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Much Ado About Little: Explaining the *Sturm Und Drang* over the Citation of Unpublished Opinions

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Much Ado About Little: Explaining the *Sturm Und Drang* over the Citation of Unpublished Opinions

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I. Introduction

I was appointed Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure (FRAP) in 1997. I have enjoyed just about every aspect of my work—except unpublished opinions.[1] I feel as though the issue is stalking me. On the day that I became Reporter, the issue of unpublished opinions was the most controversial issue on the Advisory Committee's agenda. Eight years later, the issue of unpublished opinions continues to be the most controversial issue on the Advisory Committee's agenda. I have devoted more

* St. Thomas More Chair in Law, University of St. Thomas (Minnesota) School of Law, and Reporter, Advisory Committee on the Federal Rules of Appellate Procedure. The views expressed in this Article are mine alone and not necessarily those of the Advisory Committee or any of its present or former members. I am grateful to the many federal appellate judges and appellate lawyers who spoke with me "off the record" about the subject of this Article. I am also grateful to Stephen R. Barnett, Judge Michael Boudin, Stephen B. Burbank, Edward H. Cooper, Elizabeth R. Schiltz, and Judge Carl E. Stewart for their comments on a draft of this Article and to Jessica Nelson, Katharine Nilan, and Erika Toftness for their research assistance.

1. "Unpublished opinions" is, of course, a misnomer, given that many unpublished opinions are published (in the *Federal Appendix* and elsewhere). But it is also a term of art that is widely understood to refer to opinions that are not published in the *Federal Reporter*. TIM REAGAN ET AL., FEDERAL JUDICIAL CENTER, CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS 22 (2005). Most (although not all) circuits treat their unpublished opinions as "non-precedential"—that is, as not establishing a precedent that any court is bound to follow or even to consult in future cases. For specific circuit rules regarding unpublished opinions, see *infra* notes 5–7.

attention to the unpublished-opinions issue than to all of the other issues the Advisory Committee has faced—combined.[2] At times, I have devoted more attention to the unpublished-opinions issue than to all of my children—combined. An Advisory Committee member once joked that my obituary would be unpublished.

The federal courts of appeals take three approaches to regulating the citation of unpublished opinions.[3] Four "restrictive"[4] circuits—the Second, Seventh, Ninth, and Federal—ban it altogether.[5] Six "discouraging" circuits—the First, Fourth, Sixth, Eighth, Tenth, and Eleventh—permit it in limited circumstances (typically, when no published opinion adequately addresses the same issue as the unpublished opinion).[6] Three "permissive" circuits—the

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2. There is one possible exception. I may have spent more time on the complicated and important (but dull) problems created by the interaction of the provision in Federal Rule of Civil Procedure (FRCP) 54 defining "judgment," the provision in FRCP 58 requiring entry of a judgment on a separate document, and the provision in FRAP 4(a)(7) defining when a judgment is entered for purposes of FRAP. Those problems were most recently addressed by the 2002 amendments to those three rules. 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE § 3950.2, at 23–29 (3d ed. Supp. 2005).

3. The phrase "citation of unpublished opinions" refers to the citation of unpublished opinions in unrelated cases. No circuit bars *all* citation of unpublished opinions; all circuits allow the parties to a particular case to cite unpublished opinions that were issued in related cases to support an assertion of claim or issue preclusion, to support a claim of double jeopardy, or for similar "case-specific" purposes. Circuits differ, however, in the extent to which they allow parties to cite unpublished opinions that were issued in unrelated cases.

4. The categorization and terminology are taken from the Federal Judicial Center's (FJC) recent study on unpublished opinions. REAGAN ET AL., *supra* note 1, at 1. For more on the FJC, see *infra* note 17. For more on its study, see *infra* text accompanying notes 146–60.

5. *See* 2D CIR. R. 0.23 ("Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court."); 7TH CIR. R. 53(b)(2)(iv), (e) ("Unpublished orders: [e]xcept to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent in any federal court within the circuit in any written document or in oral argument; or by any such court for any purpose."); 9TH CIR. R. 36-3(b) ("Unpublished decisions and orders of this Court may not be cited to or by the courts of this circuit, except . . . when relevant under the doctrine of law of the case, res judicata, or collateral estoppel . . . to show double jeopardy . . . [or] to demonstrate the existence of a conflict among . . . dispositions."); FED. CIR. R. 47.6(b) ("An opinion or order which is designated as not to be cited as precedent is one determined by the panel issuing it as not adding significantly to the body of law. Any opinion or order so designated must not be employed or cited as precedent.").

6. *See* 1ST CIR. R. 32.3(a)(2) ("Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses this issue."); 4TH CIR. R. 36(c) ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or

Third, Fifth, and D.C.—freely permit it.[7] Thus, nine of the thirteen circuits (the six discouraging circuits and the three permissive circuits) permit the citation of unpublished opinions in at least some circumstances, but ten of the thirteen circuits (the four restrictive circuits and the six discouraging circuits) prohibit the citation of unpublished opinions in at least some circumstances.

In 2003, the Advisory Committee published for comment a proposal to add a new Rule 32.1 to FRAP.[8] Rule 32.1 would require the federal courts of

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the law of the case."); 6TH CIR. R. 28(g) (same); 8TH CIR. R. 28A(i) ("Unpublished opinions . . . are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion."); 10TH CIR. R. 36.3(B) ("Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition."); 11TH CIR. R. 36-2 ("Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached . . . .").

7. *See* 3D CIR. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority."); 5TH CIR. R. 47.5.4 ("An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document."); D.C. CIR. R. 28(c)(1) ("All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed opinions) entered on or after January 1, 2002, may be cited as precedent.").

8. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 30–39 (2003) [hereinafter PRELIMINARY DRAFT]. As published, proposed Rule 32.1 provided as follows:

> Rule 32.1. Citation of Judicial Dispositions
>
> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
>
> (b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Id. at 31–32. The Advisory Committee has continued to tinker with the wording of proposed Rule 32.1. As of this writing, the proposed rule provides as follows:

> Rule 32.1. Citing Judicial Dispositions
>
> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.
>
> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or

appeals to freely permit parties to cite unpublished opinions in their briefs and other submissions. Rule 32.1 would thus impose one rule—a rule that reflects the practice of the Third, Fifth, and D.C. Circuits—on all of the circuits. The Advisory Committee received over 500 written comments about Rule 32.1. I do not have much to say about the merits of the rule. No one could have much new or important to say about the merits of a rule that has already been the subject of over 500 comments submitted by some of the best legal minds in America. Rather, I would like to discuss an interesting question about the controversy surrounding the proposed rule. The question is: Why is there controversy surrounding the proposed rule?

Consider the following two seemingly contradictory facts. First, Rule 32.1 has attracted a great deal of highly emotional support and opposition. The comments that were submitted on Rule 32.1 were the second-most ever submitted on a proposed amendment to a rule of practice and procedure.[9] One need only read a few of those public comments[10]—or a few of the dozens of articles[11] that have been published on the general topic of unpublished

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disposition with the brief or other paper in which it is cited.

Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 2 (May 6, 2005) [hereinafter Alito Memorandum 2005], *available at* http://www.uscourts.gov/rules/Reports/AP5-2005.pdf.

The Advisory Committee has also continued to tinker with the wording of the Advisory Committee Note accompanying Rule 32.1. This Article will quote the version of the Note that was published in 2003. For the 2003 version and accompanying Committee Note, see PRELIMINARY DRAFT, *supra*, at 32–39.

9. The staff of the Administrative Office of the United States Courts (AO) told me that only the 1993 amendment of FRCP 30 resulted in more public comments. The original version of FRCP 30 permitted the nonstenographic recording of a deposition only on the stipulation of all parties. The amended version authorizes the party taking the deposition to select the method of recording. The nation's court reporters campaigned vigorously—and unsuccessfully—against the change by submitting hundreds of pre-printed postcards.

10. Public Comments, Proposed Federal Rule of Appellate Procedure 32.1, http://www.secretjustice.org/public_comments_re_frap_32_1.htm (last modified Apr. 18, 2004).

11. In the last few years, Professor Stephen R. Barnett has probably written the most and the best on the topic of unpublished opinions. *E.g.*, Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1 (2002) [hereinafter Barnett, *Ground Shifts*]; Stephen R. Barnett, *In Support of Proposed Federal Rule of Appellate Procedure 32.1: A Reply to Judge Alex Kozinski*, FED. LAW., Nov./Dec. 2004, at 32; Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003) [hereinafter Barnett, *Under Siege*]; Stephen R. Barnett, *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 WASH. & LEE L. REV. 1491 (2005) [hereinafter Barnett, *Dog That Did Not Bark*].

Many other scholars have written insightfully on the subject, including (to cite just a few examples from just the past two years): Jessie Allen, *Just Words? The Effects of No-Citation*

opinions—to appreciate the depth of feeling surrounding the issue. One federal appellate judge nicely captured that depth of feeling when he told me that trying to talk to his colleagues about Rule 32.1 was "like trying to talk to them about sex or religion."

Second, Rule 32.1 is not sex or religion. Rule 32.1 is not even an important rule. Numerous jurisdictions have abolished or liberalized no-citation rules, and, to my knowledge, not a shred of evidence indicates that it has made much difference, one way or another. I am confident that the average American—even the average judge or lawyer—would agree that the citation of unpublished opinions does not rank with sex or religion as a topic worthy of controversy. Indeed, I suspect that the average American would have stronger feelings about whether we should continue to recognize September 17 as National Apple Dumpling Day than about whether judges and lawyers should be able to cite unpublished opinions.

Why, then, the controversy? Why have so many people—brilliant, accomplished people—gotten so worked up over whether courts should be able to bar the citation of unpublished opinions? This is a question that has puzzled me since I was appointed Reporter. I understand the arguments for Rule 32.1. I understand the arguments against Rule 32.1. What I do not understand is why

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Rules in Federal Courts of Appeals, 29 VT. L. REV. 555 (2005); Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003); Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215 (2004); J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27 (2005); Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36 [hereinafter Kozinski, *In Opposition*]; Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Michael B.W. Sinclair, Anastasoff *Versus* Hart*: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711 (2004); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761 (2004).

All those who write on the topic of unpublished opinions are indebted to the seminal work of William L. Reynolds and William M. Richman. *E.g.*, William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) [hereinafter Reynolds & Richman, *Price of Reform*]; William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807; William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) [hereinafter Reynolds & Richman, *Non-Precedential*].

Rule 32.1 stirs such passions. And I say this as someone who has had to blink back tears while arguing about the designated-hitter rule.

To help figure out this puzzle, I talked with about a dozen highly regarded federal judges. They included both supporters and opponents of Rule 32.1, and together they represented about three-quarters of the circuits. I also spoke to about a dozen highly regarded appellate practitioners.[12] The judges and lawyers agreed that there was a "disconnect" between the relatively low level of importance of Rule 32.1 and the relatively high level of emotion surrounding it (characterized by one judge as "a tempest in a thimble"). But they had widely differing explanations for that disconnect. Before I provide my own explanation, I will describe the recent history of Rule 32.1 as context for that explanation.

II. The Recent History of Rule 32.1

The early history of unpublished opinions is well described elsewhere.[13] I will briefly mention only a few of the highlights. In 1964, the Judicial Conference of the United States (Judicial Conference)[14] resolved "[t]hat the judges of the courts of appeals . . . authorize the publication of only those opinions which are of general precedential value."[15] The Judicial Conference was motivated by concern over "the rapidly growing number of published opinions . . . and the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities."[16] In 1972, the Judicial Conference, on the recommendation of the Federal Judicial Center (FJC),[17] asked "each circuit to develop an opinion

12. I promised all of the judges and lawyers to whom I spoke that I would not disclose their identities.

13. *E.g.*, Reynolds & Richman, *Non-Precedential*, *supra* note 11, at 1168–72.

14. The Judicial Conference is the policy-making arm of the federal judiciary. It is headed by the Chief Justice of the United States and consists of twenty-seven members: the Chief Justice, the chief judges of the thirteen courts of appeals, the chief judge of the Court of International Trade, and a district judge from each of the twelve geographic circuits. 28 U.S.C. § 331 (2000). The Conference typically meets twice each year to address a wide range of matters, *id.*, including proposed amendments to the rules of practice and procedure, *see infra* 28 (describing the Rules Enabling Act and the procedure for rulemaking).

15. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: MARCH 16–17, 1964, at 11 (1964).

16. *Id.*

17. *See* BD. OF THE FED. JUDICIAL CTR., RECOMMENDATIONS AND REPORT TO THE APRIL 1972 MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 4–7 (1972) (outlining the Board's recommendations and explaining the reasons for the recommendations) (on file with the Washington and Lee Law Review). The FJC is the major research and training arm of the

publication plan."[18] After all of the circuits had done so, the Judicial Conference reported in 1974 that:

> There are in effect 11 legal laboratories[19] accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans. . . . [F]urther experimentation may well lead to the amendment of the diverse circuit plans and . . . eventually a somewhat more or less common plan might evolve.[20]

And there the matter stood for about fifteen years.

The more recent chapter of the unpublished-opinions saga began with the Federal Courts Study Committee (FCSC), which Congress created in 1988 and charged with studying the American judicial system and making recommendations for improvement.[21] In its 1990 report,[22] the FCSC expressed concern about the "many problems" created by "non-publication policies and non-citation rules."[23] The FCSC recounted that no-citation rules had been justified, in part, by the desire "to keep those with better access to [unpublished opinions] from having an unfair advantage."[24] The FCSC noted, though, that "inexpensive database access and computerized search technologies may justify revisiting the issue [of forbidding citation to unpublished opinions], because these developments may now or soon will provide wide and inexpensive access

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federal judiciary. Among its purposes are "to conduct research and study of the operation of the courts of the United States," 28 U.S.C. § 620(b)(1) (2000), and "to develop and present for consideration by the Judicial Conference of the United States recommendations for improvement of the administration and management of the courts of the United States," *id.* § 620(b)(2).

18. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: APRIL 6–7, 1972, at 33 (1972).

19. At the time the Judicial Conference wrote its report, there were only eleven federal courts of appeals—the First through Tenth Circuits and the D.C. Circuit. The Eleventh Circuit was split off from the Fifth Circuit in 1981. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified in scattered sections of 28 U.S.C.). The Federal Circuit was created in 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).

20. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: MARCH 7–8, 1974, at 12 (1974).

21. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified in scattered sections of 28 U.S.C.) (establishing the FCSC and outlining its duties).

22. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

23. *Id.* at 130.

24. *Id.*

to all opinions."[25] The FCSC recommended that a committee working under the auspices of the Judicial Conference "should review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access."[26]

The Judicial Conference did not agree and voted to oppose the recommendation of the FCSC.[27] That vote should have ended the matter, as no amendment to FRAP can be promulgated through the Rules Enabling Act process without the approval of the Judicial Conference,[28] and the Judicial Conference made clear that it did not even want to study the issue of unpublished opinions.[29] But the unpublished-opinions issue is as resilient as a vampire.

Just a few short months after the Judicial Conference determined that it did not want to ask a committee to study the issue of unpublished opinions, the Local Rules Project (Project) recommended that the Judicial Conference ask a committee to study the issue of unpublished opinions. The Project was authorized by the Judicial Conference in 1984[30] and operated under the auspices of the Standing Committee.[31] The Project was a massive, multi-year

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25. *Id.* at 130–31.

26. *Id.* at 130.

27. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: SEPTEMBER 12, 1990, at 88 (1990) [hereinafter SEPTEMBER 1990 REPORT].

28. The Rules Enabling Act (codified as amended at 28 U.S.C. § 2072 (2000)) established the basic procedural framework for amending the rules of practice and procedure (including FRAP). Today, the process typically includes eight steps: (1) The advisory committee recommends the proposed amendment for publication. (2) The Committee on Rules of Practice and Procedure (commonly known as the "Standing Committee") approves the proposed amendment for publication. (3) The proposed amendment is published, and public comment is received. (4) The advisory committee, after reviewing the public comment, approves the proposed amendment. (5) The Standing Committee approves the proposed amendment. (6) The Judicial Conference approves the proposed amendment at its fall meeting. (7) The Supreme Court approves the proposed amendment by the following May 1. (8) The proposed amendment takes effect on December 1, unless Congress passes legislation blocking it. *See* 28 U.S.C. §§ 2071–2077 (2000) (outlining the procedure and powers involved in rulemaking); ADMIN. OFFICE OF THE U.S. COURTS, THE RULEMAKING PROCESS: A SUMMARY FOR THE BENCH AND BAR (2004), http://www.uscourts.gov/rules/proceduresum.htm (summarizing the process of rulemaking and the responsibilities of those individuals involved in the process).

29. *See* SEPTEMBER 1990 REPORT, *supra* note 27, at 88 (rejecting recommendation to review policy on unpublished opinions).

30. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: SEPTEMBER 19–20, 1984, at 67 (1984) (recording the Conference's decision to begin the study); Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (discussing the problems with the difficult systems of local rules and describing the procedure to implement change).

31. The Judicial Conference is empowered by 28 U.S.C. § 2073(b) (2000) to "authorize

undertaking, involving a close review of the 5000-plus local rules in effect in the federal courts at the time.[32] The Project aimed to identify topics that were the subject of conflicting local rules and therefore appropriate targets of future national rulemaking. The Project recommended that the Advisory Committee consider amending FRAP to implement national rules regarding the publication of opinions.[33]

The Standing Committee asked the Advisory Committee to comment on the Project's recommendation. In early 1992, after surveying the circuits, the Advisory Committee reported back to the Standing Committee that it was split.[34] Some Advisory Committee members were reluctant to consider a proposal on a subject that the Judicial Conference had so recently declined even to study. Other members, however, "believed that the change in technology has changed circumstances to such an extent that a new look at the policy would be timely."[35] These latter members prevailed, and the issue of unpublished opinions was added to the Advisory Committee's study agenda as Item No. 91-17.

When a film project languishes for years in Hollywood, it is said to be in "development hell."[36] After being placed on the Advisory Committee's study agenda, Item No. 91-17 languished in "rulemaking hell." Years went by without the Advisory Committee discussing Item No. 91-17, much less acting on it. The Advisory Committee was otherwise occupied. The Standing Committee had decided that the rules of practice and procedure should be "restyled"—that is, rewritten from top to bottom in plain English and according to consistent style conventions[37]—and chose the Appellate Rules to undergo

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the appointment of a standing committee on rules of practice, procedure, and evidence." The Standing Committee is charged with reviewing the recommendations of the advisory committees and recommending changes in the rules of practice and procedure to the Judicial Conference. *Supra* note 28.

32. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT (1989) (examining the rules of the ninety-four federal district courts).

33. *See* DANIEL R. COQUILLETTE & MARY P. SQUIERS, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON APPELLATE PRACTICE 68 (1991) (recommending that the Committee amend or add an appellate rule regarding a national uniform plan for opinion publication).

34. Memorandum from the Advisory Committee on Appellate Rules, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 14 (Jan. 8, 1992) (on file with the Washington and Lee Law Review).

35. *Id.*

36. DAVID HUGHES, TALES FROM DEVELOPMENT HELL: HOLLYWOOD FILM-MAKING THE HARD WAY 10 (2004).

37. For more on the restyling project, see Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (2004) and Bryan A. Garner, *Guidelines*

restyling first.[38] Thus, in the mid-1990s, the attention of the Advisory Committee and its Reporter, Professor Carol Ann Mooney, was focused on the restyling project. They did outstanding work, but the inevitable consequence of the restyling project was that little work could be done on the rest of the Advisory Committee's agenda—including Item No. 91-17.[39]

The Advisory Committee completed its work on the restyling project in 1997. That same year, both Judge James K. Logan's highly successful term as Chair of the Advisory Committee and Professor Mooney's equally successful tenure as Reporter to the Advisory Committee ended. A new chair (Judge Will Garwood) and reporter (yours truly) were appointed by Chief Justice William H. Rehnquist. The first item of business for the Advisory Committee was to hack through the backlog of agenda items that had accumulated while FRAP was being restyled.

The hacking started at the Advisory Committee's September 1997 meeting. The Advisory Committee discussed Item No. 91-17 at length and ultimately agreed to give the matter further study.[40] As a first step, Judge Garwood decided to survey the chief judges of the circuits to get some sense of

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for Drafting and Editing Court Rules, 169 F.R.D. 176 (1997).

38. The restyled Appellate Rules took effect on December 1, 1998, and the restyled Criminal Rules on December 1, 2002. The restyled Civil Rules have been published for comment. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE (2005), *available at* http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf.

39. The only significant event related to the citation of unpublished opinions that occurred during this period was the Judicial Conference's adoption of a long-range plan for the federal courts in 1995. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN]. That plan included the recommendation that "[a] uniform set of procedures and mechanisms for access to court of appeals opinions, guidelines for publication or distribution, and *clear standards for citation* should be developed." *Id.* at 69 (emphasis added). In the plan, the Judicial Conference described the recommendation of the FCSC that a committee should study citation standards, FED. COURTS STUDY COMM., *supra* note 22, at 130–31, and noted that the circuits had been adopting different citation rules, LONG RANGE PLAN, *supra,* at 69. The Judicial Conference described standards governing the citation of unpublished opinions as being "in flux" and said that the issue "clearly . . . requires study and assessment." *Id.* at 70. The Judicial Conference did not note that, just five years earlier, it had rejected the FCSC's recommendation and refused to give the issue "study and assessment." *Id.*; *see* SEPTEMBER 1990 REPORT, *supra* note 27, at 88 (opposing the FCSC's recommendation that an ad hoc committee review the policy on unpublished opinions).

40. Minutes of the Fall 1997 Meeting of the Advisory Committee on Appellate Rules 9–12 (Sept. 29, 1997). The minutes of all of the recent meetings of the Advisory Committee (and of the Standing Committee and the other advisory committees) are available on the website maintained by the AO. Administrative Office of the U.S. Courts, Minutes of Committee Meetings, http://www.uscourts.gov/rules/minutes.htm (last visited July 6, 2005).

whether the Judicial Conference's views on this matter might have changed in the past eight years.[41]

On January 28, 1998, Judge Garwood wrote to each of the thirteen chief judges and invited them to respond to the following questions:

> 1. Should the courts of appeals continue to designate some opinions as "unpublished"?
>
> 2. If so, should FRAP be amended to specify the criteria that should be used in determining whether an opinion is designated as "unpublished"?
>
> 3. Should FRAP be amended to either mandate or forbid the submission of "unpublished" opinions to Westlaw, LEXIS, and similar services for electronic dissemination?
>
> 4. Should FRAP be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited by counsel in their briefs and other submissions or by courts in their opinions and orders?
>
> 5. Should FRAP be amended to specify whether and to what extent "unpublished" opinions shall have precedential force?[42]

All of the chief judges—save those of the First and Fifth Circuits—responded to Judge Garwood's letter, as did several of their colleagues. The chief judges were almost unanimous—and, in some cases, quite vehement—in their view that the Advisory Committee should not propose rules addressing any of these issues.[43] Chief Judge Harry T. Edwards of the D.C. Circuit captured the attitude of the judges when he stated, in response to the fourth question: "This is a terrible idea."[44] Several judges simply said that they agreed with Chief Judge Edwards.[45] Others, such as Judge Edward E. Carnes

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41. The chief judges make up almost half of the voting membership of the Conference. *Supra* note 14.

42. *E.g.*, Letter from Will Garwood, Chair, Advisory Committee on Appellate Rules, to Harry T. Edwards, Chief Judge, U.S. Court of Appeals for the D.C. Circuit (Jan. 28, 1998) 1–2 (on file with the Washington and Lee Law Review).

43. *See* Minutes of the Spring 1998 Meeting of the Advisory Committee on Appellate Rules, pt. V.C, http://www.uscourts.gov/rules/Minutes/0498appellateminutes.htm (Apr. 16, 1998) [hereinafter Spring 1998 Minutes] (reporting the judges' responses to the questions).

44. Letter from Harry T. Edwards, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, to William L. Garwood, Chair, Advisory Committee on Appellate Rules 2 (Feb. 4, 1998) [hereinafter Edwards Letter] (on file with the Washington and Lee Law Review).

45. *See, e.g.*, Letter from Stanley F. Birch, Jr., Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit, to William L. Garwood, Chair, Advisory Committee on Appellate Rules 1 (Feb. 20, 1998) ("I am in complete agreement with the views of Chief Judge Edwards."); Letter from Joseph W. Hatchett, Chief Judge, U.S. Court of Appeals for the Eleventh Circuit, to

of the Eleventh Circuit, added a few words just to make sure the Advisory Committee got the point: "Amending FRAP to address unpublished opinions and attempting to force a uniform practice upon circuits in this area would be a terrible idea."[46] On March 11, 1998, Judge Garwood met with the chief judges in Washington, D.C. to seek additional input from them on the questions that he had posed in his January 28 letter. Again, the chief judges were adamant that FRAP should not be amended to address the citation of unpublished opinions (or any of the other issues raised in Judge Garwood's letter).[47]

The Advisory Committee next met in April 1998. At that meeting, Judge Garwood argued that Item No. 91-17 should be removed from the Advisory Committee's study agenda and that the Advisory Committee should give no further attention to the issue of unpublished opinions.[48] Although Judge Garwood said that he personally would favor a rule providing that unpublished opinions could be cited,[49] he urged the Advisory Committee to bow to political reality:

> Judge Garwood pointed out that the chief judges make up half of the voting membership of the Judicial Conference, and that the other half of the voting membership—district court judges from each circuit—was likely to defer to the chief judges on this matter. It is thus clear to Judge Garwood that rules regarding unpublished decisions have no chance of clearing the Judicial Conference in the foreseeable future.[50]

The Advisory Committee deliberated about Judge Garwood's recommendation. Mostly, the deliberations focused on the questions that seem

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William L. Garwood, Chair, Advisory Committee on Appellate Rules 1 (Feb. 17, 1998) ("I agree completely with Chief Judge Harry T. Edwards's responses in his letter of February 4, 1998."); Letter from Procter Hug, Jr., Chief Judge, U.S. Court of Appeals for the Ninth Circuit, to William L. Garwood, Chair, Advisory Committee on Appellate Rules 1 (Mar. 2, 1998) ("[O]ur Executive Committee concurs in the conclusions reached by the D.C. Circuit."); Letter from Dolores K. Sloviter, Circuit Judge, U.S. Court of Appeals for the Third Circuit, to William L. Garwood, Chair, Advisory Committee on Appellate Rules 1 (Feb. 12, 1998) ("I agree wholeheartedly with the comments expressed by Chief Judge Harry T. Edwards in his letter of February 4, 1998.") (all letters on file the Washington and Lee Law Review).

46. Letter from Ed Carnes, Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit, to Will L. Garwood, Chair, Advisory Committee on Appellate Rules 1 (Feb. 19, 1998) (on file with the Washington and Lee Law Review).

47. *See* Spring 1998 Minutes, *supra* note 43, at pt. V.C (stating that the chief judges were almost unanimous in their opposition to the Committee proposing rules governing unpublished opinions).

48. *Id.*

49. *See id.* (noting that Judge Garwood doubted the wisdom and constitutionality of local rules that bar citation to unpublished opinions).

50. *Id.*

to arise whenever the topic of unpublished opinions is discussed, such as the question of whether unpublished opinions contain anything of value or whether barring citation to unpublished opinions is necessary to prevent wealthy litigants from having an advantage over poor litigants.[51] But two aspects of the Advisory Committee's discussion are worth noting. First, a substantial part of the discussion addressed the practice of the Third, Fifth, and Eleventh Circuits of refusing to make their unpublished opinions available to Westlaw and LEXIS. That issue so concerned the Advisory Committee that Judge Garwood eventually agreed to appoint a subcommittee "to discuss whether and how the Third, Fifth, and Eleventh Circuits might be encouraged to provide their unpublished opinions to LEXIS and Westlaw."[52] The subcommittee never met.[53] Second, the Solicitor General's representative (joined later in the day by the Solicitor General himself) argued that, notwithstanding the opposition of the chief judges, the Advisory Committee should go forward with a proposed rule "providing that unpublished opinions may be cited."[54] The Solicitor General's views did not carry the day—or, at least, that day. The Advisory Committee agreed unanimously—although, in the case of some members (including the Solicitor General), quite reluctantly—that Item No. 91-17 should be removed from the study agenda.[55]

Again, that should have been the end of the matter, but again the unpublished-opinions issue would not die. Less than three years later the issue was put back on the Advisory Committee's agenda by the Solicitor General. On January 16, 2001—four days before the end of the Clinton Administration—outgoing Solicitor General Seth P. Waxman wrote to Judge Garwood and formally proposed "the adoption of a new provision in the Federal Rules of Appellate Procedure that would establish uniform national standards governing the citation of unpublished court of appeals decisions."[56] On the issue of citing unpublished opinions, the Solicitor General apparently refused to take "no" for an answer.

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51. *Id.*

52. *Id.*

53. The Third and Fifth Circuits soon changed their practices, and the Eleventh Circuit was forced to change its practice by Section 205 of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 (Supp. 2005)). Section 205(a) requires every federal court to maintain a website and to make available on that website "the substance of all written opinions issued by the court." *Id.* § 205(a)(5).

54. Spring 1998 Minutes, *supra* note 43, at pt. V.C.

55. *Id.*

56. Letter from Seth P. Waxman, Solicitor General, to Will Garwood, Chair, Advisory Committee on Appellate Rules 1 (Jan. 16, 2001) [hereinafter Waxman Letter] (on file with the Washington and Lee Law Review).

The Solicitor General's proposal was added to the Advisory Committee's agenda as Item No. 01-01.[57] Although the proposal eventually led to the publication of Rule 32.1, it is important to note that what the Solicitor General proposed differed significantly from what eventually became Rule 32.1. Likewise, it is important to note that what seemed to be motivating the Solicitor General in January 2001 was different from what seems to be motivating the Advisory Committee today.

The rule proposed by the Solicitor General began by providing that the citation of unpublished opinions "is disfavored."[58] The rule allowed citation only "to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or similar doctrines."[59] Otherwise, the rule would have barred the citation of an unpublished opinion, unless "a party believes" both that the unpublished opinion "persuasively addresses a material issue in the appeal" and that "no published opinion of the forum court adequately addresses the issue."[60]

The Solicitor General's letter to Judge Garwood made clear that the Solicitor General's proposal was motivated by two concerns: uniformity and clarity. The Solicitor General said that he wanted to make life easier for attorneys who practice in more than one circuit (such as the Department of Justice attorneys) by eliminating the need to learn and follow various local circuit rules on whether and when unpublished opinions may be cited.[61] The Solicitor General also wanted to clarify the law, which, he said, "leaves litigators substantially uncertain concerning how to treat an unpublished decision issued by a court that . . . [permits citation of its own unpublished decisions] (such as the Fifth Circuit), when litigating in a court (such as the Ninth Circuit), that prohibits citation of its own unpublished decisions but does not specifically address the citation of decisions issued by other courts."[62]

Thus, the Solicitor General did not object to the content of the local circuit rules that barred or restricted the citation of unpublished opinions; he objected

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57. The Solicitor General's proposal appears as Item No. 00-14 in both the agenda for the Advisory Committee's April 2001 meeting and in the minutes of that meeting. In all other Advisory Committee records, it appears as Item No. 01-01. This confuses researchers, who occasionally ask me for an explanation. I do not have one. Somehow I made a mistake.

58. Waxman Letter, *supra* note 56, app. at 1.

59. *Id.*

60. *Id.* The draft rule also would have required that a party must attach to its brief or other filing a copy of any unpublished opinion cited by the party—even if the unpublished opinion had appeared in the *Federal Appendix* or was available online. *Id.*

61. *See id.* at 3 (noting that the current rules result in uncertainty and confusion for lawyers).

62. *Id.* (footnote omitted).

only to the lack of uniformity and clarity. Moreover, far from taking issue with the notion that a court could discourage litigants from citing unpublished opinions, the Solicitor General stressed in his draft Advisory Committee Note that "parties should look to unpublished decisions only as a last resort" and that his proposed rule "does not dispense with the basic rule that unpublished decisions normally should not be cited."[63] Indeed, the Solicitor General's proposed rule would have forced the three circuits that do not ban or limit the citation of unpublished opinions to begin doing so. No soaring language about free speech, judicial accountability, or the rule of law here!

The Solicitor General's proposal was discussed at the April 2001 meeting of the Advisory Committee at the end of a very long day. Both Judge Garwood and I argued that the Solicitor General's proposal should be removed from the study agenda.[64] I recounted the history described above (several members had joined the Advisory Committee since the unpublished-opinions issue had last been discussed) and argued that "it would be a waste of this Committee's time—and perhaps risk the appearance of a lack of respect for the chief judges who responded to Judge Garwood's 1998 letter—to take up this precise proposal again just three years later."[65] Judge Garwood agreed. He described his March 1998 meeting with the chief judges and said that, "in light of the recent and vehemently negative reaction of the chief judges, he did not think this Committee should even 'stick its toe' in this area."[66]

In response, the Solicitor General's representative and other Advisory Committee members argued that the attitude of the chief judges might have changed since they were last polled in 1998.[67] These members pointed out that some circuits were now led by different chief judges and speculated that the thinking of the chief judges may have changed in light of *Anastasoff v. United States*,[68] the controversial (and later vacated) Eighth Circuit decision holding that a federal court is constitutionally required to treat all of its prior decisions—published or not—as precedent.[69] The discussion did not progress

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63. *Id.* app. at 2.

64. Minutes of Spring 2001 Meeting of Advisory Committee on Appellate Rules 64–65 (Apr. 11, 2001) [hereinafter Spring 2001 Minutes], *available at* http://www.uscourts.gov/rules/Minutes/app0401.pdf.

65. *Id.* at 64.

66. *Id.* at 65.

67. *Id.*

68. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

69. *Id.* at 899. Saying that a decision of a court must be treated as "precedent" raises as many questions as it answers, for there has long been disagreement about how a federal (or state) court must (or should) treat its prior decisions. In an article published shortly after

very far, though, as it was after 5:00 p.m., and Advisory Committee members had planes to catch. The Advisory Committee agreed to continue the discussion at its next meeting.[70]

The Advisory Committee did not meet again until April 2002.[71] In the intervening year, Judge Samuel A. Alito, Jr. succeeded Judge Garwood as Chair of the Advisory Committee, and Theodore B. Olson succeeded Waxman as Solicitor General. On February 22, 2002, in preparation for the upcoming meeting of the Advisory Committee, Judge Alito sent a copy of the Solicitor General's proposal to the chief judges of the circuits and asked for their comments.[72] The chief judges of the Second, Seventh, and D.C. Circuits did not respond; the responses of the other chief judges were all over the lot. The chief judges of the Third, Tenth, and Eleventh Circuits expressed support for the proposal;[73] the chief judges of the First, Fourth, Eighth, Ninth, and Federal

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Anastasoff was decided, Polly J. Price—a former law clerk to Judge Richard S. Arnold, *Anastasoff*'s author—describes how judges and scholars have differed over issues such as to what extent courts are bound to follow their precedents and under what circumstances courts may overrule their precedents. Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 108–17 (2000). Price argues, though, that "prior to the appearance of the non-citation rules at issue in *Anastasoff*, no one had suggested that courts should not at least *begin* their reasoning process with prior decided cases." *Id.* at 93. According to Price, "*Anastasoff* does not require that courts subscribe to any one particular theory of the *binding nature* of precedent," *id.* at 108, but rather requires merely that "[t]he decisionmaking process at least *begin[]* from prior precedent, whether the court then considers itself 'bound' by precedent [or] able to 'overrule' precedent," *id.* at 109. By "begin[ning] from prior precedent," *id.* at 109, Price means that courts must "at a minimum . . . take note of the prior determination and explain any choice to decide the matter differently," *id.* at 85.

When I refer to a decision being treated as "precedent" or "binding precedent," I am using what Price describes as the "traditional" definition of precedent—"that the holding of a case . . . must either be followed, distinguished, or overruled." *Id.* at 86. I use the traditional definition not because I somehow endorse it—I do not know enough to take a position—but because the judges and lawyers who refer to "precedent" or "binding precedent" in the debate over Rule 32.1 generally are using the traditional definition.

70. Spring 2001 Minutes, *supra* note 64, at 65.

71. The meeting scheduled for November 2001 was cancelled as a result of the September 11 attacks.

72. *E.g.*, Letter from Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to R. Lanier Anderson, III, Chief Judge, U.S. Court of Appeals for the Eleventh Circuit (Feb. 22, 2002) (on file with the Washington and Lee Law Review).

73. Letter from R. Lanier Anderson, III, Chief Judge, U.S. Court of Appeals for the Eleventh Circuit, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules (Feb. 26, 2002); Letter from Edward R. Becker, Chief Judge, U.S. Court of Appeals for the Third Circuit, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules (Mar. 4, 2002); Letter from Deanell Reece Tacha, Chief Judge, U.S. Court of Appeals for the Tenth Circuit, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules (Mar. 27, 2002) (all letters on file with the Washington and Lee Law Review).

Circuits expressed opposition;[74] the chief judge of the Sixth Circuit stated that his circuit was "not inclined to change the way . . . [it] proceed[s]";[75] and the chief judge of the Fifth Circuit said that the judges of her circuit were divided.[76] It is critical to remember that the proposal reviewed by these chief judges was the Solicitor General's, which would have *restricted* the citation of unpublished opinions in a manner consistent with the local rules of a plurality of the circuits. The proposal was *not* Rule 32.1, which forbids courts to discourage or restrict the citation of unpublished opinions.

Judge Alito reported the results of his survey at the April 2002 meeting of the Advisory Committee.[77] The Solicitor General's representative continued to press for the approval of his proposal (Olson agreed with his predecessor on the issue) and pointed to several recent developments that suggested that the climate was becoming more welcoming to the citation of unpublished opinions.[78] For example, the D.C. Circuit replaced its formerly restrictive rule with an extremely liberal rule permitting the citation "as precedent" of unpublished decisions issued on or after January 1, 2002.[79] The Third Circuit also announced a new policy on unpublished opinions. Though the policy noted that the court itself "does not cite to its not precedential opinions as authority," the policy placed no restrictions on the ability of parties to cite unpublished opinions.[80] And the First Circuit had asked for public comment on

74. Letter from Michael Boudin, Chief Judge, U.S. Court of Appeals for the First Circuit, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules 1 (Feb. 26, 2002); Letter from David R. Hansen, Chief Judge, U.S. Court of Appeals for the Eighth Circuit, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules 1 (Apr. 1, 2002); Letter from Haldane Robert Mayer, Chief Judge, U.S. Court of Appeals for the Federal Circuit, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules 1 (Mar. 12, 2002) (all letters on file with the Washington and Lee Law Review). Chief Judge Mary M. Schroeder of the Ninth Circuit and Chief Judge J. Harvie Wilkinson, III of the Fourth Circuit expressed their opposition in telephone calls to Judge Alito.

75. Letter from Boyce F. Martin, Jr., Chief Judge, U.S. Court of Appeals for the Sixth Circuit, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules (Feb. 27, 2002) (on file with the Washington and Lee Law Review).

76. Letter from Carolyn Dineen King, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules 1 (Mar. 15, 2002) (on file with the Washington and Lee Law Review).

77. Minutes of Spring 2002 Meeting of Advisory Committee on Appellate Rules 23 (Apr. 22, 2002) [hereinafter Spring 2002 Minutes], *available at* http://www.uscourts.gov/rules/Minutes/app0402.pdf.

78. *Id.* at 24; *see also* Letter from Douglas Letter, Appellate Litigation Counsel, U.S. Department of Justice, to Patrick J. Schiltz, Reporter, Advisory Committee on Appellate Rules (Mar. 28, 2002) (remarking that recent changes suggested a more open attitude towards the proposed rule) (on file with the Washington and Lee Law Review).

79. D.C. CIR. R. 28(c)(1)(B).

80. 3D CIR. I.O.P. 5.7.

a proposed local rule—a rule that the court ultimately adopted[81]—that would have liberalized its no-citation rule.

At the April 2002 meeting, the Advisory Committee debated the Solicitor General's proposal.[82] The debate followed a pattern that had already become familiar and that was to become more familiar in succeeding years. To a substantial extent, those who favored the rule argued the merits, while those who opposed the rule cited what might be called political or prudential concerns. In other words, those who argued in favor of the rule mostly cited reasons why the rule was a good one—why it was wise as a policy matter. Those who opposed the rule also argued the merits, but they relied most heavily on arguments that the rule was unlikely to be approved. Opponents argued that the Advisory Committee should not invest its time, energy, and "political capital" in pushing a rule that would spur much controversy and probably not be approved by the Judicial Conference.

The proponents won. The Advisory Committee voted six to three in favor of the proposition that FRAP should be amended to include a national rule regulating the citation of unpublished opinions.[83] The Advisory Committee then turned to the question of the contents of that rule.[84] The primary disagreement concerned whether the Solicitor General's "middle ground" proposal should be approved or whether FRAP should be amended to more broadly provide that no restrictions may be imposed on the citation of unpublished opinions. An interesting role reversal occurred. Those who had opposed any national rulemaking on the topic of unpublished opinions argued that the Advisory Committee should take the broader approach—and mostly argued the merits. I, among others, argued for the broader approach:

> The Reporter argued that, in putting so many conditions upon the citation of non-precedential decisions, the . . . [Solicitor General's proposal] was undermining the arguments of its proponents. Proponents of the rule argue . . . that non-precedential decisions should not be treated any differently than other types of non-precedential authority, such as the decisions of state or foreign courts or law review articles. No rule regulates the citation of these sources; for example, no rule provides that these sources can only be cited in "support [of] a claim of res judicata" or "if a party believes that [the authority] persuasively addresses a material issue in the appeal." By imposing such restrictions on the citation of non-precedential decisions, the draft rule seems to buy into the notion that there

81. 1ST CIR. R. 32.3.

82. Spring 2002 Minutes, *supra* note 77, at 24–25.

83. *Id.* at 25.

84. *Id.* at 25–27.

> is something "wrong" with non-precedential opinions that is not "wrong" with law review articles or other non-precedential authorities.[85]

Those who had favored national rulemaking argued in favor of the Solicitor General's approach—and mostly argued political or prudential concerns. Most members seemed to agree that the broader rule would be preferable on the merits, but they "argued that the restrictions on the citation of non-published opinions [found in the Solicitor General's draft] were politically expedient in that they would increase the chances that the rule would be approved by the Standing Committee and Judicial Conference."[86] After a lengthy debate, the Advisory Committee voted six to three to approve the Solicitor General's proposal in principle.[87]

When a proposed rule has not been drafted by the Reporter, the Advisory Committee's general practice is to approve the rule in principle and then ask the Reporter to prepare a "cleaned-up" draft of the rule for the Advisory Committee to consider at its next meeting. This practice provides the Advisory Committee an opportunity to give the proposal further thought. It also provides the Reporter an opportunity to improve the drafting of the proposed rule and write an Advisory Committee Note to accompany it. The Advisory Committee followed its usual practice with respect to the Solicitor General's proposal on unpublished opinions. The Advisory Committee approved the proposal in principle, but it asked me to present a "cleaned-up" draft at its November 2002 meeting.[88]

As that meeting approached, I became increasingly convinced that, if the Advisory Committee was going to pick a fight over unpublished opinions, it should at least pick a fight worth fighting. I knew from my experience working on the unpublished-opinion issue that the opposition to any proposed amendment would be fierce. It seemed to me that, to have any chance of approval, the proposal would have to accomplish something more significant than instructing the four circuits that barred the citation of unpublished opinions all of the time that they could bar the citation of unpublished opinions only some of the time—such as when a published opinion would serve just as well. As the Solicitor General had recognized, the only thing that such a rule would accomplish is uniformity. In light of the strong opposition that any rulemaking about unpublished opinions was certain to face, I did not think that the argument that attorneys should be spared the inconvenience of having to

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85. *Id.* at 26.
86. *Id.*
87. *Id.* at 27.
88. *Id.*

look up a circuit's rule on citing unpublished opinions (a rule that typically appears on the face of unpublished opinions) was likely to prevail.

So that the Advisory Committee would have a range of options before it, I presented three alternative drafts of a proposed Rule 32.1 at the November 2002 meeting.[89] "Alternative A" was the most sweeping. It specifically authorized courts to issue opinions that were not precedential and permitted the citation of unpublished opinions without qualification.[90] "Alternative B" was the second most sweeping. Unlike Alternative A, it addressed only the citation of unpublished opinions and not their precedential force. However, unlike "Alternative C," it permitted the citation of such opinions without qualification.[91] Alternative C was essentially the Solicitor General's original proposal. It, too, addressed only the citation of unpublished opinions and not their precedential force, but it permitted such citation only in limited circumstances.[92]

The Advisory Committee quickly decided to reject Alternative A.[93] Although they recognized that publishing Alternative A might reassure judges who feared that a rule permitting the citation of unpublished opinions was a first step in a long-range effort to bar unpublished opinions altogether, members concluded that the Advisory Committee should not embrace one side of the debate over the constitutionality of issuing nonprecedential opinions. Rather, the Advisory Committee decided to limit its involvement to the issue of citation. To date, the Advisory Committee has not wavered from this position.

The Advisory Committee also quickly determined that Alternative B represented a better approach than Alternative C.[94] Even the Solicitor General's representative supported Alternative B. He said that the Solicitor General had proposed the equivalent of Alternative C only because he had concluded that a more limited rule had the best chance of being approved by the Standing Committee and Judicial Conference. But the Solicitor General agreed that Alternative B was the better approach on the merits and, on reflection, agreed that it would be better to lead with the best alternative

89. *See* Minutes of Fall 2002 Meeting of Advisory Committee on Appellate Rules 22–35 (Nov. 18, 2002) [hereinafter Fall 2002 Minutes] (describing the three alternative versions of proposed Rule 32.1 in detail), *available at* http://www.uscourts.gov/rules/Minutes/app1102.pdf.

90. *Id.* at 23–28, 35.

91. *Id.* at 28–31, 35.

92. *Id.* at 31–34, 35.

93. *Id.* at 35.

94. *Id.*

(Alternative B) and then fall back to the less satisfactory alternative (Alternative C) if the best alternative failed to attract sufficient support.[95]

Back in April 2002, the Advisory Committee had been split six to three over whether any rule regarding the citation of unpublished opinions should be approved.[96] At the November 2002 meeting, the Advisory Committee voted seven to one in favor of Alternative B, with one abstention.[97] The dissenting vote belonged to Sanford Svetcov, a respected San Francisco appellate litigator who had supported going forward with the rule in April.[98] Svetcov explained that he had received calls from Judge Alex Kozinski and others affiliated with the Ninth Circuit, and that they had persuaded him that FRAP should not be amended to address the citation of unpublished opinions.[99] The abstainer was the Solicitor General's representative. It came as a bit of a surprise that the Solicitor General abstained on his own proposal. But the Solicitor General's representative explained that the Solicitor General had also received calls from Judge Kozinski and other Ninth Circuit judges, and he was troubled by some of the concerns that they raised.[100]

Before approving Alternative B, the Advisory Committee decided to make some stylistic changes to the draft that I had presented.[101] For example, the Advisory Committee decided that the rule should be written in the passive voice ("No restriction may be imposed") rather than in the active voice ("A court must not impose") because the passive voice sounded less confrontational and thus might create less opposition.[102] The Advisory Committee also asked me to make some changes to the Advisory Committee Note and to prepare a final draft of the proposed rule in time for the next meeting.[103]

The Advisory Committee met again in May 2003. Its discussion of Rule 32.1 was brief and focused almost entirely on stylistic issues.[104] After making a

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95. *Id.*

96. Spring 2002 Minutes, *supra* note 77, at 25.

97. Fall 2002 Minutes, *supra* note 89, at 39.

98. The minutes of the Advisory Committee do not generally disclose who made which statements or who cast which votes. However, Svetcov has been identified in the legal press as an opponent of Rule 32.1, *see, e.g.*, Tony Mauro, *Green Light to Cite Unpublished Opinions*, LEGAL TIMES, Apr. 19, 2004, at 8 (noting that Svetcov describes unpublished opinions as "junk law"), and he has given me permission to identify him in this Article.

99. Fall 2002 Minutes, *supra* note 89, at 36.

100. *Id.* at 35.

101. *Id.* at 38–39.

102. *Id.* at 38.

103. *Id.* at 39.

104. Minutes of Spring 2003 Meeting of Advisory Committee on Appellate Rules 11–17 (May 15, 2003), *available at* http://www.uscourts.gov/rules/Minutes/ app0503.pdf.

couple of minor stylistic changes to the rule and Advisory Committee Note,[105] the Advisory Committee approved Rule 32.1 for publication with Svetcov in dissent and the Solicitor General's representative abstaining.[106]

The next stop for Rule 32.1 was the Standing Committee. No proposed amendment to FRAP or any of the other rules of practice and procedure can be published for comment without the approval of the Standing Committee.[107] It is rare, though, that the Standing Committee denies permission to publish. Rule 32.1 was no exception. At its June 2003 meeting, the Standing Committee approved the request to publish Rule 32.1 for comment on a unanimous voice vote after almost no discussion.[108]

Rule 32.1 and several other proposed amendments were published for comment in August 2003.[109] The comments received by the Advisory Committee on this set of proposed amendments were unusual in several respects. First, the Advisory Committee received an extraordinarily large number of comments: 513 written comments were submitted,[110] and fifteen witnesses testified at a public hearing on April 13, 2004.[111] By contrast, a much more extensive—and, to my mind, more important—set of proposed amendments published in August 2000[112] attracted twenty written comments and no requests to testify. Second, the overwhelming majority of the written comments—about 95%—and all of the live testimony pertained only to Rule 32.1.[113] Most of the other written comments pertained to Rule 32.1 and at least one other amendment. Only nine of the 513 comments did not mention Rule 32.1 at all.[114] Third, most of the comments on Rule 32.1 came from one circuit. About 75% of all comments (pro and con) regarding Rule 32.1—and about

105. *Id.* at 16–17.

106. *Id.* at 17.

107. *Supra* note 28.

108. Minutes of Meeting of Committee on Rules of Practice and Procedure 8–9 (June 9–10, 2003), *available at* http://uscourts.gov/rules/Minutes/june2003.pdf.

109. PRELIMINARY DRAFT, *supra* note 8, at 1–44.

110. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 1 (May 14, 2004) [hereinafter Alito Memorandum 2004], *available at* http://www.uscourts.gov/rules/ Reports/AP5-2004.pdf.

111. Transcript of Hearing Before Advisory Committee on Appellate Rules 3–4 (Apr. 13, 2004) [hereinafter Hearing Transcript].

112. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 1–60 (2000).

113. Alito Memorandum 2004, *supra* note 110, at 1–2.

114. *Id.*

80% of the comments opposing Rule 32.1—came from judges, clerks, lawyers, and others who work or formerly worked in the Ninth Circuit.[115] Fourth, the vast majority of the comments on Rule 32.1—about 90%—opposed adopting the rule.[116] Finally, the comments regarding Rule 32.1 were extremely repetitive. Obviously, there had been an organized campaign to generate comments opposing Rule 32.1, as many of those comments repeated—sometimes word-for-word—the same basic "talking points" that had been distributed by opponents of the rule.[117]

The Advisory Committee discussed the comments on Rule 32.1 at its April 2004 meeting.[118] (I have described those comments at length in another Article.[119]) Every Advisory Committee member present—save Svetcov—spoke in favor of the proposed rule.[120] It appeared that positions had hardened. The supporters of Rule 32.1 increasingly spoke about the issue as one of principle, and they spoke in strong terms:

> Committee members argued that the main problem with no-citation rules—and the main reason to approve Rule 32.1—is that an Article III court should not be able to forbid parties from citing back to it the public actions that the court itself has taken. It is antithetical to American values and to the common law system for a court to forbid a party or an attorney from calling the court's attention to its own prior decisions, from arguing to the court that its prior decisions were or were not correct, and from arguing that the court should or should not act consistently with those prior decisions in the present case. One member called no-citation rules an "extreme" measure. Another member said that it was "ludicrous" that an attorney cannot cite a court's prior decisions to the court itself, but can cite those

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115. *Id.* at 2. For example, of the twenty-one law professors who wrote to oppose Rule 32.1, only two have no obvious Ninth Circuit connection—that is, a Ninth Circuit connection that appears in their online biography. *See id.* at 99–100 (listing professors who opposed the rule). Seventeen of the professors are former Ninth Circuit clerks (eight of those seventeen clerked for Judge Kozinski), and two others did not clerk on the Ninth Circuit but now teach there.

116. *Id.* at 2.

117. *Id.* These "talking points" were attached to or incorporated in many of the comments. *See, e.g.*, Eric C. Liebeler, Public Comment 03-AP-025, Proposed Federal Rule of Appellate Procedure 32.1 (Dec. 2, 2003) (attaching three pages of talking points entitled "Why Proposed Rule 32.1 Is A Bad Idea"), *available at* http://www.secretjustice.org/ pdf_files/Comments/03-AP-025.pdf.

118. Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules 2–12 (Apr. 13–14, 2004) [hereinafter Spring 2004 Minutes], *available at* http://www.uscourts.gov/rules/Minutes/app0404.pdf.

119. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 30–58 (2005).

120. Spring 2004 Minutes, *supra* note 118, at 7.

> decisions to virtually everyone else in the world, including other courts. Yet another member—a judge—said that judges should not be the only government officials who can shield themselves from being confronted with their past actions.[121]

Supporters dismissed the "parade of horribles" raised by opponents of Rule 32.1—such as predictions that it would substantially slow disposition times and cause courts to issue many more one-line orders disposing of appeals—by pointing out that many federal and state jurisdictions had already liberalized their no-citation rules without experiencing any of the "horribles."[122] The three federal appellate judges on the Advisory Committee (including John G. Roberts, Jr., now Chief Justice of the United States) all spoke in support of Rule 32.1.[123] All three judges came from circuits with liberal citation rules (the D.C., Third, and Fifth Circuits), and all agreed that, as one judge put it, "parties almost never cite unpublished opinions, and, when they do, [the courts] are quite capable of dealing with those citations."[124]

Only Svetcov argued against approving Rule 32.1. He cited three major reasons: First, unpublished opinions are "junk law";[125] they contain little or nothing of value. Second, federal rulemaking should be a consensus or near-consensus process. Not only was there no consensus in favor of Rule 32.1, but there was, if anything, a near-consensus against it among the commentators.[126] Finally, the circuits confront dramatically different challenges in handling their caseloads and should be free to meet those challenges as they deem appropriate: "This is an area in which one size does not fit all."[127]

In addition to debating the merits of Rule 32.1, the Advisory Committee discussed whether it should postpone action on Rule 32.1 and invite the FJC and AO to study some of the claims made by the commentators.[128] In the end, most members opposed a postponement, arguing that such a study would be

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121. *Id.* at 8.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *See id.* (noting an "overwhelming opposition" to Rule 32.1 among commentators). I made a similar argument in (unsuccessfully) urging the Advisory Committee either to remove Rule 32.1 from its study agenda or to postpone action on Rule 32.1 to give the matter further study. Memorandum from Patrick J. Schiltz, Reporter, Advisory Committee on Appellate Rules, to Advisory Committee on Appellate Rules 93–94 (Mar. 18, 2004) [hereinafter Schiltz Memorandum], *available at* http://www.nonpublication.com/schiltz.pdf.

127. Spring 2004 Minutes, *supra* note 118, at 8.

128. *Id.*

difficult to conduct and would change few minds.[129] The Advisory Committee also discussed two possible ways to limit Rule 32.1: first, amending it to apply only to unpublished opinions issued after the rule takes effect,[130] and, second, rewriting it to permit circuits to bar the citation of unpublished opinions unless there is no published opinion on point (similar to the Solicitor General's original proposal).[131] The Advisory Committee dropped both proposals after it became clear that the proposals did not have much support.[132] The Advisory Committee voted six to one to approve Rule 32.1,[133] with only one stylistic change.[134]

Rule 32.1 again went before the Standing Committee in June 2004. Because this time the Standing Committee's decision was not whether to publish the rule, but whether to approve it, the Standing Committee discussed the merits of the rule at length.[135] It was clear that members of the Standing Committee had reviewed the comments carefully, and many mentioned that they had been lobbied by judges and others. No member of the Standing Committee defended no-citation rules on the merits; everyone who spoke about no-citation rules personally opposed them. And no member—save one[136]—said that he or she opposed Rule 32.1 on the merits. But the Standing Committee nevertheless decided, by unanimous voice vote, to return the proposed rule to the Advisory Committee for further study.[137] The Standing Committee was clear that its decision did not reflect a lack of support for Rule 32.1.[138] Rather, the Standing Committee's decision reflected concern about the

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129. *Id.* at 9.

130. *Id.* at 9–10.

131. *Id.* at 10–11.

132. *Id.* at 11.

133. *Id.* at 9. A member who was unavoidably absent later informed the Advisory Committee that he would have voted against the proposed rule. *Id.*

134. *Id.* at 12.

135. Minutes of Meeting of Committee on Rules of Practice and Procedure 8–11 (June 17–18, 2004) [hereinafter June 2004 Minutes], *available at* http://www.uscourts.gov/rules/Minutes/june2004.pdf.

136. *See id.* at 9–10 (citing one member's contention that potential adverse consequences of Rule 32.1 "might well come to pass").

137. *Id.* at 11.

138. *Id.* The June 2004 Minutes stated:

> One member asked that the record reflect that the committee's discussion of the matter and its returning the rule to the advisory committee did not reflect a judgment by the Standing Committee on the merits of the proposal. Rather, he said, the committee's concerns were directed purely to ins[ti]tutional values and the rulemaking process. [The Standing Committee] agreed to the clarification.

Id.

strong opposition to the rule expressed by many commentators, especially federal judges. Standing Committee members noted that some of those commentators' claims—such as the claim that liberalizing no-citation rules would result in longer disposition times—could be tested empirically. Before voting on Rule 32.1, members wanted to make certain that they had taken every reasonable step to gather information relevant to the arguments of both sides.[139]

In the weeks that followed, the FJC and the AO worked with Judge David F. Levi (the Chair of the Standing Committee), Judge Alito, and others to design a study. Eventually, they agreed on a three-part approach. The first part involved sending a survey to all circuit judges (active and senior) and to a randomly selected sample of appellate lawyers, asking about such topics as the impact of liberalizing a citation rule on the workloads of judges and attorneys. The second part involved a close study of a sample of cases from each circuit to identify, among other things, how often unpublished opinions were cited in the circuits with liberal citation rules. The third part involved a review of data collected by the AO to determine whether liberalizing or abolishing no-citation rules seemed to cause either an increase in case disposition times or an increase in the percentage of cases disposed of by one-line judgment orders.

Most of this research was complete in time for the April 2005 meeting of the Advisory Committee. A detailed review of the findings is beyond the scope of this Article,[140] but I will briefly summarize the Committee's findings. The AO identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule.[141] The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year.[142] The AO focused on median case disposition times[143] and on the number of cases disposed of by one-line judgment orders (referred to by the AO as "summary dispositions"). The AO reported that "[t]he data show[] little or no evidence that the adoption of a permissive citation policy impacts the median

139. *See id.* at 10 ("Judge Levi added that it would not be advisable to seek Judicial Conference approval of the proposed new rule at this time without supporting empirical data. Obtaining the data would better inform the committee and take much of the passion out of the debate.").

140. I have reviewed the studies in more detail in Schiltz, *supra* note 119.

141. Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts, to Advisory Committee on Appellate Rules 1 (Feb. 24, 2005) [hereinafter Rabiej Memorandum] (on file with the Washington and Lee Law Review).

142. *Id.*

143. *Id.* The AO looked at both the time from submission of the briefs to final judgment and the time from oral argument to final judgment. *Id.*

disposition time in either direction"[144] and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions."[145] The data simply failed to support two of the key arguments made by opponents of Rule 32.1: that allowing citation of unpublished opinions will result in judges spending much more time drafting unpublished opinions and in courts disposing of many more cases with one-line orders.

The FJC's survey of judges was equally unhelpful to opponents of Rule 32.1. A large majority of the judges in the nine circuits that permit at least some citation of unpublished opinions rejected the most important premises of the arguments against Rule 32.1. For example, by substantial margins, the judges on those circuits said that permitting the citation of unpublished opinions creates little additional work for judges[146] and that approval of Rule 32.1 would not result in judges having to spend more time preparing unpublished opinions.[147] The judges on the four circuits that bar the citation of unpublished opinions did agree with the major arguments of Rule 32.1's opponents, but their views were more mixed than might have been anticipated. For example, in the Seventh Circuit, a majority of judges—eight of thirteen—predicted that the time devoted to unpublished opinions would either stay the same or decrease if Rule 32.1 were approved.[148] Likewise, half of the judges in the Federal Circuit—seven of fourteen—predicted that the time devoted to unpublished opinions would not increase.[149] The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase.[150] Even in the Ninth Circuit, seventeen of forty-three judges predicted no impact or a decrease—almost as many as the twenty who predicted a "great" or "very great" increase.[151]

The most interesting part of the FJC's survey was the set of questions directed only to the judges of the First and D.C. Circuits. Both courts recently had liberalized their citation rules.[152] The FJC asked the judges of the First and

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144. *Id.*

145. *Id.* at 2.

146. *See* REAGAN ET AL., *supra* note 1, at 10, 38 tbl.J (finding that 85 out of 116 judges surveyed answered that a brief citing an unpublished opinion created either a "small" or a "very small" amount of additional work for them).

147. *Id.* at 8–9, 36 tbl.H.

148. *Id.* at 36 tbl.H.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.* at 11 (noting that the First Circuit changed from barring the citation of

D.C. Circuits what impact their rule changes had on the time they devote to preparing unpublished opinions and on their overall workload.[153] Opponents of Rule 32.1 have consistently claimed that if citing unpublished opinions becomes easier, judges will have to spend much more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges in the First and D.C. Circuits did not support those claims. All of the judges—save one—said that the time they devote to preparing unpublished opinions had "remained unchanged."[154] And all of the judges—save one—said that liberalizing their rule had caused "no appreciable change" in the difficulty of their work.[155]

The FJC's survey of attorneys gave no more comfort to opponents of Rule 32.1 than did the FJC's survey of judges. Attorneys said that they already research unpublished opinions—even in the circuits in which they cannot cite them—and that they frequently run across unpublished opinions that they would like to cite.[156] Directly contradicting the predictions of opponents of Rule 32.1, a substantial majority of attorneys predicted that approval of Rule 32.1 would reduce or have "no appreciable impact" on their workloads.[157] And in every circuit save one, the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact.[158] The ratio of attorneys predicting a positive effect to those predicting a negative effect was almost always at least two-to-one, often at least three-to-one, and, in a few circuits, over four-to-one.[159] Only in the Ninth Circuit—the epicenter of opposition to Rule 32.1—did opponents outnumber supporters, and that was by a margin of only 50% to 38%.[160]

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unpublished opinions to permitting it in limited circumstances while the D.C. Circuit changed from barring the citation of unpublished opinions to freely permitting it with respect to unpublished opinions issued on or after January 1, 2002); *see also* 1ST CIR. R. 32.3 (describing circumstances in which unpublished opinions may be cited); D.C. CIR. R. 28(c)(1)(B) (removing restrictions on citations to unpublished opinions).

153. REAGAN ET AL., *supra* note 1, at 12–13.

154. *Id.* at 12–13, 42 tbl.N.

155. *Id.* at 12–13, 43 tbl.O.

156. *Id.* at 15–16, 45–48 tbls.Q–T. Opponents of Rule 32.1 insist that there is nothing of value in unpublished opinions and that one benefit of a no-citation rule is that it saves attorneys the trouble of researching useless opinions.

157. *Id.* at 17, 49 tbl.U.

158. *Id.* at 50 tbl.V.

159. *Id.*

160. *Id.*

When the Advisory Committee met in April 2005 to review the results of the AO's and FJC's studies, the rout was on. All members of the Advisory Committee—both the supporters and the opponents of Rule 32.1—agreed that the studies failed to support the main arguments against Rule 32.1.[161] Some Advisory Committee members—including one of the two opponents of Rule 32.1—went further and contended that the studies in some respects actually refuted those arguments.[162] The bottom line was that, in the wake of the studies, not a single member of the Advisory Committee believed that the no-citation rules of the Second, Seventh, Ninth, and Federal Circuits should be left in place. Seven Advisory Committee members continued to support Rule 32.1.[163] But even the two Advisory Committee members who had opposed Rule 32.1 announced that, in light of the studies, they were prepared to support a national rule on citing unpublished opinions.[164] Those two members still did not support Rule 32.1; they preferred a rule that would permit the citation of unpublished opinions only in certain circumstances, such as when no published precedent would serve as well.[165] But they no longer opposed any national rulemaking on the issue of unpublished opinions. After amending Rule 32.1 to clarify that it applied only to the unpublished opinions of federal courts,[166] the Advisory Committee approved Rule 32.1 by vote of seven to two.[167]

The Standing Committee took up Rule 32.1 at its June 2005 meeting. Those members who had previously supported the rule continued to support it, and those members who had previously expressed misgivings about the rule were persuaded by the AO's and FJC's studies. The Standing

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161. Draft Minutes of Spring 2005 Meeting of Advisory Committee on Appellate Rules 12 (Apr. 18, 2005) [hereinafter Spring 2005 Draft Minutes]. As of this writing, the draft minutes of the April 2005 meeting have not been approved by the Advisory Committee.

162. *Id.*

163. *Id.* at 17.

164. *Id.* at 13–15.

165. *Id.*

166. At its June 2004 meeting, the Standing Committee had asked the Advisory Committee to give thought to concerns that had been expressed by some state court judges that Rule 32.1 would have an impact on the development of state law. June 2004 Minutes, *supra* note 135, at 9, 11. I think it fair to say that most members of the Advisory Committee did not regard these concerns as well founded, but, at the same time, thought that exempting the unpublished opinions of state courts from the scope of Rule 32.1 was a costless way of reassuring state judges. Spring 2005 Draft Minutes, *supra* note 161, at 17. (The change was deemed "costless" because most federal appellate courts do not now bar the citation of state unpublished opinions, and federal appellate courts are unlikely to do so in the future.)

167. Spring 2005 Draft Minutes, *supra* note 161, at 17.

Committee approved Rule 32.1 unanimously.[168] In September 2005, the Judicial Conference approved Rule 32.1 on a divided vote after amending the rule so that it will apply only to unpublished opinions issued on or after January 1, 2007. Rule 32.1 now moves to the Supreme Court and, if approved there, to Congress.

III. Explaining the Controversy

As Part II makes clear, the unpublished-opinions issue has been the subject of prolonged and, at times, even bitter controversy. The purpose of this Part is to attempt to explain why—in particular, to attempt to explain the disconnect between the relatively high level of controversy over this issue and what I regard as the issue's relatively low level of importance.

Some dispute that this disconnect even exists. One argument I have heard is that, notwithstanding what I have recounted above, the citation of unpublished opinions is not, in fact, a terribly controversial issue. A second argument I have heard is that, though there is a lot of controversy over the citation of unpublished opinions, that controversy is not disproportionate but merely reflects the fact that the issue is important. Both of these arguments are wrong.

As to the first argument, some judges and lawyers contend that the citation of unpublished opinions is not as controversial as it might seem. These people attribute the near-record number of public comments submitted regarding Rule 32.1 to the fact that one prominent judge—the Ninth Circuit's Judge Kozinski—decided to mount a campaign against the proposed rule. Judge Kozinski is one of the smartest, most aggressive, and best-connected judges in America, the argument goes, and he and some of his colleagues on the Ninth Circuit have tirelessly lobbied against Rule 32.1. They have, it is said, lobbied their colleagues on the Ninth and other circuits, the lower-court judges whose decisions they review, the lawyers who appear before them, the former clerks who worked for them, members of the Advisory and Standing

168. *Key Judicial Panel Approves Rule Change Allowing Citation of Unpublished Opinions*, 73 U.S.L.W. 2761, 2761 (June 21, 2005). The text of the rule approved by the Standing Committee is quoted above in note 8. The Committee Note approved by the Standing Committee differed significantly from the Committee Note that was published for comment in August 2003, PRELIMINARY DRAFT, *supra* note 8, at 32–39, and from the Committee Note that was approved by the Advisory Committee in April 2005, Alito Memorandum 2005, *supra* note 8, at 2–7. Both of those versions were several pages long and addressed at length the arguments for and against the rule. The version approved by the Standing Committee included just five brief paragraphs of explanation and not a word of argument.

Committees, and others to oppose Rule 32.1. It was this aggressive lobbying, and not widespread opposition to Rule 32.1, that supposedly produced so many comments against the proposed rule. Those who make this argument cite the fact that the vast majority of comments opposing Rule 32.1 came from judges and lawyers with Ninth Circuit ties,[169] as well as other evidence that Judge Kozinski helped to lead a campaign against the rule.[170]

This argument is meritless. To begin with, as Part II makes clear, the controversy over the citation of unpublished opinions did not begin with Rule 32.1. Recall that in 1990 the Judicial Conference (in response to a recommendation from the FCSC) refused even to study the issue of unpublished opinions[171] because opposition to rulemaking on the issue was so strong. Recall also that the survey of the chief judges undertaken in 1998 by Judge Garwood revealed such passionate opposition to rulemaking on the issue of unpublished opinions that the Advisory Committee dropped the topic from its study agenda.[172] Other examples exist, but the point is clear: Opposition to rulemaking on the issue of unpublished opinions was widespread and deeply felt long before there was a proposed Rule 32.1.

When Rule 32.1 was published for comment in 2003, many federal judges—including almost every judge on the Ninth Circuit,[173] as well as most of the judges on the Second,[174] Seventh,[175]

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169. *See* Alito Memorandum 2004, *supra* note 110, at 2 (noting that about 80% of the comments opposing Rule 32.1 came from those with Ninth Circuit connections).

170. Some of that evidence is mentioned in Barnett, *Dog That Did Not Bark*, *supra* note 11, at 1499.

171. SEPTEMBER 1990 REPORT, *supra* note 27, at 88.

172. Spring 1998 Minutes, *supra* note 43, at pt. V.C.

173. Thirty-eight of the active and senior judges of the Ninth Circuit individually submitted comments opposing Rule 32.1. Alito Memorandum 2005, *supra* note 8, at 94–96. One active judge of the Ninth Circuit—a former member of the Standing Committee—submitted a comment supporting Rule 32.1. A. Wallace Tashima, Public Comment 03-AP-288, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 6, 2004), *available at* http://www.secretjustic.org/pdf_files/Comments/03-AP-288.pdf.

174. Chief Judge John M. Walker, Jr. submitted a comment opposing Rule 32.1 on behalf of himself and eighteen active and senior judges on the Second Circuit. John M. Walker, Jr., Public Comment 03-AP-329, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 11, 2004) [hereinafter Walker Comment], *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-329.pdf.

175. Nine active judges of the Seventh Circuit jointly submitted a comment opposing Rule 32.1. John L. Coffey et al., Public Comment 03-AP-396, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 11, 2004) [hereinafter Coffey Comment], *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-396.pdf. Two active judges of the Seventh Circuit individually submitted comments supporting Rule 32.1. Frank H. Easterbrook, Public Comment 03-AP-367, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 13, 2004) [hereinafter Easterbrook Comment], *available at* http://www.secretjustice.org/pdf_files/

Eighth,[176] and Federal Circuits[177]—submitted comments opposing it. I have worked closely with federal judges for much of my professional life, and I can attest that they are among the world's least "lobby-able" people. I have no doubt that the reason why many judges opposed rulemaking on unpublished opinions in 2003 was the same reason why many opposed such rulemaking in 1998 and 1990—not because Judge Kozinski or anyone else twisted their arms, but because they sincerely believed that rulemaking on unpublished opinions was, as Chief Judge Edwards had put it, "a terrible idea."[178]

Much the same can be said for the lawyers who opposed Rule 32.1. It is true that most of those lawyers were affiliated with the Ninth Circuit,[179] and it is clear that there was an organized effort in the Ninth Circuit to encourage lawyers to submit comments opposing Rule 32.1.[180] But that hardly proves

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Comments/03-AP-367.pdf.; Kenneth F. Ripple, Public Comment 03-AP-335, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 12, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-335.pdf. Interestingly, Judge Easterbrook is a former member of the Standing Committee, and Judge Ripple is a former chair of the Advisory Committee on Appellate Rules.

176. Chief Judge James B. Loken submitted a comment reporting that seven of the nine active judges of the Eighth Circuit who expressed a view on Rule 32.1—as well as three of the four senior judges who expressed a view—opposed adoption of the rule. James B. Loken, Public Comment 03-AP-499, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 23, 2004) [hereinafter Loken Comment], *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-499.pdf.

177. Chief Judge Haldane Robert Mayer submitted a comment opposing Rule 32.1 on behalf of himself and all other active and senior judges of the Federal Circuit. Haldane Robert Mayer, Public Comment 03-AP-086, Proposed Federal Rule of Appellate Procedure 32.1 (Jan. 6, 2004) [hereinafter Mayer Comment], *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-086.pdf. Four Federal Circuit judges also wrote individually to express their opposition. Timothy B. Dyk, Public Comment 03-AP-397, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 12, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-397.pdf; Daniel M. Friedman, Public Comment 03-AP-506, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 27, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-506.pdf; Paul R. Michel, Public Comment 03-AP-505, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 26, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-505.pdf; S. Jay Plager, Public Comment 03-AP-297, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 2, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-297.pdf.

178. Edwards Letter, *supra* note 44, at 2.

179. *See* Alito Memorandum 2005, *supra* note 8, at 101–21 (listing attorneys). For example, sixty-two of the sixty-nine federal public defenders who submitted comments opposing Rule 32.1 worked in the Ninth Circuit. *Id.* at 101–05. Professor Barnett's research suggests that the views of those public defenders are not widely shared by public defenders who do not work in the Ninth Circuit. *See* Barnett, *Dog That Did Not Bark*, *supra* note 11, at 1513–34 (summarizing the results of thirty-six interviews with public defenders who work in the nine circuits which allow citation to unpublished opinions).

180. *Supra* note 117 and accompanying text.

that the Ninth Circuit lawyers who opposed Rule 32.1 did so only because a Ninth Circuit judge or someone else asked them to do so.[181] After all, the Ninth Circuit is the largest circuit; its workload is staggering, and it makes particularly heavy use of unpublished opinions. Moreover, most lawyers who practice in the Ninth Circuit also practice in the California state courts, which have been roiled for years by controversy over unpublished opinions.[182] It is not at all surprising that most of the comments about Rule 32.1—negative and positive—came from the Ninth Circuit.

And that points to another problem with attributing the controversy over Rule 32.1 to Judge Kozinski. It is not only those who agree with Judge Kozinski who are passionate about unpublished opinions. Supporters of citation feel just as strongly. Over the past few years, organizations such as the American Bar Association,[183] the American

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181. Fifty percent of Ninth Circuit attorneys responding to the FJC's survey predicted that Rule 32.1 would have a negative effect, while 38% predicted that it would have a positive effect. REAGAN ET AL., *supra* note 1, at 50 tbl.V. Only in the Ninth Circuit did the "opponents" of Rule 32.1 outnumber the "supporters"; in the other circuits, "supporters" outnumbered "opponents" by margins that sometimes exceeded four-to-one. *Id.* The views expressed by Ninth Circuit attorneys who responded to the FJC's survey cannot be dismissed as the result of an organized campaign, as those surveyed were selected by the FJC at random. The views of Ninth Circuit attorneys are unquestionably out of step with the views of other attorneys, but there is no reason to suggest that those views are insincere.

182. *See, e.g.*, Stephen R. Barnett, *Publishing All Opinions Will Improve Judicial System in State*, L.A. DAILY J., Mar. 10, 2004, at 6 (responding to William Rylaarsdam's article of March 3, 2004, which criticized moves to liberalize no-citation rules), *available at* http://nonpublication.com/barnett3-10.pdf; William Rylaarsdam, *Lawmakers Must Resist Movement to Cite Unpublished Opinions*, L.A. DAILY J., Mar. 3, 2004, at 6 (stating that recent attempts "to remove the distinction between published and unpublished opinions are ill-founded"), *available at* http://nonpublication.com/rylaarsdam.pdf; Ronald M. George, Public Comment 03-AP-471, Proposed Federal Rule of Appellate Procedure 32.1, at 1–5 (Feb. 13, 2004) (describing why the California Supreme Court has declined to permit citation to unpublished opinions), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-471.pdf; Gary E. Strankman, Public Comment 03-AP-296, Proposed Federal Rule of Appellate Procedure 32.1, app. at 2–7 (Feb. 5, 2004) (discussing a California proposal to allow citation of unpublished opinions and why an appellate task force rejected it), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-296.pdf.

183. *See* Hearing Transcript, *supra* note 111, at 85–95 (quoting Judah Best's testimony on behalf of the American Bar Association opposing no-citation rules); *see also Report of the Section of Litigation*, 126 No. 2 REP. A.B.A. 897, 897 (2001). The recommendation states:

> [T]he American Bar Association opposes the practice of various federal courts of appeal[s] in prohibiting citation to or reliance upon their unpublished opinions as contrary to the best interests of the public and the legal profession.
>
> . . . [T]he American Bar Association urges the federal courts of appeals uniformly to . . . [p]ermit citation to relevant unpublished opinions.

Id.

College of Trial Lawyers,[184] and the American Academy of Appellate Lawyers[185] have opposed no-citation rules. Likewise, many federal and state lawmakers have been persuaded to abolish or liberalize no-citation rules.[186] Presumably, Judge Kozinski was not behind these efforts. One commentator on Rule 32.1 said that, when he served as chair of the D.C. Circuit's Advisory Committee on Procedures, the circuit's rule barring citation was "perennially and uniformly condemned."[187] Presumably it was not Judge Kozinski doing this condemning. I know very little about what lobbying Judge Kozinski or his colleagues might have done, but I do know that the controversy over Rule 32.1 is real and cannot be dismissed as their creation.

The second argument that I have heard is in some respects the opposite of the first. Some agree that there is indeed a great deal of controversy over the issue of citing unpublished opinions, but contend that the level of controversy simply reflects the level of importance of the issue. Many of those opposing Rule 32.1 made dire predictions about the harm that the rule will inflict on judges, lawyers, and litigants if it is approved.[188] Assuming (as I do) that these commentators were sincere, asking them why there is so much controversy over Rule 32.1 would be like asking them why there is so much controversy over abortion or the death penalty. The reason for the controversy would seem self-evident to them.

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184. *See* Hearing Transcript, *supra* note 111, at 209–29 (quoting William T. Hangley's testimony on behalf of the American College of Trial Lawyers); *see also* William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 647 (2002) (arguing that there should be no restrictions on the citation of unpublished opinions).

185. *See* Letter from Kenneth C. Bass, III, President, American Academy of Appellate Lawyers, to Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules (Nov. 11, 2002) (attaching a position paper adopted by the Board of Directors opposing no-citation rules) (on file with the Washington and Lee Law Review).

186. *See* Barnett, *Under Siege*, *supra* note 11, at 474–85 (discussing recent changes in the federal circuits and state court systems); Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349, 349 (2004) ("The First Circuit, the District of Columbia Circuit, Alaska, Iowa, Kansas, North Carolina, Ohio, Texas, Utah, and West Virginia have all [recently] modified their rules in some way to allow citation of unpublished opinions either as persuasive authority or in some cases as precedent.").

187. Philip Allen Lacovara, Public Comment 03-AP-016, Proposed Federal Rule of Appellate Procedure 32.1, at 3 (Oct. 28, 2003), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-016.pdf.

188. *See* Alito Memorandum 2005, *supra* note 8, at 53–73 (describing arguments against the adoption of the proposed rule).

The problem with this view is that Rule 32.1 is not, in fact, an important rule. I recognize, of course, that this point is hotly contested by those who feel deeply about Rule 32.1, some of whom are my friends, and some of whom I consider to be among the best judges and lawyers in the nation. But, with respect, I think they are wrong.

Let me be clear about two things. First, in saying that Rule 32.1 is not an important rule, I am focusing on the one and only issue addressed by Rule 32.1: the *citation* of unpublished opinions. As described below,[189] I certainly agree that there are closely related issues—such as whether unpublished opinions should or must be treated as precedential—that are extremely important. Second, in assessing the importance of Rule 32.1, I am considering only its *practical* effect. What impact will it have on judges? Will it substantially affect their workload? What about attorneys? Will it make their jobs more or less difficult? And what about parties? Will it enable them to win cases that they would otherwise lose (or cause them to lose cases that they would otherwise win)?

The vast majority of those who submitted comments about Rule 32.1 had no actual experience with the citation of unpublished opinions because they came from one of the four circuits that prohibit it.[190] Their comments, not surprisingly, were grounded largely on speculation about the likely impact of Rule 32.1. But speculation is not necessary. Numerous federal and state jurisdictions have liberalized or abolished their no-citation rules over the past decade or two, and, as the work of the FJC and AO confirm, there is no evidence that it has made much difference, one way or another. Judges and lawyers in jurisdictions that allow the citation of unpublished opinions appear to function essentially the same as judges and lawyers in jurisdictions that bar the citation of unpublished opinions.

It is telling that, out of the 504 comments submitted on Rule 32.1, not one (to the best of my memory[191]) cited a problem experienced by a state or federal jurisdiction that has permitted the citation of unpublished opinions.[192] It is

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189. *Infra* Part III.A.

190. *See* Alito Memorandum 2005, *supra* note 8, at 93–127 (listing commentators).

191. I read every word of every one of the comments in the spring of 2004, but I have not re-read the comments in writing this Article. I am confident, though, that if a judge or attorney had described a problem experienced by a circuit that permitted the citation of unpublished opinions, I would remember it, and I would have mentioned it in my memorandum to the Advisory Committee. *See* Schiltz Memorandum, *supra* note 126 (summarizing the 484 comments submitted prior to the February 16, 2004 deadline).

192. To the contrary, Eighth Circuit Senior Judge Myron H. Bright, who testified against Rule 32.1 at the April 13, 2004 hearing, candidly admitted that, in his experience as a visiting judge in several of the federal circuits, he had not noticed any difference between the circuits

equally telling that no such problem was cited by any of the judges or attorneys who responded to the FJC's survey,[193] nor did any of the public defenders surveyed by Professor Stephen R. Barnett cite any such problem.[194] Predictions of doom came not from those who have experience with permitting the citation of unpublished opinions, but from the four circuits that continue to forbid it.[195]

At the same time, there seems to be little evidence in the FJC study or any other source that liberal citation rules produce much in the way of practical benefits. (And, again, in assessing the importance of Rule 32.1, I am focusing solely on the practical.) The judges on the nine circuits that permit the citation of unpublished opinions, while of the view that such citation does not cause them much work, were also of the view that such citation does not give them much help.[196] Only seven of 123 judges said that citations to unpublished

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with liberal citation policies and the circuits that ban citation:

> JUDGE ALITO: Let me ask you a question . . . that draws on your unique experience of having sat with so many different circuits. I don't think any of our other witnesses has had that experience. You've sat with circuits that prohibit the citation of unpublished opinions, circuits that have no prohibition, circuits that limit the citation to certain circumstances, I guess including your own circuit. I wondered if you have noticed any effect that these local rules have had on either the work of the lawyers or the work of the judges. . . .
>
> JUDGE BRIGHT: I have to say in all honesty there really doesn't seem to be any difference. I've sat on the Third Circuit [which does not prohibit the citation of unpublished opinions]. There may have been some unpublished opinions that have been cited. I can't remember them and I didn't pay any attention to them if I could. And the same goes in every one of the circuits—even the Eighth Circuit, the same. . . .

Hearing Transcript, *supra* note 111, at 19–21.

193. *See* REAGAN ET AL., *supra* note 1, at 3–10, 17–19 (reporting predicted problems, but not discussing any problems currently plaguing "permissive" circuits).

194. *See generally* Barnett, *Dog That Did Not Bark*, *supra* note 11, at 1496, 1505 (pointing out the lack of complaints from lawyers and judges who work in circuits which allow citation to unpublished opinions).

195. In their responses to the FJC survey, the judges in the four circuits that have no experience permitting the citation of unpublished opinions were consistently more pessimistic about Rule 32.1 than the judges in the nine circuits that have such experience. For example, the FJC asked the judges in the four circuits that ban citation and in the six circuits that permit citation in limited circumstances whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions—a key claim of those who oppose Rule 32.1. REAGAN ET AL., *supra* note 1, at 8. A majority of the judges in the six circuits that have some experience permitting citation said that judges would not, in fact, have to spend more time preparing unpublished opinions, and, among the minority of judges who disagreed, most predicted only a "very small," "small," or "moderate" increase. *Id.* at 8–9, 36 tbl.H. By contrast, a majority of the judges in the four circuits that do not have experience permitting citation predicted that the time devoted to preparing unpublished opinions would increase, and many predicted a "great" or "very great" increase. *Id.*

196. *Id.* at 10, 38 tbl.J.

opinions are "often" or "very often" helpful; a majority said that such citations were "never" or "seldom" helpful.[197] And only three of 122 judges said that the unpublished opinions that are cited are "often" or "very often" inconsistent with the circuit's published opinions; by contrast, an overwhelming majority (eighty-six judges) said that unpublished opinions "never" or "seldom" say something different from the published precedent.[198] In sum, almost all available evidence—both the dogs that are barking and the dogs that are not—seems to point to the same conclusion: The approval or rejection of Rule 32.1 will have little practical impact on judges, lawyers, or parties.

I want to stress that this is not an argument for or against Rule 32.1. I have been careful to note that citation rules do not seem to make a lot of difference, one way or another. Those who start from the premise that courts should generally be free to operate as they see fit could cite this as a reason to reject Rule 32.1 (because the rule would do little practical good). Those who start from the premise that courts should generally not be free to forbid litigants to cite the court's own official public actions could cite this as a reason to approve Rule 32.1 (because the rule would cause little practical harm). The point is simply that it is difficult to regard Rule 32.1 as important when it will almost surely have little real-world impact.

Thus, we are back to our disconnect. If I am right on both counts—both in my assertion that the issue is very controversial and in my assertion that the issue is not very important—then how do I explain this anomaly? Let me start with the supporters of Rule 32.1—those who feel passionately that the citation of unpublished opinions should be permitted.

A. Supporters of Rule 32.1

Over the years, the opposition to no-citation rules has been driven mostly, although not entirely, by practitioners, while the support for no-citation rules has been driven mostly, although not entirely, by judges.[199] Thus, I will focus

197. *Id.* at 10, 39 tbl.K.

198. *Id.* at 11, 40 tbl.L.

199. Interestingly, law professors have overwhelmingly opposed no-citation rules in their published scholarship, but the law professors who submitted comments on Rule 32.1 overwhelmingly supported such rules. *See* Alito Memorandum 2005, *supra* note 8, at 99–100 (listing professors). This may relate to the fact that the law professors who submitted comments on Rule 32.1 were mostly former Ninth Circuit clerks who have not previously demonstrated a scholarly interest in the issue of unpublished opinions. *See supra* note 115 (stating that seventeen of twenty-one law professors opposing the proposed rule were former Ninth Circuit clerks).

on the reasons why some practitioners so intensely dislike no-citation rules and why some judges so intensely support them. Understand, though, that neither practitioners nor judges are of one mind on this issue. Many practitioners submitted comments against Rule 32.1,[200] while many judges have either supported Rule 32.1[201] or already voted to abolish or liberalize no-citation rules.

The practitioners who agitate in favor of citing unpublished opinions seem to be motivated primarily by principle, whereas the judges who agitate against citing unpublished opinions seem to be motivated primarily by practical concerns. I do not want to overstate the point. Opponents of citation certainly cite principle, and proponents certainly cite practical concerns. For example, the Advisory Committee Note to Rule 32.1 claimed that "Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges."[202] Supporters of Rule 32.1 have pointed to examples such as *United States v. Rivera-Sanchez*,[203] in which the Ninth Circuit described how twenty inconsistent unpublished opinions on the same question of law had been issued by various panels before the Ninth Circuit finally settled the question in a published opinion.[204] In such cases, Rule 32.1's supporters say, a court has needlessly reinvented the wheel time and again—and treated similarly situated litigants differently—all because the court has stubbornly refused to permit litigants to inform the court of its own past decisions.

The argument that Rule 32.1 will provide some practical benefits has always struck me as less than compelling. As noted above, the judges in the nine circuits that allow the citation of unpublished opinions overwhelmingly say that it is not often helpful and that it does not often bring to their attention unpublished opinions that are inconsistent with published precedent.[205] Even the anecdotal evidence that allowing the citation of unpublished opinions will improve judicial decision-making is sparse. I have pressed attorneys to identify for me cases in which all of the following were true: (1) the attorney had an

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200. *See* Alito Memorandum 2005, *supra* note 8, at 101–21 (listing attorneys who submitted comments opposing Rule 32.1).

201. *See id.* at 123 (listing judges who submitted comments supporting Rule 32.1); *see also* Hearing Transcript, *supra* note 111, at 234–54 (quoting the testimony of Judge Edward R. Becker in favor of Rule 32.1). The three federal appellate judges now on the Advisory Committee—Judge Alito of the Third Circuit, Judge Carl E. Stewart of the Fifth Circuit, and Judge John G. Roberts, Jr., then of the D.C. Circuit—have all supported Rule 32.1. Spring 2004 Minutes, *supra* note 118, at 8.

202. PRELIMINARY DRAFT, *supra* note 8, at 38.

203. United States v. Rivera-Sanchez, 222 F.3d 1057 (9th Cir. 2000).

204. *Id.* at 1062–63.

205. *Supra* notes 197–98 and accompanying text.

unpublished opinion that he or she wanted to cite; (2) the citation of that unpublished opinion was barred; (3) the court likely did not learn of that unpublished opinion in any other way, such as through a party moving for permission to cite the unpublished opinion[206] or through the court's own research; and (4) had the court learned of that unpublished opinion, the court likely would have decided the case differently. Every lawyer to whom I have posed this question has been able to identify, at most, only a case or two in which being able to cite an unpublished opinion likely would have made a difference to the outcome. Lawyers are understandably angry about those cases, but that does not change the fact that those cases are rare. There is little evidence (even anecdotal) that barring the citation of unpublished opinions causes substantial practical harm—in particular, that it causes courts to rule differently than they would if unpublished opinions were cited.

Why, then, do lawyers and others so passionately oppose no-citation rules? I think it is because for them this is a matter of principle. The citation of unpublished opinions is not an important issue, when importance is measured by the presence or absence of practical impact. But the issue sits at the intersection of a surprising number of principles that are very important. Those principles include the following:

First, freedom of speech. Americans are generally free to say what they want, when they want, to whom they want. It is rare that the government tries to forbid its citizens from saying something. Lawyers who support Rule 32.1 have told me that no-citation rules feel like gag orders,[207] and no one likes being subject to a gag order.[208] Some have gone even further and argued that no-citation rules violate the First Amendment.[209]

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206. This, of course, is an easy way to circumvent a no-citation rule because, even if the motion is denied, a judge or a law clerk is likely to read the opinion that the motion asks permission to cite.

207. *See* Goering, *supra* note 11, at 89 ("[No-citation rules] effectively impose a gag order on the federal bar."); *see also* Hearing Transcript, *supra* note 111, at 224 (quoting the testimony of William T. Hangley on behalf of the American College of Trial Lawyers) (describing no-citation rules as "gagging lawyers and their clients").

208. Not only attorneys have made this point. Judge Richard S. Arnold described the effect of no-citation rules as follows: "Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged." Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221 (1999).

209. *E.g.*, Richard S. Arnold, *The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767, 778 (2003); Charles L. Babcock, *No-Citation Rules: An Unconstitutional Prior Restraint*, LITIG., Summer 2004, at 33; David Greenwald & Frederick A.O. Schwartz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1161–66 (2002); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 297–300 (2001); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 780–83 (2004); Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney*

Second, accountability. If Americans are generally free to say what they want, that is especially true when what they want to say relates to the official public actions of the government. If one were to ask the typical citizen, typical lawyer, or even typical judge, "Does the federal government have the power to forbid its citizens from talking *to* the federal government *about* the federal government?," the answer would almost surely be, "Of course not." And yet that is exactly what no-citation rules do. It is difficult to identify officials of the federal government—other than appellate judges—who are permitted to say to a citizen: "I forbid you, on pain of sanction that I will impose, to even mention to me a public action that I took in my official capacity."[210] In judging, as in other walks of life, "the absence of accountability and responsibility . . . breeds sloth and indifference."[211]

Third, transparency. For centuries, the Anglo-American justice system has done its work in the full light of day—a tradition with roots in revulsion at the secret proceedings of the Star Chamber. Federal judges exercise tremendous power and, alone among federal officials, enjoy life tenure. It is hardly surprising, then, that Americans feel strongly that such officials should be required to exercise such power in the open. No-citation rules smack of secrecy and give rise to suspicion—unwarranted, I believe, but also not surprising—that judges are trying to get away with something, such as burying "nuisance" cases that raise difficult issues that judges prefer to duck.[212]

Fourth, equal justice. A bedrock principle of our judicial system—and an essential component of the rule of law—is that like cases should be treated alike. It is unjust when Litigant *A* wins a case because Issue *X* is decided one way, and then Litigant *B* loses a case because Issue *X* is decided the opposite way. One can understand such inconsistency when it is the result of

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Speech, 103 COLUM. L. REV. 1202, 1227–30 (2003).

210. For this reason, it is surprising that no-citation rules—"gag orders," in the eyes of some attorneys and judges—are supported by the ACLU Foundation of Southern California. *See* Peter Eliasberg, Public Comment 03-AP-235, Proposed Federal Rule of Appellate Procedure 32.1 (Jan. 28, 2004) (opposing the adoption of the proposed FRAP 32.1), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-235.pdf.

211. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996) [hereinafter Richman & Reynolds, *The New Certiorari*].

212. As Judge Easterbrook put it:

> Lawyers can cite everything from decisions of the Supreme Court to . . . op-ed pieces in local newspapers; why should the 'unpublished' judicial orders be the only matter off limits to citation and argument? It implies that judges have something to hide. In some corners there is a perception that they do—that unpublished orders are used to sweep under the rug departures from precedent.

Easterbrook Comment, *supra* note 175, at 1–2.

inadvertence or mistake; judges are human, after all. One can also understand such inconsistency when it is a product of different courts reaching different conclusions about Issue *X*; disagreements between courts are unavoidable in our system. And one can even understand such inconsistency when it is caused by a court changing its mind—at least when the court is open about the fact and takes the time to explain its reasoning. But when the same court, without explanation or even acknowledgment, treats Litigant *B* differently from Litigant *A*, and when Litigant *B* has been forbidden even to tell the court about Litigant *A*'s case, then Litigant *B* may well question the court's commitment to equal justice. Making matters worse, the court does itself no favor when the reason it gives for prohibiting Litigant *B* from telling it about Litigant *A*'s case is that it does not want to feel "a moral duty" to explain to Litigant *B* why it is treating him or her different from Litigant *A*.[213]

The principle of equal justice appears to be offended in another way. Federal appellate judges are issuing two classes of opinions—a "first class" of opinions that are carefully crafted, that are published, that can be cited, and that are treated as binding, and a "second class" of opinions that are not as carefully crafted, that are not published, that cannot be cited, and that are not treated as binding. No one likes to receive second-class justice. And when first-class opinions seem disproportionately to be issued in cases involving wealthy litigants who are represented by prominent attorneys,[214] anger over the disparity will only grow.

Fifth, professional autonomy. Lawyers chafe at being told what they may and may not argue on behalf of a client. In part this is because lawyers tend to

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213. *See* Coffey Comment, *supra* note 175, at 1 ("[If unpublished opinions can be cited,] [w]e will have a moral duty to explain, distinguish, reaffirm, overrule, etc. any unpublished order brought to our attention by counsel.").

214. This argument has been made passionately by William M. Richman and William L. Reynolds. *See* Richman & Reynolds, *The New Certiorari*, *supra* note 211, at 275 ("[The federal courts of appeals have] created different tracks of justice for different cases and different litigants: important cases (usually measured by monetary value) and powerful litigants receive greater judicial attention than less important cases and weaker litigants."); *id.* at 277 ("Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant's ability to mobilize substantial private legal assistance. . . . [T]hose without power receive less (and different) justice."). Richmond and Reynolds further state:

> A court is far less likely to hear oral argument or issue a published opinion in a social security or civil rights case, a prisoner petition, or the like than it is to hear argument or publish an opinion in an 'important' securities or antitrust case. . . . The cumulative effect of truncated procedures has a devastating impact on the rights of those most in need of judicial protection, those litigants whose claims raise no systematic law-making concerns, but only the claim that they have been denied justice at the trial court.

Id. at 295.

be independent, strong-willed people. But this is also because the bond between lawyer and client is strong, and frequently lawyer and client feel that they stand alone, not only against the client's adversary, but against the judicial system and the rest of the world. For good reason, attorneys are generally free to represent clients according to their best professional judgment. A court's interference with that professional judgment will create resentment, especially when that interference is not justified by compelling reasons.

Finally, the rule of law. Ours is supposed to be a nation of laws, not men (or women). The judicial system will be accepted as legitimate only if contemporary judicial decisions build incrementally and logically on the judicial decisions of the past—only if the judges of today are in conversation with the judges of yesterday. The notion that judges can pick and choose, *ex ante*, which of their opinions will count as "law"—not just in the sense of being "binding," but even in the sense of being "considered at least relevant"[215] when the court confronts the same issue in the future—is viewed by many as antithetical to the rule of law.

Please understand that I am not arguing here that no-citation rules do (or do not) violate any of these principles. My task is to explain why people feel so deeply about rules that seem to have so little practical consequence. The answer is that most opponents of no-citation rules simply do not care about the lack of practical consequences. Most opponents strongly believe in one or more of these principles and strongly oppose no-citation rules because those rules seem inconsistent with those principles.

Of course, none of these principles is absolute. All of them are commonly compromised, in one sense or another. Even limitations on the size of briefs or length of oral arguments could be seen as restricting the right to speak or to represent one's client as one sees fit, and yet no one seems to get upset about such limitations. The difference is that lawyers accept that courts could not function without limiting the size of written submissions or the length of oral arguments. After all, just about every court in the United States—federal and state—has found it necessary to impose such limitations. But lawyers do not accept that no-citation rules are similarly justified. After all, many courts—federal and state—do fine without them.

One of the comments that I have heard most frequently from lawyers who support Rule 32.1 is that it is almost impossible for a lawyer to explain to a client why the lawyer cannot tell the court that the court has previously decided a case identical to the client's. Clients just "don't get it," lawyers say. I do not doubt that these lawyers are correct, and I suspect that the reason that their

215. Price, *supra* note 69, at 108.

clients "don't get it" is because no-citation rules are inconsistent with our civic DNA—with principles that we Americans have internalized, such as the principle that the government cannot, without compelling reason, forbid a citizen from speaking to a government official about the actions of that government official. At bottom, then, most of the emotion of the pro-citation forces is driven by principle. They see no-citation rules as inconsistent with important civic values and, although they may recognize the practical consequences as being small, they see the justifications as being even smaller.

I believe that there are a couple of additional sources of anger toward no-citation rules. One is the frustration of attorneys—especially those who regularly practice in more than one circuit—with the proliferation of local rules. The local rules of the courts of appeals are numerous, lengthy, vague, conflicting, nitpicky, and often difficult to find, much less follow.[216] Every time an attorney seeks to file a brief in a circuit, that attorney must study dozens of pages of local rules, practitioner guides, internal operating procedures, standing orders, and the like—some of which are online and some of which are not.[217] Thousands of hours of attorney time—and millions of dollars in client funds—are wasted every year as lawyers try to navigate local rules in order to practice in what is supposed to be a uniform national system. This problem obviously extends far beyond rules regarding the citation of unpublished opinions, but those rules are part of the problem. The Advisory Committee Note to Rule 32.1 cited as one advantage of the rule that "[a]ttorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an 'unpublished' opinion."[218]

This concern about the hardship imposed by conflicting local rules is often dismissed by judges and was belittled by some opponents of Rule 32.1.[219] But

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216. *See* Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules In the Federal Circuits*, 68 U. COLO. L. REV. 1, 2–3 (1997) (describing the federal judiciary's procedural incoherence).

217. *See* MARIE LEARY, FED. JUDICIAL CTR., ANALYSIS OF BRIEFING REQUIREMENTS IN THE UNITED STATES COURTS OF APPEALS 1–2 (2004) (summarizing local rules of federal appellate briefs and complaints about those local rules), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/BriefReq.pdf/$file/BriefReq.pdf.

218. PRELIMINARY DRAFT, *supra* note 8, at 38. The Advisory Committee Note cited *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001), where a panel (that included Judge Kozinski) ordered an attorney to show cause why he should not be disciplined for violating the Ninth Circuit's no-citation rule, and ABA Committee on Ethics and Professional Responsibility, Formal Opinion 94-386R (1995), where the ABA opined that "[i]t is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions]."

219. *See, e.g.*, John J. Cleary, Public Comment 03-AP-242, Proposed Federal Rule of

I fear judges underestimate the level of frustration with local rules. In the eight years that I have served as a reporter to an advisory committee, no concern has been raised more often or more angrily—not just in the Advisory Committee on FRAP, but in the Standing Committee and the other advisory committees. My own committee, for example, has heard from many practitioners who have reached the limits of their patience with having briefs "bounced" by circuit clerks for failure to comply with one nitpicky[220] local rule or another. The newest member of the Standing Committee, in his "maiden comments" at a Standing Committee meeting, said that a lawyer in his firm who manages to submit a brief without having the clerk demand corrections is figuratively carried around the office on the shoulders of his or her colleagues. This member—a highly respected appellate lawyer working at one of the nation's most prestigious law firms—was visibly angry when describing the impact that the proliferation of local rules has on his firm's practice.[221]

Judges ignore this problem at their peril. One of these days, a powerful attorney (such as the Attorney General) is going to get a brief bounced because he or she overlooked a nitpicky local rule, that attorney is going to call a friend who is a senator or congressman, and Congress is going to fix the local-rules problem for judges. Lest I be accused of exaggerating, let me note that, in 1998, a member of the Standing Committee strongly denounced the

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Appellate Procedure 32.1, at 1–2 (Feb. 1, 2004) (opposing Rule 32.1), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-242.pdf; Procter Hug, Jr., Public Comment 03-AP-063, Proposed Federal Rule of Appellate Procedure 32.1, at 3 (Dec. 16, 2003) (same), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-063.pdf; Alex Kozinski, Public Comment 03-AP-169, Proposed Federal Rule of Appellate Procedure 32.1, at 17–20 (Jan. 16, 2004) [hereinafter Kozinski Comment] (same), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-169.pdf; Daniel P. Tokaji, Public Comment 03-AP-045, Proposed Federal Rule of Appellate Procedure 32.1 (Dec. 2, 2003) (same), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-045.pdf.

220. My favorite example of the "nitpickiness" of local rules is Second Circuit Local Rule 32(c), which requires that the docket number of a case appear on the cover of the brief and appendix in type that is at least one inch high. Why Second Circuit judges—apparently alone among federal and state judges—need inch-high numbers on the covers of their briefs and appendices is a mystery.

221. These comments—and those of other Standing Committee members—are referred to in the minutes of the meeting:

> One member complained that local rule requirements for briefs appear to be proliferating, change frequently, are generally confusing, and can be a snare for attorneys. Other participants added that many of the variations are not justified, and some urged the rules committees to be more active in promoting national uniformity.

Minutes of the January 2005 Meeting of Committee on Rules of Practice and Procedure 8, *available at* http://www.uscourts.gov/rules/Minutes/Rul05-01not.pdf.

proliferation of local rules and moved that the advisory committees be instructed to prepare amendments to the rules of practice and procedure that would limit local rules to twenty per court (with each discrete subpart counting as a separate rule).[222] This measure—which many judges would view as draconian—failed by only a single vote.[223] Someday a similarly draconian proposal will be approved. The level of frustration with local rules is very high and likely played some role in the controversy over Rule 32.1.

I suspect that one final reason why some lawyers so adamantly supported Rule 32.1 is because they perceived it as an attack on the entire institution of unpublished opinions. I personally do not view Rule 32.1 as such an attack. Indeed, the Advisory Committee Note to Rule 32.1 went out of its way to be clear that the rule did not forbid any court to issue an unpublished opinion, dictate the circumstances under which a court may choose to designate an opinion as unpublished, or imply anything about what effect a court must give to one of its unpublished opinions.[224] Nevertheless, I do not doubt that some of those who supported Rule 32.1 did so because they saw it as the first step on a path that will eventually lead to a requirement that all dispositions be accompanied by precedential opinions.

Some of the more general opposition to the institution of unpublished opinions is undoubtedly motivated by legal or policy concerns—such as Judge Richard S. Arnold's view that federal judges may not, consistently with Article III, declare that they will treat only some of their prior decisions as precedential.[225] But much of the opposition seems more personal. In my conversations with practitioners, I have sensed relatively little anger about times

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222. Minutes of the January 1998 Meeting of Committee on Rules of Practice and Procedure, http://www.uscourts.gov/rules/Minutes/st1-98.htm.

223. *Id.*

224. The Advisory Committee Note said:

> Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court—whether or not those dispositions have been published in some way or are precedential in some sense.

PRELIMINARY DRAFT, *supra* note 8, at 33–34 (citations omitted).

225. Anastasoff v. United States, 223 F.3d 898, 899–905 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

that they were not able to cite an unpublished opinion (although such anger clearly exists), but a lot of anger about times that they received an unpublished opinion. Fairly or not, lawyers sometimes view unpublished opinions as a slap in the face. It is one thing to lose a case, they say, but another to be told by the court that the issues they raised did not even merit a published opinion.[226] It seems that just about every experienced appellate lawyer is able to describe with fresh anger an occasion on which he or she received an unpublished opinion in a case that he or she viewed as important and difficult.

The resentment toward unpublished opinions goes beyond what they imply about the merits of the losing attorney's case. Unpublished opinions are most often issued in cases in which oral argument was not permitted. Thus, an attorney can file a notice of appeal, brief that appeal, and lose that appeal, without ever coming face-to-face with a judicial officer. The importance of procedural values—and especially the importance of feeling that one was heard—is something that law students are taught beginning with the first day of Civil Procedure. I sometimes tell my Civil Procedure students about a case that I lost years ago in the Eighth Circuit.[227] The Eighth Circuit reversed parts of two injunctions in my clients' favor on the grounds that they violated the Anti-Injunction Act.[228] The chief argument in my brief and in my oral argument—an argument based on an Eighth Circuit precedent directly on point (and published!)—was that the Anti-Injunction Act did not apply to the injunctions at issue. In its opinion, the Eighth Circuit did not even mention my argument; it acted as though my clients and I did not exist. Later, in denying my petition for rehearing, the panel snippily claimed that the reason it had ignored my argument is that I had not preserved it by presenting it to the district court. The court was dead wrong; I had made the argument before the district court, which is why my very capable adversaries had not so much as hinted that I had failed to preserve it, and which is (presumably) why none of the Eighth Circuit judges breathed a word about this concern at oral argument. The important point is that I lost an appeal based on a false assumption that I had no chance to address—not in my brief, not at oral argument, not in a supplemental brief, and not in a rehearing petition. It felt like a judicial mugging. I still get angry

226. *See* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 711 (2001) ("A party whose appeal is decided without oral argument, and whose arguments are summarily dismissed in a brief, unpublished opinion, is unlikely to be satisfied—not only because she did not prevail, but also because of the appearance that the court did not treat her appeal seriously.").

227. For the curious, the case was *National Basketball Association v. Minnesota Professional Basketball Ltd. Partnership*, 56 F.3d 866 (8th Cir. 1995).

228. 28 U.S.C. § 2283 (2000).

thinking about that case, not because I lost—I lost plenty of cases—but because I was not given the chance to be heard.

Judges insist that they are as careful to make certain that the result is correct in appeals that terminate in unpublished opinions as they are in appeals that terminate in published opinions. Many practitioners simply do not believe them. But whether or not this is true, the appearance of justice is as important as the fact of justice. Practitioners who receive unpublished opinions often feel that they were not heard. That feeling makes them resent the very institution of the unpublished opinion, and that resentment, in turn, makes them support anything that might be seen as a slap at that institution—such as Rule 32.1.

B. Opponents of Rule 32.1

As noted above, much of the strongest opposition to Rule 32.1 has come from judges.[229] Like practitioners, judges are not of one mind. Some of the best arguments in favor of Rule 32.1 that I have heard have been made by judges at meetings of the Advisory Committee or Standing Committee, and all of the appellate judges on the Advisory Committee (including Judges Alito and Roberts) have supported Rule 32.1. But just as it is mainly practitioners who drive the support for Rule 32.1, it is mainly judges who drive the opposition. Why, then, do judges feel so strongly about a rule that, according to all available evidence, is highly unlikely to have much impact on them?

One reason, I suppose, is that judges are unaware of the evidence, or they do not think the evidence is strong, or they believe that evidence about what has occurred in other jurisdictions is a poor predictor of what will occur in their circuit. It is important to bear in mind that, in the view of some judges, the margin for error here is small. The caseloads of federal appellate judges have risen dramatically in recent decades. In 1960, when there were sixty-eight authorized judgeships, 3899 appeals were filed in the federal courts of appeals—about fifty-seven per judge.[230] In 2004, when there were 167 authorized judgeships, 62,762 appeals were filed—about 376 per judge.[231]

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229. *See* Spring 1998 Minutes, *supra* note 43, at pt. V.C (noting the chief judges' strong opposition to Rule 32.1).

230. ADMIN. OFFICE OF U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.1.3 (2005), *available at* http://www.uscourts.gov/judicialfactsfigures/table1.03.pdf.

231. *Id.* The tremendous growth in the caseloads of the federal courts generally—and the federal appellate courts specifically—has been examined in numerous sources. *E.g.*, THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 31–51 (1994); FED. COURTS STUDY COMM., *supra* note 22, at 4–10, 109–10; RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 53–86 (1996).

Of course, a dramatic increase in caseloads does not necessarily translate into an equivalent increase in workloads.[232] The workload of a judge depends not just on the number of appeals filed per judge, but on such factors as the percentage of appeals that are abandoned after the notice of appeal is filed but before the case is briefed (either because the case is settled or because the appellant concludes that he or she is not likely to prevail);[233] the difficulty of the appeals that are decided on the merits;[234] the quantity and quality of the support personnel—such as law clerks and staff attorneys—who are available to the judges;[235] the percentage of appeals that involve oral argument;[236] the length of typical

232. *See* POSNER, *supra* note 231, at 64, 67–79 (explaining how procedural terminations, per curiam opinions, and unpublished opinions lighten appellate courts' workloads).

233. The AO refers to these as "procedural" terminations, and they are more common than one might think. In fiscal year 2004, a total of 56,381 appeals were terminated. ADMIN. OFFICE OF U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS: COURTS OF APPEALS, *at* http://www.uscourts.gov/fcmstat/index.html [hereinafter MANAGEMENT STATISTICS]. Of those, over half were either "procedural" terminations (26,835) or terminations through "consolidations and cross appeals" (2108)—two categories of terminations that require little or no involvement of judges. *Id.* The remainder (27,438) were terminations "on the merits." *Id.*

234. Some types of appeals are more difficult than others. Judge Richard A. Posner concluded, after a close examination of the subject matter of the opinions issued by the courts of appeals since 1960, that "the average case decided by the courts of appeals is . . . easier today than in the past." POSNER, *supra* note 231, at 77; *see also* Edith H. Jones, *A Snapshot of a Fifth Circuit Judge's Work: Boutique Justice*, 33 TEX. TECH L. REV. 529, 538 (2002) ("What has increased phenomenally during my [seventeen-year] tenure is the volume of the summary calendar or low workload cases.").

235. The number of support staff has risen substantially. *See* Cooper & Berman, *supra* note 226, at 697–99 (describing "[t]he increased number and influence of law clerks" and "[t]he growth of the central circuit office"); Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1098–99 (2004) (noting that most federal appellate judges were assisted by one secretary, two law clerks, and a few staff attorneys in the mid-1970s, and that most are assisted by one secretary, four law clerks, and a large number of staff attorneys today) [hereinafter Kozinski, *Judicial Ethics*]; Richman & Reynolds, *The New Certiorari*, *supra* note 211, at 287–93 (describing the growth in the number and responsibilities of law clerks, staff attorneys, and externs).

236. This percentage has declined substantially in recent years:

Year	Total Appeals Terminated on Merits	After Oral Argument	Percentage
2004	27,438	8,645	31.5%
1999	26,727	9,924	37.1%
1994	27,219	11,047	40.6%
1989	19,322	9,729	50.4%
1984	14,327	9,061	63.2%

See E-mail from James N. Ishida, Attorney Advisor, Office of Judges Programs, Administrative Office of the U.S. Courts, to Patrick J. Schiltz, Reporter, Advisory Committee on Appellate Rules (Apr. 18, 2005, 3:29 PM) (providing data for 2004, 1999, and 1994 for the twelve month

oral arguments;[237] and the percentage of appeals that are disposed of without opinion.[238] But, taking all of this into account, even those who are generally skeptical of claims that the judiciary is overworked would likely concede that the workload of judges has risen dramatically[239] and that, in the busiest circuits, judges are working at or near the limits of their capacity.[240]

It is thus easy to understand why judges would strongly oppose Rule 32.1 if they sincerely believed that it would increase their workloads, or even if they believed that it would create a *risk* of increasing their workloads. With the margin for error so small, a judge might reason, why should we run

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period ending September 30) (on file with the Washington and Lee Law Review); E-mail from Catherine Whitaker, Admin. Office of the U.S. Courts, to Patrick J. Schiltz, Reporter, Advisory Committee on Appellate Rules (May 17, 2005, 7:50 AM) (providing data for 1989 and 1984 for the twelve month period ending June 30) (on file with the Washington and Lee Law Review).

237. This has declined over the years. *See* Richman & Reynolds, *The New Certiorari*, *supra* note 211, at 279–80 (observing a decrease in length of oral arguments).

238. Contrary to the perception of some judges and lawyers, this percentage has actually decreased significantly over the past thirty years:

Year	Total Appeals Terminated on Merits	Summary Dispositions	Percentage
2004	27,438	775	2.8%
1994	27,219	3,073	11.3%
1984	14,327	1,624	11.3%
1974	8,451	2,052	24.3%

See Rabiej Memorandum, *supra* note 141, at 22–23.

Of course, during this period of time, several circuits abolished or liberalized their no-citation rules. *See id.* at 1 (noting that of the nine circuits that permit citation to unpublished opinions, most adopted the permissive citation policy in the 1990s). The fact that summary dispositions have declined while no-citation rules have been liberalized seems inconsistent with the claim of Rule 32.1's opponents that, if the rule was approved, judges would issue many more summary dispositions. *See, e.g.*, Kozinski Comment, *supra* note 219, at 10–11 ("Or [Ninth Circuit judges might] reduce our unpublished dispositions to one-word judgment orders, as have [judges of] other circuits.").

239. As explained below, the best readily available measure of the workload of a federal appellate judge is probably terminations on the merits per active judge. *See infra* note 241 and accompanying text (defining the calculation for this measure). The number of terminations on the merits per active judge rose from eighty-seven in 1974 to a high of 498 in 2001, falling back to 432 in 2004. *See* MANAGEMENT STATISTICS, *supra* note 233 (providing data for 2001 and 2004); ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES COURTS OF APPEALS NATIONAL STATISTICAL PROFILE (1974) (providing data for 1974) (on file with the Washington and Lee Law Review).

240. In fiscal year 2003, for example, the average Fifth Circuit judge was involved in 862 merits terminations and wrote 276 opinions for a panel or the en banc court, thirty-three of which were signed (and thus likely required considerable attention from the judge himself or herself). MANAGEMENT STATISTICS, *supra* note 233.

even a modest risk of increasing judges' workloads, especially when Rule 32.1 is unlikely to produce much in the way of practical benefits?

That said, the strong feelings that some judges have regarding Rule 32.1 cannot be explained entirely by workload concerns. There is simply no correlation between the workload of a judge and the judge's position on Rule 32.1. The best measure of the workload of a federal appellate judge is probably terminations on the merits per active judge[241]—roughly speaking, the number of times each year that a judge must "sign[] off on" a decision that disposes of a case on the merits.[242] For the year ending September 30, 2004, the three busiest circuits were the Fifth (with 727 terminations on the merits per active judge), Eleventh (711), and Fourth (522).[243] From the judges on those three circuits—the three circuits that are perennially the busiest[244]—we received a grand total of two comments opposing Rule 32.1: one from an active judge on the Fourth Circuit[245] and one from a senior judge on the Fifth Circuit.[246] By contrast, we received strong opposition from the

241. "Terminations on the merits per active judge" is a statistic calculated every year by the AO and posted on its website as part of the Federal Court Management Statistics. *Id.* In calculating the number of terminations on the merits per active judge, the AO considers only appeals that were disposed of by the court on the merits after submission on the briefs or oral hearing—as opposed to either "procedural" terminations or terminations through "consolidations and cross appeals." E-mail from James N. Ishida, Attorney Advisor, Office of Judges Programs, Administrative Office of U.S. Courts, to Patrick J. Schiltz, Reporter, Advisory Committee on Appellate Rules (Apr. 15, 2005, 1:25 PM) (on file with the Washington and Lee Law Review). The AO also considers only judges who were active for all twelve months of the fiscal year. *Id.* The AO first calculates the total number of "participations" by active judges. *Id.* For example, an appeal disposed of by a panel consisting of three active judges would count as three "participations"; an appeal disposed of by a panel consisting of one visiting judge, one senior judge, and one active judge would count as one "participation" (unless the visiting judge was an active circuit judge, in which case it would count as two "participations"); and an appeal disposed of by an en banc court consisting of eleven active judges and one senior judge would count as eleven "participations." *Id.* The AO then divides the total number of participations by the total number of active judges to arrive at "terminations on the merits per active judge." *Id.*

242. Kozinski, *Judicial Ethics*, *supra* note 235, at 1097.

243. MANAGEMENT STATISTICS, *supra* note 233.

244. The AO's website reports circuit-by-circuit data on terminations on the merits per active judge going back to 1992. *See* MANAGEMENT STATISTICS, *supra* note 233 (reporting statistics from 1992 through 2004). Year in and year out, the judges of the Fourth, Fifth, and Eleventh Circuits have had the heaviest workloads.

245. M. Blane Michael, Public Comment 03-AP-401, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 9, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-401.pdf.

246. Thomas M. Reavley, Public Comment 03-AP-170, Proposed Federal Rule of Appellate Procedure 32.1 (Jan. 21, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-170.pdf.

judges on the Second (260),[247] Seventh (349),[248] and Eighth (399)[249] Circuits—all of which have workloads below the national average (432) and, in the case of the Second Circuit, a workload that is about a third of the busiest circuit's. We also received strong opposition from the judges of the Federal Circuit,[250] but that circuit, alone among the circuits, does not disclose the data needed by the AO to calculate terminations on the merits per active judge. From other data that are available, though, I estimate that the workload of Federal Circuit judges is well below the national average.[251]

In short, most of the opposition to Rule 32.1 was heard from judges with below-average workloads (the Ninth Circuit (490) was the exception[252]), while almost no opposition to Rule 32.1 was heard from judges with above-average workloads. When almost no objection to Rule 32.1 has been heard from the judges with the heaviest workloads, and when all available evidence suggests that liberalizing citation rules does not cause more work for judges,[253] something other than concern about workloads must be animating judges.[254]

I have described three reasons why practitioners so adamantly oppose no-citation rules: practitioners believe that they are inconsistent with important civic values,[255] practitioners are frustrated with the proliferation of local

247. Walker Comment, *supra* note 174.

248. Coffey Comment, *supra* note 175.

249. Loken Comment, *supra* note 176.

250. Mayer Comment, *supra* note 177.

251. The Federal Circuit—a court of twelve active judges—reported that, during the twelve-month period ending September 30, 2004, a total of 1138 appeals were terminated "by judges." LEONIDAS RALPH MECHAM, 2004 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 117 tbl.B-8 (2004), *available at* http://www.uscourts.gov/judbus2004/appendices/b8.pdf. The Tenth Circuit—also a court of twelve active judges—reported that, during the same twelve-month period, a total of 1349 appeals were terminated "on the merits." MANAGEMENT STATISTICS, *supra* note 233. The AO calculated terminations on the merits per active judge for the Tenth Circuit as 254, the second lowest in the nation (behind the D.C. Circuit). *Id.* It is likely that, if the Federal Circuit had supplied the AO with the data it needed to calculate terminations on the merits per active judge, the Federal Circuit's number for 2004 would have been roughly similar to the Tenth Circuit's.

252. *See* Alito Memorandum 2005, *supra* note 8, at 94–96 (listing Ninth Circuit judges).

253. REAGAN ET AL., *supra* note 1, at 12–13, 42–43 tbls.N–O.

254. One additional fact causes me to doubt that the passionate opposition of judges is fueled entirely by workload concerns: The workload of federal appellate judges has remained quite steady over the past decade. *See* Jones, *supra* note 234, at 529 ("[I]t is not realistic still to be crying 'wolf' over the level of appellate work; the wolf seems to have retreated for the moment."). In 1994, the typical judge helped dispose of 459 cases on the merits; in 2004, the number was 432. MANAGEMENT STATISTICS, *supra* note 233. In 1994, the typical judge wrote 158 opinions, of which 54 were signed, and in 2004, the typical judge wrote 144 opinions, of which 47 were signed. *Id.*

255. *Supra* Part III.A.

rules,[256] and practitioners want to undermine the institution of unpublished opinions.[257] Much of the explanation for why judges so adamantly support no-citation rules is likely the "flip side" of these three reasons.

First, as described above, a lot of the fervor against no-citation rules can be explained by the fact that such rules are seen as offending important civic values, such as freedom of speech and judicial accountability.[258] Arguments based on such values may seem noble to those making them, but they can appear overblown and even insulting to those on the receiving end. Judges are likely to react one way when told, for example, that no-citation rules prevent parties from citing unpublished opinions in certain situations in which such citation might serve a purpose. Judges are likely to react differently when they are accused of violating the right to free speech or using no-citation rules to bury improper decisions. Such arguments, when made stridently, are going to provoke strident responses, and those, in turn, will provoke strident replies—and up and up the decibel level will go.

No judge ever likes to be accused of acting contrary to fundamental American values or of failing to do his or her job, but now is a particularly sensitive time to be criticizing federal judges. A number of factors have combined to depress the morale of federal judges: inadequate funding of the federal judiciary,[259] salaries that are a fraction of what top lawyers earn,[260] a sentencing system viewed by some judges as "cruel and rigid"[261] (flaws made

256. *Supra* Part III.A.

257. *Supra* Part III.A.

258. *Supra* Part III.A.

259. *See* CHIEF JUSTICE WILLIAM H. REHNQUIST, SUPREME COURT OF THE UNITED STATES, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1, 2 (2005) (addressing "the funding crisis currently affecting the federal Judiciary" and reporting that "[t]he continuing uncertainties and delays in the funding process, along with rising fixed costs that outpace any increased funding from Congress, have required many courts to impose hiring freezes, furloughs, and reductions in force"), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf; Mark Hamblett, *Lawyers Fight Back over Cuts in U.S. Courts*, NAT'L L.J., Nov. 15, 2004, at 4 (quoting John M. Walker, Jr., Chief Judge of the Second Circuit, as saying: "I've been a judge now for 19 years, and the budget situation has never been as bad as it is now.").

260. In 2003, the average compensation for a partner at one of America's 100 highest-grossing law firms was $825,500. Alison Frankel, *The Am Law 100 2004*, AM. LAW., July 2004, at 92, 92–93. In the 2003 fiscal year, a federal appellate judge was paid $164,000. AM. BAR ASS'N & FED. BAR ASS'N, FEDERAL JUDICIAL PAY: AN UPDATE ON THE URGENT NEED FOR ACTION 25 (May 2003), *available at* http://www.uscourts.gov/newsroom/judgespayaction.pdf.

261. *See* John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (attributing the author's decision to retire from the federal bench to "being part of a sentencing system that is unnecessarily cruel and rigid"). Judge Myron H. Bright was one of the most outspoken judicial critics of the Federal Sentencing Guidelines. *See* United States v. Flores, 336 F.3d 760, 765–68 (8th Cir. 2003) (Bright, J., concurring) (arguing that for "fair and proper

worse by the Feeney Amendment[262]), ethical rules that are perceived as both intrusive and ineffective,[263] poor relations with Congress,[264] and now heightened fears of personal safety in light of the Lefkow murders.[265] If judges are a bit touchy at criticism these days, one can understand why.

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sentencing procedures," sentencing judges require more discretion than that allowed under the Federal Sentencing Guidelines).

262. The Feeney Amendment was an amendment to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.). The amendment (sponsored by Representative Tom Feeney) included a number of provisions that made it more difficult for judges to exercise discretion in sentencing, including a requirement that judges who depart downward from federal sentencing guidelines be reported to Congress. The Feeney Amendment was strongly opposed by federal judges. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: SEPTEMBER 23, 2003, at 5–6 (2003), *available at* http://www.uscourts.gov/judconf/sept03proc.pdf; *see also* CHIEF JUSTICE WILLIAM H. REHNQUIST, SUPREME COURT OF THE UNITED STATES, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2004) ("[T]he PROTECT Act was enacted without any consideration of the views of the Judiciary."), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html; Marcia Coyle, *Deaf Ears for Rehnquist on Sentencing: 'Feeney' Fracas Is Not Going Away*, NAT'L L.J., Jan. 12, 2004, at 1 (reporting that "[d]espite recent criticism by federal judges, Congress is unlikely to alter the Feeney Amendment in regard to federal sentencing guidelines").

The general controversy over the sentencing guidelines—and the specific controversy over the Feeney Amendment—were largely mooted by *United States v. Booker*, 125 S. Ct. 738, 756–57 (2005), in which the Supreme Court declared invalid "the provision of the federal sentencing statute that makes the Guidelines mandatory," thereby "mak[ing] the Guidelines effectively advisory."

263. Judge Kozinski has described the financial disclosure requirements imposed on federal judges as "a nuisance and a bit dangerous and intrusive," Kozinski, *Judicial Ethics*, *supra* note 235, at 1104, and he has referred to the "[t]he idea that [he] would give up [his] honest judgment in a case for a few dollars" as "ludicrous and insulting," *id.* at 1105. Judge Kozinski has also complained that "many of the things contained within the Canons [of Judicial Ethics] . . . are wholly irrelevant in practice. They make no difference at all." *Id.*

264. *See* Mike Allen, *GOP Seeks More Curbs on Courts: Sensenbrenner Proposes an Inspector General*, WASH. POST, May 12, 2005, at A3 (describing efforts of "ang[ry] . . . House Republican leaders to . . . use budgetary, oversight and disciplinary authority to assert greater control over the federal courts"); Jeff Chorney, *O'Connor to Judges: Meet with Congress Members*, NAT'L L.J., Aug. 23, 2004, at S9 (quoting Justice Sandra Day O'Connor as describing the relations between Congress and the judiciary as "more tense than at any time in my lifetime"); Marcia Coyle, *A Caucus Is Formed, and Other Efforts Aim to Mend Chasm*, NAT'L L.J., Oct. 18, 2004, at 1 ("[T]he degree of tension between Congress and the judiciary today hasn't been experienced for at least half a century, according to political and legal observers.").

265. *See* Bethany Broida, *Judges Share Safety Fears, Ask for Help*, LEGAL TIMES, Apr. 25, 2005, at 1 ("Off-site security has been an issue of considerable concern, especially among federal judges. In the past 25 years, three federal judges have been killed—all at their homes. The murder of Judge Lefkow's family in her Chicago home is only the most recent incident."); Carol D. Leonnig, *Judges Seek to Oust Chief of U.S. Marshals*, WASH. POST, May 16, 2005, at B1 ("Leaders of the federal judiciary have privately urged Attorney General Alberto R. Gonzales to consider replacing the director of the U.S. Marshals Service, complaining that weak

Second, I argued above that the intensity of some of the opposition to unpublished opinions likely arises from frustration with the proliferation of local rules.[266] Those local rules exist because judges want them to exist. Judges like to run their courts as they see fit, and more generally, judges do not like to be told what to do, especially when it comes to how they conduct business inside of their chambers. In this, judges resemble no one as much as tenured law professors, who also do not like to be told what to do, especially when it comes to how they teach their classes and do their research. One need only consider the scrum that is the annual clerkship hiring season,[267] or the almost comical dysfunction of the typical faculty meeting, to appreciate how difficult it can be to regulate intelligent, strong-willed people who are used to getting their own way and who have no real fear of being fired, being demoted, or having their salaries reduced.

Although some judges acknowledge the problem posed by the proliferation of local rules, many do not—and, in fact, some routinely express frustration with what they view as the hyperactivity of Judicial Conference committees. Judges complain in particular that the rules of practice and procedure are amended too frequently and that those rules too often address subjects that should be left to the discretion of the judges. (I do not believe that this complaint has merit, at least as to FRAP.[268]) Some judges have told me

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management has left judges and courthouses in danger . . . ."); Tony Mauro, *Top Federal Judges Call for Increased Security*, NAT'L L.J., Mar. 21, 2005, at 7 (reporting that the Judicial Conference had approved a resolution "describing the 'crisis in off-site judicial security' as a matter 'of the gravest concern to the federal judiciary'").

266. *Supra* Parts III.A & III.B.

267. *See, e.g.*, Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129, 131–38 (2000) (comparing the judicial clerkship selection process to jungle law); Christopher Avery et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 801–04 (2001) (describing the hiring season as a "rough-and-tumble process"); Edward R. Becker et al., *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 215–20 (1994) (finding that although the March 1 interview deadline helped to alleviate some of the judicial hiring frenzy, rumors still plagued the process and judges outside of the East Coast felt disadvantaged); Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1707–20 (1991) (arguing that the high pressured competitive atmosphere of the judicial clerkship selection process allows both applicants and judges to view how the other responds to high-stress situations); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765, 772–82 (1993) (likening the process of selecting law clerks to a "feeding frenzy"); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097, 1108 (1992) (calling the clerkship hiring process "anarchic"); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 154 (1990) (calling the clerkship selection process an "annual chase").

268. FRAP has been amended only twice since 1995—in 1998 (when the restyled rules took effect) and in 2002.

that this "pro-autonomy" or "anti-uniformity" sentiment is particularly strong in such high-profile circuits as the Second, Seventh, and Ninth Circuits—which, not surprisingly (if this is true), are three of the circuits that have most strongly opposed Rule 32.1.

Ironically, Rule 32.1 may have made a good battleground for a fight between the practitioners who are angry about local rules and the judges who are angry about attacks on local rules precisely because so little is at stake (at least in terms of practical effects). Some practitioners undoubtedly thought, "Even on a matter as trivial as citing unpublished opinions, the circuits insist on going their own ways!" At the same time, some judges undoubtedly thought, "Even on a matter as trivial as citing unpublished opinions, the national rulemakers will not leave us alone!"

Third, I argued above that some practitioners pushed strongly for Rule 32.1 because they expected or at least hoped that it would be a first step toward abolishing the institution of unpublished opinions.[269] Many judges likely pushed strongly against Rule 32.1 for the same reason: They, too, expect—or at least fear—that Rule 32.1 will be the first step down a slippery slope that will lead to judges being required to issue published precedential opinions in all cases.

Several judges who oppose Rule 32.1 have told me privately that what really concerns them is not that unpublished opinions will be cited, but that courts will eventually be forced to treat unpublished opinions as precedential. The courts of appeals have issued hundreds of thousands of unpublished opinions, and judges have no idea what is in them. They know, however, that those opinions generally are not as well crafted as published opinions and often were not carefully scrutinized by any judge. Judges are terrified that they will wake up one day and find themselves bound by this mountain of unpublished opinions. Adding to the terror is the fact that all circuits hold that one panel cannot overrule another panel,[270] which means that, if unpublished opinions become binding

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269. *Supra* Part III.A.

270. *See* 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3981.1, at 612–13 (3d ed. 1999) ("The courts of appeals generally follow a practice that one panel is bound by the decision of another panel of that court. Only the court sitting en banc can overrule the panel decision. This is true even of unpublished opinions . . . ."). Some circuits vary from this procedure by permitting a panel to overrule a prior decision of the court if the panel first circulates its opinion to the entire court and, depending on the circuit, either no judge objects, *see, e.g.*, United States v. Coffin, 76 F.3d 494, 496 n.1 (2d Cir. 1996) (stating that circuit precedent can only be overruled by an en banc vote or by an opinion circulated to all judges with none objecting), or a majority of judges do not vote to hear the case en banc, *see, e.g.*, Owens v. United States, 387 F.3d 607, 611 (7th Cir. 2004) (overruling a prior opinion when the current panel opinion had been circulated with a majority of the circuit judges declining to hear

precedent, the en banc court will have to correct every mistake in such an opinion.[271] Judges have told me that being forced to treat their unpublished opinions as binding precedent would create chaos and that it would take decades to repair the damage.

Rule 32.1 would not, of course, require courts to treat their unpublished opinions as binding precedent. Nothing in the text of the rule requires such a result, and the Advisory Committee Note bent over backwards to make clear that the rule "takes no position on whether refusing to treat an 'unpublished' opinion as binding precedent is constitutional" and that the rule "says nothing about what effect a court must give to one of its 'unpublished' opinions or to the 'unpublished' opinions of another court."[272] Still, I suspect that many judges put up a stiff fight against Rule 32.1 not because they strongly object to permitting citation, but because they fear that citation will inevitably lead to treatment as binding precedent. In this, they acted like an army that, to forestall an invasion of its own country, marched out to meet an approaching enemy in a country some distance away.

I confess to having some sympathy for these judges. I say this not because I have any doubts about the intentions of the Advisory Committee. As best as I can recall, no member of the Advisory Committee has ever expressed an interest in amending FRAP to require precedential treatment of unpublished opinions. Indeed, I am confident that every member of the Advisory Committee believes that such a proposal would exceed the authority of the Rules Enabling Act.[273] I have no doubt that the Advisory Committee will maintain a firm line between citation and precedential force.

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the case en banc).

271. Professor Stephen R. Barnett has pointed out that the law-of-the-circuit rule was created by judges and can be changed by judges. *See* Barnett, *Ground Shifts*, *supra* note 11, at 23–24 ("While it has been suggested that the law-of-the-circuit rule rests on constitutional, or at least statutory, compulsion, neither appears to be the case."). He has suggested, among other things, that courts could "accord unpublished opinions 'precedential' status that requires overruling, but . . . lift the law-of-the-circuit rule to let subsequent panels overrule them." *Id.* at 23.

272. PRELIMINARY DRAFT, *supra* note 8, at 33.

273. A rule that prescribed the legal force that must be accorded unpublished opinions would likely "abridge, enlarge or modify" the "substantive right[s]" of the parties and thus proposing such a rule is likely beyond the authority provided by 28 U.S.C. § 2072(b) (2000). The Rules Enabling Act has apparently escaped the attention of some of those who have criticized the Advisory Committee for doing "next to nothing" to address the "legal force of unpublished opinions." *Ununpublished*, GREEN BAG, Winter 2004, at 105, 107.

Judges realize, however, that the main reason why attorneys want to cite unpublished opinions lies not in the quality of their analysis or research. Unpublished opinions are, for the most part, pretty useless as expositors of the law,[274] which is why most judges find them unhelpful.[275] Rather, parties want to cite unpublished opinions as part of an argument that, because a court acted in a particular way in a prior case, the court should act in the same way in the present case. True, the party would not be able to claim that the prior unpublished decision bound the court, but in all other respects the argument would be an argument from precedent. Judges fear that, the more such arguments are made, the more difficult it will be for courts to hold the line against treating unpublished opinions as binding.

I will close by offering one final theory about why many judges oppose Rule 32.1 so passionately. I call this the "Henry Friendly" theory, after legendary federal appellate judge Henry J. Friendly. I confess at the outset that Judge Friendly probably would not like my theory because it involves a lot of speculation and amateur psychoanalysis. But I offer it for what it is worth.

When today's judges were law students and young lawyers, Judge Friendly was the preeminent circuit judge in America, a mantle that he inherited from Learned Hand. When one thought of appellate judging, one thought of Judge Friendly. And when one thought of Judge Friendly, one thought of a judicial craftsman. One imagined Judge Friendly in his chambers reading every word of every brief, poring over the record himself, vigorously debating the case with his clerks, fencing with attorneys at oral argument, engaging in spirited discussions with his colleagues in conference, and then painstakingly crafting an opinion in longhand. One imagined Judge Friendly acting this way in large part because Judge Friendly in fact acted this way.[276] When today's judges were appointed to the bench, they accepted

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274. *See* Richman & Reynolds, *The New Certiorari*, *supra* note 211, at 284 (discussing the quality of unpublished opinions). The authors assert:

> It should come as no surprise that unpublished dispositions are also dreadful in quality. In a study conducted fifteen years ago, we found that twenty percent of unpublished opinions in nine of the eleven circuits failed to satisfy a very undemanding definition of minimum standards, and that sixty percent of the opinions in three circuits failed to meet those standards. There is no reason to think that the situation has improved in the years since.

Id. (citing Reynolds & Richman, *Price of Reform*, *supra* note 11, at 602).

275. REAGAN ET AL., *supra* note 1, at 10–11, 39 tbl.K.

276. Judge Friendly's approach to his work is discussed in several of the tributes published by the *Harvard Law Review* after Judge Friendly's death. Bruce A. Ackerman et al., *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1710–11 (1986).

their appointments in part because it gave them the opportunity to exercise the craft of judging, just like Judge Friendly.[277]

Judges are also proud people. They care about their reputations, and they care about their legacies. Those reputations—and those legacies—are almost entirely a function of judges' opinions. Justice Louis Brandeis, when asked whether he was writing his memoirs, reportedly said: "I think you will find that my memoirs have already been written."[278] He was referring, of course, to his opinions. The giants of the federal appellate bench in the twentieth century—Learned Hand, Henry Friendly, Richard Posner—owe their reputations in no small part to the fact that they wrote their own opinions.[279] After Judge Friendly died, the *Harvard Law Review* published a series of tributes in his honor.[280] The very first sentence of the very first tribute was: "Henry Friendly did his own work."[281] Few judges can write all of their own opinions today,[282] but they still aspire to leave a respected and influential body of work. Judges have a strong sense of ownership in their opinions[283]—which itself explains much of the strong feeling about Rule 32.1.

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277. *See* Cooper & Berman, *supra* note 226, at 708 (asserting that many federal appellate judges today "express a wistful longing for the days of the Learned Hand model"); Kozinski, *Judicial Ethics*, *supra* note 235, at 1097 ("When lawyers seek appointment to judicial office, they generally think of the interesting cases as the core of judicial work; none I know seeks judicial office so he can spend his days, nights, weekends and holidays slogging through an unending stack of routine, fact-intensive and largely (in the grand scheme of things) inconsequential cases.").

278. Paul A. Freund, *Introduction* to ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS, at xv (Univ. of Chi. Press 1967). Brandeis's line was quoted by Judge Michael Boudin, a former Friendly clerk, in a tribute to Judge Friendly. Michael Boudin, *Memoirs in a Classical Style*, 133 U. PA. L. REV. 1, 1 (1984).

279. *See* WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 122–23 (1996) (describing how Judge Learned Hand wrote his own opinions and how Judge Posner continues in this tradition); Ackerman et al., *supra* note 276, at 1709 (describing how Judge Friendly carefully constructed his own opinions).

280. Ackerman et al., *supra* note 276, at 1709–27.

281. *Id.* at 1709.

282. *See* DOMNARSKI, *supra* note 279, at 122 ("[O]nly three or four federal judges . . . write[] every word of every opinion."); Kozinski, *Judicial Ethics*, *supra* note 235, at 1100 ("It is a reality of current judicial life that few judges draft their own opinions from scratch."); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 29 (1993) ("Today . . . the vast majority of judicial opinions at all appellate levels are drafted by law clerks . . . . [Only a] tiny and shrinking minority of old-fashioned appellate judges . . . continue to write their own opinions . . . .").

283. This sense of ownership may explain the rather remarkable fact that some courts have adopted local rules that purport to bar parties not just from citing the court's unpublished opinions to the court itself, but also from citing the court's unpublished opinions to any other

As caseloads have risen, however, the role of the appellate judge has increasingly evolved from thoughtful crafter of opinions to harried manager of litigation—from head chef at a gourmet restaurant to short-order cook at a roadside diner. Consider, for example, the way that the Ninth Circuit handles about 40% of its merits dispositions: A three-judge panel will assemble to decide fifty or more cases in a single day. The judges will generally not read the briefs, the records, or anything else in advance. Instead, they will rely entirely on an oral description of the case provided by a staff attorney. The staff attorney will describe how he or she believes the case should be resolved and present an opinion that he or she has drafted. The panel will glance at the opinion, give its consent, and move on to the next case.[284] It is not uncommon for an appeal to be disposed of in this manner in as few as

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court—state or federal. The Second Circuit, for example, provides in its local rule that its unpublished opinions "shall not be cited or otherwise used in unrelated cases before this *or any other court*." 2D CIR. R. 0.23 (emphasis added). It is not clear where the Second Circuit gets the authority to bar, say, a resident of Montana who has never stepped foot in the Second Circuit from citing an unpublished opinion of the Second Circuit to a Montana state trial judge.

Ironically, the Second Circuit judges were the only opponents of Rule 32.1 who argued that the rule was "beyond the scope of the rulemaking authority of 28 U.S.C. § 2072." Walker Comment, *supra* note 174, at 5. The Second Circuit judges argued that Rule 32.1 is not a "general rule[] of practice and procedure" because, if Rule 32.1 is adopted, "some judges will make the opinion more elaborate in order to make clear the context of the ruling, while other judges will shorten the opinion in order to provide less citable material . . . ." *Id.* Of course, the no-citation rules that Rule 32.1 seeks to abolish are themselves promulgated under Appellate Rule 47(a), which gives each court of appeals authority to "make and amend rules governing its practice." FED. R. APP. P. 47(a). The Second Circuit did not explain why it has power to use its local rules to bar citation—not only in the Second Circuit, but all federal and state courts in the land—but the Supreme Court does not have power to use FRAP to permit citation in the federal appellate courts. If the Second Circuit's no-citation rule is a rule of "practice" for purposes of Rule 47(a), then surely Rule 32.1 is a rule of "practice" for purposes of § 2072.

284. I base this description on published accounts. *See, e.g.*, Kozinski, *Judicial Ethics*, *supra* note 235, at 1099 (describing how staff attorneys "process approximately forty percent of cases in which [the Ninth Circuit] issue[s] a merits ruling"); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, CAL. LAW., June 2000, at 44 (describing how Ninth Circuit judges merely ensure that the unpublished opinions written by staff attorneys reach the proper result). I also base it on comments that Ninth Circuit judges submitted regarding Rule 32.1. *See, e.g.*, Marsha S. Berzon, Public Comment 03-AP-134, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Jan. 13, 2004) (describing the "screening process" of cases where judges rely "heavily on central staff review and drafting"), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-134.pdf; Kozinski Comment, *supra* note 219, at 4–5 (describing how during the screening program judges make a decision after a presentation by the central staff); Barry G. Silverman, Public Comment 03-AP-075, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Dec. 17, 2003) (describing staff attorneys' central role in the screening panels), *available at* http://www.secretjustice.org/ pdf_files/Comments/03-AP-075.pdf.

five minutes.[285] Judge Kozinski likens the opinions produced by this process to "sausage" that is "not safe for human consumption."[286]

I believe that some of the emotion surrounding the issue of unpublished opinions relates to the perceived gap between the gem-producing judging of Judge Friendly's era and the sausage-producing judging of the present era. I should stress that, although this gap unquestionably exists, this gap also may be larger in perception than in reality. One must be careful not to idealize the past or demonize the present. Judge Friendly was, after all, only one judge, and he was famous because he was atypical. It makes little sense to compare the typical judge of today to the titan of yesterday and then lament the gap. Also, Judge Friendly himself almost surely did not give the "Friendly treatment" to every case. Undoubtedly, the Second Circuit of the 1970s—like the Second Circuit of today—had its share of easy cases (referred to as "dogs" by some judges). I would be surprised if Judge Friendly pored over the record and debated with his clerks in those cases.

At the same time, not all unpublished opinions are sausage. The approach of the Ninth Circuit is not the approach of the other circuits—or even the approach of the Ninth Circuit itself in many cases that result in unpublished opinions. The attention devoted to unpublished opinions falls along a spectrum, just as the attention devoted to published opinions does. This is as it should be. Critics of the federal judiciary often fail to recognize that many appeals are extremely easy, and judges can adequately consider them in a few minutes—especially when assisted by able staff attorneys and law clerks. Insisting that judges give the Friendly treatment to every case is as unreasonable as insisting that doctors personally administer a full battery of medical tests to every child with an ear infection.

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285. Judge Kozinski has been admirably candid in describing how difficult it is for judges to make certain that "judging" is being done under such a system:

> The increase in caseload coupled with the proliferation of staff creates a constant temptation for judges to give away essential pieces of their job. The pressure is most severe in the small and seemingly routine cases, especially those handled through the screening process. After you dispose of a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders and the urge to say okay to whatever is put in front of you becomes almost irresistible . . . . It often takes a frantic act of will to continue questioning successive staff attorneys about each case, or to insist on reading key parts of the record or controlling precedent to ensure that the case is decided by the three judges whose names appear in the caption, not by a single staff attorney.

Kozinski, *Judicial Ethics*, *supra* note 235, at 1099 (citations omitted).

286. Kozinski, *In Opposition*, *supra* note 11, at 37.

That said, the notion that the Friendly treatment[287] is somehow the norm, and that judging that falls short of the Friendly treatment is somehow a failure, has a powerful hold on the imagination of the legal profession, giving judges conflicted feelings about unpublished opinions. On the one hand, judges recognize unpublished opinions as a necessity, and they fiercely protect their right to issue them. Only by issuing unpublished opinions can judges have the time to perform their best work in difficult cases—the work that will most shape their reputations and their legacies. On the other hand, judges view unpublished opinions with discomfort or even embarrassment. Every day, judges are forced to put their name on work that is not theirs—on words that they may have barely read, much less written—on results to which they have given only a few moments' thought.

I wonder whether one reason why some judges react so strongly against the citation of unpublished opinions is because, when a party cites such an opinion, the judges feel guilty—or at least feel that the party is trying to make them feel guilty. Consider the following reasons given by a group of Seventh Circuit judges for opposing Rule 32.1:

> [Unpublished orders will be] thrown back in our faces . . . . no matter how often we state that unpublished orders though citable (if the proposed rule is adopted) are not precedents. For if a lawyer states in its brief that in our unpublished opinion in *A v. B*[] we said X and in *C v. D* we said Y and in this case the other side wants us to say Z, we can hardly reply that when we don't publish we say what we please and take no responsibility. We will have a moral duty to explain, distinguish, reaffirm, overrule, etc. any unpublished order brought to our attention by counsel. Citability would upgrade case-specific orders that this circuit has intentionally confined to the law of that particular case to de facto precedents that we must address.[288]

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287. What I have described as "the Friendly treatment" is similar to what William M. Richman and William L. Reynolds have described as the "traditional" or "Learned Hand" approach:

> Oral argument is heard in virtually all cases. Following a thorough discussion among the judges in a face-to-face conference, one panel member prepares a draft opinion, circulates the opinion among the panel, and then revises the draft in response to their comments. The resulting opinion carefully states the relevant facts and law, and explains why the combination of the two leads to the result. The judge uses a law clerk as a research tool and sounding board, but clerks have no significant role in drafting the opinion; there is no central staff. When the panel reaches agreement on the opinion, it is published in a reporter accessible to everyone. That is the traditional, or Learned Hand, model of appellate decision making.

Richman & Reynolds, *The New Certiorari*, *supra* note 211, at 278 (footnotes omitted).

288. Coffey Comment, *supra* note 175, at 1.

Two things about this passage are striking. First, the Seventh Circuit judges refer to the citation of their own official actions as "throw[ing]" those actions "back in [their] faces." In day-to-day parlance, when we refer to something being "thrown back in our faces," that "something" is almost invariably something unpleasant or embarrassing. Second, note the nature of the "moral duty" cited by the judges. It is not a moral duty to act or not to act in a particular way. Rather, it is a moral duty to take responsibility for one's actions after those actions are called to one's attention. And, we are told, it is imperative to prevent this moral duty from arising not by avoiding the actions in the first place, but by prohibiting people from later mentioning them.

When litigants can cite unpublished opinions to a court, the court is left with two real options. First, the court can decline to follow the unpublished opinion and explain why—an explanation that will often have to include an acknowledgment that the unpublished opinion was flawed. No judge likes to eat crow. Second, the court can follow the unpublished opinion, and therefore let itself be hemmed in by an opinion to which no judge may have given even a few moments' attention. For judges aspiring to walk in Henry Friendly's footsteps, it must be tempting to avoid this dilemma altogether by forbidding parties from creating it.