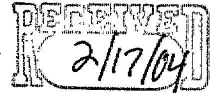

03-AP-465

---- Forwarded by Peter McCabe/DCA/AO/USCOURTS on 02/17/2004 11:24 AM ----

Gary Coutin
<gmcoutin2000@yahoo.com>
02/17/2004 10:58 AM

To: larry@lawreform.net
cc:
Subject: How Unpublished Decisions Violate the Constitution

Subject: Proposed Fed.R.App.Proc. 32.1

From: Gary Michael Coutin, gmcoutin2000@yahoo.com

Date: Mon, February 16, 2004

To: peter_mccabe@ao.uscourts.gov

Dear Sir,

It is time for an American *glasnost* regarding the decisions of the Federal Courts of Appeal. These courts are the second tier of courts below the Supreme Court of the United States. They are also the only level of court to review the actions of the Federal District Courts. The right to appeal is protected by the 1st Amendment of the Constitution. The right to petition was part of the common law of the United States which originated in the Declaration of Rights of 1688 enacted after the Glorious Revolution in England which placed the Monarchy under the law and the Constitution. The right to review by appeal is part of the right of petition. Since the Supreme Court of the United States only hears a hundred or more of the appeals decided in the United States, the right to have Courts of Appeal hear, decide, and publish decisions is the only effective check on the arbitrary actions of the federal district courts. It is the only check by the people against jud icial tyranny.

The present rules of court permitting unpublished opinions and then permitting the courts to prohibit citing those cases leads to a system where the law can be tailored to fit the parties to the court according to the will of the judge. This system inevitably leads to a denial of due process and equal protection. Equal protection is denied because persons in similar circumstances need not be treated equally; due process is denied because this results in unfair treatment. Non-publication inevitably leads to corruption due to the fact that inconsistent judgments can be concealed by a failure to publish the judgment inconsistent with the general law.

The Anastoff case correctly cited the law according to the Constitution. All decisions of the Courts are legal opinions regardless of whether they are published or not. All decisions of the courts should be consistent with the Constitution and the laws and with each other whether published or not. Under such a system, citing cases should not depend upon whether or not the legal decisions are published. The Judge in Anastoffcorrectly stated that a judge who decides the law honestly (whether accurately or not) has nothing to fear from an open system wherein every legal decision is the published and is the law of the land.

In contrast; the Hart decision by Judge Alex Kozinksi is a mask for corruption of the law. The Hart "decision" was never argued in court. No opportunity was given to address the points made therein. This lengthy "opinion" was

intended to counter the arguments in the Anastoff case. But it not a legal decision. It is nothing more than judicial legislation disguised as an opinion. Judges don't have the power to make law; judges can only decide law. Why did Judge Kozinski write such an opinion in the first place.

The Judge in Anastoff stated that a judge who decides the law honestly has nothing to fear from publishing all decisions. But Judge Kozinski does have something to fear. As an alumni of the University of California, Judge Kozinski sat in the biggest scandal in the history of the University of California and used the non-publication rule to sweep the case under the rug. Cf., Coutin v. The President of the University of California, U.S. Sup. No. 89-6102. The plaintiff in that case was barred from bringing any further cases by the enactment in 1990 of the Bill of Attainder. California S.B. 2675 of 1990, amending CCCP Section 391, et seq. This statute created a list of people who had no legal right to file any lawsuits in the courts of the state of California. The state list is incorporated into the federal list by rules of court in the Eastern District of California and by the Central District of California.

As a result of the enactment of this statute designed to cover-up unlawful conduct by members of the judiciary in one case a statute resulted which could then victimize other people. A plaintiff whose action was dismissed in state court for discrimination in employment under that statute then filed a federal action against the airline in question. Sitting as judge, Alex Kozinski stated that the prior state action did not bar federal action from going forward because the statute on its face, stated that a dismissal under California Code of Civil Procedure Section 391, et seq., was not on the merits. Wright v. United Air Lines.

However, a short time later, Larry Neuton filed an appeal from a federal case in which the constitutionality of CCCP 391 was placed in question. That issue was never actually litigated in the state court where it was used against Mr. Neuton; furthermore, Mr. Neuton was denied the opportunity to litigate that issue in the state trial court and on appeal from the decision of the state trial court. Mr. Neuton filed an appeal with the Legislative History stating that the record showed that the statute was a bill of attainder against Gary Michael Coutin (being myself). I became acquainted with Mr. Neuton when I came across his brief in the 9th Circuit on the constitutionality of CCCP Section 391 in which he mentioned my name.

Judge Kozinski treated the state proceedings in the Neuton case as a bar on the merits even though his own decision in the Wright case was to the contrary. The state statute says that a case dismissed under CCCP 391.2 is not on the merits. Mr. Neuton's earlier case was a breakthrough precedent in the law and is cited in Scotton Trusts. Mr. Neuton is not an attorney, but he makes valid and cogent arguments of law. But Mr. Neuton lost a valuable federal right due to the unequal application of the law by Judge Kozinski.

An honest judge has nothing to fear from glasnost and openness of the legal decision making process. Judge Kozinski does have much to fear in this regard. There is strong evidence to suggest that he wrote the Hart decision because I brought up the contradictions between the Wright and Neuton cases in another case pending before the 9th Circuit involving Jim Dimov.

Moreover, the issue whether the panel of judges is bound by its own decisions published or unpublished is currently being litigated in the 9th Circuit. Wolfe v. Strankman, C00-1047 SBA; 9th Cir. No. 02-15720). In that case, the judge reversed in the Wright case (Saundra Armstrong) intentionally broke the law by disregarding the Wright opinion that decisions under CCCP 391, et seq., are not on the merits. Armstrong again treated such decisions as if they were on the merits despite the decision of the Court of Appeal freshly against her. In my *amicus* in the Wolfe Case, I have argued that the unpublished decision by Kozinski in the Wright case is binding upon the entire panel. I have argued that only an *en banc* decision can reach a contrary conclusion.

I have not yet been sanctioned by the 9th Circuit for referring that unpublished opinion. But the Committee should recognize that people who insist upon judges following their own legal decisions are subject to such punishment there exists a conflict between the Rules of Court and the Constitution itself. Judge Armstrong did refer me for sanctions to the U.S. District Court two years ago when I mentioned that she was in contempt of court for failing to follow the Wright case which had reversed her. No hearing has ever been set in that case. I asked Judge Marilyn Patel for an immediate hearing a year ago. I have yet to receive a reply.

Can attorneys cite unpublished opinions and can they be held liable for doing so? Does an attorney violate his oath to vigorously represent a plaintiff by failing to cite an unpublished decision? Why do judges get to cite unpublished decisions freely, but parties cannot? Are unpublished opinions by the Courts of Appeal binding upon the panels of the Courts of Appeal? These are all questions which should be answered by your hearings.

I think the Committee should read the decision of Anastoff very carefully for its wisdom. Due process and equal protection mandate transparency in the legal decision making process. Only a judge with something to hide would argue to the contrary.

Yours truly,

Gary Michael Coutin, Esquie

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03-AP-465
Addendum

----- Forwarded by Peter McCabe/DCA/AO/USCOURTS on 02/28/2004 11:07 AM -----

Gary Coutin
<gmcoutin2000@yahoo.com>
02/17/2004 03:26 PM

To: peter_mccabe@ao.uscourts.gov
cc:
Subject: How Unpublished Decisions Violate the Constitution

February 17, 2004

Subject: Proposed Fed.R.App.Proc. 32.1

Dear Sir,

Judges of the Federal Courts of Appeal for number less one for every million people in America. The expenditures for the entire system of justice necessary to defend our liberties is less than the cost of one stealth bomber. If caseloads are too heavy, the obvious solution is to have more judges. Hon. Stephen Reinhardt claims that "Congress double the size of the Courts of Appeals. The short changing of justice has been known for some time:

"... although the judicial branch of our government is supposed to be co-equal with the executive and legislative branches, it is often given short shrift in terms of the resources provided for it to perform its functions adequately. The truth of that statement can be documented very readily in any jurisdiction by tracing the jurisdiction's population growth against the increases in the number of trial and appellate judges over the years. The solution to court congestion and delay is not to take away the rights of certain classes of citizens by eliminating certain types of cases from the justice system. It is rather to provide the personnel and facilities which will make the system function properly."

As a result of the lack of judges, less than one person in seven is accorded due process of law by the United States Courts of Appeal in the form of a legal decision which conforms to the Constitution of the United States. In the 9th

Circuit 85% of the cases are decided by unpublished decisions. These opinions may not even be written by judges as required by Article III of the Constitution. Unpublished opinions may be written by law clerks and the level of participation or supervision by the court may be extremely law.

The rate of unpublished decisions runs higher in some circuits and lower in others. But in all circuits, the rate is extremely high. Due process of the law requires that all decisions by the court be in conformity with the laws and with the Constitutions. Therefore, equal protection of the law requires that all decisions by the court be in conformity with each other.

Judge Alex Kozinski defends the no publication rule promotes a secret and private judicial system over an open and public one. The Hart "decision" was never argued in court. No opportunity was given to address the points made therein. This lengthy "opinion" was intended to counter the arguments in the Anastoffcase. But it not a legal decision. It is nothing more than judicial legislation disguised as an opinion. Judges don't have the power to make law; judges can only decide law.

The reasoning is completely flawed since the judges must follow the Constitution. "No man is above the law." If judges can issue secret (unpublished decisions), then variance is permitted as between persons situated in similar circumstances. This is a prescription for denial of due process, equal protection. It is ultimately a recipe for corruption. Equal protection is denied because persons in similar circumstances need not be treated equally; due process is denied because this results in unfair treatment. Non-publication inevitably leads to corruption due to the fact that inconsistent judgments can be concealed by a failure to publish the judgment inconsistent with the general law.

The Rules of the Federal Courts of Appeal which bar citation to unpublished decision forbid persons affected by the law to cite to the court of law the legal decisions of that very court of law. "Lawyers may cite sonnets by Shakespeare or scenes from Spielberg for their persuasive value, but they can't cite unpublished decisions by the very appellate courts they wish to persuade." The present rules of court permitting unpublished opinions and then permitting the courts to prohibit citing those cases leads to a system where the law can be tailored to fit the parties to the court according to the will of the judge.

Such rules affects prior restraint upon the First Amendment freedom to petition – not only freedom of speech. It constitutes government censorship by an unlawful prior restraint on the right to petition. The right to petition encompasses the right to sue. ''The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.'' The right to petition is "...among the most precious of the liberties guaranteed by the Bill of Rights," and except in the most extreme circumstances citizens cannot be punished for exercising this right "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions."

No-citation rules violate attorneys' First Amendment free speech rights notwithstanding the dictum that a lawyer's free speech rights are "extremely circumscribed" within the courtroom (due to "officer of the court" doctrine). The rule can create circumstances which violate the due process guarantee of due process of law and the right to Counsel. Lawyers have a duty to clients to cite all applicable cases affecting the interest of the party to the court. Yet the court rules proscribe the citing of those relevant cases. "[i]t is unthinkable to compare the state's interest in protecting fair trials with the interests asserted in the case of no-citation rules, especially because no-citation rules ultimately may operate to deprive litigants of a fair trial." The attorney must choose between citing the cases under the oath to uphold the Constitution and in accord with the rules of ethical duties to the client or following the rule of the court which clearly constitute a restric tion on First Amendment activity.

It is time for an American *glasnost* regarding the decisions of the Federal Courts of Appeal. These courts are the second tier of courts below the Supreme Court of the United States. They are also the only level of court to review the actions of the Federal District Courts. The right to appeal is protected by the 1st Amendment of the Constitution. It was part of the common law of the United States which originated in the Declaration of Rights of 1688 enacted after the Glorious Revolution in England which placed the Monarchy under the law and the Constitution. Since the Supreme Court of the United States only hears a hundred or more of the appeals decided in the United States, the

right to have Courts of Appeal hear, decide, and publish decisions is the only effective check on the arbitrary actions of the federal district courts.

Yours truly,

Gary Michael Coutin, Esquire

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