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8th Circuit Drops a Bombshell
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As the judges of the 9th U.S. Circuit Court of Appeals gathered to talk memorandum dispositions in the shadow of Idaho's Bald Mountain on Wednesday, much of the buzz around the Sun Valley Lodge concerned a decision the 8th U.S. Circuit Court of Appeals rendered a day earlier.

That's because Tuesday's decision by Arkansas Judge Richard Arnold said rules barring the citation of unpublished opinions are unconstitutional.

While Arnold's opinion applies only to his own circuit and will likely be reviewed by an en banc panel, the boldness of *Anastasoff v. United States of America*, was enough to raise the eyebrows of the judges who sit on the 9th Circuit, by far the nation's largest.

The 9th Circuit currently bars the citation of unpublished opinions, and if the decision were applied nationally, it could create headaches for the court's 26 active judges, who each see about 340 cases per year.

"It's a bombshell for the seven circuits that do ban the citation of unpublished opinions," said Boalt Hall School of Law Professor Stephen Barnett.

He praised the 8th Circuit's stand and said it's now up to the 9th Circuit to take a look at its own rules. "It seems to me they have an obligation to see if their rule is unconstitutional," he said.

Not only does the 9th Circuit have a similar rule barring the use of unpublished opinions, Barnett says, it's even broader than the one the Missouri court declared unconstitutional.

Unlike the 8th Circuit, which heretofore allowed unpublished opinions to be cited when there was conflict, Barnett says the 9th Circuit rule says unpublished opinions can't be cited as precedent at all.

In Tuesday's opinion, which stemmed from a challenge over the court's reliance on an earlier unpublished opinion, Arnold said such rules are barred by Article III of the Constitution.

"Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report," Arnold wrote on behalf of the unanimous three-member panel. "Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision."

Arnold stressed that his opinion was not about whether opinions ought to be published, but whether they ought to have precedential effect.

"Unpublished in this context has never meant 'secret,'^" he wrote.

Arnold even offered his advice on how the federal court system should handle such a dilemma.

"The remedy is not to create an underground body of law good for one place and time only," Arnold said. "The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid."

Senior Judge Gerald Heaney concurred with Arnold's opinion, praising his colleague for doing "the public, the court and the bar a great service."

But with the ink barely dry on Arnold's opinion, the 9th Circuit judges were themselves Wednesday arguing the practicalities of allowing lawyers to cite unpublished opinions -- a move many judges said would add significantly to their already mountainous case load.

Some judges suggested that the court get around the issue by deliberately making unpublished opinions so short that lawyers can't cite them.

The 9th Circuit's Judge Barry Silverman had another idea. "I suggest we go to encryption," he said.