One theme of Arnold’s years on the bench was his concern for transparency and public accountability in the judiciary, a concern rooted in his faith’s emphasis on humility. While many members of the United States judiciary hold the view that they are admired around the world, Arnold was not sure they had fully earned it. He believed the American justice system was “good,” but not great. He was especially concerned about public perception of the work of federal courts. He knew that most of the work of federal courts occurred out of the press spotlight, and it was this work, he said, that “affects the public more than they know.”

Judge Richard Posner, a friend of Arnold’s from the Seventh Circuit, commented on the potential for bad behavior from judges appointed with life tenure, removable only by impeachment. Posner wrote:

A federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers and litigants who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, be continually reversed for elementary legal mistakes, hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a nakedly political agenda, and misbehave in other ways that might get even a tenured civil servant or university professor fired; he will retain his office.

Fortunately such instances are rare. During Arnold’s tenure, he did not believe that any judge on the Eighth Circuit merited such an indictment, or at least he never recorded those thoughts.

Arnold believed that judges, like other government officials, were “public servants” who “work for the people.” He understood, and said publicly, that the ongoing operation of the federal courts was fully dependent upon the consent of the governed: “If
the day comes in this country when the people cease to give general consent to the exercise of judicial power, that’s the day we will have no more courts, and that’s the day we shouldn’t have any more courts.”

**An Underground Body of Law**

One practice bothered Arnold in particular. Federal courts of appeal issue over 80 percent of their decisions in what they term “unpublished” form. An opinion bearing the notation “Not for Publication” means that the court has not authorized it for official publication in the *Federal Reporter*. Often these opinions are unsigned (“per curiam”) and relatively short. In some instances, the decision is merely one word: “Affirmed.” For the rest, these opinions seldom contain an extensive recitation of facts or analysis of the applicable law.

“Unpublished” is a misnomer. Although designated “not for publication,” these opinions have long been readily available from the court itself or through electronic databases for a fee. An opinion sent for “official publication,” by contrast, would appear in the *Federal Reporter*. Officially published opinions typically contain extensive recitation of the facts of the case and apply those facts to a usually more extensive evaluation of the relevant law.

Defenders of the practice—almost all of them federal appellate judges—say that it is necessary because the federal judiciary could otherwise not cope with the caseload. Unpublished, non-precedential opinions are reserved for cases in which the judges agree that no new issues are presented. Both the facts of the case to be decided, as well as the law applicable to it, are routine in the court’s experience. The decisions are merely uncontroversial applications of established legal doctrine that do not make new law. Dealing with such cases in an abbreviated opinion that does not form precedent for future cases, the argument goes, frees judges to devote more time to matters of greater legal urgency.

Most opinions designated “not for publication” are unanimous. But one study revealed that 24 percent of unpublished decisions issued by appeals courts are not only not unanimous, but also that “various judges disagree so much that one writes a dissenting opinion.”
The federal courts of appeal increased their use of this practice in the closing decades of the twentieth century (from 37 percent of all cases decided in 1977, to over 80 percent by 2000). This dramatic rise in the phenomenon of the unpublished opinion brought with it increasingly vocal discontent from outside the judiciary. Federal courts now dispensed “justice in the dark,” an article in Forbes charged. “Judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings.” Other critics call it “a black mark against the legal system,” one that shields the judiciary from public scrutiny. Further appeals are for all practical purposes precluded. The Supreme Court almost never accepts a case if there is no published opinion to consider.

The most serious problem with unpublished opinions—especially when those opinions may not be cited to a court as potential precedent—is the risk of inconsistent rules of law. Forbes recounted an example from the Ninth Circuit Court of Appeals, terming it “proof that unpublished decisions mask plenty of inconsistency.” The Ninth Circuit had affirmed the conviction of an undocumented alien who had returned to the United States after being deported. As Forbes reported, “His lawyer found that the court had in the past issued twenty-seven separate unpublished decisions applying three different rules to the same immigration issue.”

One of the most cited academic criticisms came from an empirical study in which the authors concluded that unpublished opinions were “dreadful in quality.” In a 1996 article published by William M. Richman and William L. Reynolds, they wrote: “It is not difficult to understand why unpublished opinions are dreadful in quality. The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference.” Unpublished opinions also found a critic in Supreme Court justice John Paul Stevens, who called them “decision-making without discipline.”

By 1999, the number of such “unpublished” decisions accounted for an astounding 80 percent of all cases decided by federal appeals courts—four out of every five appeals. Arnold worried that increasing use of unpublished opinions meant the judiciary could avoid responsibility for outcomes, and he was not alone in his concern. Judge Posner, also a prolific legal scholar, stated that unpublished opinions are “a formula for irresponsibility.” A North Carolina state supreme court justice, whose state appellate courts also issue opinions not for publication, said: “The unpublished opinion
constitutes a great temptation to be less than fully accountable. It allows a judge to resolve an important case by making it disappear, rather than going on record on a matter that may be controversial.”14

One of Arnold’s objections was that such abbreviated decisions ran the risk of not fully representing the decision process or properly explaining to the losing party why he or she had lost the case. Arnold had well-known views about how all judicial opinions should be written. Most importantly, he believed opinions should be written for the losing side of the case, so that the person (not the lawyer) could understand the reasons for losing. “I think about losing litigants a lot,” Arnold once said. “Those are the people who need to understand that they have been heard—that a reasoning creature of some kind has evaluated their argument and come to some sort of defensible conclusion about it. They won’t like it; they won’t enjoy losing, but I hope that they will have a sense that they have been heard. And so it’s important how opinions are written. I worry that sometimes our opinions are not living up to that standard.”15

A former law clerk recalled Arnold’s admonition: “When you draft an opinion, always write to the losing side. Write to those most difficult to persuade.” An opinion should address as many of the losing side’s arguments as necessary to convince them that the arguments had been considered. (An exception would be if a party raised an excessive number of clearly frivolous matters. These could be disposed of together without necessarily writing separately and thoroughly on each one.) Arnold believed that “the art of judging well, and an opinion’s precedential power, rely on the ability to persuade others of the rightness of a decision rather than on the gun behind the pen.” His opinions were intricately and solidly built. He said no more than was necessary. “Despite his extraordinary learning,” the law clerk recalled, “he spoke directly, wrote simply, and never condescended.”16

Arnold’s “unpublished” opinions were longer than most unpublished opinions. One reason he thought unpublished per curiam opinions were such a bad practice is that they were often merely one sentence, without any explanation of the court’s reasoning. He didn’t necessarily think opinions should be long, but even a second sentence explaining that the decision was based upon precedent, and naming the precedent, would be preferable to a one-word affirmance.
Arnold recognized that his court received some frivolous appeals. As Arnold wrote for a proposed American Bar Association report, “There are some cases, not many, but some, that really do not deserve oral argument.” He believed that some pro se appeals (from persons not represented by a lawyer) fell into this category. “Occasionally,” he said, “even a civil case in which lawyers appear on both sides deserves only cursory treatment. I do agree that the present system places too much emphasis on quantity and speed. These are important values, but they are not the only values.”

In 1995 in a lecture at the University of Missouri-Columbia School of Law titled “The Future of the Federal Courts,” Arnold identified the most pressing problem facing the federal courts to be the increase in the volume of cases. He said, “I’m afraid that the volume is just about on the brink of swamping us.” Judicial statistics bear out a dramatic increase in cases filed in the Eighth Circuit. In 1984, for example, Arnold wrote 149 opinions, including 63 signed opinions for the court, 17 published per curiam opinions, 60 unpublished per curiam opinions, five dissents, and four concurrences. From 1990 to 1997, the number of filings in the Eighth Circuit increased by nearly 25 percent. Even though 1997 saw 3,388 appeals filed, the court’s median disposition time to terminate appeals was still less than ten months, better than the national average of just over eleven months.

At the time, the Eighth Circuit had only ten active judges to handle these appeals. Like other circuits, the Eighth relied heavily on its seven senior judges as well as visiting judges from other courts. The court also had the assistance of fifteen staff attorneys in St. Louis, in addition to each judge’s “chamber” clerks. Many opinions designated “per curiam, not for publication” are initially drafted by staff attorneys. One report estimated that the staff attorneys work on approximately 40 percent of the cases filed with the court.

But what Arnold really objected to was the rule followed in most federal courts of appeal, including the Eighth Circuit, preventing parties from citing to unpublished opinions. The Eighth Circuit’s rule read: “Unpublished opinions are not precedent and parties generally should not cite them.” In other words, any opinion not officially “published” was unusable beyond that individual case.
Lawyers, however, rely on court opinions to advise their clients and to predict how a court will rule in the future. Arnold was fully aware that lawyers and judges feel an obligation to read all relevant judicial decisions, including those not available for citation. In other circuits, lawyers had been sanctioned by courts for making “creative attempts to circumvent the prohibition.” In response, the American Bar Association issued a formal opinion stating it is “ethically improper for a lawyer to cite to a court an unpublished opinion . . . where the forum court has a specific rule prohibiting any reference in briefs to an opinion marked ‘not for publication.’”

From nearly the moment Arnold joined the Eighth Circuit, he sought to change the court’s rule on non-precedential opinions. Beginning in 1983, Arnold raised the issue before the Eighth Circuit judges by way of a motion to change the rule in order to allow the parties to cite to such opinions. For the next ten years, his motions never received a second. As he wrote to a fellow judge: “There is absolutely no justification for unpublished opinions, unless we abolish the rule that they cannot be cited as precedent. It’s not so much a concern to me whether they are mailed to West [a legal publisher], as whether they are available to the bar and the public to remind the courts of what they have done in the past. As I have said in public several times, the rule of our courts on the subject is an abomination.”

In one early illustration of this sentiment, Arnold delivered an address to the Sixth Circuit Judicial Conference in 1982 in which he identified the “vice” of unpublished opinions to be rules that do not permit citation. The potential for arbitrariness was real: “The result may be that a judge who writes, and the panel which files, an unpublished opinion holding one way on a certain point of law can, so far as the rules of court are concerned, feel perfectly free to decide the other way the next day. That is not the kind of behavior that we as judges, I am sure, would consciously engage in, and not the kind of behavior that we conceive of as being consistent with the judicial function.”

Speaking at the Drake University Law School in Iowa in 1999, Arnold was said to be “less genteel” than his “Old South school of courtly manners” usually required. According to a newspaper account,
Arnold was asked about a story in the *New York Times* reporting that because of crushing workloads, some federal appeals courts are resorting to perfunctory one-word rulings—“Affirmed” or “Denied”—with no written opinion giving the court’s reasoning. The practice is an “abomination,” Arnold said. He told of participating recently in a court session where more than 50 cases were decided in two hours. “We heard many, many cases with no opinions or unpublished opinions,” Arnold said. “I felt dirty. It was a . . . betrayal of the judicial ethos. It makes me feel terrible.”

Arnold had also published a law review article that year further describing his objection to the practice. Arnold expressed his concern that a court could issue an opinion, stamp it “unpublished,” and have the ability to disregard it entirely in the future. Arnold wrote the article to “venture a few personal comments from one who has produced probably hundreds of unpublished opinions, but has always felt uneasy about it.”

Arnold identified the beginning of the “unpublished opinion” phenomenon to be the recommendation in 1964 by the Judicial Conference of the United States that judges publish only those appellate opinions “which are of general precedential value.” The problem, as Arnold saw it, was that “[i]f we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so. Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice.”

Unpublished opinions create an underground body of law. Arnold seems to have been looking for a case to make precisely this point. In the early months of 2000, he found it.

**A Challenge to All Federal Courts**

*Anastasoff v. United States* was a small tax case. It did not involve Arnold’s great cause—the Bill of Rights—and in fact was later dismissed as moot when the government
agreed to refund the amount the taxpayer had claimed she had overpaid—6,436 dollars. But Harvard Law professor Frank Michelman, who had been a classmate at Yale and Harvard, termed it Arnold’s “single, boldest stroke of constitutional interpretation,” reminiscent of John Marshall, the first great chief justice of the Supreme Court.

The case itself was one of many routine taxpayer lawsuits for a relatively small amount of money. Faye Anastasoff sued the Internal Revenue Service in federal district court because the IRS refused to consider her claim for a tax refund. The IRS received her claim one day after the three-year claim period expired, but Anastasoff had mailed the refund request before the end of the claim period. The IRS took the position that the date of receipt by the IRS, and not the date of mailing (the so-called mailbox rule), determined whether the claim had been filed on time.

A federal district court agreed with the IRS. Eight years earlier, in an unpublished ruling in the case of Christie v. United States, an Eighth Circuit panel had held in favor of the IRS on this precise question. It was the only case in the Eighth Circuit to have considered the question. The Supreme Court had not addressed the issue—an illustration of the numerous questions of law on which lower federal courts can and do diverge, without Supreme Court oversight.

Christie was an unpublished opinion, although it should have been officially published because it was the first time the Eighth Circuit had decided that particular question. Thomas Walsh, Faye Anastasoff’s lawyer, claimed he could not find the Christie opinion “to save our lives.” He continued: “The government had it because they keep a bank of favorable unpublished opinions. If it’s an unfavorable precedent, of course, no one will ever know it exists.”

On appeal to the Eighth Circuit, the case was argued before Arnold and Gerald Heaney, with Paul Magnuson, sitting by designation from the Minnesota federal district court, as the panel’s third member. Walsh conceded Christie was clearly on point. But he contended that the panel was not bound by Christie because it was an unpublished decision and thus was not precedent within the Eighth Circuit. The attorney for the IRS, by contrast, cited to Christie and suggested to the court that the decision in Christie was the correct outcome and should be followed.
As usually stated, the doctrine of precedent at its core is that the holding of a case must be followed in similar cases, until overruled. “Binding” precedent—from factually similar cases in the common law setting and from prior interpretations of statutes in the area of legislation, such as in *Anastasoff*—must be followed, distinguished, or overruled. It is often said that a case is squarely on point only if the facts of the case are sufficiently similar and the general principles necessary to the decision correspond to the present case. If not, the prior case may be “distinguished,” and there is then said to be no precedent to follow.35

The problem Judge Arnold faced was that the Eighth Circuit followed the practice that no panel of three judges could overrule a prior case.36 If a precedent were to be overruled, that action required the full Eighth Circuit sitting en banc. Arnold was revolted by the notion that he need not be bound by what the Eighth Circuit had done in the past on the exact question.

Instead, Arnold ruled in favor of the IRS because, he said, the court was bound to follow the *Christie* case, even though it was “unpublished” and the Eighth Circuit rule specified that it was *not* precedent. Faye Anastasoff lost the appeal because *Christie* had previously decided the same question. But Arnold needed a justification to disregard his court’s rule on non-precedential opinions. He resolved the problem by holding that the Eighth Circuit 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, and is therefore unconstitutional. That rule does not, therefore, free us from our duty to follow this Court’s decision in *Christie*.”37

According to Arnold, the portion of the rule that specified that unpublished opinions are not precedent violated Article III of the federal Constitution, thus issuing a great challenge to all federal courts.38 That article, which confers “judicial power” on United States courts, was understood by the Framers to include the then long-standing tradition that a court’s prior decisions are a necessary starting point for judicial decision. When a court departs from this core idea, it violates the essential function of the judiciary to treat like cases alike or explain the difference. The bulk of Arnold’s opinion was devoted to a lengthy review of historical evidence to support his theory for the invalidity of the Eighth Circuit’s non-citation rule.
Arnold was careful to state that the practice of designating opinions “not for publication” was not itself the problem:

We wish to indicate what this case is not about. It is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. 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. 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. The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not.39

Arnold was aware that judges designated many of their opinions “not for publication” because of a crushing workload. In the opinion, he wrote:

It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. 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.40

Arnold also explained that the court was not “creating some rigid doctrine of eternal adherence to precedents.” Cases can be overruled and, according to Arnold, “sometimes they should be. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however,
there is a burden of justification. 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.”

Judge Gerald Heaney filed a separate concurrence in Arnold’s opinion. He described the decision as a “great public service,” but he called for the full Eighth Circuit to hear the case on the tax question, believing Christie had been wrongly decided.

The lawyers in the case did not raise or discuss the constitutional question in the briefs submitted to the panel. This fact was not remarkable for Arnold because he routinely considered appeals in which attorneys for both sides failed to locate controlling legal precedent. Arnold would supply the missing law himself from his nearly encyclopedic knowledge of Supreme Court, Eighth Circuit, and legislative precedent. A former law clerk, Price Marshall, described one such instance. Discussing a pending appeal with Judge Arnold one afternoon, a fellow clerk summarized an immigration case about a question of extradition:

“Do they cite Ker v. Illinois?” the Judge asked.

“No, sir.”

The Judge got up, went to his set of United States Reports, and pulled down a volume. He opened the table of contents and said quietly to himself, “I thought the name was spelled with one ‘r,’ not two.” Flipping to the case as he walked back, he said, again only to himself, “Oh, it was a typographical error.” Handing the book to my co-clerk, the Judge explained the holding in Ker to us and why this decision from 1886 controlled the case he was about to hear.

Arnold’s opinion in Anastasoff quickly set off a national debate. Academics, judges, and lawyers soon filled the pages of law journals and legal publications with arguments for and against Arnold’s ruling, and many called for courts to change the restriction on citation. The reaction to Arnold’s bold step engendered such national
debate that it threatened to overshadow Arnold’s other landmark decisions in the memory of the legal community.

The immediate response in the media expressed both approval and disapproval. *Forbes* wrote: “At last, one federal appeals court has declared war on the practice.”44 A *Legal Times* headline, on the other hand, stated “Judge Richard Arnold of the 8th Circuit has Taken Aim at Unpublished Opinions, But Missed His Mark.”45 The *San Francisco Chronicle* said that although Arnold was “no flake” and was “highly respected by judges and lawyers,” that had not stopped other judges from the Ninth Circuit “wondering if he’s off his rocker.”46 A colleague reported to Arnold that his opinion was “the talk of the Ninth Circuit Conference when I was out there. Most of the judges seem to think you are on the right track,” despite the article questioning Arnold’s sanity.47

Judge Alex Kozinski of the Ninth Circuit became Arnold’s most vocal critic in the unpublished opinion debate. Judge Kozinski has been characterized as a “high-flying conservative” and “the most controversial judge on our most controversial court.”48 Typically outspoken, Kozinski told a reporter: “As a matter of constitutional doctrine it’s hogwash. It’s total nonsense, and I expect it to have a very short life. I have been surprised at how much attention people are paying to this opinion.”49 Kozinski later wrote essays supporting the practice of unpublished opinions, and he testified before Congress on the issue.

Judge Kozinski also expressly disagreed with the *Anastasoff* holding in *Hart v. Massanari*, a Ninth Circuit opinion in which a lawyer who had cited an unpublished opinion, contrary to the Circuit’s rule, was required to “show cause” why he should not be disciplined for that action. Judge Kozinski upheld the Ninth Circuit’s non-citation rule, but he decided that the lawyer’s violation of the rule did not merit sanctions.50

Harvard Law School professor Laurence Tribe, a noted scholar of constitutional law, had a “mixed reaction” to the decision. Arnold had raised the stakes in the unpublished opinion debate by calling it a constitutional issue. But Arnold’s novel approach to “judicial power” as a constitutional constraint may have been “apocalyptic,” even if Tribe sympathized with Arnold’s view that non-precedential decisions are “inconsistent with the very notion of what the judicial power under the Constitution presupposes and means.”51
Shortly after Arnold issued the panel opinion in the case, he wrote to Judge Gilbert S. Merritt of the Sixth Circuit: “I’m sure many judges are dismayed, and it remains to be seen whether I will get away with this. If the case stands up, my guess is that the world will go on pretty much as it was: we will still decide a lot of cases without extended reasoning, some lawyers will cite some of them, and most of the time it won’t make much difference to the outcome. As you say, some of our colleagues don’t seem to be following even the published opinions.”

What many critics missed is that Anastasoff did not require publication of opinions. It merely said an Eighth Circuit panel of judges should consider as precedent any prior adjudication by the court. But while in subsequent years numerous law review articles carried on the debate, few sided with Arnold’s constitutional interpretation. Law professor Arthur Hellman said, “It would be unfortunate if criticism of Judge Arnold’s constitutional holding were to deflect attention from the very real issues raised by non-citation rules.” Perhaps Arnold’s purpose was not to convince others on the constitutional issue but to raise the issue in a way that could not be ignored.

Some judges, lawyers, and law professors have suggested that any rule prohibiting the citation of opinions violates the First Amendment. There also have been suggestions that due process and equal protection theories better support Arnold’s point than his reliance on Article III’s “judicial power.” Under these theories, a court must consider the precedential value of prior unpublished opinions to ensure that it is treating persons equally—applying the same law to all. No court has yet agreed. But it is clear that the potential to dispense uneven justice was Arnold’s primary concern.

A few months after Arnold’s opinion in Anastasoff garnered national headlines, the full Eighth Circuit granted Anastasoff’s motion for rehearing en banc and the case was set to be reargued in St. Louis. In the interim, however, the IRS changed its position on cases like Faye Anastasoff’s. It had recently lost a similar case in the Second Circuit Court of Appeals, Weisbart v. United States, a published decision disagreeing with Christie. After it lost the Weisbart case, the IRS announced it would follow the “mailbox rule” to determine whether a refund claim met the statutory deadline.

The IRS also acknowledged Anastasoff’s entitlement to the refund she had claimed. The tax division of the Department of Justice told the Eighth Circuit that the
case was now “moot.” Federal courts may take jurisdiction only of “cases and controversies” under Article III, section 2 of the Constitution. Only those disputes “appropriate for judicial determination” may be considered.\textsuperscript{58} A controversy that has been settled no longer presents an issue appropriate for court consideration.

The full Eighth Circuit agreed the case was now moot, and Arnold wrote the opinion dismissing the case:

There is no longer any dispute over whether the taxpayer will get her money. She has received it in full. Nor is there any dispute over whether \textit{Weisbart} or \textit{Christie} is a correct interpretation of the Internal Revenue Code. The government now unequivocally adopts the \textit{Weisbart} rule. The controversy over the status of unpublished opinions is, to be sure, of great interest and importance, but this sort of factor will not save a case from becoming moot. We sit to decide cases, not issues, and whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax-refund case.\textsuperscript{59}

Arnold’s pathbreaking panel opinion was now officially “vacated.” As Arnold noted, “The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.”\textsuperscript{60} Not all “moot” cases must be dismissed—courts can decide that a particular case presents issues of vital public importance or injuries that may be repeated yet evade review. Instead of pursuing the vital-issue exception, however, Arnold exercised restraint. He cared deeply about the non-citation issue, yet he wrote the opinion vacating his prior work in this case.

* * *

In some ways Arnold’s panel opinion in \textit{Anastasoff} was a parting shot. A few months later, in a letter to President George W. Bush in early 2001, Arnold announced he would retire from regular active service to assume senior status.\textsuperscript{61} Senior status allows judges more control over their caseload, although they are excluded from participation in
en banc hearings. In his letter, Arnold informed President Bush of his “intention to continue to render substantial judicial service as a senior judge.” And he did. For the next three years, until his death in 2004, there is little discernable decrease in Arnold’s productivity. Indeed, several important judicial opinions—in death penalty cases and in the Little Rock school desegregation litigation—lay in the future.

Perhaps Arnold had decided to take senior status even before he wrote the opinion in *Anastasoff*. If so, the realization that he would soon step down from active service may have freed him for bolder steps. In 2001, it was clear to Arnold that there was no longer any possibility he would be considered for a Supreme Court vacancy. George W. Bush, a Republican, had prevailed in the disputed 2000 election. When Bush’s first term of office would end, Arnold would be sixty-eight—probably too old for a Supreme Court nomination even if a Democrat were to win the next presidential election.

The timing of Judge Arnold’s resignation from active service was unusual in one respect. Arnold relinquished his seat on the Eighth Circuit at the beginning of the George W. Bush presidency, meaning that his replacement on the Eighth Circuit would be appointed not by a Democrat, as Arnold had been, but by a Republican president. Arnold was not unduly troubled by health issues at that point, but he did not feel the need to time his move to senior status to benefit the Democratic Party. Arnold’s seat on the Eighth Circuit was filled by Lavenski R. Smith, whose nomination drew opposition from the Alliance for Justice, NARAL, the National Abortion Federation, and Planned Parenthood. Smith had earlier published a number of statements in opposition to abortion characterized in the media as “passionate.” Despite some liberal opposition, Smith was confirmed by the Senate in 2002 without Democratic opposition.

Arnold was unhappy with the characterizations of judges as “liberal” or “conservative,” and he did not like the notion that judges were so closely identified with the political process of appointment that they should be considered Democrats or Republicans. It was important to him that judges appear to be above the political process. The terms “conservative” or “liberal,” Arnold said, “simply do not fit the process of judging.”

In a memorial tribute to fellow Eighth Circuit Judge J. Smith Henley, Arnold wrote: “I defy anyone, even with thirty-nine years of judicial service as a criterion, to say
that Judge Henley was either ‘conservative’ or ‘liberal’ and to defend the answer with reason. The job of judges is to find the facts and apply the law, not their own wills, and Judge Henley understood that well.63 Judge Henley, a Republican before his appointment to the federal bench by President Eisenhower, was most noted for reforming the Arkansas state prison system. In 1970, he had been the first federal judge in the nation to declare an entire state penitentiary system in violation of the Eighth Amendment. Henley could hardly be called “conservative” on that issue.

Beginning with the failed nomination of Robert Bork for the United States Supreme Court, rancorous Senate confirmation hearings also disturbed Arnold. Arnold wrote to Bork to say that he had not been treated fairly. He later sent encouraging letters to Justice Clarence Thomas and Charles W. Pickering, a federal district judge in Mississippi twice nominated by President George W. Bush for the Fifth Circuit Court of Appeals.64 Pickering had two Senate hearings at which he maintained his opposition to abortion. He served briefly on the Fifth Circuit via a recess appointment by President Bush, but ultimately Pickering withdrew his name from consideration and announced his retirement from the federal bench.65

Arnold was not certain Supreme Court appointments were any more controversial than in the past. In a book preface in 2003, for example, Arnold pointed out that before 1984, the Senate had refused to confirm more than one-fourth of all Supreme Court nominees. But, he added, “We may be returning to the level of conflict characterized by this earlier period.”66

In that same preface, Arnold also wrote:

Are there not at least some neutral principles that could be agreed upon for judging the judges? Some examples might be craftsmanship, promptness in decisionmaking, regard for colleagues, and clarity of writing. A judge’s reputation should be based not merely on whether his or her views seem to accord with contemporary values 20 years, or even 100 years, later. Instead, judges ought to be evaluated in the context of their own times and for broader qualities.67
Many of these “broader qualities” underlay his concern about unpublished opinions. Coming less than one year before Arnold’s death, these reflections on the ideal judicial legacy are a poignant reminder of his views of judicial legitimacy in *Anastasoff*.

* * *

Richard Arnold was vindicated in 2006 when the Supreme Court mandated a rule change for all federal appellate courts, requiring that they allow citation of unpublished opinions. Although all unpublished decisions issued after January 1, 2007, may now be cited, the rule does not take any position as to whether an unpublished decision has precedential value. Tony Mauro of the *Legal Times* attributed the new rule largely to Arnold: “Though the propriety of an essentially secret judicial process has been debated for years, the catalyst for change was Judge Richard Arnold’s opinion in *Anastasoff*.68

Arnold died in 2004, three years before the Supreme Court’s rule change went into effect. But he knew the debate had continued.69 The Department of Justice and a US Judicial Conference advisory committee had recommended in 2003 the enactment of a rule to allow lawyers to cite unpublished opinions in all appeals courts.70 The House Judiciary Committee held oversight hearings on the question, and in the interim, several circuits modified their own rules in various respects.71 As these developments were under way, the *National Law Journal* acknowledged that Richard Arnold’s opinion in *Anastasoff* had “pushed the judiciary toward a rule change,” an article Arnold carefully preserved in a scrapbook.72

Notes

4. Ibid.
7. Ibid., p. 72.
10. Ibid.
12. *County of L.A. v. Kling*, 474 U.S. 936, 940 (1985) (Stevens, J., dissenting) (“For, like a court of appeals that issue an opinion that may not be printed or cited, this Court then engages in decisionmaking without the discipline and accountability that the preparation of opinions requires”).
21. Ibid.
22. 8th Cir. R. 28A(i) (2000). The only exception recognized by this rule would involve subsequent litigation involving the same parties to the original case: “When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion.”
29. Ibid.
30. Ibid., p. 221.


36. In 2002, the Eighth Circuit referred to this practice as a “cardinal rule” of Eighth Circuit procedure. *Owsley v. Bowersox*, 281 F.3d 687, 690 (8th Cir. 2002).

37. *Anastasoff*, 223 F.2d at 900.

38. “The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1, cl. 1.

39. *Anastasoff*, 223 F.2d at 904.

40. Ibid.

41. Ibid., 904–905.


50. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). In footnote 6, Judge Kozinski attributed to an article I published that “Anastasoff’s historical analysis has been called into question even by academics who generally agree with the result.” This is incorrect. My article, “Precedent and Judicial Power After the Founding,” *Boston College Law Review* 42 (2000): 81, supported Arnold’s historical evidence and its interpretation, and augmented it with additional historical material that Arnold could have employed in support of his proposition.


60. Ibid.
61. Richard S. Arnold, letter to President George W. Bush, February 6, 2001 (announcing senior status effective April 1, 2001). The letter shows correspondence copies simultaneously sent to Chief Justice William Rehnquist and others. The announcement was also made that day to all Eighth Circuit judges. Judges with fifteen years of active service may retire at age sixty-five with full pay, or they can take “senior status” to continue full- or part-time work, also at full pay.
64. An example is Arnold’s letter to Judge Pickering: “I understand that you are to receive another hearing before the Senate Judiciary Committee next week. I sincerely hope the outcome will be favorable. I hate for you to be subjected to this sort of harassment.” Richard S. Arnold, letter to Charles W. Pickering, February 1, 2002.
67. Ibid.
72. Tony Mauro, “Toward Citing the Uncitable,” p. 27.