BUT WHAT WILL THEY DO WITHOUT UNPUBLISHED OPINIONS?: SOME ALTERNATIVES FOR DEALING WITH THE NINTH CIRCUIT'S MASSIVE CASELOAD POST F.R.A.P. 32.1

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I. INTRODUCTION

Consider the following hypothetical: you are counsel for a day care center, and you are researching whether or not a child with diabetes qualifies as disabled under the Americans with Disabilities Act (ADA).[1] Assume summary judgment had already been granted in favor of the child and you are now appealing to the U.S. Court of Appeals for the Ninth Circuit. During your research you come across a Ninth Circuit case directly on point.[2] In the case, the court held a plaintiff with diabetes who required only moderate changes and restrictions in his diet was not substantially impaired in his ability to eat, and thus did not qualify as disabled under the ADA.[3] This is the exact argument you want to make, but there is a problem. Instead of saying "Opinion" the document says "Memorandum," and has the following disclaimer: "[t]his disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3."[4]

Uncertain as to how this would affect your intended use, you look up Ninth Circuit Rule 36-3, which provides:

> (a) Not Precedent: Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.
>
> (b) Citation: Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit, except in the following circumstances.
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> (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.
>
> (ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

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[1] 42 U.S.C. § 12102 (2004).

[2] Beaulieu v. Northrop Grumman Corp., 23 F. App'x 811 (9th Cir. 2001).

[3] *Id.* at 812.

[4] *Id.*

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

(c) Attach Copy: A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.[5]

Although the rule seems to bar citation as precedent, you wonder, if at the very least, you could cite it as persuasive authority. After all, why would the court ban all mention of a case decided by the same court when it addressed the same issue and only had done so in this one opinion? Surprisingly, citing the unpublished opinion even for this limited purpose can result in substantial sanctions.

Recently, limited citation rules such as Ninth Circuit Rule 36-3 have attracted much attention and criticism.[6] A proposed rule from the Judicial Conference, Federal Rule of Appellate Procedure 32.1, which will make all unpublished opinions issued after January 1, 2007, citable in all appeals courts,[7] seeks to bring an end to these limited citation rules. Section II of this note will review the arguments for and against limited citation rules including a detailed look at limited citation rules in the context of precedent. This section will emphasize the Ninth Circuit's heavy reliance on the use of unpublished opinions and limited citation rules given the Circuit's overwhelming workload. Section III will provide a brief background to the rule-making process and discuss the current status of Rule 32.1. Section IV will then address the potential consequences Rule 32.1 will create for the Ninth Circuit, such as trial courts giving too much weight to unpublished decisions. Additionally, the increased time in preparing unpublished decisions may lead to a decreased quality of published opinions. Also, this will create confusion for attorneys who are faced with inconsistencies between federal and state procedure. Finally, Section V will address potential solutions to these consequences, such as splitting the Ninth Circuit into smaller circuits, adding more judges to the Ninth Circuit bench, and limiting appeals as of right.

II. THE HISTORY OF LIMITED CITATION RULES

A. *Arguments for the Use of Limited Citation Rules*

1. Massive Caseloads Threaten Quality of Work

Some judges and scholars have defended the use of unpublished opinions on grounds of judicial economy, indicating that because the size,[8] and number of appeals filed have increased at a rate faster than the appellate courts, the

[5] 9TH CIR. R. APP. P. 36-3.

[6] *See infra* Section II.B.

[7] *See* FED. R. APP. P. 32.1 (effective Dec. 1, 2006).

[8] Hon. Boyce Martin, *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 182-83 (1999) ("The size of the appeals, in terms of documents submitted to the court, also has grown. My evidence here is based on personal experience, but I think most judges would agree with me on this point. More briefs are pushing the fifty-page limit, and the joint appendices are coming in by the box-load. It is all I can do to lift these appendices, let alone read them.").

courts have had to resort to methods of dealing with cases in a more expeditious manner.[9] Thus, the use of limited publication and citation rules can be viewed as an administrative measure adopted by the appellate courts in response to "dramatic caseload increases in the late 1960s and early 1970s."[10] These rules, originally urged by the United States Judicial Conference in 1972,[11] were developed and adopted by each of the individual circuits as an effort to help with caseload management.[12]

Judges have continued to argue that the use of unpublished opinions yields numerous advantages including: preserving limited judicial resources;[13] allowing the court to exclude a recitation of the facts and "ponderous discussions of the law," which in turn allows the opinion to be shorter;[14] relieving judges from having to worry about precise wording that may bind them in future cases due to the unpublished opinion's lack of precedential effect;[15] and saving judges and parties time by limiting the number of "essentially identical cases" that must be researched.[16] Because unpublished opinions tend to be shorter than published opinions,[17] the judicial effort needed per unpublished opinion is substantially lower and allows the court to better keep up with its caseload. One study found that although "the number of published opinions per judge remained roughly unchanged between 1960 and 1995, the number of cases decided per judge more than quadrupled in the same period."[18] This is due in large part to the increased use of unpublished opinions.

The use of unpublished opinions has become especially popular in the Ninth Circuit due to its massive caseload.[19] Despite having close to fifty judgeships by the end of 2004, the court has continued to struggle with the

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[9] David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 821 (2005). *But cf.* Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 563 (2005) (criticizing the adoption of limited publication as a method to deal with increased caseloads without considering alternative methods such as increasing the size of the judiciary).

[10] 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, 37 (2005).

[11] *Id.*

[12] *Id.* at 37-38.

[13] Hon. J. Clifford Wallace, *Essay: Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT'L L. 187, 203 (2005) (arguing that between September 2002 and September 2003 the Ninth Circuit only issued published opinions in fifteen percent of its cases, but that "[b]y disposing of the other eighty-five percent expeditiously in 'memorandum dispositions,' the court ensured that the precedential opinions received the time and craftsmanship they deserved").

[14] *Id.* at 202 (arguing that "[t]he court drafts the disposition for the benefit of the trial court and the parties, all of whom are already familiar with the case's factual background and legal issues").

[15] *Id.*

[16] *Id.*

[17] Law, *supra* note 9, at 821 (indicating that many unpublished opinions rarely exceed two sentences in length and "in some circuits, the median length of an unpublished opinion is fewer than fifty words").

[18] *Id.*

[19] Wallace, *supra* note 13, at 203.

demands of its caseload.[20] According to the Administrative Office of the United States Courts, the total number of appeals commenced or pending in the Ninth Circuit between April 1, 2004, and March 31, 2005, equaled twenty-four percent of the total number of such federal intermediary appeals filed nationwide, and forty-five percent more than the circuit with the next largest caseload.[21] Thus, Ninth Circuit judges have been forced to resort to the use of unpublished opinions to control their caseload, much like the Supreme Court uses discretionary review to control its caseload.[22]

Some have argued that Rule 32.1 will eliminate these advantages because, since "the precedential effect of an opinion turns on the exposition of the relevant facts . . . and the precise phrasing of propositions of law,"[23] judges will have to spend more time ensuring that the language used is precise and safe from distortion in future cases.[24] This will not only eliminate the resources saved by using unpublished opinions, but it will also decrease the quality of published opinions by leaving the judges with less time to work on them.[25]

2. *Unpublished Opinions Are Generally Written by Law Clerks*

Supporters of limited citation rules often argue the sheer size of the caseloads appellate courts carry makes limited citation rules necessary.[26] Due to time constraints and caseload pressures, appellate court judges have had to dramatically increase their reliance on judicial staff and law clerks.[27] Although

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[20] Crystal Marchesoni, *"United We Stand, Divided We Fall"?: The Controversy Surrounding a Possible Division of the United States Court of Appeals for the Ninth Circuit*, 37 TEX. TECH L. REV. 1263, 1264 (2005).

[21] The total number of appeals commenced or pending for all circuits between April 1, 2004 and March 31, 2005 equaled 112,394, while the total number for the Ninth Circuit during that same period equaled 27,441, and the total number for the Second Circuit during that period was 15,171. *See* Admin. Office of the U. S. Courts, Federal Judicial Caseload Statistics 22-25 tbl.B-1 (2005), http://www.uscourts.gov/caseload2005/tables/B01mar05.pdf [hereinafter "Caseload Statistics"].

[22] Hart v. Massanari, 266 F.3d 1155, 1177 (9th Cir. 2001).

[23] Letter from Alex Kozinski, U.S. Circuit Judge, 9th Cir., to Samuel A. Alito, Jr., U.S. Circuit Judge, 3rd Cir. 5 (Jan. 16, 2004), *available at* http://www.nonpublication.com/kozinskiletter.pdf [hereinafter "Kozinski Letter"].

[24] *Hart*, 266 F.3d at 1178; *cf.* Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 96 (2004) ("The additional time necessary to transform an unpublished disposition into a published opinion might also be related to *judges'* egos.") (emphasis in original).

[25] *Hart*, 266 F.3d at 1178.

[26] Kozinski Letter, *supra* note 23, at 5.

[27] *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275 (1996) ("Clerks and central staff screen the appeals to determine how much judge time should be allocated to each case. These para-judicial personnel also recommend whether oral argument should be granted and whether a full opinion (or, indeed, any opinion) should be written."); *see also* FRANK M. COFFIN, THE WAYS OF A JUDGE 69-70 (1980) (arguing that increased caseloads leave judges with no alternative but to rely heavily on law clerks); *but cf.* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 139-59 (1996) (arguing that the increase in the number of law clerks per judge has led to the greater delegation of judicial responsibility).

some scholars have questioned the value of such delegation,[28] it is practiced in one form or another throughout the entire federal court system.[29] This delegation has been extended to the area of unpublished opinions as well. Unpublished opinions, unlike other opinions, are generally not written by the judges whose names appear on the decisions,[30] but rather are written by law clerks.[31] For example, in the Ninth Circuit, many unpublished decisions are first drafted by law clerks who then present the decision to a three-judge panel in camera.[32] Each case is then given only five to ten minutes of consideration by the full panel.[33] Although the judges insist that they are careful to ensure that the right result is reached in each case, these time constraints leave "simply no time or opportunity for the judges to fine-tune the language of the disposition."[34] The remaining unpublished decisions that come from the Ninth Circuit are merely converted bench memos that have only been edited "by adding a caption and changing the beginning and the ending . . . [leaving] protracted discussions of the facts – some relevant, some not – and discussion of such noncontroversial matters as the standard of review . . . [without checking] the language for latent ambiguities or misinterpretations."[35] Ninth Circuit Judge Alex Kozinski argues that allowing citation to unpublished opinions "as if they represented more than the bare result as explicated by some law clerk or staff attorney – is a particularly subtle and insidious form of fraud."[36] Another judge has echoed Kozinski's concern regarding the low value of unpublished opinions due to the fact that judges tend to "rely on recent graduates from supposedly excellent law schools for the writing and most of the editing" of unpublished opinions.[37]

B. Arguments Against the Use of Limited Citation Rules

1. Unpublished Opinions Are Available Equally

Although unavailability of the unpublished opinions was a common justification for the use of limited citation rules,[38] this justification has recently lost most of its force. West Publishing began collecting, classifying and including

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[28] Kenneth J. Schmeir & Michael K. Schmeir, *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?*, 7 J. L. & SOC. CHALLENGES 233, 245-46 (2005) ("While this has not proved to be true, we think no-citation rules hide quality control problems resulting from the delegation of appellate decision-making to law clerks.").

[29] Federal Judicial Center, *Staff Attorney Offices Help Manage Rising Caseloads*, http://www.uscourts.gov/newsroom/stffattys.htm (last visited Aug. 16, 2006).

[30] *See* Wasby, *supra* note 24, at 96 ("While the panel members' names appear on unpublished dispositions, the dispositions are not signed; if the name of an individual judge is not attached to the disposition as author, there is less need to polish the writing.").

[31] Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!*, CAL. LAW., June 2000, at 43-44.

[32] Kozinski Letter, *supra* note 23, at 5.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 7.

[37] *See* Wasby, *supra* note 24, at 95 (quoting the comments of Ninth Circuit Judge Alfred T. Goodwin).

[38] J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 423 (2005) ("The court noted that allowing practitioners to rely on unpublished opinions would compound the burdens and costs of legal research necessary for

unpublished opinions of the appeals courts on Westlaw in 2000, but it was not until late 2001 that West announced it would start publishing those decisions via the Federal Appendix.[39] Due to uncertain usability of the unpublished decisions, the announcement also indicated that West would "include a caveat . . . with each case to let customers know that these opinions were not selected for publication in the Federal Reporter."[40] Although initial reaction from scholars seemed skeptical about how publishing these supposed unpublished opinions would work,[41] the Third Circuit quickly embraced the notion of making unpublished opinions available to the public by putting them up on its website so they could "be picked up, archived and indexed by electronic publishers such as Westlaw."[42] Because of these steps, unpublished opinions are now as easily accessed and researched as are any other published cases.

2. Limited Citation Rules Lead to Inconsistent/Conflicting Applications of Law

Although defenders of unpublished opinions claim "the overwhelming majority of unpublished opinions are actually useless for future litigation because they involve no new law,"[43] but rather only the application of well established legal principles, some scholars argue unpublished opinions often reflect a lack of consistency in the application of the law.[44] Examples of this lack of consistency can be found at both the intra-[45] and inter-circuit levels.[46] A lack of consistency can also be found in unpublished opinions where the legal principle applied is not based upon "settled" precedent.[47] Where the law

effective client representation. The court concluded that the potential prejudice caused by disparate access to unpublished opinions warranted their exclusion at the trial court level.").

[39] *West Launches Research Library & Coverage of Unpublished Decisions*, LEGAL PUBLISHER, Sept. 30, 2001, *available at* 2001 WLNR 4196099.

[40] *Id.*

[41] Richard A. Leiter, *AALL Exhibits 2001: An Annual Review*, LEGAL INFORMATION ALERT, July 1, 2001, at 5 ("Readers, I beg your sympathy for all legal research instructors of the world who will now have to figure out a way of teaching students what an 'unpublished opinion' is. I haven't the foggiest.").

[42] *The 3rd Circuit Gets It Right on Non-Precedential Opinions*, THE LEGAL INTELLIGENCER, Mar. 25, 2002, at 9.

[43] Kozinski Letter, *supra* note 23, at 12 (quoting J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L. J. 433, 492 (1994)).

[44] Sullivan, *supra* note 38, at 447.

[45] *See* Mosten Mgmt. Co., Inc. v. Zurich-American Ins. Group, 62 F. App'x 175, 179 (9th Cir. 2003) (Kozinski, J., dissenting) (arguing the majority's opinion was inconsistent with case precedent); Favreau v. Chemcentral Corp., No. 94-56707, 1997 WL 85281, at *8 (9th Cir. Feb. 27, 1997) (Kozinski, J., dissenting in part) ("By struggling to make something out of nothing, the majority creates conflicts both with California law and our own caselaw.").

[46] *See* Williams v. County of Santa Barbara, 152 F. App'x 628, 632 (9th Cir. 2005) (Bybee, J., dissenting) ("I believe the majority's overly restrictive interpretation is inconsistent with the purposes and plain language of the statute."); United States v. Ramirez-Soberanes, No. 99-4097, 2000 WL 369348, at *7 (10th Cir. Apr. 11, 2000) (Lucero, J., dissenting in part) ("With its holding today, the majority creates a circuit split in this area of *Batson* jurisprudence.").

[47] *See* He v. Gonzales, 160 F. App'x 637, 639-40 (9th Cir. 2005) (Bybee, J., dissenting) ("I am unaware of any case, besides this one, where this Court has applied the doctrine of equitable tolling after a litigant has already raised his claim. . . . The rationale of the majority opinion seems to allow a petitioner to raise arguments indefinitely, essentially granting peti-

is unsettled, litigants are unable to use these unpublished opinions to help their arguments, even where there are no other sources of law on the issue. By not allowing this type of citation the courts are in effect prohibiting the litigants from narrowly defining the true issues, because each "unsettled" issue previously decided in an unpublished opinion will have to be relitigated and a new result may be obtained.[48] This allows multiple panels of the same circuit to reach different conclusions on virtually identical issues and thereby create inconsistency of law within the circuit.

A third inconsistency is created by the limited citation rules themselves. By their express terms, limited citation rules prohibit only citation of unpublished opinions to, or by, the courts of the circuit in which the limited citation rule was created.[49] This creates an inconsistency whereby attorneys or courts in other circuits are free to cite, and discuss, unpublished opinions of different circuits, even where the opinion could not be cited in the authoring circuit.[50] These attorneys and courts thus rely upon the unpublished opinion as representative of the law of the authoring circuit, despite the fact that this may not be the case.[51]

Further, the circuits often fail to enforce their own limited citation rules. According to one judge "[d]espite our rule, parties do on occasion cite unpublished dispositions to the [courts] of our circuit, and I have read a number of transcripts in which an unpublished disposition was the subject of discussion."[52] It is likely parties disobey the limited citation rules due to the circuit's lack of consistent enforcement thereof.[53] The district courts, too, while acknowledging the circuit's limited citation rule, cite to unpublished opinions

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tioner an unlimited window in which to assert his claims. I am unaware of any other area in our jurisprudence where such a perpetual right exists."); Sosa-Hernandez v. INS, No. 99-70358, 2000 WL 734641, at *2 (9th Cir. June 7, 2000) (Kleinfeld, J., dissenting) ("The majority has not cited authority for the proposition that the victim of persecution has to prove who his persecutors were and I do not think that the proposition is correct.").

[48] However, as Judge Kozinski noted, nothing would prevent a litigant from copying the research and reasoning wholesale from an unpublished opinion. *See* Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 37.

[49] *See* 9TH CIR. R. APP. P. 36-3(b).

[50] *See* Newborn v. Yahoo! Inc., No. 04-00659, 2006 WL 1409769, at *9 (D.D.C. May 23, 2006) (citing Invision Media Servs., Inc. v. Lerner, 175 F. App'x 904 (9th Cir. 2006)); Johnson v. Structured Asset Servs., LLC, 148 S.W.3d 711, 729-30 (Tex Ct. App. 2004) (discussing Short v. Singer Asset Finance Co., LLC, 107 F. App'x 738 (9th Cir. 2004)); Brown v. City of Milwaukee, 288 F.Supp 2d 962, 979 (E.D. Wis. 2003) (discussing Meyers v. Nagel, No. 90-35718, 1992 WL 92798, at *2 (9th Cir. Apr. 30, 1992)); Slaughter v. City of Philadelphia, No. 94-2329, 1995 WL 12060, at *4 n.3 (E.D. Pa. Jan. 12, 1995) (unpublished) (citing Pettes v. Goldman, No. 87-2670, 1988 WL 57690 (9th Cir. Sept. 29, 1988)).

[51] *See Slaughter*, 1995 WL 12060 at *4 n.3 ("This unpublished opinion is not precedential but as an opinion filed of public record which presumably reflects the considered judgment of the panel, it is instructive.").

[52] Kozinski Letter, *supra* note 23, at 2-3.

[53] For example in Singh v. Gonzales, 125 F. App'x 888 (9th Cir. 2005), petitioner's citation to Kemi v. Ashcroft, 102 F. App'x 65 (9th Cir. 2004) in his opening brief went completely unmentioned or punished. *See* Petitioner's Opening Brief at 6-7, *Singh*, 125 F. App'x 888 (No. 03-74178).

for legal principles.[54] Even the circuit court judges themselves will occasionally disregard the circuit's limited citations rule and cite an unpublished opinion.[55]

C. *Limited Citation Rules in the Context of Precedent*

1. Anastasoff v. United States:[56] *Eighth Circuit Finds Its Limited Citation Rule*

Writing for the Federal Court of Appeals for the Eighth Circuit, Judge Richard Arnold held the Eighth Circuit's limited citation rule unconstitutional.[57] The appellant in *Anastasoff* argued that the "Mailbox Rule"[58] under 26 U.S.C. § 7502 should be applied to refund claims for overpaid federal income tax under 26 U.S.C. § 6511(b).[59] However, this exact argument had been raised in front of, and been rejected by, a previous Eighth Circuit panel in *Christie v. United States*.[60] Appellant claimed that because *Christie* was not selected for publication, the Eighth Circuit's limited citation rule[61] denied it precedential effect and the court would not be bound to follow it.[62] The court, however, disagreed.

Judge Arnold first noted that "[i]nherent in every decision is a declaration and interpretation of a general principle or rule of law. This declaration of the law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties."[63] Judge Arnold thus stated that all decisions carry with them a precedential statement of the law which binds future courts. Judge Arnold further stated, a "judge's duty to follow precedent derives from the nature of the judicial power itself."[64] This is so because in order to exercise the judicial power, a judge must first determine the law.[65]

Judge Arnold argued the Framers understood the judicial power to implicitly include the doctrine of precedent,[66] and the lack of a reporting system at

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[54] *See* Allstate Ins. Co. v. Davis, 430 F. Supp 2d 1112, 1130-31 n.10 (D. Haw. 2006) (discussing N. Ins. Co. of N.Y. v. Hirakawa, 68 F. App'x 835, 836 (9th Cir. 2003), while also stating: "The Court does not rely on the foregoing unpublished opinion as precedent pursuant to U.S.Ct. of App. 9th Cir. Rule 36-3, although the Court does find the opinion to be illustrative.").

[55] *See* Boston Safe Deposit & Trust Co. v. Operadora Dulcinea, No. 94-15610, 1995 WL 756276, at *2 (9th Cir. Dec. 20, 1995) (citing Procare Labs., Inc. v. Gull Labs., Inc., No 93-16623, 1995 WL 110137 (9th Cir. Mar. 15, 1995)).

[56] Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).

[57] *Id.* at 905.

[58] The "Mailbox Rule" provides that claims are received when postmarked, rather than when physically received. *See* 26 U.S.C. § 7502 (2004).

[59] *Anastasoff*, 223 F.3d at 899.

[60] Christie v. United States, No. 91-2375, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (unpublished).

[61] 8TH CIR. R. APP. P. 28A(i).

[62] *Anastasoff*, 223 F.3d at 899.

[63] *Id.* at 899-900 (citation omitted).

[64] *Id.* at 901.

[65] *Id.*

[66] *Id.* at 901-2.

the time of the founding did not limit a decision's precedential effect.[67] Judge Arnold stated that because the Framers understood the doctrine of precedent to arise out of "the nature of the judicial power itself," they must have "intended[ ] the doctrine of precedent [to limit] the 'judicial power' delegated to the courts in Article III."[68] Thus, because the Eighth Circuit's limited citation rule allows the court to deny precedent to the cases it so chooses, the rule "expands the judicial power beyond the limits set by Article III . . . allowing [the court] complete discretion to determine which judicial decisions will bind [the court] and which will not."[69]

Because the court found the portion of the Eighth Circuit's limited citation rule which makes unpublished cases non-precedential unconstitutional, it found *Christie* to be controlling and ruled against the appellant.[70] However, following the decision, the appellant filed a petition for an en banc hearing.[71] While waiting for that hearing, the parties reached a settlement agreement.[72] The en banc court found the settlement made the decision of the prior panel moot.[73] Once again writing for the court, Judge Arnold reluctantly stated "[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit."[74] Thus, despite the first *Anastasoff*, the constitutionality of limited citation rules still remained an open question.

2. Hart v. Massanari:[75] *Judge Kozinski's Rebuttal*

With this question still open, Ninth Circuit Judge Alex Kozinski weighed in. The appellant in *Hart v. Massanari* cited an unpublished opinion in his opening brief.[76] Because this violated the Ninth Circuit's limited citation rule,[77] the court ordered the appellant's counsel to show cause why he should not be sanctioned.[78] Counsel, relying upon the ruling in the first *Anastasoff*, argued that the Ninth Circuit's limited citation rule was unconstitutional.[79] The court disagreed.[80]

Judge Kozinski first attacked the credibility of *Anastasoff* by pointing out it "may be the first case in the history of the Republic to hold that the phrase 'judicial Power' encompasses a specific command that limits the power of the

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[67] *Id.* at 903 ("[T]he Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision . . . judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum.") (citation omitted).

[68] *Id.*

[69] *Id.* at 905.

[70] *Id.*

[71] Anastasoff v. United States, 235 F.3d 1054, 1055 (8th Cir. 2000).

[72] *Id.*

[73] *Id.* at 1056.

[74] *Id.*

[75] Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001).

[76] *Id.* at 1158-9.

[77] 9TH CIR. R. APP. P. 36-3.

[78] *Hart*, 266 F.3d at 1159.

[79] *Id.*

[80] *Id.* ("[*Anastasoff*] 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.").

federal courts."[81] Rather, Judge Kozinski argued "the term 'judicial Power' in Article III is more likely descriptive than prescriptive."[82] Because of this belief, and the fact that the doctrine of precedent is not specifically mentioned in the Constitution, Judge Kozinski argued the doctrine was not intended to be given constitutional status.[83]

Judge Kozinski noted several court practices that existed at the time of the framing, including allowing juries to determine not just fact but also what the law was;[84] appellate court judges writing individual opinions rather than having one unitary decision voicing the opinion of the majority;[85] and allowing trial court judges to take part in hearing appeals of their own decisions,[86] that are no longer considered good practices.[87] Thus, allowing courts to find the phrase "judicial Power" to encompass such practices leads to the "risk that this will allow judges to pick and choose those ancient practices they find salutary as a matter of policy, and give them constitutional status."[88]

According to Judge Kozinski, "[c]ase precedent at common law . . . resembled much more what we call persuasive authority than the binding authority . . . of the federal judicial system today."[89] The modern concept of binding precedent instead did not come about until the vertical and horizontal organization of the courts,[90] the establishment of a more complete reporting system,[91] and a changed belief that a court's decision is not merely evidence of what the law is, but rather the decision itself is the law.[92] As a result of these factors, the first panel of a court of appeals "to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals."[93] Once this precedent has been established the other courts are bound to follow it even if they consider it to be incorrect or unwise.[94] This binding precedent must be followed until overturned by the Supreme Court, or the appeals court of the same circuit sitting en banc.[95] Judge Kozinski noted however, that although a prior panel's decision is binding on future panels of the same circuit and the inferior courts of that circuit, it is not binding on other circuits or their inferior courts.[96] If the understanding of precedent in *Anastasoff* were correct, the decisions of the first panel to hear a certain matter

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[81] *Id.* at 1160.
[82] *Id.* at 1161.
[83] *Id.* at 1163 ("[I]n order to follow the path forged by *Anastasoff*, we would have to be convinced that the practice in question was one the Framers considered so integral and well-understood that they did not have to bother stating it, even though they spelled out many other limitations in considerable detail.").
[84] *Id.* at 1162.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 1163.
[89] *Id.* at 1175.
[90] *Id.* at 1170.
[91] *Id.* at 1168.
[92] *Id.* at 1170.
[93] *Id.* at 1171.
[94] *Id.* at 1170. This is commonly referred to as the "prior panel rule."
[95] *Id.* at 1171.
[96] *Id.* at 1172-73.

would be binding precedent on all circuits and their inferior courts.[97] Judge Kozinski reasoned that the fact this does not happen is a reflection of judicial policy in the structure and organization of the federal courts,[98] which could not be controlling if the doctrine of precedent were a constitutional limitation.[99] Judge Kozinski also pointed to the fact trial court decisions do not create binding precedent for other trial courts, even those in the same district.[100] Judge Kozinski argued this could not be a correct result if the understanding in *Anastasoff* were correct because "the Constitution vests the same 'judicial Power' in all federal courts" and applies equally to the trial courts.[101]

Judge Kozinski then argued the Ninth Circuit's limited citation rule is a limitation on the doctrine of precedent created to further judicial policy.[102] Due to the limited resources of the appeals courts, Judge Kozinski argued unpublished opinions allow the courts to manage their caseload much like the Supreme Court manages its caseload through discretionary review.[103] Judge Kozinski pointed out unpublished opinions do not indicate a lack of reasoned analysis, but merely are "not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases."[104] Judge Kozinski further contended that allowing citation to unpublished opinions would cause the time gained from writing such opinions to vanish,[105] as judges would have to spend more time reflecting upon the language used in fear it would be distorted in future cases.[106] According to Judge Kozinski, since unpublished cases often involve non-novel issues, making all opinions precedential increases the chances of inadvertent differences in language expressing the standard or rule.[107] Although minor, these differences may "have significantly different implications when read in light of future fact patterns" leading to inadvertent intracircuit conflicts which can only be resolved by en banc review.[108] As Kozinski pointed out: "[i]n the end, we do not believe that more law makes for better law."[109] Because the court found the doctrine of precedent to be based in judicial policy rather than constitutionally mandated, it ruled that the Ninth Circuit's limited citation rule is constitutional.[110]

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[97] *Id.* at 1176.

[98] *Id.* at 1173.

[99] *Id.* at 1176.

[100] *Id.* at 1174.

[101] *Id.* at 1176.

[102] *See id.* at 1177.

[103] *Id.*; *see also*, *infra* Section V.C.

[104] *Hart*, 266 F.3d at 1177-78.

[105] *Id.* at 1178.

[106] *Id.*

[107] *Id.* at 1179.

[108] *Id.*

[109] *Id.* at 1180 n.39.

[110] *Id.* at 1180. The Court also found that Appellant's counsel should not be sanctioned for violating Rule 36-3 due to the doubt *Anastasoff* raised. *Id.*

III. THE CURRENT STATUS OF RULE 32.1

Amidst this battle regarding the propriety of unpublished opinions and limited citation rules, Federal Rule of Appellate Procedure 32.1 was proposed pursuant to the Rules Enabling Act, codified in U.S.C. §§ 2071-2077. The Rules Enabling Act, which Congress originally enacted as part of New Deal era reform, sets forth the procedure by which federal courts create uniform rules of procedure to be followed within the respective court.[111] The Rules Enabling Act specifically grants federal appellate courts the power "from time to time to prescribe rules for the conduct of their business."[112] An example of such a court rule is Ninth Circuit Rule 36-3 discussed supra. Despite this grant of power to prescribe local rules of procedure, however, the Rules Enabling Act requires such rules be consistent with the uniform rules which govern all appellate courts.[113] Therefore, local rules such as Ninth Circuit Rule 36-3 become moot where contrary to the Federal Rules of Appellate Procedure, such as proposed Rule 32.1.

As for the Federal Rules of Appellate Procedure, they too are promulgated pursuant to the Rules Enabling Act. Specifically, 28 U.S.C. § 2072 grants the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States . . . courts of appeals."[114] Rules proposed under this section are subject to a complicated adoption process. First, the Advisory Committee on Appellate Rules, which is one of five advisory committees currently existing under the Rules Enabling Act,[115] prepares a report containing the proposed rule, and an explanatory note discussing the rule's purpose.[116] The report is then reviewed by the Standing Committee on Rules of Practice and Procedure, which, if it accepts the Advisory Committee's recommendation, refers the proposed rule back to the Advisory Committee for public review and comment.[117] During the public review and comment process, the Advisory Committee conducts extensive public hearings on the proposed rule, reviews letters of support or criticism, and takes testimony from various concerned parties.[118] If, after the public review and comment process the Advisory Committee still recommends adoption of the proposed rule, it prepares another report for the Standing Committee, which in turn recommends adoption of the proposal, makes changes to the proposed rule then recommends adoption, or rejects the proposed rule in its entirety.[119]

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[111] Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1309 (2006).

[112] *See* 28 U.S.C. § 2071(a) (2004).

[113] *See id.*

[114] *See* 28 U.S.C. § 2072(a) (2004).

[115] The other four are the Advisory Committees on Bankruptcy, Civil, Criminal and Evidentiary Rules. *See* David A. Schlueter, *Who Makes the Rules?*, 20 CRIM. JUST., 58, 58 (2006).

[116] Edward H. Cooper, *Symposium Reflections: A Rulemaking Perspective*, 57 MERCER L. REV. 839, 840 (2006); *see also* 28 U.S.C. § 2073(d) (2004).

[117] Cooper, *supra* note 116, at 840.

[118] *Id.*

[119] David A. Schlueter, *How Rules Are Made: A Brief Review*, 21 CRIM. JUST. 50, 50 (2006).

The Standing Committee then delivers its recommendation to the Judicial Conference, and the Judicial Conference delivers its recommendation to the Supreme Court.[120] The Supreme Court then is charged with the duty of adopting the rule as proposed, making modifications, or rejecting the proposed rule.[121] If the Supreme Court adopts the proposed rule, it must then deliver "to the Congress not later than May 1 of the year in which [the] rule . . . is to become effective a copy of the proposed rule [which] shall take effect no earlier than December 1 of the year in which such rule is so transmitted."[122]

With respect to proposed Rule 32.1, on May 22, 2003, the Advisory Committee on Appellate Rules, to which then Third Circuit Court of Appeals Judge Samuel A. Alito, Jr. and District of Columbia Circuit Court of Appeals Judge John G. Roberts, Jr. were committee chair and member respectively,[123] proposed Rule 32.1 to the Standing Committee.[124] Later, after taking testimony on Rule 32.1's potential impact,[125] on April 13, 2004, the Advisory Committee formally approved Rule 32.1.[126] However, the Standing Committee referred the proposed rule back to the Advisory Committee on June 17, 2004, for further study.[127] Following additional study, the Advisory Committee submitted Rule 32.1 to the Standing Committee for final approval on May 6, 2005.[128] The Standing Committee voted to approve Rule 32.1 on June 15, 2005,[129] and the Judicial Conference delivered Rule 32.1 to the Supreme Court on November 29, 2005.[130]

Finally, on April 12, 2006, the Supreme Court adopted Rule 32.1 and submitted it to Congress.[131] The Supreme Court's adoption of Rule 32.1 was of little surprise for those following its progress given that former members of the Advisory Committee which proposed and adopted the Rule, Roberts and Alito,

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120 *See* 28 U.S.C. § 2073 (2004); 28 U.S.C. § 331 (2004).

121 28 U.S.C. § 2072 (2004).

122 *Id.* at § 2074 (2004).

123 *See* Admin. Office of the United States Courts, Rules Comm. Membership List 2 (2003), http://www.uscourts.gov/rules/Committee Membership Lists/ST_Roster_2003.pdf.

124 Letter from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and Procedure 30 (May 22, 2003) *available at* http://www.uscourts.gov/rules/app0803.pdf [hereinafter "Alito Letter"].

125 With over 500 public comments submitted to the Advisory Committee, Rule 32.1 was "the second-most commented-on proposal in federal rulemaking history." Editorial, *FRAP 32.1*, N.J. LAW., May 8, 2006, at 938.

126 Stephanie F. Ward, *Giving Their Opinions: Committee Backs Rule Allowing Lawyers to Cite Unpublished Decisions*, A.B.A. JOURNAL E-REPORT (April 23, 2004), *available at* http://www.nonpublication.com/ward.htm.

127 Brent Kendall, *Citation-Rule Change Hits Obstacle*, L.A. DAILY J., June 18, 2004, at 4.

128 Letter from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levy, Chair, Standing Comm. on Rules of Practice and Procedure 1 (May 6, 2005), *available at* http://www.nonpublication.com/alitomemo2.pdf.

129 Jeff Chorney, *Conference to Mull Unpublished Opinions*, THE RECORDER, June 16, 2005, http://www.law.com/jsp/article.jsp?id=1119270949530.

130 Howard J. Bashman, *Decisions to be Cited Manage to Insert a Fly in the Ointment*, THE LEGAL INTELLIGENCER, Dec. 12, 2005, at 5.

131 *See* Letter from John G. Roberts, Jr., Chief Justice, to J. Dennis Hastert, Speaker of the House 1 (Apr. 12, 2006) *available at* http://www.supremecourtus.gov/orders/courtorders/frap06p.pdf [hereinafter "Roberts Letter"].

were now Justices of the Supreme Court.[132] Assuming Congress does not make any changes to Rule 32.1 prior to December 1, 2006, it will go into effect on that day.[133]

IV. THE POSSIBLE CONSEQUENCES OF RULE 32.1

A. *Future Courts Will Give the Unpublished Opinions Too Much Weight*

As submitted to Congress, Rule 32.1 provides:

> (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:
> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
> (ii) issued on or after January 1, 2007.
> (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 disposition with the brief or other paper in which it is cited.[134]

This language does not address what precedential value should be given to unpublished opinions. In fact the Committee Note expressly states that the Rule takes no position on that point.[135] Instead the Committee Note suggests parties could, at the very minimum, cite unpublished opinions for their persuasive value. The Committee Note states that unlike binding precedent "[a]n opinion cited for its 'persuasive value' . . . is cited because the party hopes that it will influence the court as, say, a law review article might – that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning."[136] The Committee Note suggests Rule 32.1 will allow parties to cite unpublished opinions for this purpose.

However, a party citing an unpublished opinion is generally not doing so merely for this persuasive value. Instead the party is attempting to increase the credibility of its position by showing a prior panel has endorsed its reasoning. Thus, the party is indicating to the current panel that because a prior panel of the same court decided the issue in a particular way in the past, so too should the current panel. Because of the tradition of the prior panel rule, the subsequent panel will, as a practical matter, feel bound by the prior decision. One judge has already expressed this concern, stating that "we expect that [unpublished opinions] will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore

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[132] John G. Roberts, Jr., was confirmed as Chief Justice of the Supreme Court on September 29, 2005. *See* Kathy Kiely & Jean Biskupic, *Roberts Era Begins on Supreme Court*, USA TODAY, Sept. 30, 2005, at 1A. Samuel A. Alito, Jr. was confirmed as a Justice of the Supreme Court on January 31, 2006. *See* Maura Reynolds, *A Stark Division in Vote for Alito*, L.A. TIMES, Feb. 1, 2006, at A1.

[133] 28 U.S.C. § 2074 (2004).

[134] *See* Roberts Letter, *supra* note 131, at 5-6.

[135] Alito Letter, *supra* note 124, at 33.

[136] *Id.* at 34.

previous decisions."[137] This reluctance would be even greater in the lower courts. As one scholar has pointed out, "[i]t will be a rare district court judge who will ignore an unpublished opinion of the circuit that will review his or her decision . . . [because] lower courts will have to treat them as though they were binding, even if that is not technically true."[138] This reluctance will in effect make each unpublished opinion binding precedent.

B. Quality of Opinions Will Decline

Ideally, when making a decision the appellate court judges should have enough time for: "(1) reviewing party briefs; (2) attending oral argument; (3) participating in judicial conference; (4) memorializing their personal assessment of the case, with such memorandum being circulated simultaneously with the argument and conference; (5) drafting opinion(s); (6) circulating opinion(s) for comment; and (7) finalizing the opinion for subsequent publication."[139] However, this ideal process of appellate review is rarely followed due to time constraints.[140]

Instead, the judges must turn to the use of unpublished opinions in order to keep up with their growing workload. Unpublished opinions generally serve only as a cursory explanation of the court's rationale intended to be used by the parties involved, or the court below.[141] Thus, unpublished opinions are generally short documents more concerned with indicating the result rather than the reasoning behind the result or the language used to express it.[142] As one judge commented, "[the] efficiency [of unpublished opinions] is made possible only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand."[143] Because the authoring judge need not worry about the unpublished case being used in another context, that judge is able to write these in short periods of time, or delegate the assignment to a law clerk.[144]

This saved time allows judges to concentrate more thoroughly on their published opinions. However, because Rule 32.1 will make these unpublished opinions citable, judges will have no choice but to concern themselves with the quality of the reasoning and writing which goes into these opinions. Thus, Rule 32.1 will in effect require the judges to spend as much time on these

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[137] Letter from John L. Coffey et al., Circuit Judges, 7th Cir., to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 1 (Feb. 11, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-396.pdf.

[138] Patrick J. Schiltz, *Response: The Citation of Unpublished Opinions in Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 40 (2005).

[139] Diane Adams-Strickland, *Don't Quote Me: The Law of Judicial Communications in Federal Appellate Practice and the Constitutionality of Proposed Rule 32.1*, 14 COMMLAW CONSPECTUS 133, 161 (2005).

[140] *See id.* at 162.

[141] Schiltz, *supra* note 138, at 33.

[142] Letter from John M. Walker, Jr., Chief Judge, 2d Cir., to Peter G. McCabe, Sec'y of the Comm. on Rules of Practice & Procedure 7 (Feb. 11, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-329.pdf.

[143] *Id.*

[144] *See supra* Section II.A.2.

unpublished opinions as they would on published opinions, all without a reduction in their caseload.[145] This will require the judges to spend less time working on novel issues and cases that would normally be published, thus reducing their quality. After all, judges "simply do not have the time to engage in [the necessary writing] process as to each of the 450 or so cases each judge . . . is responsible for every year."[146] This additional time and effort which will be required will also mean already busy judges will become busier, resulting in greater delays for the parties.[147] These time delays will only be compacted by the fact Rule 32.1 will allow parties to cite more cases in their briefs, thus requiring more research on the part of the judges and their law clerks.[148]

However, time conscious judges will feel pressured to produce opinions as quickly as possible. One way in which they may try to compensate for the lack of time is by issuing one-word or one-line opinions. The judges who resort to these will not have to fear having the opinion cited back to them in the future because the opinion will be of little value to anyone, including the original parties. However, these one-liners are very unappealing. As one scholar notes, such "dispositions are unfair to the parties, who are entitled to some explanation of why they won or lost an appeal, as well as to some assurance that their arguments were read, understood, and taken seriously."[149] Both the parties and judges of lower courts will be left without knowing what rule or reasoning the appellate court found controlling.[150] Thus the parties will not know what to argue if an en banc hearing is requested and the judges of the lower courts will not know what to do in the future.

Some scholars point out that the argument against Rule 32.1 based upon a fear of reduced opinion quality shows major flaws in the current state of our legal system.[151] They argue the court should have enough time to provide each litigant with a well thought out and thorough decision in every case,[152] and the use of low quality unpublished opinions is not justified by a lack of court resources.[153] They argue instead, if the problem is judges lack the time they need to dedicate to each opinion they write, perhaps a better solution would be to increase the number of judges.[154] Although this may be true, because Rule 32.1 does not address this problem, courts like the Ninth Circuit will still be left with an overwhelming docket and little means to reduce it.

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[145] Schiltz, *supra* note 138, at 73 ("Congress cannot give courts fewer resources to handle more cases and expect nothing to change.").

[146] Kozinski, *supra* note 48, at 40.

[147] Schiltz, *supra* note 138, at 36.

[148] *Id.*

[149] *Id.* at 37.

[150] *Id.*

[151] *See* David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1174 (2002).

[152] *Id.*

[153] *Id.* at 1147.

[154] *Id.* at 1166; *see also infra* Section V.B.

C. *The Proposed Rule Will Create Inconsistency Between Federal and State Procedure*

One proffered reason for Rule 32.1 is it will promote consistency between the circuits when it comes to citation rules, thus alleviating hardships to attorneys who practice in multiple circuits.[155] However, this argument fails to note the fact most attorneys do not practice in multiple circuits, but rather practice in state and federal courts within one circuit.[156] Thus, Rule 32.1 would only alleviate inconsistency for the average attorney if the state in which the attorney practices permits citation to unpublished opinions. However, for most attorneys practicing in the Ninth Circuit, Rule 32.1 will actually create an inconsistency between state and federal citation rules because citation to unpublished opinions is not allowed in the state courts.[157] Thus, at least one Ninth Circuit judge has cited this confusion among the grounds for opposing Rule 32.1[158]

Another potential source of inconsistency created by Rule 32.1 would be determining which unpublished opinions could be cited. Because Rule 32.1 will make only opinions issued after January 1, 2007, citable, it could create confusion for parties and courts because each will have to determine which unpublished decisions may be cited and which may not.[159] It may also create confusion for parties who must decide what to do if judges cite "pre-2007 unpublished cases knowing that the opinion they are writing may be cited (even if it is unpublished), but the older unpublished 'authority' they are relying on may not, depending on the jurisdiction."[160] The diligent attorney will have to determine what effect that citation by the court would have on the attorney's ability to cite the authority as well. Will the reference of a pre-2007 unpublished opinion in a post-2007 citable opinion thus make the prior opinion citable, or is it still off limits? Also, what is to become of the attorney who cites a pre-2007 unpublished case? The answers to these questions are not readily apparent from the text of Rule 32.1 or the Committee Note.

V. POTENTIAL SOLUTIONS TO THE CONSEQUENCES OF FRAP 32.1

A. *Splitting the Ninth Circuit*

Judge Kozinski gives numerous reasons why he is opposed to Rule 32.1.[161] However, one potential reason neither he nor others have addressed relates to splitting the Ninth Circuit. The Ninth Circuit Court of Appeals is like no other federal circuit court. It covers a larger geographic area than any of the other circuits, encompasses the largest population of any circuit, and it has by

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[155] Schiltz, *supra* note 138, at 30-31.

[156] *Id.* at 31.

[157] *See* CAL. R. APP. P. 977 (prohibiting citation of unpublished opinions or memorandum decisions); *see also*, ARIZ. R. CIV. APP. P. 28 (same).

[158] Kozinski, *supra* note 48, at 41.

[159] Randy Diamond, *Advancing Public Interest Practitioner Research Skills in Legal Education*, 7 N.C. J. L. & TECH. 67, 105 (2005).

[160] *Id.* at 105-6.

[161] *See* Kozinski Letter, *supra* note 23.

far the most judges and the largest case load.[162] For more than twenty-five years, Congress has considered proposals to divide the Ninth Circuit and create one or more new circuits.[163] In 1995, the Senate Judiciary Committee sent out one such bill that the full Senate failed to pass.[164] In 1998, the White Commission urged Congress to divide the Ninth Circuit into three semi-autonomous "adjudicative divisions" which would "capitalize on the benefits of smaller decisional units."[165] Despite this suggestion, the Judicial Conference simply recommended seven new appellate judgeships for the Ninth Circuit without making mention of the proposal to split the court.[166]

How might this affect Judge Kozinski's view of Rule 32.1? Judge Kozinski has been a staunch opponent of splitting the Ninth Circuit,[167] and although the notion of splitting the Ninth Circuit has been met with great controversy and resistance, such action may be more likely given the added burdens brought by Rule 32.1. Thus, the passage of Rule 32.1 may bring the Ninth Circuit one step closer to its ultimate split.[168]

Splitting the Ninth Circuit is an obvious solution to the increased burden which will result due to Rule 32.1. The Ninth Circuit's enormous size is without a doubt a substantial factor in making the caseload as big as it currently is. Splitting the Ninth Circuit would reduce the number of judges on each resulting court, thus reducing the number of potential three-judge panels. By doing this each judge would be able better to keep abreast of recent trends in the circuit's jurisprudence, which would greatly reduce the number of conflicting and inconsistent opinions. It would also allow for a simpler en banc procedure. Due to its size, the Ninth Circuit is not presently capable of convening together all of its judges as one. Instead, the en banc system used by the Ninth Circuit only requires en banc cases be heard by a panel of eleven active judges.[169] Thus, these eleven judges must determine the rule of law for an entire circuit which consists of approximately fifty total judgeships.[170] This then allows for a situation in which a viewpoint held by an overall minority of judges within

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[162] Lori Irish Bauman, *Split Over Splitting: Impasse Persists on Proposal to Split the 9th Circuit Court of Appeals*, OR. ST. BAR BULL., Apr. 2004, at 15.

[163] *Id.*

[164] Pamela Ann Rymer, *How Big is Too Big?*, 15 J.L. & POL'Y 383, 383 (1999).

[165] Comm'n on Structural Alternatives for the Fed. Courts of Appeals, Final Report 47 (Dec. 18, 1998) *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf [hereinafter "Final Report"].

[166] Bauman, *supra* note 162, at 15.

[167] Justin Scheck, *9th Circuit Split Proponents Attack Case Overload*, THE RECORDER, July 17, 2006, http://www.law.com/jsp/article.jsp?id=1152867927545.

[168] This should be cause for alarm for Judge Kozinski considering the impact such a split may have upon him personally. Of the judges currently seated on the Ninth Circuit, there are only three active status judges who have seniority over Judge Kozinski; Chief Judge Mary Schroeder, Judges Harry Pregerson and Stephen Reinhardt. Pursuant to 28 U.S.C. § 45 none of these three judges will be eligible to serve as the next Chief Judge when Chief Judge Schroeder's term expires in December 2007; leaving Judge Kozinski next in line to reign as Chief Judge over the largest circuit in the nation.

[169] Judge John M. Roll, *Splitting the Ninth Circuit: It's Time*, ARIZ. ATT'Y., Sept. 2005, at 36.

[170] *Id.* ("As of December 2004, in addition to 28 authorized active circuit judgeships, the circuit had 23 senior circuit judges. . . .").

the Ninth Circuit can become the controlling stance articulated en banc. Splitting the Ninth Circuit would eliminate this scenario and thereby create jurisprudence more representative of the majority opinion. However, splitting the Ninth Circuit alone may not be able to reduce the caseload to a manageable size without doing more, such as adding more judgeships, or limiting appeals as of right, which are as discussed below.

B. Adding More Judges to the Bench

Most efforts to split the Ninth Circuit have included provisions adding new judgeships to both the old and new circuits.[171] In fact, adding more judgeships to the Ninth Circuit has always been a clear, although controversial, solution to the Ninth Circuit's docket control problem. After all, the Ninth Circuit covers over "110 authorized active district judges, more than 50 senior district judges, 68 authorized bankruptcy judges, and 94 authorized full-time magistrate judges."[172] This large number of lower courts has lead to an ever-increasing need for appellate review. Yet despite this need, Congress has been hesitant to add more judges to the Ninth Circuit. One reason for this hesitation may be due to the 1998 White Commission report which stated "the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen."[173]

One problem with creating excessively large circuits is that adding more judgeships will increase the different number of potential panels which would have to represent the views of one circuit. Based upon the current makeup of the Ninth Circuit, there are 19,600 different three-judge panels which could be created, thus greatly increasing the likelihood of panel-driven results and reducing collegiality between judges.[174]

A second problem identified with adding more judgeships is that adding judgeships decreases the prestige and power of the position, and exclusivity is the only way it can be maintained.[175] However this argument, which is mostly based upon the vanity of the court, has never been clearly supported by any study.[176]

In the context of the Ninth Circuit these arguments become even more problematic. California is one of the most populous states, and is easily the largest source of cases in the Ninth Circuit. One Ninth Circuit judge has noted that due to California's massive population, "any circuit that serves California

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[171] Howard Mintz, *Appeals Court Faces Split: Republicans Pushing to Divide 9th Circuit*, SAN JOSE MERCURY NEWS, Nov. 7, 2005 at A1 (indicating that one proposed House Bill "would add more than 60 federal judges nationwide, including seven to a newly formed 9th Circuit").

[172] Roll, *supra* note 169, at 36.

[173] *See* Final Report, *supra* note 165, at 29.

[174] Roll, *supra* note 169, at 36.

[175] *See, e.g.*, Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928) ("A powerful judiciary implies a relatively small number of judges.").

[176] *See* Richman & Reynolds, *supra* note 27, at 301 ("Opponents of additional judgeships make this argument confidently, as though its factual premises were beyond dispute. In fact, however, there is no empirical evidence that additional judgeships will reduce prestige or that reduced prestige will diminish the pool of judicial candidates.").

will have to be too big."[177] California's needs have become so great that some Ninth Circuit judges based outside of the state must travel to California so frequently they rarely hear matters within the state in which they are actually based.[178] Thus, increasing the number of judges within California alone would drastically reduce travel for judges based outside of California. This reduced travel would not only reduce travel related expenses, but would also leave those judges with more time to prepare written opinions. Adding more judgeships, although unpopular, must be done. As appellate dockets continue to increase at alarming rates, it is unrealistic to assume judges can decide these additional cases without increasing the size of the courts.

C. Limit Appeals as of Right

Another potential solution to the Ninth Circuit's overloaded docket would be to give the court more control over which cases it takes. As it stands now, the appeals courts have little power to control the size of their dockets. This lack of discretionary control over which cases the circuits hear leaves the courts open to potentially limitless docket sizes. Because these courts have no discretionary control over their dockets, they are forced to hear an ever-inflating number of meritless appeals.[179] Since judicial resources have not kept up with this docket inflation, litigants before the appeals courts face great delays in having their matters resolved. However, this is not the first time in American history a federal appellate court has faced such a problem. In the late 1800's the United States Supreme Court became increasingly overwhelmed by the sheer increase in the number and growing array and complexity of cases filed.[180] Because the Court could not keep up with this unprecedented growth, litigants found that they faced a more than three-year wait before receiving a decision on their issues.[181]

It was within this context that Congress, through the Evarts Act of 1891, first introduced the concept of making the Supreme Court's review discretionary.[182] Although the primary goal of the Act was to create nationwide uniformity of law,[183] the inclusion of discretionary review also successfully limited the size of the Supreme Court's docket. In fact, the Act was so successful that it cut Supreme Court's docket from 623 cases docketed in 1890, to just

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[177] Judge Andrew Kleinfeld, Remarks Before the Senate Judiciary Administrative Oversight and the Courts Committee (Oct. 26, 2005) *available at* http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4730.

[178] Judge Richard Tallman, Remarks Before the Senate Judiciary Administrative Oversight and the Courts Committee (Oct. 26, 2005) (indicating that he "heard cases at [his] home base of Seattle for only one week of the entire year.") *available at* http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4727.

[179] Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 218 (2001).

[180] Margaret M. Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 392 (2004).

[181] *Id.*

[182] Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826 (1891).

[183] Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1827 (2003).

275 by 1892.[184] Despite this decrease in docket size the Court still remained overwhelmed. In February of 1925 Congress acted again to limit appeals as of right, thus giving the Supreme Court even more control over its docket.[185] The docket control granted in the 1925 Act, known as the Judges' Bill,[186] has continually expanded to its current state. At present, the Supreme Court's ability to set its docket is almost without limitation, leaving the Court able to hear as many or as few cases as the Justices want.[187] In fact, the Supreme Court receives over 7000 petitions for writ of certiorari each year,[188] yet its docket ranges only from 76 to 92 cases per year.[189]

Theoretically, as it stands now the Court has the "freedom to hear just a handful of cases in a single area of the law each term or it could hear hundreds, perhaps even thousands, across the legal spectrum."[190] Despite this extraordinary power, the Court has not limited its review to only cases it finds interesting.[191] Instead the Supreme Court uses the "Rule of Four," which requires at least four Justices vote to hear the case.[192] The Justices of the Court have long recognized that this power to decide which cases it will hear is important, but "[d]eciding not to decide is . . . among the most important things done by the Supreme Court."[193] This is due not only to the fact that the issue may not be ready to be heard, but also because the Court must keep its docket within controllable limits. The Supreme Court is not the only court to follow the idea of discretionary appellate review. Rather, some states have also limited appeals as of right, including those to the first appellate level.[194]

Some scholars have criticized the use of discretionary review as, among other things, lacking public accountability.[195] Even some members of the Court itself have acknowledged this deficiency. Justice Jackson once stated, "neither those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari."[196] Despite this criticism, discretionary review has been a hallmark of the American appellate review system.

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[184] *Id.*

[185] Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1643-44 (2000) (arguing that this was the first step towards the Supreme Court legitimately removing itself from the "Senate's shadows").

[186] Cordray & Cordray, *supra* note 180, at 392.

[187] Nancy C. Staudt, *Agenda Setting in Supreme Court Tax Cases: Lessons From the Blackmun Papers*, 52 BUFF. L. REV. 889, 889 (2004).

[188] *See* The Justices' Caseload, http://www.supremecourtus.gov/about/justicecaseload.pdf (last visited Aug. 25 2006).

[189] Rex R. Perschbacher & Debra L. Bassett, *The End of Law*, 84 B.U. L. REV. 1, 49 (2004).

[190] Staudt, *supra* note 187, at 889.

[191] *Id.*

[192] Perschbacher & Bassett, *supra* note 189, at 49-50.

[193] THURGOOD MARSHALL, Address at the Second Circuit Judicial Conference (Sept. 8, 1978), *in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 174, 177 (Mark V. Tushnet ed. 2001).

[194] *See, e.g.*, PAUL M. SANDLER & ANDREW D. LEVY, APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL 25 (2d ed. 2001) (indicating that less than half of Maryland Court of Appeals docket consists of non-discretionary cases.).

[195] Cordray & Cordray, *supra* note 180, at 452.

[196] Brown v. Allen, 344 U.S. 443, 542 (1953) (Jackson, J., concurring).

Limiting appeals as of right so the circuit courts have more discretion in which cases they take would significantly reduce their current caseload. The courts would be able to deny review to cases which only raise previously settled issues, thus greatly reducing the number of redundant appeals. Because the redundancy of appeals is one of the reasons given to justify the use of unpublished opinions,[197] this solution would help the circuit courts efficiently manage their caseloads following Rule 32.1's effective date. As with the Supreme Court, giving the circuit courts more discretion would allow them to reduce both their caseloads and the number of inconsistent or conflicting decisions.

It is unlikely Congress would give the circuit courts the same type of complete discretion the Supreme Court exercises. Thus, one potential difficulty with this solution would be determining which appeals will be limited. One such matter to consider would be diversity jurisdiction. Both jurists and scholars alike have already called for an abolition of diversity jurisdiction in the district courts,[198] which, if Congress took such action, would eliminate appeals arising therefrom. However, this would likely be ineffective as the total number of appeals filed in 2005 arising from diversity jurisdiction cases in all circuits only amounted to 2,975 cases, which is roughly 4.5% of the 65,418 total cases filed during that year.[199]

Two more effective areas in which appeals as of right could be limited are the areas of administrative appeals and prisoner petitions. The total number of administrative appeals filed in all circuits in the year 2005 came to 12,808,[200] while the total number of prisoner petitions came to 16,588,[201] approximately 19.6% and 25.4% of all cases filed that year respectively. These two areas are also suitable for limitation given the low frequency with which the appeals courts reverse the decision of the court below: 6.1% and 9.4% respectively.[202] Therefore, if Congress is unwilling to grant the circuit courts complete discretionary control over their dockets, limiting appeals as of right in these two areas alone would greatly reduce the circuit courts' dockets.

Another potential difficulty with this solution would be developing the procedure the circuits would use in deciding which cases to hear. Due to their size, it would be hard for circuits like the Ninth to use a procedure such as the Supreme Court's Rule of Four. Requiring every judge on the circuit, or more likely their law clerks, to read petitions for review would diminish any time actually saved by refusing to review the case. Therefore, it would be more beneficial for the circuits to each devise a system which best fits that particular circuit. For example, larger circuits such as the Ninth could create specialized panels which are assigned the task of reviewing petitions for review. Since these screening panels would not be required to right write lengthy opinions,

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[197] *See supra* Section Part II.A.1.

[198] *See* Warren E. Berger, Address to the American Law Institute (May 20-23, 1975), *in* 52 A.L.I. PROC. 29, 37-38 (1975); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966 (1979).

[199] *See* Caseload Statistics, *supra* note 21, at 32 tbl.B-7, http://www.uscourts.gov/caseload2005/tables/B07mar05.pdf.

[200] *Id.* at 22 tbl.B-1.

[201] *Id.*

[202] *Id.* at 26 tbl. B-5.

but rather short statements granting or denying review, they would be able to review large quantities of petitions for review. Further, the panel members would gain specialized knowledge in the areas they review, which would create more consistency in the circuit's case law on the subject. Smaller circuits, on the other hand, could implement systems whereby each judge within the circuit reviews a certain percentage of the petitions for review, thereby spreading the screening responsibility equally. These are only a few examples, and as discussed above, each circuit should be permitted to devise the system which best fits the particular circuit. However, whatever system the circuit develops, giving the circuits more discretionary control would greatly reduce the size of their dockets.

VI. CONCLUSION

The Ninth Circuit, faced with an overwhelming caseload, has resorted to the use of unpublished opinions to keep up. By using unpublished opinions the judges are able to quickly dispose of redundant issues in short periods of time, and can often delegate this responsibility to law clerks. This saved time allows the judges to handle a larger number of cases without creating an unmanageable backlog. However, because these unpublished opinions are often the work of non-judges, and use vague wording, many circuits, including the Ninth, have adopted rules which prohibit litigants or other courts from citing to those opinions. Use of these limited citation rules has been greatly criticized by some judges and scholars.

Federal Rule of Appellate Procedure 32.1 will prohibit limited citation rules such as the one used by the Ninth Circuit. Although the rule does not tell the circuit courts what precedential value must be given to the unpublished opinions, the Committee Note suggests, at a minimum, they will constitute persuasive value. Rule 32.1 is intended to create uniformity between each circuit but will instead create several unintended consequences. First, because Rule 32.1 does not state what precedential value should be given to each unpublished opinion, there is an inherent problem risk that subsequent appeals and trial courts will give them too much weight. Because subsequent panels within the same circuit are generally bound by the prior panel rule, they will feel pressured to give the unpublished opinion binding authority.

The second potential consequence is that judges who face having their unpublished opinions being treated as binding precedent will feel bound to spend more time ensuring the dispositions use exact language. This increase in time spent on unpublished opinions, without a simultaneous decrease in caseload size, will result in a decrease in time spent preparing published opinions, thus decreasing their quality, or resulting in greater delays for litigants. Judges may attempt to increase their productivity by issuing one-word or one-line dispositions, which fail to inform the parties of the reasoning behind the court's decision.

A third potential consequence is that Rule 32.1 will create inconsistency between federal and state procedure for attorneys practicing within the Ninth Circuit. Although inconsistency between circuit courts was one reason given in

support of Rule 32.1, this inconsistency between federal and state courts will be more frequently encountered.

The Ninth Circuit must find methods for dealing with these consequences. One potential solution would be to split the Ninth Circuit into smaller circuits, thus reducing the number of potential three-judge panels and the number of cases issued by the circuit. This would allow each judge to keep better abreast of the decisions by other panels within the circuit, which in turn would reduce the number of inconsistent and conflicting opinions.

Another solution, albeit controversial, would be to simply add more judgeships to the Ninth Circuit. Although this would make the largest circuit larger, given the increase in the number of cases filed in the Ninth Circuit each year, it is unrealistic to think the current court size can keep up, and adding judgeships to would make up for the lost time resulting from Rule 32.1.that Rule 32.1 will cost.

Another potential solution would be to limit appeals as of right to the appeals courts. Historically the Supreme Court uses its discretionary review power as a mechanism for docket control. If Congress were to extend this power to the Ninth Circuit and other appeals courts they, too, would be able to vastly reduce the size of their dockets by not hearing appeals which raise already decided points of law.