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PLEASE IGNORE THIS CASE: AN EMPIRICAL STUDY OF NONPRECEDENTIAL OPINIONS IN THE FEDERAL CIRCUIT

First, you can't publish everything. Everybody seems now finally to realize that. You could if you wanted to wait six years for your decision, six years.¹

INTRODUCTION

Elizabeth Parker-Stuckey applied for a position with the Department of Treasury, but on the application form she did not disclose her prior convictions for marijuana possession and giving a false name to police.² The Department of Treasury fired Parker-Stuckey when it discovered that she lied on the application form.³ Parker-Stuckey appealed to the Merit Systems Protection Board ("MSPB").⁴ The MSPB denied her request, so she wrote a handwritten, informal appeal⁵ to the United States Court of Appeals for the Federal Circuit ("Federal Circuit").⁶ In her appeal, she argued that "this case is about justice," and that "my time has been served and this is part of my past."⁷ She wrote that she did not have "any type of warning of what was happening."⁸

The Federal Circuit determined from this appeal that Parker-Stuckey was "apparently" arguing that the procedural guidelines governing her termination were not applied properly.⁹ The Federal Circuit found that Parker-Stuckey's claims were without merit, and affirmed the MSPB's ruling in a nonprecedential, unpublished decision.¹⁰

The Federal Circuit disposes of many cases without publishing opinions. In fact, the Federal Circuit issues an average of 77%¹¹ of its opinions

¹ *Seventh Ann. Jud. Conf. of the U.S. Ct. of Appeals for the Fed. Cir.*, 128 F.R.D. 409, 420 (1989) [hereinafter *Seventh Ann. Jud. Conf.*] (statement of former C.J. Howard T. Markey).

² *Parker-Stuckey v. Dep't of Treasury*, 46 Fed. Appx. 625, 626 (Fed. Cir. 2002) (unpublished table decision).

³ *Id.*

⁴ *Id.*

⁵ *Pro se* appellants can submit Fed. Cir. R. App. I, Forms 8-13 for Informal Briefs, available at <http://www.fedcir.gov/contents.html#pdfforms> (last visited Oct. 6, 2004).

⁶ *Parker-Stuckey*, 46 Fed. Appx. at 626.

⁷ Brief for Appellant, *Parker-Stuckey v. Dep't of Treasury*, 46 Fed. Appx. 625 (Fed. Cir. 2002) (unpublished table decision) (No. 02-3189).

⁸ *Id.*

⁹ *Parker-Stuckey*, 46 Fed. Appx. at 626.

¹⁰ *Id.* at 628.

¹¹ See Table 1, *infra* Part II.A.

as “unpublished” decisions¹² (also called nonprecedential decisions), and affirmances without explanation. Parties in future litigations may not cite to these decisions in their briefs, except in limited instances.¹³

Nonprecedential opinions allow judges to forego carefully worded opinions, and to avoid spending time writing a lengthy opinion. In certain subject matter, such as the *Parker-Stuckey* personnel case, nonprecedential decisions may be justified by judicial economy. Yet the large number of nonprecedential opinions in other subject matter, specifically patent appeals, causes uncertainty by a court that was created to standardize patent law.

This comment presents the results of the first empirical study of nonprecedential opinions in each subject matter seen by the Federal Circuit. This study analyzed the 22,908 cases decided from October 1, 1982 through October 21, 2003, and found that the Federal Circuit published 23% of those decisions.¹⁴ Part I of this comment discusses the Federal Circuit’s rules allowing for nonprecedential opinions, and the constitutionality of similar rules in other federal appellate courts. Part II presents empirical research measuring the percentages of nonprecedential opinions issued across the different subject matter within the Federal Circuit’s jurisdiction. Part III provides suggestions for minimizing the adverse affects of nonprecedential opinions, particularly for patent appeals, but assesses why the Federal Circuit may be justified in issuing nonprecedential opinions for personnel appeals.

I. BACKGROUND: RULES FOR NONPRECEDENTIAL OPINIONS IN THE FEDERAL CIRCUIT

Like other federal courts of appeals, the Federal Circuit has created specific rules allowing judges to create nonprecedential and unpublished opinions, as well as rules prohibiting citation of those opinions.¹⁵ The Federal Circuit classifies its cases in three ways.¹⁶ First, the court issues prece-

¹² Although they are called unpublished opinions, these decisions may be retrieved on Westlaw and Lexis. Hon. Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909, 910 (1986) (“In no sense then, is an unpublished opinion concealed.”).

¹³ FED. CIR. R. 47.6.

¹⁴ The court designates an average of 77% of its decisions as nonprecedential. See Table 1, *infra* Part II.A.

¹⁵ FED. CIR. R. 36; FED. CIR. R. 47.6; see also Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PROC. & PROCESS 251, 253-57 tbl.1 (2001) (presenting table of citation and publication rules from all federal appellate courts).

¹⁶ See *Hamilton v. Brown*, 39 F.3d 1574, 1581 (Fed. Cir. 2000); see also FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10 (available from Clerk of Court) (noting that the court employs

dential, full opinions or orders. The court also issues two kinds of nonprecedential opinions: (1) one-sentence Rule 36 summary affirmances, and (2) opinions or orders that merit something more than a one-sentence order, but something less than a full opinion.¹⁷

A. *Nonprecedential Opinions*

1. Rule 36

The Federal Circuit created Rule 36 to allow for an affirmance without an opinion.¹⁸ When affirming an opinion under Rule 36, the court writes “Affirmed” without any other explanation, discussion of the relevant facts, or any text at all in the opinion.¹⁹ Rule 36 allows the court to use a form of disposition “where it is not necessary to explain, even to the loser, why he lost.”²⁰

Rule 36 allows the Federal Circuit to affirm when the court determines an opinion would have no precedential value, and any of five other conditions exist.²¹ For example, the Federal Circuit may issue a Rule 36 affirmance when it determines that the court below made no error of law.²² Yet, a Rule 36 affirmance does not mean that the appeal is necessarily frivolous enough to warrant sanctions.²³

only these means in disposing of matters: precedential opinions, nonprecedential opinions, precedential orders, nonprecedential orders, and Rule 36 judgments of affirmance without opinion).

¹⁷ *Hamilton*, 39 F.3d at 1581.

¹⁸ FED. CIR. R. 36 (“The court may enter a judgment of affirmance without opinion.”).

¹⁹ *See id.*

²⁰ *Seventh Ann. Jud. Conf.*, *supra* note 1, at 420 (statement of former C.J. Howard T. Markey).

²¹ If the court finds any of the following five conditions, it can issue a Rule 36 judgment: (1) the judgment appealed from is based on findings that are not clearly erroneous; (2) there is sufficient evidence to support a jury’s verdict; (3) the record supports summary judgment, directed verdict, or judgment on the pleadings; (4) the decision of an administrative agency warrants affirmance under the standard of review; or (5) there was no error of law in the judgment below. FED. CIR. R. 36.

²² FED. CIR. R. 36(e).

²³ *Sparks v. Eastman Kodak Co.*, 230 F.3d 1344, 1345 (Fed. Cir. 2000) (holding that court’s affirmance without opinion indicates court’s view that appeal lacked merit, but not necessarily that it was frivolous for purpose of award of sanctions). An appeal can be frivolous and merit sanctions if an appellant’s brief ignores controlling precedent, or fails to cite any authority to support its argument, or significantly misrepresents the law or facts. *See, e.g.*, *Finch v. Hughes Aircraft*, 926 F.2d 1574, 1579 (Fed. Cir. 1991) (issuing sanctions because no nonfrivolous arguments could be made to support appeal); *Bowen v. Dep’t of Transp., F.A.A.*, 769 F.2d 753, 755 (Fed. Cir. 1985) (imposing sanctions because petitioner’s brief for review had no case law or statutes supporting his position).

2. Other Nonprecedential Opinions

A nonprecedential opinion means that the panel issuing the opinion unanimously determined that an opinion, if published, would not add significantly to the body of law.²⁴ Thus, the panel designates the opinion as “unpublished” and therefore not citable, or nonprecedential.²⁵

The court has justified nonprecedential orders and opinions by stating that they “are used in summary dispositions of cases in which a full precedential opinion is not considered necessary.”²⁶ Further, nonprecedential decisions “do not represent the considered view of the Federal Circuit regarding aspects of a particular case beyond the decision itself.”²⁷ Thus, these nonprecedential decisions are not intended to convey the court’s view or application of law in other cases.²⁸

Perhaps in response to critics,²⁹ the court has tried to stress that nonprecedential decisions receive “due care, as do all cases before us.”³⁰ The court’s rationale in nonprecedential decisions, however, does not necessarily contain all of the relevant facts and legal authorities.³¹ The opinion or order is issued only for the benefit of the parties.³² Therefore, a nonprece-

²⁴ FED. CIR. R. 47.6(b) (“An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law.”).

²⁵ *Id.*

²⁶ *Hamilton v. Brown*, 39 F.3d 1574, 1581 (Fed. Cir. 1994) (“Nonprecedential orders and opinions are used in summary dispositions of cases in which a full precedential opinion is not considered necessary, but something more than a one-sentence Rule 36 affirmance is warranted or needed.”).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Nichols, Jr.*, *supra* note 12, at 914 (“The opposite charge is also voiced, that is, because it is to be unpublished, a decision will not receive enough work, the writing will be sloppy, and real difficulties with a position taken will be passed over in silence.”) (citing William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 COLUM. L. REV. 1167, 1200 (1978)).

³⁰ *Hamilton*, 39 F.3d at 1581. During the Thirteenth Annual Judicial Conference of the Federal Circuit, Judge Schall stated:

There may be a perception that when a case is the subject of a Rule 36 disposition that it has not received the full care and attention of the Judges who sat on the panel. Someone might think that just because they receive what is a one-page order, their case has been, if you will, given the back of the hand. I can assure you that from the vantage point of my two-and-a-half years on the court, that is certainly not the case. Cases that are the subject of those dispositions have been given full and careful care and attention.

Thirteenth Ann. Jud. Conf. of the U.S. Ct. of Appeals for the Fed. Cir., 166 F.R.D. 515, 551 (1995) [hereinafter *Thirteenth Ann. Jud. Conf.*].

³¹ *Hamilton*, 39 F.3d at 1581.

³² *Id.*; see also FED. CIR. R. V INTERNAL OPERATING PROCEDURES 9 (available from Clerk of Court); *Seventh Ann. Jud. Conf.*, *supra* note 1, at 419 (“An unpublished opinion should be, to everybody but the parties, incomprehensible and useless. It’s certainly useless as precedent.”) (statement of former C.J. Howard T. Markey).

dential order or opinion does not “support a particular position or reflect a new or changed view of the court.”³³

Many scholars and judges have argued that nonprecedential decisions give the judiciary too much latitude to essentially disregard precedent.³⁴ The Federal Circuit has countered that nonprecedential decisions “do not give the judiciary free will to reinvent the law; they merely permit a judgment about whether a case contributes significantly to the body of law.”³⁵

According to the Federal Circuit’s Internal Operating Procedures, the court publishes opinions meeting one or more of the following criteria:

- (a) The case is a test case.
- (b) An issue of first impression is treated.
- (c) A new rule of law is established.
- (d) An existing rule of law is criticized, clarified, altered, or modified.
- (e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.
- (f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued.
- (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
- (h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth.
- (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.
- (j) A new constitutional or statutory issue is treated.
- (k) A previously overlooked rule of law is treated.
- (l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise.
- (m) The case has been returned by the U.S. Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court.
- (n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.³⁶

³³ *Hamilton*, 39 F.3d at 1581.

³⁴ See *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th Cir. 2000) (holding that no-citation rules are unconstitutional under Article III because they confer on the federal courts a legislative power), *vacated*, 235 F.3d 1054 (8th Cir. 2000); see also Marla Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1219-21 (2003) (summarizing constitutional arguments against nonprecedential opinions).

³⁵ *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002).

³⁶ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10; see also Nichols, Jr., *supra* note 12, at 916.

Additionally, the court's panel of judges must unanimously agree to issue a nonprecedential opinion.³⁷ Some scholars argue that the court rules therefore favor publication, because only one panel member's vote requires an opinion to be published.³⁸

A party can request that the court reissue the nonprecedential opinion as precedential,³⁹ but a search on this issue revealed that the Federal Circuit has only reissued an opinion as precedential twice.⁴⁰ This might be due to the rule that a reissuance requires: (1) a unanimous vote by the judges that decided the merits of the case, and (2) a revision of the original explanation; in addition, parties must file for reissue within sixty days of the nonprecedential order.⁴¹

B. *No-Citation Rules*

Parties generally may not cite to unpublished opinions, even if the cases contain similar facts and law.⁴² Other federal appellate courts allow for more liberal citation.⁴³ Almost all courts use some form of no-citation rules because of concerns about unequal access to unpublished opinions,⁴⁴ and judicial efficiency.⁴⁵

³⁷ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10.

³⁸ Hon. Paul R. Michel, *The Court of Appeals for the Federal Circuit Must Evolve to Meet the Challenges Ahead*, 48 AM. U. L. REV. 1177, 1187 (1999) [hereinafter Michel, *Evolve*].

³⁹ FED. CIR. R. 47.6(c).

⁴⁰ I searched on Westlaw in CTAF for "Fed.Cir. R.47.6(c)" or (reissu! /5 precedent!) and found two cases: *Cedillo v. United States*, 124 F.3d 1266 (Fed. Cir. 1997); *In re Cont'l Gen. Tire, Inc.*, 81 F.3d 1089 (Fed. Cir. 1996).

⁴¹ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10; FED CIR. R. 47.6(c).

⁴² FED. CIR. R. 47.6(b).

⁴³ See Serfass & Cranford, *supra* note 15, at 253-57 tbl.1 (presenting table showing that the Fifth and Eleventh Circuits allow a party to cite unpublished opinions as persuasive authority; the Tenth Circuit allows a party to cite an unpublished opinion as persuasive authority, provided that the issue has not been addressed in a precedential decision; and the Fourth, Sixth, and Eighth Circuits allow a party to cite an unpublished decision, if the party believes that the opinion has precedential value and there is no published opinion that would serve as well).

⁴⁴ See Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 404 (2002) (noting that the Hruska Commission feared that publication would "result in a secret body of applicable and pertinent law available only to certain advantaged litigants and the courts before which they routinely appeared") (quoting Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals*, 87 MICH. L. REV. 940, 946 (1989)); see also *Sixteenth Ann. Jud. Conf. of the U.S. Ct. of Appeals for the Fed. Cir.*, 193 F.R.D. 263, 452 (1999) [hereinafter *Sixteenth Ann. Jud. Conf.*] (noting that only parties who can afford to use Westlaw have access to unpublished opinions; thus, the courts may have created a body of law accessible only to large, wealthy litigants, like the government).

⁴⁵ See Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 242

Federal Circuit Rule 47.6(b) prohibits parties from citing any nonprecedential decision as authority.⁴⁶ However, this rule does not preclude a party from citing the nonprecedential opinion for “claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like.”⁴⁷

When parties have cited to nonprecedential decision in their briefs, the court has found violations of Federal Circuit Rule 47.6(b).⁴⁸ The court also called the citations “misleading” and “miscitations” because they did not acknowledge the nonprecedential status of the case.⁴⁹ The court concluded “we condemn such behavior.”⁵⁰ The Federal Circuit has not yet issued sanctions against attorneys who cite nonprecedential authority, although the court is willing to sanction even “inadvertent” citations of nonprecedential authority.⁵¹

C. *Subject Matter Jurisdiction in the Federal Circuit*

Subject matter specialized courts like the Federal Circuit are created to help avoid inconsistency by limiting the number of precedential opinions in a specific subject matter.⁵² For example, before the Federal Circuit, the federal appellate courts created forum-shopping problems;⁵³ some circuits were

(1998) (noting that without a no-citation rule, judges will spend more time writing opinions because they will be cited, and judicial costs will consequently increase). *But see* Steven A. Fredley, Note, *Anastasoff v. United States: Nonprecedential Precedent, Judicial Power, and Due Process: A Case for Maintaining The Status Quo*, 10 GEO. MASON L. REV. 127, 136 (2001) (noting that arguments against selective publication and no-citation rules include: “(1) that claims of increased efficiency are unsupported; (2) that the rules decrease judicial accountability; (3) that review by a higher court is less likely when an opinion is unpublished; (4) that certain litigants retain an unfair advantage despite a no-citation rule; and (5) that each opinion is precedent”).

⁴⁶ FED. CIR. R. 47.6(b).

⁴⁷ *Id.*

⁴⁸ *SGS-Thomson Microelectronics v. Int’l Rectifier Corp.*, 32 U.S.P.Q.2d 1496, 1504 (Fed. Cir. 1994) (unpublished table decision).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *In re Violation of Rule 28(c), Misc. No. 774*, slip op. at 3 (Fed. Cir. Nov. 5, 2004) (per curiam), available at <http://www.fedcir.gov/opinions/misc774o.pdf> (last visited Nov. 18, 2004). A search on Westlaw in CTAF for (sanction /s non-precedent!) resulted in two hits, but neither case imposed sanctions on a party for citing nonprecedential opinions. Generally, the federal appellate courts seem reluctant to sanction attorneys for citing nonprecedential opinions; the courts will only impose sanctions if the attorney’s citation was “willful.” *See, e.g., In re Bagdade*, 334 F.3d 568, 583 (7th Cir. 2003); *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001); *Sorchini v. City of Covina*, 250 F.3d 706 (9th Cir. 2001).

⁵² *See* William M. Richman, *Elitism, Expediency, and The New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 319 (1996).

⁵³ Comm’n on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, *reprinted in* 67 F.R.D. 195, 217-20 (1975) [hereinafter Hruska Report] (noting that forum shopping under the old system demeaned the patent system).

considered “pro-patent” and others “anti-patent.”⁵⁴ Thus, there was no court capable of creating uniform patent law.⁵⁵

Congress created the Freund and Hruska Commissions to study the number of cases appealed to federal courts and the Supreme Court.⁵⁶ The Commissions found that filings in federal courts had increased substantially but judgeships had not increased at all.⁵⁷ To avoid serious backlogs due to the increased caseload, courts extensively restricted oral argument, eliminated judges’ conferences from the decision-making process, and, interestingly, made decisions “without any indication of the reasoning impelling the result.”⁵⁸ The Commission also found four major consequences of the lack of capacity to deal with the caseload: circuit splits on issues of national law, delay, burden on the Supreme Court to resolve circuit splits, and uncertainty even without circuit splits.⁵⁹ The Hruska Commission therefore recommended a national court of appeals,⁶⁰ and Congress created the Court of Appeals for the Federal Circuit on October 1, 1982.⁶¹

Critics worried that specialization would produce a court with tunnel vision, judges who are overly sympathetic to the policies promoted by the law that they administer, or judges who are biased in favor of the attorneys that regularly appear before them.⁶² Critics thought that this isolation, along with the repetitive nature of the workload, would not attract the most talented judges.⁶³ Partly out of appreciation for these dangers of specialization,

⁵⁴ Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 891 n.4 (2001) [hereinafter Moore, *Forum Shopping*].

⁵⁵ Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 66 (1989) (noting that the Supreme Court had not regularly reviewed patent cases).

⁵⁶ Act of Oct. 13, 1972, Pub. L. No. 92-849, 86 Stat. 807, amended by Act of Sept. 19, 1974, Pub. L. No. 93-420, 88 Stat. 1153 (codified at 28 U.S.C. § 41 (2000)).

⁵⁷ Hruska Report, *supra* note 53, at 205 (“The experience of the past five years is particularly instructive. Filings increased by more than [60%], yet not a single judgeship was added.”).

⁵⁸ *Id.* at 205.

⁵⁹ *Id.* at 217-19.

⁶⁰ *Id.* at 199.

⁶¹ See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

⁶² Dreyfuss, *supra* note 55, at 3; see also Randall A. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1006 (1991) (noting that critics of the specialized court worried that it would: (1) fracture subject areas of law; (2) place all venue in one distant court; (3) risk capture of a court by one class of litigants, or one viewpoint; and (4) generally inhibit common law development).

⁶³ Dreyfuss, *supra* note 55, at 3. Only four judges on the court have a technical background: Judges Lourie, Newman, Gajarsa, and Linn. U.S. Court of Appeals for the Federal Circuit, *Judicial Biographies: Judges of the Federal Circuit*, available at <http://www.fedcir.gov/judgbios.html> (last visited Oct. 6, 2004). The Federal Circuit judges do hire law clerks with technical backgrounds. See Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 18 n.72 (2001) [hereinafter Moore, *District Court Judges*] (citing Jonathan Ringel, *Federal Circuit’s Scientific Method: Coveted Judicial Clerkships Draw Pool of Candidates with Technical Backgrounds to Match the Court’s Docket*, LEGAL TIMES, Nov. 6, 2000, at 10 (noting that twenty-five of thirty-six law clerks from the Federal Circuit had a science or engineering background)).

Congress did not limit the Federal Circuit's jurisdiction to patent cases.⁶⁴ Instead, the Federal Circuit has exclusive appellate jurisdiction over:

(a) Patent, trademark and copyright appeals from district courts, and patent and trademark appeals from the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office;⁶⁵

(b) Appeals from Merit Systems Protection Board cases;⁶⁶

(c) Suits against the United States for money in the district court and in the United States Court of Federal Claims (except cases under the Federal Tort Claims Act);⁶⁷

(d) Appeals from decisions of the International Trade Commission, United States Court of International Trade, and under the Tariff Act;⁶⁸

(e) Appeals from the Board of Contract Appeals, and cases under the Contract Disputes Act of 1978;⁶⁹

(f) Appeals from decisions of the Secretary of Veterans' Affairs and the Court of Appeals for Veterans' Claims;⁷⁰

(g) Vaccine cases arising under the National Childhood Vaccine Injury Act;⁷¹

(h) Appeals that previously went to the Temporary Emergency Court of Appeals;⁷²

(i) Certain employment-related claims, including discrimination claims against the Senate, the House of Representatives, the White House, and various federal agencies.⁷³

⁶⁴ Dreyfuss, *supra* note 55, at 4.

⁶⁵ 28 U.S.C. § 1295(a)(1), (4), (8) (2000).

⁶⁶ *Id.* § 1295(a)(9).

⁶⁷ *Id.* § 1295(a)(2)-(3).

⁶⁸ *Id.* § 1295(a)(5)-(7).

⁶⁹ *Id.* § 1295(a)(10), (b), (c).

⁷⁰ Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102(a)(1), 301(a), 102 Stat. 4105, 4106, 4120-21 (codified at 38 U.S.C. § 502 (2000) (authorizing Federal Circuit review of regulations made by the Secretary of Veterans' Affairs); U.S.C. § 7292 (authorizing Federal Circuit review of Court of Veterans' Appeals decisions)).

⁷¹ Vaccine Compensation Amendments of 1987, Pub. L. No. 100-203, 4307(3)(C), 101 Stat. 1330-221, 1330-224, amended by Pub. L. No. 100-360, 411(o)(2), 102 Stat. 683, 808 (1988) (codified as amended at 42 U.S.C. § 300aa-12(f) (2000)).

⁷² Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 102, 106 Stat. 4506, 4507 (codified at 28 U.S.C. § 1295(a)(11)-(a)(14) (2000)).

⁷³ Presidential and Executive Office Accountability Act of 1996, Pub. L. No. 104-331, 2(a), 3(a), 110 Stat. 4053, 4063, 4068-69 (codified at 3 U.S.C. § 425(c)(5), 454(b)(3) (2000)); *see also* Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 591 (2003) (noting that Congress has expanded the Federal Circuit's jurisdiction in four significant areas since 1982, and Congress has never removed jurisdiction from the court).

D. *Recent Decisions in Other Federal Circuit Courts of Appeals*

Other federal appellate courts have varying standards for citing non-precedential authority,⁷⁴ and the constitutionality of those rules is widely debated. The Eighth Circuit prohibited no-citation rules in *Anastasoff v. United States*,⁷⁵ reasoning that such rules confer a greater power on federal courts than the power granted by Article III.⁷⁶ *Anastasoff* reasoned that precedent was a judicial power to determine the law, established at the time the Constitution was created, and limited by Article III.⁷⁷ The judicial power “to determine law” is a power only to determine what the law is, not to invent it; and because precedent is the best guide of what the law is, precedent limits judicial power.⁷⁸

Additionally, precedent is also necessary to separate the legislative and judicial functions.⁷⁹ If judges had legislative power to disregard established law, judges could regulate legal decisions by their own opinions.⁸⁰ *Anastasoff* also dismissed the argument that judges do not have enough time to treat every opinion as precedent.⁸¹ The court suggested that if judges do not have enough time, then more judgeships should be created, or judges should take the time to issue precedential opinions, and “if this means that backlogs will grow, the price must still be paid.”⁸²

One year later, the Ninth Circuit upheld the constitutionality of no-citation rules in *Hart v. Massanari*⁸³ when it held that Article III does not require federal courts to treat all of their decisions as binding precedent.⁸⁴ The Ninth Circuit found that the extent to which a circuit opinion is binding within that circuit is a matter of judicial policy.⁸⁵

In *Hart*, Judge Kozinski found that nonprecedential opinions are constitutional, and a matter of judicial policy.⁸⁶ *Hart* disagreed with the suggestion in *Anastasoff* that the Constitution dictates that every “declaration of

⁷⁴ See Serfass & Cranford, *supra* note 15, at 253-57 tbl.1.

⁷⁵ *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (holding that every written opinion in the circuit would have precedential effect), *vacated*, 235 F.3d 1054 (8th Cir. 2000). However, the Eighth Circuit later vacated the ruling as moot because the government paid the taxpayer a refund, and the government agreed to follow the rule that the taxpayer suggested. *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000).

⁷⁶ See *Anastasoff*, 223 F.3d at 899.

⁷⁷ *Id.* at 900-01.

⁷⁸ *Id.*

⁷⁹ *Id.* at 901.

⁸⁰ *Id.*

⁸¹ *Id.* at 904.

⁸² *Anastasoff*, 223 F.3d at 904.

⁸³ *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

⁸⁴ *Id.* at 1173.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1175.

law . . . must be applied in subsequent cases to similarly situated parties.”⁸⁷ If that reasoning were correct, Judge Kozinski stated, the Second Circuit could not disagree with a ruling of the Eighth Circuit that was directly applicable.⁸⁸

Judge Kozinski added that binding precedent can deprive the law of “flexibility and adaptability,” and give too much weight to the first case to raise an issue.⁸⁹ Further, nonprecedential decisions allow courts to experiment with different approaches to one legal problem.⁹⁰ Therefore, a court can allow an issue to percolate by using nonprecedential decisions, just as the Supreme Court does when it reviews an issue and has the benefit of different decisions and reasoning from lower courts.⁹¹

The Federal Circuit has chosen to follow *Hart*.⁹² Now, like the Ninth Circuit, the Federal Circuit can justify its use of nonprecedential decisions as a means to experiment with different solutions before choosing a binding approach to a legal issue. Many scholars have analyzed the constitutionality of no-citation rules in federal appellate courts.⁹³ This comment focuses primarily on the practical considerations surrounding no-citation rules and their effect on the different subject matter involved in cases appealed to the Federal Circuit.

II. EMPIRICAL RESULTS

A. *The Data Collected*

The Federal Circuit does not maintain statistics concerning its use of nonprecedential opinions,⁹⁴ although the Administrative Office of the

⁸⁷ *Id.* at 1176 (quoting *Anastasoff*, 223 F.3d at 900).

⁸⁸ *Id.* at 1175.

⁸⁹ *Hart*, 266 F.3d at 1155.

⁹⁰ *Id.* at 1173.

⁹¹ *Id.*

⁹² *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361, 1367 (Fed. Cir. 2002).

⁹³ See, e.g., Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1 (2002) (arguing that Judge Kozinski's arguments against no-citation rules are inadequate); Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003) (arguing that the constitutionality and wisdom of no-citation rules depend on a conception of stare decisis); Tusk, *supra* note 34, at 1219-21 (summarizing constitutional arguments against nonprecedential opinions).

⁹⁴ *Sixteenth Ann. Jud. Conf.*, *supra* note 44, at 451. The Federal Circuit does not publish its median time dispositions either, although the Administrative Office of the U.S. Courts maintains these statistics for all of the other federal appellate courts. For median time dispositions for other federal circuit courts of appeals, see *Report of the Judicial Conference*, 2002 ADMIN. OFFICE U.S. CTS. 96

United States Courts maintains these statistics for all of the other federal appellate courts.⁹⁵ Tables 1-2 represent the first empirical study of nonprecedential decisions in the Federal Circuit by subject matter.

I used Westlaw to find all cases terminated by any means in the Federal Circuit during the period from the court's creation October 1, 1982, through October 21, 2003 (22,908 cases).⁹⁶ I sorted, by subject matter, all cases that the court terminated with Federal Circuit Rule 36 affirmances.⁹⁷ Next, I sorted the other nonprecedential cases by subject matter, for each calendar year (17,709 cases).⁹⁸ I also calculated the total number of opin-

tbl.B-4, available at <http://www.uscourts.gov/judbus2002/appendices/b04sep02.pdf> (last visited Oct. 6, 2004).

⁹⁵ *Report of the Judicial Conference*, 2002 ADMIN. OFFICE U.S. CTS. 96 tbl.S-3, available at <http://www.uscourts.gov/judbus2002/tables/s03sep02.pdf> (last visited Oct. 6, 2004).

⁹⁶ I searched in Westlaw in CTAF for: co(fed) & da(bef 10/22/2003) & da(aft 9/30/1982) and retrieved 22,908 hits. The Administrative Office of the United States Courts compiles statistics on terminated cases by subject matter per fiscal year, so their figures vary from these figures, which are calculated per calendar year. *Report of the Judicial Conference*, 1990 ADMIN. OFFICE U.S. CTS. 244 tbl.G-2 (reporting appeals from June 30 through June 30 of each year).

⁹⁷ To find all Rule 36 affirmances, I conducted a search on Westlaw in CTAFEDU using the following terms:

- i. Total: "Fed. Cir. R.36" & DA(BEF 10/22/2003) (844 Docs) (1 is "recall").
- ii. CVA: 51 - "FED. CIR. R.36" & DA(BEF 10/22/2003) & (CVA veteran!) % (contact contract-appeal BCA) % (international-trade ITC CIT) % (MSPB MERIT-SYSTEM arbitrator).
- iii. BCA: 53 - "FED. CIR. R.36" & DA(BEF 10/22/2003) & (contact contract-appeal BCA) % (international-trade ITC CIT) % (MSPB MERIT-SYSTEM arbitrator).
- iv. CFC: 113 - "FED. CIR. R.36" & DA(BEF 10/22/2003) & (CFC federal-claims) % (CVA veteran!) % (contact contract-appeal BCA) % (international-trade ITC CIT) % (MSPB MERIT-SYSTEM arbitrator)
- v. Senate: 1 "FED. CIR. R.36" & DA(BEF 10/22/2003) & senate.
- vi. Compliance: 1 - "FED. CIR. R.36" & DA(BEF 10/22/2003) & compliance.
- vii. CIT: 18 - "FED. CIR. R.36" & DA(BEF 10/22/2003) & (international-trade ITC CIT) % (MSPB MERIT-SYSTEM arbitrator).
- viii. DCT: 237 - "FED. CIR. R.36" & DA(BEF 10/22/2003) & (DCT "Dist.Ct" "District Court") % (CFC federal-claims) % (CVA veteran!) % (contact contract-appeal BCA) % (international-trade ITC CIT) % (MSPB MERIT-SYSTEM arbitrator).
- ix. PTO: 94 - "FED. CIR. R.36" & DA(BEF 10/22/2003) & (patent trademark PTO) % (DCT "Dist.Ct" "District Court") % (CFC federal-claims) % (CVA veteran!) % (contact contract-appeal BCA) % (international-trade ITC CIT) % (MSPB MERIT-SYSTEM arbitrator)
- x. MSPB (including arbitrator): 275 - "FED. CIR. R.36" & DA(BEF 10/22/2003) & (MSPB MERIT-SYSTEM arbitrator).
- xi. Others: 1 Error/ "Recall"; 1 PTO; 11 MSPB extra.

⁹⁸ Westlaw searches per year were conducted in the following manner:

- i. To determine the total unpublished decisions for the year, I searched in CTAFEDU using the following terms: (unpublish! "table of decisions without reported opinion" "not citable") & DA(AFT 12/31/year-1) & DA(BEF 1/1/year+2) % "Fed. Cir. R.36"; (1982 started after 9/30/1982 and 2003 ended with 10/21/2003).
- ii. To find MSPB appeals (for example, in year 2002) I used the terms: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublish!) & DA(AFT 12/31/2001) & DA(BEF 1/1/2003) & (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

ions issued by subject matter each calendar year.⁹⁹ Using these figures, I calculated the percentage of nonprecedential and Rule 36 opinions per sub-

iii. BCA: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) & (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

iv. DCT: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) & (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

v. CFC: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) & (CFC "Fed.CI" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

vi. CVA: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) & (CVA "Vet.app" veteran!) % (CFC "Fed.CI" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

vii. CIT: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) & (ITC CIT "international trade") % (CVA "Vet.app" veteran!) % (CFC "Fed.CI" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

viii. PTO: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) & (patent trademark pto) % (ITC CIT "international trade") % (CVA "Vet.app" veteran!) % (CFC "Fed.CI" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

ix. EXTRA MSPB: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) & (postal personnel I.R.S. I.N.S. dept department Social "Health and human") % (patent trademark pto) % (ITC CIT "international trade") % (CVA "Vet.app" veteran!) % (CFC "Fed.CI" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

x. EXTRA patent related: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) & (inc co corp! ltd) % (postal personnel I.R.S. I.N.S. dept department Social "health and human") % (patent trademark pto) % (ITC CIT "international trade") % (CVA "Vet.app" veteran!) % (CFC "Fed.CI" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

xi. The rest were examined and counted by hand after excluding those already retrieved: ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" "NOT CITABLE" unpublsh!) & DA(AFT 12/31/2002) & DA(BEF 10/18/2003) % (inc co corp! ltd) % (postal personnel I.R.S. I.N.S. dept department Social "health and human") % (patent trademark pto) % (ITC CIT "international trade") % (CVA "Vet.app" veteran!) % (CFC "Fed.CI" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % "Fed. Cir. R.36".

⁹⁹ To find all opinions per subject for September 30, 1982 through October 21, 2003, I conducted searches on Westlaw in CTAF in the following manner:

i. MSPB: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & (MSPB M.S.P.! "merit system" arbitrator) % TI (Veteran) = 8831. Add to this search: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & ti(admin! HHS SSA GSA H.H.S. S.S.A. G.S.A.) (postal personnel I.R.S. I.N.S. dept department Social "Health and human") % (patent trademark pto) % (ITC CIT "international trade") % (CFC "Fed.CI" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % TI(Veteran) = 1322. 8831+1357 = 10188.

ject matter, by dividing the number of nonprecedential opinions by the total number of opinions in each subject. Next, I subtracted that percentage from 100% to find the percentage of published opinions per subject. Table 2 presents these percentages for each subject matter.

The data show that between October 1, 1982 and October 21, 2003, the Federal Circuit issued 16,886 nonprecedential decisions and 843 Rule 36 affirmances, for a total of 17,729 unpublished or Rule 36 opinions.

-
- ii. DCT: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % TI(Veteran) = 4657.
 - iii. PTO: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & (patent trademark pto) % (ITC CIT "international trade") % (CFC "Fed.Cl" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % TI(Veteran) = 1434. Add to this search: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & ti("in re") (inc co corp! ltd) % (postal personnel I.R.S. I.N.S. dept department Social "health and human") % (patent trademark pto) % (ITC CIT "international trade") % (CFC "Fed.Cl" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % TI(Veteran) = 1278. 1434 + 1278 = 2712.
 - iv. CFC: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & (CFC "Fed.Cl" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % TI(Veteran) = 1604. Add to that search: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & ti(U.S. US) % ti("in re") % (inc co corp! ltd) % (postal personnel I.R.S. I.N.S. dept department Social "health and human") % (patent trademark pto) % (ITC CIT "international trade") % (CFC "Fed.Cl" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % TI(Veteran) = 394. 1604 + 394 = 1998.
 - v. CVA: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & ti(veteran princiipi) = 1795.
 - vi. CIT: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & (ITC CIT "international trade") % (BCA B.C.A. "board of contract appeals") % (CFC "Fed.Cl" "Federal claims" "claims court") % (DCT "D.ct" "Dist.Ct" "district court") % (patent trademark pto) % (MSPB M.S.P.! "merit system") % TI(Veteran) = 441.
 - vii. BCA: DA(BEF 10/22/2003) & DA(AFT 9/30/1982) & (BCA B.C.A. "board of contract appeals") % (MSPB M.S.P.! "merit system") % TI(Veteran) = 996.
 - viii. The rest were examined and counted by hand after excluding those already retrieved.

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Table 1(a): Nonprecedential Decisions
from October 1, 1982 through October 23, 2003

| | <i>MSPB</i> ¹⁰⁰ | <i>DCT</i> ¹⁰¹ | <i>PTO</i> ¹⁰² | <i>CFC</i> ¹⁰³ | <i>CVA</i> ¹⁰⁴ | <i>CIT</i> ¹⁰⁵ | <i>BCA</i> ¹⁰⁶ | <i>Other</i> ¹⁰⁷ |
|------------------------------------|----------------------------|---------------------------|---------------------------|---------------------------|---------------------------|---------------------------|---------------------------|-----------------------------|
| 1982 | 0 | 0 | 13 | 45 | 0 | 3 | 0 | 0 |
| 1983 | 130 | 8 | 89 | 42 | 0 | 5 | 20 | 0 |
| 1984 | 276 | 31 | 68 | 57 | 0 | 3 | 25 | 0 |
| 1985 | 539 | 43 | 72 | 84 | 0 | 2 | 26 | 0 |
| 1986 | 756 | 47 | 74 | 59 | 0 | 2 | 24 | 0 |
| 1987 | 356 | 53 | 56 | 39 | 0 | 2 | 26 | 0 |
| 1988 | 253 | 91 | 62 | 46 | 0 | 2 | 40 | 0 |
| 1989 | 251 | 130 | 68 | 43 | 0 | 14 | 47 | 0 |
| 1990 | 261 | 152 | 58 | 38 | 1 | 8 | 48 | 1 |
| 1991 | 295 | 87 | 66 | 55 | 38 | 4 | 37 | 0 |
| 1992 | 406 | 137 | 57 | 85 | 79 | 12 | 37 | 0 |
| 1993 | 387 | 169 | 61 | 98 | 77 | 22 | 31 | 1 |
| 1994 | 607 | 197 | 34 | 106 | 96 | 33 | 48 | 0 |
| 1995 | 848 | 238 | 63 | 95 | 94 | 33 | 37 | 0 |
| 1996 | 710 | 217 | 48 | 108 | 59 | 28 | 28 | 1 |
| 1997 | 458 | 254 | 43 | 77 | 84 | 14 | 49 | 1 |
| 1998 | 404 | 267 | 17 | 95 | 110 | 13 | 23 | 0 |
| 1999 | 445 | 252 | 31 | 60 | 130 | 15 | 16 | 3 |
| 2000 | 454 | 272 | 16 | 65 | 147 | 5 | 9 | 0 |
| 2001 | 355 | 290 | 24 | 33 | 133 | 3 | 6 | 0 |
| 2002 | 388 | 305 | 20 | 45 | 77 | 5 | 13 | 0 |
| 2003 | 314 | 267 | 11 | 31 | 66 | 8 | 5 | 0 |
| <i>R.36</i> | 275 | 237 | 94 | 113 | 51 | 18 | 53 | 2 |
| <i>Total Nonpre- cedential</i> | 9,168 | 3,744 | 1,145 | 1,519 | 1,242 | 254 | 648 | 9 |
| <i>Total Opinions</i> | 10,188 | 4,760 | 2,712 | 1,998 | 1,795 | 441 | 996 | 18 |

¹⁰⁰ Merit Systems Protection Board appeals.

¹⁰¹ District Court appeals (all patent cases).

¹⁰² Patent and Trademark Office appeals (includes appeals from the Trademark Trial and Appeal Board, and the Board of Patent Appeals and Interferences).

¹⁰³ Includes appeals from United States Court of Federal Claims, formerly known as the U.S. Claims Court.

¹⁰⁴ Includes appeals from Court of Appeals for Veterans' Claims and the Department of Veterans' Affairs.

¹⁰⁵ Includes appeals from Court of International Trade and the International Trade Commission.

¹⁰⁶ Board of Contract Appeals.

¹⁰⁷ Includes appeals from Office of Compliance, Writs, the Senate Select Committee on Ethics and any other subject.

Table 1(b) (Totals): Nonprecedential Decisions
from October 1, 1982 through October 23, 2003

| | <i>Total Nonprecedential</i> | <i>Total</i> ¹⁰⁸ | <i>Total percentage per year</i> |
|----------------------------------|----------------------------------|-----------------------------|--------------------------------------|
| 1982 | 61 | 87 | 70% |
| 1983 | 294 | 478 | 62% |
| 1984 | 460 | 705 | 65% |
| 1985 | 766 | 1,050 | 73% |
| 1986 | 962 | 1,263 | 76% |
| 1987 | 532 | 787 | 68% |
| 1988 | 494 | 730 | 68% |
| 1989 | 553 | 737 | 75% |
| 1990 | 567 | 773 | 73% |
| 1991 | 582 | 790 | 74% |
| 1992 | 813 | 986 | 83% |
| 1993 | 846 | 1,084 | 78% |
| 1994 | 1,121 | 1,495 | 75% |
| 1995 | 1,408 | 1,710 | 82% |
| 1996 | 1,199 | 1,420 | 84% |
| 1997 | 980 | 1,293 | 76% |
| 1998 | 929 | 1,246 | 75% |
| 1999 | 952 | 1,309 | 73% |
| 2000 | 968 | 1,356 | 71% |
| 2001 | 844 | 1,278 | 66% |
| 2002 | 853 | 1,242 | 69% |
| 2003 | 702 | 1,089 | 64% |
| R.36 | 843 | | |
| <i>Total Nonprecedential</i> | 17,729 | | |
| <i>Total Opinions</i> | | 22,908 ¹⁰⁹ | 77% ¹¹⁰ |

¹⁰⁸ This column represents the court's total opinions per year, including Rule 36 orders.

¹⁰⁹ To find the total nonprecedential opinions, I searched in Westlaw in CTAF for: co(fed) & da(bef 10/22/2003) & da(aft 9/30/1982) = 22,908; this total is also equal to the sum of this column.

¹¹⁰ Dividing the total number of nonprecedential opinions (17,729) by the total opinions (22,908) = 77%.

Table 2: Percentages of Nonprecedential Opinions Per Subject Matter

| | <i>MSPB</i> | <i>DCT</i> | <i>PTO</i> | <i>CFC</i> | <i>CVA</i> | <i>CIT</i> | <i>BCA</i> |
|-------------------------------------|-------------|------------|------------|------------|------------|------------|------------|
| % <i>Unpublished</i> ¹¹¹ | 90% | 79% | 42% | 76% | 69% | 58% | 65% |
| % <i>Published</i> ¹¹² | 10% | 21% | 58% | 24% | 31% | 42% | 35% |

Figure 1: Total Percentage of Nonprecedential Opinions Per Year

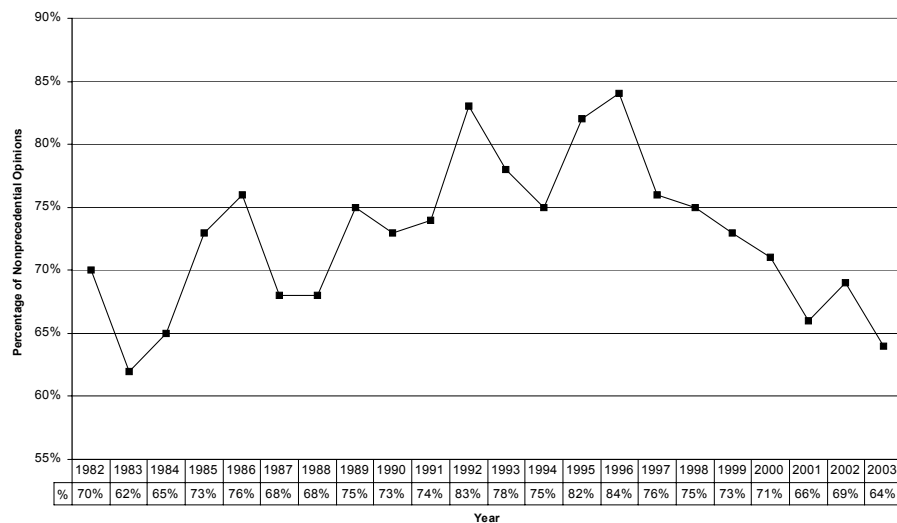


Table 1 also presents the percentage of total nonprecedential opinions per year from October 1, 1982 through October 21, 2003. The Federal Circuit issues an average of 77% of its opinions as nonprecedential,¹¹³ this percentage, however, varies each year, as illustrated by Figure 1. For example, in 1996, the Federal Circuit issued about 84% of its opinions as nonprecedential, whereas in 2002, it issued only 69% as nonprecedential opinions.¹¹⁴ Although the court's pending caseload has grown 13% since 1997,¹¹⁵ the

¹¹¹ This row represents the percentage of unpublished opinions for each subject. These figures are found by dividing the number of unpublished opinions per subject matter by the total number of opinions in that subject matter.

¹¹² This row represents the percentage of published opinions for each subject. These figures are found by subtracting the nonprecedential opinions from 100%.

¹¹³ $17,729/22,908 = 77\%$.

¹¹⁴ See Fig. 1.

¹¹⁵ On average, the Federal Circuit sees 33% of its caseload from MSPB appeals, 29% from the district court level, and 17% from the Court of Federal Claims. *Federal Judicial Caseload: Recent*

court seems to be publishing more of its decisions in the past six years. This could be due to increased pressure to publish cases.

B. *The Federal Circuit Compared to Other Circuit Courts of Appeals*

One judge speculated that the high number of nonprecedential opinions in the Federal Circuit was due to differences in the nature of the Federal Circuit compared to other federal appellate courts, including the large percentage of *pro se*¹¹⁶ appeals, and the high ratio of cases decided with published opinions at the trial level.¹¹⁷ According to the Administrative Office of the United States Courts, 80% of other federal appellate decisions in 2002 were unpublished, excluding the Federal Circuit.¹¹⁸ The highest percentage of nonprecedential decisions in 2002 came from the Fourth Circuit, which issued almost 92% of its decisions as unpublished; the First Circuit issued the lowest percentage of nonprecedential decisions in 2002 (45%).¹¹⁹ As Table 1 shows, the Federal Circuit issued only 69% of its decisions as nonprecedential in 2002.

Thus, the Federal Circuit appears to issue fewer nonprecedential decisions, on average, than most other federal appellate courts. This figure is likely due to the low percentage of unpublished decisions from the Patent and Trademark Office (42%), which reduces the court's average nonpublication rate.

C. *Empirical Results by Subject Matter*

1. Merit Systems Protection Board Appeals

As Table 2 shows, the court published only 10% of MSPB appeals.¹²⁰ This result is likely explained by the high percentage of *pro se* appellants in this category. Most *pro se* cases, like the *Parker-Stuckey* appeal, have more straightforward facts than other appeals. Some have reasoned that many MSPB appeals have little arguable merit and there is little for the court to discuss.¹²¹ The statistics seem to support this theory.

Trends, 2001 ADMIN. OFFICE U.S. CTS. 7, available at <http://www.uscourts.gov/recenttrends2001/20015yr.pdf> (last visited Oct. 6, 2004).

¹¹⁶ "Pro se" means "on one's own behalf." BLACK'S LAW DICTIONARY 1258 (8th ed. 2004).

¹¹⁷ Nichols, Jr., *supra* note 12, at 922.

¹¹⁸ *Report of the Judicial Conference*, 2002 ADMIN. OFFICE U.S. CTS. 39 tbl.S-3, available at <http://www.uscourts.gov/judbus2002/tables/s03sep02.pdf> (last visited Oct. 6, 2004).

¹¹⁹ *Id.*

¹²⁰ See Table 2, *supra* Part II.A.

¹²¹ *Thirteenth Ann. Jud. Conf.*, *supra* note 30, at 550.

Many *pro se* appellants write handwritten, informal briefs,¹²² often with no knowledge of the law, and recite vague, unresponsive, and seemingly extreme charges.¹²³ The *Parker-Stuckey* case is just one of many examples.¹²⁴ The court can save some time by disposing of these cases with Rule 36 orders and other nonprecedential decisions. Thus, when MSPB appeals contain simple facts, and when the issue has been clearly decided by the MSPB, a Rule 36 decision seems appropriate.¹²⁵

Further, Federal Circuit judges have stated that the MSPB “does a very good job” and the court reviews the MSPB’s work under exceptionally deferential standards.¹²⁶ Consequently, reversals are rare (about 5%), and “very frequently there is little to be said.”¹²⁷

2. Patent Appeals

Patent appeals from district courts and the Patent and Trademark Office (“PTO”) accounted for 32% of filings in the Federal Circuit in fiscal year 2001.¹²⁸ Given the complicated nature of most patent appeals,¹²⁹ and

¹²² See *supra* note 5.

¹²³ See, e.g., Lisa A. Mednick, *Awarding Fees to the Self-Represented Attorney Under the Freedom of Information Act*, 53 GEO. WASH. L. REV. 291, 309 (1985) (“*Pro se* litigants often submit ‘inartfully drawn, unclear, and equivocal’ pleadings”) (quoting *Estelle v. Gamble*, 429 U.S. 97, 112 (1976) (Stevens, J., dissenting)); Brief for Appellant, *Spigner v. Dep’t of Air Force*, 25 Fed. Appx. 83 (Fed. Cir. 2001) (unpublished table decision) (No. 01-3062). In response to the question, “What action do you want the court to take in this case?” one *pro se* appellant wrote, “I crave for justice in this case I also is disappointed and disturbed that the court has been misled throughout this entire process by the Agency.” Brief for Appellant, *Spigner v. Dep’t of Air Force*, 25 Fed. Appx. 83 (Fed. Cir. 2001) (unpublished table decision) (No. 01-3062).

¹²⁴ It seems impossible to determine from Westlaw and Lexis how many appeals to the Federal Circuit come from *pro se* appellants. For example, a search on Westlaw in CTAF for: (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED” “NOT CITABLE” “Fed. Cir. R.36” & DA(AFT 9/30/1982) & DA(BEF 10/21/2003) & (MSPB “MERIT SYSTEM” M.S.P.!) & “PRO SE”) would not recover all *pro se* appeals.

¹²⁵ During the Thirteenth Annual Judicial Conference of the Federal Circuit, Judge Michel stated: When a Rule 36 summary affirmance without opinion is issued, in the case for example where the board dismissed a personnel appeal because it was filed after a statutory deadline which permits of no waiver, there is no dispute about what the date was, there is no dispute that there is no waivability, and the only possible outcome is predetermined. In such a case I think a Rule 36 disposition is quite appropriate.

Thirteenth Ann. Jud. Conf., *supra* note 30, at 550; cf. *Robel*, *supra* note 44, at 406 (“For the most part, the myth that there exist great batches of redundant unpublished appellate cases is true only in certain discrete areas of law where meritless cases are litigated even to appeal.”).

¹²⁶ *Thirteenth Ann. Jud. Conf.*, *supra* note 30, at 550 (statement of J. Paul R. Michel). The Federal Circuit will generally only set aside an MSPB action if it is arbitrary, an abuse of discretion, obtained without required procedures, or unsupported by evidence. See 5 U.S.C. § 7703(c) (2000).

¹²⁷ *Thirteenth Ann. Jud. Conf.*, *supra* note 30, at 550 (statement of J. Paul R. Michel).

¹²⁸ See *Report of the Judicial Conference, 2002 ADMIN. OFFICE U.S. CTS. 114 tbl.B-8, available at* <http://www.fedcir.gov/pdf/b08sep02.pdf> (last visited Oct. 6, 2004); see also Table 1, *supra* Part II.A.

the high rate of reversal of district court claim construction,¹³⁰ it is surprising that the Federal Circuit publishes less than a quarter of patent appeals from district courts. Yet, the court publishes 58% of appeals from the PTO.¹³¹ Overall, the court publishes 35% of all patent appeals.¹³² Excluding Rule 36 orders, which do not contain any rationale, the court decides 61% of patent appeals as nonprecedential opinions with at least some discussion of the relevant facts and law.¹³³ For example, the court writes at least some opinion for approximately 230 patent appeals each year,¹³⁴ but the court chooses not to publish those opinions.

3. Veterans, Court of Federal Claims, Board of Contract Appeals, International Trade, and Other Appeals

The Federal Circuit publishes 24% of appeals from the United States Court of Federal Claims and 31% of veterans' ("CVA") appeals.¹³⁵ CVA appeals¹³⁶ accounted for 24% of appeals filed in fiscal year 2001.¹³⁷ Many CVA appeals come from *pro se* appellants, who write handwritten, informal briefs,¹³⁸ often with no knowledge of the law, like MPSB appellants.

(showing patent appeals filed from the DCT and PTO (480 + 81) divided by total appeals filed (1748) equals 32%).

¹²⁹ Moore, *Forum Shopping*, *supra* note 54, at 933 (presenting statistics that show patent cases are more complex than most civil case filings).

¹³⁰ Moore, *District Court Judges*, *supra* note 63, at 2 ("[D]istrict court judges improperly construe patent claim terms in 33% of the cases appealed to the Federal Circuit. . . . The data show that errors in district court claim constructions require reversing or vacating judgments in 81% of these cases.").

¹³¹ See Table 2, *supra* Part II.A.

¹³² This figure was calculated by adding the PTO and DCT unpublished opinions (3744 + 1145) and dividing by the total opinions from PTO and DCT (4,760 + 2,712). Thus, 4,889 divided by 7,472 equals 65%. The court issues 65% of patent appeals as nonprecedential; therefore 35% are published.

¹³³ This figure was calculated by adding the DCT and PTO unpublished opinions (3744 + 1145), subtracting the DCT and PTO Rule 36 decisions (237 + 94) and dividing by the total opinions from PTO and DCT (4760 + 2712) equals 61%. Only 4% of the court's patent appeals are decided with Rule 36 affirmances.

¹³⁴ See Table 1, *supra* Part II.A. (summing the DCT and PTO nonprecedential appeals (3744 + 1145) and dividing by 21 equals 232).

¹³⁵ See Table 2, *supra* Part II.A. In 1990, the name of the U.S. Claims Court was changed to the U.S. Court of Federal Claims. *Judicial Facts and Figures*, 2003 ADMIN. OFFICE U.S. CTS. 14 tbl.1.5 [hereinafter *Judicial Facts and Figures*], available at <http://www.uscourts.gov/judicialfactsfigures/table1.05.pdf> (last visited Oct. 6, 2004).

¹³⁶ In 1998, the U.S. Court of Veterans' Appeals was renamed the U.S. Court of Appeals for Veterans' Claims. *Judicial Facts and Figures*, 2003 ADMIN. OFFICE U.S. CTS. 14 tbl.1.5, available at <http://www.uscourts.gov/judicialfactsfigures/table1.05.pdf> (last visited Oct. 6, 2004).

¹³⁷ See *Report of the Judicial Conference*, 2002 ADMIN. OFFICE U.S. CTS. 114 tbl.B-8, available at <http://www.fedcir.gov/pdf/b08sep02.pdf> (last visited Oct. 6, 2004), for the total number of veterans' appeals and total Federal Circuit appeals filed in 2001.

¹³⁸ See *supra* note 5 and accompanying text.

For example, one *pro se* veteran appellant wrote that he would like to testify “IN YOUR COURT WITH EXTENSIVE KNOWLEDGE OF A CORRUPT VA SYSTEM. ALSO ON HOW CORRUPT VIET NAM REALLY WAS ALSO THAT IT COST TOO MUCH MONEY TO TAKE CARE OF VETERANS REMEMBER OUR MILITARY IN IRACK? [sic]”¹³⁹ This veteran was appealing a decision of the United States Court of Appeals for Veterans’ Claims.¹⁴⁰ The Federal Circuit disposed of the appeal in a nonprecedential opinion, stating that the veteran failed to assert any constitutional challenge or issue concerning the validity or interpretation of any statute or regulation.¹⁴¹

Still, the Federal Circuit disposes of only 69% of CVA appeals with nonprecedential decisions.¹⁴² Thus, the court publishes a surprisingly high percentage of CVA appeals (31%) compared to MSPB appeals (10%) and other circuit averages (20%).¹⁴³ This high publication rate could be due to the high percentage of oral arguments allowed for CVA appeals.¹⁴⁴

The court publishes 42% of appeals from the Court of International Trade and the International Trade Commission (“CIT”) and 35% of appeals from the Board of Contract Appeals (“BCA”). These comparatively high publication rates are likely due to the sophistication of the briefs and arguments in these appeals.

D. *Oral Argument*

The court can decide appeals by oral arguments or “on the briefs.”¹⁴⁵ The federal appellate courts are now more reluctant to allow oral arguments than in the past.¹⁴⁶ Generally, federal appellate courts hear arguments more often in high profile matters, such as patent cases, than in social security or veterans’ appeals.¹⁴⁷ Federal appellate courts rarely allow oral arguments in *pro se* cases,¹⁴⁸ and the Federal Circuit seems to be no exception.

¹³⁹ Brief of Appellant, *Goins v. Principi*, 66 Fed. Appx. 875 (Fed. Cir. 2003) (unpublished table decision) (No. 03-7074).

¹⁴⁰ *Goins v. Principi*, 66 Fed. Appx. 875, 876 (Fed. Cir. 2003) (unpublished table decision).

¹⁴¹ *Id.*

¹⁴² See Table 2, *supra* Part II.A.

¹⁴³ See Table 2, *supra* Part II.A.; see also *supra* note 118 and accompanying text.

¹⁴⁴ See *infra* Part II.D.

¹⁴⁵ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 7 (“Consistent with Fed. R. App. P. 34 and Fed. Cir. R. 34, it is the court’s policy to allow oral argument unless: (a) the appeal is frivolous; or (b) the dispositive issue or set of issues has recently been authoritatively decided; or (c) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.”).

¹⁴⁶ See *Richman*, *supra* note 52, at 279 (footnote omitted).

¹⁴⁷ See *id.*

¹⁴⁸ *Id.*

Samples of a two-month calendar¹⁴⁹ from the Federal Circuit indicate that the court does hear oral arguments in at least half of the cases it decides, and in over half of the patent cases it decides. In this sample, the court heard oral arguments in 101 cases out of 139 (73%) appeals.

Samples of the Federal Circuit's docket showed that forty-eight patent appeals were argued, out of 139 total appeals.¹⁵⁰ The court decided only four patent appeals on the briefs.¹⁵¹ Thus, in this two-month sample, the court permitted oral argument in 92% of patent appeals.¹⁵² In contrast, the court heard arguments for only thirteen (39%) MSPB appeals, and decided twenty (61%) MSPB appeals on the briefs.¹⁵³ These figures, although only a small sample of the court's docket, indicate that the court allows oral arguments in most patent appeals, but decides most personnel appeals on the briefs.

The high percentage of oral arguments for patent appeals is significant because oral arguments permit judges to ask questions and examine theories not discussed in the briefs.¹⁵⁴ Some Federal Circuit judges have stated that oral argument rarely influences their opinions, while other judges have stated that oral argument can more frequently change their view of a case.¹⁵⁵ Thus, oral arguments may be linked to the quality of decisions,¹⁵⁶ and, perhaps, opinions decided on the briefs are less likely published.¹⁵⁷

The statistics seem to support this theory; subject matter where cases are decided without oral argument more often result in nonprecedential decisions in that subject matter. For example, the court decided only 32% of CVA appeals in this sample on the briefs, and used nonprecedential opinions 67% of the time for the same CVA opinions in the sample. In contrast, the court decided 61% of MSPB appeals on the briefs, and the court

¹⁴⁹ Federal Circuit Calendar from November 3, 2003 to December 5, 2003, available at <http://www.fedcir.gov/calendar.html> (last visited Dec. 5, 2003) (on file with author).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² This figure was calculated by dividing 48 (oral argument) by 52 (all patent appeals) to find 92%.

¹⁵³ 13/19 (68%) of CVA appeals were argued, and 6/19 (32%) were taken on the briefs. 20/25 (80%) of appeals from the CFC and CIT were argued, and 5/25 (20%) were decided on the briefs.

¹⁵⁴ Richman, *supra* note 52, at 280 (citing Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1510 (1995)).

¹⁵⁵ *U.S. Ct. of Appeals for the Fed. Cir. Twentieth Anniversary Jud. Conf.*, 217 F.R.D. 548 (2002) ("The reason my views occasionally have to change from . . . the result I get from the brief is because the brief has been so poor it hasn't supplied me with some facts that come out during oral argument . . . [b]ut it's very rare.") (statement of J. Randall R. Rader); ("I normally go into oral argument with my mind firmly made up, only to find that I was wrong in my view of the case. That may happen as often as 15 or 20[%] of the time.") (statement of J. Timothy B. Dyk).

¹⁵⁶ See Richman, *supra* note 52, at 280 ("Because argument can be very valuable, its absence affects the quality of decision making.").

¹⁵⁷ *Id.* at 281 (quoting Lauren K. Rabel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 48 (1990)).

used nonprecedential opinions for 91% of those cases. The court decided only 8% of patent appeals in this sample on the briefs, and the court used nonprecedential opinions for only 60% of those cases.

Table 3 illustrates this apparent correlation between the lack oral argument and the use of nonprecedential opinions for this sample of cases. It appears opinions decided without oral argument (on the briefs) were more likely to be designated nonprecedential.

Table 3

| | <i>Percentage of Cases Decided without Oral Argument</i> | <i>Percentage of Cases Decided with Nonprecedential Opinions</i> |
|---------------|--|--|
| <i>Patent</i> | 8% | 60% |
| <i>CVA</i> | 32% | 67% |
| <i>MSPB</i> | 59% | 91% |

The court decides most opinions within ninety days after oral argument.¹⁵⁸ One judge speculated, however, that the relatively large number of simple personnel cases may “skew” the issuance time figures, because it is not unusual for the opinion to take up to eight months after oral argument in patent cases.¹⁵⁹ The additional time spent on patent appeals is generally due to the complexity of patent cases.¹⁶⁰

III. IMPACT OF NONPRECEDENTIAL DECISIONS IN THE FEDERAL CIRCUIT BY SUBJECT MATTER

Because the majority (86%) of the Federal Circuit’s nonprecedential decisions come from MSPB, CVA¹⁶¹ and patent issues,¹⁶² revision ought to focus on those subject matter appeals.

¹⁵⁸ Michel, *Evolve*, *supra* note 38, at 1186.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* (“The same can be said for other complicated cases, usually with large money stakes, such as major government contracts, takings, and international trade cases.”)

¹⁶¹ Including *pro se* appeals.

¹⁶² This figure was calculated using data from Table 1 to find: (9,168 MSPB + 3,744 DCT + 1,145 PTO + 1,242 CVA) / (17,729) total nonprecedential = 86%. *See also Judicial Facts and Figures*, *supra* note 135 (showing that in 2002, patent appeals accounted for 32% ((480 DCT + 81 PTO) / 1,748 = 32%) of filings in the Federal Circuit; MSPB appeals accounted for 25% (435/1,748 = 25%); CVA appeals accounted for 24% ((15+410) / 1,748 = 24%).

A. *The Majority of Pro Se Appeals Do Not Require Published Opinions*

Many MSPB appeals and CVA appeals come from *pro se* appellants, who have limited access to unpublished opinions. For example, because the Secretary of Veterans' Affairs is a party in every veterans' benefits case, his Office of General Counsel knows of each unpublished veterans' benefits decision, and can assess any case based on that knowledge.¹⁶³ The veteran or his survivor, however, likely has no knowledge of those decisions.¹⁶⁴ Further, because the unpublished opinions have no precedential value, no one outside the Office of General Counsel to the Secretary of Veterans' Affairs will index the opinions for public access.¹⁶⁵

This theory also applies to the Office of Personnel Management, which can understand the reasoning behind any unpublished decisions from the Federal Circuit; a *pro se* appellant, however, would likely be unaware of any unpublished decision. Because all nonprecedential opinions are now available on online legal databases, old concerns about complete inaccessibility are gone,¹⁶⁶ except perhaps for Rule 36 affirmances, where the decision itself does not contain any useful information.¹⁶⁷ Thus, critics who suggest that appellants have equal access to opinions because they are published in legal databases¹⁶⁸ may not be familiar with the Federal Circuit's Rule 36 summary affirmances, which give no explanation for the affirmance, and are largely used for *pro se* appeals. Recall that one-third of the court's Rule 36 affirmances (33%) come from MSPB appeals.¹⁶⁹

One critic suggested that giving equal authority to the published and unpublished decisions of the Court of Appeals for Veterans' Affairs and the Federal Circuit would balance advantages between the veteran and the Secretary of Veterans' Affairs, and make the policies in veterans' cases better known to those who previously had no access to reasoning in unpublished opinions.¹⁷⁰

¹⁶³ Charles G. Mills, *Anastasoff v. United States and Appeals in Veterans' Cases*, 3 J. APP. PRAC. & PROCESS 419, 422 (2001).

¹⁶⁴ *Id.* at 422-23.

¹⁶⁵ *Id.*

¹⁶⁶ See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 774-75 (1995) (noting that online research technology continually advances to make research easier, so that arguments about the need to constrain the number of precedents are weaker).

¹⁶⁷ See *supra* Part I.A.1.

¹⁶⁸ Robel, *supra* note 44, at 414 ("The rationale behind the citation bans—fear of unequal access—has almost evaporated in the electronic age, which makes these opinions both accessible and searchable with the laser-like capabilities of modern legal databases.").

¹⁶⁹ This figure was calculated using the data in Table 1. There were 275/843 (33%) Rule 36 decisions from MSPB appeals.

¹⁷⁰ Mills, *supra* note 163, at 423.

However, publishing all *pro se* appeals would slow the speed of adjudication and result in delays for all appellants. MSPB appeals represent at least one third of the court's entire docket.¹⁷¹ Assuming that opinion writing for published decisions takes more time than for unpublished decisions,¹⁷² if the court published each *pro se* decision, the court's workload would increase, and the speed of adjudication in the court as a whole would therefore decrease. This time is, perhaps, better spent on reasoned and precedential patent appeals.

As the court rules state, unnecessary precedential dispositions, with full opinions, "only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort."¹⁷³ Patent appeals merit the increased effort of published opinions; *pro se* appeals usually do not justify the increased effort it takes to write a published opinion.

B. *All Patent Appeals Should Have Precedential Value*

Patent appeals are more complicated than MSPB or CVA appeals and usually include extremely complex issues and facts, and often arise from longer trials.¹⁷⁴ Each additional patent appeal therefore adds a considerable amount of work for the court.¹⁷⁵ In contrast, most personnel cases involve a few simple issues, and require very short evidentiary hearings.¹⁷⁶ One judge estimated that each patent infringement case takes "perhaps ten times the work" of a personnel case.¹⁷⁷ This theory is supported by that data that show the court hears oral argument about 92% of the time for patent appeals.¹⁷⁸

Given the amount of work required for a patent infringement case, it is perhaps surprising that the court publishes its opinion in 21% of all patent

¹⁷¹ Compare *Federal Judicial Caseload: Recent Trends*, 2001 ADMIN. OFFICE U.S. CTS. 7, at <http://www.uscourts.gov/recenttrends2001/20015yr.pdf> (last visited Oct. 6, 2004) (noting that since 1997, 33% of all cases filed arose from the MSPB), with *Report of the Judicial Conference*, 2002 ADMIN. OFFICE U.S. CTS. 114 tbl.B-8, available at <http://www.fedcir.gov/pdf/b08sep02.pdf> (last visited Oct. 6, 2004) (presenting filings from fiscal year 2001, showing about 25% from MSPB), and Table 1, *supra* Part II.A. (showing 10,188 MSPB appeals / 22,908 total appeals = 45%).

¹⁷² FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10 ("The current workload of the appellate courts precludes preparation of precedential opinions in all cases."); see also Fredley, *supra* note 45, at 134 (2001) ("Opinion writing is one of the most time-consuming duties an appellate judge must perform, and by reducing the time that must be devoted to writing opinions, considerable savings in judicial resources can be realized."). But see Robel, *supra* note 44, at 404 ("Although the publication rates . . . suggest some connection between workload and publication rates . . . that connection is neither tight nor obvious.").

¹⁷³ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10.

¹⁷⁴ Michel, *Evolve*, *supra* note 38, at 1181.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* note 150 and accompanying text.

appeals from district court cases, and in 58% of appeals from the PTO. Most of these published decisions, however, are significant in their application of new facts to existing law, or in creating new precedent.

Occasionally, the court creates confusion by not publishing significant opinions. One recent source of confusion concerned the Federal Circuit's non-precedential stance on prosecution laches and submarine patents. Jerome Lemelson is an inventor famous for "submarine" patents—the prolonged prosecution of patent claims. Symbol Technologies tried to use the doctrine of prosecution laches to bar enforcement of Lemelson's patent claims that issued after a long and unexplained delay in prosecution, even though Lemelson complied with pertinent statutes and rules.¹⁷⁹ The Federal Circuit had never addressed this issue in a precedential decision—but it had addressed the issue in two nonprecedential opinions.¹⁸⁰

Lemelson argued that the Federal Circuit should consider those two prior, nonprecedential opinions as valid precedents, or at least as persuasive authority.¹⁸¹ However, the court rejected his arguments and followed the Ninth Circuit's ruling in *Hart*, prohibiting Lemelson from even citing those opinions.¹⁸² The panel did not consider the reasoning in its own previous opinions on the subject to be precedent or persuasive.¹⁸³ Judge Newman's dissent in *Symbol Technologies*, however, analyzed the two nonprecedential opinions and found them applicable.¹⁸⁴ Judge Newman seemed to regard the

¹⁷⁹ *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found*, 277 F.3d 1361, 1363 (Fed. Cir. 2002) (noting that the doctrine of prosecution laches allows a defense to infringement if an inventor's patents issued after unreasonable and unexplained delay).

¹⁸⁰ *Id.* Lemelson cited these two nonprecedential Federal Circuit opinions: *Bott v. Four Star Corp.*, 848 F.2d 1245 (Fed. Cir. 1988) (unpublished table decision) (noting that the statute governing continuation applications did not contain a time limit on an applicant seeking broader claims), and *Ricoh Co., Ltd. v. Nashua Corp.*, 185 F.3d 884 (Fed. Cir. 1999) (unpublished table decision). See Brief for Appellee at 12, *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002) (No. 00-1583).

¹⁸¹ See Brief for Appellee at 12, *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002) (No. 00-1583) (noting that although the *Bott* and *Ricoh* opinions are designated as unpublished, they are directly on point and should be considered). Lemelson's attorneys argued that the *Bott* and *Ricoh* opinions "contained thorough reasoning, announced general legal principles, and appl[ie]d those principles in a factual context to which later cases [could] be meaningfully compared." *Id.* at 19. Accordingly, "denying those decisions precedential effect cannot be squared with stare decisis, limited judicial authority, and equal treatment of like cases." *Id.*

¹⁸² *Symbol Techs., Inc.*, 277 F.3d at 1367.

¹⁸³ *Id.* at 1368 ("Accordingly, we decline to consider the nonprecedential cases cited by Lemelson.") Judge Newman apparently received "reluctant" permission from the other judges to discuss the cases in her dissent. *Id.* at 1370.

¹⁸⁴ See *id.* at 1370 (Newman, J., dissenting).

previous nonprecedential opinions as persuasive authority, comparing them to similar opinions from other circuits.¹⁸⁵

1. Long-Term Judicial Economy May Justify Publishing Patent Appeals

Judicial economy may be a strong justification for issuing nonprecedential opinions in certain subject matter, such as *pro se* MSPB or CVA appeals. Further, the Federal Circuit's own rules recognize that workload can increase with publication of opinions.¹⁸⁶ It is certainly not clear, however, that workload would increase in the same amount for each type of published opinion. For example, empirical research demonstrates that patent cases are among the most complex of all civil cases.¹⁸⁷ Thus, one study has shown that it is inaccurate to measure the court's workload based on the number of cases it hears, because patent appeals are more complex than other appeals.¹⁸⁸ Further, due to the complexity of patent cases, publishing opinions for patent cases could result in even more work than publishing opinions for *pro se* personnel appeals.

Although it could result in more work, the court should strongly consider publishing all patent decisions. Because the court cannot always determine, *ex ante*, which patent issues are significant,¹⁸⁹ 100% publication of patent decisions would eliminate a party's need to rely on nonprecedential but factually similar cases, like in *Symbol Technologies*. Even if the court "can't publish everything,"¹⁹⁰ publishing patent appeals could ultimately result in a reduced workload by increasing certainty.

The majority in *Symbol Technologies* argued that "courts contribute to the growing imprecision, uncertainty and unpredictability of the law by issuing repetitive opinions on subjects that have been thoroughly irri-

¹⁸⁵ See *id.* (Newman, J., dissenting) (agreeing that "a court is allowed to and indeed must have the right to issue nonprecedential opinions," but noting that "at a minimum these two opinions, the Federal Circuit's only word on the topic," address the relevant issues, as do opinions from other courts).

¹⁸⁶ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10 ("The current workload of the appellate courts precludes preparation of precedential opinions in all cases. Unnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort.")

¹⁸⁷ Moore, *Forum Shopping*, *supra* note 54, at 933 (noting that although patent cases represent only 0.57% of the annual civil caseload, they are 9.4% of what the courts deem complex cases, requiring twenty days or more of trial).

¹⁸⁸ Moore, *District Court Judges*, *supra* note 63, at 38 n.140.

¹⁸⁹ Cf. Tusk, *supra* note 34, at 1215 ("There is much concern among scholars about a system in which judges have unqualified discretion to decide whether or not a decision should serve as precedent, especially because there is no sound basis on which judges can divine today which decisions will be important in the future.")

¹⁹⁰ See *supra* note 1 and accompanying text.

gated.”¹⁹¹ This reasoning seems to apply to most *pro se* MSPB and CVA appeals. Yet, the judge-made doctrine of prosecution laches was not “thoroughly irrigated” before *Symbol Technologies*, at least not in precedential decisions.

As the Eighth Circuit recognized in *Anastasoff*, published opinions increase certainty for litigants because when judges determine the law, they create “a permanent rule.”¹⁹² Nonprecedential decisions could therefore increase the number of appeals in federal courts due to inconsistent or vague opinions. For example, if a lawyer finds a relevant nonprecedential decision, it will, by its very nature, fail to provide sufficient facts and reasoning.¹⁹³ Yet, at least one study shows that lawyers review unpublished decisions, both for new ideas, and to see how a court ruled before and therefore may rule in the future.¹⁹⁴

Additionally, unpublished opinions could influence a court that reads or recalls writing those opinions.¹⁹⁵ A recent study found federal appellate courts routinely cite their own unpublished decisions.¹⁹⁶ This study found that the Federal Circuit cited to its own unpublished decisions sixty-nine times as of 2001 for legal authority,¹⁹⁷ and district courts cited to the Federal Circuit’s unpublished opinions fifty-one times.¹⁹⁸ Because the Federal Circuit cites its own unpublished decisions, and because district courts also cite these opinions, it makes sense for lawyers to read all of the court’s unpublished opinions.¹⁹⁹

Nonprecedential patent decisions could therefore result in more appeals like *Lemelson*, where the court ignored two earlier, nonprecedential decisions that were factually similar. It is not clear that the Federal Circuit has seen a drastic increase in appeals over the past twenty years.²⁰⁰ Still, if vague but applicable nonprecedential decisions ultimately increase the number of appeals, the Federal Circuit may not be reducing its workload in the long run by refusing to publish certain decisions.

¹⁹¹ *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002).

¹⁹² *Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (8th Cir. 2000).

¹⁹³ Dragich, *supra* note 166, at 797.

¹⁹⁴ Robel, *supra* note 44, at 406.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (citing Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 235 (2001)).

¹⁹⁷ See Hannon, *supra* note 196, at 235 tbl.6.

¹⁹⁸ See *id.* at 237 tbl.7.

¹⁹⁹ Cf. Robel, *supra* note 44, at 406 (“In this light, it is rational for lawyers to stay apprised of unpublished dispositions, for they often explicitly influence outcomes. It is impossible to determine how much more often they influence outcomes more subtly.”).

²⁰⁰ See Table 1, *supra* Part II.A.

2. Justice for Parties Requires Precedential Opinions

The Federal Circuit has adopted the reasoning in Hart instead of *Anastasoff*,²⁰¹ and therefore continues to enforce its no-citation rules. Yet, as the Eighth Circuit stated in *Anastasoff*, courts that forbid citation of certain opinions are saying: “We may have decided this question the opposite way yesterday, but this does not bind us today, and, what’s more, you cannot even tell us what we did yesterday.”²⁰² The Eighth Circuit found that the use of nonprecedential opinions exceeds judicial power because it essentially allows a judge to invent the law.²⁰³

In one Federal Circuit case, both parties cited to nonprecedential decisions as relevant authority.²⁰⁴ The court reprimanded the parties for citing the decisions, and the court refused to analyze the nonprecedential opinions.²⁰⁵ The court essentially told the parties, “we may have decided the question another way last year, but those decisions do not bind us today, and we are not even going to discuss why they are not relevant.” This practice presents an uneven and unfair application of the law—an invention of the law, rather than a determination of the law.

Eliminating no-citation rules would create a fair and stable body of precedent. Allowing citation to all cases would not create a doctrine of endless adherence to precedent, because cases can be overruled.²⁰⁶ The Federal Circuit can overrule a case when sitting en banc, after explaining its reasoning.²⁰⁷ Therefore, if the reasoning of a case is deficient, the court can change precedents.²⁰⁸ In this way, the law can change, “but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.”²⁰⁹

²⁰¹ See *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361, 1367 (Fed. Cir. 2002).

²⁰² *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (8th Cir. 2000).

²⁰³ See *id.*

²⁰⁴ *SGS-Thomson Microelectronics v. Int’l Rectifier Corp.*, 32 U.S.P.Q.2d 1496, 1504 (Fed. Cir. 1994) (unpublished table decision).

²⁰⁵ *Id.*

²⁰⁶ *Anastasoff*, 223 F.3d at 904.

²⁰⁷ *South Corp. v. United States*, 690 F.2d 1368, 1370 n.2 (1982) (en banc).

²⁰⁸ *Anastasoff*, 223 F.3d at 904-05.

²⁰⁹ *Id.* at 905.

3. Increasing Precise Language Could Increase Certainty and Decrease the Court's Workload

The legal system values precision in language,²¹⁰ and some judges worry that forced publication would result in the circulation of badly written opinions. The 1975 Judicial Commission used this concern as a strong justification for nonprecedential opinions: judges do not feel the same need to refine their writing and scrutinize each phrase as they do with precedential opinions.²¹¹ One study determined that most unpublished federal appellate court opinions were of inferior quality to most published opinions.²¹²

As one judge wrote, it is not clear that badly written opinions are better off published than unpublished, "unless the object is to expose the incompetence of the circuit judges to a maximum readership."²¹³ Still, opinion writing can strengthen analysis and impose a "sense of responsibility" on judges.²¹⁴ Most importantly, a published opinion improves predictability, and even if the opinion simply restates existing law, it can show how the law applies to different facts.²¹⁵ A lawyer will cite an unpublished opinion, not only because of its language, but because the facts of that case are more similar to those in the case before the court than the facts of any case in a published opinion.²¹⁶

The application of new facts to existing doctrine can prove especially important in patent appeals because of their complex facts. Although the Federal Circuit has emphasized that all decisions receive "due care,"²¹⁷ at least one critic has argued that judges can only demonstrate due consideration of each case through considered opinion writing.²¹⁸

²¹⁰ ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 748 (3d ed. 2002).

²¹¹ See Hruska Report, *supra* note 53, at 257.

²¹² This study stated:

[W]e found that [20%] of unpublished opinions in nine of the eleven circuits failed to satisfy a very undemanding definition of minimum standards, and that [60%] of the opinions in three circuits failed to meet those standards. . . . The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference.

Richman, *supra* note 52, at 284.

²¹³ Nichols, Jr., *supra* note 12, at 915.

²¹⁴ See Richman, *supra* note 52, at 282 (citing Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 781 (1995)); see also *Sixteenth Ann. Jud. Conf.*, *supra* note 44, at 452 (noting that the low chance of Supreme Court review of nonprecedential opinions reduces judicial accountability).

²¹⁵ See Richman, *supra* note 52, at 282.

²¹⁶ Barnett, *supra* note 93, at 18.

²¹⁷ *Hamilton v. Brown*, 39 F.3d 1574, 1581 (Fed. Cir. 1994).

²¹⁸ See Dragich, *supra* note 166, at 800. *But see* Nichols, Jr., *supra* note 12, at 915 ("The critic's error is, I think, in supposing that the writing difficulty that generates the judicial epiphany occurs in the portions of a published opinion that would not be found in one written for nonpublication.").

If the patent appeals that are currently disposed of with nonprecedential opinions already receive due care, the increase in workload would only come from requiring precise language in a published opinion. It is not clear that the court's workload would drastically increase by slightly revising and then publishing all patent opinions.²¹⁹ For example, in 2002, the court designated 325 patent decisions as nonprecedential,²²⁰ but the court wrote at least some opinion in each of those cases.²²¹ The increased precision of language that could come from revising and publishing these nonprecedential opinions each year could also ultimately increase certainty in a unique area of law. This certainty would decrease the court's long-term workload by reducing the number of patent appeals.

C. *Suggested Solution for Federal Circuit Standards*

1. The Federal Circuit Should Consider Relaxing its Citation Rules

The Federal Circuit has not yet issued sanctions for citing nonprecedential opinions. However, the court has clearly stated that even "inadvertent" citation of nonprecedential opinions is not an accepted practice.²²² There are only two published opinions where the court has informally reprimanded attorneys for citing unpublished opinions, and one of these cases is for a patent appeal.²²³

²¹⁹ Cf. Nichols, Jr., *supra* note 12, at 916 ("[T]he idea that published and unpublished opinions are totally different is just as incorrect as the notion that unpublished opinions are somehow a lode of unmined precious metal.").

²²⁰ See Table 1, *supra* Part II.A. This figure excludes Rule 36 orders, which do not contain any rationale.

²²¹ Thus, the court would not have to write an entirely new opinion, unlike with Rule 36 orders. In fact, some of these nonprecedential opinions are more than cursory. One of the nonprecedential patent cases that Lemelson cited contained over 3,200 words. See *Ricoh Co., Ltd. v. Nashua Corp.* 185 F.3d 884 (Fed. Cir. 1999) (unpublished table decision). Lemelson's attorneys argued that the nonprecedential decision that they cited contained thorough reasoning, announced legal principles, and applied those principles in a factual context to which later cases could be meaningfully compared. See Brief for Appellee at 18-21, *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002) (No. 00-1583).

²²² See *In re Violation of Rule 28(c)*, Misc. No. 774, slip op. at 3 (Fed. Cir. Nov. 5, 2004) (per curiam), available at <http://www.fedcir.gov/opinions/misc774o.pdf> (last visited Nov. 18, 2004); *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002).

²²³ A Westlaw search in CTAFEDR for "Fed.Cir.R.47.6" returned six results, two of which contain reprimands: *Butler v. Soc. Sec. Admin.*, 331 F.3d 1368 (Fed. Cir. 2003) (MSPB appeal); *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002) (patent appeal).

Only 5% of the patent cases filed each year go to trial.²²⁴ The patent cases that do result in trial have competent counsel, who can and do research all unpublished opinions from the Federal Circuit²²⁵—unlike most *pro se* appellants.

First, instead of sanctions, the Federal Circuit could change Rule 47.6 to permit attorneys to cite unpublished opinions as persuasive authority. The Fifth and Eleventh Circuits allow a party to cite unpublished opinions as persuasive authority.²²⁶ The Tenth Circuit allows a party to cite an unpublished opinion as persuasive authority, provided that the issue has not been addressed in a precedential decision.²²⁷ In 2003, the Advisory Committee on Appellate Rules proposed a similar new Federal Rule of Appellate Procedure, Rule 32.1, which would require all appellate courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as unpublished or nonprecedential.²²⁸ The judges of the Federal Circuit strongly oppose this proposed rule because it “will override [the] local rule, may adversely affect the administration of justice by skewing the allocation of judicial resources, delaying issuance of precedential opinions, increasing the issuance of judgments without an accompanying opinion, and harming litigants.”²²⁹ Although the court’s expressed fears may be exaggerated, it is true that the Federal Circuit must find a way to balance fairness to litigants with efficient judicial administration.

Thus, the Federal Circuit should consider changing its standards to allow a party to cite to a relevant decision when there is no precedential authority on point. The Fourth, Sixth, and Eighth Circuits allow a party to cite an unpublished decision, if the party believes that the opinion has preceden-

²²⁴ Moore, *District Court Judges*, *supra* note 63, at 30 (noting that 5%, or about 100/2200 patent cases go to trial each year).

²²⁵ *Cf.* Robel, *supra* note 44, at 406.

²²⁶ See Serfass & Cranford, *supra* note 15, at 253-57 tbl.1 (citing 5th Cir. R. 47.5.4. and 11th Cir. R. 36-2).

²²⁷ 10th Cir. R. 36.3 (noting that citation of an unpublished decision is disfavored, but an unpublished decision may be cited if it has persuasive value with respect to a material issue that has not been addressed in a published opinion, and it would assist the court in its decision).

²²⁸ Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure 27-36 (May 22, 2003), available at <http://www.uscourts.gov/rules/app0803.pdf> (last visited Oct. 6, 2004). Notably, the proposed Rule 32.1 is limited; it does not forbid any court from issuing an unpublished decision or dictate how a court must treat an unpublished opinion from another court. *Id.* at 30-31; see also Dean A. Morande, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 Fla. St. U. L. Rev. 751, 756-57 (2004) (discussing Rule 32 and other publication plans in appellate courts).

²²⁹ Letter from Haldane R. Mayer, Chief Judge of the U.S. Court of Appeals for the Federal Circuit, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (Jan. 6, 2004), <http://www.fedcir.gov/pdf/fedcir.pdf> (last visited June 2, 2004) [hereinafter Federal Circuit Letter].

tial value and there is no published opinion that would serve as well.²³⁰ Allowing citation of relevant, nonprecedential authority would have allowed the Federal Circuit to consider Lemelson's citations to the court's own nonprecedential decisions in *Symbol Technologies*.²³¹ As Judge Newman discussed in her dissent, the two unpublished opinions that Lemelson cited were the Federal Circuit's "only word on the topic."²³²

Like the Fourth, Sixth, and Eighth Circuits, the Federal Circuit could add a caveat to the new rule, allowing citation of nonprecedential decisions—but only when there is no precedential authority that would serve as well. This rule would therefore serve the interests of the litigants like Lemelson by making the Federal Circuit's rulings more certain. The rule would also aid the judges by allowing them to continue using nonprecedential rulings in certain cases, such as simple *pro se* personnel appeals, where there are already precedential decisions on point.

2. The Federal Circuit Should Revise its Publication Standards

At first glance, it seems unusual that a court would allow a party to cite a law review article or another court's opinion as persuasive authority, and yet not allow a party to cite the court's own opinions at all. However, allowing citation of any decision as persuasive authority could harm the judiciary if the opinions are imprecise or badly worded.²³³ Thus, instead of relying on complicated no-citation rules, the Federal Circuit could simply revise its publication standards in order to increase publication of patent appeals.

The court already requires unanimity for nonpublication.²³⁴ Interestingly, the requirement of unanimity among the panel for nonpublication is found in only two other federal appellate courts—the Second and Fifth Circuits.²³⁵ One scholar suggests that the unanimity requirement prevents careless nonpublication, because all judges must vote for nonpublication.²³⁶

²³⁰ See Serfass & Cranford, *supra* note 15, at 253-57 tbl.1 (citing 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28A(i)). The First Circuit has the most liberal citation standards of all the circuits, because it allows a party to cite an unpublished opinion in a related case. 1st Cir. R. 36(c).

²³¹ See *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361, 1363 (Fed. Cir. 2002).

²³² *Id.* at 1370 (Newman, J., dissenting).

²³³ Johanna S. Schiavoni, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859, 1889 (2002) ("Because the opinions can be cited as persuasive authority and the reasoning may be adopted in a published opinion, it actually harms the judiciary to have a body of imprecise and less carefully worded unpublished opinions in existence.").

²³⁴ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10, 5.

²³⁵ See Nichols, Jr., *supra* note 12, at 924 n.39 (noting that Second, Fifth, and Federal Circuits require unanimity for nonpublication); see also Serfass & Cranford, *supra* note 15, at 253-57 tbl.1.

²³⁶ See Nichols, Jr., *supra* note 12, at 924.

Still, some appellate judges like to see their “own deathless prose in published format.”²³⁷ The individual preferences cause variations in the ratios of unpublished opinions among individual judges.²³⁸ However, the unanimity requirement does not sufficiently prevent nonpublication. The court should instead consider revising its rules to require publication of patent issues.

Although the court’s Internal Operating Procedures state that “a significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case” allows publication,²³⁹ in practice this is not what happens in at least some of the 65% of unpublished and Rule 36 patent appeals. Many patent lawyers read all decisions from the Federal Circuit, regardless of their precedential status.²⁴⁰ Therefore, each new patent decision, regardless of its precedential status, can be of interest to a “wide spectrum of persons other than the parties”²⁴¹ to the case. This is likely not the case with most personnel appeals, which can be disposed of with either a nonprecedential opinion or a Rule 36 affirmance. The judges on the Federal Circuit recently implied that increased use of Rule 36 affirmances would harm litigants.²⁴² Yet, the court already disposes of hundreds of cases a year with Rule 36 affirmances, and the additional time spent writing precedential patent opinions might ultimately save the court time in the long run by increasingly certainty.

The court’s previous rules did not expressly require publication of any opinion, and one former judge found this part of the rule a mistake.²⁴³ This former judge also found that publication rules would better serve the public if the rules included examples of what the court does not publish,²⁴⁴ and the current rules do include examples of what types of opinions the court should publish. The 79% unpublished patent appeals from district courts, however, could result because the court is not consistently following its own rules to publish patent appeals that clarify existing law or would likely be of interest to many attorneys, other than the parties to the case.

Therefore, the Federal Circuit should consider revising its standards to:

(a) Allow citation of nonprecedential opinions as persuasive authority; or

²³⁷ *Id.*

²³⁸ *Id.* at 922-24.

²³⁹ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10, 4(h).

²⁴⁰ *See* Robel, *supra* note 44, at 406.

²⁴¹ FED. CIR. R. V INTERNAL OPERATING PROCEDURES 10, 4(e).

²⁴² *See* Federal Circuit Letter, *supra* note 229.

²⁴³ Nichols, Jr., *supra* note 12, at 923.

²⁴⁴ *Id.* at 923-24.

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- (b) Allow citation of nonprecedential opinions when there is no precedential authority on point; or
- (c) Require publication of all patent appeals; and
- (d) Include examples of what the court does not publish.

These new standards could potentially reduce the number of patent appeals due to greater certainty, and at the very least, eliminate any mistaken, but justifiable, reliance on applicable but “not-citable” precedent.

CONCLUSION

While the Federal Circuit may be justified in issuing nonprecedential opinions for *pro se* appeals because of their simple facts, the same justifications are not clearly viable for creating non-binding decisions in patent cases. A court that was created to establish more unified patent law should consider publishing all of its opinions, which could clarify complex patent issues on complex facts. Unlike other federal courts of appeals, the Federal Circuit plays a unique role in determining the future of patent law. Therefore, the court could at least allow citation to nonprecedential decisions as persuasive authority, or as authority when there are no relevant precedential opinions. Further, although the court only publishes 35% of its patent decisions, it is not clear that publishing all patent decisions would add an impossible amount of work for the court. In the interest of long-term certainty, the court should consider revising its standards to require publication of all patent decisions.

*Beth Zeitlin Shaw**

* George Mason University School of Law, Juris Doctor Candidate, May 2005; Articles Editor, *George Mason Law Review*, 2004-2005; Johns Hopkins University, B.A., Computer Science, May 2001. I would like to thank Kimberly A. Moore for her guidance. Special thanks also to Ronnie Shaw, Elaine and Andrew Zeitlin for their support. An earlier version of this comment won an Honorable Mention in the Foley & Lardner Fifth Annual Intellectual Property Writing Competition.