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PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE BEFORE THE ADVISORY COMMITTEE ON APPELLATE RULES JUDICIAL CONFERENCE OF THE UNITED STATES APRIL 13, 2004, WASHINGTON, D.C.

SUPPLEMENTAL REMARKS OF ELIZABETH J. PAWLAK

I thank the Committee, and in particular its Chair, the Honorable Samuel A. Alito, Jr., for allowing me to present my remarks to be read into the official record without being physically present at this historical, very important hearing on the proposed FRAP 32.1.

Neither my Comment 03-AP-449 nor the instant remarks should be interpreted as a message from some idealistic, inexperienced and confused outsider who has grandiose, unworkable ideas for the change from the status quo. To the contrary, I am the one who has a keen, if painful, understanding of summary "do not publish, do not cite, non-precedential" (thereafter, "non-precedential") dispositions in action. I am also the one who has been fighting -- since 1995-- uphill battles to repeal Track Two justice in federal courts.

I received a mountain of unpublished boilerplate dispositions from the Third and Fourth Circuits all of which were as correct and as "run-of-the-mill" as the most recent infamous Fifth Circuit's opinion in Banks vs. Dretke.[1] All of these dispositions were rendered in a vacuum as the first appellate brief has yet be filed by any party. These "non-precedential" dispositions not only "establish, alter, modify or clarify a rule of law," but also put, in fact, every rule of the law on its head, let alone sub silentio overrule several dozens of the landmark cases in the area of, for example, antitrust or constitutional law. In addition, not only are some of these unprecedented "non-precedential" dispositions hidden from the public view, but also the dockets and files are hidden from the public view as well! As a direct result of all these dispositions, I lost a decade of my most productive professional years, not to mention several millions in income, among other losses. Had the judges took responsibility for the manner these unprecedented "non-precedential" opinions were

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[1] *Banks v. Cockrell*, 48 Fed.Appx. 104 (Table) (5th Cir. 2002), reversed by *Banks v. Dretke*, 124 S.Ct. 1256, 157 L.Ed.2d 1166(2004). For full unpublished opinion, see www.secretjustice.org.

produced, none of the grave injustices would have occurred.

More than a century after the Civil War and more than a quarter century after the great crusade for equality and other civil rights, the proposed FRAP 32.1 -- if passed in its present form -- will become a 21-century version of a rule-making nadir. It will join *Dred Scott*,[2] *Plessy v. Ferguson*[3] and even *Korematsu*[4] on the list of the most shameful failures of the federal judiciary to discharge its duty of giving life to our constitutional civil rights.

While, undoubtedly, the proposed Rule would supercede all local no-citation rules (the rules which are clearly unconstitutional and hardly "administrative" in nature), any reference to dispositions that have been designated as "unpublished" or "not for publication" in Subdivision (a) of the Rule makes a mockery of Section 205 of the e-Government Act of 2002. Moreover, the clause referring to the dispositions designated as 'non-precedential,' 'not precedent' or the like endorses classes among appellants and, hence, is a direct violation of the plain language of the Constitution. To be sure, our Constitution neither knows nor tolerates classes among citizens. Nor are there any "opt-outs."

I strongly disagree with Professor Schiltz's position that equates the Supreme Court's "denied" in response to a petition for a writ of certiorari with one-word dispositions of appeals. Firstly, while the grant or denial of a writ of certiorari is discretionary, the circuit courts do not have discretion to determine whether or not to hear a statutory appeal. Secondly, one-word (or one-line or even fact-free-law-free-whole-page) dispositions virtually annihilate the losing party's opportunity of either en banc review or certiorari from the Supreme Court in violation of both the Petition Clause of the First Amendment and the Due Process /Equal Protection Clause of the Fifth Amendment. I also join Ms. Jessie Allen's position that "any court that declines the justification of the grounds for the entire class of its dispositions of its decisions is a court that risks losing the respect and perhaps even the compliance of the people it purports to govern." (Allen's Prepared Testimony, at p8).

As for the suggestion that there is no evidence whatsoever that the Rule 32.1 proponents' suspicions "that courts use unpublished opinions to duck difficult issues or to hide decisions that are contrary to law" are valid (Schiltz, at p. 40), the disposition of any of my own appeals (as well the appeals of thousands of the similarly-situated) belies this assertion.

Similarly, the assertion that the Rule 32.1 proponents' suspicions that "judges are intentionally and systematically using unpublished opinions for improper purposes" are lacking any evidence (Id.) is flatly contradicted by, for example, the Fourth Circuit' s Local Rules 46(f) and 36(a), to wit,

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[2]Scott v. Sanford, 60 U.S. 393, 19 How. 393, 15 L.Ed. 691(1856).

[3]163 U.S. 537, 165 S.Ct. 1138, 41 L.Ed. 256 (1896).

[4]Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

> "In any pro se appeal... the parties... shall file informal briefs as provided by Local Rule 34(b)...Cases involving pro se litigants are ordinarily not scheduled for oral argument.. " *U.S.Ct. of App. 4th Cir. Rule 46(f)(emphasis added)*.
>
> "...The Court will publish opinions only in cases that have been fully briefed and presented at oral argument." *U.S.Ct. of App. 4th Cir. Rule 36(a)(emphasis added*).

Is there any doubt that the condition of being a pro se litigant is hardly a proper purpose for reducing the entire class of litigants to second class citizens? Rule 32.1 (even in its present form) will make this "improper purpose" citable and, hence, transparent, at very least.[5]

To the extent the Legal Times (April 12, 2004) reported the unpublished, anonymous view of one of the members of the Committee, to wit, "If these [unpublished] opinions are as much junk as they made out to be it really is a fraud on the public," I would add that the vast majority of these "do not publish, do not cite, non-precedential" disposition is not only the fraud on the public but also a fraud on the litigants and a fraud on the Constitution, not to mention a fraud on the Code of Judicial Conduct.

For all of the foregoing reasons (in addition to the reasons stated in my Comment 03-A-449), I join Professor Schiltz in his view that "If the Committee is going to press forward, it should press forward with a version of Rule 32.1 that would make a real difference — one that does not permit any restrictions on the citation of . . . opinions."(Schiltz, at p. 95). Even if nothing about the disposition of appeals by staff attorneys will change, it would make a panel of three judges fully responsible for this "not safe for human consumption" "veritable gold mine of ambiguity and misdirection."

Thank you very much for your cordial consideration.

Respectfully submitted,

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[5] Given that Kinko's is open 24 hours and there is at least one computer in a prison library, any suggestion that "Rule 32.1 will particularly disadvantage pro se litigants and prisoners, who often do not have access to the Internet or to the Federal Appendix" is a red herring.