THE COMMITTEE FOR THE RULE OF LAW
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September 13, 2005

Justice John Paul Stevens
United States Supreme Court
Washington, DC 20543

Re: Sept. 20 Judicial Conference vote on FRAP 32.1 - to allow citation of unpublished opinions.

Dear Justice Stevens:

You are scheduled to chair the Judicial Conference meeting on September 20th where the agenda includes a vote on proposed Federal Rule of Appellate Procedure ("FRAP") 32.1 -- to permit citation of unpublished appellate decisions. We write to encourage your approval of this rule.

Selective prospectivity limitations have been held unconstitutional in both civil and criminal matters, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) and *Griffith v. Kentucky*, 479 U.S. 314 (1987). Can the contrivance of making opinions uncitable avoid the ban on selective prospectivity?

Citability forces people to pay attention to court decisions for their own protection because appellate decisions inform subsequent court proceedings and may impact future decisions affecting other people. Uncitable decisions do not affect other people, and thus draw no such attention. The prohibition of citation of unpublished appellate decisions offends the expectations of the American people regarding basic due process – the right to alert courts as to how others similarly situated have been treated by the courts, and to argue for equal protection. This is the foundation argument in support of FRAP 32.1. Other reasons we find citability of all appellate decisions essential to the maintenance of the democracy include: 1) it is a significant mechanism by which the rule of law is imposed upon the judiciary; 2) it inculcates the people with the law as the press and public are encouraged to monitor the development of law; and 3) it promotes improvements in the law when court watchers push for corrections by both judicial and legislative bodies. (See our article "Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?" 7 Journal of Law and Social Challenges 233 (September 2005), available along with much other information at our group's website: www.NonPublication.com.)

The Advisory Committee on Appellate Rules twice voted to adopt FRAP 32.1, as did its member, now chief justice nominee, John Roberts. The Judicial Conference Standing Committee on Rules unanimously voted to adopt it. While Second Circuit opponents may fear that approval of FRAP 32.1 will curtail its issuance of large numbers of oral decisions they regard as not adequate to stand and be cited, we believe the better practice would be that all appellate opinions be written, and provide reasons for the decision. Rationales offered by opponents in the Ninth Circuit were investigated by the Federal Judicial Center and found to be lacking in merit. The Ninth Circuit has a no-citation rule, however Judge Tashima believes a slight majority of judges favor the proposed rule. (http://www.NonPublication.com/tashima.pdf).

We urge your support for FRAP 32.1.

Sincerely,

THE COMMITTEE FOR THE RULE OF LAW

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KENNETH J. SCHMIER, Chairman	MICHAEL K. SCHMIER, Board Member

cc: Standing Committee Chairman, Judge David Levi
Appellate Rules Committee Chairman, Judge Samuel Alito, Jr.

FAX TRANSMITTAL

To: Judge David Levi `

From: The Committee for the Rule of Law
Michael Schmier, Member
Telephone: 510-652-5450; e-mail:MichaelSchmier@aol.com

Date: September 13, 2005

Pages: 3 including this transmittal

I am faxing to you a copy of my letter faxed today to Justice John Paul Stevens.

It may be useful in your presentation to the Judicial Conference next Tuesday to know that chief justice nominee John Roberts repeatedly told the Senate Judiciary Committee on national television today that key confirmation hearing themes, stare decisis and precedent, are all about "settled expectations;" that people believe that the law is what the courts have said the law is. Proposed FRAP 32.1 is a big step toward removing the ban on citing about 80-90% of what courts say in unpublished decisions, presses the courts to follow the stated law or explain to the people the reasons for change, which then becomes new law, and thus enormously improves settled expectations.

Best regards,

MICHAEL SCHMIER