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Supreme Court Votes to Allow Citation to Unpublished Opinions in Federal Courts

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Legal Times
04-13-2006

The Supreme Court on Wednesday adopted a historic rule change that will allow lawyers to cite so-called unpublished opinions in federal courts starting next year. The new rule takes effect unless Congress countermands it before Dec. 1.

The justices' vote represents a major milestone in the long-running debate over unpublished opinions, the sometimes-cursory dispositions that resolve upward of 80 percent of cases in federal appeals courts nationwide. In some circuits these dispositions have no precedential value and cannot be cited.

"Unpublished" is a misnomer, since most of these opinions are available now on legal databases. But some federal judges have argued that if this category of opinions can be cited and used as precedent, they will take more time to decide and write, sharply increasing the backlog of cases. Many sentencing appeals, for example, are resolved by unpublished opinions. The U.S. Courts of Appeals for the 2nd, 7th, 9th, and federal circuits ban the citation of unpublished opinions outright, while six other circuits discourage it.

Under the new rule, circuits will still be able to give varying precedential weight to unpublished opinions, but they can no longer keep lawyers from citing them -- in the same way lawyers cite rulings from other circuits or other authorities, such as law review articles.

"This change will facilitate lawyers' representation of their clients, and it will facilitate the courts' informed decision of future cases," said Mark Levy of Kilpatrick Stockton, a member of an advisory committee that recommended the change. "It will also bring national uniformity to the process."

At one point in the debate, 9th Circuit Judge Alex Kozinski, the leading opponent of the rule change, said unpublished op were so designated for a reason: They are drafted "entirely" by law clerks and staff attorneys. He added, "When the peo making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washi people to go ahead and eat it anyway."

The committee Kozinski was referring to, the Advisory Committee on the Federal Rules of Appellate Procedure, was chai time by then-3rd Circuit Judge Samuel Alito Jr., and one of its members was then-D.C. Circuit Judge John Roberts Jr. Bo supported the change while on the committee, and now that both serve on the Supreme Court, Wednesday's vote may h unsurprising. There was no indication in the Court's order whether any justices dissented or did not participate.

The advisory committee's original recommendation was to allow the citation of all unpublished opinions, past and future, Judicial Conference last September added an amendment to make the rule prospective, allowing the citation only of thos issued on or after next Jan. 1. The high court adopted that amendment in the rule change it promulgated Wednesday.

Unpublished opinions first came into vogue in the 1960s as a time-saving device for appellate judges. Though the propri essentially secret judicial process has been debated for years, the catalyst for change came in 2000, when the late 8th C Judge Richard Arnold ruled in a routine case that stripping unpublished opinions of precedential value was unconstitutior because it gave judges a power not authorized by Article III of the Constitution.