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

Dear Mr. McCabe:

I write to express my opposition to proposed Federal Rule of Appellate Procedure 32.1, which would allow the citation of unpublished, non-precedential opinions. I was an Assistant to the Solicitor General in the Office of the Solicitor General of the United States Department of Justice for more than six years (from November of 1997 until earlier this month), and I was in private practice for four years before that. In my experience, the prohibition against the citation of unpublished opinions — a prohibition employed by numerous circuits — serves important functions. I believe that its abolition would disserve litigants and the judicial system alike.

It is, as an initial matter, difficult to discern the benefit of permitting unpublished, non-precedential circuit court decisions to be cited. In general, those decisions are not designated for publication precisely because they break no new ground. Consequently, for any particular proposition of law articulated in those decisions, there ordinarily will be a perfectly serviceable published, precedential decision establishing the same point. Furthermore, to the extent that the reasoning of a particular unpublished decision is persuasive, nothing prevents litigants from appropriating the reasoning. The only thing litigants may not do is cite the decision as if it were an authoritative statement of law from the court of appeals.

The potential costs of allowing litigants to cite non-precedential, unpublished decisions, in contrast, are great. First, because such decisions are designed primarily to explain the outcome in that case to the litigants before the court — not to establish binding law upon which others may rely — they are not drafted with the same extreme caution as published decisions. For example, unpublished decisions may make statements of law without explaining qualifications and limits that, although not relevant in that case,

will be important in others. They may omit potentially important facts, since the litigants to whom they are directed already know the facts. Or they may include extraneous materials, because it is often more efficient for courts to draft longer decisions than to take the time necessary to pare down overlong drafts. Thus, even though an unpublished decision will accurately explain the court's rationale to the litigants in that case, it may easily be misconstrued when relied upon by others less familiar with the underlying litigation.

For similar reasons, allowing the citation of unpublished, non-precedential decisions may impose additional costs on litigants and the courts. Once such decisions can be cited, few attorneys will limit themselves to discussing published decisions in their briefs. Instead, it seems likely that litigants will begin parsing unpublished decisions and debating their meaning at length. Lest they be accused of issuing inconsistent decisions, the courts of appeals in all likelihood will similarly take to discussing non-precedential, unpublished decisions in their published opinions. And district courts, exposed to myriad unpublished decisions, will very likely find themselves following such decisions as if they were binding precedent. Indeed, it would take an unusual degree of intestinal fortitude for a district court to disregard the unpublished decisions of a superior tribunal once those decisions are identified to it, even if the superior tribunal itself has designated the decisions non-precedential.

For that reason, I also fear that the development of the law could be impaired by permitting reliance on and citation of unpublished decisions. District courts often invest substantial time and energy developing original and helpful analysis when applying the law to the novel factual circumstances they confront in individual cases. That investment of time and energy could easily disappear as district courts spend more of their time attempting to locate, analyze, and find "guidance" in the unpublished opinions of the courts of appeals. Why go out on a limb when you can simply follow what appears to be the path blazed by three circuit judges in what appears to be (but may not be) similar circumstances?

Finally, allowing the citation of unpublished, non-precedential decisions may substantially increase the number of panel and en banc rehearing petitions. Currently, repeat players in the courts of appeals with a long-term interest in the proper development of the law can safely decline to seek further review of an unpublished decision if the relevant circuit bars its citation, even if the litigant fervently disagrees with the decision's reasoning or particular statements in it. The United States, for example, may (and sometimes does) choose to let an unpublished decision go unchallenged, secure in the knowledge that the issue it addresses will remain open for further consideration and percolation both in the district courts and court of appeals. If unpublished, non-precedential decisions may be cited, however, such forbearance could prove costly and may become less common. The

government will have to consider the potential impact of having the particular decision (and any potentially loose or unqualified language contained therein) cited against it in other cases. The result is likely to be more panel rehearing petitions, more requests for rehearing en banc, potentially more petitions for writs of certiorari, as well as additional amicus submissions by other repeat players concerned with the proper development of the law.

I recognize the concern, expressed by some, that unpublished, non-precedential decisions may distort the law because certain types of decisions (e.g., those reversing convictions) are more likely to be designated for publication than others (e.g., those affirming convictions). That concern, it seems to me, may provide good reason for the courts of appeals to keep careful statistics regarding, and to be particularly diligent in monitoring, the use of unpublished decisions. But I fail to see how allowing the citation of such decisions would have any effect on the perceived bias. Even under proposed Rule 32.1, published decisions have precedential effect and unpublished decisions do not. Any perceived distortion in the law that results from the non-publication of certain types of decisions and the frequent publication of others would be largely unaffected.

In sum, I see little reason to abandon the current system, under which each circuit decides for itself the propriety of allowing unpublished decisions to be cited. The judges of each circuit are best aware of their caseloads, their ability to scrub their unpublished decisions with the same care as their published ones, and the sensibilities and proclivities of the local bar. I urge the committee to resist the temptation to adopt a one-size-fits-all solution — particularly given that the proposed garment is appears to be an ill-fit for many courts of appeals.

Sincerely yours,

Jeffrey A. Lamken