Non-published And Non-precedential Opinions Stealthily Harm The Innocent

Non-published and non-precedential opinions were unknown 45 years ago, and they have only come into widespread use in the last 30 years. Yet in that short period of time they have stealthily become an integral and dominating feature of this country's legal system.

The reliance of appeals court judges on a non-published opinion to resolve a case has grown to the point that in 2005 they were used in about 80% of federal Circuit Court cases, and in 93% of the Court of Appeals cases in California, the country's most litigious state.

Use of non-published opinions, which with very rare exceptions are non-precedential, has reached the point that they are a significant factor affecting the handling and outcome of state and federal civil and criminal cases.

The innocent are one class of litigants affected by the surreptitious and pervasive use of non-published opinions. They are likely affected more profoundly than any other identifiable group, because non-published opinions are being used by judges (and prosecutors) as a tool to deny under the cover of darkness the very thing the courts are not just touted as offering, but which is their very reason for existing — to offer litigants the opportunity for "justice."

Justice is not an ephemeral concept ... it is the sole reason for courts in this country to have any legitimacy. Any institutional procedure that undermines the likelihood that a person will be fairly and impartially treated is unacceptable in a society committed to observing "justice" as a real and vibrant guidepost, and not just a meaningless catchphrase intended to placate the masses of people who will never find out how illusory of a concept it can be within the four corners of a courtroom.

When state and federal policies were adopted allowing the resolution of a case with a non-published and non-precedential opinion, there was no serious public debate about the consequences that would result. The following four articles express concerns about the use of non-published and non-precedential opinions from varying perspectives. Looked at as a whole, however, they can be interpreted to make one thing crystal clear: since non-published opinions undermine the historical underpinning of this country's legal system, the debate today ought to be about whether they should be used in any circumstance — or relegated to the dustbin of history as a menace to "Justice," and the innocent.

Commitment To Justice Requires All Appellate Opinions Must Be Published and Precedential

By Hans Sherrer

The judgment of every state and federal judge in the United States is subject to being colored by varying shades of a pro-prosecution bias. This is to be expected because of the politically laden processes that are used to elect or select both state and federal judges and prosecutors. The country recently witnessed the prevalence of judicial bias by the confirmation of two judges to the U.S. Supreme Court with a track record of being overly solicitous to executive power. Deference of judges to executive authority can manifest itself subtly and not-so-subtly in rulings, body language, verbal queues, and courtroom treatment of prosecutors and their witnesses, as well as in numerous other ways from the time of a defendant's arraignment through resolution of his or her final habeas appeal. This judicial attitude only occasionally appears to weaken in a case that may involve particularly egregious conduct by police or prosecutors.

In this country there are two checks on conscious displays of judicial bias.

One is the conducting of proceedings in public, and the consequent availability of a case's documents and transcripts. The rare instance of when a judge is admonished for ethical misconduct occurs only because a case is public. The Fifth Amendment wisely requires the process of a "public" trial, which arguably isn't concluded until after a convicted defendant's judgment and sentence are finalized when his or her direct appeal is exhausted.

The second check is *stare decisis*, which is expressed in the common law as the 'doctrine of fairness.' [1] Stated simply, that means fairness requires that similarly situated litigants should be treated equally regardless of the judge(s) involved. If defendant Jones' case was dismissed because of a particular police impropriety, then *stare decisis* dictates that defendant Smith's identical case under a different judge needs to likewise be dismissed.

That all decisions of a court have precedential value was a given for the first 175 years of the United States' history, and it is integral to the common law upon which this country's legal heritage rests. It is also integral to the common law that whatever aspect of a particular decision is precedential can only be determined by a court in the future confronted with similar circumstances – not by the court issuing the opinion. [2]

Two Tier System of Opinions Created

A revolutionary assault on precedent, a critical component of this country's legal system, was launched in 1964 when the Judicial Conference of the United States issued a report that recommended, "that the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct." [3] The impetus behind the Conference's recommendation was to limit the growth in the number of legal volumes necessary to store opinions – by creating a heretofore unknown class of non-precedential decisions that were not published as an opinion of the court. The idea was based on the assumption that most cases involve factual situations resolvable by established legal rules, and consequently it would be duplicative to publish any case that followed the precedent setting case. The time and energy of judges spent thinking about and writing decisions would thus be saved for "important" first-tier cases involving new legal issues, while all others would be relegated to second-tier non-published status.

In 1971 the First Circuit Court of Appeal became the first federal court to authorize the judges deciding a case to issue an unpublished opinion that would be barred from citation as precedent. Within the next few years all the federal circuit courts adopted rules that to varying degrees restricted publishing and citation of selected opinions. A majority of state appellate courts did likewise. Thus the creation was begun in this country of an underworld of what Supreme Court Justice John Paul Stevens described in 1985 as "a body of secret law," that only applies to the litigants of the particular case under review. [4]

For three decades the revolutionary new system of appellate courts routinely issuing decisions that were neither published nor allowed to be considered precedential was implemented with little fanfare. Members of the general public, and even some lawyers, only became aware of it if they happened to be involved in a civil or criminal case secretly disposed of with an order or memorandum stamped Do Not Publish or Not For Publication. The practice expanded to the point that in 2005 about 80% of federal circuit court decisions were non-pub-

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lished, [5] and in 2004, 92% of California Appeals Court decisions were non-published. [6]

Non-published opinions hit the radar screen

The general public became aware that something was seriously amiss when the Supreme Court issued its December 2000 decision in *Bush v. Gore*, 531 U.S. 98 (2000). The public controversy was generated because it was an obviously partisan decision that effectively determined the outcome of the presidential election. [7] Although it attracted less publicity, Bush was also significant because the Court mimicked the common practice of the lower federal courts by declaring that its decision was to be considered non-precedential, although in doing so it created the precedent of publishing its non-precedential decision.

The public furor over the Court's decision in Bush was a reflection of the furor created in legal circles four months earlier when a panel of federal Eighth Circuit judges ruled that Circuit's non-precedential (non-citation/non-publishing) rule violated Article III of the U.S. Constitution. Based on the historical common law tradition predating the U.S. Constitution of judges relying on the precedential value of any prior decision to decide a case, Judge Richard Arnold wrote for the panel in *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir.8-22-2000), that the rule "insofar as it would allow us to avoid the precedential effect of our prior decisions purports to expand the judicial power beyond the bounds of Article III." [8]

The Eighth Circuit subsequently vacated that decision as moot when the civil dispute between Anastasoff and the IRS that gave rise to the case was settled. However, the controversy triggered by the decision resulted in numerous articles in law reviews and legal publications discussing the pros and cons of non-precedential and/or non-published decisions, and the creation of at least one website devoted to the subject. The research inspired by *Anastasoff* supports several basic conclusions:

- Classification of selected appellate court decisions as non-precedential was a radical departure from the centuries old practice of considering every decision as precedential. As Richard Cappalli observed in *The Common-Law's Case Against Non-Precedential Opinions*, "The non-precedent regimen starkly reverses centuries of common law tradition." [9]
- A significant percentage of cases categorized as non-precedential establish recognizable new rules of law or refine existing ones. These hidden precedential opinions have been described as a "shadow body of law" [10] created by judges inappropriately exercising their unchecked discretion to designate an opinion for non-publication. One commentator described as "frightening," the common practice of sweeping "under the rug" decisions involving controversial, difficult or complex issues, by their designation as non-precedential. [11] One consequence of this practice is that judges are routinely violating court rules by designating what they know are precedential decisions for non-publication.
- Less attention is devoted to producing non-published decisions. That is indicated by a June 2005 Federal Judicial Center report analyzing 650 randomly selected cases from all thirteen federal circuit courts. [12] The 15% of the opinions that were published averaged 5,137 words. That is 648% longer than the non-published opinions that averaged 793 words. [13] This situation is particularly pronounced in four circuits: in the Fourth Circuit 98% of the opinions were non-published and they averaged 273 words; in the Fifth Circuit 94% of the opinions were non-published and they averaged 390 words; in the Ninth Circuit 92% of the opinions were non-published and they averaged 557 words; and, in the Eleventh Circuit 98% of the opinions were non-published and they averaged 557 words. [14] The report's findings were consistent with the belief that the Fourth, Fifth and Eleventh Circuits are defendant unfriendly federal appeals courts, while it also indicates that in spite of its reputation to the contrary, the Ninth Circuit may be no better for defendants.
- The quality of non-published decisions is so inferior that they have been described as "dreadful in quality." [15] This can be partially attributable to a judge's lack of reviewing a case once it is assigned for "second class" processing by the bureaucratic decision of the judge's clerk or staff attorney who filtered the case based on factors that can include its anticipated precedential value, or if it concerns an issue of particular interest to the judge, or possibly the staff member(s) filtering it. The lesser quality of non-published opinions can also be attributed to them typically being reasoned and written by a clerk or staff attorney who may lack experience or training in "legal methods" of understanding and interpreting case law and statutes. [16]
- Publishing only selected opinions allows the weighing of those opinions to favor prosecution friendly arguments consistent with the executive deferential world-view of the judges involved, while defendant favorable decisions are more likely to be designated for non-publication status. Indeed, less and different justice is reserved for those without political power or influence.
- The designation of a case for non-publication status and the lesser attention to details devoted to it can be due to judicial laziness, since many appellate judges view their position as a form of semi-retirement. Designating cases for non-publication status is an effective method of reducing a judge's work by clearing his or her caseload by disposing of those cases without personally spending time considering their merits. That may be one reason "that judges support the non-precedent policy en masse against the near unanimous opposition of lawyers and academics." [17]
- Non-publishing an opinion allows the arbitrariness and inconsistency that underlies it to go undetected. It also encourages their use since it enables the deliberate discretionary application of precedents due to a bias or preference for a particular appellant or issue by the judge, or possibly the clerk or staff attorney who screened the case. A defendant with case law favorable to the facts of his or her case can be ruled against by a court that either ignores or misstates applicable case law, or ignores or misstates the key fact(s) so it doesn't appear the case law applies, with the subterfuge tucked away in a non-published opinion. Thus by such devices as "fact stretching or shrinking," non-published opinions allow a precedent to "rule" publicly in name, while being ignored in practice. The consequence of this situation is most pronounced in capital cases, and there are many opportunities for it to happen. A recent study of a random sampling of capital cases from six leading death penalty states found that overall, 40% of the state and federal appellate decisions in those cases were non-published. [18]
- Designating selected opinions as non-precedential may violate the Fifth Amendments "equal protection" and "due process" clauses. It is legitimate to ask whether a litigant is deprived of due process by being ac-

> "Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges.
>
> I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules."
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> Monroe Freedman, Professor of Law at Hofstra University School of Law, Speech to The Seventh Annual Judicial Conference of the US Court of Appeals for the Federal Circuit (May 24, 1989).

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corded the significantly less attention to his or her case that is indicated by the issuing of a non-published opinion. Is that same person also deprived of equal protection by their second class treatment compared to a litigant whose opinion is published?

- No discernable justification for a decision is set forth in many non-published opinions. Those decisions are issued without substantive legal support based on the case's facts. That can be due to a lack of understanding about a cases facts or ignoring those facts, or possibly their deliberate misrepresentation. As law Professor Richard Cappalli phrased it, "Today's appellant wins and tomorrow's appellant loses on the same basic facts." [19] A decision's designation for non-publication status, however, virtually eliminates the likelihood that the judges involved will experience any negative public or professional fall-out from issuing what to all appearances is an insubstantial opinion.
- Contrary to court rules, when making a decision judges are known to secretly rely on non-published opinions as if they had precedential effect. This is being done unbeknownst to the parties involved in jurisdictions that either bar citing a non-published opinion, or only permit doing so for its persuasive value in supporting an argument.
- There is an aura of secrecy enveloping a non-published opinion that is contrary to the procedural transparency guaranteed by the constitutional requirement for public trials. This secrecy is particularly odious when non-published opinions disproportionately involve affirmation of a conviction or rejection of a habeas petition. In overturning a rape conviction, during the trial of which the judge cleared the courtroom of all spectators when three prosecution witnesses testified the Eighth Circuit (in a published opinion) recently stated: "While the Supreme Court has held that the right of access to a criminal trial is 'not absolute," the Court has never actually upheld the closure of a courtroom during a criminal trial or any part of it, or approved a decision to allow witnesses in such a trial to testify outside the public eye." [20] Non-published opinions are inconsistent with the requirement that the trial proceedings about which the opinion is concerned must be conducted publicly. The intuitive insight that non-published opinions are given less attention than published decisions is born out by their known lesser quality, and as Professors William Reynolds and William Richman observed in *The Non-Precedential Precedent*, "Justice must not only be done, it must also appear to be done." [21] Non-published and non-precedential opinions are outside of our system of justice, and even under the lowest level of scrutiny they don't even appear to do justice.
- Practical observations about the negative aspects of non-published/non-precedential opinions are compounded by the ethical and legal considerations related to non-judicial bureaucrats who routinely and surreptitiously perform tasks that the public, the media and the litigants believe are performed by the judge(s) involved. Yet the only association a judge may have with a non-published opinion is reviewing his or her staff person's summary of the case and signing off on its assignment to non-precedential status, and then signing the opinion/memorandum/order written by a clerk or staff attorney. It is possible that the judge has not read a single word of the petition or briefs, so he or she doesn't even have the knowledge necessary to challenge the staff member's opinion of the case. For all practical purposes, the actual judge(s) of the case were the bureaucrats involved whose judgment determined its outcome. Thus behind the scenes the role of the judge and his or her staff members has been reversed: the judge is the bureaucrat and the staff members act as the judge.

How Many Innocent People Are Affected By Non-published Opinions?

There is no hard data on how many innocent people have been adversely affected by the negative consequences of issuing non-published opinions. However, a hint of the problems magnitude can be gleaned by considering the number of non-published opinions that are issued. It is conservatively estimated that from 1980 to 2005 some 460,000 non-published federal appeals court opinions were issued. [22] Forty-five states (plus the Dist. of Columbia) limit non-published decisions to non-precedential status, [23] and state courts handle many times more appeals than federal courts. About 48% of federal appeals involve a criminal case, [24] and in the state of California, for example, 50% of appeals involve a criminal case. [25] So it can conservatively be surmised that something more than a million non-published opinions were issued by state and federal courts in the past quarter-century.

For example, if only 1% of only one million state and federal non-published decisions from 1980 to 2005 involved a criminal case in which an innocent defendant's conviction was affirmed or habeas relief was denied, that would amount to 10,000 innocent defendants directly impacted by the scheme of designating select opinions for non-precedential status.

Another consideration is that even if there were 10,000 wrongly decided cases during the past twenty-five years involving an innocent person, it would still be a significant understatement of the impact non-published opinions have had on the innocent. Consider, e.g., their effect on the plea bargaining process. About 95% of state and federal convictions are obtained by a plea bargain. Defendants claiming innocence may agree to a plea bargain at the goading of a defense lawyer who may be convinced that the prosecution slanted case law relied on by the trial judge, and if necessary the appellate judges, is adverse to the facts of the defendant's case, or that there is the possibility the case's facts or a precedent favorable to the defendant could be manipulated or ignored in a non-published opinion.

Conclusion

An enormous body of non-precedential opinions has been created by the selective publishing rules instituted as an experiment to reduce the number of legal volumes necessary to be published, purchased and stored for reference purposes. That justification has evaporated due to the ability of unlimited numbers of opinions to be electronically stored and readily accessed for a reasonable cost. However, in an example of the moving goalpost, since the original justification for publishing only selected opinions is no longer legitimate, it has been replaced by the argument that the present number of judges is insufficient to devote the time and energy necessary to carefully analyze and write a complete opinion outlining the facts of each case, the applicable case law, and the judge's reasoning for deciding for or against the relief sought by a litigant.

That argument ignores that if a person allegedly committed an offense serious enough to warrant the expenditure of the considerable resources necessary to investigate, prosecute, convict and punish him or her, then it is reasonable to require a full, public and precedential explanation of the reasons used to justify upholding that person's conviction and sentence. If that necessitates more appellate judges, so be it. That would be a minor additional expenditure to increase confidence in not just the fairness of the judiciary's treatment of all defendants, but the legitimacy of the law enforcement process itself. Yet while there have been stopgap measures offered to diffuse the broad based opposition to disallowing the citation of non-published opinions, to date no judicial organization has favored restoring precedential status to all appellate decisions.

Considering the plethora of negatives associated with non-published decisions, there is no sustainable argument in favor of continuing the experimental procedure of selectively publishing opinions as precedential. Consequently, the non-publishing experiment should be abandoned and all appellate opinions should be

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CA Justices Carve Exception To No-Cite Rule

By Kenneth J. Schmier and Michael K. Schmier

Fifty California appellate justices, more than half the bench, were caught violating the same court rule they insist on enforcing against litigants — the rule prohibiting reliance on unpublished appeal decisions. The Judicial Performance Commission (CJP) must now decide whether to sanction them.

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published and considered precedential without restriction. This restoration of precedentiality to all opinions should not be delayed. Innocent people are being mistreated by the judiciary every day that non-published and non-precedential decisions are allowed to be issued.

Note: This is an edited version of the complete article that omits many endnotes not associated with a direct quote or reference to a statistic.

Endnotes:

1 Ronald Dworkin, *Taking Rights Seriously* (1977), p. 113.
2 Richard B. Cappalli, The Common Law's Case Against Non-precedential Opinions, Southern California Law Review, Vol. 76:755, 774- 775 (2003).
3 Joshua R. Mandell, Trees That Fall In The Forest: The Precedential Effect Of Unpublished Opinions, Loyola of Los Angeles Law Review, 34:1255, 1259, April 2001.
4 *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Stevens. J., dissenting).
5 U.S. Court of Appeals - Judicial Caseload Profile (2000-2005), at, http://www.uscourts.gov/cgi-bin/cmsa2005.pl
6 Percentage of Majority Opinions Published Courts of Appeal, Fiscal Year 2003–04 Table 9, 2005 Court Statistics Report (California), p. 29, at, http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf.
7 For an analysis of the Republican partisanship of the five justices who voted with the majority in Bush, see, see Vincent Bugliosi, *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* (Thunder's Mouth Press 2001).
8 *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 8-22-2000).
9 Richard B. Cappalli, 772.
10 *Id*., at 764, note 52, and also note 53.
11 Joshua R. Mandell, supra, 1264.
12 Tim Reagan, Citations to Unpublished Opinions in the Federal Courts of Appeals, Federal Judicial Center, June 1, 2005.
13 *Id.*
14 *Id.*
15 Richard B. Cappalli, *supra* at 789.
16 *Id.* at 790.
17 *Id.* at 760. (citation omitted)
18 See, David R. Dow; Bridget T. McNeese, Invisible Executions: A Preliminary Analysis of Publication Rates in Death Penalty Cases in Selected Jurisdictions; *Texas Journal on Civil Liberties & Civil Rights*; 2004.
19 Richard B. Cappalli, *supra* at 787.
20 *United States v. Thunder*, No. 04-3780 (8th Cir. 02/22/2006); 2006.C08.0000279 ¶12 <http://www.versuslaw.com>
21 William Reynolds and William Richman, The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the Untied States, 78 Colum. L. Rev. 1167, 1175 (1978).
22 Richard B. Cappalli, *supra* at 769-770, note 71.
23 See, Melissa M. Serfass and Jessie Wallace Cranford, Federal and State Court Rules Governing Publication and Citation of Opinions: An Update, *The Journal of Appellate Practice and Process* (Fall 2004).
24 U.S. Court of Appeals – Judicial Caseload Profile (2000-2005), http://www,uscourts.gov/cgi-bin/cmsa2005.pl. This includes direct federal criminal appeals and state and federal habeas corpus petitions (including 28 USC §§2254 and 2255 petitions.)
25 Summary of Filings Courts of Appeal, Fiscal Years 1994–95 Through 2003–04 Table 4, , 2005 Court Statistics Report (California), p. 24, at, http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf.

The embarrassing violations of Rule 977(a) came to light when the Supreme Court Advisory Committee on Rules for Publication ("Werdegar Committee") released its preliminary report in mid-October 2005. A survey taken by the committee revealed that 58 percent of 86 justices responding rely upon "unpublished" appellate opinions when drafting their opinions. California's "no-citation" Rule 977 says unpublished opinions "must not be cited or relied on by a court or party."

California appellate courts have repeatedly rejected challenges to Rule 977. Rule 977 and other no-citation rules have spawned a great deal of controversy over the past decade. Many high ranking judicial officers have argued that no-citation rules must be rescinded.

Flouting The Law

Nonetheless the California judiciary, its chief justice, its Judicial Council, the attorney general and, most importantly, the appellate courts, have resolutely defended the validity of Rule 977. To paraphrase the late Johnnie Cochran, if the rule is fit, the appellate bench too must submit.

But half are not submitting. A comment included in the Werdegar Committee's report said, "Most justices who rely on unpublished opinions indicated that they do so in order to consider the rationale or analysis used in a similar decision or to ensure consistency with their own rulings or with those in their district/division." Justices are deciding cases by relying upon unpublished decisions in the same way they would use decisions marked "Certified for Publication" — except without citation. Apparently the admission escaped the attention of the committee's chair, Justice Kathryn Mickle Werdegar, and the members of her committee specially chosen by Chief Justice George.

We are the ones who complained to the Commission on Judicial Performance that justices are violating Rule 977. Given the poor regard in which we hold Rule 977, why did we do so? We invoke the rule of law to attack it. The rule of law requires that law — bad or good — be applicable to all, including the appellate bench. If the appellate bench finds abiding by Rule 977 awkward, the rule of law forces the bench to change it. It is not acceptable that judges, who made and enforce the rule that forbids us to rely on unpublished decisions, secretly violate the same prohibition.

"Violating rules relating to court administration" constitutes judicial misconduct, according to the CJP. But is the CJP sufficiently independent of the judicial establishment to issue charges?

We are giving the CJP an opportunity to prove its rectitude. The complaint is not frivolous; there is great harm in what the justices are doing.

Clandestine reliance upon unpublished decisions deprives litigants and attorneys of any opportunity to argue against their validity. Worse, these decisions have never been vetted before the tens of thousands of court watchers, incentivized by citability and stare decisis, who monitor published appellate decisions. Among these court watchers is vast expertise regarding all manner of issues that come before appellate courts. Vetting decisions before them serves as a realistic and vocal quality control mechanism for the enormous volume of appellate dispositions.

But court watchers, and justices too, have been misled by Rule 977 into believing unpublished decisions do not influence the determination of future cases, and rarely criticize them. Unpublished opinions lack the crucial dignity of standing for something. They are not supposed to count, except for the parties, who are often shocked, and many devastated, by their "result orientation." The warranty of rightness is stripped when unpublished opinions circumvent court watcher inspection. Yet the Werdegar Committee report reveals that these opinions are calcifying into decision-determining lines of secret precedent anyway.

Our strategy depends upon the CJP to enforce Rule 977. Will it? It's already waffling. Its executive secretary, Bernadette Torivino, responded to our complaint the day it was received. She wrote that the investigation will not go forward until we name the justices and "specify exactly, what action or behavior of each judge is the basis for your complaint." When 50 of 101 justices have admitted a serious violation in writings held by a Supreme Court advisory committee, it is hard to believe the CJP does not have enough information to move forward. Sounds like evasive bureau-speak to us.

We cannot identify the specific justices because, despite open government Proposition 59, the committee met in secret and will not release to us the survey responses or other records of their meetings. We have sued the Judicial Council to gain access, but the Judicial Council, represented by Morrison & Foerster, aggressively defends its questionable right to hold all of its policy-making subcommittee meetings in secret and to keep their papers from the public.

So we shall name all of the appellate justices and rely upon the CJP to use its investigative powers to defend the rule of law, and hope for the best.