

ADMINISTRATIVE OFFICES OF THE U.S. COURTS

ADVISORY COMMITTEE ON APPELLATE RULES

Tuesday, April 13, 2004

One Columbus Circle, N.E.
Washington, D.C. 20544

PARTICIPANTS

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1 P R O C E E D I N G S

2 JUDGE ALITO: Can we come to order? We're
3 here this morning to hear statements concerning a
4 number of rules that we have published for comment.
5 We've received over 500 comments. Most of them
6 have been about a rule concerning unpublished
7 opinion or our rule concerning the counting of
8 votes for rehearing en banc. We've also had
9 comments on a new proposed rule regarding briefing
10 in cross-appeals, not very many comments on our
11 proposal to change the reference to President's Day
12 to Washington's Birthday, but maybe one of the
13 witnesses this morning will want to comment on
14 that.

15 We appreciate the tremendous line-up of
16 witnesses that we have this morning representing a
17 broad array of views and a great deal of
18 experience. The first witness on our list is the
19 Honorable Myron H. Bright, United States Court of
20 Appeals for the Eighth Circuit. Judge Bright?

21 STATEMENT OF THE HON. MYRON H. BRIGHT

22 JUDGE BRIGHT: Good morning, Mr. Chairman

1 and members of the committee, staff, and guests. I
2 am the first hitter, lead-off, so I don't expect to
3 be like Casey and strike out but I'll do the best I
4 can.

5 I'm really very pleased to be here to
6 discuss Rule 32.1, as proposed, and to tell you why
7 I oppose it. I do so on the basis of my
8 experience. I've been a federal appellate judge 35
9 plus years and I've sat with many of the courts and
10 I've been a senior judge now for almost 19 years.
11 And I might mention that as a senior judge I've
12 served frequently not only in my own circuit, which
13 is the Eighth, but I've served with the Second, the
14 Third, the Sixth, the Ninth, and the Eleventh
15 Circuits and somewhat less consistently with the
16 Fifth, the Seventh and the Tenth Circuits. So I've
17 been around a while.

18 I'm at the stage of life, incidentally,
19 known as the fourth stage. The first stage is
20 young. The second stage is middle-aged, as some of
21 you are. The third stage is a little older, as
22 maybe one or two may be around here. And the

1 fourth stage is "You're looking good." In point of
2 time and seniority, I'm the ninth in point of
3 service of all of the appellate judges in this
4 country.

5 Now I know you've had hundreds of comments
6 on Rule 32.1, some for, some against, and Dean
7 Schiltz--you know, I always mispronounce that,
8 Dean. I should know it because my daughter married
9 a guy by the name of Schultz, which is not too far
10 different. And I know you've given the committee
11 and those of us who are testifying and others
12 really a very good summary and a conclusion, which
13 I may not agree with in all events but you have
14 your views and I certainly respect them.

15 I'm speaking here for the Eighth Circuit.
16 As you know, Jim Loken, our chief judge, has
17 written a letter pointing out that 10 of 13 judges
18 on our court who responded opposed the rule and
19 three approved the proposed rule. I also speak on
20 my own behalf and most of the remarks are really my
21 own views.

22 While I'm going to speak on my experience,

1 I want to mention four letters, three of which you
2 have and the fourth one you'll have because it was
3 written to me. Those letters are really quite
4 significant to me because they represent a spectrum
5 of people that I know and respect and their views
6 are pretty important.

7 On one side of the coin is Ken Starr.
8 Now, as you know, he was an appellate judge. He's
9 now an appellate attorney and soon, Patrick, he's
10 going to be a dean. On the other side of the coin
11 is a person who's been an appellate practitioner
12 and I've done programs with him and is now an
13 appellate judge, and that's Tim Dyk of the Federal
14 Circuit. I also have a great deal of regard for a
15 letter which I have from Gerald Tjoflat of the
16 Eleventh Circuit. He and I go back a long time.
17 We've served on committees together. We've been
18 great friends. And I have a copy of that letter,
19 which I'll see that you get. And the fourth is
20 from the Attorney General when I became a judge,
21 and that's Ramsey Clark.

22 Let me go back a little bit in appellate

1 history. If there were a perfect appellate world,
2 when I became a member of the court it was almost
3 perfect. We heard arguments in every case unless
4 it was a pro se appeal, no lawyer, or unless it was
5 just frivolous and dismissed. We gave each case
6 full treatment, published an opinion unless it had
7 been dismissed earlier.

8 Well, we soon had to change. The Eighth
9 Circuit adopted the nonpublication rule in 1973 and
10 we followed the leading circuit, and that was a big
11 Fifth Circuit which just had so many cases that
12 they had to do something, so they developed a
13 program of screening the cases, putting them on a
14 fast track with no argument if they didn't seem to
15 justify full treatment and writing a very short
16 opinion, really for the parties and giving their
17 reasons therefore.

18 In the '70s and '80s, with the litigation
19 explosion and, of course, the increase in appeals
20 in the federal courts, that nonpublication rule
21 really became a judicial necessity. The language
22 "unpublished" simply means, to me, that we judges

1 have not had the time to carefully write an opinion
2 to worry about precedent and we really concentrate
3 only on is the result right? And lots of times the
4 work on opinions, maybe most of the time, is not
5 our own.

6 Let's turn for a moment though to compare
7 how I as an appellate judge and I think many of the
8 appellate judges look at a case as compared to the
9 lawyers, and there are a number of lawyers who are
10 here and are in favor of the proposed rule and part
11 of it, I think, is because the perspective on which
12 we're on.

13 Now with the appellate lawyer, and many of
14 you have or are appellate lawyers, the appellate
15 lawyer really puts the sources together, puts the
16 cases together and serves it out to us on a plate.
17 Not too much of it is original except how it's
18 arranged. On the other hand, when we have to write
19 an opinion for precedent, we are really an author.
20 We're a creative writer. When I was first a judge
21 and it just scared the living you-know-what out of
22 me and I'd done a lot of appellate work but it was

1 different. And, as you know, writing an opinion is
2 different. So there's a difference of
3 perspective there, members of the committee.

4 Listen, I've written on cases, and many of
5 you have, and I've worked weeks, sometimes months
6 on a case and it takes very thoughtful, careful
7 writing and editing to write an opinion which you
8 know is going to be precedent. It requires
9 extensive work and very careful writing. I try to
10 make every phrase, every sentence, even every
11 paragraph really meaningful and right to the point.

12 Now I want to remind you that to change
13 the no-citation rule to allow all opinions to be
14 cited puts into the inventory of cases each year
15 about 20,000 of the 27,000 cases decided by the
16 appellate courts. About 80 percent of the cases,
17 as you know, are nonpublished opinions.

18 Sometimes I think there's too much law out
19 there, you know? The Federal Reporter Second was
20 391 when my name appeared as a judge and now it's
21 at 370 Federal Third, 969 volumes later, and the
22 volumes are thicker now, you know? Estimating at

1 1,500 pages per volume and that's not a bad
2 estimate, I don't think, we have between 1.3 and
3 1.4 million pages of legal writing.

4 I make two other comments. I know you've
5 been exposed to the argument that if unpublished
6 opinions are citable, judges will take time away
7 from the important cases that they want to write a
8 publication opinion on and will not be able to
9 spend that much time. I think that argument is
10 well taken. Adding so much law in over 20,000
11 opinions published each year will really mean from
12 a research standpoint the cup runneth over.

13 I'm a firm believer, having sat with many
14 circuits, that while the way we sit and the way we
15 decide cases is pretty much the same, the
16 procedures vary and I believe that the circuits
17 should have the right and prerogative to handle
18 their own caseload in the best way possible. As
19 you know, some courts don't allow any citation of
20 unpublished opinion except in narrow areas, like
21 res judicata, law of the case, and so forth, and
22 others allow it in limited circumstances.

1 Now I want to mention a couple of circuits
2 and I know that Judge Walker's going to be here
3 from the Second Circuit but I've sat there many
4 times and I love that court because they hear
5 arguments on almost everything and I love to hear
6 oral argument. But in those cases we hear the oral
7 argument, we've done our preparation, we really on
8 the bench ordinarily say, "Is there anything to
9 write?" "Well, we're going to affirm." The judge
10 writes a short opinion, usually the presiding
11 judge. The other two judges take a quick look and
12 concur and the next day there's an order going out,
13 which usually affirms. Very few unpublished
14 opinions reverse that I've seen and they shouldn't.

15 Now I see no reason in the Second Circuit,
16 for example, to make those opinions published and
17 citable without a lot more work on the part of the
18 judges.

19 Now the Ninth Circuit has its own special
20 problems. They hear about 5,300 cases a year.
21 They've got 28 active judges and--I don't know--I
22 think about 17 senior judges and a lot of the

1 publication of those opinions really would create a
2 problem and I think most of the judges have written
3 to you about them. And I'm not going to mention
4 anything special except that I think the criticism
5 of its nonpublication rule is really not well
6 taken.

7 I'm going to put the Third, the Sixth, and
8 the Eight Circuits together because all three of
9 those circuits allow publication under certain
10 circumstances. As a matter of fact, I think in the
11 Third Circuit there really are no bars to it but to
12 tell you the truth, I have rarely if ever--well, I
13 have but I've rarely seen an unpublished opinion
14 brought to the attention of the court. The one
15 case that I do recall once in a while, and we do
16 get them once in a while, would be sentencing
17 guideline cases because many of those are
18 unpublished and probably should not be published,
19 except in the few instances where there's a new
20 twist to some of the guidelines.

21 In our circuit we had an absolute
22 no-publication rule except for limited exceptions,

1 like res judicata, and so forth, until 1994 and
2 then we put in this so-called persuasive rule. If
3 there's no case otherwise citable, you can cite an
4 unpublished opinion. Well, it hasn't caused any
5 problems and I haven't seen really, as I've told
6 you, much in the way of unpublished opinions. I
7 know there was one mentioned in the famous or
8 infamous Anatasoff case, and I won't go into that.

9 Well, I suppose you could say what's the
10 beef? What's the big deal? It's not causing any
11 problems. Well, let me tell you: Rule 32.1 trumps
12 the advice that we give not to cite unpublished
13 opinions. It really puts on the same level to the
14 appellate lawyer that he or she can cite an
15 unpublished opinion and it makes a difference to
16 us. Really while the argument made in an
17 unpublished opinion may always be repeated in a
18 brief, what the lawyers want is the imprint of
19 three judges on that opinion. And let's face it.
20 If we know that our so-called unpublished
21 nonprecedential opinion can come back, we've got to
22 take more care in writing. We've got to look over

1 it a lot more carefully. And I think the rule of
2 unintended circumstances may well apply, with the
3 result being that unpublished opinions will be
4 treated by lawyers, publishers and the academia as
5 part of the necessary research for making an
6 appellate argument and writing a brief, and I think
7 that's going to be more work for everybody.

8 Moreover, it forces the courts to change
9 their operations without their consent. And you
10 can bet the lawyers will seek out the unpublished
11 opinion that may contain language supporting their
12 views affecting briefing in appeals courts, as well
13 as trial courts.

14 Now listen. If all of the lawyers who are
15 going to appear in this committee were the quality
16 of the lawyers that appear before us, I wouldn't
17 worry about it because there wouldn't be an
18 unpublished opinion that would be cited unless it
19 was the rare case, but that's not true. The
20 quality of lawyers who appear in appeals varies in
21 sections, in circuits, and otherwise.

22 Now I really think that the adoption of

1 this Rule 32 and the opening up of four to five
2 times more cases possibly being cited than now is a
3 mistake and it's going to probably mean an
4 unintended circumstance, at least for me and I
5 don't want to do it because I like to say something
6 in my unpublished opinions. You know, we can say
7 just affirmed or enforced under our rule, I never
8 do that except in an unusual case. I try to give
9 the parties some reason and I think it could go the
10 other way. I would hope not but unless you're
11 going to increase judge power, law clerk power to
12 take care of the new problems that may well surface
13 under 32.1, I think we've got something that should
14 not be enacted.

15 I've served on this committee for a time
16 and I know that it's the tradition not to press for
17 a rule unless it has near unanimity for its
18 adoption. That's not so here. Almost all the
19 federal judges oppose the rule. In addition to the
20 judges, I know you have a lot of letters from
21 lawyers and I've sort of surveyed the appellate
22 lawyers in my circuit. Many of them would like to

1 have the rule or at least say well, I'd like a
2 national rule, just like we have it in the Eighth
3 Circuit, but recognizing the problems that it may
4 make for judges and for lawyers, there are many who
5 have said we don't think you need a national rule.
6 And let's face it. Most lawyers don't practice in
7 more than one circuit and there's no problem in
8 learning the rules of the circuit.

9 Well, what do I think? Let me give you my
10 views from a practical standpoint. Number one, if
11 it ain't broke, don't fix it. Number two, don't
12 open the door to a new rule unless you can clearly
13 see what's on the other side. And number three, I
14 echo Dean Patrick because soon and even now under
15 the E-Government Act of 2002, all written opinions
16 of the court will be on line.

17 Therefore, I think the proposed Rule 32.1
18 should be dropped and let each circuit deal with
19 this new E-Government Act and decide whether
20 changes in procedure are to be made in light of the
21 computer age and the E-Government Act. Anyway,
22 speaking of the computer age, I just came back from

1 computer school at age 85 and I wasn't the only
2 older judge there.

3 So anyway, Mr. Chairman and members of the
4 committee, thanks for your time and it's been a
5 pleasure. If there are any questions I'd be glad
6 to answer them and I'm going to give John a copy of
7 my extended remarks that yo can have in case you
8 want to refer to them. Thanks, John.

9 JUDGE ALITO: Thank you very much, Judge
10 Bright. Let me ask you a question to start out that
11 draws on your unique experience of having sat with
12 so many different circuits. I don't think any of
13 our other witnesses has had that experience.
14 You've sat with circuits that prohibit the citation
15 of unpublished opinions, circuits that have no
16 prohibition, circuits that limit the citation to
17 certain circumstances, I guess including your own
18 circuit.

19 I wondered if you have noticed any effect
20 that these local rules have had on either the work
21 of the lawyers or the work of the judges. We've
22 had conflicting comments from a variety of

1 commenters. We've had those who've predicted that
2 if Rule 32.1 is adopted many very serious adverse
3 consequences will occur. We've had others who've
4 said that if you look to the experiences of the
5 circuits that do not prohibit the citation of
6 unpublished opinions, there's really very little
7 evidence, if any, that this has had any major
8 effect either on the work of the lawyers or on the
9 work of the courts.

10 And I wondered whether you have noticed
11 that in the circuits where the citation of
12 unpublished opinions is allowed that when you are
13 preparing for an argument you have been burdened
14 with a great many citations to unpublished opinions
15 that don't seem to be well written or well reasoned
16 and whether this has materially, the knowledge that
17 the opinion will be citable when you're writing an
18 unpublished opinion, has made the process of
19 producing the opinion much more burdensome than it
20 is in the circuits that prohibit their citation.

21 JUDGE BRIGHT: I'm glad to answer that
22 question. I'm going to focus it right on your

1 circuit because I've been sitting there for a long
2 time, even before Judge Becker was chief, and he
3 and I have been close friends.

4 I have to say in all honesty there really
5 doesn't seem to be any difference. I've sat on the
6 Third Circuit. There may have been some
7 unpublished opinions that have been cited. I can't
8 remember them and I didn't pay any attention to
9 them if I could. And the same goes in every one of
10 the circuits--even the Eighth Circuit, the same.

11 But there's a difference and the big
12 difference is this. Right now every one of the
13 circuits has a warning--we don't want to hear
14 unpublished opinions but you can cite it if really
15 it's persuasive, something like the Eighth Circuit.
16 That's true, I think, in almost all the circuits.
17 It's certainly true in the circuits where I've sat
18 and they allow publication.

19 But if you're going to make it a level
20 playing field with this new rule, there's no longer
21 to be the deterrence. Sure, the court can say we
22 don't like you to cite them but the rule says you

1 can, but the main rule is going to put nonpublished
2 and published opinions as far as being in the
3 briefs on the same level. And if I were sure that
4 it wouldn't make any difference I'd say go ahead,
5 but I am not sure. I really think if you open the
6 doors, you're going to cause a problem. And if it
7 isn't a problem today, let's not change it.

8 Anything else?

9 MR. SVETCOV: Can I say you look terrific,
10 Judge?

11 JUDGE BRIGHT: Thank you. I tell you, I
12 stopped in to see the chief. We've been friends
13 for a long time. As a matter of fact, I always say
14 I was his token Democrat who went to his swearing
15 in as chief and also went to his party that evening
16 and I said to him, "You're looking good" and he
17 said to me, "You're looking good." Thank you.
18 Thank you very much. It's been a real pleasure.

19 JUDGE ALITO: Thank you very much.

20 JUDGE BRIGHT: By the way, John has a copy
21 of my extended remarks. Thank you.

22 JUDGE ALITO: Thank you. The Honorable

1 Diane P. Wood, United States Court of Appeals for
2 the Seventh Circuit.

3 STATEMENT OF THE HON. DIANE P. WOOD

4 JUDGE WOOD: Well, good morning to
5 everyone. I really do appreciate the opportunity
6 to be here to offer my thoughts on proposed Rule
7 32.1. The Seventh Circuit, as you know, is one of
8 the stricter circuits.

9 Both for the reasons explained in the
10 letter that a majority of judges of our court
11 submitted and for some additional reasons I'd like
12 to highlight this morning, I and most of my
13 colleagues oppose this proposed rule. On top of
14 that, I think the flaws are deep enough that I
15 don't think they would be cured by a further study
16 of this particular solution to the set of problems
17 the committee has been thinking about. So I urge
18 the committee to table this proposal indefinitely
19 and to continue to entrust the manner in which
20 legally binding precedent is developed to the
21 discretion of each circuit.

22 Now while it is an undeniable fact that

1 thousands of dispositions in the Federal Courts of
2 Appeals fall under the noncitation rules and I'm
3 going to try to call this a noncitation rule, some
4 80 percent of the matters terminated most recently,
5 the year ending 2003, it's far less clear that this
6 constitutes a serious problem. The committee note,
7 as I observed, and I looked at most of the comments
8 that had been filed, offers several reasons for
9 taking this action but I think each one can be
10 challenged.

11 One reason is that there's a need for
12 national uniformity with respect to citation
13 practices and that uniformity should be achieved in
14 the direction of liberalizing citation practices
15 instead of the opposite direction.

16 Second is a reason that I'm thinking of as
17 something like a truth in labeling requirement.
18 The present orders, memoranda, and so forth are out
19 there. They're produced by the circuits. Why
20 pretend they aren't out there? You know, it seems
21 that if they are out there and they're real
22 decisions of real courts, we ought to treat them

1 that way.

2 A third reason is that we ought to prefer
3 a more open system in which there are no limits on
4 materials that counsel or the parties can call to
5 the court's attention--I suppose if it were a pro
6 se case--at least when, as is asserted to be the
7 case, there's very little cost to doing so.

8 And the fourth was a comment that this
9 rule change would lighten the burden on attorneys,
10 who have to decipher every circuit's citation
11 rules.

12 Let me address these points one at a time
13 but I want to begin with something that seems to me
14 like a dog that's not barking. No one I think
15 anymore is seriously arguing that proposed Rule
16 32.1 is necessary to counter an impression that
17 there's some secret law of the circuit hidden away
18 in so-called unpublished orders. That story simply
19 cannot hold water in the 21st Century court system.

20 As Judge Bright just commented, as you
21 certainly are well aware, whatever discrepancies
22 there may have been in that regard are soon to be

1 cured by the E-Government Act, which assures that
2 every court of appeals will put everything on its
3 website. In fact, in the Seventh Circuit we've
4 been doing that for years. That means that with
5 free Internet access--maybe you'll go to the public
6 library or whatever--every last word coming out of
7 the Courts of Appeals is available to anyone with
8 the skill and the access to navigate these free
9 websites, both inside and outside the judiciary.
10 For those with the resources to use Westlaw or
11 Lexis, access is even easier. So we're not talking
12 about a secret law problem.

13 The discussion we're having today deals
14 solely with the question whether each and every
15 publicly available decision of the courts may be
16 raised in submissions to those courts in support of
17 the litigant's position. So let me turn to these
18 arguments and just run through them briefly.

19 What about the hardship point? Well, it
20 was first quote notable to me that quite a few
21 distinguished members of the bar who submitted
22 comments to this committee flatly disagreed with

1 that prediction. They pointed out the circuit
2 rules aren't really that hard to find. They're on
3 the websites, too. All you have to do is click
4 over to the website and you can see everybody's
5 local rules. And no responsible appellate lawyer
6 is going to omit checking out the local rules just
7 because of publication versus nonpublication.
8 There are too many others rules you have to look
9 at.

10 Most importantly, I think, just as we
11 suggested in our comments from the Seventh Circuit
12 judges, attorneys from private firms, from public
13 interest groups, and others think that the true
14 hardship is going to come from the need to deal
15 with this enormous body of decisions that are
16 presently designated for nonpublication.

17 It reminds me a little bit of one of my
18 favorite scenes from a movie. I'm a big Indiana
19 Jones fan and as you may remember, the very last
20 scene of "Raiders of the Lost Ark" deals with the
21 question where are they going to hide the ark?
22 Where are they going to keep it where it's

1 absolutely safe? And you see some men trundling it
2 down on a hand cart in an enormous warehouse in
3 some--I always think of Suitland out here in
4 Maryland, but they're hiding it in the midst of
5 this giant mass of boxes and I have a feeling that
6 the worthwhile things are going to be hidden in a
7 similarly huge mass of cases.

8 This 80 percent number is a worthwhile
9 number to think about. By adding these noncitable
10 dispositions to the body of law a competent lawyer
11 will want to look at, the research load for the
12 lawyer will increase some fourfold. If clients are
13 paying for the hour their bills will go up. It
14 will hit the poor and the middle class and I think
15 it's hardly the direction we want to take when
16 we're really worried about the spiraling cost of
17 litigation. So it would be worth it if
18 there were some marginal benefit but I suggest
19 there is very little marginal benefit.

20 If you're having trouble sleeping some
21 night let me recommend that you sit down and read
22 two or three weeks worth of the Seventh Circuit's

1 unpublished and noncitable orders, the orders that
2 say "Do not cite; see Circuit Rule 53," every one
3 of which I assure you I read. You will find
4 prisoner cases where the prisoner failed to allege
5 that a prison official acted with the necessary
6 malice to make out an Eighth Amendment violation.
7 You'll find Social Security cases where we say,
8 "Yeah, the administrative law judge had substantial
9 evidence to rely on, so we're affirming the
10 disposition." You'll find immigration cases where
11 we say the same thing.

12 You'll find employment cases where the
13 plaintiff failed to make out one element of the
14 McDonnell-Douglas prima facie case, adding to the
15 mountain of McDonnell-Douglas cases that are out
16 there. And you'll find Anders brief after Anders
17 brief after Anders brief where the order rehearses
18 why counsel has correctly concluded that this
19 appeal is absolutely without merit and so we grant
20 the motion to dismiss the appeal.

21 Each of these orders typically includes a
22 discussion of some basic standards of law. It

1 might be the standard of review. It might be basic
2 principles of administrative law if it's a Social
3 Security case or an immigration case. It might be
4 basic principles about employment discrimination
5 cases, whatever it may be. In the Anders briefs we
6 might have a little section explaining why a Fourth
7 Amendment challenge would be an utter frivolity, so
8 you talk about that.

9 These are principles of law that would
10 apply in a meritorious case but they're just
11 rehearsed for the benefit of the parties in these
12 orders, as we call them. So I think they would do
13 nothing but clutter up the research of someone
14 faced with a genuine issue in one of these areas.

15 All right, so that gets me to the point
16 that I think it would be a fallacy to think that
17 this rule would be cost-free from the standpoint of
18 courts. I know a lot of commentators have pointed
19 out to you that the effort in the rule to draw a
20 distinction between something that's citable and
21 something that's precedential is perhaps based on
22 unrealistic hopes and I think that that's quite

1 right.

2 If the cited order is the work product of
3 our court, if we have to study the facts to see if
4 they're distinguishable from the case presently
5 before us, if we should either follow the precise
6 formulation of the rule of law or explain why we're
7 not doing so, in sort, if we really have to treat
8 this thing as a full-fledged precedential opinion
9 of the court, then it is a full-fledged
10 precedential opinion of the court. You know the
11 old saying--if it walks like a duck and quacks like
12 a duck, and so forth.

13 It is and it's hard for me to see how if I
14 was looking at one of these endless
15 McDonnell-Douglas unpublished orders, which by the
16 way in our court come when it's a pro se appellant
17 because we give oral argument and publish in every
18 single case where there's a lawyer on both sides,
19 then it's just not something that's going to be a
20 very fruitful process for us.

21 So I also would point out with this vastly
22 increased pool of cases, the chances of both

1 intracircuit conflicts are magnified and
2 intercircuit conflicts. Intracircuit conflicts
3 will place an extra burden on the en banc courts.
4 Intercircuit conflicts may have the undesirable
5 effect of bloating the Supreme Court's certiorari
6 docket.

7 Now as Judge Bright certainly pointed out,
8 I think there can be no denying the fact that the
9 workload on judges will increase. I don't think
10 any of us around this table thinks judges are being
11 lazy right now or underworked, so that's something
12 to be concerned about, as well. Resources are
13 shrinking for the judiciary, not expanding, and I
14 think that's a point to remember.

15 Recall--actually, this is way back in the
16 day when I was a law clerk in the Fifth Circuit.
17 Judge Griffin Bell at that time was taking the lead
18 on the Fifth Circuit, which in those days was the
19 old Fifth Circuit, all the way over to Florida, in
20 creating the innovations, then innovation in the
21 mid-'70s to which Judge Bright referred--case
22 screening, decisions whether oral argument should

1 be given in various cases or not, and this was
2 because the caseloads were really starting to
3 explode around the country.

4 We thought it was bad then. I compared
5 the number of cases my judge, Irving Goldberg of
6 the Fifth Circuit had decided the year I clerked
7 for him with the cases I had the first year I was
8 an appellate judge on the Seventh Circuit and it
9 was more than doubled. I thought, "Boy, I thought
10 I was working hard." That would be the reason.
11 There's just more out there.

12 So I don't think the need for effective
13 docket management has decreased since Judge Bell's
14 day; it has only become more severe.

15 Now let me quickly move--I know the
16 committee has lots of people to hear. I think
17 truth in labeling sounds like a good idea but in
18 some sense no one is pretending that those opinions
19 aren't out there. What we're saying instead is
20 these opinions, these orders, unpublished,
21 uncitable documents, are routine applications of
22 routine principles of law with explanation for the

1 benefit of the parties. That's a good thing to do.
2 The parties deserve to hear from us, the judges,
3 why they win or why they lose. We are not arbitral
4 tribunals and indeed arbitral tribunals sometimes
5 explain, as well. We're public courts and we
6 should tell the parties why they win or lose.
7 Otherwise, as my Chief Judge Joel Flaum likes to
8 say, we're going to look like the Emperor Nero
9 going out with a thumb's up or a thumb's down and
10 seeming just as arbitrary as I guess we all assume
11 that particular emperor was. So I'm going to come
12 back to another point in a minute.

13 Let me spend just an extra minute on the
14 uniformity point. This is a very serious issue.
15 Sometimes uniformity is a good thing but sometimes
16 it can be used to stifle local experimentation. I
17 think of the Supreme Court's constant praise for
18 using the states as laboratories for innovation.
19 The same thing is true of the circuits in many
20 ways. Note it was a circuit--it was the Fifth
21 Circuit that began to develop the tools on which we
22 all rely today.

1 On top of that, a superficial uniform rule
2 superimposed on extremely different circumstances
3 is not going to produce uniform results. It's
4 going to produce dissimilar results because, as it
5 were, the data that feeds into it is going to be so
6 different.

7 Now a lot of people have already commented
8 and everybody here knows that the 13 circuits vary
9 tremendously. They vary in geography, caseload.
10 We have one specialized circuit, the Federal
11 Circuit. The D.C. Circuit has its own unique
12 aspects. And they differ in myriad other ways.
13 That's obviously true. That alone is enough to
14 counsel caution, I think, in assuming that we have
15 a one-size-fits-all situation.

16 But there are some other ways that I think
17 we also want to pay attention to variations in the
18 circuits. These include allocation of cases to the
19 oral argument docket versus the nonargued docket,
20 the percentage of cases that are resolved by a
21 published, fully precedential opinion, and the use
22 of various summary disposition techniques. These

1 are incredibly different among the circuits.

2 Let's deconstruct this 80 percent number I
3 referred to a minute ago. The AO says that out of
4 some 27,000 opinions or orders filed in cases
5 terminated on the merits, and these statistics weed
6 out very routine jurisdictional dismissals for the
7 people who waited 120 days to file their notice of
8 appeal or something like that, it's about 80
9 percent unpublished. Then they divide it up into
10 other categories--written signed dispositions,
11 written reasoned and unsigned, and written reasoned
12 and no comment. Then within each of those
13 categories they say, "How many are published? How
14 many are unpublished?"

15 The variations among the circuits are
16 enormous. The Second Circuit, for example, had a
17 total of almost 2,000 opinions or orders of all
18 kinds. The published 438 written signed opinions.
19 1,451 were unpublished, written and signed opinions
20 and 45 were published, written and unsigned. Now
21 they don't use written and unsigned without comment
22 at all.

1 In the Seventh Circuit, as I mentioned a
2 minute ago, our practice is completely different.
3 In our case a written, signed opinion is a synonym
4 for a published opinion. We don't do it the other
5 way. Zero of our written and signed opinions were
6 unpublished. And out of our total of 1,404 cases,
7 581 were published, written and signed, zero
8 unpublished, written and signed. And in the
9 unsigned opinion group, which is our orders, 22
10 were published written explanations and 765 were
11 unpublished.

12 You could go through--you'll have the
13 statistics available to you with the charts and
14 there are enormous differences among the circuits.
15 The same differences show up when you look at the
16 total percentage of unpublished opinions by a
17 circuit. And here, of course, we're using
18 unpublished in the specialized way we're talking
19 about it.

20 In 2003 the Fourth Circuit had the highest
21 percentage at 91 percent. The lowest percentage
22 was the First Circuit at 39 percent, a difference

1 exceeding 100 percent. So the instinctive reaction
2 of somebody who practices in the First Circuit
3 might be, "What's the big deal?" The pool of
4 precedential published opinions in that circuit is
5 vastly larger than the pool.

6 So I think in answer to the question that
7 Judge Alito posed to Judge Bright, what's the
8 difference among the circuits, I think part of it
9 is that underlying practice of how much is out
10 there to be looked at may be linked--in fact, I'm
11 certain it is linked in some ways to that circuit's
12 rule about the use of noncitable dispositions.

13 The Seventh and the D.C. Circuit, as it
14 happens, were the same on this. We each had 57
15 percent of our opinions unpublished--quote-unquote.
16 The Eleventh and the Fifth Circuits were up at the
17 87 percent level. These are big differences.

18 So while on the one hand the Seventh
19 Circuit has one of the more restrictive rules
20 regarding citation, on the other hand, a far
21 smaller percentage of our docket is being put in
22 the order category and thus noncitable. Even

1 though we're a small circuit and I'm sure one can
2 speculate about why this is true, in absolute
3 numbers we had the third largest number of written,
4 signed and published opinions in the country. The
5 Ninth Circuit had 777. Not surprising that they
6 would have the most. The Eighth Circuit had 648
7 and we had 581. No one else exceeded 500 in the
8 statistical year ending September 30, 2003.

9 So I think you need to look at the full
10 picture in each circuit. In other words, you can't
11 just sort of pluck out the published opinion rule
12 and say let's do something with that without
13 realizing that it's a function itself of the
14 circuit's practices and cultures on oral argument,
15 on publication, on other matters that lead into
16 this.

17 My point, I stress, is not that I think
18 there's any magic percentage of publication for any
19 circuit. I think it's up to each circuit to decide
20 what it wants to do. I'm very happy in our circuit
21 that we do give oral argument in every case where
22 there's a lawyer on both sides. I think that's a

1 useful practice. And in cases where there is no
2 lawyer if one judge thinks that the case deserves
3 fuller treatment, we importune or appoint or in any
4 other way, hijack a lawyer into representing the
5 party. Sometimes it has to be an amicus.

6 So let me suggest a different strategy
7 that might address the rare situation where a panel
8 has erred in designating something for
9 noncitability. Most circuits--maybe not every
10 circuit, but I found similar rules in most
11 circuits--have rules that address that problem,
12 rules that allow someone to change the designation
13 of a particular order from unpublished and
14 uncitable to published. In the Seventh Circuit,
15 which has an extremely liberal rule, local rule
16 53(d)(3) provides that any person may request by
17 motion that a decision by unpublished order be
18 issued as a published opinion. The First Circuit
19 local rule 36 is similar, although it refers to any
20 party or other interested person, so it's a little
21 more restrictive than ours and it does specify that
22 good cause must be shown. The Fourth Circuit has

1 an even stricter rule, giving the right to make
2 such a motion to counsel, and the Fifth Circuit
3 allows any judge of the court or any party to make
4 such a request.

5 My suggestion is that if there's serious
6 concern that the occasional noncitable order was
7 misclassified as something that merely applies
8 existing law and instead it really does advance the
9 law somehow, then maybe we ought to look at this
10 error correction device that's a much more targeted
11 device. I can't even remember sitting on panels of
12 the Seventh Circuit when we have denied such a
13 motion. We grant them with extraordinary
14 liberality.

15 Now I'm sure if CNN came in and said we're
16 hereby filing a motion to publish everything, we
17 wouldn't--I mean that's not the point of this rule.
18 That would take us right back to proposed Rule
19 32.1. But that's not how it happens and if a
20 lawyer who is preparing a brief in a case runs
21 across an unpublished disposition that seems to
22 fall in this category, they can make a motion. You

1 don't have to be linked to the case. You don't
2 have to be anything. You can just be a concerned
3 citizen.

4 Maybe you're a person who practices a lot
5 in the Social Security area. That was one such
6 case I remember, where we thought we had done
7 something extremely routine, we issued it as an
8 unpublished order. We got a motion from somebody
9 who I know has an active Social Security practice
10 in Chicago, not a lawyer in the case, who said
11 you've actually said something that nobody's really
12 said before; would you please publish it? We said
13 sure. We reissued it as a published opinion and
14 now it's out there.

15 So that, I think, is the better way to go
16 if there is a concern that in this vast ocean of
17 orders floating out there, most of which, as I
18 said, are quite routine and not really worthy of
19 citation, let's do that instead. I think proposed
20 Rule 32.1 goes the wrong way. I urge the committee
21 to abandon this route and leave things as they are
22 for now. Thank you.

1 JUDGE ALITO: Thank you, Judge Wood.

2 Any questions?

3 MR. LETTER: I found your comments very
4 thoughtful and you've obviously given this a lot of
5 consideration and, as I say, very thoughtful. I
6 had a couple of questions for you.

7 From a practitioner perspective I had a
8 situation not long ago in one of the circuits that
9 doesn't allow citation of unpublished orders. I
10 found about four or five unpublished orders
11 dismissing a particular kind of interlocutory
12 appeal. These orders were all issued within about
13 a two-year period. There were no published
14 opinions on point, which is sort of not surprising.
15 This was simply a procedural issue on an
16 interlocutory appeal.

17 As I was looking at that, were I a judge,
18 I would very much want an attorney to be able to
19 give me that information and tell me that by the
20 way, in the last several years your same court has
21 dismissed four or five of these. Does that worry
22 you? Aren't you frustrated that you cannot get

1 that kind of information from the attorneys? Or is
2 the answer your law clerks will find it and you
3 don't need the attorneys, anyway?

4 JUDGE WOOD: Well actually, my answer is a
5 third one, which is that certainly in the Seventh
6 Circuit if you found those, all you'd have to do is
7 file a motion to make the best one or a couple of
8 them published and that would be a way of calling
9 it to our attention.

10 MR. LETTER: Although I often find I
11 discover these probably about a week before the
12 brief was due. I think that's probably very
13 standard among attorneys. You don't find these
14 things six months in advance.

15 JUDGE WOOD: Right. Maybe you practice in
16 circuits where the bar doesn't use the opportunity
17 to file supplemental authority requests as often as
18 we see them. I see them on the morning of oral
19 argument not uncommonly, so I really question
20 whether if you found it a week before you wouldn't
21 have any way of getting it to our attention.

22 We, in fact, in that kind of situation,

1 even if we're doing an interlocutory order, if it's
2 something like that--suppose we don't think
3 mandamus is the right vehicle or something like
4 that--we're as likely as not to publish that
5 opinion. That's the first thing we talk about--is
6 this anything that's out there? And if we've made
7 a mistake, in our circuit you should call it to our
8 attention and I think that would solve your problem
9 altogether.

10 The other thing is in terms of that, I
11 think the judges probably do know what their
12 practice is on interlocutory orders but if they
13 don't, there are ways without opening Pandora's box
14 to address the particular situation you're talking
15 about. Make a motion to publish.

16 MR. LETTER: The second is are you
17 troubled by the fact that--and here I understand
18 your practice--your meaning the Seventh Circuit's
19 practice--may be different from the other three
20 circuits that have similar rules--are you troubled
21 by the fact that your unpublished decisions
22 actually are citable and cited in almost every

1 other federal court in the United States? Most of
2 the circuits and virtually every district court,
3 your unpublished opinions can and are cited. I see
4 district court briefs all the time and they
5 routinely cite unpublished court of appeals
6 opinions.

7 So, as I say, does it trouble you that
8 your court is in this tiny, tiny minority when
9 actually these opinions are widely cited and
10 citable, perfectly proper within the rules? Does
11 that give you concern?

12 JUDGE WOOD: Well, I guess my reaction to
13 that--actually, the approach we take to citation of
14 other circuits' opinions in our court is to follow
15 what that other circuit's rule is. So if it's a
16 circuit that has a very liberal citation rule,
17 fine. In a way it's like *res judicata*. You know,
18 you give the same weight that the issuing court is
19 going to give to it, so we do the same thing with
20 citation practices.

21 Our responsibility is for the development
22 of the law of the Seventh Circuit and if somebody

1 else is off in some other place citing an
2 unpublished order of ours, I just have to trust
3 that the readers will give it what weight they wish
4 to give it. It's not the law of the circuit and it
5 could be misleading. That's not a good thing and
6 that's what we're trying to signal by having
7 emblazoned across the top of the page, "Not to be
8 cited, unpublished order," but I don't have any
9 power to tell the other circuits what they want to
10 have or not. So I regret that it's misleading but
11 I can't really do anything about it.

12 MR. LETTER: And the last question is do
13 you have concerns that, for instance, in this
14 current term of the Supreme Court, there are at
15 least five that I found and there may be more of
16 the Supreme Court's docket are reviewing
17 unpublished court of appeals decisions? So these
18 are decisions that in particular courts could not
19 even be cited to those courts and yet they are the
20 subject of Supreme Court review. And, in fact, one
21 of them, I think, took up 50 pages in the printed
22 appendix that was filed with the cert petition.

1 So the Supreme Court has at least five and
2 maybe more of those this term. I was wondering
3 does that trouble you at all?

4 JUDGE WOOD: You're talking about
5 something very near and dear to my experience. I
6 don't know if you remember a few terms ago the Kilo
7 case having to do with whether thermal imaging is a
8 search, but that was a petition for cert granted
9 from an unpublished order of the Seventh Circuit,
10 on which I happened to be on the panel.

11 Now why did we decide that--in fact, they
12 reversed. The reason our order was unpublished was
13 because we had had exactly the same issue in the
14 Seventh Circuit not two years before; we had issued
15 a fully reasoned published opinion saying that we
16 thought that thermal imaging was not a search.
17 That opinion is cited throughout the unpublished
18 order. In fact, the only thing the unpublished
19 order really says is, "Here are the facts. We
20 think this is squarely governed by this earlier
21 case," because nobody on the en banc court wanted
22 to hear the earlier case back when it was issued.

1 It was the law of the circuit and we were bound to
2 it.

3 So the Supreme Court, for whatever
4 reason--as we know, they have many reasons for
5 taking cases or not taking cases at the time
6 petitions for cert are presented--the Supreme Court
7 didn't take the earlier case. So anyone who wanted
8 to know the position of our circuit had only to
9 read the unpublished order, see what was the
10 published precedential opinion on which it relied,
11 and they were fully aware of what it was.

12 The Supreme Court chose to take the later
13 case. They reversed. They said no, actually
14 thermal imaging is a search, it's not just
15 something that's out there. And it didn't bother
16 me at all, to tell you the truth, because in
17 keeping with my obligation to follow the law of the
18 circuit, to have to keep publishing the same thing
19 over and over again when it's really just governed
20 by this thing is crazy.

21 MR. LETTER: I'm not talking about
22 publishing. The question is citation.

1 JUDGE WOOD: But I don't buy that there's
2 a difference. I think citability and precedential
3 value are inseparably linked. And, as I said, in
4 the Seventh Circuit for certainly as long as I've
5 been on the court there has never been any such
6 thing as an actual unpublished opinion. We've
7 never had a situation where somebody had to march
8 into the clerk's office and pick up a copy of it.
9 We've had a very active website for a very long
10 time, so it was all available, at least for people
11 with computers it was available, and Westlaw has
12 picked them up--I can't even remember, but
13 certainly for a very long time.

14 MR. LETTER: Thank you.

15 MR. LEVY: Let me follow up briefly, if I
16 might, on Doug's first set of questions. Do I
17 understand correctly that motions to publish a
18 previously unpublished decision can be made years
19 after the issuance of the opinion? And about how
20 long would it take the court to act on such a
21 motion?

22 JUDGE WOOD: I think there's no time

1 limit. I'm trying to think what the times have
2 been when I've been faced with those things and
3 certainly I can remember a year in one case. It's
4 not like within the time for a petition for cert or
5 any such thing. I suppose at some point it's not
6 really very interesting anymore because the court's
7 probably moved on in whatever the area is but
8 there's no specific time limit on it. We generally
9 act on it pretty quickly.

10 When I get a motion like that obviously it
11 goes to the panel but the authoring judge will have
12 the leading oar on that. I'll consult my panel.
13 I'll go back and take a look at it because if I'm
14 going to turn it into a published opinion, I want
15 to make sure it's right. You know, I go through
16 that extra process that Judge Bright was talking
17 about just to make sure that I haven't
18 inadvertently misstated the McDonnell-Douglas test
19 or done something silly, you know, that I shouldn't
20 have done.

21 So I don't think there is. I've never
22 seen one that was like five years late but I think

1 within a fairly reasonable range there's no time
2 limit.

3 JUDGE ROBERTS: First of all, Judge Wood,
4 thank you very much for coming and visiting with us
5 and I want to second your point that judges are not
6 lazy and underworked. I think there's no dispute
7 about that.

8 JUDGE WOOD: None of at the table, right?

9 JUDGE ROBERTS: But I want to focus a
10 little bit on a tension that I see in the arguments
11 against the proposed rule that on the one hand,
12 these--I don't really know what to call them--the
13 unpublished, the noncitable, whatever, opinions are
14 not worth very much; they just sort of apply
15 existing law to the specific parties. And then the
16 other argument that well, if you allow the citation
17 of them, lawyers are going to have this extra
18 burden of going and looking at them and judges are
19 going to have to look at them.

20 Traditionally I think in our adversary
21 system we allow disputes about the value of citable
22 materials to be resolved by the lawyers in the

1 exercise of their professional judgment in the
2 interest of their client and let the judges decide
3 whether we think that's worth anything, whether
4 it's an opinion from another circuit, a district
5 court opinion, a student comment in a law review.
6 And a lot of the arguments seem to focus on the
7 quality, the merit, the worth of the noncitable
8 precedents but not so much on the solution of not
9 allowing them to be cited and I wondered if you
10 could address why that is the best solution, as
11 opposed to, for example, many of the circuits have
12 discouraging language saying you should realize we
13 don't take these very seriously.

14 You know, my experience over the last 10
15 months, I think I've seen non--whatever we call
16 them--nonprecedential memoranda, whatever, probably
17 twice. Two different times I've seen that cited,
18 even though it's freely citable in our circuit,
19 because the lawyers know the judges aren't terribly
20 impressed by it.

21 On the other hand, as a lawyer I've had
22 situations where that is the exact case. It's a

1 year ago. Maybe two of the judges are on the same
2 panel. However basic the proposition, in my
3 professional judgment this is what I want that
4 court to know on my client's behalf and I found it
5 frustrating to have a rule saying you can't do
6 that.

7 So it's a long wind-up but focus on the
8 problem that the rule's addressed to, which is the
9 noncitability, even agreeing whatever you want to
10 postulate as to how valuable or invaluable all of
11 that body of law is.

12 JUDGE WOOD: Well, I have a couple of
13 reactions. I don't want to sit here and say that
14 there's absolutely no wheat among this chaff
15 because there probably is and, as I said, I think
16 that our device for catching it is one that works
17 pretty well. There is a sorting process for the
18 lawyers to find that one case, wading through all
19 of those on the whole, as I said, to be quite
20 honest, incredibly boring unpublished noncitable
21 orders that we issue--boring only in the sense that
22 they're so repetitive after a while, not, of

1 course, to the parties whose case it is.

2 So I worry from the point of view of the
3 lawyer who is trying to persuade the court to do
4 something feeling an ethical obligation to conduct
5 that sorting process. Lawyers, as you know, as
6 Judge Bright said, are of vastly different
7 abilities and some lawyers are not going to be as
8 discriminating as you would be, I am confident. We
9 read briefs like this all the time.

10 In fact, sometimes that factual match is
11 so misleading. You know, it's not really the legal
12 principle that's at issue in the case. Maybe the
13 case is in a different posture. Maybe it's a
14 somewhat different set of problems that are before
15 us.

16 And I think what we're touching on is
17 actually a very delicate area for the federal
18 judiciary, which is the fact that in a case--for
19 courts like the intermediate courts of appeals in
20 the federal judiciary, just as for most state
21 intermediate courts of appeals, we perform two
22 functions. We're usually performing the function

1 in our compulsory jurisdiction of error review
2 where we're looking at a particular case to make
3 sure the district judge got it right. District
4 judges usually do get it right, number one.

5 And number two, when we're doing that
6 there's real law out there. We all apply it the
7 same. I tell people you can pick any random panel
8 you want of the Seventh Circuit and we will agree
9 on 90 percent of the cases. It's just that clear.

10 So that's our error correction function
11 and I think there's a pretty close correlation
12 between the things that wind up as these noncitable
13 orders and at least a subset of the cases that are
14 applying that. Somebody said how many times do you
15 need to read the proposition that when a criminal
16 defendant calls up a witness and threatens him
17 before the trial, that an obstruction of justice
18 enhancement is appropriate under the sentencing
19 guidelines? We know that. This is not a
20 proposition that is subject to serious debate. And
21 lots of appeals, given the draconian sentences that
22 people get, are of that nature.

1 Or did the district court clearly err when
2 the court decided not to give an acceptance of
3 responsibility adjustment? It's a pretty
4 straightforward thing.

5 So again yes, there's a little bit of
6 wheat. How do we find it? How do we solve this
7 problem? If you really feel that to represent your
8 client properly you need to call that to the
9 court's attention I think jettisoning the ability
10 of courts to separate out that second group of
11 cases, the group of cases for the real development
12 of the law, is a vastly over-inclusive solution to
13 the problem.

14 JUDGE ALITO: I wondered if I could get
15 your reaction to a comment that was made by one of
16 your colleagues who submitted a comment in support
17 of the proposed rule, and that is that this is
18 basically an empirical question. Even given the
19 variations in the circuits that you pointed out,
20 would it not still be possible to do a systematic
21 study of the effect of no-citation rules or the
22 absence of no-citation rules in the various

1 circuits?

2 And if it would be possible to do such a
3 study and if such a study were to show that the
4 adverse consequences that have been predicted have
5 not materialized in the circuits that permit
6 citation, do you think that you and your colleagues
7 who have written in opposition to this proposed
8 rule would feel that that merited reconsideration
9 of their position?

10 JUDGE WOOD: Well, I'm certainly familiar
11 with the colleague in the letter to which you refer
12 and in a world of unlimited resources, how could I
13 be opposed to one more empirical study? I think a
14 study would have to be constructed very carefully
15 to adjust for the differences I was talking about
16 because if the circuit, in fact, just to use rough
17 numbers, has as fully precedential published
18 opinions fully half of its output, it's doing
19 something different than a circuit that has only 20
20 percent of its output that way. And I think some
21 very sophisticated techniques would need to be
22 brought to bear to make sure that one was not, in

1 fact--you know, if you ask the wrong question
2 you'll get the wrong answer and that's a risk that
3 I think is a serious one in such a study.

4 Now having said that, I think that I also
5 want to throw into the hopper the fact that the
6 states have vast experience with this, as well.
7 Most of the states--I think it's still a numerical
8 majority of the states have restrictions on
9 publication of opinions of their intermediate
10 appellate courts. I know I checked in our circuit
11 and all three of the states in our circuit do.
12 They each have particular criteria for their
13 intermediate appellate courts to publish opinions.
14 Some states may have no restrictions whatsoever and
15 if you're thinking of a study, maybe that's
16 actually a better way to control for these
17 differences than looking at the various Courts of
18 Appeals would be. I'm not sure.

19 I doubt actually in the final analysis
20 that if I were to be told that a complete free
21 market for citability was out there I would still
22 think it was worth having a fourfold increase in

1 the number of potentially citable things out there
2 on a nationwide basis but, as I said, I think it
3 really depends. It's a resource question and it's
4 also a question of whether this is the most burning
5 problem on your docket or whether there are other
6 things that you might wish to put those resources
7 to. But any such study would have to be very
8 carefully constructed.

9 JUDGE STEWART: Just as a follow-up,
10 doesn't your answer suggest, though, that--I mean
11 assuming the study's done and it unquestionably
12 shows a lot of these workload burden notions that
13 have been put out here don't prove out, that the
14 opposition to the rule still really boils down to
15 sort of the way you've characterized it, as
16 citability and precedential are linked? I think
17 that's an interesting term of art and in reading
18 all the comments, I don't see that as a predominant
19 viewpoint but that's another issue.

20 Isn't it really more the self-governance
21 notion? In other words, saying if a ton of
22 evidence from the study came to show that all these

1 workload notions just don't prove out, don't you
2 allow for the fact that you and perhaps your
3 circuit would be opposed to the rule simply because
4 it cuts into the self-governance and this merging
5 of citability? Because you cite in support of the
6 position you take about potentially increasing the
7 Supreme Court's cert docket and intracircuit--I
8 mean with all due respect, I don't see how that's
9 quantified or there's any data to really back that
10 up.

11 So I mean at bottom, isn't there really
12 sort of a philosophical disagreement with this rule
13 based on the premise of citability and precedential
14 merged together and kind of a notion of
15 self-governance?

16 JUDGE WOOD: Well, I certainly think that
17 I and my colleagues do think that a certain amount
18 of self-governance in each circuit is appropriate
19 since the circuits are, in fact, so different and
20 there are so many things--just to give you an
21 example, the Seventh Circuit never sits a week at a
22 time. We have a different panel every day. I sit

1 every week of every month. We're very
2 geographically compact. Somebody hops on the train
3 in South Bend or Milwaukee, travels 90 miles and
4 they're in Chicago. That doesn't look at all like
5 the Ninth Circuit.

6 The reason, actually just for the record,
7 that I said what I did about intracircuit
8 conflicts, I actually do think we have a certain
9 empirical base for because the larger circuit, such
10 as the Ninth Circuit with a vastly greater number
11 of dispositions of any type each year, do have the
12 risk of more intracircuit conflicts.

13 We all try, of course, to avoid those but
14 when there are that many more cases out there, are
15 you really going to remember every last thing,
16 every last nuance of every panel? I think it's
17 humanly very difficult to do.

18 So my sense is just if you quadruple or
19 quintuple the number of dispositions out there this
20 is, in fact, a serious risk, both within circuits
21 and for the country as a whole.

22 So it does partly get down to what you

1 think we're doing, whether you think we're
2 focussing on self-governance and the like, and how
3 we want to develop the law. We're responsible for
4 the development of the law at the circuit level
5 until the Supreme Court tells us we're wrong, of
6 course, and if we think that focussing on the
7 opinions that receive that full process that Judge
8 Bright was talking about are the ones where we want
9 to develop it, then maybe we should do that. I
10 think that's certainly been my position.

11 One thing I didn't stress in my oral
12 remarks but certainly was in the letter that the
13 rest of us on the Seventh Circuit submitted to this
14 committee is the fact that in our circuit the
15 process that yields a published precedential
16 opinion is considerably more elaborate than the
17 process that yields an unpublished noncitable
18 order. A published opinion is almost invariably
19 the result of oral argument and everything that
20 that entails--you know, public discussion with the
21 lawyers, an opportunity to explore whatever the
22 issues may be, the ability to deliberate with one's

1 colleagues--whereas our unpublished orders are
2 those where we decide in conference, obviously
3 still panels of three judges, with the assistance
4 of the staff attorneys. I don't want to be here
5 saying that I think our staff attorneys do a bad
6 job because I don't think so. Actually I think
7 they do an excellent job and we're responsible,
8 anyway. I don't want to be in a position of saying
9 that here's this second-class work product. But it
10 is not as elaborate a procedure. It's a devil's
11 deal that we've all made for the last 30 years
12 because of the incredible workload.

13 If you don't get oral argument--we
14 probably have all had the experience in oral
15 argument that somebody every so often says
16 something that you really didn't realize was in the
17 case, that makes you understand that the issue is a
18 narrower issue or a broader issue or the facts were
19 not really adequately portrayed in the person's
20 brief, and we pick up all that in our published
21 opinions and we don't necessarily--obviously
22 there's some risk of errors in these pro se

1 rambling, disjointed things that are presented to
2 us and we make the best of it that we can and come
3 out with an unpublished order. So they really do
4 strike me as two different kinds of things, in the
5 end.

6 JUDGE ALITO: Any other questions?

7 Judge Wood, thank you very much. We
8 appreciate your coming very much.

9 JUDGE WOOD: Thank you.

10 JUDGE ALITO: Richard Frankel.

11 We're running quite a bit late and I would
12 appreciate it if the witnesses would try to keep
13 their prepared remarks to about 10 minutes, to no
14 more than 10 minutes, so that we have ample time to
15 follow up with questions from the members of the
16 committee.

17 Mr. Frankel, thank you for coming.

18 MR. FRANKEL: My remarks run a little bit
19 longer so feel free to tell me to stop.

20 JUDGE ALITO: Okay.

21 STATEMENT OF RICHARD FRANKEL

22 MR. FRANKEL: My name is Richard Frankel

1 and I'm here on behalf of Trial Lawyers for Public
2 Justice and my testimony relates to proposed
3 Federal Rule of Appellate Procedure 32.1 concerning
4 the citation of unpublished opinions.

5 Generally speaking we wholeheartedly
6 endorse the committee's proposed rule for many of
7 the same reasons stated in the Advisory Committee
8 note accompanying the proposed rule and we believe
9 that the committee should approve it. At the same
10 time however, we believe that the proposed rule
11 does not go far enough and we would urge the
12 committee to consider issuing a new proposed rule,
13 one that would require all appellate decisions to
14 be given the weight of binding precedent.

15 And in support of that position, I wish to
16 stress three points this morning: one, that
17 allowing courts to issue unpublished decisions
18 which do not make law is contrary to our rule-based
19 system of lawmaking; two, issuing decisions that do
20 not make law creates both the perception and
21 unfortunately the reality that courts issue
22 nonrule-based and inconsistent decisions; and

1 three, the fact that requiring all decisions to be
2 given the weight of binding precedent will increase
3 judicial workload cannot justify an approach that
4 violates the basic principles of the American
5 judicial system.

6 Our first point is that unpublished
7 opinions are contrary to rule-based decisionmaking.
8 Our legal system is predicated on the idea that
9 society should be governed by the rule of law and
10 not the rule of men and women. Courts preserve the
11 rule of law by issuing decisions that both apply
12 the law and create law.

13 As the Honorable Judge Wood just recently
14 stated very succinctly, our courts are public
15 courts and they exist not merely to arbitrate
16 dispute or just to decide cases. However, when
17 courts issue unpublished or nonprecedential
18 decisions, they undermine both of those facets of
19 the rule of law system because they neither
20 articulate a lasting principle of law through their
21 decisions; nor do they require future courts to
22 apply the law that was used in their previous

1 unpublished decisions. Without a system that binds
2 future courts to follow its own past decisions,
3 nothing ensures that courts will act according to
4 principle rather than personal opinion.

5 This, in turn, erodes another basic
6 principle of our judicial system, the notion of
7 fundamental fairness, that like litigants should be
8 treated alike. Every litigant who walks into
9 court should be able to have the expectation that
10 he or she will be treated no differently than any
11 other litigant. However, when courts can issue
12 unpublished decisions in which they can decide an
13 issue one way one day and another way the next day,
14 not only are courts telling those litigants that
15 they are not entitled to have that expectation but
16 additionally, that it is perfectly reasonable and
17 proper for courts to actually treat those litigants
18 differently even though they face almost identical
19 situations.

20 We believe the only way to truly preserve
21 a rule of law system is to require that all
22 appellate decisions actually be given the force of

1 law, both present and future, by giving them
2 binding precedential weight.

3 Our second major point is that the
4 practice of issuing unpublished decisions creates
5 both the perception and sadly, the reality of a
6 two-tiered system of justice in which courts are
7 not engaging in rule-based decisionmaking.

8 First in terms of perception, whether or
9 not it is actually true, unpublished decisions send
10 a message that courts are engaging in
11 results-oriented decisionmaking. When a court
12 announces a result in a case but says that the
13 principle underlying that result in the case need
14 not be followed, it sends the message that courts
15 are more interested in getting the result that they
16 want than in the principle underlying that result.

17 Whereas with published opinions the court
18 shows faithful adherence to the rule of law by
19 starting out by identifying an appropriate legal
20 principle and then applying that principle to see
21 which result follows, with unpublished opinions it
22 appears that the court starts out with the result

1 and then expressly disclaims the lasting value of
2 any reasoning used to reach it. As a result, the
3 system creates two different levels of justice
4 being administered, one for published decisions and
5 another for unpublished decisions.

6 And this perception of results-oriented
7 decisionmaking is, in fact, reinforced by many of
8 the statements that judges have themselves made in
9 their comments to this committee in which they
10 state that in many unpublished decisions the only
11 thing that a panel will agree upon is the result in
12 the case and not necessarily the reasoning used to
13 reach it and moreover, that lawyers in lower courts
14 would actually be affirmatively misled if they were
15 to rely on reasoning that is while printed and
16 stated in the decision, doesn't actually reflect
17 the collective agreement of the panel. This also
18 exacerbates public perceptions that judges may be
19 motivated more by results than they are by
20 principle.

21 Now in terms of reality, it's also true
22 that unpublished decisions have resulted in a

1 reality where inconsistent decisions result. In
2 our written comments we have highlighted a number
3 of examples of inconsistent decisionmaking within a
4 circuit on identical issues that have been caused
5 by the use of unpublished decisions. In one
6 notable example, the case of United States versus
7 Rivera-Sanchez, which was a published decision of
8 the Ninth Circuit, that panel noted 20 previous
9 unpublished decisions all addressing the same issue
10 but resolving that issue in three different ways.

11 This shows that this problem actually is
12 real and occurring within circuits and it's not
13 something that should be dismissed as merely
14 abstract or theoretical and we believe that the
15 only way that this problem truly can be rectified
16 is to make all decisions binding and precedential.

17 Our third and final point is that the fact
18 that judicial workload will increase as a result of
19 making all decisions binding and precedential
20 cannot justify a radical departure from a
21 rule-based legal system.

22 Now of course, as almost all commenters

1 have conceded, it's inevitable, given that judges
2 spend more time on published opinions than they do
3 on unpublished ones, if you require publication of
4 all decisions as precedent, judicial workload is
5 going to increase. And under our proposed rule,
6 judges are going to face very difficult choices
7 about how to allocate their time. They may either
8 decide to issue more summary one-line or even
9 one-word dispositions or to spend less time on
10 opinions that they currently designate as published
11 and we recognize this is going to happen. However,
12 this framework is preferable to allowing the
13 continued use of unpublished decisions, we think,
14 for several reasons.

15 The first is that as we have already
16 expressed, mandatory publication as binding
17 precedent is the only way to truly preserve notions
18 of rule-based law-making and fundamental fairness
19 and these principles represent the heart of the
20 judicial function and should not at the drop of a
21 hat, we think, be readily sacrificed at the alter
22 of time savings for appellate judges.

1 Second, it may be that the use of summary
2 dispositions, while certainly not ideal, could be
3 preferable to the use of unpublished opinions in
4 many cases. Given that judges have already stated
5 that a lot of cases they agree on a result but they
6 may not agree on the reasoning, it may not make
7 sense to issue an unpublished decision that
8 contains reasoning that does not reflect the
9 opinion of the panel but to also issue a result
10 that they do agree upon but that is not binding.
11 It may make more sense to make that result binding
12 but then to exclude the reasoning that creates the
13 possibility of lawyers and lower court judges being
14 misled.

15 Third, while judicial workload, we admit,
16 will increase, we believe that the amount that it
17 will increase or the concerns that have been
18 addressed by critics of this rule are somewhat
19 exaggerated and we have several reasons why we
20 think this is so.

21 The first, as the committee is well aware,
22 nine of 13 federal circuits already permit citation

1 of unpublished opinions in some form for their
2 persuasive value. And while there may not be a lot
3 of data already out there, there's no indication
4 that the opinions in those circuits have fallen in
5 quality as judges devote more time to their
6 unpublished decisions or that lawyers and lower
7 court judges are being misled by erroneously
8 relying on unpublished decisions.

9 Second, while certainly not exclusively,
10 an overwhelming number of commenters who have
11 expressed this workload concern are lawyers and
12 judges that practice within the jurisdiction of the
13 Ninth Circuit, which suggests that while it may
14 not be a problem unique to the Ninth Circuit,
15 perhaps it's a problem certainly much more
16 pronounced in the Ninth Circuit. And this is not
17 to say that it is not a real problem but a problem
18 of limited geographical scope certainly should not
19 be the driving force behind national policy-making
20 and should not be a reason to reject either the
21 proposed rule or the idea of making all decisions
22 binding and precedential.

1 Third, the available statistics that are
2 out there do not support the contention that
3 judicial workload will radically increase. One
4 study by Dean Robel of Indiana University Law
5 School shows no correlation between a circuit's
6 per-judge workload and the percentage of opinions
7 that that circuit chooses to publish.

8 There was another study cited in Law and
9 Contemporary Problems in 1998 which shows a wide
10 disparity in the number of opinions published by
11 individual judges. It studied a two-year span and
12 showed that within that span a number of active
13 judges published as many as 120 opinions while
14 other judges, also active judges, published as few
15 as 20, which suggests that it's possible that there
16 may be ample room for judges to significantly
17 increase the number of opinions that they publish
18 without detracting from the quality of judicial
19 decisionmaking.

20 And finally, while it's true that judicial
21 workload will increase in the short run, we think
22 there's a possibility that requiring all decisions

1 to be binding and precedential could actually
2 reduce judicial workload and the workload of
3 lawyers in the long run by stopping repetitive
4 litigation, by establishing a firm rule of
5 precedent and filling in ambiguities in existing
6 precedent so that you don't have a case like United
7 States versus Rivera-Sanchez that must be decided
8 21 times rather than a single time, and also by
9 providing greater guidance to lower court judges
10 and to lawyers about what the state of the law is
11 so that they have a better idea of whether appeals
12 can and should be filed, and this could ultimately
13 reduce the number of appeals that ultimately will
14 be filed.

15 Our final conclusion would be that as many
16 commenters have stated this morning and in their
17 comments, both for and against the rule, they seem
18 to acknowledge that unpublished opinions are a bit
19 of an unfortunate practice in that in an ideal
20 world every judicial opinion would give the time
21 and attention that it deserves and whatever path
22 the committee decides to take with respect to

1 unpublished opinions, we think it makes little
2 sense to acknowledge the lamentability of the
3 practice of issuing unpublished opinions and then
4 to adopt a rule structure that both enshrines and
5 perpetuates that practice. If they truly are
6 flawed and imperfect, then they should not be
7 condoned but they should be eliminated.

8 JUDGE ALITO: Thank you, Mr. Frankel.
9 Any questions?

10 MR. LETTER: I just had one question for
11 you. The statute that sets up this process, 20 USC
12 I think it's 207.1, says specifically that the
13 Supreme Court can promulgate rules of practice and
14 procedure but those rules cannot affect substantive
15 rights.

16 The proposal that you're making, at least
17 to me, raises the question that we would be
18 recommending and the Supreme Court would be
19 adopting a rule that is not practice and procedure
20 but would be substantive. It would be telling the
21 courts, setting a rule for them that certain
22 opinions bear precedential weight, meaning have

1 substance, and isn't that beyond the statutory
2 power of the Supreme Court and therefore this
3 committee?

4 MR. FRANKEL: Well, I would say that to
5 the extent that it would be, I would think that the
6 rule that allows courts to establish their own
7 rules regarding unpublished opinions would do the
8 same thing by allowing courts to deprive--

9 MR. LETTER: But that rule just says what
10 you can cite in your brief. It doesn't say
11 anything about whether that opinion is or is not to
12 govern the substantive rule of law in the case.

13 MR. FRANKEL: Well, I understood, at least
14 from reading Professor Schiltz's summary of the
15 comments, and I may have misunderstood it or
16 misinterpreted it, that originally there was some
17 rule passed in the early '60s or the 1970s that
18 allowed this practice of unpublished opinions.
19 Before there was a practice of issuing unpublished
20 opinions all decisions were published and given
21 precedential weight and there was some shift that
22 allowed the use of unpublished opinions in a way

1 that therefore allowed courts to deprive those
2 decisions of having any precedential weight.

3 MR. LETTER: I may be wrong but I think
4 those were decisions or rules by the courts
5 themselves, either in opinions or in their own
6 rules, which may or may not be valid. But again
7 this committee and the Supreme Court are bound by
8 the statute, which says we cannot set
9 substantive--we cannot affect substantive rights.

10 MR. FRANKEL: I don't know whether that
11 rule would be substantive or procedural in the
12 sense that you're not--you're only saying what
13 decisions should be given the force of law but
14 you're not saying what that law would be and I
15 don't know whether that would be classified as
16 substantive or procedural.

17 JUDGE ALITO: Do you really think that
18 court of appeals judges could write 100 or 150
19 opinions a year, precedential opinions a year,
20 without experiencing an enormous decrease in the
21 quality of the opinions?

22 MR. FRANKEL: I mean I obviously don't

1 have the experience of being a federal judge, so
2 certainly I would show some deference to the
3 opinions of judges who have expressed that some
4 degree in quality would occur.

5 Judicial workload increases all the time
6 and judges seem to find ways to continue to fulfill
7 their judicial duties without sacrificing quality.
8 I mean the number of appeals, even though more and
9 more are being issued as unpublished opinions,
10 increases every year and this increases a judge's
11 workload and I think that like I said, they may
12 have to find ways of reallocating their time
13 between published--between how they allocate time
14 on opinions.

15 It may be that some opinions can be issued
16 without spending as much time that is currently
17 spent on them. They could be written in more
18 narrow ways. It could be that summary dispositions
19 could be used in certain cases, as I mentioned in
20 my comments.

21 I think there's no question that a
22 judicial workload is going to increase but judicial

1 workload always increases and that doesn't mean
2 that we always take steps that deny litigants their
3 opportunities to have fundamental fairness
4 protected, so I think there are ways that judges
5 can do it.

6 MR. SVETCOV: I'm from San Francisco. I
7 practice in the Ninth Circuit. So now you want me
8 to read not only the 777 published opinions in my
9 circuit but the other 4,800 that are not published,
10 even though once a panel in my circuit in a
11 published opinion sets the law of the circuit, that
12 is the law of the circuit and everything else is
13 merely an application of that principle to various
14 sets of facts, many of which are very much like the
15 one in the first panel opinion?

16 Why are you asking me to digest 5,000
17 extra opinions each year in my practice? I mean
18 you're forgiving the judges. They could write
19 summary--you say they can write summary judgments.
20 Why do I have to learn that much more law? What is
21 it about uniformity that makes that a worthwhile
22 principle for me, practicing in the Ninth Circuit?

1 MR. FRANKEL: Well, I would answer that
2 question in several ways. The first is that
3 available studies that I've seen, particularly the
4 one conducted by Dean Robel, shows that most
5 lawyers practicing within circuits, including the
6 Ninth Circuit, already regularly read, rely and
7 cite to unpublished decisions.

8 Secondly--

9 MR. SVETCOV: Trust me; I never do.

10 MR. FRANKEL: Then I guess there are
11 exceptions to every rule.

12 Secondly, many times unpublished cases are
13 cited because there are holes in existing precedent
14 and if you made those decisions precedential,
15 instead of when you now do research and you
16 initially find the case most on point is an
17 unpublished case but you have to continue doing
18 research because that case cannot be cited, if that
19 was the first case that you found, this would
20 substantially save your research time.

21 MR. SVETCOV: In my circuit we can find
22 cases on both sides that are already published.

1 MR. FRANKEL: Well, if they're already
2 published, truly if the cases are truly repetitive
3 and they're not going to add anything to your
4 research time, then there's no need to continue to
5 read them. But to the extent that they do add
6 persuasive reasoning that is not contained in
7 current published opinions, then whether those
8 opinions are citable or not, lawyers have a duty to
9 find that reasoning and to use that reasoning,
10 whether or not they cite the case in their
11 arguments to the court and whether the case is
12 ultimately citable or not or persuasive or
13 precedential doesn't change that.

14 MR. SVETCOV: Why doesn't Judge Wood's
15 proposal, which I think is true in many circuits,
16 that a motion to publish would resolve that
17 situation in those rare cases?

18 MR. FRANKEL: I would have two answers to
19 that question. One is that although, at least it
20 seems in the Seventh Circuit and in many other
21 circuits, any interested member of the public can
22 move to publish a case, those who are going to be

1 most aware of it are the lawyers in the case and
2 you're leaving it up to the lawyers in those cases
3 to decide whether or not they think that case
4 merits publication.

5 Second, if the case does not get
6 published, then you still have the risk of
7 inconsistent results occurring and the risk that
8 litigants who walk into court will not be treated
9 equally and in our mind that is the most important
10 concern and the one that must be protected, whether
11 or not a motion to publish is made.

12 Third, it may be that you only want to
13 publish--you find out that you want to publish a
14 case--the case might be useful to you several years
15 after the decision is published and I guess there
16 are procedures to decide how to publish a case, but
17 if the original author of the opinion perhaps is no
18 longer on the court, it may be difficult for a
19 court to decide whether they think that opinion
20 merits publication or not.

21 JUDGE ALITO: Any other questions?

22 Thank you, Mr. Frankel. We appreciate

1 your comments very much.

2 Mr. Judah Best of Debevoise & Plimpton on
3 behalf of the ABA Section of Litigation.

4 STATEMENT OF JUDAH BEST

5 MR. BEST: Good morning. My name is Judah
6 Best. I wrote it down so that I couldn't forget
7 it. I'm of counsel to the law firm of Debevoise &
8 Plimpton. I'm a former chair of the Section of
9 Litigation of the American Bar Association.

10 Some of you know me in one of my other
11 capacities. I was chair of the Standing Committee
12 on the Judiciary and prior to that I had been on
13 the committee for a number of years. I see at
14 least one face that's familiar to me in that
15 context.

16 I'm also a Litigation Section delegate to
17 the House of Delegates of the American Bar
18 Association. By the way, the Litigation Section is
19 composed of 70,000 trial lawyers.

20 In the capacity as a member of the House
21 of Delegates, in the summer of 2001 I presented to
22 that house a resolution urging that the American

1 Bar Association oppose the practice of various
2 federal Courts of Appeals in prohibiting citation
3 to or reliance upon their unpublished opinions as
4 contrary to the best interest of the public,
5 contrary to the best interest of the legal
6 profession. The resolution was passed by the House
7 of Delegates and is the official policy of the
8 American Bar Association. A copy of the resolution
9 and the accompanying report are attached to my
10 testimony, which has been presented to this
11 committee.

12 Now in the interest of the committee's
13 time, I will limit my remarks today to two topics.
14 First, that all opinions, whether binding precedent
15 or not, should be published, as provided by the
16 Advisory Committee in proposed Rule 32.1. Second,
17 that the new rule should be uniform. That is to
18 say the rule should not allow for opt-outs but
19 should govern all circuits. I think it's sort of
20 higgly-piggly, as I will explore later in my
21 remarks, to see the differences in the circuits.

22 Approximately 80 percent of the opinions

1 published by circuit courts today are noncircuit
2 binding. In most circuits today the opinions are
3 released to publication in the most widely used
4 database services, Lexis and Westlaw.
5 However--it's a big however--it was only recently
6 that the First and Third Circuits began releasing
7 their decisions and the Fifth and Eleventh Circuits
8 still withhold them. And, by the way, that is true
9 of many state appellate courts, as well.

10 One huge problem is the so-called
11 institutional litigants, the ones who have the
12 opinions--the United States Attorneys, the
13 government agencies, insurance companies, and the
14 like. They're far more likely than others to have
15 access to the unpublished opinions. After all,
16 they have a continuing, focussed interest and they
17 set up a library of relevant decisions and I think
18 that gives an unfair advantage to one side.

19 I had personal experience with this.
20 Several years ago I was engaged to counsel a
21 defendant in a criminal appeal. I went through the
22 familiar process of reviewing the record, sorting

1 out the issues, choosing those that seemed most
2 promising and abandoning those that did not. I
3 found an important issue on which there was a split
4 among the circuits and no published opinion in the
5 circuit where the matter was situated. I said
6 published opinion, so that's the caveat. I
7 counseled that the issue was one of first
8 impression in that circuit.

9 To my chagrin, the United States Attorneys
10 Office produced an unpublished opinion that was
11 contrary to my stated position. Actually they
12 presented it in the circuit in which it was
13 inappropriate to present it, but they did so.
14 Frankly, I felt that I had been had. The U.S.
15 Attorneys Office simply had more access to the law
16 than my client did and he and I were at an unfair
17 disadvantage.

18 And this is not an isolated instance. I
19 believe it happens constantly in jurisdictions
20 where opinions are not published but are available
21 and accessible to the institutional litigant.

22 You have developed what I would call the

1 homer situation. Indeed, Professor Lauren Robel,
2 an acknowledged authority in this area, has
3 conducted survey research demonstrating that
4 institutional litigants do, in fact, collect,
5 catalogue and use unpublished opinions in ways not
6 available to other litigants. Professor Robel has
7 also pointed out that institutional litigants have
8 every incentive to, and I quote, "stack the
9 precedential deck by moving for reporter
10 publication (and therefore circuit-bindingness) of
11 unpublished cases with outcomes that they favor,
12 while allowing the unfavorable decisions to remain
13 unpublished and occult." And I cite her quotation
14 in my prepared remarks.

15 It's no answer to suggest that
16 anti-citation rules can solve this sort of problem.
17 I don't think they can. As the chief judge of one
18 circuit has put it, and I quote, "Commentators have
19 argued that the no-citation rule may work to
20 increase rather than decrease the unfairness to the
21 uninitiated lawyer. If the sophisticated attorney
22 uses arguments or language drawn from the

1 unreported case without citing it, his uninitiated
2 opponent is unlikely to learn of its existence. In
3 sum, if unreported opinions are cited, the
4 uninitiated lawyer can remedy his deficiency; if
5 they cannot be cited, he may not even know a
6 deficiency exists."

7 Now there's another concern and that is
8 that if none of the lawyers know about the occult
9 opinion, the court or its law clerks will know
10 about it. Judges acknowledge that they read the
11 unpublished opinions and it is impossible to
12 believe they do not consider the reasoning of those
13 opinions when faced with similar fact patterns or
14 arguments, so I think you have to read those 4,000
15 unpublished opinions because the judges are reading
16 them.

17 But the lawyer who cannot research the
18 day-to-day rulings of the appellate bench in a
19 particular area will be that much less prepared to
20 counsel his or her clients. Binding or not, the
21 unpublished opinions are a pretty good indicator of
22 what a judge thinks on a particular issue in a

1 particular context and a faithful recordation of
2 what she or he does in 80 percent of her cases.

3 If one lawyer can get that information and
4 the other cannot, that is not fair. If the judge
5 has that information and the lawyer does not, that
6 is also not fair.

7 Now there's a deeper problem that must
8 also be dealt with. Although the circuit rules may
9 rationalize the nonbindingness of some opinions on
10 the theory that they have nothing new to say, the
11 inescapable fact discussed by William Hangle, who
12 is sitting behind me and will be speaking soon, in
13 a wonderful article published in Federal Rules
14 Decisions, is that they often do break new legal
15 ground. The widely felt suspicion is that there
16 are important decisions out there but they cannot
17 be accessed. Now that cannot be good for the law
18 as an institution. In fact, we believe it is
19 destructive to law and is not respectful to law.

20 Let's talk about uniformity for a minute.
21 I am aware that the Advisory Committee has
22 consciously decided not to include a local opt-out

1 provision in the proposed rule. We congratulate
2 the committee on that judgment and we urge that you
3 hold to it. I believe that a local opt-out would
4 leave us with essentially the same Babel of
5 inconsistent rules and practices--I think I used
6 the term higgly-piggly before--in this area that
7 face us today.

8 The circuits have adopted a bewildering
9 variety of inconsistent rules for the handling of
10 unbinding opinions. Some circuits publish. Some
11 do not. Some circuits allow you to cite them
12 subject to various tests. Others prohibit you from
13 citing them in almost all circumstances. One
14 circuit seems to be saying that you may cite them
15 but the court will either ignore them or refrain
16 from mentioning them.

17 In Mr. Hangle's article he summarizes the
18 views of the various circuits as follows. One, you
19 cannot read our nonbinding opinion, A, First
20 Circuit until recently, you must not talk about
21 them. B, Eleventh and Fifth Circuits in some
22 cases, you may talk about them but first you have

1 to find them. Fifth Circuit in other cases, we
2 discourage you from talking about them even if you
3 find them; however, they are binding and we will
4 apply them against your client. D, Third Circuit
5 until very recently, you are welcome to talk about
6 them if you can find them; however, we'll not pay
7 any attention. Alice in Wonderland, ladies and
8 gentlemen?

9 You can read our nonbinding opinions
10 but--Fourth, Sixth, Eighth, Tenth and for some
11 cases District of Columbia Circuit--we prefer that
12 you not talk about them. Second, Seventh, Ninth
13 Federal and for other cases District of Columbia
14 Circuits, as well as recently First Circuit, you
15 must not talk about them. Third Circuit very
16 recently, we still will not pay any attention to
17 them.

18 I don't mean to make a comedy of it but I
19 think it's sort of revealing to place it in this
20 context.

21 To make matters worse, several of the
22 circuits, including my own District of Columbia

1 Circuit, have a sort of comity rule that prohibits
2 citation of out-of-circuit opinions that could not
3 be cited in the courts which wrote them. That
4 means that every appellate lawyer must become
5 expert in the local rules of every circuit before
6 he can cite and out-of-circuit case.

7 I heard one commentator say well, these
8 are really not problems because some lawyers or
9 many lawyers only argue in their own circuit. That
10 is an answer but in my case I'm a member--I don't
11 collect membership in circuits but I'm a member of
12 the First, Second, Fourth, Fifth, Eleventh, Eighth,
13 and Ninth Circuits and I've appeared in all of
14 those circuits. There is something known as planes
15 and trains, so lawyers do get around these days.

16 There's simply no need for all this
17 complexity. Traditionally lawyers and judges have
18 not hesitated to cite the words of novelists,
19 comedians, athletes and cartoon characters, not as
20 binding precedent but simply for whatever
21 persuasive value they may have. There is no good
22 reason for judges to treat their own words or the

1 words of their colleagues any differently a priori
2 and to set up artificial barriers to their
3 citation.

4 In conclusion, I again congratulate the
5 committee upon its promulgations and
6 recommendations of Rule 32.1 and it is my view and
7 that of the Litigation Sectoin that the new rule is
8 badly needed. Thank you very much.

9 JUDGE ALITO: Thank you.

10 Questions? Carol?

11 MS. MOONEY: I have two questions. You
12 talked first about the unfair advantage to
13 institutional litigants or even judges knowing
14 about opinions that a lawyer does not. Will that
15 unfair advantage not disappear with the
16 E-Government Act?

17 MR. BEST: I don't know that it will or it
18 won't. We discussed that as we heard the reliance
19 on the E-Government Act. I can't predict that. I
20 know that it's a jungle now. I don't know that the
21 act is going to clarify that jungle and I think it
22 would be better if you do it the old-fashioned way

1 and publish the opinions.

2 MS. MOONEY: Secondly, you seem to be
3 making the distinction that the first two witnesses
4 were not making; that is, separating citability
5 from an opinion's binding or precedential value.
6 At least a couple of our witnesses collapsed those
7 two things. Could you explain how you believe--

8 MR. BEST: I'm not sure that I believe
9 there's any significance. I think citability and
10 precedential value, of course, is very important.
11 I don't think I'm distinguishing between those two
12 concepts. I may be mentioning them in different
13 aspects of the same problem.

14 MS. MOONEY: I thought you had. Thank
15 you.

16 MR. SVETCOV: Mr. Best, thank you very
17 much. Let me ask you a question.

18 MR. BEST: You're going to have to read
19 those 4,000 opinions.

20 MR. SVETCOV: Well, let me ask you a
21 question. If the unpublished opinion begins with
22 the following sentence, "The parties are familiar

1 with the facts," and then goes on to discuss four
2 or five different contentions let's say in a
3 criminal case or a summary judgment case, how does
4 one go about citing that?

5 JUDGE LEVI: I think there's something
6 known as footnotes.

7 MR. SVETCOV: If "The parties are familiar
8 with the facts" is the first sentence of the mem
9 dispo, many of the Ninth Circuit decisions that are
10 unpublished begin with that sentence and then go on
11 over three or four pages to discuss contentions of
12 law and answer the question and give the parties a
13 disposition on the contentions raised without any
14 explication of the facts, how do I as a subsequent
15 practitioner looking at that disposition use it in
16 my practice?

17 MR. BEST: It's a question of whether or
18 not--I understand what you meant. I didn't
19 understand what you were saying before. I think I
20 would use it in seeing if it's generally a state of
21 facts that requires further elaboration by me and I
22 suppose I would try to get the record on appeal and

1 see what the case is all about.

2 MR. SVETCOV: You would do that?

3 MR. BEST: I wouldn't do it in 4,000 and
4 you wouldn't do it in 4,000 cases.

5 MR. SVETCOV: Exactly.

6 MR. BEST: But if something in the case is
7 arresting in that circumstances, I might very well
8 want to see the record on appeal. It's a rule of
9 reason, like everything else.

10 MR. SVETCOV: You listened to Judge Wood's
11 testimony about the fact that circumstances are
12 different in different circuits. Not only the
13 number of published versus unpublished opinions but
14 the fact that in the Fourth Circuit 10 percent of
15 the cases are published and in the Seventh Circuit
16 43 percent of the cases are published.

17 Doesn't that suggest that a
18 one-size-fits-all uniform rule may not be the best
19 answer for this particular problem but rather, that
20 diversity is the better answer, rather than
21 uniformity? And you were able to figure out--you
22 and Mr. Hangley were able to figure out all the

1 various nuances in the various circuits on rules of
2 publication. They're not difficult to figure out.
3 Why is uniformity better than diversity here?

4 MR. BEST: I think there should be a
5 presumption toward uniformity and to the extent
6 that you want to deviate from that, there must be
7 exceptional circumstances that require it. I doubt
8 that there are. I think uniformity is good. I
9 think that--

10 MR. SVETCOV: I've spent my whole life
11 fighting for diversity. I'm not about to change--

12 MR. BEST: You're using it in a different
13 context.

14 It's a homer concept. You know all of the
15 problems in your circuit. You know how to deal,
16 just as I know cases like Smith v. Pollan and very
17 arcane ways of doing things in the District of
18 Columbia Circuit, but we're trying to have a
19 uniform application and I think that's important.

20 MR. SVETCOV: I go down to the Fifth
21 Circuit all the time. I can figure out the rules.

22 MR. BEST: I congratulate you.

1 JUDGE ALITO: Any other questions of Mr.
2 Best?

3 Thank you very much. We appreciate it.
4 Professor Stephen R. Barnett of Boalt Hall
5 Law School.

6 STATEMENT OF STEPHEN R. BARNETT

7 MR. BARNETT: Good morning. My name is
8 Stephen Barnett. I'm an emeritus professor of law
9 at Boalt Hall in Berkeley. I thank the chair and
10 the committee for allowing me to testify today on
11 the proposed FRAP Rule 32.1, which I strongly
12 support.

13 This committee has been hit by an
14 avalanche of public comments and I confess to
15 having contributed my share. In addition to this
16 morning's statement, I earlier submitted comments
17 in reply, in part, to Judge Kozinski's comments.
18 In the spirit of expiation then, I thought I might
19 be most useful to the committee this morning by
20 offering some analysis of what's in that daunting
21 pile of 500 plus comments, so that's what I propose
22 to do briefly this morning.

1 That great legal realist, Holmes--that's
2 Sherlock, not Wendell--famously solved a case by
3 pointing to the dog that did not bark. What I find
4 most telling in the comments here is a whole
5 kennelful of dogs that did not bark. The proposed
6 rule, after all, would require four federal
7 circuits to do essentially what the other nine
8 federal circuits already do--allow their
9 unpublished dispositions to be cited. That's also
10 what a growing number of states, now 22 of them,
11 already do. We thus have actual contemporaneous
12 experience in both the federal and state courts
13 with what rules that are equivalent to 32.1, in
14 fact, do.

15 What we have in almost all of the 500
16 comments meanwhile are predictions about bad things
17 that will happen if the rule is adopted. If those
18 predictions are accurate, we would expect to see
19 some evidence of such bad things in jurisdictions
20 where equivalents of Rule 32.1 have been adopted.
21 We would expect judges and lawyers from the nine
22 circuits that allow citation of their unpublished

1 opinions, the citable circuits if you will, to have
2 filed comments saying to this committee don't do
3 it; we did it and look what happened to us. We'd
4 expect those comments to lay out in painful detail
5 all the adverse consequences that have been
6 suffered in those circuits as a result of making
7 opinions citable and we'd expect to get the same
8 kind of reports from judges and lawyers in the 22
9 states where unpublished opinions are now citable.

10 What we get, however, in the entire stack
11 of comments is virtually no such reports. This is
12 the number one dog that did not bark. In their
13 silence on this point the comments validate what
14 Judge Frank Easterbrook wrote in his comment.

15 "What would matter are adverse effects and adverse
16 reactions from the bar or judges of the nine
17 circuits and 21 states that now allow citation to
18 unpublished orders and from that quarter no protest
19 has been heard," says Judge Easterbrook.

20 Specifically I will report briefly on
21 three groups of lawyers or judges in the citable
22 circuits from whom one would have expected to hear

1 of such adverse effects if they existed. These are
2 circuit judges, lawyers, and federal public
3 defenders. Then I'll report on three additional
4 groups--first, additional public defenders in the
5 citable circuits whom I surveyed myself, then
6 lawyers in the Ninth Circuit, and federal circuit
7 judges in the four no-citation circuits.

8 First, federal circuit judges in the nine
9 citable circuits. The comments received from
10 federal circuits judges in the nine circuits where
11 citation to unpublished orders is now allowed are
12 striking in three respects--first, their paucity;
13 second, their failure to report adverse reactions
14 or effects from such citability; and third, their
15 failure to refer to, let alone criticize, their own
16 circuit's pro-citation rules.

17 In the first place, the number of comments
18 from circuit judges in the citable circuits is only
19 eight. In my written statement I said six but two
20 came in subsequent to that. These two letters from
21 Judge Burch of the Eleventh Circuit and Chief Judge
22 Loken of the Eighth Circuit are puzzling. They

1 oppose the proposed rule and they report that other
2 judges in their circuit are opposed without
3 mentioning that their own circuits both have rules
4 allowing citation of unpublished opinions--that is,
5 the Eighth and the Eleventh--rules comparable to
6 FRAP 32.1. Neither of these letters refers to the
7 existing rule in the writer's own circuit, let
8 alone criticize it and says it's terrible.

9 And one of all eight letters point to
10 adverse effects from the current regimes of
11 citability in the writer's own circuits. To the
12 extent that they refer at all to the citation rules
13 of their circuits, these letters mostly praise
14 those rules. And I would call your attention to
15 Judge Ebel's letter from the Tenth Circuit, Judge
16 Michael from the Fourth Circuit, Judge Martin from
17 the Sixth.

18 And Judge Bright this morning was eloquent
19 on the point. He's a wonderful natural experimenter,
20 if you will, since he's sat in all these circuits
21 with all these different citation rules and he said
22 he sees no difference. He's afraid there would be

1 a difference under FRAP 32.1 because it would bar
2 what I call discouraging words. Well, as I've
3 argued in my comments, I don't think it would bar
4 them, so I think the one difference Judge Bright
5 sees would not, in fact, be there.

6 So that's judges from the citable
7 circuits. With respect to lawyers from the nine
8 citable circuits, if you rule out Washington
9 lawyers who, with the exception of Mr. Best and
10 some others, may not focus particularly on the D.C.
11 Circuit and its citation rule, the letters from
12 lawyers are almost equally sparse. And while
13 almost all of these comments oppose the proposed
14 rule, their opposition only rarely is based on any
15 harms that they claim to result from the citation
16 that is now allowed in the writer's jurisdiction.
17 Again the dog doesn't bark.

18 With respect to federal public defenders
19 in the nine citable circuits, here, too, you would
20 expect that if they were chaffing under the
21 citation rules in those circuits that they would be
22 saying so now to warn and protect their colleagues

1 in the four no-citation circuits. When one looks
2 for comments from federal public defenders in the
3 circuits that now allow citation, however, I count
4 only four and while these comments oppose the rule,
5 they again don't mention, let alone criticize, the
6 citability rule under which they, in fact,
7 practice.

8 Given the paucity of comments from federal
9 public defenders in circuits allowing citation, I
10 conducted my own little fact-finding inquiry. I
11 interviewed by telephone eight randomly selected
12 federal public defender attorneys in the Fourth,
13 Fifth, Eleventh and D.C. Circuits and I have their
14 names and my notes of the conversations and am
15 willing to make them available to anyone who wants
16 to see them.

17 Asked whether they thought the citability
18 of unpublished opinions in their circuit added to
19 their research time, the attorneys unanimously said
20 essentially no. They said "Not a bit" or it
21 doesn't add any burden at all, or perhaps a little
22 bit, such as 2.5 percent.

1 In the Fifth Circuit, whose unpublished
2 opinions only recently have been put no line and
3 hence there should be no substantial factor of
4 custom or habit, the appellate chief in Houston
5 reported that there was "no added burden."

6 More than one of the attorneys I
7 questioned expressed surprise and some even
8 derision that their colleagues in the Ninth Circuit
9 were opposed to a rule allowing use of unpublished
10 opinions. Public defenders in the Ninth Circuit
11 "must be scared of computer research," said one
12 attorney.

13 "No one complains about citability," said
14 the public defender in Dallas. "This is the kind
15 of research that lawyers do," said more than one
16 attorney. More than one also noted that an
17 unpublished opinion "can be helpful when it's right
18 on point on the facts."

19 Does citability of unpublished opinions
20 entail a financial burden for public defenders
21 offices? The attorneys unanimously said no. Lexis
22 is provided to those offices completely free and

1 Westlaw is provided at the special rate of \$150 a
2 month, the same rate judges get, I'm told.

3 It was acknowledged, however, that
4 litigants who are pro se or had no right to counsel
5 already are hurt by the cost of Lexis and Westlaw
6 and would be marginally more hurt if unpublished
7 opinions were included in the database. But, said
8 one attorney, "You go on the merits. If an opinion
9 is there, it's there." So my survey gives quite a
10 different picture from that produced by the
11 comments from public defenders in the Ninth
12 Circuit.

13 Let me look now quickly at Ninth Circuit
14 lawyers. Another notably quiet kennel in this
15 proceeding has been the offices of lawyers within
16 the Ninth Circuit who support the proposed rule.
17 There must be some such lawyers but you wouldn't
18 know it from looking at these comments. I count
19 more than 100 comments from Ninth Circuit lawyers
20 opposing FRAP 32.1 while the comments from Ninth
21 Circuit lawyers supporting the proposed rules can
22 be counted on one's fingers. How can this be, one

1 may wonder?

2 Judge Tashima reports that there was a
3 letter-writing campaign among lawyers in the Ninth
4 Circuit to oppose the new rule, but lawyers are no
5 more herdable than cats. No mere letter-writing
6 campaign would produce this kind of a landscape.
7 So what did? How is it that Ninth Circuit
8 lawyers, so famous for their independence, their
9 fractiousness, their readiness to take on
10 motherhood, apple pie, or recently God, have
11 suddenly found an important legal issue that's
12 highly controversial elsewhere but on which
13 virtually all Ninth Circuit lawyers agree. How has
14 this committee become such a powerful builder of
15 consensus?

16 The answer lies, of course, not in the
17 fairly counted views of Ninth Circuit lawyers but
18 in the dynamic of self-selection. The majority of
19 Ninth Circuit judges are known to be strongly
20 opposed to the proposed rule. Given that fact,
21 lawyers who practice in the Ninth Circuit and who
22 also oppose the rule have every reason to say so,

1 and may it please the court. Lawyers who support
2 the rule, meanwhile, have no need to vote against
3 the judges before whom they practice. These
4 lawyers just take a walk. They don't submit
5 comments. Thus, we get the one-sided results
6 displayed here.

7 With respect to federal circuit judges in
8 the no-citation circuits, we can count the votes
9 pretty much from their comments filed here. As I
10 have said, the circuits that allow citation have
11 produced only eight comments from circuit judges
12 but what about the four circuits that ban
13 citation--the Second, Seventh, Ninth and Federal?
14 From those quarters there's plenty of opposition to
15 the proposed rule. It's worth looking closer,
16 however, at the vote counts in these circuits,
17 starting with the Ninth.

18 While the vote count in the Ninth Circuit
19 seems monolithic, 38 judges opposing the rule and
20 only Judge Tashima expressly supporting it, but
21 that may not be the whole story. Judge Tashima
22 reports that there was a letter-writing campaign

1 among both lawyers and judges to oppose the rule.
2 He and Judge Thomas also report that the Ninth
3 Circuit was closely split on the proposed rule.
4 Well, the eventual comments certainly are not
5 closely split but it may be that like Judge Thomas,
6 other Ninth Circuit judges sacrificed their own
7 views on the altar of circuit solidarity.

8 And even so the Ninth Circuit's vote was
9 far from unanimous. Six active judges did not
10 vote. There may be a question whether you consider
11 that votes against the majority or not. The vote
12 among active judges was 23 to seven in the Ninth
13 Circuit--one-sided but not overwhelming. It's only
14 when you add the senior judges and 15 senior judges
15 oppose the rule while three didn't vote, that the
16 margin became 38 to 10.

17 One may wonder, of course, as with the
18 Ninth Circuit lawyers, how is it that Ninth Circuit
19 judges, so famously independent and ready for
20 dissent, in this case produced only one expressed
21 dissent from 48 judges. I have no answer to that
22 question.

1 Turning to the Federal Circuit, it
2 out-does the Ninth, producing unanimity against the
3 proposed rule. But the other two no-citation
4 circuits, the Seventh and Second, are split. In
5 the Seventh Circuit the vote among all judges was
6 nine to six. Among active judges alone it was
7 eight to three. I guess those are the figures that
8 Judge Wood reported this morning. Among the three
9 dissenters, Judges Easterbrook and Ripple both
10 wrote forceful comments supporting the proposed
11 rule. As Judge Wood indicated, the majority also
12 suggested a fallback compromise based on routinely
13 granting motions for publication.

14 Then in the Second Circuit the vote among
15 all judges was 19 to four opposing the rule. The
16 19, however, included all 11 of the circuit's
17 senior judges. Among active judges alone the vote
18 was eight to four. As in the Seventh Circuit, the
19 Second Circuit majority made a significant
20 compromise suggestion. This was that if the rule
21 goes forward, it operate only prospectively.

22 Then there's a special fact about the

1 Second Circuit that should be noted. While there
2 was apparently no statement from any dissenting
3 circuit judge in the Second Circuit, there exists a
4 mutiny among the district judges of the Second
5 Circuit. As I relayed in my statement at page 13,
6 several district judges in the Second Circuit have
7 been citing summary orders of the Second Circuit,
8 in defiance of that court's no-citation rule. See
9 the Harris case, which is cited in my statement,
10 where Judge Lynch describes the Second Circuit as
11 pretending that this decision never happened.

12 Well, the action of these district judges
13 perhaps suggests the depth of the disagreement in
14 the Second Circuit. It may also suggest that
15 citability is becoming a de facto norm in the
16 Second Circuit.

17 In sum, the rather close splits in the
18 Seventh and Second Circuits, combined with the
19 suggested fallback compromises by the majority in
20 each case, may indicate that those circuits, the
21 Second and Seventh, do not strongly oppose
22 citability. That may be particularly so for the

1 Second Circuit in which the states of New York,
2 Connecticut and Vermont all allow citation, and it
3 may become so for the Seventh Circuit if Illinois
4 switches to citability and the Rules Committee of
5 the Illinois Supreme Court, I'm told, is meeting
6 later this month on a proposal to switch to
7 citability with respect to at least some orders of
8 the Illinois Courts of Appeal.

9 The bottom line then, the bottom line of
10 the vote count is that of the four no-citation
11 circuits, the Second and Seventh and perhaps even
12 the Ninth are split on the proposed rule. Only the
13 Federal Circuit is monolithic.

14 In contrast, the nine circuits that permit
15 citation appear to be quite satisfied with the rule
16 that they have. Not a single judge from a circuit
17 that allows citation and virtually no one else from
18 such a circuit has filed a comment complaining
19 about that rule of citability. This is a remarkable
20 record, it seems to me. It may not bark but it
21 speaks volumes. Thank you.

22 JUDGE ALITO: Thank you, Professor

1 Barnett.

2 Questions?

3 MR. SVETCOV: Professor Barnett, I have to
4 confess that I graduated from Boalt Hall four years
5 ago and I guess--

6 MR. BARNETT: One of our most
7 distinguished graduates.

8 MR. SVETCOV: Except that I probably am
9 getting an F in your class on publication. But
10 don't you account for the Hound of the Baskervilles
11 in your presentation in Judge Wood's description of
12 the different ways in which circuits treat
13 unpublished opinions, the various percentages of
14 cases that are not published, and in particular,
15 the ways in which unpublished opinions are crafted.

16 Namely, as I mentioned to Mr. Best a few
17 minutes ago, in the Ninth Circuit the great
18 majority of unpublished opinions begin with the
19 words, "The parties are familiar with the facts."
20 Then the discussion that follows is a discussion of
21 the legal issues that were raised by the appellant
22 and are disposed of for the benefit of the parties

1 who are familiar with the facts. As a practicing
2 lawyer in the Ninth Circuit, I don't see how I
3 could make very much use of that type of opinion.

4 I contrast that with cases that are
5 sometimes published in the State of California in
6 which the judges will spend 30 pages laying out all
7 of the facts and addressing all of the legal issues
8 fully, but they don't publish because California,
9 as you know, has a rule that says once there's a
10 principle of law in place in a court of appeal
11 decision, that applications of that rule are not to
12 be published.

13 So you do have these different types of
14 opinions. Doesn't that mitigate in favor of
15 diversity rather than uniformity?

16 MR. BARNETT: Well, I have my own
17 arguments with the state judges in California about
18 this, too. I think you have to ask whether it's
19 underlying essential differences that make the
20 difference or whether it's practices that the
21 judges have acquired perhaps for reasons that are
22 not congruent with the best interest of the

1 judiciary and the litigants.

2 For example, if you compare these
3 California state decisions with state decisions in
4 New York, you find it's roughly the same number of
5 cases decided each year, about 12,000. In New York
6 all published, all with opinions, all citable. In
7 California, 93 percent not citable. And you may
8 say isn't that just a difference in cultures? I
9 say yes, but maybe it shows that California ought
10 to be doing something differently.

11 MR. SVETCOV: I'm from New York
12 originally.

13 MR. BARNETT: So am I.

14 MR. SVETCOV: I want to also disabuse you
15 of the notion that those of us who oppose this rule
16 do it because we want to kiss our circuit's behind.

17 MR. BARNETT: I didn't say that.

18 MR. SVETCOV: I testified in front of the
19 White Commission in favor of some sort of
20 divisional operation of my circuit and there was no
21 repercussions one way or the other from that and I
22 don't think any of us who have a position on this

1 rule or any other do so because we think we're
2 going to gain anything from the judges in our
3 circuit. We have a lot more respect for them and
4 they have for us.

5 MR. BARNETT: I do, too, and I didn't say
6 that. I said lawyers who oppose the rule will say
7 so. I didn't say that lawyers would take that
8 position for any reason other than the merits.

9 MR. SVETCOV: And trust me; lawyers who
10 favor the rule say so and I was in a meeting just
11 this past week in which the chair of the Advisory
12 Committee to the Ninth Circuit Rules Committee, Les
13 Weatherhead, took the exact opposite position I did
14 and he didn't write in but his views are there and
15 we know how the lawyers feel about this. There are
16 lawyers--

17 MR. BARNETT: How do you explain, then,
18 that there are perhaps no more than half a dozen
19 letters here from California lawyers supporting the
20 rule?

21 MR. SVETCOV: I think, Professor Barnett,
22 you have to recognize that there are different

1 cultures, there are different bodies of law. In
2 the Fourth Circuit there may not be cases on all
3 the issues. In our circuit there are cases all
4 over the ballpark and they are already published.

5 You know, you've heard of the term junk
6 science?

7 MR. BARNETT: Yes.

8 MR. SVETCOV: In the Ninth Circuit these
9 cases come under the heading of junk law.

10 MR. BARNETT: So your answer is that there
11 are no lawyers out there who support the rule?

12 MR. SVETCOV: I didn't say that.

13 MR. BARNETT: I'm sorry.

14 MR. SVETCOV: I'm just saying that a lot
15 of these cases are not worth pursuit as precedent
16 or for citation as mock precedent.

17 JUDGE ELLIS: Don't you think it's just as
18 disrespectful to assume that lawyers who don't
19 complain are afraid of judges as it is to say that
20 lawyers who oppose it want to kiss the butts of
21 judges? It's just as disrespectful of the lawyers.
22 If they didn't write in, we can only assume they

1 don't have feelings strong enough to move them to
2 put pen to paper, just as we assume that you're
3 very passionate about it. You have articles, you
4 have letters, you've analyzed it in great depth, so
5 I understand you have passion. We must assume, I
6 suppose, that the others don't have passion, not
7 that they're afraid of judges.

8 MR. BARNETT: I don't want to attack
9 California lawyers in any way but these are all
10 California lawyers presumably with similar
11 attitudes about when they think it's worth it to
12 write a letter on a matter like this and when they
13 don't and we have this astonishing record that
14 there are 100 or more letters on one side and less
15 than half a dozen on the other and I'm trying to
16 find an explanation for that.

17 JUDGE ELLIS: Why isn't the explanation
18 that some care enough about the merits to write;
19 others don't think it makes a hill of beans and
20 they don't write? Not that they're afraid of
21 judges or that they want to kiss judges' butts.

22 JUDGE ALITO: Judge Levi?

1 JUDGE LEVI: Just one point. It's quite
2 typical in these rules matters that the
3 overwhelming letters, particularly on a
4 controversial matter, will be opposed. There's
5 almost a tradition of that.

6 MR. BARNETT: I understand.

7 JUDGE LEVI: But I want to point you to
8 the form of the rule. You brought up the
9 suggestion in the Second Circuit that the rule not
10 apply retroactively and then I think in your own
11 submission you also have some suggestions on the
12 form of the rule.

13 What would you like the language of the
14 rule to be?

15 MR. BARNETT: Well, in my statement, which
16 I don't have here, I think it reads any disposition
17 by any federal court may be cited to or by any
18 court, period, in contrast to the committee's
19 present proposal, which is there shall be no
20 restrictions on opinions that are labeled
21 unpublished or not citable or not precedential or
22 whatever.

1 JUDGE LEVI: Do you have a view on whether
2 it should be going forward or--

3 MR. BARNETT: No, I would agree with
4 making it prospective only. That's what a number
5 of jurisdictions have done in moving to citability
6 and I think that's perfectly appropriate, to make
7 only decisions issued henceforth citable.

8 JUDGE ALITO: Judge Ellis?

9 JUDGE ELLIS: You said the Fourth Circuit
10 was citable. What is your criticism of that
11 circuit rule?

12 MR. BARNETT: I have no criticism of any
13 really of the circuit rules that allow citability.
14 They're different. It might be better to make the
15 uniform but I wouldn't even insist on that. And I
16 defend--I disagree with Pat Schiltz on this but I
17 defend what I call the discouraging words, the
18 statement that you should only cite an unpublished
19 opinion if there's no published opinion on point,
20 or the statement that citation of unpublished
21 opinions is disfavored. I think that's all okay.

22 JUDGE ELLIS: So a dichotomy between

1 published and nonpublished is all right provided
2 that the unpublished decisions are fully accessible
3 and citable.

4 MR. BARNETT: Yes, that's my view, so long
5 as they're citable. And I would go further,
6 though, in one respect. The Third Circuit had the
7 last time I looked a practice whereby lawyers may
8 cite the unpublished orders but the court has a
9 tradition of not doing so. I would not allow that
10 tradition to persist. I explain in a footnote how
11 I would deal with that.

12 MR. LEVY: Professor Barnett, just so I'm
13 clear on the next-to-the-last point you made, would
14 you favor the rule that allows citations without
15 restrictions or the rule that favors them with
16 restrictions, or would you favor a nonuniform rule
17 that allows it?

18 MR. BARNETT: I myself would prefer the
19 rule that allows them only for persuasive value,
20 not for precedential--

21 MR. LEVY: No, that's not my point. The
22 rules, like the Eighth Circuit, we got a letter

1 from our Chief Judge Hodeen saying the First
2 Circuit recently has adapted the rule and they all
3 say they're not precedential, that they're
4 persuasive only, but some allow them only when
5 there is no public decision on point or kind of a
6 second tier. Other circuits, like the D.C.
7 Circuit, allow them without restriction.

8 So the question is would you favor a D.C.
9 Circuit-type rule that says you can cite them
10 without regard to anything else or the Eighth
11 Circuit-type rule that says you can cite them but
12 only if, and then certain circumstances? Or would
13 you allow the circuits to choose between those two
14 so that we don't have a national rule in the end at
15 all?

16 MR. BARNETT: I would allow the circuits
17 to choose and I myself would prefer the
18 restriction, the persuasive value only, but that's
19 really for political purposes to make a uniform
20 rule more palatable for the various circuits and
21 indeed the various states. I would expect that
22 over time that would move toward a precedent rule.

1 JUDGE ALITO: Any other questions?

2 Thank you, Professor Barnett.

3 Chief Judge Mayer of the Federal Circuit.

4 Just as a procedural matter I think that
5 we are running quite late and I expect after we
6 hear from Chief Judge Mayer we will take a very
7 short recess and then continue until 12:30.

8 Chief Judge Mayer?

9 STATEMENT OF THE HON. HALDANE ROBERT MAYER

10 JUDGE MAYER: Thank you, Mr. Chairman.

11 Thank you for the opportunity to address the
12 committee on behalf of the United States Court of
13 Appeals for the Federal Circuit. With me today in
14 case there are questions that I can't answer are my
15 colleagues Judge William C. Bryson, our Circuit
16 Executive and our Clerk of Court, January Horbaly,
17 and our senior members of the Central Legal Office,
18 Melvin Halpern and Ellie Thayer.

19 In a letter dated January 6, 2004 I wrote
20 to the express the unanimous opposition of the
21 judges of the Federal Circuit to three of the
22 proposed amendments to the Federal Rules of

1 Appellate Procedure. I'd like to address in
2 further detail our objections to two of those
3 proposed amendments--the adoption of a proposed
4 Rule 32.1 regarding citation of nonprecedential
5 dispositions and the adoption of proposed Rule
6 35(a) concerning the determination of the majority
7 in en banc cases.

8 The Federal Circuit is similar to its
9 sister courts of appeals in many ways. You will
10 undoubtedly hear and have heard from
11 representatives of other circuits why the proposed
12 amendment regarding unpublished dispositions or, as
13 we say, nonprecedential opinions, should not be
14 adopted and how such a rule would affect the other
15 circuits. To the extent possible I'll try not to
16 repeat the objections and concerns of my colleagues
17 and their respective courts, although we share most
18 of them. Instead, I will focus my remarks today on
19 the unique procedures and decision-making processes
20 of the Federal Circuit and how the proposed rule
21 will adversely affect the judicial process in the
22 way the Federal Circuit decides its cases.

1 To focus on why our court objects to
2 proposed Rule 32.1 regarding the citation of
3 nonprecedential dispositions, let me first offer a
4 little background on the Federal Circuit. Our
5 court was created by statute in 1982. This was
6 longer after the Judicial Conference of the United
7 States, in response to an ever-increasing appellate
8 court caseload, an increasing number of
9 precedential opinions, and the concern for the
10 ability of libraries to maintain the increased
11 materials, requested that the courts of appeals
12 begin issuing unpublished, nonprecedential
13 opinions.

14 In 1964 the Judicial Conference adopted a
15 resolution that requested the courts of appeals to
16 "authorize the publication of only those opinions
17 which are of general precedential value and that
18 opinions authorized to be published be succinct."
19 Thereafter, in 1972 the Judicial Conference
20 requested that all circuits develop a publication
21 plan for opinions.

22 By the date of our court's creation, all

1 courts of appeals were issuing both precedential
2 and nonprecedential opinions in response to the
3 Judicial Conference's suggestion. Thus, in
4 drafting every opinion, our court has had in its
5 collective mind whether that opinion should be
6 issued as precedential or, if the issues raised by
7 the case were not likely to be relevant to the
8 development of the law in general, issued as
9 nonprecedential.

10 In this regard we created our local rule,
11 Federal Circuit Rule 47.6(b), which provides that
12 if a panel wishes a nonprecedential opinion, "Any
13 opinion or order so designated must not be employed
14 or cited as precedent. This rule does not preclude
15 assertion of claim preclusion, issue preclusion,
16 judicial estoppel, law of the case, or the like
17 based on a decision of the court designated as
18 nonprecedential."

19 We further developed a set of criteria to
20 determine when an opinion should be issued as
21 precedential. These criteria are published in our
22 Internal Operating Procedures, OP Number 10. That

1 procedure states that the "purpose of a
2 precedential disposition is to inform the bar and
3 interested persons other than the parties. The
4 parties can be sufficiently informed of the court's
5 reasoning in a nonprecedential opinion." Our
6 procedure expressly states that disposition by a
7 nonprecedential opinion "does not mean that the
8 case is considered unimportant, but only that a
9 precedential opinion would not add significantly to
10 the body of law or would otherwise fail to meet a
11 criterion" for being precedential.

12 The criteria for issuing an opinion as
13 precedential are, and I'm listing the 14 of them
14 lest it be thought that they are treated cavalierly
15 in our court. Number one, the test of a test case.
16 Number two, an issue of first impression is
17 treated. Three, a new rule of law is established.
18 Four, an existing rule of law is criticized,
19 clarified, altered or modified. Five, an existing
20 rule of law is applied to facts significantly
21 different from those to which that rule has
22 previously been applied.

1 Six, an actual or apparent conflict in or
2 with past holdings of this court or other courts is
3 created, resolved or continued. Seven, a legal
4 issue of substantial public interest which the
5 court has not sufficiently treated recently is
6 resolved. Eight, a significantly new factual
7 situation likely to be of interest to a wide
8 spectrum of persons other than parties to a case is
9 set forth. Nine, a new interpretation of a Supreme
10 Court decision or of a statute is set forth.

11 Ten, a new constitutional or statutory
12 issue is treated. Eleven, a previously overlooked
13 rule of law is treated. Twelve, procedural errors
14 or errors in the conduct of the judicial process
15 are corrected, whether by remand with instructions
16 or otherwise. Thirteen, the case has been returned
17 by the United States Supreme Court for disposition
18 by the action of this court other than ministerial
19 obedience to directions of the court. Fourteen, a
20 panel desires to adopt as precedent in this court
21 an opinion of a lower tribunal in whole or in part.

22 These criteria are applied by a panel of

1 three judges each time an opinion is issued. Is it
2 possible that we might decide that an opinion
3 should be nonprecedential but that members of the
4 bar might disagree, given their perspectives? Yes,
5 and our rules recognize this possibility, allowing
6 any person to request that an opinion or order be
7 reissued as precedential.

8 The members of the bar who frequently
9 practice before our court peruse our opinions
10 carefully and they keep us on our toes. Thus we do
11 receive such requests, even from persons that were
12 not parties to the pertinent appeal. Requests to
13 reissue as precedential are granted when
14 appropriate and, if granted, the panel may choose
15 to revise the language of the earlier opinion to
16 make it more acceptable as a precedential opinion.

17 Thus, we have rules and procedures that we
18 believe best serve our court in its decision-making
19 process. It has been suggested that the rulemaking
20 authority of the Rules Committee does not permit a
21 rule that directly affects the decision-making
22 processes of the court. Even assuming such

1 authority, which is not altogether clear, the
2 proposed rule should be reconsidered by the
3 committee and it should not be adopted.

4 Turning back to our court's procedures,
5 if the earlier-mentioned criteria are not met, a
6 panel prepares a nonprecedential opinion or enters
7 judgment without opinion. In the past eight
8 statistical years, from 1996 to 2003, 33 percent of
9 our merits panel cases have issued as precedential
10 opinions, 47 percent have issued as nonprecedential
11 opinions, and 20 percent have issued as judgments
12 without opportunity.

13 It is my understanding that our rate of
14 issuing precedential opinions is well above the
15 national average. Perhaps because our jurisdiction
16 is limited to discrete areas of the law, we are
17 particularly aware when a case involves an issue
18 that might add something of relevance to the law
19 and we strive to publish those opinions.

20 Nonetheless, nearly half of our opinions
21 are nonprecedential. They were not prepared with
22 less care with respect to arriving at the proper

1 result. Indeed the panel must follow established
2 precedent. But they were not written with the
3 extra care or concern for language that would be
4 used if they were to be extended or relied upon by
5 those who were not parties to the case. In other
6 words, nearly half of our cases were written with
7 one audience in mind--the parties only.

8 Although members of this committee surely
9 understand, some people may not appreciate the
10 different type of writing, editing and procedure
11 that is entailed when preparing a precedential
12 opinion. It is by all means more time-consuming
13 than the preparation of a nonprecedential opinion.

14 The Federal Circuit may also be unique in
15 some of the procedures that it's adopted in this
16 regard, which I will brief explain. If an opinion
17 is to be issued as precedential, the authoring
18 judge prepares the opinion and obtains the votes
19 and comments from the other panel members. This is
20 the same initial procedure that is used in the
21 preparation of a nonprecedential opinion, but that
22 is where the similarities end. After the panel

1 approves the language of a proposed precedential
2 opinion, that opinion is circulated to the other
3 judges and to the court's Central Legal Office.
4 During the period of circulation, nonpanel judges
5 may comment or make suggestions. Thus, each judge
6 reads each circulated precedential opinion before
7 it is issued. This is in addition to his or her
8 duties regarding the cases to which that judge is
9 assigned.

10 At any one time, many precedential
11 opinions are circulated. The Central Legal Office
12 also reviews the circulating opinions and informs
13 the court of any apparent conflicts or confusion
14 with existing precedent or Supreme Court law.
15 Comments from nonpanel judges or the staff may
16 result in changes to the opinion or even a sua
17 sponte poll by the judges to determine whether the
18 case should be heard en banc. After such comments
19 and considerations are made, the opinion is issued
20 as precedential.

21 This procedure is time-consuming and
22 labor-intensive but well worth the effort. Thus,

1 when our court determines that an opinion adds
2 something to the law, it receives the attention of
3 the full court before the opinion's issuance.

4 In contrast, a nonprecedential opinion is
5 written to inform parties why their arguments were
6 accepted or rejected. Such opinions refer to the
7 relevant precedent or simply apply the pertinent
8 standard of review. The aim of more conversational
9 nonprecedential opinions is only to briefly
10 explain. A nonprecedential opinion is not written
11 to be a pronouncement on the law or to have
12 far-reaching effect. Before issuance, it is not
13 reviewed by nonpanel judges or by the Central Legal
14 Office. When written, it is not intended to be
15 considered for any purpose by a future merits panel
16 in a different case.

17 However, under proposed Rule 32.1, these
18 opinions will be cited and, as some comments have
19 suggested, an attorney might have the ethical duty
20 to search for and cite such cases. The citable
21 body of case law within our circuit would more than
22 double, and in some circuits it might increase

1 tenfold. Appellants and appellees will proceed to
2 argue the value to be ascribed to such
3 nonprecedential opinions, with hen we have already
4 determined that they should have none--that's why
5 we wrote them that way.

6 In all areas of the law our court
7 sees--intellectual property, government contracts,
8 veterans appeals, federal personnel cases,
9 international trade, Indian claims, inverse
10 condemnation, tax appeals, Vaccine Act cases, et
11 cetera--words and word choices are very important.
12 Nonprecedential opinions would be scoured for that
13 unintended turn of phrase. Now, with the advent of
14 web-based research, an attorney could search for a
15 snippet of language in a nonprecedential opinion
16 and latch ont it.

17 When we write precedential opinions, we
18 craft those snippets, phrases, and holdings in a
19 manner that reflects, limits or expands on the
20 nature of the issue, as appropriate. When we write
21 nonprecedential opinions, we are merely giving the
22 parties what they sought--an answer to the

1 questions raised in their particular case.

2 Another factor that distinguishes our
3 court is that every decision on the merits, whether
4 precedential or nonprecedential, is written in
5 chambers and not by the central legal staff. Our
6 staff attorneys are primarily concerned with the
7 court's motions practice and providing comments on
8 circulating precedential opinions.

9 We have a great desire to maintain this
10 practice, whereby every litigant knows that a
11 merits decision was reached in chambers and not by
12 the court's legal staff. But if we must devote
13 more time and effort to fine-tuning the language of
14 nonprecedential opinions because they may be cited
15 by the parties in future cases, then our circuit's
16 practice of having all cases decided in chambers
17 must change. I would imagine that the proposed
18 rule would have a decided and adverse effect in our
19 court, even to the point of considering personnel
20 changes.

21 The committee notes state, rather
22 unconvincingly, that Rule 32.1 is "extremely

1 limited" and would not require changes to the
2 circumstances in which a court may choose to
3 designate an opinion as unpublished, changes to the
4 procedure that a court must use, or changes in
5 effect the court must give to one of its
6 unpublished opinions.

7 In practice, the effects of the rule would
8 not be so limited. It would change the way we
9 write nonprecedential opinions. Our mindset would
10 be that, for whatever value, the language used in a
11 nonprecedential opinion would be used by parties to
12 argue for something likely never intended by the
13 opinion. Perhaps perversely we would issue fewer
14 nonprecedential opinions and more judgments without
15 opinion. Perhaps, because we would spend more time
16 refining the language in nonprecedential opinions,
17 the time that we have to issue precedential
18 opinions will be more limited.

19 Certainly our workload would increase,
20 both because of the time expended to write
21 nonprecedential opinions and because of the time
22 expended reading and researching previous

1 nonprecedential opinions cited by the parties in
2 their briefs. It is not difficult to foresee,
3 because of the way our circuit circulates and
4 prepares its precedential opinions and because we
5 do not use staff attorneys to prepare opinions,
6 that the increased time it would take to write
7 nonprecedential opinions would detrimentally affect
8 the amount of time it takes to issue our decisions.
9 Decisions would be delayed. The rule would serve
10 only to add to the cacophony of the law.

11 I also disagree that the proposed rule is
12 "extremely limited" as the committee notes state
13 because the proposed rule not only contradicts our
14 local rule; it is contrary to our case law.
15 Perhaps the committee believes that the restriction
16 against citing nonprecedential opinions exists only
17 in courts' local rules. This is suggested by the
18 statement in the committee's notes that there is a
19 "hardship" on counsel that practice in more than
20 one circuit because different courts' rules of
21 practice give different weight to or prohibit the
22 citation to nonprecedential opinions.

1 I find it hard to believe that learned
2 counsel would be confused by easily ascertainable
3 rules or standards. Indeed, if counsel has the
4 wherewithal to locate a nonprecedential opinion
5 that he believes addresses an issue not covered by
6 any precedential opinion, that attorney should have
7 the ability to find a local rule or read the
8 heading on the nonprecedential opinion that
9 explains its nonprecedential status.

10 In any event, it is not just the local
11 rule that governs the relevance of or weight that
12 we give to nonprecedential opinions. As our court
13 explained in *Hamilton v. Brown*, a 1994 case,
14 "Nonprecedential opinions and orders are not
15 citable to this court, they do not represent the
16 considered view of the Federal Circuit regarding
17 aspects of a particular case beyond the decision
18 itself, and they are not intended to convey this
19 court's view of law applicable in other cases.
20 Nonprecedential orders and opinions are used in
21 summary dispositions of cases in which a full
22 precedential opinion is not considered necessary,

1 but something more than a one-sentence affirmance
2 is warranted or needed.

3 "They are nonprecedential for a
4 reason--while the decision itself receives due
5 care, as do all cases before us, the explanation
6 given in the summary disposition does not
7 necessarily contain a full recitation of all the
8 relevant facts and legal authorities. The opinion
9 or order is primarily for the benefit of the
10 parties. It is error to assume that a
11 nonprecedential order or opinion provides support
12 for a particular proposition or reflects a new or
13 changed view held by this court."

14 Before I turn to the rule regarding en
15 banc voting, I would like to respond directly to a
16 committee comment in its notes and a similar
17 comment submitted by a bar association about a
18 specific Federal Circuit case.

19 First, the notes of the committee state
20 that even nonprecedential opinions can be reviewed
21 by the Supreme Court, noting that in 2002 the
22 Supreme Court reviewed our nonprecedential decision

1 in Holmes Group, Incorporated v. Vornado Air
2 Circulation Systems, Incorporated. It is true that
3 our decision--actually in that case it was not an
4 opinion; it was a short order--was issued as
5 nonprecedential.

6 However, the Supreme Court's review was
7 directed to a jurisdictional issue that had been
8 decided in an earlier en banc case. In Holmes we
9 did not even address the issue that the Supreme
10 Court was reviewing. Holmes itself was not
11 ground-breaking law. The jurisdictional issue was
12 so longstanding in our jurisprudence that we didn't
13 address it in our nonprecedential order, which
14 instead simply remanded the case to the district
15 court to consider intervening Supreme Court case
16 law on the merits.

17 Even under the proposed rule, no party
18 would have cited the nonprecedential order to us
19 concerning the issue of jurisdiction because our
20 nonprecedential order didn't even address the
21 issue. It is strange for the committee to use that
22 case as an example of a case that warranted Supreme

1 Court review although issued as nonprecedential.
2 It does not to any degree support the notion that
3 the case should have been citable for the issue on
4 which the Supreme Court granted review. But the
5 committee's notes themselves show the kind of
6 mischief that this proposal can lead to.

7 According to the summary prepared by the
8 committee's reporter, some comments argue that
9 local rules prohibiting citation to nonprecedential
10 opinions suggests that "wealthy parties represented
11 by big law firms" receive "high-quality justice"
12 because their cases are resolved by published
13 decisions but that "no-name appellants represented
14 by no-name attorneys" receive "low-quality justice"
15 involving only a quick review of their briefs, no
16 oral argument, and an unpublished decision.

17 This is simply not the case in the Federal
18 Circuit. The Federal Circuit holds oral argument
19 in every counseled case, whether the parties are
20 represented by a big firm or a small one. In pro
21 se cases a party may move for oral argument.
22 Whether we choose to make an opinion precedential

1 has nothing to do with whether the parties are
2 represented by big or small firms or even whether
3 the appellant is pro se.

4 Indeed, a large number of our cases
5 involve federal employees who are seeking review of
6 Merit Systems Protection Board decisions or
7 veterans who are seeking review of decisions of the
8 Court of Appeals for Veterans Claims. Many of the
9 appellants or petitioners in those cases proceed
10 pro se. Necessarily, our precedential cases
11 include the cases, counseled or not, that raise
12 issues of importance to the development of the law.

13 It may be that in some cases a
14 well-seasoned attorney can find and raise an issue
15 that would not be raised by a less talented
16 attorney or by a pro se litigation, but again we
17 don't choose to make it precedential because of the
18 identity of the attorney or client. It is
19 precedential because the issue should be addressed
20 and because it adds to the law.

21 Another comment that I would like to
22 address, submitted by the Association of the Bar of

1 the City of New York, argues in support of the
2 proposed rule that "there are many unpublished
3 opinions that address cases of first impression, or
4 are of constitutional dimension." This cite as an
5 example our November 1999 nonprecedential opinion
6 in O'Connell v. Secretary of Health and Human
7 Services. That comment states that a dissenting
8 judge in that case argues that a section of the
9 Vaccine Act violates the Presentment Clause of the
10 Constitution, suggesting that the opinion should
11 not have been nonprecedential because it concerned
12 such a momentous issue.

13 The Bar Association's citation of that
14 nonprecedential opinion is a perfect example of why
15 the proposed rule is ill-advised and how the rule
16 will be abused by litigants. It does not appear
17 that the authors of the comment read our decision,
18 in which it is expressly stated that the
19 constitutional issue was addressed in a
20 precedential opinion, *Terran v. Secretary of Health*
21 *and Human Services*, also a 1999 case. The
22 O'Connell dissenting judge merely states that, as

1 he stated in his dissent in the Terran case, he
2 would hold the section of the Vaccine Act to be
3 unconstitutional. There is nothing new in that
4 nonprecedential opinion that was not addressed
5 fully by the court in the precedential Terran
6 opinion. Learned counsel would have cited the
7 precedential opinion.

8 We have fewer but no less important
9 objections to the proposed change to Rule 35(a)
10 concerning determinations of a majority in en banc
11 cases. We are not convinced that this is a rule
12 that needs to be uniform among the circuits. Each
13 court is different. What possible concern can it
14 be to the parties how we vote in comparison to how,
15 say, the Fourth Circuit votes?

16 In the Federal Circuit we presently have
17 12 active judges. Under our current and
18 longstanding local ruler we require the votes of a
19 majority, in this case seven, of the active judges
20 to take a case en banc. Often en banc cases are in
21 the area of patent law, government contracts and
22 some others that due to the complex issues raised

1 in those cases, call for en banc disposition.
2 Those cases often involved major corporations or
3 even multiple corporate entities, thus increasing
4 the possibility that judges may be recused from
5 voting on an en banc petition.

6 Nonetheless, we believe it is important
7 that a decision to take a case en banc require the
8 assent of a majority of the active judges. In this
9 way, every en banc cases carries the same weight,
10 in our view. If the proposed rule were in effect,
11 the votes of four judges, only one more than a
12 regular panel, could grant en banc review and
13 indeed, decide a controversial issue binding the
14 whole court.

15 In fact, in my letter I noted that in a
16 recent case five judges were recused, leaving only
17 seven voting members. If four of those seven, a
18 majority, granted en banc review, and the same
19 number of judges signed onto the en banc opinion,
20 the court could be bound by what in other
21 circumstances is considered a minority view.

22 If a majority of the recused judges

1 disagreed with the outcome of that en banc
2 decision, their only recourse would be to force
3 another en banc in a later case in which fewer
4 judges were recused. In that situation the initial
5 en banc would not provide the permanent resolution
6 of the issue that is the justification for holding
7 an en banc proceeding and the court and counsel
8 would have been put to the considerable expense and
9 trouble of two en bancs where one would have
10 sufficed or even where an en banc review would not
11 have been necessary in the first place.

12 The committee states that the need for
13 national uniformity is the rationale for the
14 proposed en banc rule, citing 28 U.S.Code Section
15 2073, which requires that the Standing Committee on
16 Rules recommend to the Judicial Conference rules
17 that are "necessary to maintain consistency and
18 otherwise promote the interest of justice."

19 The committee notes that the circuits are
20 split, that both of the primary approaches to
21 determining en banc status are "reasonable
22 interpretations," and then decides to follow the

1 approach of a minority of the circuits. This, in
2 our view, is representative of our objection to the
3 proposed rule. A recognized minority view is
4 imposed on the whole.

5 With this proposed rule I must again raise
6 my concern that the committee may be overstepping
7 its authority here when it attempts to tell the
8 courts how to interpret a statute, 28 U.S. Code
9 Section 46(c). That matter, going to a statutory
10 interpretation, could be decided by a court of
11 appeals or the Supreme Court in case law. The
12 committee should not, under the guise of
13 consistency, attempt to intervene in the circuits'
14 disagreement concerning the interpretation of a
15 statutory provision.

16 In closing, the judges of the Federal
17 Circuit do not believe that the proposed rules
18 concerning citation of nonprecedential opinions or
19 the determination of an en banc majority should be
20 adopted. The proposed rules are ill-advised. They
21 are not in the best interest of the administration
22 of justice in the Federal Circuit. They do not

1 involve areas in which consistency is necessary.
2 The reason that the circuits vary on these issues
3 is in great part due to their history and because
4 of the determinations made by the judges regarding
5 what works best for each circuit. Consistency
6 should not be sued to erase the historical
7 development of the law and procedures of the
8 individual circuits.

9 Mark Twain once said, "I am persuaded that
10 the world has been tricked into adopting some false
11 and most pernicious notion about consistency--and
12 to such a degree that the average man has turned
13 the rights and wrongs of things entirely around and
14 is proud to be 'consistent,' unchanging, immovable,
15 fossilized, where it should be his humiliation." I
16 cannot think of a better way to end. Thank you for
17 your attention and I'm sorry for reading so fast
18 but I know it's been a long morning and I wanted to
19 get through it.

20 JUDGE ALITO: We appreciate that.

21 May I ask a question about Rule 35(a)?
22 Congress provided in 28U.S.C. Section 46(c) that

1 rehearing en banc may be ordered by "a majority of
2 the circuit judges who are in regular active
3 service." Now must that not mean the same thing
4 everywhere in the country? How can it be argued
5 that this concept of a majority of circuit judges
6 who are in regular active service can mean one
7 thing in one circuit and one thing in another
8 circuit? It's a unitary statutory standard.

9 JUDGE MAYER: It is. It's a statute that
10 is subject to interpretation and our court has
11 interpreted it to mean the majority of the active
12 judges, not the majority of the active judges who
13 are not recused. So if we have 12 judges that has
14 to be seven. That's how we have interpreted it. In
15 our view it seems like the interpretation that
16 should prevail but apparently it doesn't.

17 JUDGE ALITO: If we were to recommend that
18 as the uniform national standard would you have an
19 objection to that?

20 JUDGE MAYER: Ours?

21 JUDGE ALITO: Yes.

22 JUDGE MAYER: I have an objection--well, I

1 don't want to get in too deep on this topic
2 because, as I said, it's something that could very
3 well be a matter in litigation. I would say that
4 the prudent thing to do is not to have a rule, that
5 this committee should withdraw the proposal and
6 leave it alone. If it becomes important enough to
7 somebody someday--I can't imagine why it would--it
8 could be a matter in litigation that could be
9 decided by the circuit or the court.

10 JUDGE ALITO: I can give you an example of
11 why it could become important and this was when the
12 rule first struck me. I know your court does not
13 have death penalty cases but we do and many of the
14 other circuits do. When we had the absolute
15 majority rule in our circuit we had a case in which
16 rehearing en banc was denied under the absolute
17 majority rule, even though a majority of the judges
18 who were not recused voted in favor of rehearing
19 the decision affirming the denial of a habeas
20 petition by a capital defendant.

21 It just struck me, although I was not one
22 of the judges who voted for rehearing in the case,

1 it just struck me that the outcome of a case like
2 that should not depend on whether this individual
3 was prosecuted in the Third Circuit as opposed to
4 some other circuit that had the case majority rule.

5 Now in a case like that where it is the
6 outcome of the particular case that is so critical,
7 doesn't that argue very strongly in favor of
8 national uniformity?

9 JUDGE MAYER: Well, when you start talking
10 about death penalty, and it is true that we don't
11 have death penalty cases, that makes it sound more
12 severe, but my view is that the interpretation that
13 we've adopted is correct. It could be, as I say,
14 challenged in litigation some other time.

15 My point is the rulemaking procedure is
16 not the way to take care of this. There's a
17 statute out there and the Rules Committee and the
18 Judicial Conference are not empowered, in my view,
19 to make these interpretations.

20 MR. MCGOUGH: Judge Mayer, it's always
21 dangerous, I think, to try to compartmentalize or
22 group like with like and this is going back to the

1 citation rule. But using Professor Barnett's
2 paradigm or his groupings, he seems to say there
3 are nine circuits that allow citation of some form
4 or another and four that don't. And the four that
5 he identifies are the Second, the Seventh, the
6 Ninth and the Federal Circuit.

7 There's a difference, though, that I see
8 in the rules between, on the one hand, the Second
9 Circuit and the Ninth Circuit and the rules, on the
10 other hand, of the Seventh Circuit and your
11 circuit. Second Circuit and the Ninth Circuit, at
12 least the edited versions I've seen seem to say you
13 may not cite them, period, nonprecedential
14 opinions.

15 JUDGE MAYER: That's right.

16 MR. MCGOUGH: The Seventh Circuit and your
17 circuit seem to say you may not cite them as
18 precedent, which it seems to me is maybe far closer
19 to the circuits that say these aren't precedent but
20 you can cite them for persuasive value.

21 JUDGE MAYER: Well, you may be confusing
22 our court with the D.C. Circuit, maybe. I don't

1 know. Our court says you may not cite
2 nonprecedential opinions and indeed, you might get
3 sanctioned if you do. The only time you can cite
4 them, and I've read the rule here, is if it's res
5 judicata or collateral estoppel or something and
6 that would usually arise in the same transaction,
7 anyway. It's another court you're referring to,
8 not ours.

9 MR. MCGOUGH: Well, I was just looking at
10 Rule 47.6(b), which I think is cited, as well, in
11 your letter to the court. Maybe not. At least the
12 footnote in Professor Mayer's article seemed to say
13 that an opinion order designated not to be cited as
14 precedent must not be employed or cited as
15 precedent, which seems sort of circular.

16 MR. LETTER: In your letter that's quoted.
17 It says may not be cited as precedent, it says.

18 MR. MCGOUGH: Which seems to be wholly
19 circular and doesn't move your circuit that far
20 from the circuits that say these things aren't
21 precedent but may be cited for persuasive value.

22 My question is this. Do you see cases

1 cited for persuasive value, nonprecedential
2 opinions cited in your court for persuasive value,
3 as opposed to for their precedential value?

4 JUDGE MAYER: No, unless they've made a
5 mistake, and they're called on it frequently. It
6 doesn't happen very often but most of the time
7 they'll be called on it in the course of oral
8 argument. But you can use it for precedential
9 value if it's a collateral estoppel--

10 MR. MCGOUGH: I understand the exceptions
11 but you also quoted a case which seemed much more
12 absolute in its language, that said may not be
13 cited, essentially, period.

14 JUDGE MAYER: Right.

15 MR. MCGOUGH: I practice in the Third
16 Circuit mostly. I have an occasional matter in the
17 Federal Circuit. I could find the rule that says,
18 and I'm very likely to find the rule that says may
19 not be cited as precedent. I'm unlikely to find a
20 rule or the case that says may not be cited,
21 period.

22 And I wonder if it wouldn't be confusing

1 to someone in my position to think I could say in
2 my brief I recognize that this is not precedent but
3 this is a nice turn of phrase or an interesting way
4 of looking at the problem. I'm not citing it as
5 precedent but I find it persuasive and the court
6 may find it persuasive. It seems to me I would not
7 be in violation of the rule but I might be in
8 violation of this case.

9 JUDGE MAYER: Well, I believe you would be
10 in violation of the rule, as well, if it's being
11 read that way. Maybe our use of the language is a
12 little looser than it should have been. But as a
13 matter of practice I think it's very rarely that
14 people make the mistake of citing a nonprecedential
15 opinion because they understand what it is.

16 I think the solution to that problem, if
17 it is one, would be for our rules committee to take
18 a look at it and to adjust it, send it out to our
19 advisory council for public comment and so forth,
20 because that is how we do it and there really
21 hasn't been a problem with it over the years.

22 MR. LETTER: Chief Judge Mayer, I very

1 much welcome the assistance of you and your
2 colleague, my friend Judge Bryson, on trying to
3 understand this and I have a question for you.
4 Before I ask the question I have two observations.

5 One, on the uniformity point, remember
6 this committee has no authority whatsoever. All we
7 do is--

8 JUDGE MAYER: Mr. Chairman, would you mind
9 if Judge Bryson joined me?

10 JUDGE ALITO: No, not at all.

11 MR. LETTER: Can I object?

12 MR. LEVY: This is your chance to ask him
13 a question.

14 MR. LETTER: Remember that this committee
15 does nothing other than make recommendations. The
16 Supreme Court is the one that would actually set
17 any rule. So, for instance, on the en banc, if it
18 decides to do that it would be the Supreme Court
19 that would do that after it having sat before
20 Congress. So all we do is make recommendations to
21 the Supreme Court.

22 And second, I think Judge Wood, who I

1 think has left, made the same point, I had to say a
2 little derisively, saying look, if you lawyers can
3 find cases, you can find our rules. Of course, I
4 can find your rules but I practice in every single
5 circuit. I practice in a lot of district courts.
6 And it seems to me saying I can find your rules is
7 justification for your saying in the Federal
8 Circuit opening briefs will be orange, whereas in
9 the Seventh Circuit they'll be blue or the Ninth
10 Circuit they'll be green, et cetera. So I think
11 there is massive value in uniformity, even if I can
12 find your rules.

13 The question that I'm really hoping that
14 you and Judge Bryson can help on is one that I'm
15 struggling with. From talking with practitioners
16 and judges in the circuits that allow free
17 citation, my very strong impression is this is a
18 nonproblem, that the cases are very rarely cited.
19 I disagree with my fellow Boalt alum, Sandy, that
20 this suddenly massively increases the job of the
21 lawyers doing research.

22 So it really doesn't seem to be a massive

1 burden on the attorneys. When I do a case in the
2 Federal Circuit or the D.C. Circuit, I don't work
3 on them any differently. I research them the exact
4 same, even though you have completely different
5 rules about citation.

6 So what is it that you view as a serious
7 problem to pick up on what Tom McGough was saying,
8 if all I do is say to you here's an interesting law
9 review article--here's your precedent, judges, your
10 published precedent, but by the way, here's a law
11 review article that I think is interesting, here's
12 a district court opinion that you might find
13 useful, and here's a nonprecedential unpublished
14 opinion that was issued by your court a year and a
15 half ago?

16 I know it's not precedent. I know it's
17 not binding on you. You know it's not. So what is
18 the problem with me pointing that out to you, as
19 well as pointing out the law review article, the
20 clever Shakespearian quote I toss in, et cetera?
21 Why does that trouble, since all you need to do is
22 say that's not precedent, it's not binding on us,

1 just like the law review article, just like the
2 Ninth Circuit opinion, the D.C. Circuit opinion?
3 What am I missing? What's the problem that's
4 caused for you by my putting that citation in the
5 brief?

6 JUDGE MAYER: Let me just start. First of
7 all, your first point about treating this matter as
8 the same as what color the brief covers should be,
9 that is a purely ministerial topic. I see no
10 problem with that.

11 This goes to the heart of the judicial
12 process and I believe it's questionable that the
13 rulemaking process, whether it's the Supreme Court
14 or anybody else, the rulemaking process can dictate
15 it.

16 Now I did explain and I read it fast, I
17 know, at some length as to the process we use,
18 anyway, and of course I talked limited to our court
19 now and other courts are coming in with their own
20 perspectives, and we prepare these things entirely
21 differently. You're going to be citing it in the
22 hopes that we're going to sign onto it. I mean

1 it's not true that people are asking for permission
2 to cite something to be ignored.

3 And the final point, you said what's the
4 difference between our case and Shakespeare. Well,
5 we know that Shakespeare is not legal, is not case
6 law in our circuit.

7 MR. LETTER: If I cite a D.C. Circuit
8 opinion to you, you know that's not--I know that's
9 not binding on you and you know that's not binding
10 on you. You read it for interest to decide whether
11 you want to go in conflict with it or go the same
12 with it. I assume pay close attention to it.
13 Again why is it okay for me to cite it? Does it
14 not cause you problems for me to cite a D.C.
15 Circuit opinion to you but I can't tell you about
16 something that your court did, again knowing I know
17 full well that it's not binding on you? You know
18 that and I know that, just like the D.C. Circuit
19 opinion is not binding on you.

20 JUDGE BRYSON: Well, it's not binding but
21 I think we're specifically advised that we are to
22 pay very close attention to other circuit opinions

1 that may be in conflict with a position that are
2 inclined to take. I think that's actually
3 established law.

4 What troubles me about this is perhaps
5 illustrated by this distinction that has come up a
6 couple of times, I think, between persuasive value
7 and precedent. I don't really see that there's a
8 difference between persuasive value and precedent
9 in the sense that when you're talking about
10 opinions. Opinions, that's the nature of
11 precedent, that they have persuasive value. Either
12 they bind you or they strongly indicate where you
13 should go.

14 And what worries me about beginning to
15 cite nonprecedential opinions for their persuasive
16 value or other purposes is that you get this kind
17 of creeping precedentialism. You get this notion
18 that this is precedent that's perhaps not entitled
19 to the same degree of attention but it's entitled
20 to some degree of attention because it has
21 persuasive value, and that is going to have, I
22 think, down the line perhaps not cataclysmic

1 consequences but it will have the marginal effect,
2 increasing I'm concerned over time, of forcing us
3 to feel that we have to be more attentive to
4 precisely what we say, how we say it, as the Chief
5 Judge was saying, in our "nonprecedential
6 opinions," which becomes these kinds of
7 quasi-precedents.

8 The other concern that I have is, and this
9 is peculiar perhaps in many respects to our court,
10 but there are areas of our practice, and I think
11 the chief judge mentioned, for example, the
12 typically pro se federal employee cases, a pretty
13 substantial chunk of our cases, typically not
14 briefed very well, either on the appellants' side,
15 the federal employees pro se, or candidly and with
16 apologies to the Department of Justice--

17 MR. LETTER: You're not going to say that,
18 are you?

19 JUDGE BRYSON: Let me say charitably that
20 sometimes the Department of Justice doesn't feel
21 challenged as much as they do in other cases and
22 sometimes we don't get the kinds of thorough and

1 careful briefing that we do in other counseled
2 cases in that area.

3 Our concern is that it's much easier in
4 those kinds of cases than in the case in which
5 counsel are on both sides of the case and when the
6 case is vigorously disputed, it's much easier for
7 us to miss things because the counsel don't call
8 them to our attention, for us to have opinions that
9 just flat out miss things that are out there. And
10 if we have to confront those cases and deal with
11 them, even as persuasive authority, it, I think,
12 makes our task a lot harder.

13 It does happen that we have cases when an
14 issue will ultimately arise in the federal employee
15 area when an issue just hasn't been previously
16 briefed, that it's been in the case but it hasn't
17 really been presented well enough to call itself to
18 our attention, and that's a concern.

19 JUDGE STEWART: To follow up on Doug's
20 question, because I'm trying to understand the
21 argument, as well, and I opposed the question to
22 Judge Wood because it strikes me that much of the

1 opposition and viewpoints really are merging the
2 noncitation and the precedential issues, which one
3 could argue are two separate questions very
4 adroitly avoided by the proposed rule, but it seems
5 in the eyes of many they are read and Judge Wood
6 acknowledged that she viewed those as intertwined.

7 So trying to understand your answer
8 collectively to Doug's question, I'm trying to
9 understand because we get cited to district court
10 opinions all the time on matters which obviously
11 aren't binding to me as a circuit judge but the
12 cognitive processes just don't find it difficult to
13 discern it in that plane--you know, read it as
14 persuasive, dismiss it or something. But it just
15 seems collectively in some of the answers that
16 because it's a circuit unpublished opinion, somehow
17 the demarcation of what you described as creeping
18 "precedentialism," which I thought was an
19 interesting term, is that really the core of the
20 opposition, this foot in the door kind of notion of
21 creeping precedentialism? Not these other issues
22 of parade of horrors about all the workload.

1 People can differ about those and there
2 isn't any evidence on the table about on that but
3 is the core of it really the question of to the
4 extent you have to look at it, it therefore may
5 become binding in sort of a jail with no bars
6 notion? Is that really the core because if so,
7 perhaps that's a powerful argument not to. All
8 these other arguments, the way they're labeled,
9 that seems to be a theme in a lot of instances that
10 yes, the rule is proposed as nonprecedential but
11 really at the core of it is it's the first step
12 toward should all circuits publish all opinions for
13 precedential value? Is that the way I should be
14 understanding the opposition?

15 JUDGE BRYSON: No. Just for myself and I
16 think there are a variety of different views as to
17 the potential mischief among the opponents of the
18 rule, but I think for myself and I think I speak in
19 this respect for a number of others, I think that
20 is the real concern. And it's not just the foot in
21 the door as such, although it's interesting that
22 many of the proponents of the rule see it as

1 ultimately leading to what is the most favored
2 consequence, which is to have all opinions
3 precedential.

4 But setting that aside for a moment
5 because that's not what this rule would do, at
6 least not in its present form, I do think that
7 there's a problem that if you say you may cite this
8 and people cite it, well, why are they citing it?
9 They're citing it because they want you to follow
10 it. They want you to do pretty much the same thing
11 as you did in this case that they have found.

12 Now you may not be "bound" to do it but
13 the whole purpose of the exercise of putting that
14 citation in is to try to push you in the direction
15 of doing what was done in that case, which is what
16 I mean when I say creeping precedentialism. It's
17 that you are asking a court to give some weight to
18 something that that court feels very uncomfortable
19 giving weight to and either one of two things is
20 going to happen. Either you will break the promise
21 implicit in the citation rule by saying we aren't
22 going to pay any attention to this and to heck with

1 the Appellate Rules Committee; we're just going to
2 allow you to cite it but we will never, never pay
3 attention to it, or you will end up giving it up
4 weight, which is contrary to what we think the
5 right approach to nonprecedential--

6 JUDGE STEWART: Short follow-up. But why
7 is that repugnant? Why is that repugnant, though?
8 Yes, when they cite the district court opinion to
9 me from the Southern District of New York or an
10 area in which we have no law. Well, I'm not
11 offended as a circuit judge that some district
12 court judge doing the real work in the trenches has
13 confronted this problem--we have no law on it--as
14 part of the calculus of me deciding how to come out
15 on this case.

16 So I just can't quite follow the notion
17 that because another panel in an unpublished
18 opinion approached this and came out bare facts as
19 outlined, but as at as one piece of 1,000 pieces in
20 the calculus of decision-making, why is that
21 repugnant to the decision-making process because
22 it's a circuit opinion versus Shakespeare or

1 something else that's cited as persuasive? As
2 judges I'm sure you do; we ignore, don't read,
3 reject a whole warehouse of information that's put
4 forth, and I'm totally separating out the pro se
5 issues because those are issues unto themselves but
6 even from lawyers.

7 So I guess the bottom line is why is it
8 more difficult to ignore, don't follow, don't read,
9 et cetera, that opinion cited, more so than it is
10 for me to ignore the Southern District of New York
11 district judge's opinion? I guess simplified, why
12 is that more difficult or is it qualitatively so
13 that as a member of this committee I really ought
14 to put more weight on that perhaps than some other
15 points?

16 JUDGE MAYER: Well, we know that the
17 Southern District of New York opinions or any
18 district court opinion is not binding precedent.
19 It's not binding precedent on the district court
20 itself. They could decide issue, if it thought
21 better, it could decide the issue the opposite way.
22 But in our case we have applied our precedent.

1 I mentioned in the hearing this cacophony
2 of the law. We have in our court anyway, discrete
3 areas of jurisdiction. We have a multitude of
4 cases interpreting, and it's mostly statutory,
5 statutory provisions. What we then see is multiple
6 cases coming along with slightly different fact
7 patterns that we feel is redundant and not helpful
8 to be throwing out there for lawyers to try to look
9 for some nuance, some word choice that some overly
10 ambitious judge wrote to try to sound a little bit
11 different from the other opinion when he didn't
12 mean it to be different.

13 So we're basically just saying now here's
14 the principle and we've decided that in a number of
15 cases you win or you lose for that reason.

16 The other thing is, you know, you're going
17 to have a lot of these nonprecedential opinions
18 that have no development. They have no factual
19 development. They're very thin, very thinly
20 argued. They're going to be cited to us for the
21 nice language that's in there. I think that it
22 would be incumbent upon counsel, if they're going

1 to use nice language, to go out and find out first
2 whether the fact pattern of that case has anything
3 to do with what we're deciding in the case that
4 it's being cited for. If not, then I think you
5 should be concerned about sanctionable conduct to
6 be citing things as judicial precedent or citable
7 precedent, persuasive precedent, for something that
8 has absolutely nothing to do with our case.

9 JUDGE BRYSON: If I could just add--I
10 agree with that but if I could just add two quick
11 points in perhaps partial response.

12 One is as has been said before and I think
13 there's truth to this, if you say that these things
14 can be cited, just internally I know what effect it
15 will have on me personally, which is I'm going to
16 spend more time on the nonprecedential opinions.
17 There's a limited amount of time available to us
18 and you know, as do all of the appellate judges, we
19 are pretty hard pressed and it's going to come out
20 of somebody else's hide. The question is an
21 allocation of resources. Do you want it to come
22 out of the hide of the precedential opinions? Do

1 you want it to come out of the hide of preparation
2 for oral argument, and so forth? That's the first
3 point. It's just a natural human response to this
4 will be to be more cautious about the
5 nonprecedential and that translates into time.

6 The other factor is one that's been
7 mentioned here a little bit and I think perhaps not
8 enough. That is and I think even some of the
9 proponents of the rule and the proponents of an
10 even broader rule of having all opinions fully
11 citable and fully entitled to precedential weight,
12 is that the way we could deal with the time problem
13 is simply to have more judgment orders, those
14 wonderful one-line orders that just say "Affirmed,"
15 in our case "See Rule 36."

16 Now I didn't like those when I was
17 practicing. At least I liked them when they were
18 in my favor. I didn't like them when they came out
19 against me. I don't think any lawyer who's out
20 there who gets a nonprecedential judgment order
21 would prefer that to getting a nonprecedential
22 opinion that explains the reasons why the lawyer

1 lost, gives the lawyer a basis on which, for
2 example, to petition for cert if there's a cert
3 issue in there.

4 I think it's a good thing that we have
5 nonprecedential opinions, as opposed to judgment
6 orders. It forces us to confront the questions in
7 the case and just do what the opinion-writing
8 process is partly intended to do, which is to force
9 us to actually confront the questions in a writing
10 format that sometimes leads us to draw different
11 conclusions about the case. That just doesn't
12 happen in a nonprecedential order.

13 MR. LETTER: Judge Bryson, just one
14 follow-up from that. Don't you already have that
15 concern, though, because your decision, your
16 nonprecedential unpublished decisions are already
17 citable in 90 something percent of the federal
18 courts in the United States because the district
19 courts, I think either none or almost none have
20 rules against citing unpublished court of appeals
21 opinions. And my colleagues who practice in the
22 district courts routinely cite unpublished court of

1 appeals opinions and the district judges routinely
2 refer to them.

3 So one, you already should know that your
4 unpublished opinions are picked up, cited and
5 relied on. And second, I inadvertently discovered
6 the other day a Ninth Circuit opinion that cites
7 approvingly on the merits, not for res judicata or
8 anything, an unpublished Second Circuit opinion.
9 So here we have two circuits with rules against
10 publication and yet the Ninth Circuit actually
11 cited this unpublished Second Circuit opinion,
12 which again shows me that if you were, as you sit
13 and work on those unpublished opinions, you have to
14 understand that in almost every federal court in
15 the United States those are citable.

16 So don't you already have the problem? In
17 other words, it's only in about four courts that
18 they're not citable. And, as we know, they're
19 citable in the Supreme Court. There are five cases
20 this term involving unpublished court of appeals
21 decisions. So your words in your unpublished
22 decision may end up in the Supreme Court, too.

1 JUDGE BRYSON: Well, I think it's a matter
2 of degree. It would be a bigger factor if it were
3 in the briefs that we see than in the briefs that
4 the District of Nevada court sees.

5 MR. LEVY: I wanted to follow up on a
6 comment of Judge Bryson a moment ago. Your court
7 may be different and that's really the question I'm
8 asking, but the judges around the country have been
9 very candida and it's been quite revealing to hear
10 their own descriptions of their unpublished
11 nonprecedential decisions. We hear, for example,
12 that the judges don't really write those opinions.
13 They're done by staff attorneys. They agree
14 perhaps only on the bottom line and don't agree
15 with what the staff attorneys have put down on
16 paper.

17 I wonder how much good it really does the
18 parties or the lawyers in the cases with these
19 nonprecedential opinions to be given what purport
20 to be reasons of the court that from what we've
21 been told in many instances are not reasons of the
22 court.

1 JUDGE BRYSON: Well, as Chief Judge Mayer
2 mentioned, we don't have the practice of having
3 opinions drafted by staff counsel. All of our
4 opinions, precedential and nonprecedential, are
5 written in chambers. I've got a nonprecedential
6 opinion right here I'm working on.

7 JUDGE MAYER: That's because I told him he
8 wouldn't have to say anything or do anything, just
9 listen.

10 JUDGE BRYSON: But it is part of our
11 culture, and again the culture varies from court to
12 court; for instance, I think one of the reasons
13 that I think this sort of procrustean uniformity
14 principle doesn't really apply here or shouldn't.

15 But yes, our practice is for the judges to
16 exercise the same kind of supervisory role with
17 respect to the preparation of opinions whether
18 they're nonprecedential or precedential, which may
19 mean that for us, there's somewhat less of a
20 difference in the amount of judicial time spent on
21 them but I can tell you there's still some and if
22 we narrow the gap in the amount of time, the

1 investment of effort that goes into the
2 nonprecedentials, since there are so many of them,
3 you just increase the expenditure of time and I
4 think, on balance--this is where we ultimately come
5 down--on balance, the game is not worth the candle.

6 JUDGE ROBERTS: I agree with Judge
7 Stewart. I think there is a need to keep separate
8 precedential, nonprecedential and the citability
9 issues. I guess the best way to do that is to ask
10 have either of you ever looked at nonprecedential
11 opinions in the course of preparing for argument or
12 preparing for a decision or preparing an opinion?

13 In other words, if your law clerk in to
14 you and says, "Your Eminence, I have found an
15 unpublished opinion from our court two months ago
16 that is on the exact same question; it really helps
17 resolve the case. Here, look at it." I mean do
18 you say no; I know that not as much care went into
19 that as an opinion? I know that that's not binding
20 precedent; I don't want to see it?

21 I assume the answer is no, that you look
22 at it and you give it whatever worth or value you

1 think it deserves, appreciating that you're not
2 bound by it.

3 So my question is if you actually do look
4 at these things, why won't you let the lawyers tell
5 you about them?

6 JUDGE MAYER: I don't know that the answer
7 is yes. I don't recall anyone bringing them in to
8 me but that's because we know that they're
9 nonprecedential and we don't want to fool with
10 them. But we did look at them in the case that was
11 written about in some of this material, the Symbol
12 Tech case, which was the question of whether
13 nonprecedential opinions are unconstitutional and I
14 wrote the opinion and I ignored prior
15 nonprecedential opinions, didn't even mention them
16 in the opinion and my colleague in dissent felt
17 compelled to go into it which, of course, is the
18 fear. And, of course, our court as a whole did not
19 join that dissenting view or raise the question.
20 Our process was followed and the case came out but
21 that matters what might or might not happen.

22 I personally don't think that I'm not

1 going to look at them because I know what we
2 intended by them and if some of my colleagues
3 didn't see it otherwise, I guess I can't help it,
4 but it wouldn't be healthy.

5 JUDGE BRYSON: My own experience is that
6 I've looked at them but no more than a handful and
7 I think not even a very full hand. One of them was
8 one that I had written, which went the other way
9 from the way that I thought was clearly pointed and
10 all I could say to my law clerk when he presented
11 this to me was, "What was I thinking?" And, of
12 course, I blamed it on the lawyers for not having
13 briefed the case adequately.

14 But it isn't something we regularly do,
15 partly because of the nature of our jurisprudence.
16 A lot of these cases are either in the employee
17 area where the issues just weren't raised or in the
18 plain construction area in patent cases where each
19 case is really sui generis. These are like
20 contract construction issues and each patent is
21 different, so you just are not likely to have very
22 similar issues arising and they just don't come up.

1 JUDGE ALITO: Thank you very much. We
2 appreciate your comments.

3 I'm going to have to depart from what I
4 said earlier. I had promised Chief Judge Walker of
5 the Second Circuit that he could testify at 10:30.
6 We're well past that now and he has to leave, so
7 I'd like to take him out of order now.

8 STATEMENT OF THE HON. JOHN M. WALKER, JR.

9 JUDGE WALKER: Thank you very much, Mr.
10 Chairman. I want to thank the committee for
11 permitting me to speak in opposition to the rule,
12 proposed Rule 32.1. As has been pointed out, 18
13 other judges on my court join in this position.

14 The focus of this brief statement is going
15 to be to highlight the major problems that are, I
16 think, posed by this effort to impose what I
17 believe is a one-size-fits-all rule on appellate
18 courts and in particular, the way the rule will
19 affect the Second Circuit. Let me just give you a
20 little bit of background as far as we're concerned.

21 Pro se appeals constitute about 40 percent
22 of the Second Circuit's docket and insubstantial

1 sentencing and immigration appeals comprise a
2 significant portion of the balance. The great
3 majority of these cases are disposed of by what we
4 call summary orders, which are usually a page or
5 two, that provide the litigant with a concise
6 outline of the panel's reasoning in support of the
7 disposition.

8 Permitting citation of summary orders, we
9 think, promises to add considerable extra work for
10 judges and lawyers with very limited, if any,
11 benefit to the adjudicatory process.

12 First of all, I just want to say that I do
13 believe that it's not appropriate for the Rules
14 Committee to establish this kind of uniform rule in
15 this way. Each circuit has historically been given
16 autonomy in determining how best to conduct its own
17 business and to allocate its scarce resources. And
18 this autonomy, I think, is exemplified by the
19 various no-citation rules promulgated by each
20 circuit that are out there now and also that were
21 done in response to the Judicial Conference's
22 exhortation in the late 1960s and early 1970s to

1 devise such rules in order to curtail the
2 burgeoning body of case law being created as a
3 result of rapidly expanding caseloads. This
4 mandatory rule would directly, I think, interfere
5 with this autonomy.

6 While there may be satisfactory reasons to
7 encourage the circuits to revisit their rules in
8 light of technical innovations and the ready
9 availability now of unpublished decisions to
10 litigants, as several circuits have done, the
11 matter really should be left to the discretion of
12 each circuit court.

13 And in any event, I firmly believe that
14 the Judicial Conference should not go beyond
15 requesting courts to consider changes to their
16 internal practices, just as the conference did in
17 1965 and 1973 going the other way. A request for
18 consideration is very different from a mandatory
19 rule and it preserves local court autonomy in
20 dealing with these questions. And I can assure you
21 that we would approach any such request, if it came
22 to that, with a completely open mind. We're

1 mindful of the changed dynamics that may be out
2 there now, particularly with the fact that they're
3 all published on line.

4 In any event, even if there is some merit
5 to the contention that citation should be allowed,
6 and it's a view that I disagree with, the impact of
7 adopting this rule will be different in each
8 circuit and I think that therefore each circuit
9 ought to be allowed to make its own determination.

10 Also I believe that the rulemaking process
11 really, if you look at the statutes, and I'm
12 talking about the rule's enabling acts and
13 specifically in Title 28, U.S. 2071 through 2077,
14 you'll see that those rules, the rules' enabling
15 acts, generally apply to rules that do not dictate
16 changes to the substance and legal import of
17 courts' decisions and determine how a court will
18 manage its caseload. Rule 2077, Section 2077 makes
19 clear that there really is no role in those
20 circumstances to be played by the Judicial
21 Conference or any of its committees in promulgating
22 a circuit court's rules for the conduct of its

1 business.

2 Now the fact that several circuits have
3 allowed citation to unpublished decisions, with or
4 without restrictions as to their use, in my view
5 does not justify the uniform national rule. Each
6 circuit does have different workloads. Judge Wood
7 pointed this out. We have different workloads,
8 different compositions of its caseloads, the types
9 of cases that it has, and different cultures,
10 different relationships with its communities.
11 Therefore I think even where no-citation rules may
12 be identical, when they're abandoned they will have
13 different impacts on the conduct of the court's
14 business in different circuits.

15 This rule, I think, will impose
16 substantial burdens on the courts. The proponents
17 have argued that there really is no increased
18 burden on the courts because the courts can devise
19 internal rules, can manage it, manage the problem.
20 I think that this argument, which focusses
21 primarily on the difficulties that a court may
22 encounter when litigants cite unpublished opinions

1 to them, is wrong for two reasons.

2 First, as the Advisory Committee itself
3 acknowledges, the reason that unpublished opinions
4 will be cited is for their persuasive value. A
5 future panel confronted with an argument that
6 relies on an unpublished opinion is placed in the
7 difficult position of determining and explaining
8 whether the unpublished opinion is persuasive,
9 whether it was intended to be persuasive by the
10 issuing panel.

11 Now this may necessitate additional work,
12 the additional work of searching out and reviewing
13 briefs and other materials related to the
14 unpublished opinion, but that burden, in my view,
15 will pale in significance to the burden on the
16 panel that is drafting these orders, summary
17 orders, in the first place. That burden stems from
18 the necessity of trying to forecast how the
19 disposition could be interpreted by a future panel
20 to which it's cited. And I don't think the
21 committee and the comments that I've seen have
22 really focussed on this aspect of it enough.

1 In the Second Circuit, summary orders, our
2 summary orders typically provide concisely reasoned
3 explanations for the court's decision but they do
4 spare much of the factual and procedural
5 elaboration that would be necessary to permit
6 application of the decision to other cases. As a
7 result, they take, on average, a matter of hours to
8 prepare whereas signed published opinions, which
9 are scrutinized for their effect in future cases,
10 usually take weeks, sometimes just days but usually
11 weeks and in some cases, major cases, obviously
12 longer. They also involve extensive work by three
13 chambers, as opposed to the summary orders.

14 So the efficiencies that are garnered in
15 preparing summary orders, I think will be lost if
16 they become susceptible to citation in future
17 cases. The authoring judge will no longer be
18 assured that shorthand statements of fact and law,
19 clearly understood by the parties and relevant to
20 their consideration--they're the only constituents
21 there--will not later be scrutinized for their
22 legal significance by a panel not privy to the

1 specifics of that case.

2 And second, the argument that the courts
3 will be able to modify the way they prepare
4 unpublished dispositions to accommodate the rule I
5 think rests on unrealistic assumptions that there
6 is homogeneity among the judges in a given circuit
7 and that is plainly not the case. Judges who are
8 drafting these rules will approach them
9 differently.

10 We just heard from one judge who stated
11 that if they're citable, he's going to spend a lot
12 more time working on them and make them proper
13 vehicles for conveying the law of the circuit.
14 Other judges will not take that view. Other judges
15 will resort to one-line dispositions, particularly
16 in the face of increasing caseloads, such as we
17 have in the Second Circuit, where our caseload has
18 been going up steadily and is now at about 6,000
19 cases a year. And still other judges will change
20 nothing to what they do presently.

21 I think there's no compelling reason for
22 permitting citations that justifies implementing

1 this kind of a sea change, at least in the culture
2 of the Second Circuit and in the Second Circuit.
3 The argument that lawyers are going to be
4 inconvenienced by having to pick through
5 conflicting no-citation rules of the circuits I
6 think is a red herring. Lawyers have to do this
7 kind of thing anyway with respect to the local
8 rules and every self-respecting lawyer examines the
9 local rules before appearing or filing a brief.
10 Certainly that's a minor inconvenience that cannot
11 justify, in my view, forcing courts to make such a
12 pronounced change in the way they conduct their
13 business.

14 And I don't think there can be a serious
15 contention that there's a dearth of case law out
16 there for lawyers to review in preparing their
17 cases. The expectations of the Judicial Conference
18 back in the early '70s have been more than
19 realized. We're now in the third Federal Reporter
20 series at Volume 360. It's taken us about 10 years
21 to get there. When the second series was published
22 it took about 42 years to get to Volume 360.

1 Now while it's true that lawyers will no
2 longer be plagued with the herculean task of
3 picking through the conflicting no-citation rules,
4 they will be able to impose, I think, increased
5 litigation costs on their clients by picking
6 through the greatly expanded base of citable
7 opinions and examining the relevant ones with
8 greater care in preparing briefs.

9 The proponents that assert that lawyers
10 are unlikely to feel compelled to search
11 unpublished decisions for cases that support their
12 positions, particularly if they've found one that
13 supports their position, have ignored the fact that
14 lawyers will nevertheless have to, I think, waste
15 valuable time researching and devoting briefs in
16 responding to unpublished decisions that contradict
17 their position, in anticipation that such decisions
18 will be cited by their adversaries or even the
19 court.

20 Now from our perspective, the perspective
21 of the Second Circuit, the consequences of the
22 rule, I think, will disserve the appellate process

1 and will hurt litigants. If, in response to this
2 rule, judges spend more time elaborating
3 unpublished decisions, the entire appellate process
4 will be delayed. It will be delayed in preparing
5 these summary orders, in the detail and the work
6 that will have to go into them because we know that
7 they will be cited. It'll also delay obviously the
8 fully published signed opinions that are normally
9 issued because, as has been pointed out, judges
10 have a finite amount of time within which to work.

11 In my court where about two-thirds, maybe
12 more now, of the cases are decided by summary
13 order, our disposition rate will be delayed
14 significantly, I think, to the detriment of the
15 litigants and the bar.

16 Moreover, because the bulk of our caseload
17 comprises pro se appeals, unsupported essentially,
18 broadly stated, that are often unsupported by any
19 legal basis, and rather routine sentencing and
20 immigration appeals, the considerable amount of
21 extra work that is imposed on judges and lawyers
22 will result in few, if any, valuable additions to

1 citable case law while, I think, generating a glut
2 of redundant and insignificant decisions to be
3 waded through for possible nuggets of value.

4 In addition, as two federal defenders in
5 New York have pointed out, Barry Leiwant and
6 Leonard Joy, who, by the way, strongly oppose this
7 proposed rule, the rule could reinstate many of the
8 inequities that prompted some no-citation rules in
9 the first place and that have been ameliorated by
10 the advent of Westlaw and Lexis and their
11 publication. Large firms and government offices
12 will be able to devote their considerable resources
13 to ferreting out briefs and other court materials
14 pertaining to sparse unpublished decisions in order
15 to provide greater context and thereby bolster
16 their persuasiveness.

17 They won't just cite the summary order;
18 they'll cite the summary order and then they'll
19 cite the briefs and they'll cite the surrounding
20 context in order to make their argument. These
21 litigants will have a distinct and unfair advantage
22 over litigants with fewer resources and in

1 particular, the many indigent litigants that file
2 actions against government entities.

3 And finally, where many proponents have
4 argued that citability will result in greater
5 transparency in appellate proceedings, the exact
6 opposite is more likely in the Second Circuit where
7 faced with the choice of either providing
8 sufficiently detailed explanations of its decisions
9 to prevent distorted applications in future cases,
10 the court will either do that or will issue on-word
11 dispositions and more panels in our court, with
12 rising caseloads, I think will go that route out of
13 sheer necessity.

14 Thus, if that's the case, the most
15 poignant hardship that will result from Rule 32.1
16 is that it will deprive litigants, many litigants,
17 primarily the most vulnerable, of the explanation
18 for the court's disposition and with it, the
19 assurance that the court understood and actually
20 reckoned with the contentions that were raised on
21 appeal. Thus, whether the rule forces us to issue
22 longer, more elaborate unpublished decisions with

1 consequent delay and misallocation of judicial
2 resources, or to do away with giving explanations
3 altogether, leaving parties bewildered and
4 short-changed, the appellate process will be the
5 worse for it.

6 So in conclusion, I ask the committee to
7 reject proposed Rule 32.1 and to adhere to the
8 principle of local autonomy in matters affecting
9 how a court conducts its own business. Thank you.

10 JUDGE ALITO: Thank you.

11 Questions?

12 If I could just ask you briefly
13 essentially the same question I asked Judge Wood,
14 would you see any value in a study about what
15 effect the elimination of no-citation rules has had
16 in the circuits that have eliminated no-citation
17 rules or never had them? Do you think that that
18 might cause your court to reconsider its position
19 on this?

20 JUDGE WALKER: I can see no harm in a
21 study and if the committee adopts in principle
22 local autonomy and exhortation as opposed to

1 command decisions, I can assure you that we would
2 examine the study carefully to revisit the
3 question. I'm not saying how we would come out but
4 we have an open mind on this subject and I would
5 hope that if such a study were done and it was done
6 carefully and persuasively, that then I see no
7 reason why our court wouldn't look at it very
8 seriously. But we would, in the last analysis,
9 like to be able to make that decision ourselves.

10 MR. LETTER: Judge Walker, just one
11 question. Given that there are clearly widely
12 varying and strong views on this, wouldn't it make
13 sense for us as a committee--and your answer may be
14 no but I'm phrasing it--wouldn't it make sense for
15 us as a committee to send this up the line so that
16 frankly the Supreme Court is the one who makes the
17 decision, rather than us? Because it may very well
18 be that many of us agree with you on local option
19 but nevertheless understand that many disagree.

20 So again shouldn't this be passed up so
21 that this, since this is so controversial and
22 apparently difficult, shouldn't the Supreme Court

1 make that decision rather than this committee?

2 JUDGE WALKER: This is really how you want
3 to conduct your business and how you see your role.
4 I'm not in a position to really advise you on that.
5 I mean it would seem to me that your
6 recommendation, if it's going to have merit, should
7 be what you honestly and sincerely think the rule
8 ought to be, not some situation that other people
9 can throw stones at if it's not an honestly held
10 position on your part.

11 I would expect this committee to vote its
12 conscience and to reach a decision that they
13 believe in, as if they had the final
14 decision-making authority. It's your best
15 recommendation and you've been tasked with this job
16 as experts in this area.

17 MR. LETTER: But if we recommend against,
18 it doesn't go to the Supreme Court. I think the
19 way the system is set up, it doesn't go to the
20 Supreme Court, so even if the Supreme Court
21 disagreed with us, it would never get to them. The
22 only way, as I understand it, that it would get to

1 them is if we passed it along, maybe saying there's
2 significant disagreement here and that's why we
3 think the Supreme Court, you ought to decide it.

4 JUDGE WALKER: That's a course you could
5 take. Another course you could take would be if a
6 majority of you felt that the rule was worthwhile
7 or the idea anyway of citing unpublished opinions
8 was worthwhile, that you would propose a rule, as
9 was done in the late '60s and early '70s, strongly
10 encouraging courts to consider this and in light of
11 the fact that it's a practice in other circuits,
12 although not a uniform one, and although with
13 restrictions. And under those circumstances it
14 seems to me every court would be mindful of that
15 and would also not be as bipolarized, if you will,
16 on this issue.

17 If your thinking was that this would make
18 sense, then why not just encourage courts? That's
19 something also that I think just flatly as a member
20 of the Judicial Conference would be viewed very
21 differently by the Judicial Conference than a
22 mandatory rule, which is, in my view, intruding

1 into the way courts conduct their own business and
2 how they manage their own unique caseloads.

3 JUDGE ALITO: Judge Levi?

4 JUDGE LEVI: I recall that your rule is
5 one of the stricter ones.

6 JUDGE WALKER: It is.

7 JUDGE LEVI: My question is this. One
8 reason that attorneys want to cite unpublished
9 opinions, as I understand it, isn't only for
10 persuasive value but as a fact. This is the way a
11 rule is being applied. This is where a rule is
12 being applied. This is a fact piece of evidence
13 that might be argued in a qualified immunity case
14 as to whether law is clearly established or not.

15 Would your rule permit a lawyer to argue
16 not that you should follow these cases but that
17 these cases are there and therefore certain
18 inferences could be drawn in the current case? For
19 example, if I want to say to the panel we need a
20 clearer rule in this area because look what's
21 happening in some of these unpublished opinions,
22 I'm not relying on them for authority but simply as

1 facts. Can I do that?

2 JUDGE WALKER: That issue has not come up.
3 My court has not ruled on that particular question.
4 We do permit it, obviously, for any case-related
5 determination--res judicata, collateral estoppel,
6 law of the case, that kind of thing. And as far as
7 drawing a distinction between persuasive and fact,
8 I think that if they were to--given the ingenuity
9 of the New York bar, they'd start citing these
10 things for their factual value and not for their
11 persuasiveness and we'd be in the same situation
12 we're opposed to.

13 JUDGE ALITO: Any other questions?

14 Thank you very much, Judge Walker. We
15 apologize for the delay.

16 JUDGE WALKER: Not at all.

17 JUDGE ALITO: We'll hear from Carter G.
18 Phillips of Sidley Austin Brown & Wood.

19 STATEMENT OF CARTER G. PHILLIPS

20 MR. PHILLIPS: I appreciate the
21 committee's indulgence. I've promised to be very
22 brief, in large part because most of the

1 observations that I would make as chairman of the
2 Advisory Council of the United States Court of
3 Appeals for the Federal Circuit have already been
4 made by the two judges who have ably expressed
5 their viewpoints in opposition to Rule 32.1.

6 I think I would just like to say two
7 things. One, the Advisory Council is comprised of
8 lawyers, both government and nongovernment, large
9 firms, small firms. We were asked to develop a
10 position if the council was in agreement about what
11 position to take with respect to Rule 32.1. I was
12 quite stunned, frankly, by the unanimity in
13 opposition to it and I think it's a testament,
14 frankly, to the way the Federal Circuit basically
15 decides cases and the general consensus that it's a
16 process that, on whole, seems to be quite fair and
17 that any significant departure from that process
18 would be one that would be of grave concern to
19 practicing lawyers, which leads me to the only two
20 points I really want to make, which is what will
21 the effect of the rule be for those of us who
22 practice before a court like the Federal Circuit?

1 I think you have to take Judge Bryson's
2 assessment here at face value and I believe it's
3 two. One of two things will happen. Either more
4 time will be devoted to nonprecedential opinions,
5 which will, I don't think detract from the time
6 that's devoted to precedential opinions because all
7 judges place far too much significance on the work
8 product that they put out under their own name. So
9 the only way that it can make a difference is the
10 way Judge Walker described, which is that it will
11 delay the outcome of these cases.

12 And I can tell you as a practicing lawyer
13 in a lot of courts of appeals who has a lot of
14 clients, there is nothing more frustrating and more
15 difficult to explain away than delay. Now
16 fortunately in my own practice, most of it's in the
17 United States Supreme Court and the one thing in
18 know to a moral certainty is when we get to the end
19 of June of a term we're going to get all the
20 opinions that that court has to hand out.

21 That's not true with the courts of
22 appeals, obviously, and there are lots of cases

1 that stay pending for a long time. They get lots
2 of phone calls to lawyers from their clients about
3 what's going on when the second, third, fourth,
4 fifth month goes on. And to the extent that any
5 change in the rules is going to delay this process
6 any greater, I think it's a profound mistake.

7 The flip side is the only way then to
8 avoid greater delay, it seems to me, is going to be
9 the issuance of the one-word orders and that is
10 even more difficult to explain away to a client.

11 Now blissfully in my own practice, most of
12 my clients have issues that if they come to me and
13 ask for an appeal, it usually is the kind of thing
14 that will, in fact, generate an opinion, but we do
15 an awful lot of pro bono work for individuals in a
16 lot of different circumstances and a lot of those
17 cases do not involve significant issues and there's
18 nothing that a practitioner appreciates more than
19 even a two- or three-page explication of what the
20 panel was thinking about because then you can go
21 back to that individual and explain that the
22 process worked, that this assessment of the

1 situation is a legitimate one.

2 When you get a one-word affirmance then
3 it's very difficult to explain that the system, in
4 fact, worked, so to the extent that you adopt a
5 rule that's going to increase the instances in
6 which courts of appeals are likely to follow that
7 process, I would urge you strongly not to do so in
8 the absence of clear and compelling reasons to
9 adopt a uniform rule. And at least from my
10 perspective, I haven't seen reason to adopt a
11 uniform rule.

12 Those are the only two points I wanted to
13 make. I don't want to indulge any more delay in
14 this process.

15 JUDGE ALITO: Any questions?

16 JUDGE ROBERTS: Mr. Phillips, I assume you
17 do what I used to do when you get a one-word order,
18 which is tell your client there's no way they could
19 have written an opinion that would have come out
20 against us.

21 MR. PHILLIPS: I assume your clients
22 reacted the same way mine do, with some

1 incredulity.

2 JUDGE ROBERTS: Don't you, though--I don't
3 know what the right word is but if you're in the
4 situation where you think for whatever evocative
5 value it has that you want to cite an unpublished
6 opinion to a court that doesn't allow it, I mean it
7 may be any number of reasons--it is the most recent
8 articulation of the rule; it is a panel that is
9 identical to the panel that you're appearing
10 before; there's a particular factual nuance that is
11 identical. In other words, not that it's binding
12 precedent but you think it will help you convince
13 the judges to come out your way.

14 So how do you reconcile the noncitation
15 rule with your professional judgment about how to
16 present your client's case?

17 MR. PHILLIPS: Judge Roberts, maybe you've
18 had a vastly different experience than what I've
19 had in my 23 years of appellate practice, but I can
20 literally count on one hand the number of instances
21 in which I really felt as if a nonbinding,
22 nonprecedential order of some sort would make any

1 material difference under any circumstances. And
2 if you compare that with what I--I don't want to be
3 demeaning about it but the truth is there is a vast
4 wasteland of unpublished material out there and to
5 compare the two, it seems to me, it's much easier
6 to say I'd rather be in a position where I don't
7 have to worry about culling through all of those
8 materials, or more relevant today, I don't have to
9 send out all of the assocaites in the office to go
10 chase down all of those things through the methods
11 of Lexis and Westlaw and computer research.

12 So on balance, it seems to me it's not
13 much of a problem at all.

14 MR. LETTER: Carter, I did want to focus,
15 since you and I have worked both with and against
16 each other on various Supreme Court matters, isn't
17 the fact that the Supreme Court has this term at
18 least five cases involving unpublished opinions,
19 doesn't that really change things? Because I
20 wonder how many judges now are saying to themselves
21 it's okay to either pay not much attention to these
22 or let staff counsel write them. No problem. They

1 can't be cited here. They can be cited in all the
2 district courts in the United States and I don't
3 really care that an opinion with my name on it,
4 along with two other judges, might get to the
5 Supreme Court.

6 I mean I just wonder about given this what
7 I thought was quite surprising fact that so many of
8 these cases can end up in the Supreme Court,
9 whether that changes things.

10 MR. PHILLIPS: Well, I don't know the
11 specifics of all of these cases. I do know that
12 the example that Chief Judge Mayer identified was
13 the one that I've sort of seen in my own practice,
14 which is a rule has become so settled that there's
15 no reason to publish it but the rule nevertheless
16 either conflicts with the rule in another court or
17 frankly it's just wrong, or at least at some stage
18 it gets to the point where you say there's no
19 reason to allow that issue to percolate any
20 further.

21 In that situation it seems to me it's
22 irrelevant. That is the best use of not publishing

1 because all you're doing is announcing a principle
2 that's already out there. It just tells you what
3 the circuit's law is.

4 Indeed there are a lot of cases that I
5 seek cert in where the opponent says well, the law
6 is not all that clear at this stage, and it's
7 actually quite helpful to have unpublished orders
8 that say the rule in that circuit is so settled at
9 this stage that they don't even bother to publish
10 opinions on it anymore, so there's no reason to
11 allow this to percolate. The judicial process has
12 essentially been turned off. They've stopped
13 thinking about it anymore, at least in those
14 circuits that have announced a rule and therefore
15 the court should take this particular vehicle for
16 resolving it.

17 MR. LETTER: I'm not talking about
18 publishing these opinions. Remember all this rule
19 would do is say can people cite them? And again it
20 just seems very odd that people can't even tell
21 courts of appeals about opinions that at least five
22 times in one term are going up to the Supreme

1 Court.

2 MR. PHILLIPS: I can only think of one
3 case in my entire experience where I thought that
4 there was an instance of an abuse of the
5 nonpublication rule and the court did grant cert in
6 that particular instance. It was a dissent and it
7 struck me at the time that that was just simply a
8 mistake that had been made by a particular panel.
9 I don't think it was anything more than that. I
10 don't think it's a reason to change the basis rule
11 in terms of how you approach these issues.

12 JUDGE ALITO: Any other questions?

13 Thank you very much, Mr. Phillips.

14 All right, we're going to take a very
15 short break. If we can be back here by 12:35 on
16 the dot we'll try to continue.

17 [Recess.]

18 JUDGE ALITO: I'll ask everybody to take
19 their seats and we can get started again.

20 Mr. Hangley? Thank you for coming and for
21 your comments and once again my apologies for the
22 delay but we've had quite a few questions.

1 STATEMENT OF WILLIAM T. HANGLEY

2 MR. HANGLEY: Well, I have enjoyed it, I
3 have learned from it and I thank you for the honor
4 of being allowed to attend and testify today.

5 I would like to introduce my co-counsel,
6 Jimmy Morris, the president-elect of the American
7 College of Trial Lawyers, who is with me to make
8 sure that I don't stray from the college's agenda
9 today. As you know, the college, founded in 1950,
10 is widely considered to be the premier lawyer's
11 professional organization in America.

12 I personally am a trial and appellate
13 lawyer practicing in Philadelphia. I am chair of a
14 medium-sized firm that I founded 10 years ago,
15 Hangley, Aronchick, Segal & Pudlin.

16 In 2001 and 2002 I had the honor of being
17 asked to examine and then prepare a report which
18 ultimately became the college's report and
19 recommendations on the phenomenon known as
20 unpublished opinions. And let me say that I hate
21 the terminology unpublished opinion and I hate the
22 terminology that's been bandied about today,

1 precedential, because they both, in my view, are
2 kind of meaningless terms. Unpublished opinions
3 are, in fact, published for the most part on the
4 Internet. They are accessible. To my way of
5 thinking as a lawyer, district court decisions are
6 precedent, state court decisions are precedent.
7 That which can be used for persuasive purpose is
8 precedent.

9 The big question is what is binding within
10 a circuit and I use the awkward term
11 circuit-binding precedence or circuit-binding cases
12 when I talk about these things. I think that might
13 help clear up some of the confusion surrounding
14 this question of does precedential equate to
15 citability. I don't think in terms of binding
16 precedence it need necessarily do so. I do think,
17 as you know and the college believes strongly, that
18 all opinions should be citable for whatever
19 persuasive value they may have to the listener.

20 My report, the college's report on the
21 subject has been passed out to you during the
22 recess. I sneaked it up on you. It's called

1 "Opinions Hidden, Citations Forbidden: a Report and
2 Recommendations of the American College of Trial
3 Lawyers on the Publication and Citation of
4 Nonbinding Federal Circuit Court Opinions." It
5 appears in 208 FRD 645, September of 2002 if I
6 remember correctly.

7 We make the following recommendations.
8 One, that the rules and procedures governing the
9 publication of and resort to nonbinding opinions
10 should be uniform; B, that the noncircuit-binding
11 opinions should all be published; and C, that
12 litigants must be free to cite nonbinding circuit
13 court opinions.

14 We of the college are delighted that the
15 Advisory Committee has recommended the adoption of
16 proposed Appellate Rule 32.1. We followed the
17 debates closely and, as you know, we have not
18 hesitated to pester your able reporter, Patrick
19 Schiltz, with our own comments as your good work
20 went forward.

21 I will concentrate today on the third
22 point made by the college and contemplated by the

1 rules, that lawyers must be free to cite
2 noncircuit-binding opinions when they consider them
3 persuasive, just as they are free to cite fiction,
4 doggerel, beer commercials and stand-up comics when
5 they consider these "precedence-persuasive."

6 I have heard my friend and college Judd
7 Best, also a fellow of the college, discuss the
8 need for publication and the need for uniformity in
9 his separate testimony offered here today on behalf
10 of the Section of Litigation of the ABA, but I
11 would like to add one small voice on the question
12 of uniformity because I've heard a lot about local
13 option and how the courts should be left to their
14 own local circuit devices and I'd like to depart
15 from my prepared testimony for that purpose.

16 It must be remembered that what we have
17 gotten from local option in the years since
18 unpublished opinions and anticipation rules came
19 into existence is a Tower of Babel. There are
20 rules in the various circuits that collide with one
21 another, that are consistent with one another, and
22 that create a nightmare. It is not as easy as you

1 may think to know that you're following the rules,
2 largely because you need not only look at whether
3 or not your particular circuit where you're
4 appearing allows citation; you must also look at
5 the rules of the other circuits to see whether they
6 forbid citation or, as the Second Circuit says,
7 using it for any purpose anywhere.

8 And you must then determine whether your
9 local circuit has a rule that, on a kind of comity
10 basis, embraces or honors the rules of the other
11 circuit, and they do that. An example, of course,
12 is the D.C. Circuit where a couple of years ago
13 they changed from being an anti-citation to a
14 citation-permitted jurisdiction, but only
15 prospectively. So you have to know what cases you
16 can cite and what cases you can't cite. The Fifth
17 Circuit changed from being a case where the
18 unpublished, and they were literally unpublished
19 opinions, were binding precedent to one in which
20 the still unpublished opinions are not binding
21 precedent. You could and still can in cases
22 decided before 1991 be bound by a precedent that

1 you can't read.

2 If you are arguing in the District of
3 Columbia Circuit, just as one example, where they
4 do have a comity rule, you will find yourself in a
5 situation where--in my article I talk about this
6 and I envisage a lawyer instructing his associate
7 on how to write a brief form in a Section 1983
8 case. He tells her that you can cite the D.C.
9 Circuit's own cases but only if they were decided
10 after 2001. The other ones go on the pantomime
11 pile where you can talk about them but you can't
12 mention their names. I don't know what the
13 difference is between the pre- and post-2002
14 decisions but there is one.

15 You can cite opinions from the Fourth,
16 Sixth, Eighth and Tenth Circuits if you have to.
17 You could cite cases from the Fifth and the
18 Eleventh Circuit but there aren't any; that is, you
19 won't be able to find them. I don't know why that
20 is, either. You'll find some Third Circuit
21 unpublished cases lately but they're all very
22 recent. You can cite them in a pinch, I think.

1 You'll also find a few such cases in the First
2 Circuit but, as of the time of this writing you
3 can't cite them or mention the actual cases in the
4 brief.

5 There are lots of cases from the Seventh,
6 Ninth and Federal Circuits but you can't mention
7 their names, either, in the D.C. Circuit because of
8 the D.C. Circuit rule. And although the Second
9 Circuit cases are all over the Internet, you're not
10 even allowed to think about them, much less talk
11 about them. It's probably best that you not read
12 them at all. Why do they publish them? I have no
13 idea.

14 That's where local option gets you in
15 these rules. That gets you, as I said before, into
16 a Tower of Babel and it really, from the
17 standpoint of the litigant who is served by
18 clients, not a constructive environment in which to
19 have to practice law or to depend on your lawyer to
20 practice it for you.

21 I should observe that like the Advisory
22 Committee, the American College of Trial Lawyers

1 does not take any position on the question whether
2 courts can or cannot constitutionally take the
3 position that all cases must be binding precedent
4 in the deciding circuit. The Anatasoff, Hart v.
5 Massanari debate is one we think that is
6 appropriately left to courts. We agree that it is
7 not the work of this committee or of the Supreme
8 Court, in the rulemaking context at least.

9 As a practicing lawyer, too, I can't help
10 observing that we are not much troubled much of the
11 time by the question whether a decision is or is
12 not a "binding" precedent within the circuit where
13 we're arguing, and that's simply because most cases
14 are not squarely governed by the circuit-binding
15 precedent. Most of the time cases are there to be
16 distinguished. If a case is controlled by a
17 precedent, from the standpoint of the lawyer in
18 private practice, that is not the case that is
19 going to pay the rent because that is not a case
20 that is going to go very far.

21 What lawyers do find troubling and what
22 their client litigants finding troubling and

1 personally threatening is a universe in which some
2 decisions are off-base, taboo, not to be discussed.
3 There should be no restriction, in our view, upon
4 litigant citations to nonbinding opinions for
5 whatever persuasive merit they are thought to have.

6 Assuming that a circuit court can decide
7 that a given holding will not be a binding
8 precedent in a future case, that court or any court
9 can surely decide what weight it wishes to give to
10 that persuasive point. I think, Judge Stewart,
11 that was exactly the point that you were touching
12 on in your questions earlier today. And the courts
13 should not be attempting because they're really not
14 terribly good at it so far as I can tell, at making
15 the a priori judgment that nothing in today's
16 holding could possibly be pertinent to an argument
17 in some future case.

18 Courts signal a lack of confidence in
19 their own decisions when they prohibit the public's
20 representatives from even discussing what the
21 courts themselves have said and that can't be
22 healthy for the growth of the law. The limited

1 available information also demonstrates not
2 surprisingly that appellate judges are sometimes
3 fallible in their decision that a case adds nothing
4 to the law or is not precedent.

5 Let me mention here a case that Chief
6 Judge Mayer mentioned in his own remarks today.
7 That was the Symbol Technology case in the Federal
8 Circuit. That case involved the arcane issue of
9 prosecution estoppel of patents. It means not much
10 to me but it was at one time a very important issue
11 in patent law and the Supreme Court in the '20s had
12 held in various contexts that there was such a
13 doctrine, an equitable doctrine of prosecution
14 estoppel, that would stop someone from claiming
15 patent infringement in certain circumstances where
16 he had been guilty of delay in raising his rights,
17 deliberate delay.

18 There came some amendments to the Patent
19 Act, actually a new Patent Act, and in the 1980s
20 the Federal Circuit decided that the doctrine no
21 longer had any vitality and in effect, that the
22 Supreme Court's decisions had been overruled since

1 Silentio by Congress's failure to mention this
2 doctrine in enacting the Patent Act.

3 Now those two cases, one called Bott and
4 one called Ricoh, were on the electronic books for
5 some 14 years. They were cases that were widely
6 discussed by lawyers. They were cases that you
7 would find described as setting the law in Chisum
8 on Patents and other tomes involving patent rights
9 and patent infringement. They were generally
10 considered to be the law although they were not
11 published in F.2d or F.3d.

12 Importantly, those are cases which by the
13 standards of the Federal Circuit itself
14 respectfully, should have been--one at least of
15 them should have been a published circuit-binding
16 opinion if you followed their standards, that it
17 established new law that hadn't been decided
18 before. There are six or seven different of their
19 standards that were not followed in that case.

20 Fourteen years later in the Symbol
21 Technology case the Federal Circuit decided just
22 the opposite. They decided that without ever

1 mentioning the Bott and the Ricoh decision, they
2 decided that the law was not at all changed after
3 the enactment of the Patent Act, there had been no
4 mistake, and since Silentio that these two
5 unpublished opinions were wrong. Interestingly,
6 there is not a mention of those two well publicized
7 if not published opinions in the Symbol Technology
8 case.

9 Interestingly, too, the attorneys on one
10 side or the other--I forget which--moved the court
11 for an exception. This will be contrary to what we
12 heard from Judge Wood this morning about what
13 happens in the Seventh Circuit. They moved for an
14 exception to the general doctrine and said please
15 let us cite these two cases because they are
16 important cases and they are squarely on all fours
17 with the issue that you have before you.

18 The Federal Circuit did not mention the
19 two cases. The Federal Circuit simply said that
20 the request to cite unpublished opinions of this
21 court is denied. We know only because Judge Newman
22 wrote a scholarly and vehement dissent in that case

1 that, in fact, it was the Bott and Ricoh cases that
2 these people wanted to cite and she took the court
3 to task for not at least dealing with authorities,
4 whether circuit-binding or not, that were out there
5 and deserved to be discussed after all of these
6 years.

7 That's the kind of thing that can happen
8 with a priori judgments that a case is or is not to
9 be accorded the honor of being published in F. 3d
10 and that therefore citation will or will not depend
11 on its being published on paper instead of merely
12 electronically.

13 For a court to blind itself in advance to
14 the persuasive power of its own reasoning to the
15 college makes no sense. It undermines the process
16 of stare decisis and it corrodes, we think, the
17 crucial public perception that cases are decided by
18 the rule of law and not arbitrarily.

19 I was impressed today by the fact that no
20 one mentioned the First Amendment. There is a
21 serious question as to whether a court can prohibit
22 parties and their lawyers from telling them about

1 the court's decisions. As committee members are
2 all too aware, there's discussed in the article
3 that many reputable judges and scholars have raised
4 serious questions about whether anti-citation rules
5 can pass muster under the speech and petition
6 clauses of the First Amendment, separation of
7 powers, whether they are within the scope of an
8 Article III courts' powers in the first place, or
9 whether they are a denial of equal protection or
10 due process.

11 Stated as an abstract proposition, a rule
12 that lawyers can't cite judicial statements they
13 consider persuasive or criticize the ones they
14 consider erroneous is just unthinkable. Imposing
15 prior restraints on citizen references to the
16 public words or acts of any public official--a
17 judge, a mayor, a crossing guard--seems undeniably
18 contrary to our treasured notions of freedom of
19 speech and of the compact between citizens and
20 their government.

21 The common law on stare decisis more
22 narrowly are built on the premise that lawyers will

1 use one judge's reasoning to persuade the next
2 judge not that his case is controlled by an earlier
3 decision but that its reasoning lights the path
4 that the court should consider in addressing the
5 present dispute. To tell lawyers and the public
6 that they must disregard some 80 percent of the
7 available reasoning--and let's remember that most
8 of the time the judges do get it right in these
9 unpublished opinions--must foreswear 80 percent of
10 the available reasoning is really a radical step in
11 itself. Changing that rule is not what's radical.
12 That we have the rule in the first place in some
13 circuits is the radical thing.

14 It becomes even more radical, as others
15 have noted today, when we consider that judges all
16 over the country regularly cite the
17 noncircuit-binding opinions of state courts,
18 district courts, and other courts, even if in the
19 mother courts, the issuing courts themselves, the
20 court could not do that. The thinking can't be
21 that the less than optimally vetted analyses are to
22 be avoided completely but that the rulemaking

1 tribunal doesn't want to show less than its very
2 best work, but that work is already shown because
3 it is released to the Internet and it is available
4 and it is, in the final analysis, a paltry excuse
5 for gagging lawyers and their clients.

6 Second, contrary to the rationale of the
7 anti-citation rule, the record demonstrates
8 compellingly that the nonbinding opinions are not
9 uniformly redundant. They do say something new on
10 certain occasions. Sometimes they are important
11 building blocks of the corpus juris.

12 In the article I discuss the A pile cases
13 that are marked as binding precedent and the B pile
14 cases that are easy and redundant or automatic or
15 nothing new but as several of you have mentioned,
16 the Supreme Court regularly considers those cases
17 and you wouldn't expect that of a redundant
18 decision. Nor would you expect to see dissents
19 from redundant or automatic decisions but dissents
20 are not uncommon in noncircuit-binding
21 dispositions.

22 Third, with all due respect to the good

1 faith of the appellate bench and its attempts to
2 follow its own rules, it's impossible to avoid
3 concluding that some cases go into the nonbinding
4 pile because they have not been given enough
5 attention for the judges to be comfortable with
6 them. We discuss in the article several instances
7 where it should have been obvious from the start
8 that a particular decision should never have gone
9 onto the uncitable pile in the first place because
10 it was not at all redundant.

11 We discussed already the Symbol
12 Technologies case but the Anatasoff case by Judge
13 Arnold relies on a case called Christie that was a
14 case of first impression in the Eighth Circuit, one
15 which should have been published under the Eighth
16 Circuit's own rules.

17 The Fifth Circuit's nonbinding decision in
18 a case called Anderson versus Dallas Area Rapid
19 Transit was a case of first impression. It
20 addressed the Eleventh Amendment immunity of a
21 metropolitan transit authority. A later published
22 decision of that Fifth Circuit came out with a

1 different ruling and there was a strong dissent
2 from one of the panel members, who participated in
3 the ruling but dissented from the petition for
4 rehearing because he said having these two opinions
5 on the books, we should at least have discussed the
6 earlier opinion in the first place.

7 There's a case called Barry Sterling
8 versus Pescor Plastics, again in the Federal
9 Circuit. It was an unpublished opinion but it was
10 a good and sensible attempt to resolve an obvious
11 conflict between two published opinions of the same
12 circuit that had reasonably come down. Yet it was
13 a decision that tried to harmonize them, one
14 resolving an intracircuit conflict, another stated
15 reason in most of these local rules for publishing
16 opinions and making them circuit-binding, in fact.
17 Yet that case could not be cited and it was a case
18 where I personally, my client suffered badly
19 because the district court refused to allow the
20 citation of the federal circuit opinion harmonizing
21 the two precedents.

22 The Ninth Circuit's decision in a case

1 called Kish v. City of Santa Monica was at odds
2 with a decision of another circuit. The case had
3 to do with a Section 1983 claim of a fugitive who
4 was bitten by a police dog and the question was
5 one, of course, of excessive force and the Ninth
6 Circuit's decision was squarely at odds with a
7 decision of, I believe, the Seventh Circuit but I'm
8 not entirely sure that I've got the circuit right.

9 That case was not published and indeed in
10 a case called Sorchina v. City of Covina, an
11 attorney who dared to cite the Kish case, the
12 unpublished Kish case, in another Section 1983
13 fugitive dog bite case, if you can believe they get
14 two in the same circuit, the lawyer who had cited
15 that opinion was made to come before the Ninth
16 Circuit and show cause why she should not be
17 subjected to sanctions for having the temerity to
18 tell the court about its own decision in the
19 earlier Kish case. That is very troubling. That
20 suggests that the sorting mechanism isn't a perfect
21 mechanism.

22 The anti-citation rules finally do not

1 help the courts. So far as one can tell from
2 reading the cases, it cannot fairly be said what
3 I've heard people say today, that the quality of
4 justice will change if the anti-citation rules are
5 overruled by the proposed Rule 32.1.

6 Someone mentioned doing a study. Study
7 after study has already been done. The work of,
8 for example, Professor Lauren Robel from the
9 University of Indiana, I believe, with regard to
10 what cases judges consider, with regard to what
11 judges do in this, that or the other circuit,
12 anti-citation and non-anti-citation circuits, has
13 led to the conclusion that you cannot say that
14 Ninth Circuit judges have to work harder than Tenth
15 Circuit judges or that the quality of the published
16 opinions in the Sixth Circuit is demonstrably lower
17 than the quality of published opinions in the Ninth
18 Circuit, comparing anti-citation to
19 citation-available courts across the board. You
20 simply cannot say that. There is no evidence to
21 suggest that the anti-citation rules have led to a
22 quality of circuit-binding case law in one circuit

1 that is markedly superior to that in another
2 circuit or that the absence of such a rule has led
3 to a pronounced inferiority in the others.

4 In sum, parties and the lawyers they hire
5 must be allowed to pursue justice by every ethical
6 means and use every weapon in their arsenal and
7 that includes citing opinions that lawyers find
8 persuasive or that they hope the tribunal will find
9 persuasive for their persuasive purposes. The
10 American College of Trial Lawyers supports the
11 proposed new rule, congratulates the committee on
12 drafting it and putting it forth, and we strongly
13 urge its adoption. Thank you very much.

14 JUDGE ALITO: Thank you.

15 Any questions?

16 MR. SVETCOV: Mr. Hangle, why can't you
17 use the persuasive value of the arguments made in
18 an unpublished opinion in your briefs without
19 citing to the case itself? And I ask that because
20 it's my impression that the principal reason for
21 citing to the case itself is to give the perhaps
22 misleading impression that three judges have signed

1 onto that reasoning when, in fact, we've been
2 hearing testimony that they may not, in fact, I have
3 signed onto it but only to the bottom line; that is
4 to say, the result in the case. They haven't
5 looked at the nuances of the language of the
6 opinion.

7 So go ahead and make the argument if you
8 think it's persuasive but why suggest that three
9 judges have signed onto it?

10 MR. HANGLEY: Because one
11 persuasive--first of all, let me begin with the
12 proposition, and I certainly fervently believe and
13 we hope that this is true, that when judges write
14 noncircuit-binding opinions, just as when district
15 judges write opinions and even when district judges
16 write opinions that aren't going to be published in
17 F. Sup., that all of those judges are really trying
18 to get it right.

19 Likewise let me indulge in another thing
20 in which I firmly believe, that in the great
21 majority of instances they do get it right, that
22 they are thoughtful, honest scholars who, while

1 they are not publishing what Judge Kozinski would
2 call a law review article, are certainly turning in
3 an honest day's work or an honest hour's work on
4 this opinion.

5 It makes sense not to have to do a
6 pantomime act. You shouldn't have to say well, one
7 could have a hypothetical in which this, this and
8 this happens and one might come out this way. I
9 think it's far better to say that in such-and-such
10 a case, which of course is not a binding precedent
11 in this court, either because it's from a district
12 court or because it's from another circuit or
13 because it's from your court but you have chosen
14 noncircuit-binding status for it, you decided the
15 following and let the court decide how persuasive
16 it considers that argument to be.

17 The wonderful thing about the common law
18 and the wonderful thing about our adversarial
19 system is that what we say is let's have a lawyer
20 on each side to make the most persuasive case that
21 he can for the litigants and then the judge will
22 decide how persuasive he is. It's an excellent

1 system, it serves us well but someone is changing
2 it by saying you can't mention the fact that I said
3 this.

4 And frankly, most of us who are out there
5 plowing in the fields consider that proposition
6 just incomprehensible. What's that old Mark Twain
7 line that Justice Jackson quoted in the Chettery
8 case? "The more you explain it the more I don't
9 understand it."

10 MR. SVETCOV: Well, do you draw a
11 distinction between getting it right and how they
12 got there to get it right?

13 MR. HANGLEY: You know, you asked some
14 questions earlier about how much of the facts they
15 tell you and that the parties know the facts. We
16 both know as practicing lawyers that it is very
17 difficult to write anything without putting a fact
18 into it. We also know that in the course of laying
19 things out a court will tell you something, once
20 you get past the judgment order idea, a court will
21 tell you something about its thinking processes.
22 And I may not care terribly about the facts; on the

1 other hand, I might. But in the cases where I
2 don't much care about the facts, I may only cite to
3 a proposition of law that a judge utters in a
4 particularly felicitous way that I think will lend
5 itself well to my facts and there's nothing
6 dishonest about saying that.

7 In another case, as Judd Best suggested to
8 you earlier, you might want to go back and look at
9 the record and see what the facts were and say this
10 judge of this court or these three judges of this
11 court were persuaded by this particular argument
12 and here is what the facts were. Now is that
13 heretical? No. I have done exactly the same thing
14 with respect to published opinions and, as you
15 know, there are many, many published opinions out
16 there where sometimes, as a result of conscious
17 decision by the court or sometimes I think despite
18 the court's best efforts, you can't find in the
19 published circuit-binding opinion the critical fact
20 that you need to know in order to determine whether
21 that particular precedent is or is not going to be
22 a persuasive precedent for you to bring to the

1 court and therefore you have to go to the briefs
2 or, better yet, you have to go into the decision of
3 the trial court or the record of the court below.
4 It happens both with published and unpublished
5 opinions.

6 Lawyers, by the way, are perfectly
7 comfortable in the fact that a decision has
8 persuasive power only. We know that. Ninety-nine
9 percent of what we do, because most of it is in the
10 district court or the state trial courts, deals
11 with nonbinding but nevertheless arguably quite
12 persuasive precedents. That's not a sea change for
13 lawyers or the people they represent.

14 JUDGE ALITO: Thank you, Mr. Hangle. And
15 Mr. Morris, thank you for coming here this morning.

16 I will call on my colleague Judge Edward
17 R. Becker from the United States Court of Appeals
18 for the Third Circuit.

19 STATEMENT OF THE HON. EDWARD R. BECKER

20 JUDGE BECKER: Thank you. I appreciate
21 the committee's indulgence. I know you'd like to
22 go to lunch but Judge Alito knows I have a very

1 important mission over on the Hill this afternoon.
2 I've been in the process of mediating with Senator
3 Specter the asbestos legislative package and hope
4 to be making some progress this afternoon, so I
5 appreciate your indulgence. I'll try to speak with
6 celerity. I have copies for the members of the
7 committee. It is somewhat in outline form, so if
8 the members of the committee would like to follow
9 along, I have copies of my statement.

10 My name is Edward Becker. I have been a
11 judge of the United States Court of Appeals for the
12 Third Circuit for over 22 years. I was chief judge
13 for over five years. Prior to that I was a judge
14 of the United States District Court for the Eastern
15 District of Pennsylvania for 11 years, so that I
16 have been a federal judge for over 33 years.

17 I appear on my own behalf, although I
18 believe that the views that I express fairly
19 represent the views of the judges of the United
20 States Court of Appeals for the Third Circuit with
21 respect to our experience with the citation of what
22 we call nonprecedential opinions. We used to call

1 them not-for-publication opinions but now we call
2 them nonprecedential opinions and I'll refer to
3 them as NPOs. I do not represent that I speak for
4 the court with respect to the proposed national
5 rule.

6 I support the adoption of new Rule 32.1.
7 I find the arguments set forth in the draft
8 committee note persuasive and I will not repeat
9 them here. Rather, I will limit myself to an
10 accounting of the Third Circuit experience, to
11 comments on the objections raised to proposed 32.1,
12 and to the reasons that I favor the proposed rule.

13 First, the Third Circuit experience. In
14 our experience citations to nonprecedential
15 opinions are not frequent. Such citation, and they
16 are cited from time to time, has never created any
17 problem for us. Indeed, when they are cited, and,
18 as I said, they are from time to time, they have
19 often been useful in a number of respects.

20 First, they give us the benefit of the
21 thinking of a previous panel and help us to focus
22 on or think through the issues. For busy judges

1 that is a tremendous boon.

2 Second, they identify issues on which we
3 should be writing a precedential opinion. When an
4 issue has been dealt with in an NPO and then it
5 comes up again, that is a signal that we need to
6 clarify the law precedentially.

7 Now there's a suggestion in the committee
8 materials that in United States versus
9 Rivera-Sanchez the Ninth Circuit admitted that
10 various panels had issued at least 20 unpublished
11 opinions resolving the same unsettled issues of law
12 at least three different ways before any published
13 opinion addressed the issue. I spoke to Judge
14 Kozinski about it and he assures me that that's not
15 so and I accept his explanation. But once or twice
16 is too much. If you see the same issue coming up a
17 second time or a third time, then it is time
18 whether or not there's a conflict. It is time to
19 settle it. It saves the time of the lawyer, it
20 saves the time of the district judges, it saves the
21 time of everybody.

22 These citations help the district judges

1 in the same way they help us. District judges know
2 they're not bound by our NPOs. They're judges of
3 the Third Article, just like we are, and they
4 exercise independent judgment, but these opinions
5 are useful.

6 Now let me turn to the Third Circuit
7 practice in connection with NPOs. We write on
8 every counseled case. Seventy-nine percent of our
9 opinions are nonprecedential opinions. Most are
10 not cursory. In fact, they average over seven
11 pages. The clerk of our court Marcie Waldron is
12 here and indeed the statistics she gave me the
13 other day are 7.13 pages. Actually it's 8.13 pages
14 but we deduct a page for the caption.

15 Because they are primarily written for the
16 parties, they often or usually do not set forth the
17 facts but some NPOs do and some are fairly
18 comprehensive. In all events, they uniformly set
19 forth the ratio decidendi of the opinion.

20 Our NPOs are prepared in chambers under
21 the close supervision of the judge. They're
22 usually drafted by the clerks but to repeat, they

1 are carefully reviewed and edited by the judge and
2 to me the notion that a judge would sign on the
3 bottom line without examining the language and
4 rationale of the opinion is startling. It does not
5 happen, I assure you, in the Third Circuit.

6 In my chambers all the NPOs are written by
7 me. Why do I write them myself? Well, they're
8 generally easy opinions and if you gave them to the
9 law clerks they'd take too much time on them and I
10 need the law clerks for the hard, comprehensive
11 opinions. So I do the NPOs myself and then the law
12 clerks edit them and correct them and cite-check,
13 and so forth. Of course, when the law clerks have
14 done a bench memo in the case I draw on it.

15 Our NPOs are sufficiently lucid that their
16 citations can be valuable. All of our NPOs in
17 counseled cases are placed on line and hence are
18 reported in the Federal Appendix. We do not place
19 our pro se opinions on line, although we write
20 opinions in many, many, many pro se cases.

21 Now let me contrast our practice with the
22 comments made to the committee about the practice

1 elsewhere. I refer to representations that--this
2 is all in the committee material--unpublished
3 opinions are hurriedly drafted by staff and clerks
4 and are written in loose, sloppy language. Two,
5 because they receive little attention from judges,
6 these opinions often contain statements of law that
7 are imprecise or inaccurate. Three, judges are
8 careful to make sure that the result is correct but
9 they spend little time reviewing the opinion
10 itself. Four, citing unpublished opinions might
11 mislead lower courts and others about the views of
12 a circuit's judges. And five, it will be the rare
13 unpublished opinion that will precisely and
14 comprehensively describe the views of any of the
15 panel's judges.

16 Now apparently these comments reflect the
17 views in the Ninth Circuit, which is where the
18 principal complaints about 32.1 seem to come from,
19 but these descriptions of NPOs do not reflect the
20 practice in the Third Circuit where, as I have
21 said, the judges are involved with the drafting of
22 the NPOs and in all events they are reviewed with

1 care.

2 Moreover, we often have dissents from NPOs
3 and concurrences, as well. Just ask your chairman.
4 In the last two months I have filed two dissents
5 from his nonprecedential opinions and now the
6 subject of fervent petitions for rehearing with a
7 panel and before the court en banc, and I also
8 filed one concurrence from one of your chairman's
9 nonprecedential opinions. So we take them
10 seriously.

11 We do not consider them a burden. They
12 don't take that much time to prepare and there is
13 no delay in processing them and they are typically
14 filed promptly after the regularly scheduled
15 disposition case. Most are on nonargued cases but
16 many are on argued cases and I cannot say that they
17 detract from our ability to do precedential
18 opinions, as many as we always did.

19 Now let me turn to the criticisms of the
20 proposed 32.1. That is the burden on the judges'
21 time. Well, as I've said, they are not burdensome
22 to prepare. Somebody in the materials said that

1 maybe there's a moral obligation to distinguish
2 NPOs that are cited to us. I don't think so. We
3 don't even have to distinguish every precedential
4 case in our opinion. I mean when you see the size
5 of some of the briefs, Bill Hanglely talked about
6 what they do in the trenches and they turn out a
7 lot of long briefs in the trenches and cite a lot
8 of cases. If every time we did an opinion we had
9 to distinguish every case or deal with every case
10 that the lawyers cite to us, our job would be
11 endless. We don't have to do that and neither do
12 we have to do it with respect to nonprecedential
13 opinions.

14 Are there too many NPOs cited? That's not
15 our experience. We have a responsible bar. It
16 doesn't want to waste its time. It doesn't want to
17 waste its own time. If a useless case is cited it
18 doesn't take very long to discover that fact. You
19 can look at it and very quickly you can say that's
20 not going to be of any help and the citation's
21 ignored.

22 And the same is true about the criticism

1 of undue consumption of the lawyers' time. The
2 same considerations are at work. It doesn't take
3 them long to discard an NPO of no utility but if
4 they find one that is persuasive, then it's worth
5 the time.

6 Another criticism is the bloating of the
7 corpus juris. Well, the cow's out of the barn.
8 It's beyond our control. The NPOs are on line and
9 in the Federal Appendix. If the lawyers want them
10 the market, the supreme arbiter, has spoken. And
11 the fact of the business is that NPOs help the
12 lawyers in other ways. They help them evaluate
13 cases for settlement, cases that never get into
14 court.

15 What is the rationale for 32.1, at least
16 in my point of view? The citation issue was not a
17 real one for us until we jettisoned our former
18 practice of deciding almost half of our cases with
19 judgement orders, essentially one-line
20 dispositions, and in many, many, probably 40-45
21 percent of these cases, there had been no oral
22 argument.

1 Now when I became chief judge I said to my
2 colleagues this is terrible. You're a lawyer, you
3 appeal a case, you don't get oral argument and you
4 get a one-line disposition. We owe more to our
5 colleagues at the bar, we owe more to our
6 profession--after all, we're nothing but lawyers
7 with a robe and a commission--we owe more than that
8 to them and to their clients. I viewed it and view
9 it--and I will segue this into the rationale--as a
10 matter of respect. It's a matter of respect for
11 our profession. It's a matter of accountability.
12 It's a matter of responsibility.

13 My colleagues agreed and we ceased writing
14 judgment orders and we now write NPOs--we used to
15 call them memoranda of opinions--in every case.

16 I view the proposed noncitation rule in
17 essentially the same way. How can we say to
18 members of our profession--we're all members of the
19 same profession. Remember, we judges work for them
20 and their clients and the public. They don't work
21 for us. It goes with the territory when we took
22 this job. How can we say to them that they can't

1 cite to us what we've said?

2 Now that sounds like what Judge Arnold
3 said in Anatasoff. Anatasoff's not the law. We're
4 not bound by an NPO but we can at least if the case
5 is cited think about it and we can't do that if the
6 cases are not cited to us.

7 And I must score the suggestion in the
8 Advisory Committee materials that the NPOs be
9 phased out in favor of more precedential opinions
10 and one-line judgments. I would reject that for
11 the reason that we reject it in the Third Circuit,
12 one-line judgment orders. That's not the way
13 courts of appeals should do business.

14 Why then a national rule? Several
15 reasons. First the zeitgeist, if I may use that
16 phrase, for the last several decades. The chairman
17 and I have a colleague in Newark who would not let
18 me use that in an opinion. She would ax it but
19 that's all right. The zeitgeist for the last
20 several decades, animated by Congress as well as by
21 the Judicial Conference, is in favor of national
22 rules. Local rules, in the view of the Congress

1 and the conference, as I understand it, and I
2 served on the conference for over five years,
3 they're for experimentation and for innovation.
4 That principle doesn't apply here. Sometimes
5 there's an exception for a local culture but that's
6 a local, not a circuit-wide geographic notion.

7 We're all affected by national rules. Is
8 your ox gored? Our ox is gored. The proposed en
9 banc quorum rule alters a Third Circuit rule. We
10 like our rule you pass a new rule and the
11 conference approves it and the Congress doesn't
12 knock it down, fine, we'll live by the new and
13 different rule.

14 Thirdly, law practice is national. Our
15 sittings regularly have attorneys from New York,
16 Chicago, California, and elsewhere. Procedure is
17 complicated enough. Sure, they can look up a local
18 rule but they're unsure about its operation, and
19 that's costly. You've got to check around. In my
20 view a national rule is better.

21 But to get to the bottom line, the
22 strongest reasons for the national rule are those

1 that I described above when I talked about our
2 jettisoning the judgement order--our duty to the
3 bar and the public, our respect for the bar and the
4 litigants, responsibility, accountability, all of
5 which is undergirded and informed by what I view as
6 the unreasonableness of saying to lawyers that you
7 can't cite what we've written. In my view, Rule
8 32.1, for these reasons which go to the core of our
9 professional responsibility, they have a right, and
10 that's why I endorse the rule.

11 That concludes my formal statement and I'd
12 be glad to answer any questions that any members of
13 the committee have.

14 MR. LEVY: Judge Becker, thank you for
15 your thoughtful statement 's got to give, well, I
16 guess something's got to give and you don't want it
17 to be your sleep but my estimate of the enormous
18 capacity of Judge Bryson is such that I think that
19 Judge Bryson could do it all. And I think that if
20 he's stuck with Rule 32.1, like the republic, Judge
21 Bryson will not just survive but he will thrive.

22 MR. LEVY: Were we all like Bill Bryson.

1 MR. SVETCOV: Just to follow up on Mark
2 Levy's question, I'm Sandy Svetcov. I have a
3 practice in San Francisco in the Ninth Circuit and
4 unfortunately, the practice in the Ninth Circuit is
5 not the same as in your circuit, Judge Becker.
6 There are a huge number of cases, 5,000
7 dispositions by mem dispo or by published opinion
8 each year, 777 published precedential opinions,
9 over 4,000 mem dispos and the mem dispos typically
10 begin with the following sentence: "The parties
11 are familiar with the facts." Then there are a
12 couple of paragraphs, often sometimes a couple of
13 pages, of discussion, and they are written for the
14 parties.

15 The judges, except for Judge Tashima, have
16 all testified before us in written statements that
17 they, like Judge Bryson, perceive that their work
18 would change. They, unlike the Third Circuit, do
19 not have all of those mem dispos done in chambers.
20 Some are done by central staff attorneys and then
21 presented to a panel of judges for disposition
22 without oral argument in nonpublished,

1 nonprecedential form.

2 JUDGE BECKER: So you look them over. So
3 you read them and you scrutinize them and you edit
4 them. I mean part of the problem in the Ninth
5 Circuit is the Ninth Circuit. I mean I don't want
6 to get into the splitting of the Ninth Circuit.
7 I've written an article in U.S. Davis Law Review
8 about the Ninth Circuit and I not only proposed
9 splitting the Ninth Circuit but I proposed a
10 redrawing of all the circuit lines and I said the
11 republic would survive after 100 years. You know,
12 we do it every 100 years.

13 But to me, I have always operated under
14 the 11th commandment, that thou shalt not let the
15 tail wag the dog, and it strikes me that if the
16 Ninth Circuit is our caliper, the tail's wagging
17 the dog. At some point something's going to happen
18 to the Ninth Circuit. I don't know what's going to
19 happen to the Ensign bill. They had hearings last
20 week, and so forth, but at some point my guess is
21 the Ninth Circuit's going to be divided in some way
22 and maybe the problem will take care of itself.

1 MR. SVETCOV: I've testified, as I said,
2 before the White Commission in favor of some
3 divisional accommodation within the Ninth Circuit,
4 which some version of that was adopted by the White
5 Commission, but the fact of the matter is splitting
6 the Ninth Circuit will still leave, unless
7 California is split--

8 JUDGE BECKER: Oh, I'm for that, too.

9 MR. SVETCOV: You know, that's something
10 whose time has not come, Judge Becker, and I submit
11 to you the same is true with Rule 32.1 and nothing
12 further needs to be--

13 JUDGE BECKER: My point, Mr. Svetcov, is
14 if what they had given you isn't worth anything,
15 then you don't cite it. That's all. I mean the
16 issue here is not the quality of their work product
17 but the question of whether it's citable. If
18 they've given you two paragraphs that are
19 incomprehensible, then Sanford Svetcov, good lawyer
20 that he is, isn't going to bother citing it. And
21 the lawyers who are not of the Sanford Svetcov
22 caliber, and they do cite it, it's going to take

1 Alex Kozinski--I don't know the difference between
2 a microsecond or a nanosecond but it'll be that
3 fast to toss it aside. So I don't see the burden.

4 MR. SVETCOV: Well, put yourself in my
5 office. Do I read the 777 opinions that are
6 published and also the 4,000 or 5,000 that are not?

7 JUDGE BECKER: The answer is neither you
8 nor anybody else reads the 700 that were published.
9 When I started sitting with the Third Circuit 30
10 years ago and Tom McGough's father appeared before
11 us at that time, we had an audience at that time.
12 The courts of appeals had an audience. We don't
13 have an audience anymore. The bar is so huge, it
14 is so specialized, it is so fractured that no
15 longer reads all the opinions. You read the
16 opinions that are in your area and nobody in their
17 right mind's going to read the 7,000 or however
18 many there are nonprecedential or unpublished
19 opinions, but you've got research tools which will
20 identify if it's of any value to you.

21 It strikes me, Mr. Svetcov, that this is
22 an interrorem argument that in the real--I mean I'm

1 not qualified to talk about the economics of law
2 practice; I've been out of it for over 33 years,
3 but my sense is that in terms of the economics of
4 law practice, you're not going to invest a lot of
5 time and a lot of your clients' money in that
6 enterprise.

7 MR. SVETCOV: I don't. That's the point.
8 But if I'm facing my opponents citing to them on a
9 regular basis because the floodgates are opened up
10 to that stuff and I don't find the same level of
11 talent on both sides of the case, then I'm faced
12 with having to deal with--

13 JUDGE BECKER: Then the question is
14 whether your opponent's got a brain or half a
15 brain. If he's got half a brain and he's citing
16 garbage, then you don't worry about it. If it's
17 stuff that doesn't amount to a hill of beans you're
18 not going to spend any time on it. But if he cites
19 an opinion, a seven- or eight-page opinion which is
20 thoughtful, well then you'd damned well better deal
21 with it because the court's going to look at it.

22 So what else is new? So what's wrong with

1 that?

2 MR. SVETCOV: Well, as I said, if it's
3 thoughtful you can adopt that reasoning and make it
4 part of your case without citing to the--

5 JUDGE BECKER: Well, I heard--

6 MR. SVETCOV: Judges may or may not have
7 signed off--

8 JUDGE BECKER: I heard that. I find that
9 argument underwhelming, to paraphrase the old Four
10 Roses ad, Mr. Svetcov.

11 MR. SVETCOV: I've underwhelmed a lot of
12 judges in my time.

13 MR. MCGOUGH: Thanks for the reference to
14 my father, Judge Becker. The Third Circuit--

15 JUDGE BECKER: He was a great guy. He
16 really was.

17 MR. MCGOUGH: The Third Circuit is, I
18 think, maybe unique in that it allows the citation
19 but has an internal operating procedure that says
20 the court, by tradition, doesn't cite NPO decisions
21 in its own decisions.

22 Would you see that changing if Rule 32

1 were amended as we've proposed?

2 JUDGE BECKER: Let me say this, Tom.

3 That's a rule we haven't really looked at. I think
4 there's a disparity between the rule and the
5 practice. We surely look at them and sometimes we
6 cite them. I think, and Marcie Waldron, our clerk,
7 and Judge Alito chairs the Rules Committee--we
8 might consider changing that by tradition. We
9 don't do it often.

10 So I think that may be somewhat
11 anachronistic vis-a-vis our own practice, rather
12 than Rule 32.1.

13 JUDGE ALITO: Any other questions?

14 Thank you very much, Judge Becker.

15 JUDGE BECKER: Thank you for accommodating
16 me. I'm very grateful.

17 JUDGE ALITO: Thank you. We appreciate
18 your comments.

19 For the record I should say that one of
20 the effects of Judge Becker's redrawing of all the
21 circuit lines would have been to put us in
22 different circuits. If that was the motivation or

1 not, I don't know.

2 MR. LETTER: Were you going to the Ninth
3 Circuit?

4 JUDGE ALITO: Before everyone collapses
5 we're going to break for lunch and if we can be
6 back here by 2:15, I would appreciate it.

7 [Whereupon, at 1:30 p.m., the hearing
8 recessed for lunch.]

1 to promote the understanding that independent
2 judges are still institutionally accountable for
3 fair decision-making.

4 And the core of our support for Rule
5 32.1--the Brennan Center strongly supports proposed
6 Rule 32.1 and the core of that support is our
7 belief that when courts bar citation of most of
8 their routine decisions, they effectively prohibit
9 litigants from advocating for consistent judicial
10 treatment.

11 The committee has my written statement and
12 I know that everybody would be pleased by brief
13 presentations this afternoon. I'm going to make
14 three brief points, all of which I think go to the
15 harms that I think are caused by the no-citation
16 rules. We've heard a good deal today about the
17 lack of harm that seems to be happening in courts
18 where citation is allowed and we've heard some
19 statements, and I must say I think the commentary
20 is full of statements about the lack of harm
21 created by no-citation rules. Today we've heard
22 that it would be of only marginal benefit to get

1 rid of them. There are statements like if it ain't
2 broke, don't fix it, a kind of no harm, no foul
3 approach. I think there is harm created
4 by citation bans and as I say, I'll make three
5 brief points about that.

6 One, I want to articulate for you in
7 procedural due process terms the harm of
8 prohibiting advocacy for consistent judicial
9 treatment. That's not to say that I'm suggesting
10 that I would attempt to bring an actionable claim
11 of procedure due process against no-citation rules
12 but I think I can articulate it in a way that shows
13 that those rules do trigger concerns about fairness
14 and about legal regularity that are values that the
15 due process clause has been interpreted to protect
16 and that looking at it in due process terms is
17 valuable because you can see that you can
18 articulate in a rigorous constitutional way the
19 overarching sense of arbitrariness that many people
20 and many attorneys feel results in circuits that
21 ban citation.

22 So that's the first point I'll make in a

1 minute very briefly and then I want to talk about
2 two very pragmatic ways that I think no-citation
3 rules prevent important information about how
4 courts use their precedents, and these are
5 problematic results of no-citation rules that
6 happen even if those rules are not being abused,
7 even if they're being used exactly as the rules are
8 set up.

9 So very briefly, the due process idea.
10 The basic notion, as I said, is that no-citation
11 rules prohibit people from arguing for consistent
12 treatment and Judge Kozinski, in fact, makes this
13 point and I think it also goes to the question
14 about the difference or the relationship between
15 citability and precedent.

16 I think that it's undeniably true that
17 no-citation rules prevent people from arguing you
18 should do in this case something like what you did
19 in these other cases. It's a basic argument from
20 consistency. It is not the same thing as an
21 argument about binding precedent. It's quite
22 coherent to say you should treat me consistently

1 with the decision that this court or the court that
2 reviews this court's decisions made in these other
3 cases, without saying you must treat me in exactly
4 the way you did because you are bound by judicial
5 doctrine to treat me that way.

6 Due process in American jurisprudence
7 focusses on a right to be heard. There are many
8 other ways that we could imagine trying to
9 guarantee fairness in governmental decision-making
10 but as everyone here knows, the American
11 jurisprudence focusses on a right to be heard and
12 one of the things that is unquestionably a
13 component of a meaningful right to be heard is a
14 right to present the reasons why the decision that
15 you're challenging are wrong.

16 Consistency is also deeply associated with
17 fairness and with correctness in many different
18 moral and philosophical and legal systems.
19 Interestingly, the courts' cases in reviewing
20 agency decisions acknowledges quite specifically
21 and directly consistency is a factor in so-called
22 Skidmore deference. I won't go into the doctrinal

1 issues but it's one of the criteria that federal
2 courts use in evaluating the arbitrariness or the
3 correctness or the degree of deference that should
4 be given to decisions of other governmental
5 decision-makers and it is unclear to me why it
6 should not be similarly a component in the
7 evaluation of judicial decision-making.

8 At any rate, that's the basic outline of
9 the due process claims. My statement then goes on
10 to sort of play this out into several different due
11 process doctrinal approaches that the court has
12 taken. I certainly won't belabor those points here
13 but I think you see the basic core notion is that
14 prohibiting somebody from arguing for consistent
15 treatment would seem to be a fairly nontrial
16 deprivation of the right to be heard in support of
17 arguments for a government decision, and that's the
18 basic due process claim.

19 Now quickly the other two points about
20 harms that no-citation rules cause and these might
21 be considered in a way responses to counter
22 arguments, the due process main issue.

1 The first of these, I think, is that most
2 of what we've heard about how people would want to
3 and do, in fact, use currently uncitable
4 unpublished opinions would be to identify what the
5 court said in a specific case and bring a quote
6 from that case or point to a specific ruling. But
7 I think there's another use of these cases that
8 doesn't involve that and it's the following.

9 The no-citation rules prohibit people from
10 telling a court how they've used their precedents
11 in most of their routine recent cases. So if, for
12 example, I want to argue to the court, "Your Honor,
13 the precedent that my opponent is suggesting you
14 follow you've ignored for the last two years in
15 most of the cases in the area that we're talking
16 about, whereas the precedent that I'm suggesting
17 you apply you applied five times in the last six
18 months in cases that while identical or maybe that
19 closely similar to my case, are certainly within
20 the area."

21 That's a fairly sophisticated, strong
22 argument about how the court's applying its

1 precedents. It's an argument that doesn't depend
2 on great precision in terms of the legal analysis
3 of the factual analysis of each of those specific
4 cases. Those cases are the only source of
5 information about the sort of legal landscape of
6 how the court is applying its precedents in most of
7 its routine recent matters.

8 And we've heard again and again these
9 cases are not important because they're routine but
10 I think that there's a value in exactly
11 understanding what the court's doing in its routine
12 decision-making in most of its cases. To prohibit
13 information about that strikes me as perverse. So
14 that's the first way that it's harmful.

15 The second way is a question about how it
16 could be misleading about the nature of the court's
17 precedents to leave out these routine applications.
18 We've heard from a number of sources, notably Judge
19 Kozinski, about the ways allowing citation of these
20 precedents, particularly quotation of these
21 precedents, could mislead district judges into
22 confusion about what's the court's precedential

1 rules actually are by reciting all these iterations
2 in nonprecedential cases of the precedential rules.

3 Now the point has been made that after
4 all, judges are experts in the value of
5 nonprecedential versus precedential cases and if
6 anyone should be able to know what those
7 recitations are worth, it would be federal judges.

8 But beyond that, I think the point I want
9 to make is that there is another kind of deception
10 that results, in fact, from excluding all of these
11 routine applications of precedent from cases that
12 can be discussed, and let me give you an example.

13 Consider the court's application of its
14 precedents regarding attempts to overturn criminal
15 convictions or civil jury verdicts based on claims
16 that the district judge allowed into evidence
17 unconstitutional or otherwise improper evidence
18 that was prejudicial. We all know there's an abuse
19 of discretion standard that's operating in those
20 kind of situations and typically federal appellate
21 courts are likely to affirm the verdicts or
22 convictions below because they will either find

1 that the district judge's evidentiary decision was
2 reasonable, if not the one that they themselves
3 would make, or that the evidence that was allowed
4 in was harmless.

5 In other words, by definition the summary
6 judgments that are unpublished will contain a
7 disproportionate number of those affirmances. As
8 we've said, these are the routine cases. Although
9 there certainly are some reversals, as well as
10 dissents in uncitable cases, by and large the
11 affirmances are packed into those cases. So that
12 means that most of these routine applications of
13 the exclusionary rules and of the decisions of
14 harmless error decisions are packed into uncitable
15 cases.

16 Well, what happens to the precedential
17 case law, then? It reflects a disproportionate
18 number of reversals, of decisions by appellate
19 panels to reverse district judges and say either
20 that the evidence was--both that the evidence was
21 harmful and that it was unconstitutionally admitted
22 or wrongly admitted in the first place. So the

1 effect then is that if district judges and future
2 appellate panels are only seeing the precedential
3 case law, then they're seeing a piece of
4 information that tells them that appellate panels
5 are more disposed than they actually are to reverse
6 district judges' evidentiary decisions and what
7 that means is effectively that it distorts the
8 precedent. It makes the precedent appear more
9 stringent, broader than it actually is.

10 So I think that you could find other
11 examples that would show that by this procedural
12 skewing of moving affirmances into uncitable,
13 undiscussable cases, you are, in fact, distorting
14 the character of the precedents that remain.

15 That's the end of my prepared comments in
16 this short time. For these reasons, as well as the
17 ones in our statement, the Brennan Center strongly
18 supports Rule 32.1 and hopes that you'll push it
19 forward.

20 JUDGE ALITO: Any questions?

21 JUDGE ROBERTS: I'm very interested in the
22 last comment you made. A lot of the arguments on

1 this issue are ones that we've seen for some time
2 and hear over and over again but that's a new one,
3 on me, anyway.

4 Do you know if there's any sort of
5 empirical study to support I guess the idea that
6 most reported precedents or a higher percentage on
7 abuse of discretion-type cases are--comparing the
8 reported precedents versus the nonreported and that
9 you'd expect the nonreported to have, you know,
10 whatever, 90 percent affirmance, and the reported
11 ones are 60 percent. That's your point, right?

12 MS. ALLEN: Yes.

13 JUDGE ROBERTS: Do we know if there's--

14 MS. ALLEN: Not that I know of. I think
15 it would be wonderful for somebody to do such an
16 empirical study. I would certainly welcome it.
17 And, of course, mine is just a logical argument but
18 I've thought about it for a while and I haven't
19 seen how it could not be so.

20 JUDGE LEVI: It's believed to be the case
21 among district judges that we are affirmed in
22 unpublished opinions and we are reversed in

1 published opinions and we keep getting reversed
2 when they keep revising them and they keep
3 reissuing them, so it's like being reversed even
4 more often.

5 MS. ALLEN: Well, by definition, if the
6 rules are being applied the way they're supposed to
7 be applied, that should be happening because if
8 indeed the district judge and the panel of
9 appellate judges are disagreeing, that presumably
10 means it's an issue that's more likely to be a
11 difficult legal issue, a new legal issue, and one
12 that isn't controlled by existing precedent.

13 MR. SVETCOV: I can testify to the
14 opposite experience. As a criminal defense lawyer
15 after 25 years as a prosecutor I went up to Seattle
16 and argued a case in front of a panel of Ninth
17 Circuit judges and reversed the conviction on
18 404(b) evidence and insufficiency of evidence to
19 support a fraud conviction, reversed, unpublished,
20 unanimous, motion for publication denied.

21 MS. ALLEN: There certainly are examples
22 of those kinds of reversals, although I'm not sure

1 I see that they're an argument for maintaining
2 no-citation rules. But I think that everyone
3 agrees that affirmances are overrepresented on
4 purpose among uncitable opinions. If they're not
5 then there's something very wrong with the way
6 those rules are being used.

7 MR. LEVY: This may be outside your area
8 of expertise but it's not clear to me that
9 no-citation rules would prevent you from counting
10 results and saying in the last 20--I mean not using
11 them as legal authority. You're not using them for
12 whatever reasoning or rationale they have in them.
13 Are you sure or confident that you couldn't use
14 unpublished decisions for that purpose?

15 MS. ALLEN: I'm not confident but I guess
16 that's a question for the judges on the circuits
17 that employ them. I would think if I were
18 practicing in the Ninth Circuit that I would
19 certainly think I was risking being asked to show
20 cause.

21 MR. SVETCOV: That's definitely not
22 correct. The Ninth Circuit has had an experimental

1 rule for the past two and a half years which
2 they've just signed onto for another two and a half
3 years which allows the citation of unpublished
4 opinions in connection with opposing or applying
5 for rehearing en banc to show circuit
6 inconsistency. So it's perfectly permissible to do
7 that in the Ninth Circuit.

8 There are also instances under the Ninth
9 Circuit rules where you can use unpublished
10 opinions to establish a fact, as Judge Levi
11 mentioned earlier. So there are exceptions but
12 obviously you have to be careful and you have to be
13 right, but there are exceptions that allow you to
14 address those kinds of concerns.

15 MS. ALLEN: I just say as I understand the
16 exception that you just articulated about being
17 allowed to cite them to show inconsistency for the
18 purpose of en banc, that that's not the usage I
19 think that I was being asked about over there.

20 MR. LEVY: That's right, and I don't know
21 the answer, either. You seem fairly confident in
22 your proposition.

1 MS. WALDRON: I'd just point out that the
2 AO does publish tables on reversal rates but I
3 don't think that it's broken down between published
4 and unpublished. But you can go by circuit and
5 find the reversal rates and then I guess you could
6 run a Westlaw search on reported cases and see if
7 there's a difference in the--

8 JUDGE STEWART: I don't know if the
9 difference is meaningful in the sense that I think
10 John was asking the question but unquestionably
11 what you said would be true. In my circuit, unlike
12 some others, we have a rule that what's being
13 called NPOs, you can't have a dissent in an NPO
14 because definitionally within the culture is if
15 we're going to do one without an opinion, it's
16 going to be an affirmance. If somebody dissents,
17 you know, that's just another nuance.

18 But the point is there's a cultural rule
19 in the circuit I learned as a new judge and that is
20 that we never reverse a district court in an
21 unpublished opinion. Part of it was explained to
22 me that the respect for the district court and the

1 district courts, if we want to reverse the district
2 court, you do it in a published opinion with
3 reasons explaining why and hopefully the exposition
4 on the law will be helpful to other district judges
5 that are sitting, whereas if we do an NPO, it might
6 be a half page but it basically says affirm and a
7 lot of ours will say we affirm for essentially the
8 well written reasons of the district court, see
9 district court's memorandum opinion.

10 So the reasons articulated are the reasons
11 of the district court in an affirmance but in a
12 reversal, the practice would be to give reasons for
13 the reversal because culturally then the district
14 judges frown, which is probably a mild way of
15 saying it, on being reversed in an unpublished
16 notion. It's the kind of notion that the court's
17 hiding something or whatever the case may be.

18 MS. ALLEN: I just want to clarify that
19 I'm not saying that the point here is that there
20 are no reversals in summary judgments or even that
21 there aren't a significant number. The Ninth
22 Circuit, I counted 15 reversals in a two-week

1 period recently in uncitable opinions. I think
2 that raises another kind of a problem.

3 JUDGE ALITO: Any other questions?

4 Thank you very much.

5 MS. ALLEN: Thank you.

6 JUDGE ALITO: John A. Taylor, Jr., Horvitz
7 & Levy, chair of the California State Bar
8 Association Appellate Courts Committee.

9 STATEMENT OF JOHN A. TAYLOR, JR.

10 MR. TAYLOR: Mr. Chairman, members of the
11 committee, I wish to express my appreciation for
12 being permitted to speak today and give this
13 testimony. I also appreciate all the patience
14 which has been exhibited by the committee in
15 hearing the various perspectives from a broad range
16 of people affiliated with the appellate courts.

17 I think today I hope to offer a
18 perspective which I haven't heard yet, which is
19 that of appellate practitioners who practice
20 exclusively in the appellate courts. I think I
21 represent a group that's uniquely affected by the
22 proposed rule.

1 Just by way of personal background, I'm a
2 California certified appellate specialist. I've
3 been handling appeals exclusively for the past
4 decade. I'm a partner in a firm which is sort of
5 unique in the country, I think. We only handle
6 appeals. We're California's largest civil
7 appellate firm with approximately 30 lawyers doing
8 that.

9 And as was mentioned by the committee
10 chair, I am chair of the California State Bar
11 Appellate Courts Committee and a member of the Los
12 Angeles County Bar Appellate Courts Committee.
13 Both of these committees are comprised almost
14 exclusively of appellate practitioners in civil,
15 criminal, private and government practice, and the
16 membership of both committees is overwhelmingly
17 opposed to Rule 32.1.

18 I'd just like to briefly address first the
19 notion that there's some kind of campaign in the
20 Ninth Circuit to round up opposition to Rule 32.1.
21 Both committees I'm on routinely look at proposed
22 rules and comment on them and we're already on

1 record in opposition to previous attempts to amend
2 the California rules of court to allow citation to
3 unpublished decisions. So we've had a consistent
4 position on this issue. It's not one that we've
5 been more or less brought into a campaign on this
6 particular rule. I think it would be unfair to
7 discount the independent opposition of
8 practitioners on the ground that they're somehow
9 under the control of the federal judiciary.

10 I might ask then why are the vast majority
11 of comments by appellate practitioners, at least
12 from the Ninth Circuit and I think probably across
13 the board, why have they been in opposition to Rule
14 32.1? I think it's because it's in recognition
15 that we practice in a real world. We think in the
16 ideal world all opinions would be crafted with
17 utmost care but in the real world in which we
18 practice we understand that that's not possible.

19 I think Rule 32.1, from my perspective, is
20 a solution that's in search of a problem. I looked
21 carefully at the committee note and I couldn't find
22 a single serious problem in the note that I think

1 the rule would resolve. The main problem it seems
2 that's identified by the rule is that there's some
3 sort of hardship on attorneys to pick through the
4 various citation rules of the different circuits
5 but I note that under the proposed rule, courts
6 would remain free to say what precedential value
7 those unpublished decisions would have in their
8 circuit and I think that this moves the hardship
9 just from one level up to another. Rather than
10 having to decide what's citable in a particular
11 circuit, you have to decide what is precedent in a
12 particular circuit when you cite it.

13 We heard earlier today from Mr. Best, who
14 quoted from the American College of Trial Lawyers
15 report about the different rules in the different
16 circuits about what is precedent and what is not
17 and in that report it actually says the circuits
18 cannot even agree on the meaning of that central
19 term "precedent."

20 Well, if unpublished decisions are citable
21 everywhere, you're going to have differing views in
22 every circuit about what will be treated with

1 precedential value and what won't. And you can
2 look to the Hangle report for the different rules
3 now that exist with respect to citation and you're
4 going to have those same exact problems with regard
5 to what's given precedential value and trying to
6 comb through those and figure them out when you're
7 writing a brief will be just as difficult as
8 figuring out what's citable, maybe even more so
9 because right now the unpublished decisions
10 actually when you print them off, most computer
11 databases have a heading on them that explain what
12 rule applies and where they can be cited.

13 If this concern of lack of uniformity,
14 which is mentioned in the rules, is the real
15 problem here, I think it makes more sense to
16 uniformly bar the citation of unpublished opinions
17 rather than to make them all citable, which creates
18 a whole new set of problems.

19 There's also been this notion that
20 allowing circuits to ban the citation of
21 unpublished decisions somehow creates a secret body
22 of law. I think that's been addressed by other

1 people who've testified about the fact that these
2 opinions are all going to be available under the
3 E-Government Act. In my circuit they've always
4 been available. You can see them on Westlaw.
5 They're discussed openly in the legal community,
6 can be written about in law reviews. Their legal
7 analysis can be drawn upon in writing a brief. So
8 the idea that there's some secret body of law out
9 there just doesn't hold water.

10 Another objection has been that somehow
11 these unpublished decisions are being used to hide
12 departure from published precedent in particular
13 cases and I think even though these are widely
14 available for use, there haven't been any studies
15 that show that, in fact, that is happening. It's
16 speculative. Certainly in my committees we've
17 discussed whether that's happening and no one on
18 the committee has cited any example in any of their
19 practice where that has occurred.

20 And I note that in the Ninth Circuit now
21 there is, as Mr. Svetcov mentioned, a safety valve
22 which allows the citation of any conflicting

1 unpublished decision in a petition for rehearing or
2 a petition for rehearing en banc. The judges
3 who've reported on that rule and how it's been
4 working reported that despite the fact that the
5 rule's been in effect for two and a half years,
6 almost no parties have been able to find
7 unpublished decisions in conflict with the
8 published decisions.

9 I think a better solution than Rule 32.1,
10 which to me is the tail wagging the dog, would be
11 to do what Judge Wood suggested this morning, which
12 is to create rules and standards governing when
13 decisions have to be published. I like what Judge
14 Stewart had to say, that in his circuit if there's
15 a dissent, that automatically becomes a published
16 decision. I think I saw in the comments the
17 suggestion that perhaps the decision to publish
18 could be reviewed separately by judges not on the
19 panel that's deciding it.

20 At any rate, there's a number of
21 mechanisms that could be created to govern when
22 decisions are published and when they're

1 unpublished, which would, I think, solve a lot of
2 the problems that exist out there without creating
3 new problems, which Rule 32.1 creates.

4 Let me just turn for a minute to assuming
5 that Rule 32.1 has some benefits, what are the
6 burdens that it would impose and are those burdens
7 really worth the candle? I think if it goes into
8 effect there are three possible outcomes. Judges
9 will spend far more time crafting unpublished
10 decisions, some judges will spend far less time
11 drafting unpublished decisions, and some judges
12 will not do anything differently, and there are
13 adverse consequences under any of these three
14 options.

15 Scenario one sees judges spending more
16 time drafting and polishing unpublished opinions
17 because they're now citable. This may be the
18 outcome that some proponents of the rule would
19 actually like to see, so I'll address it first. I
20 don't think there can be any debate that such a
21 rule would create delay. Judges would spend more
22 time working up their unpublished decisions either

1 to the detriment of the published decisions or
2 simply slowing down the whole process.

3 We heard Carter Phillips speak this
4 morning of the impact that would have on his
5 clients and I have to say that in my practice it is
6 similar. Litigants are forced to hold important
7 business, career and personal life decisions in
8 abeyance while they're waiting for appeals to be
9 decided. Delay can create unfair settlement
10 leverage, forcing some litigants to settle claims
11 for far less than they're worth while they wait for
12 an appeal to be decided.

13 And the quality of oral advocacy before
14 the court declines as the time between briefing and
15 argument expands and the intricacies of the record
16 are forgotten and legal arguments grow stale.

17 I've got a federal appeal I'm handling
18 right now. I just went into this settlement
19 mediation program where we were told it would take
20 two years to resolve the appeal if the case didn't
21 settle. The plaintiff in that case is earning 1.5
22 percent interest on the judgment right now and

1 that's an interesting contrast to California's
2 state court cases, where there's a 10 percent
3 statutory rate. Right now with the 1.5 percent
4 interest rate on a federal judgment, the defendant
5 really has very little incentive to settle during
6 that delay process.

7 The second scenario is that judges spend a
8 lot less time drafting unpublished decisions. In
9 the Ninth Circuit we've heard the term being used
10 "mem dispos." That applies where there's a
11 one-paragraph or even a one-line disposition
12 affirming or reversing the district court.

13 I think we heard Professor Barnett asking
14 where's the barking dog in this situation and maybe
15 the barking dog is that in the circuits that permit
16 liberal citation of unpublished decisions, those
17 are the circuits that are most recently making use
18 of one-line dispositions.

19 I think it's ironic that some proponents
20 of the rule actually suggest that limiting
21 unpublished decisions to one or two issues or
22 simply stating the result will answer many of the

1 objections to the rule. Increased use of mem
2 dispos is one of the best arguments against the
3 rule, since their expanded use would be a great
4 disservice to the bar and their clients.

5 The reason is that these short, one-line
6 dispositions are extremely demoralizing to both
7 lawyers and their clients. I know in my practice
8 after devoting many months of reading the record,
9 researching and writing the briefs, to get back a
10 one- or two-paragraph decision that really doesn't
11 address most of the issues in the appeal is
12 extremely demoralizing and it creates a very
13 difficult situation in trying to explain to a
14 client why their arguments weren't heard or
15 considered and what the reason was for the result.
16 It may also create difficulties in trying to
17 explain to the client what they should change in
18 their practice to avoid future liability.

19 In the record there's the letter from
20 Maria Stratton, who's a federal public defender,
21 and I really encourage members of the committee to
22 read that because it explains from the criminal law

1 perspective what effect these one-line dispositions
2 have on her clients who may be sitting in
3 incarceration waiting to hear what the result is of
4 their appeal and to get a simple affirmed or
5 reversed makes them feel like they have really been
6 a victim of the justice system, which hasn't
7 considered their arguments in full.

8 In that sense, these one-line dispositions
9 really undermine the public's perception of justice
10 I think to a much greater percentage than the fact
11 that we have unpublished decisions does now.

12 Other detriments from that also would be
13 the fact that it's difficult to seek rehearing or
14 en banc review or even Supreme Court review in
15 those situations where there is simple affirmance
16 or reversal because it's difficult to explain where
17 the court went wrong in seeking review.

18 Also, I think it provides little guidance
19 to the lower courts when they get an unpublished
20 one-line disposition. They can't correct the
21 mistakes that they made if they don't know the
22 reasons they were right or wrong when they made a

1 particular decision.

2 Finally, the last scenario would be that
3 judges do nothing different except that
4 nonpublished decisions become citable and I think
5 that the problem there, at least in the Ninth
6 Circuit, is that there's just so much law. It's
7 difficult enough for the judges there to craft a
8 seamless web of precedent without asking them to
9 weave in every single stray bit of litigation that
10 comes to the courthouse door.

11 Since less time goes into writing
12 unpublished decisions, they're going to introduce
13 into the law many ambiguous and potentially
14 misleading statements that will be touted as the
15 law of the circuit.

16 Where they contain no statement of the
17 case or only a cursory one, it's difficult to
18 distinguish those cases in a factual context in
19 which they shouldn't properly apply and I think at
20 the district court level that encourages the use of
21 string citations. How many unpublished decisions
22 on one side of a discretionary ruling versus how

1 many on the other can the parties throw at the
2 court?

3 Also, the use of the felicitous-sounding
4 phrase, which may be inapposite in the particular
5 case in which it's being cited but you can't tell
6 because the unpublished decision has no statement
7 of facts on which it could be distinguished.

8 In all, I think that unpublished decisions
9 will have a greater effect in these lower court
10 proceedings than they will in appeals because, as
11 we've heard, appellate courts know how to deal with
12 unpublished decisions from their own court but in
13 the lower courts they're going to be harder
14 pressed, I think district court judges, to ignore
15 these unpublished decisions when they're thrown at
16 them and they're told this is what the court of
17 appeals did in this particular case in the past and
18 this is what you should do, also, even though
19 there's no factual setting for the particular point
20 of law.

21 Finally, this propose rule will impose new
22 research burdens on attorneys that won't outweigh

1 the benefits. I know in the Ninth Circuit I've
2 rarely encountered a situation where there wasn't
3 enough law on the subject. I think in maybe one
4 case I can remember in my practice where there was
5 an unpublished decision which I wanted to cite and
6 couldn't. And I think for a practicing lawyer,
7 expanding the volume of cases to research fivefold,
8 especially where the newly cited cases have not
9 been written for publication and where there are
10 very few diamonds, if any, hidden in the coal bin,
11 threatens not to clarify the law but to cloud it
12 with nuances, distinctions and variations and to
13 make practice in the Ninth Circuit where I practice
14 much more difficult.

15 Right now only 20 percent of the cases are
16 currently published. Where unpublished decision
17 can be cited, as a matter of prudence and
18 professional ethics, we'll have to treat them as a
19 significant source of authority. We'll have to
20 look for them. If we don't, we'll be considered
21 sloppy and potentially even victims of claims of
22 malpractice where we haven't searched unpublished

1 decisions for those that are perhaps more closely
2 in factually aligned context than the published
3 decisions on point which have maybe more nuanced
4 language which we can use, or even to find out what
5 our opponents are going to be throwing at us in the
6 opposing brief.

7 This is a particularly difficult situation
8 when the issue is one of a discretionary ruling. I
9 recently have been handling a juror misconduct case
10 and this is a state court case but I think it's
11 analogous to what one might experience doing
12 research in the federal context. For every one
13 juror misconduct case there are probably nine or 10
14 which are unpublished and when you're doing
15 research in that area, what you're really looking
16 for is cases which discuss a factual situation
17 similar to yours, rather than simply for the law
18 that applies in that case, so simply throwing at
19 the court different factual contexts in which juror
20 misconduct came up.

21 I spent probably two weeks looking at the
22 published cases. If that had to expand tenfold to

1 look at every unpublished juror misconduct case, I
2 simply could not have met the time to get my brief
3 on file.

4 Finally, I'd just like to address the
5 point that perhaps this rule should be postponed
6 for further study. As I understand it, the
7 national rulemaking process generally works on a
8 consensus or near-consensus basis and based on my
9 review of the comments, which I think should
10 overwhelming opposition to Rule 32.1, it seems
11 unlikely that postponement will result in any
12 consensus-building, rather than further
13 polarization on this issue.

14 I look to California where we've had year
15 after year a couple of vocal proponents who want to
16 make all decisions, all unpublished decisions
17 citable, go to a different legislator every year to
18 try to get a bill passed to get their way on this
19 particular issue and it's resulted in year after
20 year uncertainty in the law in this area and a
21 tremendous waste of resources by the judiciary and
22 appellate bar as they have to gear up year after

1 year to consider this issue. I think I would urge
2 the committee to put it to rest and not to pass
3 Rule 32.1 on to the next level.

4 JUDGE ALITO: Thank you.

5 Any questions?

6 JUDGE STEWART: I have one. I've tried to
7 listen earnestly to the unique perspective in terms
8 of the impact that this rule might have on
9 appellate practice and I'd have to tell you I
10 missed it because most of what you cited in the
11 letter are similar to other things that we've
12 heard.

13 For example, when you talk about the cases
14 pending for two years, I just can't imagine you're
15 going to get an NPO in the case you described, a
16 big case like that, that you're going to get an
17 unpublished decision, so I don't understand how
18 that example fits what we're talking about. If
19 it's pending two years and you have what's at
20 stake, I just can't imagine you're going to get a
21 three-liner at the end of the two years addressing
22 that case. So I don't see how saying that's

1 pending really informs the position you're taking
2 about an unpublished opinion. I mean there's just
3 no doubt in my mind that if it doesn't settle
4 you're going to get an opinion whether you win or
5 lose.

6 Secondly, I don't follow if you get a
7 one-liner that says affirmed, you're appellate
8 counsel and I'm just not following that you and
9 your client are going to go and sit down and parse
10 the fact that the court of appeals didn't give you
11 a long written opinion explaining how you won. In
12 other words that you aren't overjoyed that you won
13 with one word or more but that you're going to, you
14 know, go and parse the fact that you've been
15 deprived of a long opinion explaining how you won.
16 I just don't see that as realistic.

17 Now following the flip side, yes, the
18 prisoner is unhappy that in two pages the district
19 court was affirmed, but as much prisoner litigation
20 as we did, if we wrote 30 pages and published it
21 we've got the same pro se litigation coming to us.

22 So I have a disconnect between some of the

1 things that you're asserting here and the rule
2 that's before us, not minimizing the opposition but
3 just help me connect how in the appellate practice
4 that you come from what in this rule so impacts on
5 your ability, taking the case perhaps where you
6 didn't try the case originally and so forth, that's
7 the part that I'm not connecting.

8 MR. TAYLOR: I think the first question
9 was in the two-year example, how would an NPO or an
10 unpublished decision affect my client? My point
11 really was we're already waiting two years. As the
12 Ninth Circuit is right now, with positions on the
13 Ninth Circuit that haven't been filled by the
14 Congress, the Senate--

15 JUDGE STEWART: You're talking about
16 delays?

17 MR. TAYLOR: Right. I'm saying if that
18 process has to be extended even further because the
19 judges--

20 JUDGE STEWART: Well, what's the evidence
21 of that? See that's my problem. It's conclusory.
22 You were here and you heard Judge Becker say in his

1 experience on the Third Circuit those are the
2 fastest dispositions that get out the door because
3 they're decided after the case is argued and in
4 chambers. They're out the door.

5 So I'm interested in why is it in those
6 circuits that allow citation that dispositions seem
7 to go out quicker. So why is it that that event is
8 going to retard the resolution of your two-year-old
9 case, other than that being a surmise that you're
10 making but I'm saying nobody in these comments
11 cites that. No district judges wrote letters
12 saying that it's going to slow the process.

13 MR. TAYLOR: I think first of all, it's
14 dangerous to transport what's happening in the
15 Third District to the Ninth Circuit, which is much
16 different and very unique. I think overwhelmingly,
17 there were comments from the Ninth Circuit judges
18 saying if we're forced to allow these decisions to
19 be published we're going to have to put a lot more
20 time into writing them and that time writing those
21 decisions, doing polishing, whatever they feel
22 needs to be done so that they're out there in a

1 citable form, is going to either take away from the
2 work they do on their published work or it's going
3 to delay it. And I think we've heard the judiciary
4 is not going to allow their published work, their
5 published decisions to suffer, and what will happen
6 is the delay will come in delaying the result or
7 the decision-making in all cases, so that rather
8 than having a two-year delay, which we have now,
9 we'll see two and a half, three, three and a half
10 years to get a decision in the case I'm talking
11 about.

12 Whether it comes in an unpublished
13 decision or whether it's a published decision, it's
14 going to slow down the decision-making process in
15 all cases and that was really my point, how my
16 clients as an appellate practitioner will be
17 uniquely affected by this rule because they're
18 already waiting a long time for decisions and the
19 delay will cause even further problems in that.

20 I think we've seen letters in the comments
21 from companies like Verizon and others who have
22 cases in the Ninth Circuit who don't want further

1 delays in their cases that are before the Ninth
2 Circuit.

3 And I'm sorry I've forgotten the second
4 part of your question--

5 JUDGE STEWART: That's all right. You did
6 well.

7 MR. LETTER: I just have a couple of brief
8 observations. You started by saying it would just
9 change the difficulty that national practitioners
10 have, from trying to figure our citations to trying
11 to figure out what's precedent. The difference is,
12 as we know, you can be sanctioned for guessing
13 wrong on whether you can cite something or not.
14 You're not going to be sanctioned if you cite an
15 unpublished opinion and it turns out not to be
16 binding law of the circuit.

17 MR. TAYLOR: Well, has there ever been
18 anybody sanctioned? I think there were two cases
19 in which people were threatened with sanctions in
20 the Ninth Circuit but have we had examples of
21 people actually sanctioned?

22 MR. LETTER: Yes. Yes.

1 JUDGE ROBERTS: How much were you charged?

2 MR. LETTER: It was the D.C. Circuit,
3 Judge Roberts. The government paid for it.

4 Second, the point about the motions to
5 publish, I don't think that that really is a
6 solution because, for example, in the D.C. Circuit,
7 unlike the Ninth Circuit, you don't have two years
8 between briefing and oral argument. The D.C.
9 Circuit sets it up so that the briefs are finished
10 and then oral argument is almost immediately
11 thereafter.

12 So if you come across some of these cases
13 let's say a week or so before your brief is due,
14 there isn't time to do a motion to have that
15 decision published and then be able to cite it,
16 unless the D.C. Circuit is going to act on these
17 immediately, which I doubt they're going to do
18 because presumably, as Judge Wood said, they're
19 going to get it to the original panel, which by the
20 way might include visiting judges, et cetera.

21 So I don't think in some circuits like the
22 Ninth maybe this is a solution because they've got

1 that up to two-year gap between briefing and
2 argument but I think in a lot of the other
3 circuits, like the Third, the Seventh actually
4 which is quite fast, I don't think this is a
5 practical solution.

6 MR. TAYLOR: My proposal really was more
7 front-loaded than that, which is to create
8 standards about when decisions must be published so
9 that we don't end up with the situation of a
10 decision with a dissent but which then is an
11 unpublished decision.

12 MR. LETTER: That was going to be my next
13 point. I think that misunderstands. I'm not
14 trying to get more opinions published. That's not
15 my goal at all. I think the courts do a very good
16 job in general of deciding what is to be published
17 and what isn't. As I mentioned before, I had the
18 situation where the court that I was in had four
19 orders dismissing interlocutory appeals. It
20 probably didn't need a published opinion. I don't
21 know; maybe they could have. I just wanted to be
22 able to tell the court about those four orders in

1 the past two years and there wasn't really anything
2 worth publishing probably. Maybe the court could
3 have published it but I just wanted to be able to
4 cite that.

5 I didn't want them to publish something
6 and make it law of the circuit. That wasn't the
7 goal. I just wanted to let them know about this
8 recent practice.

9 And the last thing is--

10 MR. TAYLOR: If I could just respond to
11 that real quick, in the Ninth Circuit you could use
12 the reasoning from those opinions, if there were
13 any. Even if there weren't, if the court ended up
14 reaching a decision contrary to those past four
15 cases, you could then call it to their attention in
16 a petition for rehearing.

17 MR. LETTER: Again I'm not trying to get
18 rehearing. The government seeks rehearing in a
19 tiny percentage of our cases. We try to work with
20 the courts. Unlike private practitioners who seek
21 rehearing often, we seek rehearing in a tiny
22 percentage of the cases, so that's not what I'm

1 trying to do, either. I'm just trying to tell the
2 court look, here's what your colleagues have done
3 four times in the last couple of years.

4 And the last thing, you said on citations
5 to the district courts, Sandy tells me that the
6 Ninth Circuit attempts to tell the district courts
7 that lawyers can't cite Ninth Circuit unpublished
8 decisions in the district court. But again you
9 said you do an appellate practice. If you look at
10 district court practice around the United States,
11 district court briefs over and over cite
12 unpublished court of appeals opinions.

13 So the practice has moved beyond, I think,
14 what you're saying. These decisions are cited.
15 They're cited all the time. So if judges are
16 acting as if they're not going to be cited, as I
17 say, the practice has moved beyond them. All that
18 they can do is say don't cite it in my court or
19 maybe don't cite it in my district courts, but they
20 can't say don't cite it because that is happening.

21 MR. TAYLOR: I would respond that just
22 because something bad has happened doesn't mean we

1 should encourage it further. And I think the fact
2 that these unpublished decisions are being used in
3 the district court is misleading. It's probably
4 making bad law and to the extent we can cut back on
5 it then it probably should be cut back, not
6 encouraged.

7 MR. LETTER: But then the only way to cut
8 back on it is the Federal Rules of Civil Procedure
9 would be amended to say that nobody can cite in any
10 district court in the United States an unpublished
11 court of appeals opinion. I suppose you could do
12 that.

13 MR. TAYLOR: If you wanted to create
14 uniformity, but I would say let's leave it to the
15 individual circuits and the Ninth Circuit can
16 manage what's cited in the district courts to the
17 extent it can. If people are violating those
18 rules, let the Ninth Circuit deal with it.

19 MR. LETTER: They're not violating it.
20 That's what I'm saying. It's not a violation of--

21 MR. TAYLOR: Well, I think it is. I think
22 what Sandy said is it is a violation.

1 MR. LETTER: No, no, no. To cite it in a
2 district court in Alabama. That's not a violation
3 of the Ninth Circuit's rules. It obviously can't
4 be. The Ninth Circuit can't set rules for Alabama.

5 MR. TAYLOR: The Ninth Circuit's not
6 trying to control its precedents' use outside the
7 circuit, only within the circuit, but in its own
8 district courts it tells attorneys, "Don't cite
9 these cases in our district courts in the Ninth
10 Circuit," but I understand.

11 JUDGE ALITO: Judge Levi?

12 JUDGE LEVI: We both practice in the same
13 circuit. You seem well pleased with what I will
14 call the discursive Ninth Circuit unpublished
15 opinion and I want to ask you--

16 MR. TAYLOR: Not well pleased but it's
17 better than a one-word disposition.

18 JUDGE LEVI: Well, we say one word but you
19 also said two paragraphs, so let me ask you just
20 about two areas here because they're recurring and
21 everybody's heard about this.

22 The first is our colleagues in the Ninth

1 Circuit say that these discursive Ninth Circuit
2 unpublished opinions are actually written by law
3 clerks and that the panel puts very little input
4 into it and that the opinion itself is not a good
5 guide for the reasoning process of any single
6 member of that panel.

7 How do you get comfort with your client
8 when you have one of these discursive let's say
9 five- to 10-page unpublished opinions now that you
10 know from reading these comments that this does not
11 reflect the thinking of the panel but rather, the
12 thinking of a law clerk and the panel is simply
13 comfortable with the outcome? That's my first
14 question.

15 My second question is--

16 MR. TAYLOR: I might forget it if--

17 JUDGE LEVI: Go ahead.

18 MR. TAYLOR: I think there are some judges
19 who have made those statements. I'm not sure I
20 take at total face value that we never look at the
21 reasoning; we just sign off on the bottom line and
22 whatever it says is what it says. I have to

1 believe that in having been a law clerk myself, the
2 fact that somebody has gone through the discipline
3 of looking at the briefs, addressing the arguments,
4 writing them up has brought some kind of reasoning
5 and discipline to the process, rather than simply
6 getting a one-word affirmed or reversed because
7 when I was a work sometimes we'd read the briefs,
8 we'd say yeah, the result should probably be X, and
9 the judge would say okay, write it up. And by the
10 end of writing it up there were times when I went
11 to the judge and said, "No, after looking at the
12 cases and trying to write this up, it won't write.
13 It's got to be Y" and then we go forward from
14 there.

15 I think that there is a benefit, even if
16 it doesn't reflect totally the views of all three
17 panel members, in having somebody, whether it's a
18 research attorney or a law clerk or a staff
19 attorney, having looked at the briefs and having
20 written up the arguments and having given a reason
21 to the parties that is beneficial, that you would
22 lose if judges moved to affirmed or reversed as the

1 result.

2 JUDGE LEVI: I think you've just given us
3 an example of entropy in the rules process because
4 you made the argument for unpublished opinions that
5 is the argument that has been made for published,
6 for having these opinions be citable.

7 MR. TAYLOR: Some of these arguments do
8 cut--

9 JUDGE LEVI: They probably do.

10 MR. TAYLOR: It's like those who say we
11 should have this rule because a one-word
12 disposition would be better than a three-page or
13 three-paragraph disposition and let's force judges
14 to either write a fully citable decision or let's
15 force them to just give an affirmed or reversed. I
16 think that's an argument against the rule where
17 some would say that's an argument before it.

18 JUDGE LEVI: Just on that, the Ninth
19 Circuit rule says that this should be for an
20 unpublished opinion a routine application of
21 clearly established circuit law and you're not
22 happy with the two-paragraph or three-paragraph

1 ruling but the example that the Ninth Circuit gives
2 in its rules is a one-sentence statement that the
3 defendant's statements are not subject to exclusion
4 under the X case and maybe if you'd make 10
5 arguments you'd have 10 sentences like that but
6 what's the matter with that? That is the circuit's
7 own view of what its opinion should be.

8 I think the difficulty we're getting into
9 is that nobody would cite to an opinion like that.
10 Nobody would want to. It's this discursive
11 unpublished opinion that you've been defending,
12 that's where the rub is and yet that's not what's
13 even contemplated by the local rule.

14 MR. TAYLOR: And my response would be that
15 if this rule goes into effect, knowing we'll have
16 more of these one-line dispositions which nobody
17 likes, we'll have fewer of the discursive ones,
18 which aren't great; let me tell you. We'd much
19 rather have a fully reasoned published opinion in
20 any appeal that I've been working on. I'd be much
21 happier with that. But the three-paragraph or even
22 two-page opinion is better than nothing, better

1 than a one-line disposition.

2 And I say if you're going to create a rule
3 which encourages the judges not even to give you
4 the three-paragraph or the two-page opinion but
5 just the one-line opinion, that's a detriment to
6 the practice of law in the Ninth Circuit. That's
7 demoralizing to the attorneys and it's demoralizing
8 to clients.

9 Yeah, I'm not thrilled to have a
10 three-paragraph opinion when I've written a 50-page
11 brief but it's better than a one-line opinion,
12 which is I think what you'll see more and more of
13 if the rule goes into effect.

14 MR. LEVY: Mr. Taylor, you cited I think
15 favorably, as Sandy did, the Ninth Circuit rule
16 that nonprecedential opinions can be cited in
17 requests for rehearing or rehearing en banc. Can
18 you explain to me what the logic is for allowing
19 that but not allowing citations in the brief that
20 would keep the panel from wandering into conflict
21 and error in the first place?

22 MR. TAYLOR: I think the reason is because

1 they don't want to be buried with these string
2 citations to unpublished decisions but they want
3 also to provide a safety valve which ensures that
4 an injustice is not occurring because some of these
5 decisions remain unpublished.

6 MR. LEVY: Isn't that really sandbagging
7 of the highest order to allow a panel to write a
8 decision and then later tell them, by the way,
9 there's something--

10 MR. TAYLOR: No, because you can give them
11 all the reasons for why it should go one way and if
12 they don't end up buying those reasons and they
13 actually write a decision that's in conflict with
14 something another panel has said, then you call it
15 to their attention and say, you know, you didn't
16 buy our arguments but look, somebody else did and
17 now there's a conflict you need to resolve, and you
18 do that in a petition for rehearing.

19 MR. SVETCOV: I'm on that rules committee,
20 too, so I know how this happened. The pressure
21 from the bar that wanted this rule, 32.1
22 nationally, there was a bar in the Ninth Circuit

1 that wanted a publication rule. The Ninth Circuit
2 Rules Committee said no. This was the foot in the
3 door for broader citation. In effect, the circuit
4 folded its tent and said okay, if consistency's a
5 problem, we'll let you cite it for rehearing.

6 Two-and-a-half-year experience, as Judge
7 Levi--not one instance of a conflict raised through
8 unpublished opinions. In other words, it was the
9 pressure for 32.1 in the Ninth Circuit that made
10 this silly rule part of an exception to our rule
11 against nonpublication.

12 MR. TAYLOR: But supposedly it was going
13 to show that, in fact, all these conflicts were
14 occurring and therefore we should be able to cite
15 unpublished opinions. And in fact, after two years
16 of this experiment it showed exactly the opposite.

17 MR. SVETCOV: I can remember Judge
18 Kozinski having smoke come out of his ears when the
19 court agreed to this experiment and now is touting
20 its inability to show anything as another argument
21 in support of his position.

22 MR. LEVY: This was the organized pressure

1 of the Ninth Circuit bar, of which we've heard no--

2 MR. SVETCOV: You know, when you tilt at
3 windmills in our circuit too many times--

4 JUDGE ALITO: That result is
5 incomprehensible to me because every single
6 precedential opinion that I've ever written, I
7 think, has generated a petition for rehearing en
8 banc, each of which can cite at least a dozen
9 Supreme Court cases and two dozen Third Circuit
10 cases that my decision conflicts with. You mean to
11 say nobody in all this time in the Ninth Circuit
12 has ever found an unpublished opinion that
13 conflicts with--

14 MR. SVETCOV: That at least has some
15 empirical basis.

16 MR. TAYLOR: It shows that what these
17 things contain is not of much importance.

18 MR. SVETCOV: Here's how the components of
19 those who think it's a good rule say well, give it
20 another two and a half years. Surely in another
21 two and a half years we'll find one.

22 JUDGE ALITO: Mr. Taylor, unless there are

1 other questions--

2 MR. MCGOUGH: My understanding is that in
3 the Ninth Circuit the unpublished or
4 nonprecedential opinions, that that function is
5 highly centralized in the staff attorneys office,
6 as opposed to some of the other models. I was
7 hearing Judge Wood and I understand that may be the
8 case in the Seventh Circuit, as well, but Judge
9 Becker in the Third Circuit and in the Federal
10 Circuit, the nonpublished opinions are written in
11 chambers by the individual judges.

12 MR. SVETCOV: And I think in the Ninth
13 Circuit that's also true and I know of my own
14 experience in criminal cases--

15 MR. MCGOUGH: Which is also--

16 MR. SVETCOV: And also in securities cases
17 as a plaintiff's lawyer, there are lots of
18 unpublished affirmances of private Securities Act
19 cases that were dismissed in the district court and
20 are affirmed in unpublished opinions, thankfully,
21 because if I have any more adverse precedents in
22 securities cases in my circuit I'd really be

1 rolling upstream.

2 MR. MCGOUGH: But my question is really
3 while we've got at least one Ninth Circuit
4 practitioner and we haven't had any of the judges
5 here from the Ninth Circuit, are the unpublished
6 opinions coming out of the staff attorneys office,
7 is it centralized in general?

8 MR. SVETCOV: Some are.

9 MR. MCGOUGH: Or are any coming out of the
10 chambers?

11 MR. TAYLOR: I think both. They screen
12 the cases and some get diverted off to the staff
13 attorneys and some go to chambers and maybe some of
14 the ones that go to chambers after they've looked
15 at the brief, they decide this isn't worthy of a
16 published opinion and they'll issue a nonpub,
17 versus the staff attorneys cases, which can come up
18 through a different route. So you're getting two
19 different--

20 MR. MCGOUGH: Does it make a difference?
21 In the Ninth Circuit is there any perceived
22 difference between whether the opinion's coming out

1 of the staff attorney's office versus the opinions
2 coming out of chambers?

3 MR. SVETCOV: What difference are you
4 looking for, Tom? I'm not understanding.

5 MR. MCGOUGH: Either quality, consistency.
6 I could see, for example, where an argument could
7 be made that the staff attorneys office, the
8 quality is lower but the consistency is high and
9 coming out of chambers the consistency is lower but
10 the quality is higher. I don't know. Or you could
11 flip it around the other way.

12 MR. SVETCOV: I'm trying to--my own
13 experience is that I've had unpublished decisions
14 in my cases that went to chambers and were orally
15 argued and were still mem dispo'd on occasion and
16 they were written "The parties are familiar with
17 the facts" and sometimes the analysis is, you know,
18 three pages, sometimes eight pages.

19 And I think that the screening decisions
20 that the staff attorneys have are very often
21 one-issue cases. They're qualitatively different
22 cases.

1 MR. MCGOUGH: Is the level of judicial
2 input perceived to be the same?

3 MR. SVETCOV: No. I know that it's not
4 the same. Those screening cases are presented 30
5 at a time to a panel of three judges and they read
6 the memo dispos and if they read the summary of
7 argument, I would be delighted to hear that. And
8 if one of the three judges says whoops, there's
9 something more to this, then it goes off that
10 screening calendar. If the three judges sign on,
11 then the staff attorney disposition goes out.

12 JUDGE ALITO: Thank you, Mr. Taylor.
13 Steven I. Wallach, Morrison Cohen Singer &
14 Weinstein, New York.

15 STATEMENT OF STEVEN I. WALLACH

16 MR. WALLACH: Thank you, Mr. Chairman.

17 Mr. Reporter, Mr. Secretary, members of
18 the committee, thanks a thousand times for your
19 patience. I apologize ahead of time if I'm too
20 duplicative. Alas, that's sometimes unavoidable.

21 I'm a patent lawyer. With all due respect
22 to Judge Bright, who we heard a century ago this

1 morning, the system is broke in a small but
2 fundamental way. Advocates cannot cite decisions
3 for their persuasive value that may be very
4 relevant to the very issue that's pending before a
5 court and it is fundamental because the courts of
6 appeals are, in part, here to help guide the
7 district courts and the public as to what the law
8 is and what the outcomes should be in particular
9 cases.

10 Now I do want to address very real-world
11 concerns. Of course as lawyers, we all know
12 hypotheticals are sometimes useful for that so
13 let's say we have an inventor, H.D. Thoreau, who
14 has a patent on a new mousetrap and he's suing Tom
15 Katz, my client, who's allegedly infringing this
16 patent for making, using and selling mousetraps.
17 Let's say that I file a summary judgment motion of
18 noninfringements and I win.

19 The case goes up to the Court of Appeals
20 for the Federal Circuit, which reviews the very
21 important issue of claim construction, what is a
22 very central issue in most patent cases about what

1 a patent means. The Court of Appeals for the
2 Federal Circuit reverses and remands.

3 Now Mr. Thoreau files a motion for summary
4 judgment that his patent is valid and infringed.
5 In opposing that motion I say well, we have a good
6 deal of prior art, publicly available information
7 that shows that the patent is invalid and that the
8 court should consider in deciding on the motion for
9 summary judgment. And let's say Mr. Thoreau argues
10 well, Mr. District Court Judge, you don't have to
11 consider the issue of validity of the prior art
12 because the Federal Circuit would not have said
13 what it said about claim construction if it thought
14 the patent was invalid.

15 Now what does this mean practically? Now
16 I'm going to do some research and see if this
17 argument holds water and I'm going to do research,
18 as I do in any case. We're going to have someone
19 look at what the courts have said on this issue and
20 maybe we will find an unpublished decision. We
21 will find a case called Xerox Corp. versus 3Com
22 Corp. in which the very same procedural issue came

1 up. It was on remand from the Federal Circuit. A
2 district court said it was not going to listen to
3 the issue of invalidity because of course the
4 Federal Circuit would not have ruled on claim
5 construction as it did if it thought the patent was
6 invalid.

7 On a second appeal in this Xerox versus
8 3Com, which I cite in my written statement, Federal
9 Circuit said well, of course, the issue of claim
10 construction is different from the issue of
11 validity; the district court has to consider the
12 prior art defense and consider whether the patent
13 is indeed invalid.

14 Well, why can't I cite that to the
15 district court? It may be that the Federal
16 Circuit's prohibition on citing its nonprecedential
17 decision should apply only to the Federal Circuit
18 but it's my very strong impression that, as you
19 heard Chief Judge Mayer saying, he is very strongly
20 of the opinion that these nonprecedential decisions
21 should never be cited. I'm very hesitant to cite
22 an unpublished nonprecedential decision of the

1 Federal Circuit to any district court judge.
2 Heaven forbid if, as sometimes happens, we have
3 sitting as a district court judge one of the judges
4 of the Federal Circuit.

5 Now it's said that there's a question of
6 resources that are available to litigants. Well,
7 again I don't think that this is a serious issue.
8 One researches these issues as they come up. If
9 the cases are out there they need to be found.

10 Now if an associate brings this
11 unpublished decision to me and says well, I found
12 this case that seems to be on point; what do we do?
13 Well, I'm going to say well, you're going to need
14 to spend some more time and find a published
15 decisions if it exists because that's what the
16 courts want to see, either at the district court
17 level or when this gets to the court of appeals.

18 So we're going to be spending more money,
19 it seems to me, to try to find published decisions.
20 For some clients we'll say okay, if you found the
21 unpublished decision let's stop there. If I take
22 my chances and cite this decision, what I'd like to

1 be able to do if Rule 32.1 is passed, as I think it
2 should be, is I'd like to say okay, you can stop.
3 We have an unpublished decision but for the
4 persuasive value and for this client we're not
5 going to spend any more money researching. We're
6 going to put this in our brief and try to argue the
7 persuasive value that it has.

8 Now another problem that the Federal
9 Circuit has which Judge Mayer did not allude to is
10 a 60-day rule for making a motion to get its
11 nonprecedential decisions published as
12 precedential. So if we find this case after that
13 60-day time limit has passed, then we've got a
14 problem.

15 Now I think Judge Wood alluded to the very
16 strong presumption that should attach to motions to
17 make nonprecedential decisions citable and perhaps
18 at the very minimum this committee should recommend
19 that there be no time limits on making such
20 motions. But I think as other committee members
21 have pointed out, there are still very practical
22 problems in finding this case the day before the

1 arguments. In the district court or court of
2 appeals, making the motion is awkward, to say the
3 least.

4 Now we've heard a lot of the very real
5 dangers that could come into being if Rule 32.1 is
6 adopted. I have very little doubt that judges
7 will, as Judge Bryson said, spend more time
8 addressing nonprecedential unpublished decisions,
9 but that's life and that's what should be done. It
10 is the burden that the judges unfortunately carry
11 and I apologize that an increased burden may be
12 placed upon them but, as Judge Becker pointed out,
13 that's what they're there for, to render decisions
14 that will be helpful to the parties and to the
15 public.

16 I thought it was also very instructive the
17 colloquy that Judge Stewart had with the judges
18 from the Federal Circuit about what is the big deal
19 about citing a nonprecedential decision as
20 persuasive? Aren't there all sorts of decisions
21 that are not precedent in the Federal Circuit that
22 are cited to you? And I must say respectfully I

1 found the judge's attempts to deal with those
2 questions unpersuasive. Judges can and do often
3 address decisions that are not binding precedents
4 in a particular court and they deal with them all
5 the time.

6 Particularly in the patent field where
7 district court judges may not be as familiar with
8 Federal Circuit precedent and patent law as they
9 should be, it is very helpful, I think, to be able
10 to cite, in those cases where we have to, a
11 nonprecedential unpublished decision. In the
12 hypothetical I described, isn't it better that we
13 cite to the district court or, if need be, to the
14 Court of Appeals for the Federal Circuit, this
15 Xerox versus 3Com case so that the courts get it
16 right? It's more important that the courts get it
17 right than we deal with some possibility that
18 decisions will be delayed.

19 The chairman has suggested that perhaps
20 more empirical studying may be needed. Perhaps
21 that's a good idea but I would say that no
22 empirical study, additional empirical study, is

1 necessary if you think that the dangers pale in
2 comparison, as I do, to the very fundamental aspect
3 of being able to cite for whatever value these
4 nonprecedential unpublished decisions have.

5 And it is the case--and I've spoken to
6 lawyers in the Ninth Circuit and I've spoken to
7 lawyers all around the country--it is frequently
8 the case that my colleagues have said oh yes, we
9 have had several occasions where I can remember
10 clearly in my mind the time when we had this
11 wonderful nonprecedential decision that would have
12 made things clearer for the judge, clearer for our
13 clients, and help reach the right result but we
14 couldn't cite it. That just seems to me a very
15 unfair result.

16 Now there's lots of unfairness and the
17 unfairness that may ensue to judges who have to
18 deal with the proposed rule are genuine but, as I
19 suggest, given the nature of judges' role in our
20 system, the unfairness of not allowing lawyers and
21 the public to cite these nonprecedential decisions
22 trumps the other unfairnesses.

1 Finally, as Judge Wood said, there is
2 something of a devil's deal that is recognized in
3 the situation where courts of appeals have said
4 these decisions should not be cited. Please be on
5 the side of the angels in this instance. Thank
6 you.

7 JUDGE ALITO: Thank you.

8 Questions?

9 MR. MCGOUGH: Mr. Wallach, I had just
10 gotten onto my first patent case in the Federal
11 Circuit as an appellate lawyer and you mentioned
12 claim construction and the case I have is a claim
13 construction case and I have seen some statistics
14 cited about the percentage of claims construction
15 cases that are reversed by the Federal Circuit.
16 Are you familiar with those?

17 MR. WALLACH: Generally, yes, a legal
18 decision that the Federal Circuit feels free to
19 review de novo. As all legal questions are, there
20 are frequent reversals, yes.

21 MR. MCGOUGH: But I saw a statistic that
22 said that currently it's up to 74 percent reversal

1 rate on claims construction on district court
2 decisions. Are those generally done in published
3 or unpublished decisions? Do you have any feel for
4 that?

5 MR. WALLACH: I don't know that and I
6 don't know that the Administrative Office keeps
7 that sort of statistics. The Federal Circuit
8 itself might keep those statistics. I can just
9 tell you from my own experience I was involved in
10 one of the cases that I cite in my written
11 statement, Extrel versus Bruker, and we have an
12 unpublished decision which involved not claim
13 construction but a question of what evidence is
14 sufficient to prove infringement under the doctrine
15 of equivalence.

16 I must say you can't guarantee that the
17 same sort of evidence will be presented in a later
18 case but if it is, I would very much like to be
19 able to cite the decision with which I'm familiar
20 and point out to the judge, either in a proposed
21 jury instruction or a motion for judgment as a
22 matter of law, what that result was in that

1 previous case and why the result should or
2 shouldn't be the same in the future case.

3 JUDGE ALITO: Thank you very much, Mr.
4 Wallach. We appreciate your coming and appreciate
5 your waiting so long.

6 Our final witness is Brian Wolfman,
7 director of Public Citizens Litigation Group.

8 STATEMENT OF BRIAN WOLFMAN

9 MR. WOLFMAN: Thank you for the
10 opportunity to come here today and I will try to be
11 brief.

12 To quote somebody I was talking with
13 earlier today, at the risk of being the mouse that
14 squeaked, what I want to do here is try to connect
15 two of the rules that are before the committee
16 here, 32.1 and another one that I believe--I got
17 here a little late this morning because I was in
18 the D.C. Circuit doing a case this morning but I
19 got here a little late and I'm pretty sure this
20 other rule hasn't been discussed.

21 I want to try to connect the two because
22 to me, many things have come out here but there

1 hasn't been a sufficient emphasis on uniformity as
2 it applies to practitioners and one reason for me
3 to support 32.1 and to make another point that I
4 want to make here is the importance of uniformity
5 unless there's a good reason to be nonuniform.

6 I'm the director of Public Citizen
7 Litigation Group and we've litigated hundreds of
8 cases in the courts of appeals. Our lawyers have
9 this year, just in the past year, filed briefs and
10 argued cases in the D.C., Second, Third, Fifth,
11 Sixth, Seventh, Eighth, Ninth, Eleventh and Federal
12 Circuits. I mention this for two related reasons.

13 First, the theme of these remarks, as I
14 said, is that in our experience uniformity in the
15 rules is generally beneficial to practitioners and
16 I believe at least to the court clerks because it
17 allows practitioners to file motions, briefs, and
18 other papers and to do whatever is necessary to
19 move the case along and to make the best case for
20 the client without fear that they're violating a
21 local rule, some of which are quite difficult to
22 discern. It's always been our view therefore, as I

1 said, that absent a compelling reason, the federal
2 rules should establish one rule and the local
3 rule-makers shouldn't thereafter interfere.

4 Second, several of the comments on
5 proposed Rule 32.1 take the position that the
6 status quo is preferable because local citation
7 rules regarding these so-called unpublished or
8 nonprecedential opinions allow the courts to
9 confirm their practices to local needs and
10 traditions. In this regard it's further argued
11 that most practitioners either one, practice
12 exclusively in one circuit or nearly so or two,
13 that they practice with large national firms that
14 have the resources necessary to discern all the
15 local variations and comply with them.

16 I don't think that's a fair
17 characterization of the practice world and it's not
18 just our situation. Our situation is obviously not
19 like that. Our offices practice all over the
20 country, more outside D.C. than within it, yet our
21 staff size and resources are quite limited and
22 complying with the myriad of local variations is a

1 significant burden. But we know of many other
2 small and medium-size firms that we work with that
3 are in similar situations in which dealing with
4 local variation is a burden. It's not going to
5 kill their practices but it's a significant burden,
6 so you have to ask the question what is the value
7 of local variation?

8 And believe it or not, this first brings
9 me to Rule 27(d)(1)(e), which is proposed here,
10 which no one talked about so far and it's not what
11 brought everyone here today, of course, but it's
12 important because it helps illustrate our concern
13 with local variation and it'll bring me back to
14 Rule 32.1.

15 That proposal says that motions now will
16 have to meet the typeface and type style
17 restrictions currently in place for briefs,
18 generally a larger type than we all grew up using,
19 and this is necessary, the committee says, to
20 prevent abuses such as litigants using very small
21 typeface to cram in as many words as possible into
22 the pages that are permitted.

1 We like this change because it eliminates
2 local variation of a kind that's really not useful,
3 in our view. Some courts of appeals allow 12-point
4 type. The D.C. Circuit where we practice with some
5 regularity allows 11-point type. The problem to us
6 is just one of transition. As we say in our
7 comments and I won't belabor, by moving to a larger
8 font but leaving the page limits the same, the
9 committee has, I think without explanation,
10 effectively reduced the page limits for these items
11 and that can be dealt with, we think, and ought to
12 be.

13 Similarly, after filing our comments on
14 the rules the committee is considering today we
15 learned of two proposed changes to the local rules
16 of the Third Circuit. Again neither of them are
17 earth-shattering but both of which would create
18 additional nonuniformity and difficulty for
19 national practitioners. I've submitted a copy of
20 our comments on those rules to this committee so
21 you can see what I mean but one of those proposed
22 changes, again not earth-shattering at all, is that

1 each brief contain marginal line numbering. This
2 illustrates our concern. We noted that this new
3 requirement would add yet another of the myriad
4 local rules for briefs that are imposed in circuit
5 after circuit and we pointed to FRAP 32(e), which
6 is supposed to forbid a court of appeals from
7 rejecting a document that complies with the
8 formatting requirements of Rule 32.

9 The point is not, to us, the merits of
10 that requirement, although we express doubt as to
11 whether the rule is warranted, but the increasing
12 nonuniformity that we've perceived over the last
13 half dozen or dozen years.

14 Put another way and to use this example,
15 assuming line numbering is a good idea, it should
16 be this committee that takes that up and we doubt
17 that there's something about practice in the Third
18 Circuit particularly that makes such a rule
19 particularly important there.

20 And that brings me back to Rule 32.1.
21 Although we did not get embroiled in this
22 controversy, we took the position that the

1 committee had it right and the lofty reasons given,
2 which we subscribe to, are the ones given by Judge
3 Becker and others this morning. We agree that the
4 principal benefits of the rule would be how it
5 serves the litigants and the public.

6 Again I have to say also I have to admit
7 that the controversy over this rule taught me the
8 value of the notice and comment process because
9 although I didn't read the 400 plus comments, I
10 read a good number of them and many of the concerns
11 expressed, particularly those of some of the
12 judges, were powerful and caused me to at least
13 rethink the position that many of us in my office
14 had taken. But, as I say, I ultimately agree with
15 the positions taken by individuals such as Judge
16 Becker and Mr. Hangle of the benefits of the
17 proposed rule.

18 But the one argument that I found least
19 powerful was the notion that local needs and indeed
20 local traditions, whatever that means in this
21 circuit or that, demanded flexibility and
22 themselves argued in favor of the status quo.

1 There is some speculation and we heard it again
2 here today, at least in my time here today, about
3 local needs that might explain why some circuits
4 allow citation of unpublished opinions and others
5 do not but none seem convincing or backed up by a
6 lot of empirical evidence of what might happen if
7 the rule were to change.

8 The more convincing argument, it seemed to
9 us, was that since some circuits have allowed
10 citation for many years without great apparent
11 harm, that proposed Rule 32.1 could achieve
12 unanimity without the horrible consequences that
13 some have predicted, and that remains our position.
14 And since the local needs argument is unconvincing,
15 we urge the committee to stick with the proposal.
16 I almost--I really don't think this but I would
17 prefer almost a no-citation rule than the current
18 mish-mash that exists out there today.

19 I just don't see the sense in a wide
20 variation of rules on this subject in what is
21 supposedly a unitary federal appellate system. The
22 notion that under the current regime unpublished

1 decisions may be cited in other courts, indeed in
2 many other courts, but not in the courts that
3 issued them is particularly at odds with the notion
4 that we have one system of federal appellate
5 jurisprudence.

6 In sum, my message today is that when it
7 comes to the federal rules, particularly those that
8 instruct practitioners how they make their arguments
9 and get their arguments before the courts, the
10 rules ought to be uniform wherever possible, even
11 where the local rule-makers may themselves think
12 they have a better way of doing things. And I
13 don't say that pejoratively. They may have a
14 better way of doing things but except in the rare
15 case where local needs truly demand variation and
16 those needs outweigh the countervailing benefits of
17 national consistency, we urge the committee to
18 assert its authority to establish national rules of
19 practice and wherever possible to discourage local
20 variation.

21 Thank you for allowing me to appear today
22 and if anyone has any questions I'd be happy to try

1 to answer them.

2 MR. LEVY: You have a very interesting
3 perspective because of the nationwide nature of the
4 cases you work on. When your lawyers first work on
5 a case in whatever circuit it is, unless it's one
6 they're intimately familiar with, do they pick up a
7 copy of the rules?

8 MR. WOLFMAN: We do pick up a copy of the
9 local rules and they're not as easy to discern as
10 someone who has practiced there all the time and
11 sort of knows the inside story thinks they are.
12 I'm embarrassed to say and I wouldn't be
13 surprised--I think we're very careful lawyers, I
14 think we write good briefs, but we get briefs
15 bumped because of local rules. It's hard to
16 discern in many instances the value of them.

17 I want to emphasize that doesn't mean it's
18 not the better rule but the question is does that
19 better rule respond to some local need? And it's
20 very hard to understand in most instances what that
21 is.

22 MR. LEVY: You don't get briefs bumped

1 because of the no-citation rule?

2 MR. WOLFMAN: No, we know that's a problem
3 and we look into it. However, in some
4 instances--for instance, it is not at all clear to
5 me sometimes what it means by what a precedent is,
6 what is meant by a precedent. There are some
7 people that clearly mean that to mean something
8 that's controlling. There are other instances
9 where people mean that just to be cited for any
10 persuasive reason at all. But we try to accord
11 with those rules and we make multiple phone calls
12 to clerks' offices. Sometimes you get good
13 answers; sometimes you don't. That's really not
14 the principal point I'm making. We try our best and
15 we spend lots of time doing it but why?

16 JUDGE ALITO: Any other questions?

17 Thank you very much, Mr. Wolfman, and
18 thank you again for waiting.

19 MR. WOLFMAN: No problem. Thank you.

20 JUDGE ALITO: I'd like to take a
21 five-minute break and then the committee will
22 reconvene for its regular agenda.

