3100 Connecticut Ave., NW, #130
Washington, DC 20008

January 2, 2004

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am writing to express my strong opposition to proposed Federal Rule of Appellate Procedure 32.1. As an attorney, I have argued appeals in the Second, Fourth, and Eleventh Circuit Courts of Appeals, and I have served as a law clerk in the Ninth Circuit. While I currently work as a counsel on the Senate Judiciary Committee, I am writing to express only my personal views regarding this matter.

As you know, the proposed rule would require all federal courts of appeals to permit the citation of "unpublished" or "non-precedential" opinions. Under current practice, several circuits now forbid the citation of such opinions.

My main concern with the proposed rule is the likelihood that it will result in a far greater number of one-word rulings: *i.e.*, "affirmed," with no explanation of the court's thinking. In an ideal world, of course, every appeal would be decided with a detailed opinion of equal precedential value. Anyone familiar with the reality of today's case loads, however, knows that this is an impossibility. There are simply too many cases in the federal circuit courts for each to be resolved in an opinion that is drafted with sufficient care and detail for it to be cited by future litigants. If proposed Rule 32.1 is adopted, courts that now dispose of many cases through "unpublished" or "non-precedential" memorandum dispositions – which give litigants a basic explanation of the result reached – will likely resolve many more of these cases with no explanation whatsoever. The effect of this change, I believe, will be an increased danger that the litigants and attorneys, whether they win or lose, will perceive the judicial process as arbitrary and capricious.

This belief is based on personal experience. No other case that I have handled as an attorney was as dispiriting as an appeal to the Eleventh Circuit that was resolved – after

exhaustive briefing and a spirited oral argument involving important concessions by the opposing side – with the one-word opinion "affirmed." Although my clients and I disagreed with the result, our main dissatisfaction was the court's refusal to explain its reasoning in any manner. By providing an incentive for other courts to resolve appeals this way, I fear that the proposed rule will ultimately undermine the public's confidence in the courts' integrity and commitment to the rule of law.

For this reason, I urge the Rules Committee to reject proposed Federal Rule of Appellate Procedure 32.1 and to continue to allow appellate courts to prohibit the citation of "unpublished" or "non-precedential" opinions.

Respectfully,

Robert E. Toone