, 814 F.2d at 1308 (emphasis added; internal quotation marks deleted).

[17] *Hart*, 266 F.3d at 1179.

[18] Arnold, supra note 7, at 222–23.

If the courts were still following the classic model of common law adjudication delineated in the writings of Karl Llewellyn, I might agree with Judge Arnold that each new decision has at least minimal precedential significance. And because the number of cases is so large, I might then have to agree with Judge Kozinski that requiring later panels to follow unpublished opinions "would preclude courts from developing a coherent and internally consistent body of caselaw." But much of the work of the federal courts today—and particularly that part of it that tends to generate unpublished dispositions—departs significantly from the Llewellyn model. These changes have important consequences for the prospect of treating unpublished opinions as binding precedent.

The classic model of adjudication involves a process of matching cases, memorably described by Llewellyn in his book *The Bramble Bush*. The process was neatly summarized by one of the judges who personified Llewellyn's "Grand Tradition:" the law "works itself pure from case to case."[19] But today on many recurring issues the law never works itself pure; rather, the law retains an element of indeterminacy, and the "rules of decision" are not rules but (in the Hart and Sacks classification system) standards. Many of the illustrations are familiar: Did border patrol agents have reasonable suspicion to stop a vehicle? Did an alien challenging deportation show a well-founded fear of persecution? Did a trademark holder show that the competitor's mark created a likelihood of confusion?

I believe that in these settings the legal regime creates what I will call a *zone of discretion* for appellate panels. By this I mean that there are numerous cases in which a panel can decide a fact-based issue either way without changing the law of the circuit or creating an intracircuit conflict. The "zone" is not itself a legal rule, nor is it part of the system of rules. Rather, it is a consequence of the rules that do exist.

The zone of discretion is not limited to situations in which the court of appeals reviews deferentially. Indeed, the Supreme Court decision that provides the strongest support for the concept is one that involves non-deferential review. In *United States* v. *Arvizu*,[20] the Court considered whether a border patrol agent had "reasonable suspicion" for stopping a vehicle. The Court reaffirmed its holding that "the standard for appellate review of reasonable-suspicion determinations should be *de novo*, rather than for 'abuse of discretion.'" The Court explained that one reason for this approach is to "prevent the affirmance of opposite decisions on identical facts from different judicial districts in the same circuit." But the Court also reiterated that "the existence *vel non* of 'reasonable suspicion'" is governed by a "totality of the circumstances" test. The Court acknowledged that "a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise," but said "it is the nature of the totality rule."

I believe that "the nature of the totality rule"—and of other indeterminate or multi-factor "rules"—also allows for leeway among the panels hearing cases on appeal. One consequence is that it becomes almost irrelevant whether unpublished opinions are binding or not. Even if they are binding, it is highly unlikely that an unpublished opinion—one among the many that apply the "rule" to an infinite variety of factual circumstances—could compel a decision one way rather than the other in a new case.

3. Conclusion

If the preceding analysis is correct, there will be relatively few occasions when a litigant will be able to make even a colorable argument that an unpublished opinion *compels* a decision one way rather than another in a new appeal. And if the unpublished opinion is not even an arguably compelling precedent, the question whether such opinions are binding becomes one of more theoretical than practical interest. In some cases, however, the panel will find that the unpublished opinion is squarely on point: if it is binding, it will determine the outcome. Is the panel obliged to follow the unpublished opinion? To that question I now turn.

B. To Bind or Not to Bind?

What is most remarkable about the current regime is not that unpublished opinions are not treated as binding precedent, but that later panels can treat them as though they never existed. Although Judge Kozinski and Judge Arnold disagree on almost everything else, they both appear to assume that the only choice is between perpetuating this regime and giving unpublished opinions the same precedential

[19] See Arthur D. Hellman, Breaking the Banc: The Common-Law Process in the Large Appellate Court, 23 Ariz. St. L.J. 915, 917 & n.13 (1991) (quoting Lord Mansfield).

[20] 122 S. Ct. 744 (2002).

status as published opinions. I believe that a more nuanced approach may be possible.

As Judge Kozinski points out, the current understanding of precedent in the federal courts of appeals is of relatively recent origin. Indeed, as late as 1960, at least one eminent circuit judge took the position that "in a proper case a panel—may frankly state its disagreement with a decision of another panel and refuse to be bound thereby."[21] No one takes that position today, for good reason.[22] At the same time, no one argues that federal courts should adopt the practice formerly followed by the House of Lords, under which the overruling of a prior decision was absolutely forbidden. In every court of appeals there are one or more procedures for overruling circuit precedent. The question, then, is whether it is possible to find a middle ground—an approach that would give limited precedential weight to unpublished opinions, but allow such opinions to be overruled more easily than published decisions.[23]

1. Stare decisis and the unpublished opinion

In considering the precedential status of unpublished opinions, it is useful to begin by asking why, in our system, courts ordinarily feel obliged to treat their own prior decisions as binding. In *Moragne* v. *States Marine Lines*,[24] Justice Harlan, writing for a unanimous Supreme Court, summarized the "[v]ery weighty considerations" that underlie the principle of stare decisis: "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."[25] How much weight do these considerations carry when the prior decision is "unpublished"?

Justice Harlan's first consideration invokes what we might call reliance interests; it emphasizes the role of precedent in guiding primary conduct. But when a court designates an opinion as "not for publication," it is signaling that, in the court's view, the opinion adds nothing to the guidance found in existing decisions. In the words of the Tenth Circuit rule, an unpublished decision "does not require application of new points of law;"[26] in the Fourth Circuit's language, the decision does not "establish, alter, modify, clarify or explain a rule of law within [the] Circuit."[27] Even if the court's perception is clouded, the designation itself puts citizens on notice that they should not rely on the opinion for legal rules not previously established.

Next, Justice Harlan invokes concerns of efficiency. He echoes Justice Cardozo's oft-quoted observation that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case."[28] But as Judge Kozinski and others have made clear, the "labor" involved in preparing an unpublished opinion is modest indeed. From the standpoint of efficiency, little would be lost if judges were to "reopen" the determinations made in unpublished opinions.

This brings us to Justice Harlan's final consideration. In emphasizing the role of the judiciary as a source of *impersonal* judgments, Justice Harlan calls attention to a principle deeply embedded in the idea of justice: the principle of even-handedness, or treating like cases alike. To allow courts to decide new cases without regard to how they have treated similar cases in the past violates basic norms of equality and indeed the rule of law.

The fact that the earlier decision was unpublished does not diminish the force of these imperatives. On the contrary, if the court today rejects the same claim that it accepted last week in a decision withheld from the Federal Reporter, that is even more likely to shake "public faith in the judiciary as a source of impersonal and reasoned judgments." And that is not all. The "court" that rejects the claim today will probably be a different "court"—i.e. a different panel of judges—than the one that endorsed the identical claim last week.

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[21] *Dunbar* v. *Henry du Bois' Sons Co.*, 275 F.2d 304, 306 (2d Cir. 1960). The judge was Judge Charles E. Clark, the principal drafter of the original Federal Rules of Civil Procedure.

[22] *See* Hellman, supra note 19, at 922–23.

[23] There is a parallel in the Supreme Court's treatment of its summary affirmances. The Court has said that summary affirmances "are of precedential value," but "not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

[24] 398 U.S. 375 (1969).

[25] *Id.* at 403.

[26] 10th Cir. R 36.1.

[27] 4th Cir. R. 36(a) (tenses altered)

[28] Benjamin N. Cardozo, The Nature of the Judicial Process 149 (1921).

Thus, of the three considerations that underlie the practice of stare decisis, one applies fully to unpublished decisions, while the other two apply only in an attenuated way. I believe that this analysis points to the desirability of a middle ground: (a) requiring panels to treat unpublished decisions as binding precedent in limited circumstances but (b) allowing unpublished decisions to be repudiated without en banc rehearing.

2. Giving unpublished opinions their due

What sort of rule would give unpublished opinions their due—but no more? Before answering that question, it is necessary to address a point that is easily overlooked. Often—probably more often than not—the panel that is confronted with an unpublished decision that is squarely on point will reach a conclusion that is consistent with the earlier decision. Under those circumstances, the question whether the unpublished decision is a binding precedent is of little more than academic interest. All the panel need do is to publish its opinion with a footnote flagging the unpublished decision and announcing that there is now no reason to cite it.

But suppose the panel concludes that the unpublished decision, if binding, compels a result in the new case that is contrary to the outcome the panel would reach on the basis of its independent analysis. A simple approach to this situation is suggested by the Seventh Circuit's rule on published decisions. In the Seventh Circuit, a panel may overrule a prior published decision if the panel's proposed opinion "is first circulated among the active members of [the] court and a majority of them do not vote to rehear en banc the issue of whether the [new] position should be adopted."[29] The courts of appeals might consider this approach as a means of dealing with unpublished opinions.

A rule of this kind is responsive to the different processes that attend the issuance of published and unpublished opinions. In most if not all circuits, opinions designated as "for publication" receive scrutiny by off-panel judges, either before or after filing.[30] Decisions that appear out of line with circuit authority, Supreme Court precedent, or sound policy will generally be flagged, and if the initial misgivings prove well-founded, the error will be corrected by the court en banc or by the panel itself. By the same token, if a panel decision has survived this scrutiny, it should be treated as authoritative, and nothing short of reconsideration by an en banc court should suffice to repudiate it.

In contrast, when a decision is designated as "not for publication," it will receive little if any attention from off-panel judges. If a later panel concludes that the unpublished decision "got it wrong," that judgment is entitled to great weight, particularly in comparison to the judgment of the earlier panel, which by hypothesis did not believe that its decision was making new law. At the same time, by requiring the later panel to circulate a proposed opinion to all active judges, the Seventh Circuit approach assures that the panel will not act casually in repudiating the earlier decision.

C. Drawbacks of this approach

Many judges will be uneasy at the prospect of giving even limited binding effect to unpublished dispositions. I therefore emphasize once again that the approach suggested here would affect only a small number of cases. Fact-based holdings in unpublished opinions would almost never qualify. Propositions of law would be treated as presumptively binding only if (a) the earlier panel announced a rule of law not supported by existing Supreme Court or circuit precedent; (b) the proposition was indisputably essential to the outcome of the earlier case; and (c) adhering to the proposition in the new case would *compel* a holding contrary to the holding that the panel would otherwise reach. When all of those circumstances obtain, it would be but a modest step to say that the obligation to treat like cases alike requires the later panel to accord the earlier disposition a formal burial before deciding the new case differently.

Yet even if I am right that panels would seldom find that an unpublished disposition constitutes a compelling precedent for a wrong decision in the case before them, that does not fully answer the judges' concerns. The problem, they will argue, is that panels would be required to examine numerous unpublished opinions in order to ascertain whether those opinions can conscientiously be distinguished. That in itself would be a substantial burden.

At least a partial answer lies in the adversary system. If one litigant argues that an unpublished disposition constitutes a compelling precedent for a particular out-

[29] 7th Cir. R. 40(e).

[30] *See*, e.g., Edward R. Becker, Contemplating the Future of the Federal Courts of Appeals, 34 U.C. Davis L. Rev. 343, 344 (2000) (Third Circuit).

come, the lawyer on the other side can be expected to point out why the case cannot be read so broadly. Given that most unpublished opinions are brief, the judges should not have to spend a great deal of time analyzing these arguments.

There is, however, a further difficulty with the approach suggested. Even if it would make sense for the courts of appeals, how would it work in the lower courts of the circuit? Suppose that a litigant were to point to an unpublished decision which, under the criteria set forth above, constituted a compelling precedent in a new case. Would we say that the lower court must treat the decision as binding law, even though the opinion received minimal scrutiny within the three-judge panel and, in all likelihood, none from off-panel judges? I do not think we would. But if the lower court has the discretion to reject the unpublished opinion, we would be giving the lower courts greater freedom to depart from appellate teachings than three-judge panels of the court of appeals.[31] That cannot be right either.

D. Conclusion

Reluctantly, I conclude that the Seventh Circuit approach is not an acceptable middle ground. If unpublished opinions are to be given even limited binding effect in the courts of appeals, they would have to be given some precedential status in the lower courts, and that would raise grave problems. Fortunately, what is important is not the formal legal status of unpublished opinions but their role in the adjudicative process. I now address that subject.

V. THE CITEABILITY OF UNPUBLISHED DECISIONS

A. Options for litigants

Perhaps some courts will be persuaded by Judge Arnold's argument that judges do not have the power "to choose for themselves, from all the cases they decide, those that they will follow in the future, and those that they need not."[32] If so, it would follow that lawyers should be permitted to cite unpublished dispositions. The adversary system requires no less.

The converse is not true, however. Even if later panels have no obligation to follow unpublished opinions, I would still argue that lawyers should be permitted to cite them.[33] There are at least three reasons for this.

First, citation of unpublished opinions provides information to the courts of appeals that the courts should have, but are unlikely to receive from other sources. Has an unpublished opinion relied on a proposition of law that is not supported by binding published authority?[34] Has a panel applied established law to reach a result that could not readily be deduced from published opinions applying the rule? How have prior panels dealt with recurring but low-visibility issues of procedure or remedies?[35] Are there patterns of apparently novel holdings in unpublished opinions that point to systematic malfunctions in the court's use of nonpublication rules?

This is information that a court should have, not only for the purpose of monitoring its publication practices, but also from a jurisprudential perspective. Indeed, from a jurisprudential standpoint I fear that there may be an element of wishful thinking in judges' resistance to allowing citation of unpublished opinions. For example, Chief Judge Boyce Martin of the Sixth Circuit has emphasized the value of keeping the body of circuit law "cohesive and understandable, and not muddying the water with a needless torrent of published [and therefore citable] opinions."[36] But as Professor Loren Robel has pointed out, the "cohesiveness" that is achieved by excluding unpublished opinions from the corpus of citable precedent "is a false cohesiveness, achieved only by ignoring decisions that create the mud."[37] Courts do themselves no favors by forbidding litigants from telling later panels about unpublished decisions when awareness of those decisions could help the court to bring

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[31] The problem, of course, stems from the fact that the lower court would have no authority to overrule the unpublished decision.

[32] *Anastastoff*, supra note 1, 223 F.3d at 904.

[33] The discussion here is limited to citation rules in the courts of appeals. Different considerations come into play at the trial-court level.

[34] As Chief Judge Boudin of the First Circuit said in his letter to Judge Alito, "it is quite convenient for us to know that the court has said one thing in an unpublished opinion and is proposing to say something else in a published one; we may well find this out ourselves but [a rule allowing citation] would make counsel help."

[35] *See, e.g., United States* v. *Rivera-Sanchez*, 222 F.3d 1057, 1062–63 (9th Cir. 2000). In that case, at the request of the court, counsel "produced a list of twenty separate unpublished dispositions instructing district courts to take a total of three different approaches to correct [a recurring] problem [involving resentencing]."

[36] Boyce Martin, In Defense of Unpublished Opinions, 60 Ohio St. L. J. 177, 192 (1999).

[37] Lauren Robel, The Practice of Precedent: Anastasoff, Noncitation rules, and the Meaning of Precedent in an Interpretive Community, 35 Ind. L. Rev. 399, 416 (2002).

greater coherence to the law or simply to improve the operation of nonpublication plans.

Second, there is something unseemly about a court's laying down a rule that lawyers may not call the court's attention to decisions of that court that bear on the issues in a new appeal. As members of the Advisory Committee on Appellate Rules pointed out at the April meeting, lawyers generally can cite just about everything else to a court of appeals—anything from decisions of foreign tribunals to op-ed pieces and news stories. It is at least anomalous that the one body of material lawyers cannot cite is composed of decisions of that very court.

Although I would not argue that non-citation rules violate the First Amendment, they do implicate First Amendment concerns. Recently, in *Legal Services Corp.* v. *Velasquez*,[38] the Supreme Court emphasized the importance of allowing attorneys to "present all the reasonable and well-grounded arguments necessary for proper resolution of the case."[39] The Court struck down a law that sought "to prohibit the analysis of certain legal issues and to truncate presentation to the courts."[40] While this holding would not apply to restrictions imposed by the courts themselves, it does raise doubts about the soundness of rules that "truncate presentation" of the law—here, the court's own decisions.

Finally, the experience of those courts that have allowed citation of unpublished opinions does not bear out the fears of Judge Kozinski, Judge Martin, and other proponents of non-citation rules. The Tenth Circuit suspended its non-citation rule on a trial basis 8 years ago. Before long, the court made its permissive rule permanent. Presumably the judges found that they were not being inundated with citations to unpublished dispositions, and that allowing lawyers to cite unpublished opinions for their persuasive value did not interfere with the court's ability to establish a coherent body of law within the circuit.

Upon reflection, it is not surprising that courts have been able to live in peace with permissive citation rules. As a member of the Advisory Committee pointed out at the April 2002 meeting, a lawyer who relies on an unpublished opinion in a brief or oral argument is in effect acknowledging that no published opinion supports the lawyer's position. That is a substantial disincentive to promiscuous citation of unpublished rulings.

There may be a second reason why lawyers have been restrained in their use of unpublished dispositions. Most appellate decisions ratify the status quo by affirming criminal convictions, administrative agency determinations, or district court rulings denying relief in civil cases.[41] Unpublished dispositions are skewed even more strongly in the same direction.[42] This means that the typical appellant is far more likely to find support in published decisions than in those that are unpublished. The typical appellee will find more ore in unpublished dispositions, but because the corpus of published decisions is so favorable, there will usually be little incentive to go beyond them. Thus, for somewhat different reasons, both classes of litigants will generally be content to make their arguments on the basis of published opinions alone.

B. Options for the court

When the Advisory Committee on Appellate Rules discussed this issue in April, members who supported the proposed national rule emphasized that allowing citation by litigants would in no way limit the power of the courts of appeals to designate some opinions as "non-precedential." That is certainly true. But it does not follow that because unpublished opinions are not binding precedent, the courts of appeals should feel free to ignore such opinions when they are on point. After all, it is commonplace for these courts to discuss opinions of other circuits, opinions of district courts, state-court decisions, and other non-binding authority. Why should unpublished decisions of the same court not receive at least as much consideration?

In fact, I would go further. Even if no change is made in the precedential status of unpublished opinions as a matter of law, I believe that the courts of appeals should feel obliged to at least acknowledge on-point dispositions cited by a party, if only to make explicit that the disposition has been superseded by the published disposition. This belief rests on the premise that the task of creating a coherent and sensible body of law is not one that the judges carry out alone; on the contrary,

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[38] 531 U.S. 533 (2001).

[39] *Id.* at 545.

[40] *Id.*

[41] *See* Michael Hannon, A Closer Look at Unpublished Opinions in the United States Courts of Appeals, 3 J. App. Prac. & Process 199, 218–19 (2001); Ruth Colker, Winning and Losing under the Americans with Disabilities Act, 62 Ohio St. L. J. 239, 254 (2001).

[42] *See* Hannon, supra note 41, at 220–21; Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R-C.L. L. Rev. 99, 104–05 (1999).

under the adversary system the judges work (or should work) in partnership with the lawyers. When a litigant, through counsel, informs the court that a prior panel has improvidently made new law in an unpublished opinion, the court should acknowledge the error and either assimilate the holding into the body of circuit law or forthrightly repudiate it.[43]

C. Options for the Advisory Committees

In January 2001, Solicitor General Seth Waxman wrote to Judge Will Garwood, chair of the Advisory Committee on Appellate Rules, proposing the adoption of a new rule that would allow litigants to cite unpublished opinions for their persuasive value. In April 2002 the Advisory Committee endorsed the proposal with some modifications. I support the Advisory Committee's decision and hope that when the process has run its course the proposed rule will be adopted.

This is not the place for a detailed discussion of the particulars of the rule. However, two points deserve mention. First, at the Advisory Committee meeting in April, members debated whether the proposed rule should include a cautionary note, similar to the one included in most of the circuits' current rules, stating that unpublished opinions should be cited only if no published opinion of the forum court adequately addresses the issue. I believe that a hortatory note of this kind is desirable. While the courts of appeals sometimes err in choosing not to publish, unpublished dispositions generally deserve their second-class status. Litigants should be encouraged to research published opinions carefully before citing one that is unpublished.

Second, Chief Judge Boudin of the First Circuit has suggested that adopting a permissive citation rule on a national basis would "undermine[] the ability of different circuits to maintain or adopt procedures [for unpublished dispositions] that work best in their local circumstances." The reason, he explains, is that these procedures "are sensitive to the volume of cases, the expectations of lawyers, the size of the circuit and the use of different methods of screening cases and drafting short-form dispositions."[44]

Although I do not find this argument totally convincing, I cannot say that Judge Boudin is wrong. I therefore believe that the rule should include a provision that would allow individual courts of appeals to opt out if a majority of the active judges vote to do so after giving notice and an opportunity for comment in accordance with the procedure specified in 28 USC § 2071(b).[45]

In saying this, I do not retreat from my view that litigants should be permitted to cite unpublished opinions in arguing later cases. However, I also appreciate the value of the system of regional decentralization embodied in the organization of the federal appellate courts. If the judges of a court of appeals, after formally and publicly consulting the bar of the circuit and other interested citizens, adhere to their view that a permissive citation rule would undermine circuit operations, it is appropriate to respect that judgment.

VI. CONCLUSION

A. Recommendations

In my testimony today I have suggested that judges should not treat unpublished opinions as though they did not exist. At the very least, courts should allow lawyers to cite unpublished dispositions. When an unpublished disposition is closely on point, I believe that the later panel should acknowledge it and publish an opinion that clarifies the law on that issue. A further question is whether these matters should be addressed on a circuit-by-circuit basis, or whether there should be national rules.

On three issues, policy and experience point to the desirability of a national rule, at least as the default:

1. The Federal Rules of Appellate Procedure should be amended, as the Hruska Commission recommended, to require that in every appellate case the court should provide "some record, however brief, and whatever the form, of the reasoning which impelled the decision."

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[43] This approach can be seen as a particularized application of the insights associated with the economist F.A. Hayek. Hayek's theories would suggest that the collective perceptions of lawyers acting on behalf of clients with diverse interests will provide better information about the precedential value of opinions than the small groups of judges who decide the cases.

[44] Letter of Chief Judge Boudin to Judge Alito, Feb. 26, 2002, at 2–3 (on file with author).

[45] When a duty of initial disclosure was first made part of the Federal Rules of Civil Procedure, individual judicial districts were permitted to opt out by local rule. Seven years later, the rules were amended to eliminate the opt-out provision.

2. The Judicial Conference of the United States should require all of the courts of appeals to make their decisions (including unpublished dispositions) available in electronic form to legal publishers.
3. The Advisory Committee on Appellate Rules should proceed with its drafting work on the proposed rule that would allow litigants to cite unpublished dispositions for their persuasive value. However, the rule should include a provision allowing individual circuits to opt out in accordance with the notice-and-comment procedure specified in 28 USC § 2071(b).

On the other hand, our system of precedent is characterized by flexibility. Further, reasonable people can disagree as to how much weight an unpublished opinion should carry, and how panels should treat such dispositions when they are on point. Thus, I would not favor a national rule on the precedential status of unpublished opinions.

B. Implications

Judge Kozinski has argued that, given the volume of appeals, it is simply not possible for the judges to write citeworthy opinions in all cases while still giving truly precedential opinions the care and consideration they deserve. There are two responses to this point.

The first has already been given: several of the circuits have for some years allowed litigants to cite unpublished opinions, and the disastrous consequences Judge Kozinski predicts have not materialized.

Second, if judges do not have sufficient time to provide "some record—of the reasoning" in every case, without creating problems for the adjudication of future cases or stinting on the attention they give to precedential opinions, then there are not enough judges to do the job that we as citizens want them to do. Indeed, there probably are not. The Judicial Conference of the United States recently requested 10 new judgeships for the courts of appeals—and that number may well understate the need.

I recognize that Congress is not likely to act on this judgeship request, or any other, in the immediate future. In the meantime, the courts must do the best they can with the judges they have. Nevertheless, an oversight hearing provides a good opportunity to look to the long term. From that perspective it is appropriate to suggest that Congress should create new appellate judgeships not only to meet expanding caseloads but to handle existing caseloads with a minimum of compromise to the quality of the process.

C. A larger perspective

Half a century ago, Professor Henry Hart reminded us that the judges who sit for the time being on our courts "are only the custodians of the law and not the owners of it."[46] I sometimes think that the judges of the courts of appeals, in prohibiting lawyers from citing the courts' own decisions, have lost sight of the great truth found in Hart's words.

I have no quarrel with the basic idea underlying nonpublication rules. Vast numbers of appeals today involve no more than the routine application of established law. When the judges correctly identify these cases and relegate them to a subordinate position in the decisional array, everyone benefits.[47] But some unpublished decisions go beyond established law or the zone of discretion. When this occurs, the judges should welcome the assistance of litigants in assimilating or repudiating the nonconforming dispositions.

The rule now under consideration by the Advisory Committee would go a long way in the right direction. How much beyond that the courts should go is a question on which reasonable people can differ. I thank the Subcommittee for holding this hearing and providing the opportunity for a thoughtful exploration of these difficult issues.

Mr. COBLE. Thanks to each of you. Mr. Berman and I imposed the 5-minute rule against us as well, so the red light will appear in our eyes as well. Let me get moving here.

Judge Alito, in your written testimony you articulate a defense of unpublished cases that lack precedential value. You state that

[46] Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1396 (1953).

[47] It is instructive to browse through a volume of the Federal Appendix. The vast majority of the opinions have nothing in them that anyone would want to cite.

a brief written response is all that is necessary to inform the litigants of the outcome and the reasons for it.

Is this in fact being done, A; and, in other words, do all litigants throughout the circuits receive some response, however brief, which explains the reasoning behind an opinion, even though it is unpublished?

Judge ALITO. That is true in my court, and I am, of course, most familiar with the practices of my court. We now issue an explanation in every case.

Whether it is true now in every circuit, I am afraid I can't answer. I believe it is now the predominant practice nationwide.

Mr. COBLE. Mr. Schmier, do you and Mr. Hellman want to weigh in on this?

Mr. HELLMAN. It is the practice in most circuits. The best evidence we have is the annual report of the Administrative Office of U.S. courts. According to that, of the 28,000 decisions on the merits in the most recent fiscal year, there are only about 1,300 classified as without comment. That is about less than, I think, one half of 1 percent; 647 of those are from the Eighth Circuit, and that does not accord with what I have seen of the Eighth Circuit practice.

So it may be that there is some difficulty there in classifying cases in accordance with the AO's labels for these things, but my strong sense is that what Judge Alito describes for the Third Circuit is the practice pretty much throughout the country.

Mr. COBLE. Mr. Schmier?

Mr. SCHMIER. The question is really whether or not the appellate decision is respectful of the humanity of the people who come before the court. If the appellate decision does not carefully address and explain the law used to resolve the issue, or does not address the arguments that have been posed by the losing party to explain why they are not relevant, then that decision leaves the parties unsatisfied that their arguments have been heard, and that is the constant practice in unpublished opinions. The real reason why we are here is the unpublished opinions are simply not made to a quality level that satisfies people.

Mr. COBLE. Judge Kozinski, do you want to weigh in on this?

Judge KOZINSKI. In our circuit, in our court of appeals, you always get an explanation in writing. One of the points I want to make is if you make all of those things citable, we are simply going to say less. We are simply going to say less, because everything that you say and you put in an opinion, anything that is precedential, lawyers will look at, lawyers will try to twist and find a way of using to their advantage, and we will simply say less.

So I think in a way, acquiring the ability to cite and making them precedential would in fact go counter to what Mr. Schmier was worried about.

Mr. COBLE. I think you touched on this, Judge Alito, but let me ask you, Professor Hellman, comment on the difference between unpublished and uncitable and why is the distinction significant? I am going to start with you, Professor Hellman.

Mr. HELLMAN. Yes.

Mr. COBLE. I think you touched on it, Judge Alito, in your statement. You go first, Mr. Hellman. I will then come to Judge Alito.

Mr. HELLMAN. Judge Alito is absolutely right in saying the term "unpublished opinion" is a misnomer, and maybe the time has come to get rid of it, because it is so misleading.

It seems to me that we have two phenomena here, and it is so easy to get them confused or to assume that they are the same thing. Judge Alito's committee, I think, in the rule it is considering refers to non-precedential opinions. That is, the court designates a certain class of opinions and says these opinions are nonbinding. That is the relevant, the first relevant classification; is or is not the opinion in a class that the court calls binding.

The second question is are nonbinding opinions citable for their persuasive value, even though they are not binding? That it seems to me is the central issue and the one that is toughest and the one that I would like to see the most attention paid to.

Mr. COBLE. Do you want to add anything to that, Judge Alito?

Judge ALITO. No, I think that explains it.

Mr. COBLE. The gentleman from California.

Mr. BERMAN. Mr. Chairman, I sort of wish this hearing were an unpublished hearing, because I have not done all the background work I had hoped to do before it.

My first question is really just out of curiosity, and perhaps silly, but in an uncitable opinion, an opinion that has been ruled to be uncitable, when one of the parties to that ruling wants to assert that the issue is res judicata, can he cite the earlier opinion?

Judge KOZINSKI. That is a very good question.

Mr. BERMAN. A good question. All right.

Judge KOZINSKI. All of the noncitation rules that I am aware of, certainly ours does, have an exception for res judicata, collateral estoppel, and double jeopardy, all things that go not to the precedential effect of the opinion; and precedential effect means the effect of this ruling on other unrelated cases; but where the rule goes to the relationship of the parties to this case, there is always an exception for those.

Mr. BERMAN. Why should—this may have been touched upon, but I missed it. Why not have a universal rule that binds all circuits, whatever that rule is, rather than having different rules for different circuits? Is there a case for the regionalization, the decentralization of practices in this area?

Judge ALITO. Well, we are, of course, considering whether a national rule on citation should be adopted. There are certainly those on our committee and those people in the bar who argue very strongly in favor of a national rule. Some of them are institutional litigants who appear in many different circuits, and they find it difficult to operate under all of these conflicting regimes.

Some argue that there simply is not any justification for regional differences.

On the other side, there is the argument that the caseloads of the courts of appeals do differ quite significantly. The number of cases per judge in some of the courts of appeals—and Judge Kozinski's court is one of them—the caseloads in some courts are considerably higher than in other courts.

Courts have different internal practices about circulating opinions before publication and things of that nature.

So to the extent there are differences in caseloads and internal operating procedures, the argument is made there is a justification for a different treatment on a circuit-by-circuit basis.

Judge KOZINSKI. We believe—or I believe very strongly there is a justification for having different rules for different circuits. As I said, what opinions are are those communications that the court of appeals judges make to instruct those who apply the law, like district judges and magistrate judges, U.S. Attorneys and the like, as to how to apply the law. We don't want a lot of clutter. We don't want a lot of static. We want to speak clearly through those published opinions. And given that we have over two dozen judges doing the speaking, plus 10 senior judges, plus visiting judges, you can actually get quite a cacophony going; and then we speak to a very large group as well, more district judges than any other circuit.

The Federal Circuit probably has an even more serious problem than we do, because as members may recall, they not only review the Court of International Trade, but every single district in the country in patent cases. Every single district court in the country. So when they speak, they speak to the 800 district judges in the country, some of them as remote as Hawaii and Alaska and so on. For them to speak clearly, for us to speak clearly, is much more difficult with so many people speaking and so many people listening, than perhaps a smaller circuit, a smaller court like the First or Third Circuit. It is much larger than any of us would like to have courts of appeals be, but it is a very difficult problem.

Mr. BERMAN. Are you calling for more circuits?

Judge KOZINSKI. Certainly not. I think we can do the job quite well.

Mr. BERMAN. I was curious, you made a comment in response to Mr. Schmier that if you had—I guess the word is "nonpublished"—but if you had to have precedent decisions on every single case you ruled on, on many of those cases you might write shorter, less clearly, your thought processes because of the danger of a lawyer twisting something you said in a situation where you wouldn't have had the time to make all the distinctions you might have liked to have made, because you are now having to deal with all of those issues.

My guess is also that another judge—it is not just lawyers sometimes twist these things, but other judges could also look at it. Did you want to respond to that?

Mr. SCHMIER. Yes, I would, because I think that is really at the crux of the problem. The question is what do we mean by the word "precedent"? What we mean by the word "precedent" is only that which was allowed before. All we ask of the judges is that when they hear a case, when they hear an argument, that they either abide by precedent, they distinguish it, or they overrule it, but they don't ever ignore it. And that is why the citation is so important. The citation is so important because every judge, when he or she writes an opinion, has to know that that opinion is going to be looked at either now or 5 years from now or 10 years from now, and that makes that judge walk around their opinion and look at it from every possible perspective.

That is what guarantees the people who stand alone before judges that their decisions are going to be accurate, and it is the removal of that citation that then says to the judges, hey, I don't have to be careful, I don't have to think about how this is going to play out in the future. And that frees them from the rule of law.

I ask you this question: What mechanism—what mechanism controls the caprice of judges? What controls their discretion if they are free to make rules of ephemeral application? Judge Kozinski in Sorchini versus the City of Covina has insisted that judges have the clear ability to, one, ignore precedent; two, to make decisions that don't make precedent; and, three, to make decisions of ephemeral application.

Mr. BERMAN. Was that a decision that can be cited?

Mr. SCHMIER. That is a decision that can be cited. I believe that what will remain from Sorchini versus the City of Covina is that it is authority for someone that the rule of law has ended. So concerned was the City of Covina that despite the fact they won that case, they brought that to your Committee's attention.

Mr. BERMAN. I am just curious, was there a petition for a writ on that case? The Supreme Court could also look at an uncited opinion, right? All the appellate rights continue?

Judge KOZINSKI. There was no petition for rehearing.

Mr. SCHMIER. Because they won. The important point for this Committee's attention in Sorchini is that Judge Kozinski's court took the basic issue, which was that the police released the dog which bit someone without announcing—that bit a potential arrestee—without announcing it. And despite the fact that the appellate court dealt with that in a case called Kish, and dealt with it again in an unpublished portion of the decision, not the published part I was talking about, so now the appellate court has decided that issue twice, and it still doesn't stand as any kind of law that could deter litigation. The question we have is how come they don't have the time to do it right, but they seem to have the right to do these cases over and over?

Mr. BERMAN. I am sorry. My time has expired.

Mr. COBLE. We will go for a second round. Mr. Berman and I are here by ourselves. There are no votes being sounded as yet.

Judge Alito, practically everything we do in this town—strike that—practically everything we do, period, has a cost factor. Having said that, let me ask you this: Let's assume that the Congress were to mandate the publication of all decisions. Could you estimate the burden this would place upon the judiciary's budget and how much would it cost to implement it? A ball yard figure. If you don't know, give it to us subsequently.

Judge ALITO. I don't know the answer off the top of my head. I would have to calculate it. But I can say this, and I am reiterating something I think I mentioned briefly in my initial statement. If the courts of appeals were required to prepare in every case the kind of opinion that is prepared for what we used to call publication, printing in the most common reporter of our decisions—each court of appeals judge now prepares between, I would say, 20 to 40 of those a year depending on the judge and the circuit and factors of that nature—that number would have to go up. On my court it would be about 100 instead of 30. Let's say it would be 100. On

Judge Kozinski's court, I think it would be 150. So it might be necessary just to produce the opinions, it might be necessary to double the size of the judiciary or perhaps increase it by even a greater factor.

There would be the additional complication of trying to maintain consistency among all those opinions. We try very hard to make sure that our opinions are consistent with each other. We circulate them to all the members of the court before they are ever sent to the printer. So we have an opportunity to point out inconsistencies between the opinion that is being proposed and opinions that exist with which we are familiar.

Trying to maintain consistency for this greatly increased body of cases would be an additional burden. So I couldn't quantify what increase in membership of the judiciary would be necessary, but I have no doubt that it would be very substantial.

Mr. COBLE. I am sure that issue has been considered. I see Mike from AOC is in the audience; May have an opinion on that subsequently. We can talk about that. I guess probably 25 years ago—perhaps shelf space, for example, it may require more filing space. But that probably is not a pertinent deal now since we are in the disk age. But anyway, those two issues probably are of some concern. We can kick that around.

Mr. COBLE. Mr. Schmier, an argument against mandatory citation is that prudent judicial administration requires adherence to noncitation rules. How do you respond to that, or what is your opinion of that?

Mr. SCHMIER. I think it is malarkey. I don't understand really any of these points. The citation is the way we reconcile our law. What seems to be suggested here is that we will have this body of published law that clearly States what courts are supposed to do. And the concept of binding precedent which says that courts, even panels of the same level, must do the same thing. But if they want to violate the law or do something different they just do it in an unpublished opinion that doesn't surface.

So what has happened is that by taking this rigid control of the system, they have actually destabilized the system. What they have done is they forced all of the minute changes and rules that have to be made in order to accommodate the varying circumstances of human beings to go underground. And that is the problem. It is much better if every panel looks at each case. They abide by stare decisis, which gives them respect for stability, but they are free to do what is required.

I say this, look, precedent should be strong enough to stand against every force except reason and mercy. That is what the rule should be. This binding precedent is wrong because it makes it impossible for judges to correct error without this en banc proceeding. If they get rid of that, then there is no problem with panels looking at each other's decisions and talking about them. Inconsistency is where we learn both in the scientific community and in the legal community. It is what draws our attention to problems and it is what invokes the whole democracy, the law schools, the legislatures, the community groups and the industry groups, all these people to weigh in on what our law should be. And when they make all our cases uncitable, they get rid of the sweet flower that

attracts our attention to these cases and they make it impossible, truly impossible on a systemic basis for the democracy to operate.

Judge KOZINSKI. Mr. Schmier has put his finger on an important point. What he says is the reason we can go with his system where we publish everything is we should not have a rule that panels of the Ninth Circuit or panels of the Third Circuit are bound by earlier rulings of the same circuit. We can look at the published opinion of another panel and say gee, we don't agree. Goodness or mercy tells us we shouldn't go the same way.

That is not how the Federal courts operate, and in fact, there is no State court system that operates in that way. When you have a court of 28 judges or 24 judges or 22 judges who sit on panels of three, the only sensible rule, the only workable rule, is that when a panel of three judges decides an issue, that is binding, that is binding on every district judge, every bankruptcy judge, every magistrate judge and every circuit judge in the circuit unless you go to the burden of going en banc, which is a huge expensive difficult process.

And if Mr. Schmier is suggesting we just jettison the en banc process and let every panel of every circuit say we looked at this and we choose to ignore it, we are talking about revamping how the Federal courts do business in a way again that will lead to chaos.

To answer the Chairman's question I think you would have to multiply by 20 times the size of the Federal Judiciary to get published opinions——

Mr. COBLE. If you would, give us some estimated figures on that, if you will.

Judge KOZINSKI. My estimation would be on the neighborhood of 20 times. The example I give in my testimony is imagine we asked—the Supreme Court just handed down 80 opinions, complex, difficult, often contested issues. Imagine if we asked the Supreme Court to publish 1,600 cases a year because there is not enough consistent law there. You can't—there is no way they could do it. There is no way they could do it. You would have to increase the number of justices, which then would mean you would have a different institution, a different court and a very different way of making decisions. These are very fundamental things we are purporting to change and when Mr. Schmier says get rid of the en banc process I am sure he is talking more.

Mr. COBLE. I am sure my 5 minutes have expired. Let me recognize Mr. Berman.

Mr. BERMAN. Well, the Supreme Court would then have to resolve not conflicts between circuits, but conflicts between panels within a circuit.

Judge KOZINSKI. Exactly right.

Mr. BERMAN. But your experience—your very bad experience, I take it, was with the California and the California State court system am I right about that? When you first started to testify, you spoke of——

Mr. SCHMIER. That's correct, but there are others here who can could say the exact same circumstance.

Mr. BERMAN. But I am trying—I have a memory not that long ago of a huge hullabaloo in California. Was it about the California

Supreme Court certifying for nonpublication a decision of a Court of Appeals? In other words, the Court of Appeals didn't want to keep it from having precedential value, but the Supreme Court, rather than taking the case and reversing the case, instead came in and depublished it.

Judge KOZINSKI. That is the term of art.

Mr. SCHMIER. The fundamental flaw I see in California's unique depublication practice—the word itself doesn't show up in the law dictionaries, and that is that they simply erase it as precedent is that it allows the Supreme Court to change the law for the State without changing the result for the parties. It disconnects the ability of a party to hold the law hostage, that is, the law for everybody hostage in order to insist on the right result for the one person.

It is this—in this context that one begins to see how all of our rights vis-a-vis our Government are violated by the no citation rule. You see, they can't—the way our system works is that Government cannot act against an individual without—without the imprimatur of the court. And every person in our country has the right to elevate that decision of the court to an appellate court where, through the process, they can insist that that decision of what the Government is doing to that person becomes law for everyone.

And it is the fact that it is law for everyone that concerns everyone and rallies people to the defense of the individual. That process has been disconnected and severed so that it no longer protects us. That is why this is a fundamental issue.

Mr. BERMAN. I mean, I am not sure that that is why people go to court to make law for everybody as opposed to try to get justice for themselves.

Mr. SCHMIER. How about a test case. How do you bring a test case in Judge Kozinski's court?

Mr. BERMAN. They are not pursuing test cases, but pursuing cases. There are certainly other situations, I agree.

Judge KOZINSKI. May I comment on Mr. Schmier? Whether or not something is published is not up to the whim of the judges. We have legal standards for when we publish. One very simple way of testing it, if I have to write a disposition and I can't cite a Ninth Circuit case on point I publish, and I think that is a rule of most of my colleagues. It has to be a Ninth Circuit case directly controlling.

Now there is always this undercurrent, as Mr. Schmier points to, that lawyers always say, oh, there is all this law being made. It is unaccountable. It is underground and all these unpublished things go contrary to the law, and basically judges are free to do anything they want. So we actually looked into it. We sent out letters and memoranda and requests to lawyers. We put it on our web site and we asked for comments and asked anybody to send us—we put out thousands of these a year—to send us two unpublished dispositions that were in conflict, either with another disposition or with a published one.

We got six answers, two of them had merit and they both dealt with conflicts in published opinions. And they were conflicts of which we were already aware and we are in the process of fixing. We have another initiative which is still in progress where we allow the citation of unpublished dispositions in requests for publi-

cation. The idea would be look, you need to publish this because you don't really have any published law on point. The experiment has been going on for 15 months. We have been monitoring it very closely and nothing has come in that—and the Committee, if it wishes, can have these materials open to the public—but there is nothing that has come in that supports the view that there is lawlessness out there or renegade panels or unpublished dispositions that are being used to sweep unacceptable results under the rug.

Unpublished dispositions are cases that are squarely controlled by existing precedent, squarely controlled by existing Ninth Circuit opinion, that and nothing more.

Mr. BERMAN. I have one more question, Mr. Chairman. My time has run out.

Mr. COBLE. Ms. Waters, do you have any questions?

Ms. WATERS. I have no questions.

Mr. COBLE. Go ahead and ask your question, Howard.

Mr. BERMAN. My last question, assuming that we agree—we decide we don't like this system, we want everything citable, published, have precedential value, do we have the authority to legislate in this area?

Professor Hellman.

Mr. HELLMAN. I think it is very doubtful. I think it would raise some very grave separation of powers issues. And it seems to me that on the immediate issues we are talking about today, citation rules, precedential status, it is really very hard for me to see a role for Congress on that. But let me just add something else to that, because one of the things that strikes me a little bit listening to Judge Kozinski and Judge Alito, you don't have to dig very far into this subject before you start asking a question, that is, I guess one step from a question that has already been asked, are there enough appellate judges today to do the job.

Put aside what additional requirements you might add or asking the judges to do more, are there enough judges to do the job today in the way we would like them to do their job. And if there are not enough, then there is only one branch of Government that can create new judgeships and that is Congress.

Now I recognize the political realities and they seem to get worse everyday on the other side of the Hill. But one of the great virtues of an oversight hearing is that you can look to the long-term. And one of the things I would hope this Subcommittee would do from this perspective is to ask the question taking into account all the things that we would like the judges to do, to write for the parties, to be accountable, to come up with a coherent and sensible body of law, are there enough judges today and if there are not, maybe Congress should be thinking about creating some new judgeships as the Administrative Office and the Judicial conference have asked for. So, in terms of a constructive response——

Mr. BERMAN. And a couple Senate judiciary Committees to confirm that.

Mr. HELLMAN. That would be wonderful and something that folks over here I know have no control over at all and indeed lawyers.

Mr. COBLE. Professor Hellman you are reading my mind because I was going to tack on what Mr. Berman said earlier and I believe

in your statement you made reference to the argument posed by Judge Kozinski that not having sufficient time or not being able to write more complete opinions because of the lack of time, but I was going to say one of the problems might be an insufficient number of sitting judges. There may be enough—spots for judges, but an inadequate number of sitting judges. I assume you concur with that.

Mr. HELLMAN. Yes. And I think it is something that warrants a very close look because if you look at what has happened, and again, this gets beyond the subject of today's hearing, but not much because to the extent that judges are doing less than they think the case really calls for because there are too many cases then Congress does have a role and that is to provide adequate judicial power.

Mr. COBLE. I hope you will hold us harmless because, Ms. Waters and Mr. Berman, and I don't have the authority to appoint judges. Did you want to say something, Ms. Waters?

Mr. BERMAN. I do have one thing I want to say, and that is all right, you are throwing out a proposition here, more judges, fewer reasons to go noncitable because—but I am wondering to what extent in the judicial process—I am sure it is not a written standard, this case is simple, it is boring, it is easy to decide and it is so clear cut, so covered by existing law, so straightforward and so uninteresting that I rather take the additional time to deal with the more interesting, more complicated cases, and I am going to go uncitable.

Mr. HELLMAN. If I might respond to that. Yes, and I don't want to give a wrong impression that there are lots of cases that deserve no more than they get. They would not get any more. They should not get any more judges' time even if there were 10 or 20 times as many judges. But I have here—this is the Federal appendix we have heard so much about. These are the unpublished opinions—not hard-covered version but the soft-covered version. If you were to browse through that, you would say that most of those cases got just about the treatment they deserve, a written opinion, but not precedential.

Mr. COBLE. Gentlemen let me conclude by thinking aloud. The Advisory Committee on Appellate Rules tentatively approved a proposal for an amendment that would allow litigants to cite nonprecedential decisions for persuasive value. If this change is subsequently adopted by the Congress and applied uniformly throughout the circuits, are the problems we have discussed today solved, A; and B, if not, what should Congress do? Does anybody want to weigh in on that before we drop the hook on this meeting? Mr. Schmier?

Mr. SCHMIER. I think in large measure——

Mr. COBLE. As briefly as you can.

Mr. SCHMIER. That would address the freedom of speech issue and it would address, in many ways, the stare decisis issue, only because stare decisis is a natural motivation. But I think really they must be accorded the status of precedent. That doesn't mean it is binding on anybody. It means only that they must be considered. And if that were the rule, I would find that acceptable.

Mr. COBLE. Anyone else want to be heard?

Judge KOZINSKI. I think it would exacerbate the problem. I think that so long as the unpublished dis lets us write to the parties who know everything about the case, who know the intricacies, we can be very brief. As soon as these things are going to be used by other people who don't know the intricacies, then you have to be sure that what you put in there is enough to make it useful and not misleading.

Judge ALITO. Well, because my committee is going to be voting finally on this in November, I don't think should say whether I think it is a good idea. I think it would resolve one of the three questions that I mentioned at the outset, and the only one I believe that is properly—that needs to be addressed that may properly be addressed through the rules process at this time.

Mr. HELLMAN. I agree with Judge Alito on that last point.

Mr. COBLE. Gentlemen, we thank you for your attendance today and we very much appreciate your contribution. This concludes the oversight hearing of unpublished judicial opinions. The record will remain open for 1 week, so if anything crosses your train of thought, feel free to submit it to us. And thank you again for your attendance and the Subcommittee stands adjourned.

[Whereupon, at 3:30 p.m., the Subcommittee was adjourned.]