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**Stealth Decisions Under Fire**  
By Tony Mauro

Far more often than not these days, federal appeals court decisions are issued with a warning at the top: "Not to be Published."

By marking opinions as unpublished, overburdened appeals judges can dispose of stacks of cases without explaining their rationale, and without checking to see if their decisions contradict circuit precedent.

The reason: With rare exceptions, the federal circuits discourage lawyers from citing unpublished opinions, and give them no precedential value.

But that tradition may have started to unravel late last month because of a little-noticed ruling from the U.S. Court of Appeals for the 8th Circuit.

For the first time, a federal appeals panel said that stripping unpublished opinions of precedential value was unconstitutional.

Writing in a routine tax case, Judge Richard Arnold reasoned that by allowing judges to ignore precedent, the rule grants them a remarkably arbitrary power—a power that the framers of the Constitution did not intend to give them in Article III. Arnold stayed away from trickier due process or equal protection arguments, instead basing his view on the essence of the judicial function in the federal system.

"The duty of courts to follow their prior decisions was understood (by the framers) to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power," Arnold explained in the Aug. 22 decision in *Anastasoff v. United States*.

It was a solitary ruling from a single appellate panel, but the decision was the talk of the appellate world within hours. The next day, it dominated hallway discussions at the 9th Circuit Judicial Conference in Idaho. Academics traded around the decision—and reactions to it—in online chats for days. And lawyers who often curse unpublished opinions were jubilant.

"This is a brilliant and very important opinion that captures the crux of what is wrong with unpublished opinions," says Arthur Bryant, executive director of Trial Lawyers for Public Justice, a longtime critic of the practice. "It will have huge impact nationwide."

Judges who routinely dispose of cases through unpublished opinions—or assign clerks or staff attorneys to do so—will think twice about giving the cases such short shrift, many predicted.

"Some unpublished opinions right now are pretty dreadful. They lack reasoning," says Professor William Reynolds of the University of Maryland School of Law, who has written on the subject. "Judges may be more careful if they know they might have precedential effect."

The Arnold opinion may have an impact on lawyers as well, Reynolds adds. "It would be a foolhardy lawyer in the 8th Circuit—or other circuits—who did not go through the unpublished opinions from now on."

In many circuits—despite the rules—lawyers frequently review and cite unpublished opinions, which are usually available in court clerks' offices and online even if they are not published in bound volumes. But because these unpublished opinions are not binding, lawyers don't cite them consistently—and some judges get angry when they are cited.

For the 8th Circuit itself, the decision could mean a wave of en banc reviews of previously hidden intracircuit conflicts, says Eugene Volokh of University of California at Los Angeles School of Law. "Before, there might have been two published opinions to cite on one side of a case, but now

there may be three unpublished ones on the other side that you didn't have to deal with before."

Even though Arnold's ruling is unique and does not reflect a split between circuits, it was easy for many analysts last week to see the issue racing to the Supreme Court. Juan Keller, the St. Louis lawyer for taxpayer Faye Anastasoff, whose case triggered the Arnold ruling, says he will seek en banc review.

Harvard University Law School Professor Laurence Tribe says, "En banc treatment or a grant of cert (by the Supreme Court) seem fairly likely, especially in light of the enormous practical consequences of what Arnold has done."

Keller, a partner at Bryan Cave, says the Arnold ruling "certainly was a surprise," given that the constitutionality of the rule on unpublished opinions was "not raised in either brief by either side."

But Arnold signaled that the issue was on his mind during oral arguments.

Gregory Hewett, a colleague of Keller's who is no longer with the firm, was arguing the seemingly routine case in the 8th Circuit courtroom in St. Louis.

At issue in the case was whether Anastasoff, a retired teacher, should be denied a refund of her \$ 6,000 tax overpayment because her claim arrived a day late at the Internal Revenue Service.

As Hewett droned on about the relevant IRS regulations, Judge Arnold leaned forward and asked, "What do you do with our opinion in the Christie case?"

Arnold was referring to an unpublished 1992 8th Circuit decision that favored the IRS on the issue—a case the Justice Department had cited in its brief.

Hewett replied matter-of-factly that, because it was unpublished, the Christie decision was "not binding on this court."

Arnold pounced. "This is where I disagree with you. I think it is unconstitutional for a court to say we decided a case a certain way yesterday, but we don't like it anymore and we're ignoring it. It flies in the face of the whole notion of a court."

The argument moved on, but the issue clearly stuck in Judge Arnold's craw. On Aug. 22, when the 8th Circuit panel issued its ruling in the Anastasoff case, Arnold's rumination became the rule of the case. Because of the unpublished Christie precedent that favored the IRS position, Anastasoff lost.

Part of the instant weight given to the decision stems from the credibility of its author. Once on President Bill Clinton's short list for a Supreme Court appointment, Arnold won the prestigious Devitt Award for Distinguished Service to Justice last year and is well-known throughout the federal bench.

But the decision also had an "emperor has no clothes" appeal, shedding new and iconoclastic light on a little-discussed tradition of federal court procedure.

Fully 78 percent of the case dispositions by federal appeals courts last year were by unpublished opinions, according to the Administrative Office of the U.S. Courts—an amazing number given that the practice only began in 1964 as a cost-cutting and work-saving measure. All but one circuit, the 3rd, discourage lawyers from citing them to varying degrees, and all circuits except the 5th, which recognizes them under certain circumstances, give them no value as precedent.

Critics say that unpublished opinions are often the product of barely reviewed assessments by law clerks or circuit staff attorneys. Law clerks say that dissenting judges will sometimes agree to withdraw their dissents if the majority marks the opinion "unpublished."

In a 1999 article in the *Journal of Appellate Practice and Process* that foreshadowed his objections in Anastasoff, Arnold said it is tempting for judges who want to rule differently from prior cases, but can't come up with a justification to resolve the dilemma "by deciding the case in an unpublished opinion and sweeping the difficulties under the rug."

Bryant of the trial lawyers group says the practice of unpublished opinions creates a "two-tiered body of law" where judges are unaccountable and "there is the rampant possibility of abuse."

Arnold's decision, even if it is upheld by the Supreme Court, does not necessarily spell the end of unpublished opinions.

In the ruling, Arnold takes pains to say there may be legitimate reasons for continuing the practice. "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," he says. "The question presented here is not whether opinions ought to be published but whether they ought to have precedential effect, whether published or not."

Arnold also cautions that he is not in favor of "some rigid doctrine of eternal adherence to precedents."

If a precedent needs to be changed, so be it, he says.

"When this occurs, however, there is a burden of justification," Arnold wrote. "The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds."

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Blast to the Past: Unpublished opinions with no precedential value may be a thing of the past if other jurists adopt 8th Circuit Judge Richard Arnold's conclusions that the practice is unconstitutional./Patrice Gilbert

Thumbs Up: Arthur Bryant of Trial Lawyers for Public Justice applauds Judge Arnold's decision./NC

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