"Thomas Healy"
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02/13/2004 12:53 PM

To: rules_comments@ao.uscourts.gov
cc:
Subject: Comment on Proposed FRAP 32.1

03-AP-380

To the Advisory Committee:

Attached please find my comment on proposed FRAP 32.1. Also attached is an article I refer to in my comment. Both attachments should be considered part of my comment. If you have trouble opening either attachment, please let me know. Thank you.

Sincerely,

Thomas Healy
Associate Professor of Law
Seton Hall University Law School
973-642-8561

(See attached file: FRAP comment.doc) (See attached file: 104 W Va L Rev 43.pdf)

FRAP comment.doc 104 W Va L Rev 43.pdf

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

February 13, 2004

Dear Mr. McCabe,

I am writing in opposition to proposed Federal Rule of Appellate Procedure 32.1. I am a former clerk to Judge Michael Daly Hawkins on the Ninth Circuit and an associate professor of constitutional law and federal jurisdiction at Seton Hall Law School. I have published an article on the issue of unpublished and non-precedential opinions, which I attach to this letter.

I object to the proposed rule primarily because I believe it is motivated by the mistaken view that the practice of forbidding citation to unpublished opinions is mischievous, or perhaps even unconstitutional. This view was articulated forcefully by Judge Richard Arnold in an opinion published four years ago and has caught fire in some circles; it was even the subject of a congressional hearing in the summer of 2002. As I demonstrate in the attached article, however, there is nothing unconstitutional or even unusual about the practice of limiting the body of case law available for citation.

The historical evidence establishes several points. First, although it is often assumed that the practice of citing precedent is an immemorial custom, for a substantial part of the common law's history lawyers and judges did not rely on precedent. It was not until a body of law reports emerged in the 16th and 17th centuries that citing cases became a regular practice.

Second, even when reporters began to record and publish judicial decisions, they only included those opinions they thought valuable. If a case turned only on its facts or involved only a slight variation of existing law, it would not be reported. Moreover, judges did not object to this practice, but encouraged it. Both Sir Edward Coke and Matthew Hale warned reporters against reporting all cases, while Chancellor James Kent argued that "the evils resulting from an indigestible heap of laws and legal authorities are great and manifest. They destroy the certainty of the law and promote litigation, delay, and subtilty." It is not clear whether Kent or other judges precluded lawyers from citing any cases, but their goal was clear: they wanted to limit the body of available case law to a manageable size.

Finally, the practice of denying precedential value to certain opinions does not violate the Constitution. Contrary to Judge Arnold's claim, the founding generation did not believe that the judicial power was limited to issuing decisions with precedential status, nor did it view stare decisis as a necessary check on the judicial branch. To the extent that

founding era judges and lawyers embraced stare decisis, they did so out of pragmatic concerns, not constitutional ones.

Does this evidence establish that allowing citation to unpublished opinions is bad policy? Not necessarily. I leave that to the lawyers and judges who deal with the issue on a daily basis. But if the members of the Advisory Committee are concerned that the practice of forbidding citation to these opinions is inconsistent with tradition or constitutional values, I hope my article assures them that it is not.

Sincerely,

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STARE DECISIS AS A CONSTITUTIONAL REQUIREMENT

Thomas Healy[*]

Is the rule of stare decisis a constitutional requirement, or is it merely a judicial policy that can be abandoned at the will of the courts? This question, which goes to the heart of the federal judicial power, has been largely overlooked for the past two centuries. However, a recent ruling that federal courts are constitutionally required to follow their prior decisions has given the question new significance. The ruling, issued by a panel of the United States Court of Appeals for the Eighth Circuit, argues that stare decisis was such an established and integral feature of the common law that the founding generation regarded it as an inherent and essential limit on judicial power. Therefore, when the Constitution vested the "judicial Power of the United States" in the federal courts, it necessarily limited them to a decision-making process in which precedent is presumptively binding.

This Article challenges that claim. By tracing the history of precedent in the common law, it demonstrates that stare decisis was not an established doctrine by 1789, nor was it viewed as necessary to check the potential abuse of judicial power. The Article also demonstrates that even if stare decisis is constitutionally required, the courts are not obligated to give prospective precedential effect to every one of their decisions. Stare decisis is not an end in itself, but a means to serve important values in a legal system. And those values can be equally well served by a system in which only some of today's decisions will be binding tomorrow.

* Associate, Sidley Austin Brown & Wood, Washington D.C.; J.D., Columbia, 1999; Law Clerk to Judge Michael Hawkins on the United States Court of Appeals for the Ninth Circuit, 1999-2000. I am grateful for the helpful comments of Vincent Blasi, Michael Dorf, Mark Feldman, Banu Ramachandran, Seetha Ramachandran, Lara Shalov, and Peter Strauss and for the fine editorial work of Rob Alsop. I owe special thanks to Arlene Chow for extensive help in formulating and articulating the arguments that follow.