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I support Proposed Fed.R.App.Proc. 32.1 . See my Citizens Law Journal article "Kozinski-itis: Hypocrisy in the Unpublished Opinions Controversy" at the following URL:

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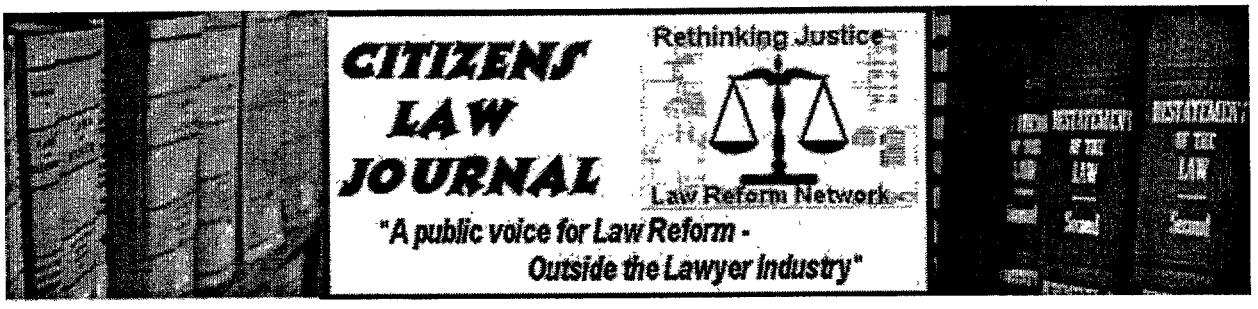

Kozinski-itis: Hypocrisy in the Unpublished Opinions Controversy, by L. Neuton

Print Page

The 9th Circuit's non-publication rule (Circuit Rule 36-3) undermines the Doctrine of Precedent - the very foundation of Anglo-American law. In a published case, Judge Alex Kozinski ruled it constitutional - assuring the public not to worry about its being abused. Yet he, himself, abused the rule in two unpublished cases. A rule he sets forth as law in one opinion is completely contradicted by his own ruling in another, nearly identical, case (article revised 2-9-04).

A disturbing trend among federal appellate courts is to promulgate rules which allow selective publication of opinions and provide that the unpublished opinions do not constitute binding precedent and may not even be cited in unrelated cases. In the Ninth Circuit Court of Appeals such a non-publication/no-citation rule is Circuit Rule 36-3.

Rule 36-3 states that "Unpublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit . . . .".

No-citation rules such as Rule 36-3 undermine the Doctrine of Precedent which is fundamental to our judicial system.

A similar no-citation rule was struck down as unconstitutional by the Eight Circuit Court of Appeals in Anastasoff v. United States, 223 F.3d 898, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000).

Anastasoff holds (in regard to 8th Circuit Rule 28A which is similar to 9th Circuit Rule 36-3) ". . . that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the "judicial."".

Anastasoff's reasoning is as follows:

> **"Inherent in every judicial decision is a declaration and interpretation of a**

general principle or rule of law. Marbury v. Madison, 1 Cranch 137, 177-78 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991); Cohens v. Virginia, 6 Wheat. 264, 399 (1821). These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution.. . In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty. . ." .

Judge Alex Kozinski

However, in the Ninth Circuit Court of Appeals, in Hart v. Massanari, 266 F.3d 1155 (9th Cir. 09/24/2001), Judge Alex Kozinski ruled that Circuit Rule 36-3 was constitutional.

Judge Kozinski argues that "Judges have a responsibility to keep the body of law 'cohesive and understandable, and not muddy . . the water with a needless torrent of published opinions' " (Hart v. Massanari, 266 F.3d 1155 (9th Cir. 09/24/2001)). This is a noble-sounding goal until you scratch the surface and see what is really going on.

In reality, Judge Kozinski wants freedom to achieve any judicial result he likes without being bound by precedent. This will be shown below. But first let's take a closer look at the concept of the no-citation rule.

In an article titled, "Unpublished Opinions: A Comment." 1 Journal of Appellate Practice and Process 219 (Summer, 1999), Judge Richard S. Arnold, of the United States Eighth Circuit Court of Appeals, discussed his concerns with his Circuit's selective publication/no-citation rule. His article is discussed in an article at the web site of the North Carolina State Bar, http://www.ncbar.com/Journal/journal_7,2.asp , as follows:

> **"First he found it startling that the rule renders judges "perfectly free to depart from past opinions" so long as those opinions are unpublished-in violation of the doctrine of precedent. This is particularly bothersome when the judges are the sole decision maker regarding whether or not an opinion is published. Judge Arnold observed that every case has "some" precedential value and so is publishable under the rules. There is a danger, then, that if "after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug." The issue is delicate, however, and Judge Arnold observed: "I'm not saying that this has ever occurred in any particular case, but a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings.".**

Judge Arnold does not know of judicial abuse in this regard ever occurring. However, as shown below, not only has such abuse occurred, but the abusing judge is none other than the champion of the 9th Circuit unpublishing rule (Circuit rule 36-3) himself (Judge Kozinski)!

Abuse of the rule coming from the very judge who re-assures us in a published opinion not to worry about such abuse is something more than blatant hypocrisy.

This is a type of corruption - a corruption which legimizes a policy of corruption and which we have labeled "Kozinski-itis".

Judge Kozinski's opinion (Hart v. Massanari) was written in response to the 8th Circuit case (Anastasoff v. United States):

> **". . . Anastasoff v. United States, 223 F.3d 898, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000). Anastasoff, while vacated, continues to have persuasive force. . . . It may seduce members of our bar into violating our Rule 36-3 under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest.".**

Anastasoff's lengthy discussion of the history of the Doctrine of Precedent principle is well worth repetition:

> **" . . .Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds. By contrast, on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of the judicial power itself. As Blackstone defined it, each exercise of the "judicial power" requires judges "to determine the law" arising upon the facts of the case. 3 Blackstone, Commentaries 25. "To determine the law" meant not only choosing the appropriate legal principle but also expounding and interpreting it, so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule . . .." 1 Commentaries 69. In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges "to determine law" in each case, a judge is "sworn to determine, not according to his own judgments, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old." Id. The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "best and most authoritative" guide of what the law is, the judicial power is limited by them. Id. The derivation of precedential authority from the law-declaring nature of the judicial power was also familiar to the Framers through the works of Sir Edward Coke and Sir Matthew Hale. See 4 E. Coke, Institutes of the Laws of England 138 (1642) (a prior judicial decision on point is sufficient authority on a question of law because "a judicial decision is to the same extent a declaration of the law."); 1 Coke, Institutes 51 (1642) ("[i]t is is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."); Sir**

Matthew Hale, The History of The Common Law of England 44-45 (Univ. of Chicago ed., 1971) ("Judicial Decisions [have their] Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is . . .").".

"In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone, Commentaries 258-59. If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions . . .." Id. at 259.".

"The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it. Hamilton, like Blackstone, recognized that a court "pronounces the law" arising upon the facts of each case. The Federalist No. 81, at 531 (Alexander Hamilton) (Modern Library ed., 1938). He explained the law-declaring concept of judicial power in the term, "jurisdiction": "This word is composed of JUS and DICTIO, juris dictio, or a speaking and pronouncing of the law," id., and concluded that the jurisdiction of appellate courts, as a law-declaring power, is not antagonistic to the fact-finding role of juries. Id. Like Blackstone, he thought that "[t]he courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be. The Federalist No. 78 507-08. Like Blackstone, he recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power. Id. at 508. Hamilton concludes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . .." Id. at 510. . . .".

. . . . . .

"To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III. No less an authority than Justice (Professor) Joseph Story is in accord. See his Commentaries on the Constitution of the United States §§ 377-78 (1833): "The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors

> brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.".

Along comes Judge Kozinski to overthrow this foundation-stone of Anglo-American law.

First, he mis-states Anastasoff :

> "According to Anastasoff, exercise of the"judicial Power" precludes federal courts from making rulings that are not binding in future cases. Or, to put it differently, federal judges are not merely required to follow the law, they are also required to make law in every case.".

No, just the opposite. Anastasoff doesn't say that judges are required to "make law in every case", at all. They are to "determine the law in every case" based only on precedents to "avoid an arbitrary discretion in the courts". See above:

> "The judicial power to determine law is a power only to determine what the law is, not to invent it.".

Judge Kozinski attacks the reasoning of Anastasoff by arguing that Article III of the Constitution does not limit the power of the federal courts in "how they conduct their business". He states that Anastasoff "focused on one aspect of the way federal courts do business--the way they issue opinions--and held that they are subject to a constitutional limitation derived from the Framers' conception of what it means to exercise the judicial power.".

No. This again mis-states Anastasoff. Anastasoff's focus is not on the way courts issue opinions. It's on the very nature of the judicial function itself. Whether a judge can arbitrarily invent his own law and issue capricious decisions or whether he is bound by precedent. It goes to the very definition of what is "judicial power" not simply "one aspect of the way federal courts do business".

It may be worthwhile here to see what Judge Arnold, in the article cited above, wrote in this regard:

> "Article III of the Constitution of the United States vests "judicial power" in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. We can exercise no power that is not "judicial." That is all the power that we have. When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being

> **exercised properly be called "judicial?" Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions? In other words, is the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III?".**

Judge Kozinski argues essentially that we shouldn't worry about unpublished decisions not having precedential effect (since the published ones still do).

> **"We believe that Anastasoff overstates the case. Rules that empower courts of appeals to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents; if they did, we might find cause for alarm. But such rules have a much more limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings. This is hardly the same as turning our back on all precedents, or on the concept of precedent altogether.".**

This sounds almost reasonable until you look at some of Judge Kozinski's own (unpublished) opinions.

A rule he sets forth as law in one opinion is completely contradicted by his own ruling in another, nearly identical, case.

He can get away with this because the opinions are unpublished. There is, from Judge Kozinski's own opinions great cause for alarm. Having one law for one litigant and another law for another litigant contradicts one of the most fundamental foundation stones of American law - "equal Justice under Law". These words - which are even carved on the façade of the United States Supreme Court building - are easily brushed aside by Judge Kozinski because his opinions are unpublished.

The intellectual dishonesty of Judge Kozinski rises above simple hypocrisy. It is a policy-type corruption of our judicial system - something which I label as "Kozinski-itis" (although Judge Kozinski is not the only judge suffering from this malady).

The cases I am referring to are the following:

In re Neuton (9th Circ. 1998) Case No. 98-55030 and Wright v. United Airlines (9th Cir.1994) Case No. 94-15282.

You'll have a hard time finding these cases in the law library because they are both unpublished. I was able to find the Wright case through the power of an internet search (using VersusLaw, http://www.versuslaw.com - whose database includes unpublished cases).

In the Wright case, an employment discrimination claim was the underlying issue. The district court ruled that res judicata barred Wright from pursuing his claim in federal court because the action had been dismissed in state court under California

Civil Procedure Code §391 et seq (California's so-called "vexatious litigant" statute). Res Judicata, like collateral estoppel, is a doctrine that bars claims that have been litigated previously. In Wright, Judge Kozinski ruled that the vexatious litigant statute itself (specifically sec. 391.2) means exactly what it says:

> **"No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof.".**

And, therefore, in Wright, there is no bar to the underlying claim.

Click here to see a copy of the Wright opinion.

In the Neuton case (my own case), the underlying issue was my contention that California Civil Procedure Code §391.7 conflicted with the US Constitution. This was an issue I raised at my hearing under CCP sec.391.7 in the California probate court (although, in fact, the probate court judge expressly refused to consider it).

Contrary to his own interpretation of sec. 391.2 in Wright, Judge Kozinski's (unpublished) opinion in my case stated that res judicata precluded me from raising the issue. It didn't even mention sec.391.2 although I raised that issue in my opening brief and I put the Wright case squarely in front of Judge Kozinski in my petition for rehearing (something I was prohibited from doing in my opening brief because of Circuit rule 36-3.).

My Opening Brief at page16, argues that determinations made under the vexatious litigant statute are not on the merits and have no res judicata effect:

> **"The California statute itself (California Civil Procedure Code §391.2) says that determinations made under that statute have no res judicata effect: .. . . No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof. . . What could be clearer than this?".**

My point was made clearly and unambiguously.

The appellees briefs are totally silent regarding this issue. Click here to see appellee's brief of City National Bank and click here to see appellee's brief of Judicial Council of California.

And Judge Kozinski's Memorandum decision is totally silent regarding my argument although he, himself, wrote the case law making the point as clear and conclusive as can be.

My petition for rehearing puts the issue squarely in his face, showing that Judge Kozinski's Memorandum decision totally contradicts Judge Kozinski's own rule set down in another unpublished opinion regarding the exact same statute (Sec. 391.2),

and the exact same issue (res judicata effect of the statute).

> **"JUDGE KOZINSKI, OF THE PANEL HEREIN, ALSO MADE THIS EXACT POINT THE BASIS FOR A REVERSAL IN A SIMILAR CASE**
>
> **Not only did appellant make this point in his Opening Brief, but Judge Kozinski, of the Panel herein, made this exact point the basis for a reversal in a similar case. Wright v. United Airlines (9th Cir.1994), unpublished 2 Case No. 94-15282 reversed a dismissal for res judicata as follows:**
>
> > **'Before: Farris, Kozinski, and Noonan Circuit Judges . . . . . .**
> >
> > **. . . A state court, upon a motion and a showing that the plaintiff is a vexatious litigant and has no reasonable probability of success, may require the plaintiff to post a cash security in a litigation. Cal. Civ. Proc. §§ 391- 391.3. If the plaintiff fails to furnish the required security, the court must dismiss the action. Id. at § 391. 4. No determination made by the court in ruling on the vexatious litigant motion is deemed to be a determination of any issue in, or the merits of, the litigation. Id. at 391. 2. . . . . Regardless of the intent of the state trial court in dismissing Wright' s complaint, . . . the court' s finding that Wright was a vexatious litigant did not involve a determination of any issue in, or the merits of, the case. See Cal.Civ. Pro. § 391. 2. Accordingly, the court' s dismissal based upon Wright's failure to post security was not a dismissal on the merits. See Muller, 82 Cal. Rptr. at 736 n.4 & 738; . . . Because the state court' s dismissal of Wright' s suit was not on the merits, the district court erred by barring Wright' s retaliatory discrimination claim on the basis of res judicata. REVERSED and REMANDED."**

Judge Kozinski, who decided the Wright case, completely contradicted himself in the my case without giving any explanation for this.

His Memorandum decision in the Neuton case states the following:

> **". . ., Neuton filed a complaint seeking a declaratory judgment that the California vexatious litigant statute (Cal.Code Civ.P. 391.7 is unconstitutional . . . Neuton argues that his federal action is not barred by collateral estoppel. This argument lacks merit. "Collateral estoppel, or issue preclusion, prevents the relitigation of all issues of fact or law that were actually litigated and necessarily necessarily decided in a prior proceeding." Robi v. Five Platters, Inc, 838 F.2d 318,322 (9th Cir. 1988). Because Neuton's federal action is premised on his contention that the California vexatious litigant statute is unconstitutional, an issue that was actually litigated and necessarily decided in his prior state court action, his federal action is barred by collateral estoppel. See id. AFFIRMED".**

In my case the sub-issue is somehow "actually litigated and necessarily decided" while in Wright the sub-issue could not be deemed decided because of sec.

391.2.

My Petition for Rehearing brought his self-contradiction squarely to Judge Kozinski's attention, but without success. The petition was summarily denied (click here to see order).

The arguments of the two cases have nearly identical syllogisms:

The major premise of each case's syllogism (in regard to the sec. 391.2 argument) is the following: "According to sec. 391.2, no determination made by the state court in ruling on a vexatious litigant motion shall be deemed to be a ruling having res judicata effect.".

So the syllogism in Wright is the following:

Major premise: According to sec. 391.2, no determination in ruling on a vexatious litigant motion shall be deemed to be a ruling having res judicata effect. Minor premise: A particular determination was made in ruling on a vexatious litigant motion [employment claim issue]. Conclusion: Therefore, that particular determination has no res judicata effect.

In Neuton, the syllogism is the following: Major premise: According to sec. 391.2, no determination in ruling on a vexatious litigant motion shall be deemed to be a ruling having res judicata effect. Minor premise: A particular determination was made in ruling on a vexatious litigant motion [constitutional issue]. Conclusion: Therefore, that particular determination has no res judicata effect.

The syllogisms are identical. The only difference is what issue the "particular determination" happens to have been in each of the cases (what's in brackets). Therefore, the cases are identical in respect to the sec. 391.2 issue. Nevertheless, in my case, the actual conclusion came out to be totally inconsistent with the conclusion in Wright. The "particular determination" in Neuton did have res judicata effect, whereas in Wright it did not have res judicata effect.

Obviously, the ruling in Neuton is clearly inconsistent with the ruling in Wright.

Apparently - for reasons we can only guess - Judge Kozinski just didn't want to decide the constitutional issue in my case. So - by simply omitting any mention of the sec. 391.2 issue (which I raised in my opening brief) from his decision - Judge Kozinski contradicted his own judicial interpretation of sec. 391.2 in order to bar my claim.

Same statute (sec. 391.2), same issue (res judicata effect of the statute), yet a different rule for two different litigants!

Judge Kozinski can get away with this because both cases are unpublished!

Ironically, it is Judge Kozinski himself (the author of Hart v. Massanari, reassuring us

not to worry about such abuse) who provides evidence from his own opinions of abuse of the unpublished opinion rule!

Some related web sites:

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Peter McCabe
02/17/2004 08:29 AM

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cc:
Subject: Another Comment on Proposed Fed.R.App.Proc. 32.1

I just received this from "Larry" Neuton. I assume that this is the only copy. It needs to be docketed and acknowledged.

Peter

----- Forwarded by Peter McCabe/DCA/AO/USCOURTS on 02/17/2004 08:28 AM -----

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02/17/2004 02:25 AM
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cc:
Subject: Proposed Fed.R.App.Proc. 32.1

To:

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

Attn: Peter McCabe, Secretary
Email: peter_mccabe@ao.uscourts.gov

I am writing in support of proposed Federal Rule of Appellate Procedure 32.1, which would require the courts to permit citation of unpublished judicial opinions.

It's unfortunate that rule 32.1 is needed. But it is indeed needed, to address the problem of those bizarre no-citation rules (such as Ninth Circuit Court of Appeals, Rule 36-3) which forbid (under penalty of sanctions) even mentioning in court any unpublished opinions produced by that very same court. The court is saying in effect: "You are forbidden to remind me what I just proclaimed the law to be about this exact same issue that you are arguing because I marked it 'not for publication'".

A judicial opinion - whether published or not - is law (at least for somebody) and yet, under rule 36-3, it's forbidden by law to even mention it to that very court of law. "Lawyers may cite sonnets by Shakespeare or scenes from Spielberg for their persuasive value, but they can't cite unpublished decisions by the very appellate courts they wish to persuade". (MacLean, "The Fight to Cite", Daily Journal (Feb. 6, 2004)). This is absurd.

Although I'm a layman (who never formally studied law) it sounds to me like the no-citation rules - whatever else you may say about them - do nothing to enhance the dignity of the court.

And it's not one or two cases being censored for some particular purpose. No-citation rules restrict ALL citation (with few exceptions) to the vast majority of appellate opinions. Ninth Circuit Judge Alex Kozinski, in his January 6, 2004, 22-page letter to this Committee in opposition to rule 32.1 ("Kozinski letter") states (at p.10) that opinions are written in only "15% of the cases" and that they "may well have to reduce that number".

In other words, 85% - and in the future more than this - of appellate case

law cannot be considered by the very court responsible for those same opinions.

What's more incredible is the reason given by Judge Kozinski to justify rule 36-3. He tells us (with a straight face) that the non-published opinions (WHICH HE SIGNS HIS NAME TO) are essentially JUNK: "When the people making the sausage tell you it's not safe for consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway" (Kozinski letter, p.2). I would ask Judge Kozinski the following question: Instead of just hiding it, wouldn't common sense tell us to stop cranking out unsafe sausage - and to replace the guilty sausage-makers with competent ones?

Judge Kozinski focuses his concern on the differences in quality of writing style between published and non-published opinions. Poor phrases or "fine nuances of wording" in an unpublished decision can lead to confusion (Kozinski letter,p.2). "While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising" (Kozinski letter,p. 9).

I would ask Judge Kozinski the following question: Is it the proper role of judges to spend their time creating monuments of judicial literature (which, incidentally, redound to their own fame and glory)? Or is it to dispense quality justice to the American public who are waiting in line to have their cases decided? In my humble opinion, I think the latter function is what's important.

Judge Kozinski's amazing letter reveals even more. Why are 85% of appellate opinions too lousy to be cited? He tells us it's because they're not even written by judges! They're written by law clerks (Kozinski letter,p.3). Appellate judges sign their names to these unpublished opinions after "an average of five or ten minutes devoted to each case" (Kozinski letter,p.5). This is a scandal - a complete abrogation of judicial responsibility! Judge Kozinski, another question: Aren't judges supposed to judge - to consider the facts and law of each case - not to just automatically sign their names to a judgment written by a clerk?

According to Judge Kozinski, only 15% of the cases deserve more than 5 minutes of the judge's time. The other 85% of the cases get short shrift. This cavalier approach to dispensing justice is simply not compatible with American values of equal justice under the law.

While Judge Kozinski is polishing his fine phrases and creating literary masterpieces for those select few whose cases will be published, the rest of us are handed over to law clerks to be made into sausages. This is a failure of justice.

Judge Kozinski's letter speaks for itself, without my having to make these points. What bothers me most - and the primary reason I'm writing you - is that a key presumption of Judge Kozinski - a presumption upon which his entire 22-page presentation stands or falls - is simply false. And (since I am, myself, a victim of rule 36-3) I can provide this Committee with information in this regard, which would probably not otherwise be available.

Judge Kozinski's presentation depends on the presumption that the current scheme of managing cases under rule 36-3 does not result in a failure of Justice or abuse by the judges. However, that presumption is not correct.

Judge Kozinski states that (although little time is given to unpublished cases):

"We are very careful to ensure that the result we reach in every case is right, and I believe we succeed" . . . "we can make sure that a disposition reaches the correct result and adequately explains to the parties why they won or lost, . . ." (Kozinski letter, p.5).

This is FALSE. My own appeal to the Ninth Circuit proves that this is false.

In his letter at p.7, Judge Kozinski states:

"Much of the criticism of the noncitation rule seems to be based on some dark suspicion that appellate judges . . . are using the noncitation rule as a means of ignoring or contravening the law . . . or giving certain parties a special exemption from the law generally applicable to everyone else. My colleagues and I are well aware of these concerns, and we are, frankly, baffled by them.".

This is no mere suspicion. It is a fact that the no-citation rule is being abused. This can be seen from my own 1998 appeal to the Ninth Circuit. And, ironically, the abusing judge is none other than Judge Kozinski himself!

In my unpublished case, In re Neuton (9th Circ. 1998) Case No. 98-55030, I argued in my opening brief (at p.16) that California Civil Procedure Code, sec. 391.2 precludes res judicata from applying in regard to an underlying issue.

In another unpublished case Wright v. United Airlines (9th Cir.1994) Case No. 94-15282, Judge Kozinski wrote the opinion (or shall I say he signed it as the opinion writer). The Wright opinion is decided on exactly the same argument as I made in my opening brief.

However in my case, Judge Kozinski (or shall I say his law clerk) ruled completely inconsistently with Wright saying that litigation of my underlying issue was barred. And the decision in my case didn't even mention sec. 391.2.

Because of Ninth Circuit Rule 36-3, I was barred from citing the Wright case in my opening brief. However, in my petition for rehearing (the function of which is to point out what is overlooked by the court's opinion) I did cite it because the existence of the Wright case (written by the same judge as the writer of the opinion in my case) proves that the sec. 391.2 argument which I had made in my opening brief, was completely overlooked.

My petition for rehearing put the issue squarely in Judge Kozinski's face, showing that his decision in my case totally contradicted his own rule of law set down in another unpublished opinion regarding the exact same statute (Sec. 391.2), and the exact same issue (res judicata effect of the statute). My petition for rehearing was summarily denied. (I see now from the Kozinski letter the he probably didn't even read the petition.)

Copies of these documents (in pdf format) are posted at the following URL's:

My opening brief: http://www.citynationalstory.com/98-55030/openbrief.pdf
Decision in my case: http://www.citynationalstory.com/98-55030/memorandum.pdf
My petition for rehearing:
http://www.citynationalstory.com/98-55030/petrehearing.pdf
Final order in my case: http://www.citynationalstory.com/98-55030/order.pdf
The Wright decision:
http://www.citynationalstory.com/98-55030/wrightopinion.pdf

In other words, the rule which Judge Kozinski sets forth as law in one opinion is completely contradicted by his own ruling in another, nearly identical, case. Same statute (sec.391.2), same issue (res judicata

effect of the statute) - yet a different rule for two different litigants. This is a failure of Justice resulting from the no-citation rule.

Incidentally, even without factual evidence, Judge Kozinski's presumption that judges can (and do) come to the correct decisions, spending five minutes per case (looking over their clerk's work) is not sustainable. Witkin, Manual on Appellate Court Opinions (West, 1977) states (p.25) that a ". . . basis for requiring a written statement of reasons in connection with the disposition of cases relates to the process of deciding cases. Most people find that their thinking is disciplined by the process of written expression. The reduction of ideas to paper, the organization of ideas on paper, significantly affects ultimate decisions; fuzzy thinking is exposed and . . ., errors are corrected.".

In other words, writing the opinion is, itself, part of the intellectual process of deciding the case. If the judge doesn't write the opinion himself he has not given proper attention to the case.

There are more objections to no-citation rules.

No-citation rules are unconstitutional - especially in regard to pro se litigants.

Tusk, "No Citation Rules as a Prior Restraint on Attorney Speech" Columbia Law Review (June 2003, p.1202) argues that no-citation rules violate attorneys' First Amendment free speech rights notwithstanding the dictum in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) that a lawyer's free speech rights are "extremely circumscribed" within the courtroom (due to "officer of the court" doctrine). Tusk argues that "[i]t is unthinkable to compare the state's interest in protecting fair trials with the interests asserted in the case of no-citation rules, especially because no-citation rules ultimately may operate to deprive litigants of a fair trial." (Tusk at 1228).

In any case, to whatever extent "officer of the court" doctrine may or may not allow no-citation rules to apply to attorneys, that doctrine should not apply, of course, to pro se litigants who are in no respect "officers of the court".

Judge Kozinski ridicules the prior restraint objection: ". . . we apply all manner of restrictions to what lawyers may argue in their briefs - restrictions that could never be applied to other types of speech." (Kozinski letter,p.20). Yes, but there is a difference between restrictions having to do with the form of the brief (e.g., whether a brief may be 30 pages or 40 pages long, etc.) on the one hand, and restrictions affecting the substance of the brief, on the other. Restrictions regarding the form of the brief affect all litigants equally. But rule 36-3 does not. It affects catastrophically those litigants (such as myself) whose case authority to support their argument happens to be unpublished. Rule 36-3 is more than a technical rule regarding day to day business of the court. It goes to the substance, the heart of litigation, and touches upon the very definition of the judicial process itself.

Another dimension to the prior restraint analysis is that rule 36-3 affects the First Amendment freedom to petition - not only freedom of speech (which concerns Tusk, supra). It constitutes government censorship by an unlawful prior restraint on the right to petition.

The right to petition encompasses the right to sue. (California Transport v. Trucking Unlimited (1972) 404 U.S. 508,510 . . . "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the

foundation of orderly government.'' (Chambers v. Baltimore & O.R. Co. (1907) 207 U.S. 142,148 . .).

In other words, rule 36-3 touches upon the most primary and essential of our American liberties, one which should not be tampered with.

The right to petition is "among the most precious of the liberties guaranteed by the Bill of Rights," Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967), and except in the most extreme circumstances citizens cannot be punished for exercising this right "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions," De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

The gist of Judge Kozinski's position is that - due to the judges' heavy caseload - a kind of judicial "triage" is necessary. Judges don't have enough time to write opinions in every case. 85% of the cases must be sacrificed (be unpublished). And rule 36-3 is necessary for this scheme to work. However this approach throws out the baby with the bathwater.

The purpose of the judicial system is to dispense Justice to the American public and to do so WITH EQUAL JUSTICE FOR ALL. Judge Kozinski's elitist approach is not a "triage" solution which complies with this purpose at all. It is one that makes life easier for judges, legal publishers, and some lawyers, but it's not one which benefits the American public in general.

The argument (Kozinski letter,p.14) that there is an "optimal amount of precedent" and that adapting the Anastasoff rule would result in "too much" precedent is difficult to fathom. The more precedent, the more precisely people come to know what their rights are - and to know this without the necessity of litigation. It should result in more settlements and less litigation.

And Judge Kozinski's concern (Kozinski letter,p. 14-16) for disadvantaged litigants (e.g., pro se litigants) is misplaced. With today's technology, it is no more difficult to find unpublished than published opinions. For example, a VersusLaw search turns up the published and unpublished opinions (meeting the search terms) side by side - at no extra charge.

Of course, the problem that caseloads are too heavy is without dispute. The obvious solution is to have more judges. This problem has been recognized for many years:

". . . although the judicial branch of our government is supposed to be co-equal with the executive and legislative branches, it is often given short shrift in terms of the resources provided for it to perform its functions adequately. The truth of that statement can be documented very readily in any jurisdiction by tracing the jurisdiction's population growth against the increases in the number of trial and appellate judges over the years. The solution to court congestion and delay is not to take away the rights of certain classes of citizens by eliminating certain types of cases from the justice system. It is rather to provide the personnel and facilities which will make the system function properly." (DEFENSE RESEARCH INST., Administration of Civil Justice Position Paper (Mil.,Wis. 1981),p.33 (emphasis added). See also (Hon.Stephen) REINHARDT, Whose Federal Judiciary is it Anyway? 27 Loyola(L.A.) L.R. (1993), who proposes that "Congress double the size of the courts of appeals", and states that "We spend almost as much on one stealth bomber as we do on the whole federal judicial system. . . 160 federal appellate judges is simply far too small a number for a nation of over 240 million people.".

The Ancient Romans had a solution for the caseload problem in "Lex Cincia", a law of Ancient Rome prohibiting paying fees to lawyers for representing anyone in court.

"During the rise of Rome, its citizens involved in lawsuits pleaded their own cases, as was true everywhere in the ancient world. . . . According to the lex cincia passed by the Senate in 204 BC, the advocati [legal experts] were forbidden from taking fees. During a Senate debate [47 AD.] of the issue, Senator Gaius Silius said:

'If no one paid a fee for lawsuits, there would be less of them! As it is, feuds, charges, malevolence and slander are encouraged'." (Tacitus, The Annals of Imperial Rome, Penguin Books, Harmondsworth, 1956, pg.233).

Statutes to limit lawyers' fees would be a giant step towards curbing spiraling caseloads.
(There are other possible solutions but this is getting off topic.)

Judge Kozinski has made an investment in rule 36-3 by his decision in Hart v. Massanari, 266 F.3d 1155 (9th Cir. 09/24/2001) which upholds the constitutionality of rule 36-3, contra the scholarly, well-reasoned opinion of Anastasoff v. United States, 223 F.3d 898, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000), which rules that a similar court rule is unconstitutional.

However, the reasoning in Hart is flawed and misses the point of Anastasoff. Whether a judge can arbitrarily invent his own law and issue capricious decisions or whether he is bound by precedent goes to the very definition of what is "judicial power" - it's not simply "one aspect of the way federal courts do business".

In any case, Judge Kozinski's "depth of feeling" on this subject (Kozinski letter,p.22) reflects his investment in rule 36-3. However, in my view, if he put as much time, effort and attention into reading briefs and writing opinions, as he does into lobbying for rule 36-3 (and against proposed rule 32.1) our entire judicial system would be better off.

In conclusion, I thank you for having had the courtesy and patience to read this far. And I wish your Committee success in promulgating the proposed rule 32.1.

Respectfully submitted,

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